IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LISA M. PASS	)	**CASE NO. CV-17-886917**
	)	
Appellant,	)	**JUDGE PAMELA A. BARKER**
	)	
v.	)	**DECISION AND JOURNAL ENTRY ON APPEAL FROM DENIAL OF OF UNEMPLOYMENT COMPENSATION**
	)	
DIRECTOR, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES	)	
	)	
and	)	
	)	
CLEVELAND METROPOLITAN SCHOOL DISTRICT,	)	
	)	
Appellees	)	

This matter is before the Court on the Brief of Appellant, Lisa M. Pass, in support of her appeal from the decision of the Ohio Unemployment Compensation Review Commission ("UCRC") that denied her claim for benefits; the Briefs of Appellees, Director, Ohio Department Of Job And Family Services ("ODJFS") and Cleveland Metropolitan School District ("CMSD" and "the employer"); and Appellant's Reply Brief.

The certified copy of the transcript of the record of the proceedings pertaining to the instant matter was filed on October 26, 2017 and was reviewed by this Court. The transcript demonstrates the following. On June 1, 2016, Appellant filed a claim for unemployment benefits with Appellee ODJFS. On June 22, 2016, ODJFS issued an initial *Determination of Benefits* 229186380 that allowed the claim without any hearing under R.C. 4141.281(A). On July 7, 2016, CMSD filed an appeal of the June 22, 2016 ODJFS *Determination of Benefits*. On May 16, 2017, ODJFS issued a *Director's Redetermination of Benefits* that affirmed the *Determination of Benefits* allowing the claim, and finding that "the claimant was discharged without just cause under R.C. 4141.29(D)(2)(a)." On June 1, 2017, CMSD filed an appeal of the

ODJFS *Redetermination of Benefits*, and on June 7, 2007, ODJFS transferred jurisdiction of the claim to the Unemployment Compensation Review Commission ("UCRC").

A *Notice That An Appeal Has Been Transferred By The Director To The Review Commission* was mailed on June 8, 2017 to Appellant, CMSD, and CPM Risk Management ("CPM") as an "Interested Party" or CMSD's representative to the Board of Education. A Notice Of Hearing setting the date of the hearing as June 22, 2017 by Telephone was mailed to Appellant, CMSD and CPM on June 9, 2017.

The TRANSCRIPT OF TESTIMONY from the June 22, 2017 Telephone Hearing demonstrates the following. Appellant initially appeared via telephone for the hearing but she was disconnected from the call at the beginning of the employer's testimony. Therefore, the hearing was continued and a copy of the audio recording of the employer's testimony was provided to Appellant, who received and listened to it before the continuance and conclusion of the hearing on August 8, 2017. During the June 22, 2017 and August 8, 2017 telephone proceedings, Appellant represented herself and CMSD was represented by Danielle Latarski from CPM. Appellant and Irene Dunbrook, Employee and Labor Relations Manager for CMSD were the only two witnesses who testified.

Ms. Dunbrook testified in relevant part as follows. Appellant was employed by CMSD as a Principal Secretary reporting to Principal Harriet Freeman, the program administrator for residential schools. On April 11, 2016 a "fact-finding hearing" was held to evaluate allegations of Appellant having an unlawful interest in multiple district purchases, facilitating multiple purchases with which the employee had an unlawful interest, facilitating multiple purchases without administrative authorization, facilitating multiple purchases without a required approved contract, facilitating a purchase without required board resolution, and theft of district funds. On

April 13, 2016 Appellant was administratively reassigned, at which time Appellant took a paid leave of absence, and on May 11, 2016, Appellant was terminated by CMSD.

According to Ms. Dunbrook, these allegations arose as a result of the discovery that Appellant's husband, Steven Pass, was producing and selling academic journals for students, and Appellant was soliciting these journals at her school and another school. Ms. Dunbrook testified that it was against board policy to solicit product or sell any goods on Appellant's behalf or on behalf of her family, and that Appellant had done so without the principal's authorization, i.e., she had committed theft. She cited to R.C. 2921.42 to support her testimony that the prohibition against selling products applied to those sold on Appellant's behalf or on behalf of her husband, Steven Pass, to wit: "(A) No public official shall knowingly do any of the following: (1) Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest; ***"

Ms. Dunbrook testified that Appellant's direct supervisor, Ms. Freeman was aware that Appellant was ordering and distributing the journals from her husband after Appellant had proposed to Ms. Freeman that she order them. Since Appellant had Ms. Freeman's log-in information to approve the purchase order(s) that Appellant prepared, CMSD disciplined Ms. Freeman by placing a letter of reprimand in her personnel file dated June 27, 2016, which letter was marked as Exhibit 1 during the hearing and admitted into evidence. According to Ms. Dunbrook, Appellant violated subsections (A)(1), (A) (4) and (A)(5) of R.C. 2921.42, titled "Having an unlawful interest in a public contract", as well as four (4) CMSD policies: "**GBIA SOLICITATIONS BY DISTRICT EMPLOYEES**; "**GBCC Code of Ethics**; "**GBCA PERSONNEL CONFLICT OF INTEREST AND IMPROPER COMPENSATION**"; **AND**

"GBCB Conflict of Interest in Contracting and Purchasing". According to Ms. Dunbrook, she was the hearing officer at the April 11, 2016 "fact-finding hearing" during which Appellant admitted that she solicited and facilitated the purchase of 182 writing journals from LSL Company, LLC, which is owned by her husband, Steven Pass, for a total purchase price of $7,270.90.

Ms. Dunbrook testified that CMSD pressed criminal charges against Appellant and she plead guilty to having an unlawful interest in a public contract in violation of R.C. 2921.42, a first degree misdemeanor, in Cuyahoga County Court of Common Pleas, Case Number CR16-605900A, and was ordered to pay restitution to CMSD in the amount of $4873.00. According to Ms. Dunbrook, in-service training regarding procurement, and purchasing is conducted at the beginning of every school year for all school secretaries and Appellant should have received that training multiple times by the time of the "fact-finding hearing" that was conducted on April 11, 2016.

Appellant testified that she began working for Ms. Freeman in January of 2015, but had been employed in a secretarial capacity by CMSD since 1997. According to Appellant, she was on a paid medical leave between April 13, 2016 and her termination date of May 11, 2016. Her husband was an approved vendor for CMSD and had received approval from the district to distribute books throughout the district. Therefore, she asked Ms. Freeman if she would be interested in purchasing journals from him and Ms. Freeman had her bring the materials to her. According to Appellant, Ms. Freeman reviewed the materials and then gave her the o.k. to get some of the materials for two of her sites. The standard procedure for purchasing any materials was to have the secretary input the order into the system and then the administrator, with an administrative code, would approve it. Appellant testified that with respect to the purchase of

the journals or workbooks from Mr. Pass, and consistent with normal practice regarding other purchases, Appellant created the three purchase orders. Ms. Freeman then verbally approved them and told Appellant to physically approve them in the system with Ms. Freeman's information or code, which Appellant did. Appellant testified that with respect to each of the three purchase orders, she had Ms. Freeman's authorization and approval to process them. Appellant had Ms. Freeman's authorization code and log-in information beginning in February of 2015.

Appellant acknowledged that she plead to a misdemeanor offense, specifically unlawful interest in a public contract, and was ordered to pay restitution. Appellant testified that CMSD terminated her and pursued criminal charges against her to conceal Ms. Freeman's misconduct, not only in giving her authorization to use her code to process the three purchase orders of her husband's journals, but in other ways. Appellant testified that at the "fact-finding hearing" she had explained that everything she had done had been with the permission of Ms. Freeman. According to Appellant, she did not do this intentionally and she did not know that what she was doing was incorrect. Appellant testified that she did not know about, or become aware of the school board's policy regarding having an unlawful interest in a public contract until she received notice of the "fact-finding hearing".

On August 9, 2017, a **DECISION** was issued by the hearing officer of the UCRC that reversed the *ODJFS Redetermination of Benefits* dated May 16, 2017 and denied the claim on the basis that Appellant was discharged by CMSD for just cause under R.C. 4141.29(D)(2)(a). In that **DECISION**, the hearing officer found that CMSD's policies contain prohibitions against conflicts of interest, self-dealing, having an interest in public contracts, and violations of applicable law(s), rule, and/or application regulations, and that "[t]hese policies are reviewed

annually with all employees." Apparently, then, the hearing officer found credible or believed Ms. Dunbrook's testimony that the policies containing these prohibitions are reviewed with all employees, including Appellant; and did not find credible or believe the testimony of Appellant that she was unaware of such policies/prohibitions until she received notice of the "fact-finding hearing". Indeed, the hearing officer concluded that "Claimant's explanations, her attempt to somehow minimize her role in the incidents at issue, or claims of ignorance of the applicable rules and policies (that were reviewed annually) are not well-taken."

In the **DECISION**, the hearing officer also found that the three purchase orders associated with workbooks authored, sold and distributed by Appellant's husband, were approved by Ms. Freeman, as Appellant has always contended and testified at the hearing. The hearing officer did not consider evidence of the post-separation criminal conviction.

Nonetheless, the hearing officer concluded that the "findings of fact established by a preponderance of the evidence that claimant's own conduct and actions placed her job in jeopardy, violated multiple employer policies and law, exceeded reasonable expectations of behavior in the workplace *for a public employee*, and were contrary to the employer's interests." The hearing officer more fully explained:

> It cannot be said of claimant, in this instance that she was without fault in the circumstances that resulted in her termination. Claimant's overall conduct and actions were serious and egregious. As such, claimant was sufficiently at fault to reasonably justify her discharge, she was subject to termination consistent with policy as a result of her own conduct and actions, and accordingly, the employer acted reasonably in discharging claimant at that time.
>
> Under these circumstances, therefore, it is found that claimant was discharged for just cause in connection with work. ***

On August 29, 2017, Appellant filed a *Request for Review* of the **DECISION** of the UCRC hearing officer, and on September 13, 2017, a final **DECISION** was issued by the full

UCRC that disallowed the *Request for Review* filed by Appellant. On October 4, 2017, Appellant filed an appeal with this Court. In Appellant's Brief, Appellant argues that the decision of the UCRC hearing officer was erroneous in that it is unlawful, unreasonable, and against the manifest weight of the evidence.

This Court may reverse the UCRC's determination only if it is "unlawful, unreasonable, or against the manifest weight of the evidence." *Shepard v. Director, ODJFS, et al.*, 166 Ohio App.3d 747, 754, 2006-Ohio-2313, 853 N.E.2d 335, at ¶18, citing *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.*, 73 Ohio St.3d 694, 696, 653 N.E.2d 1207, 1995 Ohio 206. In making this decision, this Court must give deference to the Commission in its role as finder of fact. *Shepard, supra*, citing *Irvine v. Unemploy. Comp. Bd. Of Review*, 19 Ohio St.2d 15 (1985).[1] This Court may not reverse the Commission's decision simply because "'reasonable minds might reach different conclusions.'" *Shepard, supra*, quoting from *Irvine, supra*, 19 Ohio St.3d 15, 18. This Court is not permitted to determine the credibility of the witnesses. *Irvine, supra*, at 18. "On close questions, where the board might reasonably decide either way, [this Court has] no authority to upset the agency's decision. *Id.* Instead, [this Court's] review is limited to determining whether the Commission's decision is unlawful, unreasonable, or totally lacking in competent, credible evidence to support it." *Shepard, supra* at ¶18, citing *Irvine*, 19 Ohio St.3d 15, 18.

According to the Eighth District Court of Appeals, "it is well-established that the burden of proof in an unemployment compensation case is on the employee to prove that she was discharged by her employer without just cause, or quit work with just cause, and is therefore

[1] In *Irvine*, quoting *Peyton v. Sun T.V.*, 44 Ohio App.2d 10 (1975), the Ohio Supreme Court explained: "The term 'just cause' has not been clearly defined in our case law. We are in agreement with one of our appellate courts that '[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.'"

entitled to unemployment benefits under R.C. 4141.29(D)(2)(a). *Shepard, supra,* at ¶20. Moreover, "as a general rule, administrative agencies are not bound by the strict rules of evidence applied in a court."[2] *Id.* at ¶22.

Appellant argues that there is no evidence in the record to support the hearing officer's finding that the employer's policies, including the Code of Ethics, are reviewed annually with all employees, and therefore, this finding or conclusion is against the manifest weight of the evidence. Appellant cites to that part of the record where she testified that she was not aware of CMSD's policy against having an unlawful interest in a public contract until the "fact-finding hearing" occurred to support her contention that the employer never provided her with copies of these policies. Appellant correctly asserts that at the hearing the employer did not submit any documentary evidence to demonstrate that Appellant received copies of the policies or acknowledged receiving them. However, being trained on the policies annually is distinguishable from, or not the same as, being provided with copies of the policies and/or being required to execute an acknowledgment form associated therewith. Again, Ms. Dunbrook testified that these policies were reviewed with all secretarial personnel each year; she did not testify that copies of policies were provided to secretarial personnel or that CMSD secured any written acknowledgments associated with the annual review of the policies. Moreover, the hearing officer heard the testimonies of both Ms. Dunbrook and Appellant, and obviously deemed Ms. Dunbrook's testimony on this issue more credible. It is the hearing officer who is charged with evaluating the credibility of witnesses and weighing the evidence, and not this Court. This Court finds that the testimony of Ms. Dunbrook constituted competent and sufficient

[2] Ohio Adm.Code 4146-7-02(B) Evidence, reads in relevant part: "***The proceedings shall be informal, and the review commission and hearing officers shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure."

proof upon which the hearing officer could conclude that the policies were reviewed annually with Appellant.

Appellant also argues that the following conclusions or statements set forth by the UCRC hearing officer in his **DECISION** are not supported by the record: "The critical issue is not whether the employee has violated a company rule. Rather, just cause for discharge exists when an employee's actions demonstrate an unreasonable disregard for an employer's best interests." Appellant asserts that the record does not demonstrate that she acted intentionally, deliberately or willfully, but rather, demonstrates that she "did not deviate from the customary procedures including conferring and complying with Program Administrator Freeman," and therefore, CMSD did not have just cause to terminate her. However, it is clear from a review of the **REASONING** section of the UCRC hearing officer's **DECISION** that he applied the correct definition of "just cause" to the evidence that the record demonstrates was presented to him.[3] It is not necessary that the record demonstrate that Appellant acted intentionally, deliberately or willfully to support the UCRC hearing officer's finding that Appellant was terminated for "just cause". Ms. Dunbrook testified that Appellant admitted at the "fact-finding hearing" that she solicited and facilitated the purchase of 182 writing journals from LSL Company, LLC, which is owned by her husband, Steven Pass, for a total purchase price of $7,270.90. Any conduct by Ms. Freeman in providing Appellant with her authorization code to approve the purchases, for which Ms. Freeman was reprimanded by CMSD, does not justify or excuse Appellant's own actions that demonstrated an unreasonable disregard for her employer's best interests.

[3] The second paragraph of the section of the **DECISION** titled "**REASONING** reads in its entirety as follows: "'Just cause' means conduct which a person of ordinary intelligence would consider to be a justifiable reason for the discharge of an employee; there must be some fault on the part of the employee, although the conduct need not reach the level of misconduct. The critical issue is not whether the employee has violated a company rule. Rather, just cause for discharge exists when an employee's actions demonstrate an unreasonable disregard for an employer's best interests."

Finally, Appellant argues that the hearing officer's conclusion that her overall conduct and actions were serious and egregious is not supported by the record. Presumably, the hearing officer set forth this conclusion as the basis for rejecting Appellant's argument that the CMS did not have "just cause" to terminate her because she had not been warned against, or reprimanded previously concerning, the conduct that resulted in her termination.[4] As an initial matter, it is important to note that the record demonstrates that although Appellant introduced the reprimand letter issued to Ms. Freeman, she did not introduce any evidence regarding any applicable progressive discipline policy of the CMSD. However, even if she had done so, the Court does not find that hearing officer's conclusion that her actions were egregious and serious to be unlawful, unreasonable, or against the manifest weight of the evidence.

The record also demonstrates that the hearing officer complied with his duties and provided a fair hearing, guaranteeing both Appellant and the CMSD their due process rights.

Accordingly, the UCRC's decision is affirmed.

IT IS SO ORDERED.

Pamela A. Barker 2-15-18

JUDGE PAMELA A. BARKER DATED

[4] The third paragraph of the **REASONING** section of the hearing officer's **DECISION** reads in relevant part: "When an employer has an established progressive discipline policy, the employer, generally, must follow and act in accordance with the policy for an employee's discharge to be found to have been for just cause in connection with work. This is the case as progressive disciplinary systems create expectations upon which employees reasonably rely. Accordingly, fairness requires that an employee not be subject to more severe discipline that that provided for by company policy. However, if an employee's misconduct is unusually egregious or serious, an employer may have just cause to discharge the employee even if discharge is not provided for in the employer's progressive discipline policy."