

**COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

Temperature Technologies, Inc,	:	
	:	
Appellant,	:	CASE NO. 17 CV 63
	:	
-vs-	:	JUDGE KIMBERLY COCROFT
	:	
Director, Ohio Department of Job and Family Services,	:	
	:	
Appellee.	:	

DECISION AND ENTRY

COCROFT, JUDGE

This matter comes before this Court upon the appeal of Appellant, Temperature Technologies, Inc., from a Decision of Appellee, Ohio Department of Job and Family Services, (“ODJFS”), Unemployment Compensation Review Commission (“Review Commission”), which was mailed on December 7, 2016. Appellee affirmed the Director’s Decision, mailed August 10, 2016, concluding that Appellant was a successor-in-interest to Griswold Group LLC for purposes of determining Appellant’s 2010 unemployment contribution rate as an Ohio employer. R.C. 4141.24(F).

Background

In a Director’s Reconsidered Decision, mailed August 10, 2016, ODJFS held that Temperature Technologies, Inc. “pursuant to ORC 4141.24(G)(1) and Rule 4141-17-05 the portion of unemployment experience acquired by the Griswold Group, LLC from Griswold Refrigeration, Inc. was then transferred to Temperature Technologies, Inc.” August 10, 2016 Decision. Therefore, the Director determined that the “Ohio Unemployment Tax Notification

Voluntary Successorship Determination mailed 06/03/2015 is hereby affirmed.” August 10, 2016 Decision.

Temperature Technologies, Inc. filed a timely appeal of the Director’s Reconsidered Decision, and jurisdiction was transferred to the Review Commission. Hearing Officer Shane Griest conducted a telephone hearing on November 29, 2016.

In a Decision mailed December 7, 2016, the Review Commission held that “Temperature Technologies, Inc., is a successor-in-interest to Griswold Group LLC. The contribution rate is based upon the successorship. Temperature Technologies, Inc. was assigned a proper contribution rate for the year 2010.” December 7, 2016 Decision. Thereafter, Appellant filed a timely appeal to this Court.

Facts

The Director’s Reconsidered Decision, mailed August 10, 2016, states the following Findings of Fact:

In 2007, Griswold Group LLC was formed as a limited liability company with Ronald Griswold as its sole member. Griswold Group LLC did not have an unemployment account until its purchase of Griswold Refrigeration, Inc. in January of 2010. At that time, the former employees of Griswold Refrigeration, Inc. were transferred to the unemployment account for Griswold Group LLC. The purchase included office furniture, valves and miscellaneous parts, and a forklift formerly belonging to Griswold Refrigeration, Inc. A separate decision from the Ohio Department of Job and Family Services has held that Griswold Group LLC is a successor in interest to Griswold Refrigeration, Inc.

Also in January of 2010, Ronald Griswold formed Temperature Technologies, Inc, a commercial refrigeration, heating, ventilation, and air-conditioning company. He serves as the owner and president of that company. After a brief stay under the unemployment account of Griswold Group LLC, the employees who had formerly been employees of Griswold Refrigeration, Inc were transferred to the unemployment account for Temperature Technologies, Inc. While no specific purchase of assets has occurred, Temperature Technologies, Inc uses the office furniture, valves and miscellaneous parts, and forklift purchased by Griswold Group LLC from Griswold Refrigeration, Inc.

At the hearing on this matter, the employer argued that Griswold Group LLC is a real

estate holding company and was never intended to operate as a commercial refrigeration, heating, ventilation, and air-conditioning company. The employer also noted that Temperature Technologies, Inc and Griswold Group LLC did not enter into an Application for Voluntary Successorship Transfer of Clearly Separable and Identifiable Portion. The employer argued that the absence of that Application and the absence of a specific purchase of assets by Temperature Technologies, Inc. shows that Temperature Technologies, Inc. was not a successor in interest to Griswold Group LLC.

Findings of Fact, August 10, 2016 Decision, as affirmed by December 7, 2016 Decision.

Appellant's Argument

Although not labeled as assignments of error, Appellant asserts the following in its brief:

- A. R.C. 4141.24(F) DOES NOT APPLY TO THE FACTS.**
- B. O.A.C. 4141-17-01(A) EFFECTIVE 7/23/13 IS THE WRONG LAW; THE 12/31/09 APA 7 R.C. 4141.24(G) ISSUES ARE PRECLUDED BY THE 4/8/15 DECISION.**
- C. COLLATERAL ESTOPPEL AND/OR RES JUDICATA APPLIES.**
- D. THE HEARING OFFICER FAILED TO ISSUE SUBPOENAS UPON REQUEST IN VIOLATION OF DUE PROCESS.**

Appellant argues that the absence of evidence that Appellant filed an "Application for Voluntary Successorship: Transfer of Clearly Separable and Identifiable Portion" and the absence of evidence of a specific purchase of assets by Temperature Technologies, Inc. shows that Appellant was not a successor in interest to Griswold Group, LLC. This reasoning appears to ignore R.C. 4141.24(F) and O.A.C. 4141-17-04. Also, in its brief, Appellant incorrectly argues that R.C. 2506.04 is the standard of review that this Court must apply in reviewing this case.

Standard of Review

The standard of review this Court must apply is set forth in R.C. 4141.26(D). R.C. 4141.26(D) provides, in relevant part:

The court may affirm the determination or order complained of in the appeal if it finds, upon consideration of the entire record, that the determination or order is supported by

reliable, probative and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the determination or order *or make such other ruling as is supported by reliable, probative and substantial evidence and is in accordance with law.* (Emphasis added).

“Reliable evidence” is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. “Probative evidence” is evidence that tends to prove the issue in question; it must be relevant in determining the issue. “Substantial evidence” is evidence with some weight; it must have importance and value. *Our Place v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, (1992).

In reviewing the decision of the Review Commission, the Court may not weigh or judge the credibility of the witnesses. This Court must give due deference to the administrative resolution of evidentiary conflicts. *All Star Personnel v. State of Ohio*, 2006-Ohio-1302, citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St. 2d 108 (1980); see also *Kathmandu, Inc. v. Bowland*, 1999 Ohio App. LEXIS 4499. Additionally, a reviewing Court must give due deference to statutory interpretations by an administrative agency that has substantial experience and has been delegated enforcement responsibility. *Resources Title National Agency v. Ohio Dept. of Job & Family Services*, 2014-Ohio-3427.

Law and Analysis

Although Appellant argues that this Court must review this case pursuant to R.C. 2506.04, the applicable standard of review is R.C. 4141.26, which is clearly set forth in the December 7, 2016 Decision within the “**APPEAL RIGHTS**” instructions as follows:

An appeal from this decision may be filed in the Court of Common Pleas of Franklin County, Ohio, within thirty (30) days after the date of mailing, in the manner set forth in Section 4141.26, Revised Code of Ohio. Such appeal shall be taken by the employer or the director by filing a notice of appeal with the clerk of such court and with the commission. Such notice of appeal shall set forth the decision appealed and the errors in it complained of. Proof of the filing of such notice with the commission shall be filed with the clerk of court...

December 7, 2016 Decision.

R.C. 4141.26 statutorily mandates that this Court consider the entire record to determine if there is reliable, probative and substantial evidence to support the determination or order. This Court must also analyze if the determination or order under review is in accordance with law. Thus, this Court will follow the statutory mandate and focus on the evidence in the record, not the absence of evidence, as purported by Appellant.

R.C. 4141.24(F) provides, in pertinent part:

If an employer transfers all of its trade or business to another employer or person, the acquiring employer or person shall be the successor in interest to the transferring employer and shall assume the resources and liabilities of such transferring employer's account, and continue the payment of all contributions, or payments in lieu of contributions, due under this chapter.

Additionally, O.A.C. 4141-17-04 describes a successor in interest by operation of law:

(A) The transferee shall become the successor in interest by operation of law where:

(1) There is a transfer of all of the transferor's trade or business located in the state of Ohio: and

(2) At the time of the transfer the transferor is liable under Chapter 4141 of the Revised Code.

(B) The transferee, as successor in interest, shall assume all of the resources and liabilities of the transferor's account. The director shall revise the contribution rates of the transferee to reflect the result of the successorship.

(C) The director shall not approve a transfer of experience or contribution rates of the transferee or transferor for any contribution period with respect to which the director has determined contribution rates for the transferee or transferor pursuant to division (G) of section 4141.24 or section 4141.48 of the Revised Code.

R.C. 4141.09 mandates that every employer in the state make contributions to the unemployment compensation fund. Furthermore, ODJFS must determine each employer's contribution or experience rate. There are three methods of acquiring status as a successor in

interest. Two of those methods require both the predecessor employer and acquiring employer to submit an application for successor in interest status. The remaining method, the one that is applicable to this case, is obtaining successor in interest status by operation of law. R.C. 4141.24(F); see also O.A.C. 4141-17-04.

The record demonstrates that Appellee has consistently concluded, as a matter of law, that Appellant is a successor in interest to Griswold Group LLC. Upon a review of the entire record, this Court concludes, as a matter of law, that there is reliable, probative and substantial evidence to support that conclusion and that the December 7, 2016 Decision is in accordance with law.

Appellant did not meet its burden of proof. *Prime Kosher Foods, Inc. v. Bureau of Employment Services*, 35 Ohio App. 3d 121 (1987). The evidence demonstrates that Appellant and Griswold Group LLC, although separate legal entities, were under the common management and control of Ronald Griswold. Tr. 18-20.

O.A.C. 4141-17-05 provides, in pertinent part:

If the director finds pursuant to division (G)(1) of section 4141.24 of the Revised Code that an employer has transferred a portion Of its trade or business to another employee and, at the time of the transfer, both employers are under substantially common ownership, management, or control, then the unemployment experience and outstanding debt attributable to the transferred portion of the trade or business shall be transferred to the transferee...

A review of the record demonstrates that there was common ownership, control and management between Appellant and Griswold Group LLC which triggered the mandatory transfer of experience pursuant to O.A.C. 4141-17-05. Tr. pgs. 11-15, and 17-20. Ronald Griswold testified as follows:

Q. Has Temperature Technologies made any purchase of equipment or fixtures from Griswold Group, LLC?

A. No. I own them, I own both entities, so I doesn't (sic) need to. I own it all.

Q. All right. Does Temperature Technologies use any of the equipment and fixtures purchased by Griswold Group from Griswold Refrigeration?

A. Yes.

Q. How is Temperature Technologies able to use those?

A. I own both entities, so they're mine. I let anybody use them that needs them.

Tr. p. 18.

Thus, there is reliable, probative and substantial evidence supporting that Appellant received a transfer of trade or business from another employer that was under substantially common ownership, management and control. R. C. 4141.24(G) statutorily mandates that if an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, both employers are under substantially common ownership, management, or control, then the unemployment experience attributable to the transferred trade or business, or portion thereof, shall be transferred to the employer to whom the business is so transferred.

Additionally, Appellant asserts that the Hearing Officer's failure to issue subpoenas violated Appellant's due process rights. However, in its brief, Appellant does not cite to any constitutional provision which sets forth the "due process" it claims was denied.

The phrase "due process" expresses the requirement of "fundamental fairness." In defining the process necessary to ensure "fundamental fairness," the United States Supreme Court has recognized that the clause does not require that the procedures used to guard against an erroneous deprivation be so comprehensive as to preclude any possibility of error, and in addition, the Supreme Court has emphasized that the marginal gains from affording an additional procedural safeguard may be outweighed by the societal cost of providing such a safeguard.

Thus, an appellant must make a showing of “identifiable prejudice.” See *Haj-Hamed v. State Medical Board*, 2007 Ohio App. LEXIS 2335.

Here, the record establishes that Appellant had notice of the charges against it, was represented by counsel, had an opportunity to be heard, and an opportunity to challenge and present evidence at the November 29, 2016 hearing. This Court concludes as a matter of law that Appellant has not made a showing of identifiable prejudice and thus, has failed to meet its burden.

The record demonstrates that Appellant’s counsel made two separate requests for the production of the “original of the Application for Voluntary Successorship: Transfer of Clearly Segregable and Identifiable Portion referred to in the middle of Exhibit A. “ These requests were made on September 7, 2016 and September 26, 2017. It would appear that Appellant’s subpoena was not proper, because a subpoena is a request for an appearance whereas a request for a document or documents would be a subpoena duces tecum. The Review Commission declined to issue the subpoenas based on the fact that the document does not exist. Tr. pps. 6-8. The testimony of Ron Griswold substantiates that the document requested by Appellant’s attorney does not exist. Ron Griswold testified as follows:

Q. All right. Did Griswold Group LLC, and Temperature Technologies ever enter into an Application for Voluntary Successorship?

A. No. Absolutely not.

Tr. p. 19.

Thus, this Court is perplexed as to how Appellant’s counsel’s request for a document he knew did not exist could constitute an identifiable prejudice and thus, violate his client’s due process rights.

The transfer that occurred in the case sub judice was effectuated by operation of law. Appellant's argument that R.C. 4141.24(F) does not apply to the facts has been addressed. Likewise, this Court has addressed the arguments set forth in Appellant's assertion regarding O.A.C. 4141-17-01(A) and the 12/31/09 APA and R.C. 4141.24(G) issues.

Accordingly, the evidence demonstrates that the transfer was as a result of Appellant becoming a successor in interest *by operation of law*. R.C. 4141.24(F); O.A.C. 4141-17-04. In light of the fact that Appellant became a successor in interest *by operation of law*, the only legal conclusion is that Appellee's decision is in accordance with law.

Based on the foregoing, Appellant's legal arguments are hereby **OVERRULED**.

DECISION

Accordingly, this Court concludes that Appellee's December 7, 2016 Decision is supported by reliable, probative and substantial evidence and is in accordance with law because the evidence demonstrates that Appellant became a successor in interest by operation of law. Thus, Appellee's December 7, 2016 Decision is hereby **AFFIRMED** and supported by the evidence.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

(B) Notice of filing. When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

THE COURT FINDS THAT THERE IS NO JUST REASON FOR DELAY. THIS IS A FINAL APPEALABLE ORDER. Pursuant to Civil Rule 58, the Clerk of Court shall serve notice upon all parties of this judgment and its date of entry.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

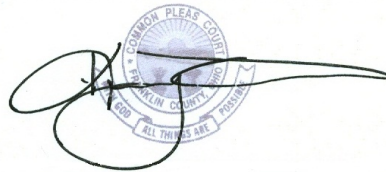
Date: 05-22-2017

Case Title: TEMPERATURE TECHNOLOGIES INC -VS- OHIO
DEPARTMENT JOB & FAMILY SERVICES

Case Number: 17CV000063

Type: ENTRY

It Is So Ordered.

A handwritten signature in black ink is written over a blue circular seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY, OHIO" in the middle, and "ALL THINGS ARE POSSIBLE" at the bottom.

/s/ Judge Kimberly Cocroft

Court Disposition

Case Number: 17CV000063

Case Style: TEMPERATURE TECHNOLOGIES INC -VS- OHIO
DEPARTMENT JOB & FAMILY SERVICES

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes