IN THE OHIO SUPREME COURT

MICHAEL PENNESSI

Plaintiff/Appellant,

v.

SUPREME COURT CASE NO._____

COURT OF APPEALS CASE NO. CA 028022

HANGER PROSTHETICS AND ORTHOTICS, INC.,
Et al.

Defendants/Appellees.

PLAINTIFF/APPELLANT'S
REVISED MEMORANDUM IN SUPPORT OF JURISDICTION

s/ Robert L. Guehl, Esq.
Counsel for Plaintiff/Appellant
Ohio Bar #: 0005491
129 Oak Knoll Dr.
Dayton, OH 45419
(937) 479-5598
RguehlEsq@Gmail.com

ROBIN A. JARVIS (0069752)
Senior Assistant Attorney General Job & Family Services Section
robin.jarvis@ohioattorneygeneral.gov Attorney for Appellee, Director ODJFS

Appellee Hanger Prosthetics and Orthotics, Inc
PO Box 182366, Columbus, OH 43218-2366

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER:

COMMENTARY:

ARGUMENT

The primary issues addressed by this petition for review are inherent in the Due Process inequities and imbalances in the Ohio unemployment compensation statutes and administrative review process. Mr. Pennessi requests this Court's review in light of those inequities.

Underfunding of unemployment compensation is a current legislative controversy in Ohio, as reported by the Columbus Dispatch:

> There's something worse than Ohio having an unemployment-compensation system on a sure-fire road to insolvency: a legislature that knows the system is broke and remains paralyzed on how to fix it.
>
> The state's own calculations put the Ohio Unemployment Compensation Trust Fund at more than 60 percent below the "minimum safe level" at the end of 2017.[1]

The decision below presents substantial constitutional questions of public or great general interest for the residents of Ohio in relation to the State unemployment compensation system.

The Court of Appeals held:

> {¶ 2} In support of his appeal, Pennessi contends that the UCRC and trial court erred as a matter of law by holding that he was fired for just cause. Pennessi further argues that the trial court and UCRC erred as a matter of law by disallowing evidence that he proffered. Finally, Pennessi maintains that the UCRC violated his due process rights by allowing UCRC employees, rather than judicial officers, to hear his appeal.
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> {¶ 3} We conclude that no error existed during the UCRC proceedings and that Pennessi's benefits were properly denied because he was terminated for just cause. Furthermore, Pennessi waived his due process argument by failing to raise it prior to this appeal. Even if this argument were considered under the plain error doctrine, this

[1] www.dispatch.com/opinion/20180129/editorial-lawmakers-must-fix-unemployment-fund; see https://www.policymattersohio.org/research-policy/fair-economy/work-wages/state-of-working-ohio/how-ohio-has-underfunded-unemployment-compensation

case does not present exceptional circumstances that would warrant reversal based on plain error. Accordingly, the judgment of the trial court will be affirmed.

Mr. Pennessi appealed the disallowance of his unemployment benefits on the following grounds, restating Appellant's Assignments of Error:

THE TRIAL COURT ERRED AS A MATTER OF LAW BY HOLDING THAT APPELLANT WAS FIRED FOR JUST CAUSE.

THE TRIAL COURT AND THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION ERRED AS A MATTER OF LAW BY DISALLOWING PROFFERED EVIDENCE. RUBBERSTAMPING BY THE COMMISSION AND THE COMMON PLEAS COURT LIKEWISE CONSTITUTES ERROR.

THE DECISION BY THE ADMINISTRATIVE HEARING OFFICER'S IS A VIOLATION OF PLAINTIFF'S DUE PROCESS RIGHTS. RUBBERSTAMPING BY THE COMMISSION AND THE COMMON PLEAS COURT LIKEWISE CONSTITUTES ERROR.

Appellant will address the matters in order.

1. **THE TRIAL COURT ERRED AS A MATTER OF LAW BY HOLDING THAT APPELLANT WAS FIRED FOR JUST CAUSE**.

The Court of Appeals argued that ***"...Additionally, Pennessi failed to cite any particular Ohio statute or regulation concerning hearing officers..."*** Decision {¶ 69}. This is incorrect as Mr. Pennessi cited the Ohio statute in question, O.R.C 4141.282, and referenced http://codes.ohio.gov/orc/4141, the Unemployment statute specifically, on page two of his brief.

The procedure upon appeal of the administrative decision to the Common Pleas Court

is subject to the same disadvantage to the worker as the telephonic administrative hearing headed by an employee of ODJFS. Close examination of the initial administrative hearing reveals several defects beyond the lack of discovery, face-to-face confrontation of witnesses, and the basic informality and unfairness of the "hearing."

2. **THE TRIAL COURT AND THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION ERRED AS A MATTER OF LAW BY DISALLOWING PROFFERED EVIDENCE. RUBBERSTAMPING BY THE COMMISSION AND THE COMMON PLEAS COURT LIKEWISE CONSTITUTES ERROR.**

The Ohio Department of Jobs and Family Services (hereafter ODJFS) submitted in response to the appeal (regarding supplementation of the administrative record) that:

> *"This idea is firmly rooted in Ohio law. R.C. 4141.282(H) states in part: The court shall hear the appeal on the certified record provided by the commission."*

However, the statute is neutral and does not negate the addition of supplemental materials necessary for a fair decision.

The typical economic inequality between a worker and his employer is a major issue in the area of unemployment compensation. Ohio's unemployed workers are being sacrificed by the State, with the willing cooperation, if not complicity, of employers. Both ODJFS and employers have substantial economic incentives to unfairly deny unemployment compensation claims. See Columbus Dispatch article cited above. [2]

An unemployed worker, with no income, is not typically able to contest the actions of an employer and the State when the safety net of unemployment compensation is denied. The State statutory appeal procedure (or lack of an effective appeal) plays into this unfair system.

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[2] ***Id.***

In Ohio, a worker who loses his job may apply for Unemployment Compensation.[3] Following an extensive preliminary process, the worker may be subject to an administrative hearing (usually held by telephone, as in this case) before an administrative hearing officer. Hearing officers are **employees of the ODJFS, not independent judicial officers**.[4]

The decision of the Hearing Officer is subject to appeal to the Board of ODJFS, and from there to the local Common Pleas Court as a review of the administrative process, currently not a trial de novo. Because the "hearing" (as in this case) is generally by telephone and rather informal, the worker is at a disadvantage versus the employer's agency tasked with defending such claims.[5]

If an appeal can only be submitted based on the "record" (i.e., a transcript of proceedings), then no citation to any other source, or indeed any argument, is apparently necessary or warranted. That, however, is not the nature of an administrative appeal - argument and a basis for the argument are allowable. Certainly some items outside the record (such as a case citation) are perfectly legitimate standard supplements to a party's argument. Exhibits may be the basis of argument, admissions against interest, or otherwise contradictory argument against the employer's position.

The Civil Rules allow argument to the Court of many sources outside the "record"on an

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[3] https://jfs.ohio.gov/unemp_comp_faq/index.stm See generally http://codes.ohio.gov/orc/4141 unemployment compensation

[4] https://www.governmentjobs.com/careers/ohio/jobs/1704749/human-services-hearing-officer-2?

[5] See generally https://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Legal/AdministrativeLawHandbook.aspx

administrative appeal:

Rule of Evidence 201, Judicial Notice of Adjudicative Facts[6]

Ohio. R. Evid.803(A) - Hearsay Exceptions; Declarant Unavailability Immaterial.[7]

The Ohio Supreme Court **Writing Manual [internet citations]** [8]

Ohio Senate Bill 139 adopts the **Uniform Electronic Legal Material Act**[9]

Further, a 2013 law review article addresses the issue of supplementation of the record directly[10]. While dealing with the Federal Rules and not the Ohio Rules, the referenced commentary gives insight to the power of courts to review supplemental materials in an appellate brief, from the perspective of the Federal courts:

> "Fortunately, **the general rule of a closed appellate record is not absolute**. Attorneys requesting that federal courts of appeals consider materials not in the district court record can rely on three possible avenues to supplement the record on appeal:
> (1) Rule 10(e)(2)(C) of the Federal Rules of Appellate Procedure,
> (2) Rule 201 of the Federal Rules of Evidence, and
> (3) the inherent equitable authority of the federal courts of appeals..."
> [emphasis added]

Rule 48 of the Federal Rules of Appellate Procedure also provides for appellate fact-finding in the form of appointing a "special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court."

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[6] https://www.rulesofevidence.org/article-ii/rule-201/

[7] https://www.supremecourt.ohio.gov/LegalResources/Rules/evidence/evidence.pdf

[8] https://www.supremecourt.ohio.gov/ROD/manual.pdf

[9] https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-SB-139

[10] George C. Harris and Xiang Li, "Supplementing the Record in the Federal Courts of Appeals: What If the Evidence You Need Is Not in the Record?", 14 J. App. Prac. & Process 317 (2013) [Available at: http://lawrepository.ualr.edu/appellatepracticeprocess/vol14/iss2/7]

Fed. R. App. P. 48.[11]

Fed. Evidence Rule 201[12] provides that, at any stage of the proceedings, a federal court of appeals may take judicial notice of "adjudicative facts" that are not subject to reasonable dispute because they are "generally known within the territorial jurisdiction of the trial court" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Thus, a "high degree of indisputability is the essential prerequisite" to a court taking judicial notice. Ohio courts take a similar approach, declaring that “Judicial notice may be taken at any stage of the proceeding.”[13]

Inherent Equitable Authority. A court also has inherent equitable authority to review facts readily available:

> Parties may request that the court exercise its inherent equitable authority to supplement the appellate record **when changes in the law affect the outcome** or when changes in the facts affect the suitability of injunctive relief or the court's subject-matter jurisdiction. And, even in the absence of such changed circumstances, courts are inclined to exercise **inherent equitable authority if supplementing the record will advance the principles of fairness, truth, or judicial efficiency**.[14] [emphasis added]
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> ...
>
> "The federal courts of appeals generally exercise their inherent equitable authority to permit supplementation if... (4) the court is convinced, after factoring in the principles of fairness, truth, and judicial efficiency, that the balance of equities tips in favor of supplementation."[15]

3. **THE DECISION BY THE ADMINISTRATIVE HEARING OFFICER’S IS A VIOLATION**

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[11] https://www.law.cornell.edu/rules/frap/rule_48

[12] https://www.law.cornell.edu/rules/fre/rule_201

[13] https://www.supremecourt.ohio.gov/LegalResources/Rules/evidence/evidence.pdf

[14] 14 J. App. Prac. & Process @323, 325

[15] Id. @332-333 [emphasis added]

OF PLAINTIFF'S DUE PROCESS RIGHTS. RUBBERSTAMPING BY THE COMMISSION AND THE COMMON PLEAS COURT LIKEWISE CONSTITUTES ERROR.

A. ***Lucia v. SEC*** decision by U.S. Supreme Court sets forth the standard for political accountability for an administrative hearing officer.

B. Proper remedy in this case is reversal and remand for expanded hearing before an accountable officer.

An electronic search of the Dayton Bar Association's Caselaw data base returns only one very recent case in each relevant jurisdiction: the Federal 6th Circuit (***Jones Bros., Inc. V. Sec'y ofLabor*** (6th Cir.,July 31, 2018), and in the Ohio state courts (this case) that cite to either ***Freytag****, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764* (1991) or to the recent case of ***Lucia vs. SEC***, *138 S.Ct. 2044, 201 L.Ed.2d 464* (2018.)

Note that ***Lucia*** was decided 27 years after ***Freytag***. In the tintervening years since the ***Freytag*** decision without comment or decision in either Ohio State or Federal courts, it appears this is a **question of first impression** before this Court. This negates the Court of Appeals argument that "*{¶ 69} Pennessi also failed to cite any Ohio cases that have invalidated the use of hearing officers based on either Lucia... or Freytag..."* Ohio courts merely have not discovered this significant issue.

Additionally, ***Freytag*** involved a similar situation on appeal, that is, the question was raised "late":

> The Commissioner correctly notes that petitioners gave their consent to trial before the Special Trial Judge. This Court in the past, however, has exercised its discretion to consider nonjurisdictional claims that had not been raised below. [citations omitted] Glidden expressly included Appointments Clause objections to judicial officers in the

> category of nonjurisdictional structural *879 constitutional objections that could be considered on appeal whether or not they were ruled upon below.
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> ... **we are faced with a constitutional challenge that is neither frivolous nor disingenuous**. The alleged defect in the appointment of the Special Trial Judge goes to the validity of the Tax Court proceeding that is the basis for this litigation. It is true that, as a general matter, a litigant must raise all issues and objections at trial. But the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what **Justice Harlan called "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers."** Ibid. We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge.[16] (Emphasis added)

Lucia v SEC, *supra*,, sets out the due process rights of a litigant before a government hearing officer who is an "employee" rather than a "judge" or "officer" of the United States. Similarly it is an abuse of process for a litigant to be deprived of a substantial right (in this case, unemployment benefits) without hearing before a duly authorized officer of the State of Ohio, rather than an “employee”. A commentator provides relevant analysis:

> The opinion [***Lucia***] strikes a major blow at one of the centerpieces of the administrative state – the tradition of civil-service appointments of administrative law judges. The Court first reviewed the standards for distinguishing between inferior officers of the United States, who must be appointed consistent with the Appointments Clause, and mere employees, who fall outside of the Clause’s reach. To be such an officer, a person must (i) have “continuing and permanent” duties; and (ii) “exercise[] significant authority pursuant to the laws of the United States.” ...according to the views of a majority of the Justices, the Court’s decision in ***Freytag v. Commissioner*** dictated that SEC ALJs are officers of the United States under the Constitution. ***Freytag*** held that special trial judges of the United States Tax Court (“STJs”) exercised significant authority and were thus constitutional officers because, among other things, STJs could take testimony, conduct trials, and enforce compliance with discovery orders. That STJs could not issue final decisions, but only made proposed findings for adoption by a Tax Court Judge, did not change the analysis...[17]

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[16] ***Freytag***, 501 U.S. 868, @879 et seq.

[17] https://www.davispolk.com/files/2018-06-25_supreme_court_holds_that_sec_administrative_law_judges.pdf

> The Constitution's Appointments Clause requires that an "officer" of the United States be appointed by the president, the courts of law, or by the heads of departments. SEC ALJs have traditionally not been appointed by the President, the judiciary, or even the SEC's Commissioners. Rather, SEC ALJs are hired through the SEC's Office of Human Resources. They have delegated authority to hear administrative proceedings and issue "initial decisions," which must be finalized by an order from the Commissioners, who also retain the authority to review ALJ decisions either sua sponte or on appeal." [18]

The Wall Street Journal believes the ***Lucia*** decision is valuable in bringing accountability to decisions by administrative judges:

> "The government cannot hand authority to ALJs who are appointed by low-level managers with no line of responsibility to the President..." Appellate Ex.2 (attached), June 22, 2018 Wall Street Journal.

Summarizing the ability of the judges to take testimony, conduct trials and enforce compliance with discovery orders, the ***Lucia*** court concluded that "point for point – straight from ***Freytag*** – the Commission's ALJs have equivalent duties and powers as [the Freytag judges] in conducting adversarial inquiries."

The ***Lucia*** court resolved the case by referring back to the trial court for *"...a new hearing before a properly appointed official..."*@12. This would be an appropriate remedy in this case.

The Wall Street Journal editorial "Administrative Law Smackdown", Appellate Ex. 2, (attached), analyzed the decision:

> "...In ***Lucia v. SEC***, the Court ruled 6-3 that under the Constitution **administrative law judges must be appointed by proper political authorities, not merely by career bureaucrats**. ALJs, as they're known, have proliferated across the government to adjudicate disputes between citizens and federal bureaucracies...

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[1] [8] http://www.haynesboone.com/Alerts/supreme-court-rules-on-secs-administrative-law-judges.

> **The ruling is a victory for political accountability in an administrative state that is ever more sprawling and opaque**. Administrative judges can be especially frustrating because their rulings overwhelmingly favor the agencies for which they work...[emphasis added]
> ...
> Our research indicates that all federal agencies hire ALJs through a merit-selection process administered by the Office of Personnel Management (OPM). An agency may select an ALJ from the top three ranked applicants. It is unclear who at the CFPB would have been responsible for selecting and hiring Ms. Kirby from the list of candidates presented by OPM. Clearly, anyone other than Mr. Cordray would not have qualified as the "head of a Department" for purposes of the Appointments Clause...[19]

The U.S.Supreme Court in ***Lucia*** granted certiorari on the "**sole question [of] whether the Commission's ALJs are 'Officers of the United States' or simply employees of the Federal Government**," and by a 6-3 margin, held that **SEC ALJs are officers subject to the Appointments Clause**.

CONCLUSION:

1. Basic fairness applied to these facts indicates a **gross penalty** to Mr. Pennessi (loss of employment, salary, benefits, and unemployment compensation) in comparison to the alleged "misconduct".. The decision of the Hearing Officer was unlawful, unreasonable, or against the manifest weight of the evidence.

2. **Proferred evidence** -consistent with the lack of due process in the limited telephone hearing procedure, and the failure to consider relevant evidence by the trial court - constitutes reversible error.

3. The decision by a Hearing Officer, employed by the affected agency, ratified by the ODJFS, and rubber-stamped by the Common Pleas Court, amounts to an **abuse of process**

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[19] https://www.consumerfinancemonitor.com/2018/07/02/what-does-the-supreme-courts-lucia-decision-mean-for-the-cfpb-and-federal-banking-agencies/

pursuant to the rationale of the ***Lucia*** court.

Claimant Michael Pennessi requests this Honorable Court to review the record in this case, to reverse the decision of the Hearing Officer and Trial Court. Certainly if the ***Lucia*** case was important enough for review by the U.S Supreme Court, then the facts of this case are important enough for review by the Ohio Supreme Court.

s/ Robert L. Guehl, Esq.
Robert L. Guehl
Counsel for Plaintiff
Ohio Bar #: 0005491
129 Oak Knoll Dr.
Dayton, OH 45419
(937) 479-5598
RguehlEsq@Gmail.com

CERTIFICATE OF SERVICE

I hereby certify that, on or before this December 20, 2018, the foregoing was filed (electronically or otherwise) with the the Court of Appeals and the Ohio Supreme Court with copy to opposing legal counsel and unrepresented Appellee Hanger:

ROBIN A. JARVIS (0069752)
Senior Assistant Attorney General Job & Family Services Section
robin.jarvis@ohioattorneygeneral.gov
Attorney for Appellee, Director, ODJFS

Appellee Hanger Prosthetics and Orthotics, Inc.
PO Box 182366, Columbus, OH 43218-2366

/s/Robert L. Guehl
Robert L. Guehl