IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CITY OF DAYTON,	CASE NO. 2011 CV 05159
Plaintiff,	JUDGE MARY KATHERINE HUFFMAN
-vs-	DECISION, ORDER AND ENTRY AFFIRMING DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION
ROBERT J. BARON, et. al,	
Defendants.	

This matter is before the court as a result of an appeal taken by Appellant, City of Dayton, from a determination of the Ohio Unemployment Compensation Review Commission, granting unemployment compensation benefits to Appellee, Robert J. Baron, a former employee of Appellant. Appellant filed its brief herein on October 3, 2011. Appellee, Robert J. Baron, filed his brief on November 1, 2011. On November 4, 2011, the Brief of Appellee, Director, Ohio department of Job and Family Services was filed. Appellant filed its Reply Brief on November 21, 2011.

Also before the court is Appellee's Motion to Strike or Reject Appellant's Newly Raised Argument filed on November 29, 2011. Appellant filed its Memorandum in Opposition to said Motion on December 12, 2011. These matters are now ripe for decision.

I. PROCEDURAL HISTORY AND FACTS

The City of Dayton maintains a Personnel Policy and Procedures Manual. The manual includes numerous policies, including the City's dual employment policy, detailed at paragraph II, A:

> No member of the Commission, other officer, or employee shall hold employment with the State of Ohio, or a county, township, or municipal government. Employment in a public school system or other educational institution shall not be a violation of this section.

A letter dated February 15, 2006 was forwarded to Appellee, Robert Baron, from Michael Caudill, Assistant Fire Chief, Department of Fire for the City of Dayton, indicating that Baron 000 had been accepted as a candidate for appointment as a professional firefighter with the Dayton Fire Department. He was asked to report on Monday, February 27, 2006 to the Dayton Fire Department Training Center to begin his basic training. There was no discussion in the correspondence regarding dual employment with another entity. Firefighter recruits are employees of the City of Dayton from the time they start recruit training. The recruits receive a paycheck from the City of Dayton as well as benefits beginning the date the training class begins. (Hearing Transcript, p. 22).

During a firefighter's probationary period, his supervising officer is required to complete a probationary checklist with the officer. Among those items are policies and procedures of the Dayton Police Department and Civil Service Rules and Regulations. (Hearing Transcript, pg. 21). Baron's supervising officer signed documents indicating that the policy relating to dual employment was reviewed with him on June 11, 2006.

Herbert Redden, the Director of Fire Service recommended termination of Baron from his employment, based upon Baron's violation of City Policy 2.06. An appeal from that decision was taken to the City of Dayton Civil Service Commission.

In its Order on Appeal dated March 25, 2011, the Civil Service Commission found that the parties had stipulated, at paragraph 4, that "Mr. Baron was also an employee of the City of Hubbard, Ohio, Police Department, from February 27, 2006 until he was suspended April 14, 2006. His position was later terminated." In the Order on Appeal, the Civil Service Board affirmed the discharge of Baron from his employment with the City of Dayton.

Appellee, Robert J. Baron, hereinafter "Baron," filed an Application for unemployment benefits on November 19, 2010. Benefits were allowed by the Ohio Department of Job and Family Services. An appeal was filed by the City of Dayton on December 23, 2010. A Director's Redetermination was issued on January 14, 2011, affirming the prior determination allowing benefits. A further appeal by the employer, filed on January 24, 2011, was transferred to the Unemployment Compensation Review Commission. A hearing on the appeal was scheduled for April 21, 2011. That hearing was continued until April 28, 2011, and against continued until May 2, 2011.

At the hearing before the Unemployment Compensation Review Commission, Jeffrey Payne, Assistant Chief of Emergency Services testified that Baron became employed with the City of Dayton on February 27, 2006 and was discharged on November 3, 2010 for "violating City policy that addresses dual employment, with the second employment being for another municipality." (Hearing Transcript, p. 12). The City of Dayton became aware of Baron's dual employment in August, 2010 when Payne found an appeals court ruling sitting on his chair, which indicated that Baron had been terminated from employment with Hubbard Township and Payne concluded that Baron had worked for the township at the same time he was in the Fire Academy for the City of Dayton. (Hearing Transcript, pgs. 12-13). It was Mr. Payne's belief that Baron became aware of the City's policy prohibiting dual employment during the week of February 27, 2006. (Hearing Transcript, pg. 14).

During the hearing Baron admitted working for the City of Hubbard from June, 2002 through the second week of April, 2006, when he was suspended for calling off of a shift without giving four hours notice. (Hearing Transcript, pg. 27). He never worked for the City of Hubbard again. (Hearing Transcript, pg. 28). He testified that he was not aware of the City of Dayton policy prohibiting dual employment until after he completed the firefighter academy and went to his first

assignment. He became aware of the rule, according to his testimony, on June 11, 2006 when he was provided with Civil Service Rules and Regulations and on July 10, 2006, when he was provided with the City's Personnel Policies and Procedures Manual. (Hearing Transcript, pg. 24; see also Dayton Fire Dept. Training Academy Probationary Check List). He denied knowing about the policy when he was in the Fire Academy. (Hearing Transcript, pg. 25). He first became aware that the City of Dayton was concerned about his prior dual employment in August, 2010 when he was provided with a notification that there were charges pending against him for violating the City's policy on dual employment. (Hearing Transcript, pg. 25).

Larry Ables, who was one of the instructor's at the Fire Academy testified at the hearing that Baron, along with all other trainees, were instructed during their academy training regarding the City's policy on dual employment. He did not recall the specific date on which the issue would have been covered with recruits. (Hearing Transcript, pg. 30). However, there is nothing specific in the recruit class schedule indicating that the topic was or should have been discussed. (Hearing Transcript, pg. 32).

Herbert Redden, Fire Director of the City of Dayton testified before the hearing officer that he was the person who decided to terminate Baron "(b)asically because there was a violation that he was working for another jurisdiction at the time that he was in our Fire Academy." (Hearing Transcript, pg. 36). Redden chose not to discipline Baron, rather than terminate him, because he believed that Baron knew of the policy and, therefore, there was no mistake on Baron's part in maintaining dual employment. Chief Redden stated that one of the issues which was to be covered with all recruits during the interview process was the prohibition against dual employment, a process in which he partook. (Hearing Transcript, pg. 37). Chief Redden also testified that recruits were advised that they were employees of the City of Dayton when "they reported on Monday morning for the...recruit class at the Fire Training Center." (Hearing Transcript, pg. 38). Chief

Redden believes that violation of the City's dual employment policy can result in discharge for cause. (Hearing Transcript, pg. 39).

Another firefighter recruit who was interviewed in the same process as Baron did not recall being advised about the dual employment prohibition during his interview. (Hearing Transcript, pg. 45).

In a decision issued on May 3, 2011, the Unemployment Compensation Review Commission Hearing Officer made the following findings of fact:

> Claimant, Robert Baron, was previously found to have filed a valid application for determination of benefit rights.
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> Claimant worked as a firefighter for City of Dayton from February 27, 2006 until November 3, 2010. Claimant was discharged for allegedly violating City policy.
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> The City of Dayton has a policy which states that "[n]o member of the Commission, other officer, or employee shall hold employment with the State of Ohio, or a county, township, or municipal government. Employment in a public school system or other educational institution shall not be a violation of this section."
>
> Claimant was employed with the City of Hubbard from June, 2002 until on or around April 8, 2006, when he was suspended for being absent without leave.
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> In February, 2006, claimant was notified that he was selected for firefighter training, and that his training period would start on February 27, 2006. Prior to this notification, claimant, and all other prospective firefighter trainees were interviewed separately by three members of the Board, one of whom was Chief Redden. Numerous policies and procedures were covered with the prospective trainees. While Chief Redden states that he recalls specifically informing claimant that dual employment was prohibited, he does not recall the other Board members who interviewed claimant with him. He also does not recall if he was one of the Board members who interviewed Gregory Wright, another prospective trainee. Both claimant and Mr. Wright testified that they do not recall the subject of dual employment being discussed with them during their interviews.
>
> The training class is presented by different teachers. Assistant Chief Payne and Lieutenant Ables are two of those teachers. They believe that the subject of dual employment was covered during the training period. Claimant and Mr. Wright do not recall the subject of dual employment being covered during the training period. Claimant received his certification of training as a firefighter on May 5, 2006. During the period February 27, 2006 through May 5, 2006, claimant received a paycheck and was entitled to benefits.
>
> On or about June 11, 2006, claimant was presented with several policies and procedure which he was expected to read and familiarize himself with. On June 11, 2006, claimant

signed documentation acknowledging his receipt of these policies and procedures. One of these policies was the policy prohibiting dual employment.

In August, 2010, Assistant Chief Payne received some documentation on his chair. The documentation was of a court case involving claimant. It was at this time that employer representatives became aware that claimant had dual employment with the City of Hubbard and the City of Dayton from February 27, 2006 through approximately April 8, 2006. Claimant was given notification that the matter was going to be investigated. During the investigation, claimant contended that he was unaware of the policy prohibiting dual employment until June 11, 2006.

On November 3, 2010, claimant was discharged.

In finding that Appellee was discharged without just cause, the hearing officer reasoned:

The employer maintains that the claimant was properly discharged for knowingly violating company policy by having dual employment with the City of Hubbard and the City of Dayton for the period February 27, 2006 and April 8, 2006. Claimant argues a lack of knowledge of the policy until June 11, 2006, and also that he was a mere candidate for employment until such time as he completed the firefighter academy training.

The Hearing Officer finds that claimant was more than a mere candidate for employment while he underwent firefighter academy training. Claimant was paid and was entitled to benefits. While it is possible for an individual to successfully or unsuccessfully complete the training, individuals are actually employed, even though they may only be candidates for actual certification. Claimant's argument that the policy did not apply because he was not actually an employee is without merit.

The Hearing Officer finds that contradictory testimony and evidence has been presented regarding whether claimant, Mr. Wright, and other classmates were informed in their academy training between February 27, 2006 and May 5, 2006 that dual employment was prohibited. While claimant and Mr. Wright were not in the same interview, it is also unclear that either or both of them were informed during their interviews that dual employment was prohibited. It is clear, however, that on June 11, 2006, claimant was made aware of the prohibition against dual employment, as he signed documentation acknowledging this. By this time, claimant did not have dual employment for over two months. Furthermore, by the time that employer representatives became aware of claimant's dual employment, more than four years had passed since the period of dual employment. According to City of Dayton policy, claimant's discharge was permissible. There is insufficient evidence in the record, however, to demonstrate fault or wrongdoing on the claimant's behalf that is serious enough to disqualify him from receiving unemployment benefits. It is held that claimant was discharged by City of Dayton on November 3, 2010 without just cause in connection with worth.

In its letter dated January 20, 2011 appealing the Director's Redetermination, employer stated, in part, "(u)nbeknownst to the employer, from at least February 27, 2006, through mid-April, 2006, Baron was employed both by the City of Dayton and by the City of Hubbard, Ohio."

II. LAW AND ANALYSIS

I. Motion to Strike

Appellee has moved the court to strike the argument raised by Appellant in his reply brief that Baron's discharge was for good cause because he was allegedly employed with both the City of Hubbard and the City of Dayton through September, 2006, rather than April, 2006, which was the time frame referenced in the City's letter appealing the Director's Redetermination. There is nothing in the record before this court, nor did there appear to be any such evidence in the record before the Commission indicating the date of Baron's actual termination from employment with the City of Hubbard, although the record is very clear that Baron did not perform any services for the City of Hubbard and was suspended pending his discharge in April, 2006.

"A just cause determination cannot be based on a reason never stated by the employer as a justification for discharge." *LaChappelle v. Ohio Dept. of Job and Family Serv.*, 184 Ohio App. 3d 166, 2009-Ohio-3399.

The parties differ in opinion as to whether the date of Baron's termination from the employment of the City of Hubbard, as opposed to the date of his suspension from that employment, represents a new argument and a basis for discharge not previously stated. The court finds that Appellant's argument that Baron maintained dual employment is not a new one. Therefore, Appellee's Motion to Strike is **OVERRULED.** Appellant, though, argues now that Baron continued that dual employment even after he became aware, according to his testimony, of

the City's dual employment policy in June, 2006, and, as such, he was terminated for just cause. The court will address the merits of Appellant's argument below.

II. Administrative Appeal

The right to appeal from an administrative decision is not an inherent right, but instead is one conferred by statute. *See Harrison v. Ohio State Medical Board* (1995), 103 Ohio App.3d 317, 321. Where a statute confers a right to appeal, strict adherence to the statutory conditions is essential. *Holmes v. Union Gospel Press* (1980), 64 Ohio St.2d 187, 188.

Pursuant to R.C. 4141.281(A), a party may appeal a determination of unemployment benefit rights or a claim for benefits determination. "Within twenty-one days after receipt of the appeal, the director of job and family services shall issue a redetermination or transfer the appeal to the unemployment compensation review commission. A redetermination under this section is appealable in the same manner as an initial determination by the director." *R.C. 4141.281(B).*

Once the final decision of the review commission has been sent to all interested parties, any party may appeal the decision to the court of common pleas within thirty days. *R.C. 4141.282(A).* R.C. 4141.282(H) delineates the standard of review for the court of common pleas during such appeal, stating:

> The court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

The reviewing court is limited to the record as certified by the review commission. *Abrams-Rodkey v. Summit County Children Servs.*, 163 Ohio App. 3d 1 (2005). The court must give due deference to the agency's resolution of evidentiary conflicts, and the court may not substitute its judgment for that of the agency. *Budd Co. v. Mercer*, 14 Ohio App. 3d 269 (1984).

Moreover, "[a] reviewing court may not make factual findings or determine the credibility of witnesses, and may not overturn a decision of the commission simply because it might reach a different result." *Gregg v. SBC Ameritech*, 2004-Ohio-1061, *citing Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Servs.*, 73 Ohio St. 3d 694, 696-697 (1995). The claimant has the burden of proving his or her entitlement to unemployment compensation benefits. *Irvine v. Unemployment Comp. Bd. of Review*, 19 Ohio St. 3d 15, 17 (1985). A trial court "must uphold the hearing officer's decision so long as it is not unlawful or unreasonable and some competent, credible evidence supports it." *Myers v. Director, Ohio Dept. of Job and Family Services*, 2009-Ohio-6023. The court, however, does not have the discretion to consider the credibility of the witnesses in its review of the decision of the hearing officer. Instead, the sole duty of the Court of Common Pleas is to determine whether the evidence on record supported the Commission's decision. *Kilgore v. Board of Review*, 2 Ohio App. 2d 69, 71 (1965). "The Court may not substitute its judgment***, it may not reverse simply because it interprets evidence differently***." *Angelkovski v. Buckeye Potato Chips, Co.*, 11 Ohio App.3d 159, 161 (1983).

An employee is ineligible for unemployment compensation benefits if he was terminated for just cause. O.R.C. §4141.29(D)(2)(a) provides, in pertinent part:

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
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> (2) For the duration of the individual's unemployment if the Director finds that:
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> (a) The individual...has been discharged for just cause in connection with the individual's work.

"An employee is not eligible for benefits if he has 'quit work without just cause or has been discharged for just cause in connection with [his] work.'" *Lorain County Auditor v. Ohio Unemployment Compensation Review Comm.*, 113 Ohio St. 3d 124 (2007); *see also* O.R.C. §4141.29(D)(2)(a). The Ohio Supreme Court has defined "just cause" as "that which, to an

ordinary intelligent person, is a justifiable reason for doing or not doing a particular act" *Irvine v. Unemployment Comp. Bd. of Rev.*, 19 Ohio St. 3d 15, 16 (1985), *quoting Peyton v. Sun T.V.*, 44 Ohio App. 2d 10, 12 (1975). "'(T)here is, of course, not a slide-rule definition of just cause. Essentially, each case must be considered upon its particular merits. Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.'" *Irvine v. Unemployment Comp. Bd. of Review*, 19 Ohio St. 3d 15, 17 (1985) *quoting Peyton v. Sun T.V.*, 44 Ohio App. 2d 10, 12 (1975). In reviewing such a determination, a court is not permitted to interpret the facts or put its spin to the facts. *Gallagher v. Alliance Hospitality Management*, 2010-Ohio-1882.

"Just cause" is "conduct that would lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee's discharge." *Carter v. Univ. of Toledo*, 2008-Ohio-1958. A determination of just cause sufficient to uphold the discharge of an employee under a civil service rule or a labor contract does not equate to just cause to prohibit an employee from receiving unemployment compensation benefits. *See Guy v. City of Stuebenville*, 147 Ohio App. 3d 142, 2002-Ohio-849.

When an employee demonstrates by his or her actions an unreasonable disregard for the employer's best interest, there is just cause for the discharge. *Kiikka v. Ohio Bur. Of Emp. Serv.*, 21 Ohio App. 3d 168 (1985); *see also LaChappelle v. Ohio Dept. of Job and Family Serv.*, 184 Ohio App. 3d 166, 2009-Ohio-3399. "(T)he critical issue is not whether an employee has technically violated some company rule, but rather whether the employee, by his actions, demonstrated an unreasonable disregard for his employer's best interests.***" *Stephens v. Bd. of Rev.*, Cuyahoga App. No. 41369 (May 22, 1980); *see also Kiikka, supra.* "The determination of whether just cause exists to support discharge depends on the factual circumstances of each case and is largely an issue for the trier of fact." *Harrison v. Penn Traffic Co.*, 2005-Ohio-638.

Appellant argues that the City had just cause to terminate Baron. It further argues Baron was advised of the dual employment policy and that the four year period between Baron's dual employment and the City's termination of his employment is irrelevant. Appellant also argues that, at best, Baron was "re-schooled" in June, 2011 on City policy he had been made aware of during Fire Academy training . Appellant further argues that Baron's employment did not end until September, 2006, instead of in April, 2006 when he last performed services for the City of Hubbard.

For his part, Baron maintains that he was not fired with just cause to prevent him from receiving unemployment benefits. Baron has consistently maintained that he was unaware of the dual employment policy during his academy training and only became aware of it in June, 2006. Baron's position is supported by the worksheet executed by his training officer indicating that the policy was reviewed with him on June 11, 2006. Still further, Baron was discharged four years after the termination of his employment with the City of Hubbard. Baron maintains that the City's progressive discipline policy would suggest the imposition of a penalty less than termination.

After reviewing the evidence herein, the court cannot say that the decision of the Review Commission, and the hearing officer, was unlawful, unreasonable, or against the manifest weight of the evidence. A determination of just cause is one that depends on the factual circumstances, and a matter that was left for the determination of the hearing officer. This court is not permitted, in its limited role, to make a determination of the facts. Instead, this court must accept the hearing officer's factual determination. The hearing officer resolved the conflict in the testimony by finding that claimant was not employed for purposes of the policy following his suspension from his employment with the City of Hubbard. Despite the fact that the hearing officer considered Baron terminated from his employment with Hubbard in April, 2006, even though the actual termination from employment occurred later in 2006, the date of actual termination is not relevant. The hearing officer was entitled to conclude that Baron's employment with the City of Hubbard terminated, for

all intents and purposes, on the date of his suspension. Furthermore, no matter what the date of his actual termination, the hearing officer found that, while the termination was permissible under the City's rules, it was insufficient to establish fault or wrongdoing on Baron's part sufficient to disqualify him from receiving unemployment benefits. The court cannot say that the hearing officer's decision was unlawful or unreasonable. Based upon the record, there was evidence to support the hearing officer's finding that Baron's termination lacked just cause. Furthermore, the decision was supported by some competent, credible evidence. It must be remembered that the critical issue is not whether an employee has technically violated some company rule, but rather whether the employee, by his actions, demonstrated an unreasonable disregard for his employer's best interests. The hearing officer determined, by finding a lack of just cause, that Baron's conduct was such that he did not demonstrate an unreasonable disregard for his employer's best interests. The court cannot find to the contrary based upon the record. Therefore, this court must **AFFIRM** the decision of the Review Commission.

III. CONCLUSION

For the reasons stated above, the decision of the Unemployment Compensation Review Commission is **AFFIRMED**.

SO ORDERED:

JUDGE MARY KATHERINE HUFFMAN

RICHARD T BUSH
(330) 743-5101
Attorney for Defendant, Robert J. Baron

ROBIN A JARVIS
(513) 852-3497
Attorney for Defendant, Ohio Department Of Job And Family Services

Ryan Colvin, Bailiff (937) 496-7955 Colvinr@montcourt.org

General Divison
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

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Type: Decision

So Ordered

Mary K. Huffman

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