

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
HGC Enterprises, Inc.,	:	
	:	
Relator,	:	No. 12AP-482
	:	
v.	:	(REGULAR CALENDAR)
	:	
Stephen Buehrer, Administrator,	:	
Bureau of Workers' Compensation,	:	
	:	
Respondent.	:	

D E C I S I O N

Rendered on May 23, 2013

Black, McCuskey, Souers & Arbaugh, and Brian R. Mertes,
for relator.

Michael DeWine, Attorney General, and Cheryl J. Nester, for
respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶ 1} Relator, HGC Enterprises, Inc. ("HGC Enterprises"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Bureau of Workers' Compensation ("BWC") (1) to vacate its order that denied HGC Enterprises' request that it be issued a new policy number after the BWC applied Ohio Adm.Code 4123-17-13(C), found HGC Enterprises was "essentially the same employer" as HYWY Foods, Inc. ("HYWY Foods"), and assigned to HGC Enterprises the same policy number that was previously assigned to HYWY Foods, (2) to find that HGC Enterprises is

not essentially the same employer, and (3) to issue HGC Enterprises its own policy number.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court deny HGC Enterprises' request for a writ of mandamus. HGC Enterprises has filed objections to the magistrate's decision.

{¶ 3} HGC Enterprises presents two objections. In its first objection, HGC Enterprises argues that the magistrate's decision incorrectly concluded that the BWC did not abuse its discretion when it applied the "policy initiation rule" in Ohio Adm.Code 4123-17-13(C) instead of the two-step analysis required by Ohio Adm.Code 4123-17-02 and R.C. 4123. Ohio Adm.Code 4123-17-13(C) provides:

If the bureau determines, after reviewing the information submitted with the application provided for in paragraph (A) of this rule, that the employer is essentially the same employer regardless of entity type for which risk coverage previously had been provided, the bureau may transfer the prior risk coverage to the employer and the employer shall assume any outstanding obligations under the prior risk coverage. The bureau may reactivate a previously cancelled risk coverage in order to complete this transfer.

{¶ 4} R.C. 4123.32(C) provides:

The administrator of workers' compensation, with the advice and consent of the bureau of workers' compensation board of directors, shall adopt rules with respect to the collection, maintenance, and disbursements of the state insurance fund including all of the following:

* * *

(C) Such special rules as the administrator considers necessary to safeguard the fund and that are just in the circumstances, covering the rates to be applied where one employer takes over the occupation or industry of another or where an employer first makes application for state insurance, and the administrator may require that if any employer transfers a business in whole or in part or otherwise reorganizes the business, the successor in interest shall

assume, in proportion to the extent of the transfer, as determined by the administrator, the employer's account and shall continue the payment of all contributions due under this chapter.

{¶ 5} Ohio Adm.Code 4123-17-02(B) provides, in pertinent part:

Succeeding employers – experience.

(1) Where one legal entity, not having coverage in the most recent experience period, wholly succeeds another legal entity in the operation of a business, his or its rate shall be based on the predecessor's experience within the most recent experience period.

* * *

(3) Where a legal entity succeeds in the operation of a portion of a business of one or more legal entities having an established coverage or having had experience in the most recent experience period, the successor's rate shall be based on the predecessor's experience within the most recent experience period, pertaining to the portion of the business acquired by the successor.

* * *

(6) Whenever one employer succeeds another employer in the operation of a business under paragraphs (B)(1) to (B)(5) of this rule, the bureau shall transfer the predecessor's experience under the workers' compensation law to the successor if one of the following criteria is met:

(a) The successor expressly or impliedly agrees to assume such obligations;

(b) The succession transaction amounts to a de facto consolidation or merger;

(c) The successor is merely a continuation of the predecessor; or.

(d) The succession transaction is entered into for the purpose of escaping obligations under the workers' compensation law.

If one or more of the criteria set forth in this paragraph is met, the bureau shall transfer the predecessor's experience under the workers' compensation law, regardless of whether the predecessor's transfer to the successor was voluntary or through an intermediary bank or receivership.

{¶ 6} HGC Enterprises contends that R.C. 4123.32(C) and Ohio Adm.Code 4123-17-02(B) contemplate the following two-step analysis: (1) the BWC must assess and determine whether a predecessor employer transferred a business in whole or in part or otherwise reorganized the business, and then (2) the BWC must assess and determine whether a subsequent employer is a successor-in-interest of that business. If the BWC finds that both steps have been satisfied, argues HGC Enterprises, the successor-in-interest shall assume the prior employer's experience rating.

{¶ 7} Applying this framework to the present case, HGC Enterprises asserts that, if a transfer of the franchise did occur, as the magistrate concluded, then the only logical conclusion is that there was a transfer of the business from HYWY Foods to HGC Enterprises, and BWC should have applied the two-step analysis contemplated by R.C. 4123.32(C) and Ohio Adm.Code 4123-17-02(B).

{¶ 8} In response to HGC Enterprises' argument that the BWC should have applied R.C. 4123.32(C) and Ohio Adm.Code 4123-17-02 instead of Ohio Adm.Code 4123-17-13(C), the magistrate found there was no evidence that HGC Enterprises purchased HYWY Foods, and there were no client lists or contracts to assume. We agree with the magistrate. HGC Enterprises' argument in its objection is, essentially, that a transfer of a franchise equates with a transfer of a business; thus, the analysis in Ohio Adm.Code 4123-17-02 is triggered. However, there was simply no transfer of a business in the present case so as to apply Ohio Adm.Code 4123-17-02. Instead, when there are circumstances to suggest that something other than a partial or whole transfer of a business has taken place, the "essentially-the-same-business" analysis in Ohio Adm.Code 4123-17-13(C) applies. HGC Enterprises' contention throughout the case was that there was no transfer or purchase of business between it and HYWY Foods. Nevertheless, even lacking a transfer or purchase of a business, Ohio Adm.Code 4123-17-13(C) permits the BWC to find that the two entities are "essentially the same employer," so that the subsequent entity cannot unfairly escape liability for any outstanding obligations incurred by the prior

entity by artful maneuvers that technically and legally sever the succession between the two entities. The present circumstances support such a finding that both entities were essentially the same employer, for the reasons stated by the magistrate on pages 23-24, although no transfer of business took place.

{¶ 9} As for HGC Enterprises' specific contention that a transfer of a franchise is necessarily the same as a transfer of a business, we note initially that the franchise agreement was a private contractual matter between HGC Enterprises and Fox's Pizza Den, and their characterization of the franchise agreement is neither binding upon the BWC nor determinative of whether a transfer of business took place. Notwithstanding, the characterization of the franchise agreement as a transfer could be used to support either of the competing views at issue here. To be sure, under certain circumstances, evidence of a transfer of a franchise agreement could be used to support the conclusion that a transfer of business took place between two entities. However, where, as here, there is no other evidence to demonstrate that a transfer of business took place, the characterization of the franchise agreement as a transfer, alone, does not prove that an actual transfer of the underlying pizza business took place so as to trigger the analysis in Ohio Adm.Code 4123-17-02. Instead, where, as here, there is evidence of a relationship between the two businesses, yet no evidence of an actual transfer of business, the transfer of franchise would support the conclusion that the two pizza businesses were essentially the same employer, though maybe not technically or legally.

{¶ 10} Thus, in the present case, where HGC Enterprises has argued from inception that no transfer of business took place between it and HYWY Foods, the fact that Fox's Pizza Den and HGC Enterprises believed the businesses were related enough to merit a transfer of franchise instead of a new franchise agreement supports a finding that the HGC Enterprises and HYWY Foods were essentially the same employer, while doing nothing to alter the fact that there was no legal transfer of business. Therefore, the trial court's finding that there was a transfer of franchise but no triggering of the transfer-of-business analysis in Ohio Adm.Code 4123-17-02 is not inconsistent. For these reasons, HGC Enterprises' first objection is without merit.

{¶ 11} HGC Enterprises argues in its second objection that Ohio Adm.Code 4123-17-13(C), the policy initiation rule, is unconstitutionally vague. HGC Enterprises asserts

that the policy initiation rule offers no guidance or factors to determine what actions will cause one employer to be deemed essentially the same as another employer. Although the magistrate agreed that the policy initiation rule does not identify any factors for the BWC to consider when determining whether one employer is essentially the same as another employer, the magistrate found that, at least in the present case, such factors were not necessary because the facts in the present case clearly show that HGC Enterprises is essentially the same employer as HYWY Foods.

{¶ 12} The party asserting that a statute is unconstitutionally vague must establish that "upon examining the statute, an individual of ordinary intelligence would not understand what he is required to do under the law." *State v. Anderson*, 57 Ohio St.3d 168, 171 (1991). Thus, laws are vague when they "trap the innocent by not providing fair warning." *Grayned v. Rockford*, 408 U.S. 104, 108 (1972). Additionally, in order to defeat an allegation of vagueness, a law must contain explicit standards as guidance for those who apply them, thereby preventing arbitrary and discriminatory enforcement. *Id.* However, there is a strong presumption that all legislative enactments are constitutional. *State v. Collier*, 62 Ohio St.3d 267, 269 (1991). When it is alleged that a statute or ordinance is void for vagueness, all doubts must, if possible, be resolved in favor of its constitutionality. *Oregon v. Lemons*, 17 Ohio App.3d 195, 196 (6th Dist.1984).

{¶ 13} In the present case, we find that Ohio Adm.Code 4123-17-13(C) is not unconstitutionally vague. As the Supreme Court of the United States has noted:

[A] statute is not unconstitutionally vague merely because it fails to define specific terms: "many statutes will have some inherent vagueness, for in most English words and phrases there lurk uncertainties. Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid." *Rose v. Locke* (1975), 423 U.S. 48, 50, 96 S.Ct. 243, 46 L.Ed.2d 185 (citations and internal quotations omitted). Thus, a statute is not vague if the meaning of words can be ascertained from these sources or, for words in common usage, from the meaning commonly attributed to them. See [*State v. Glover* [1984], 17 Ohio St.3d [256] at 258, 479 N.E.2d 254 (citations omitted); *Jeandell v. State* (2005), 165 Md.App. 26, 884 A.2d 739.

State v. Sommerfield, 3d Dist. No. 14-05-23, 2006-Ohio-1420, ¶ 16.

{¶ 14} Here, under Ohio Adm.Code 4123-17-13(C), "essentially," "same," and "employer" have simple, common meanings, and a reasonable person can ascertain their meanings. An ordinary person is expected to understand and apply the common meaning of everyday terms used in legislation. *Traditions Tavern v. Columbus*, 171 Ohio App.3d 383, 2006-Ohio-6655, ¶ 24 (10th Dist.). The issue is not whether the regulation provides "factors" that one might look to determine whether he or she falls within the definition; rather, what is important is that "essentially the same employer" is capable of being understood by the reasonable person. What constitutes being essentially the same employer may vary from case to case, but that does not render the phrase vague. Furthermore, because the phrase is capable of being understood and uses direct, common words, we do not believe it is subject to any more arbitrariness or discrimination in its enforcement than any of the other many undefined terms in the code. For these reasons, HGC Enterprises' second objection is without merit and overruled.

{¶ 15} After an examination of the magistrate's decision, an independent review of the record, pursuant to Civ.R. 53, and due consideration of HGC Enterprises' objections, we overrule the objections and adopt the magistrate's findings of fact and conclusions of law. HGC Enterprises' writ of mandamus is denied.

*Objections overruled;
writ of mandamus denied.*

SADLER & CONNOR, JJ, concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
HGC Enterprises, Inc.,	:	
	:	
Relator,	:	No. 12AP-482
	:	
v.	:	(REGULAR CALENDAR)
	:	
Stephen Buehrer, Administrator,	:	
Bureau of Workers' Compensation,	:	
	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered January 17, 2013

Black, McCuskey, Souers & Arbaugh, and Brian R. Mertes,
for relator.

Michael DeWine, Attorney General, and Cheryl J. Nester, for
respondent.

IN MANDAMUS

{¶ 16} Relator, HGC Enterprises, Inc. ("HGC Enterprises"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Bureau of Workers' Compensation ("BWC"), to vacate its order which denied HGC Enterprises' request that it be issued a new policy number after the BWC applied Ohio Adm.Code 4123-17-13(C), and found HGC Enterprises was "essentially the same employer" as HYWY Foods, Inc. ("HYWY Foods") and assigned to HGC Enterprises the

same policy number that was previously assigned to HYWY Foods and ordering the BWC to find that it is not essentially the same employer, and issue HGC Enterprises its own policy number.

Findings of Fact:

A. Facts Pertaining to HYWY Foods

{¶ 17} 1. HYWY Foods was formed on December 16, 1999 by George Joseph, III.

{¶ 18} 2. Between December 1999 and January 2011, HYWY Foods operated a Fox's Pizza Den, Inc. ("Fox's Pizza Den") franchise at 1213 Third Street NW, New Philadelphia, Ohio.

{¶ 19} 3. HYWY Foods ceased operating the Fox's Pizza Den on or about January 29, 2011.

{¶ 20} 4. On April 22, 2011, HYWY Foods filed a form U-117 with the BWC requesting that its coverage be cancelled since it was no longer actively operating a business.

{¶ 21} 5. At the time it ceased operating the Fox's Pizza Den, HYWY Foods had allowed its workers' compensation coverage to lapse.

{¶ 22} 6. As a result, a claim was filed against it during the period of lapsed coverage and, as of January 2011, HYWY Foods owed the BWC approximately \$44,000 related to the non-covered claim and approximately \$2,800 in past due premiums.

{¶ 23} 7. At some point, the BWC negotiated a payment plan with HYWY Foods on the amount it owed and began collecting \$500 per month from HYWY Foods.

B. Facts Pertaining to HGC Enterprises

{¶ 24} 8. HGC Enterprises was formed on February 25, 2011 by George Joseph, Jr. ("Joseph, Jr.").

{¶ 25} 9. Joseph, Jr. is the father of George Joseph, III, the owner of HYWY Foods.

{¶ 26} 10. On March 1, 2011, HGC Enterprises entered into a franchise agreement with Fox's Pizza Den. In a letter from the law firm representing Fox's Pizza Den dated March 14, 2011, HGC Enterprises was advised regarding "Fox's Pizza Den Franchise Transfer/New Philadelphia, OH," as follows:

As you know, we are in receipt of the partially executed transfer documents relative to the recent transfer of the New Philadelphia, Ohio Fox's Pizza Den franchise from your son's company, to your new company, HGC Enterprises, Inc. Mr. James Fox has signed the Franchise Agreements, and I am pleased to enclose herein for your company's file a fully executed original Franchise Agreement and photocopies of the Promissory Note and Guaranty in connection with this transfer.

If you have any questions regarding the operation of your store, please do not hesitate to telephone Ken Crosby or Jim Fox directly at * * * .

{¶ 27} 11. The copy of the franchise agreement contained in the stipulated record of evidence specifically provides as follows:

SECTION THIRTEEN-ROYALTY & FRANCHISE FEE

In consideration of the grant of a license to use Franchisor's trademarked system, etc., Franchisee shall pay to Franchisor the following amounts:

[One] Franchise Fee:

[Two] Training Fee:

[Three] Site Consulting Fee: \$_____

Total \$_____

{¶ 28} No dollar amounts were listed here; instead, the word "transfer" was stamped upon the document.

{¶ 29} 12. On March 21, 2011, HGC Enterprises filed an application for Ohio Workers' Compensation Coverage.

{¶ 30} 13. The business was identified as follows: Fox's Pizza Den located at 1213 Third Street NW, New Philadelphia, Ohio, 44683, and the telephone number was listed as (330) 343-4600. On page two, in response to the question "[d]id you acquire/purchase the business," Joseph, Jr. answered "no."

{¶ 31} 14. On April 4, 2011, the BWC sent a letter to HGC Enterprises requesting additional information regarding the application for Ohio Workers' Compensation

coverage. Specifically, the BWC asked for information concerning whether or not the business had been acquired or purchased.

{¶ 32} 15. Joseph, Jr. again answered that question as "no."

{¶ 33} 16. On April 20, 2011, two separate letters were sent from the BWC to HGC Enterprises. The first letter indicated that the BWC had received a request to change policy information and that, as a result of the request, BWC records would now indicate:

OLD POLICY NAME
Hywy Foods Inc

NEW POLICY NAME
Hgc Enterprises Inc

{¶ 34} 17. In the second letter dated April 20, 2011, HGC Enterprises was informed that records indicated that an existing policy already existed and, as such, the March 21, 2011 application for coverage would not be processed. Specifically, that letter provides:

We received your application for workers' compensation coverage. However, our records show you have an existing policy, which is referenced above. Therefore, we will not process the application you recently filed. Please report payroll and pay your workers' compensation premium using the existing policy.

In addition, our records show your policy has an **inactive coverage status**. To bring this policy into compliance with Ohio workers' compensation laws, you must:

- Report payroll and pay premium for any outstanding payroll reporting periods; and/or
- Pay any outstanding balance due BWC, including amounts certified to the Office of the Attorney General of Ohio for collection.

I have enclosed the documents and information you need to resolve this issue.

- Please complete and return any payroll reporting forms I have included to BWC, along with your premium payment.
- If an invoice/statement is enclosed, please pay the balance shown.

- Please return all enclosed documents and any applicable payments using the envelope provided.
- Once we process the documents, BWC will bill you for any additional late filing penalties and interest/fees accrued due to referrals to the Office of the Attorney General of Ohio.

(Emphasis sic.)

{¶ 35} 18. In a letter dated April 27, 2011, Kevin E. Willoughby, a certified public accountant whose client was HGC Enterprises, sent a letter to the BWC explaining that HGC Enterprises did not buy the business of HYWY Foods and that HGC Enterprises should be assigned a new policy number as requested. Specifically, that letter provides:

To follow please find the request for additional information received by our client HGC Enterprises, Inc. This is the second request our client received and the first request was faxed back on April 8, 2011 noting that the business was not purchased. It appears that the BWC is transferring coverage from HYWY Foods, Inc. to HGC Enterprises, Inc. The business was closed by HYWY Foods, Inc. on January 29, 2011 and not opened by HGC Enterprises until April of 2011. HGC Enterprises, Inc. did not buy the business from HYWY Foods, Inc. and therefor should be assigned a new policy number as requested.

{¶ 36} 19. In a letter dated June 22, 2011, Brian R. Mertes, an attorney whose firm represents HGC Enterprises, sent a letter to the BWC requesting a hearing on the following issues:

HGC seeks to bring the following issues before the Adjudicating Committee: 1) assessment of premium; 2) transfer/combination of experience and risk coverage; and, 3) failure to issue a risk number. As set forth herein, a hearing is needed so that HGC has an opportunity to be heard on these issues and present its position to the Bureau.

Mertes also provided a history of the formation of HGC Enterprises and how it should be distinguished from HYWY Foods.

{¶ 37} 20. In a letter dated July 28, 2011, counsel for HGC Enterprises reiterated its request for a hearing before the adjudicating committee and indicated that the matter

was now urgent because the BWC was presently characterizing HGC Enterprises as a non-employer with lapsed coverage.

{¶ 38} 21. On August 10, 2011, the BWC denied HGC Enterprises' application for the issuance of a new policy, stating:

The Bureau has reviewed your complaint requesting that a new policy be issued. Regrettably, the Bureau must deny your request at this time due to the fact that the Bureau cannot waive application of the rule. It has been confirmed that the Policy Processing Unit updated your existing policy rather than establishing a new policy and followed the guidelines in the BWC Policy Statement regarding Coverage Initiation (copy attached).

The Ohio Administrative Code section 4123-17-13(3)(C) [sic] establishes the protocol for the Rule controlling the making of the initial application for rating to determine when the bureau may transfer the prior risk coverage to the employer and the employer shall assume any outstanding obligations under the prior risk coverage.

If you disagree with this decision, you may appeal in writing.

{¶ 39} 22. HGC Enterprises appealed, resubmitted the June 22, 2011 letter and a second letter dated August 26, 2011 concerning the issues which needed to be addressed:

Please be advised that I have been retained to represent HGC Enterprises. Please let this letter serve as an appeal/request for an Adjudication Hearing regarding the above-referenced Complaint number. On or about June 22, 2011, the employer sought a request for a hearing for the Adjudication Committee on several issues, including assessment of premium, transfer/combination of risk experience, risk coverage, and failure to issue a risk number. Again on or about July 28, 2011, the employer brought these issues to the Bureau's attention. On August 10, 2011, the Bureau, through its Policy Processing Unit, issued a response to the employer's complaint. However, the response only addressed the denial of the issuance of a new policy/risk number. The other issues were not addressed.

As set forth in the attached correspondence to the Bureau dated June 22, 2011, the employer disagrees with the Bureau's treatment of its application for workers' compensation coverage. The employer requests a hearing

before the Adjudicating Committee on the issues it raised in the attached letter.

{¶ 40} 23. In a letter dated September 28, 2011, HGC Enterprises was given notice that the hearing would be held on October 19, 2011 and that the only issues to be addressed were contained in the enclosed statement of protest, which provided:

Pursuant to Ohio Administrative Code Section 4123-17-13 (3)(C) [sic], the Bureau did not issue the employer a new policy when the employer filed a new application for coverage. Instead the Bureau instructed the employer to use an existing policy. The employer objected to the denial of a new policy and requested a hearing with the Adjudicating Committee.

{¶ 41} 24. The hearing was held before the adjudicating committee on October 19, 2011. The order which followed set out the statement of protest and then summarized the arguments. That order summarized the arguments as follows:

HGC Enterprises' Position

The employer's representatives stated the old company is on a payment plan of \$500.00 a month. The old company might owe around \$2,800.00 in premiums. In January 2011, the son closed the business. The father then inquired about opening his own franchise of the same business previously owned by the son. The father got a new corporation ID and reopened the business at the same location using the same trade name. However, the son was not an owner of the new business. There were equipment and supplies purchased from the son's old business. Some of the old employees were hired by the new business. The old lease for the building was not assumed. A new lease was entered into. There was no transfer of business between HYWY and HGC.

BWC's Position

The BWC representative stated that a new application was received on March 21, 2011. The dba for the business was Fox['s] Pizza Den. The Bureau researched the application and found that the old restaurant was owned by George Joseph III. The new owner was George Joseph Jr. Given the company was a pizza restaurant at the same location and the owners were all family members, the Bureau applied OAC 4123-17-13.

{¶ 42} 25. Thereafter, the adjudicating committee determined that the BWC had properly applied the law, stating:

Based on the testimony at the hearing and the materials submitted with the protest, the Adjudication Committee DENIES the employer's protest. The BWC correctly applied the policy initiation rule. The two businesses operated out of the same location, with the same line of business, using the same phone numbers and equipment. The two owners were close family members. The Committee properly applied the rule.

(Emphasis sic.)

{¶ 43} 26. HGC Enterprises notified the BWC that it was appealing the order from the adjudicating committee in a letter dated November 30, 2011. After setting forth the facts concerning HYWY Foods and HGC Enterprises, counsel for HGC Enterprises argued that Ohio Adm.Code 4123-17-13(C) was unconstitutionally vague because the rule failed to provide any guidance to a perspective employer as to the criteria that would be used to determine whether two entities were essentially the same. Counsel also argued that the BWC ignored the statutory provisions related to successor employers contained in Ohio Adm.Code 4123-17-02, which do provide guidance to perspective employers as to the criteria that will be used to determine whether an employer will be determined to be a successor-in-interest, arguing that the adjudicating committee applied the wrong law. In arguing that Ohio Adm.Code 4123-17-02 should have been applied instead, counsel stated:

In this matter, the BWC completely ignored the applicable statutory and regulatory framework. The BWC made no determination whether HYWY transferred a business in whole or in part to HGC. Additionally, the BWC made no determination whether HGC was a "successor-in-interest" to HYWY. The BWC chose to apply, albeit incorrectly OHIO ADMIN. CODE 4123-17-13, while at the same time completely disregarding Ohio Admin. Code 4123-17-02. The BWC cannot pick and choose what rules it will apply, yet, that is exactly what it did in this case.

The BWC's failure is magnified when one considers that Ohio Admin. Code 4123-17-02 requires that a subsequent employer succeed a predecessor employer in the operation of the business that had established coverage or experience in

the most recent period. In this matter, the alleged predecessor business — HYWY — was not in existence when HGC began its operations. There was no business to succeed.

Furthermore, the BWC completely ignored the criteria set forth in Ohio Admin. Code 4123-17-02 allowing for transfer of risk or experience. First, there is no evidence that HGC expressly or impliedly agreed to assume any of HYWY's obligations. HGC entered into its own lease and franchise agreement. There was no assumption of any HYWY obligations by HGC. Second, there is no evidence of a defacto merger or consolidation of HGC and HYWY. HGC and HYWY were owned by two different individuals. HYWY's owner has no ownership interest in or other role in HGC. Similarly, HGC's owner had no interest in or relationship with HYWY. Third, there is no evidence that HGC is merely a continuation of HYWY. HYWY's pizza shop ceased to exist as of January 2010 [sic]. HGC began operating a pizza shop in April 2011. The only similarity between HYWY and HGC is that each business operates a pizza shop. HGC purchased its own equipment, entered into its own agreements related to the operation of the shop, hired its own employees, and installed new management. Fourth, there is no evidence that HYWY ceased operating to escape its workers compensation obligations. To the contrary, HYWY has continued to fulfill its obligations to the BWC by entering into a payment plan with the BWC. The BWC's actions in accepting payments from HYWY are tantamount to an express admission that HYWY, not HGC, is the party responsible for the obligations that the BWC has transferred to HGC.

As set forth above, had the BWC considered the applicable statutory provisions, it would have concluded that the risk and experience of HYWY should not transfer to HGC. However, this is not what happened. Instead, the BWC relied upon a rule that is unconstitutionally vague, while ignoring the statutory framework that provides specific instruction and criteria to be used when considering whether to transfer risk and experience [from] one employer to another.

The BWC should reconsider and vacate its Order issued herein on October 28, 2011, and issue a new order finding that the risk and experience of HYWY was not properly transferred to HGC. HGC requests that a hearing be scheduled so that the [issues] raised herein can be addressed.

{¶ 44} 27. HGC Enterprises sent a letter to the BWC and attached the affidavit of Joseph, Jr. In that affidavit, Joseph averred as follows:

[Two] I am the majority owner of HGC Enterprises, Inc. ("HGC"), which I formed in March 2010 [sic]. My daughter and I are the only two shareholders.

[Three] HGC operates a pizza shop in New Philadelphia[,] Ohio known as Fox's Pizza Den.

[Four] Prior to opening the pizza shop, I entered into various agreements as needed for the operation of my pizza shop, including a franchise agreement with Fox's Pizza Den, Inc., a lease with my landlord, and various vendors as needed.

[Five] For a time before I opened my pizza shop, another Fox's Pizza Den owned by HYWY Foods ("HYWY") operated at the location where I am now located. However, that shop closed several months before I opened. I do not know why HYWY closed the pizza shop.

[Six] I do not presently and have never had any interest of any kind in HYWY, nor was I ever an employee of HYWY.

[Seven] However, after it closed, I considered opening a pizza shop in the same location, and that is why I formed HGC.

[Eight] HGC has not assumed any contractual, or other, obligations of HYWY. HGC has entered into its own agreements and secured its own loans for the operation of its pizza shop.

[Nine] Prior to opening the shop, I purchased some, not all, of the equipment I needed to operate my pizza shop from HYWY. I purchased a pizza oven, steel prep table and freezer. The equipment I purchased from HYWY was not in any way unique and almost identical to such equipment used in all restaurants.

[Ten] Before opening, I hired employees, some, but not all, of which worked for HYWY. I hired a manager that had no prior relationship of any kind with HYWY.

[Eleven] I did not assume any part of HYWY's business. At the time that I opened my pizza shop, HYWY had ceased

operating its pizza shop. There was no business to acquire or assume.

{¶ 45} 28. In a letter dated March 5, 2012, HGC Enterprises sent the BWC the affidavit of Kevin Willoughby, the certified public accountant for HGC Enterprises. In that affidavit, Willoughby explained the basis upon which he advised HGC Enterprises that it would not have to assume any of the outstanding monetary obligations of HYWY Foods as follows:

[Four] George Joseph, Jr., owner of HGC, came to me in February 2011 with questions concerning a new business opportunity. He wanted to open a pizza franchise. His son previously operated a franchise in the area and Mr. Joseph wanted to open a pizza shop where his son previously operated his pizza shop.

[Five] I explained to George that his son's business (HYWY Foods) had an outstanding monetary obligation with the Ohio BWC, and that he should not open the pizza shop if the BWC would assign the obligation of HYWY Foods to HGC. I was aware of the outstanding obligation as HYWY Foods is also a client.

[Six] George asked that I look into the matter and let him know if it would be an issue as he did not want to open a pizza shop if the obligation would follow his business. As such, on or about February 8, 2011, I called Don Henegar, an auditor with the BWC who I knew from audits that he had conducted on my clients. I explained mine and HGC's concerns to Don regarding the outstanding obligation of HYWY Foods and asked what action HGC should take to make sure that the obligation did not follow HGC if it opened a pizza shop. Based on my prior dealings with Don, I considered him a knowledgeable person on such issues who had the authority to make decisions concerning workers' compensation coverage issues as this is what he did as an auditor with the BWC.

[Seven] At the end of our initial conversation, Don told me that he would talk to another person at the BWC and get back to me with an answer, which he did later that day. When we again spoke, Don advised me to file a new application for workers' compensation coverage for HGC. Based on the context of our conversations, I took this to

mean that so long as HGC filed a new application the obligation of HYWY Foods would not follow HGC.

[Eight] I then explained to Mr. Joseph what Don told me, and based on the information, he decided to proceed with opening his pizza shop.

{¶ 46} 29. Following a hearing on March 6, 2012, the administrator's designee for the BWC issued a final order affirming the determination of the adjudicating committee, stating:

Pursuant to Ohio Revised Code Section 4123.291, this matter came on for hearing before the Administrator's Designee on the employer's appeal of the Adjudicating Committee order dated October 19, 2011. At issue before the Administrator's Designee, the Employer protested of the Bureau's determination that policy HYWY and HGC are essentially the same employer. Therefore, in accordance with OAC 4123-17-13(C), the Bureau required HGC to use the policy of HYWY.

* * *

The Administrator's Designee adopts the statement of facts contained in the order of the Adjudicating Committee.

Based on the testimony and other evidence presented at the hearing, the Administrator's Designee affirms the Adjudicating Committee's findings, decision, and rationale set forth in the order.

{¶ 47} 30. Thereafter, relator, HGC Enterprises, Inc., filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 48} For the reasons that follow, it is this magistrate's decision that this court should deny HGC Enterprise's request for a writ of mandamus.

{¶ 49} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 50} The BWC applied Ohio Adm.Code 4123-17-13, the rule controlling the making of the initial application for rating, to HGC Enterprises' application for workers' compensation coverage. Ohio Adm.Code 4123-17-13(A) requires an employer seeking workers' compensation coverage to submit an application containing the following relevant information:

(1) On the occasion of instituting coverage under this rule, the employer shall submit an application for coverage that completely provides all the information required for the bureau to establish coverage for the employer. The employer shall, at a minimum, provide the following information:

(a) Legal name of the employer;

(b) Address of the employer;

(c) Federal identification number or social security number;

(d) Business entity type (corporation, L.L.C., sole proprietorship, partnership, etc.);

(e) Information related to whether the applicant for coverage has purchased an existing business or has another associated policy;

(f) Name of the owner or corporate officer, and, where applicable for elective coverage, the name of the sole proprietor, partners, or minister;

(g) Information related to the description of the employer's operations;

(h) Signature of the person completing the application for coverage.

{¶ 51} Upon receipt of the application, the BWC classifies the applicant-employer's status as to the type of industry or nature of the enterprise with regard to the degree of hazard involved and advises the applicant of its classification, rate, and amount of first premium security deposit.

{¶ 52} After receiving HGC Enterprises' application for coverage, the BWC applied paragraph (C) of Ohio Adm.Code 4123-17-13 and determined that HGC Enterprises was

"essentially the same employer" as HYWY Foods and, instead of granting HGC Enterprises' application for coverage, the BWC concluded that HGC Enterprises already had coverage in the form of the policy already issued to HYWY Foods. Paragraph (C) provides as follows:

If the bureau determines, after reviewing the information submitted with the application provided for in paragraph (A) of this rule, that the employer is essentially the same employer regardless of entity type for which risk coverage previously had been provided, the bureau may transfer the prior risk coverage to the employer and the employer shall assume any outstanding obligations under the prior risk coverage. The bureau may reactivate a previously cancelled risk coverage in order to complete this transfer.

(Emphasis added.)

{¶ 53} HGC Enterprises argues that the BWC should have applied Ohio Adm.Code 4123-17-02 and determined whether it was a successor employer to HYWY. HGC Enterprises argues further that Ohio Adm.Code 4123-17-13 is unconstitutionally vague and that employers would have no way of knowing whether or not they would be found to be essentially the same as some other employer. For the reasons that follow, the magistrate disagrees.

{¶ 54} Following a search on Westlaw, the magistrate was unable to find any cases where an employer was challenging the applicability of this rule to them. Although the magistrate does not know how frequently this rule is applied, it appears that its application has not been challenged before.

{¶ 55} When considering an administrative agency's application of its own rules and regulations, court's give due deference to the agency's interpretation, provided the analysis is reasonable and is not in conflict with relevant statutes. *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282 (2001); *State ex rel. McLean v. Indus. Comm.*, 25 Ohio St.3d 90 (1986). On several occasions, the Supreme Court of Ohio has repeatedly acknowledged the difficulty of setting workers' compensation rates and has deferred to the BWC's determination in these matters unless the agency has acted in an arbitrary, capricious, or discriminatory manner. *State ex rel. Cafaro Mgt. Co. v. Kielmeyer*, 113 Ohio St.3d 1, 2007-Ohio-968.

{¶ 56} Here, HGC Enterprises contends that the BWC abused its discretion when it applied Ohio Adm.Code 4123-17-13 instead of 4123-17-02 which applies when the BWC needs to determine whether or not an employer is not a successor in interest. Part of HGC Enterprises' argument focuses on its assertion that Ohio Adm.Code 4123-17-13 is unconstitutionally vague.

{¶ 57} The vagueness doctrine is an outgrowth of the due process clause of the Fifth Amendment to the United States Constitution. *U.S. v. Williams*, 553 U.S. 285, (2008). Due process demands that the law provide sufficient warning of what conduct is proscribed so people may conduct themselves in such a manner as to avoid that which is forbidden. *Rose v. Locke*, 423 U.S. 48 (1975). Consequently, a legislative enactment is void for vagueness if it fails to provide sufficient definition and guidance that would enable a person of ordinary intelligence to conform his or her conduct to the law. *Hill v. Colorado*, 530 U.S. 703 (2000). A statute can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) it authorizes or even encourages arbitrary and discriminatory enforcement. *Id.* HGC Enterprises' argument focuses on the steps Joseph, Jr. took to make certain he did not assume the debts of his son's business. HGC Enterprises argues that Joseph, Jr. relies on his accountant's advice. Because the accountant, after talking with a BWC auditor, believed Joseph, Jr. could avoid liability by filing a new application, HGC Enterprises argues that the average person could not know if and when the policy would be applied.

{¶ 58} The magistrate finds that Ohio Adm.Code 4123-17-13 is not unconstitutionally vague and that the commission did not abuse its discretion in applying it to the facts of this case.

{¶ 59} Although, Ohio Adm.Code 4123-17-13(C) does not identify any factors for the BWC to consider when determining whether or not one employer is essentially the same as another employer, the magistrate finds that, at least in the present case, no such factors are necessary. As noted in the findings of fact, the former Fox's Pizza Den was operated by HYWY Foods, a company which was owned and operated by George Joseph, III, who happens to be the son of George Joseph, Jr., the man whose company, HGC Enterprises, operates the current Fox's Pizza Den restaurant. The current Fox's Pizza Den

is located at the same address as the former Fox's Pizza Den and the two establishments share the same telephone number. Further, some of the equipment used by the former Fox's Pizza Den was bought by HGC Enterprises and is currently being used in the new Fox's Pizza Den. Some of the former employees of the first Fox's Pizza Den employed at the current Fox's Pizza Den. Based on these facts alone, the magistrate finds that the BWC did not abuse its discretion by finding that HGC Enterprises is essentially the same employer as HYWY Foods.

{¶ 60} In its defense, HGC Enterprises makes the following arguments: (1) we have our own franchise agreement and lease, and (2) we have no idea why HYWY Foods went out of business. As noted in the findings of fact, the franchise agreement between Fox's Pizza Den and HGC Enterprises was designated by Fox's Pizza Den as a transfer of the franchise license previously granted to HYWY Foods. This fact cuts against the argument that HGC Enterprises had its own franchise agreement. Further, although Joseph, Jr. averred in his affidavit that he had no idea why his son's company went out of business, the BWC was not required to find this statement credible. Also, the fact that Joseph, Jr. knew of his son's outstanding debt to the BWC cuts against his argument that he did not know why HYWY went out of business. As the BWC noted, the same business, Fox's Pizza Den, was being operated out of the same location as the previous Fox's Pizza Den utilizing some of the same equipment and some of the same employees. Further, this was not an arms length transaction; instead, the owner of HYWY Foods is the son of the owner of HGC Enterprises. Again, given these facts, the magistrate finds that it was not an abuse of discretion for the BWC to find that HGC Enterprises is essentially the same employer as HYWY Foods.

{¶ 61} To the extent that HGC Enterprises argues that the BWC was required to apply Ohio Adm.Code 4123-17-02 and determine whether or not it was a successor employer to HYWY Foods before the BWC could transfer the experience of HYWY Foods to HGC Enterprises, the magistrate disagrees. There is no evidence that HGC Enterprises purchased HYWY Foods and there were no client lists or contracts to assume. However, HGC Enterprises is operating the same type of business, a pizza shop, under the same name, Fox's Pizza Den, and is serving customers in the same geographical location. Ohio Adm.Code 4123-17-02 does not apply here; however, Ohio Adm.Code 4123-17-13 does.

{¶ 62} Based on the forgoing, it is this magistrate's decision that HGC Enterprises has not demonstrated that the BWC abused its discretion when it determined that it was essentially the same employer as HYWY Foods and this court should deny its request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).