

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 2013-001230

Fredrick S. Pfeiffer, Appellant,

v.

SC Department of Employment and Workforce, and Gleaton Wyatt Hewitt, P.A.,
Respondents.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. The decision of the Administrative Law Court that Pfeiffer was disqualified from employment benefits for 17 weeks following his termination from employment by order of the South Carolina Supreme Court due to the interim suspension of his license to practice law was affected by an error of law, namely that the interim suspension of a professional license is, by itself, cause sufficient to warrant disqualification where the employer testified that the Appellant was not terminated for cause and where there is no evidence in the record to demonstrate any cause other than suspension of the license.
2. The decision of the Administrative Law Court that Pfeiffer was disqualified from employment benefits for 17 weeks following his termination from employment by order of the South Carolina Supreme Court due to the interim suspension of his license to practice law was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.
3. The decision of the Administrative Law Court that Pfeiffer was disqualified from employment benefits for 17 weeks following his termination from employment by order of the South Carolina Supreme Court due to the interim suspension of his license to practice law was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

STATEMENT OF THE CASE

On June 15, 2012, Claimant Pfeiffer was indicted by the South Carolina Attorney General for allegedly “aiding and abetting” a former client’s violation of the South Carolina Securities Act, in that, from 2002-2006, Pfeiffer reviewed and opined on Prospectuses issued by the client that were registered by qualification with the South Carolina Attorney General’s Office and that allegedly omitted certain facts deemed material by the Attorney General.

Effective June 15, 2012, the South Carolina Supreme Court, without notice or an opportunity to be heard, suspended Pfeiffer’s license to practice law until such time as the indictment is disposed of.

On June 15, 2012, the Supreme Court sent a letter to Pfeiffer’s law partners, Ralph Gleaton, David Wyatt and Jay Hewitt, directing them to terminate Mr. Pfeiffer’s employment immediately. Record at 55.

Ralph Gleaton, acting on behalf of the law firm, terminated Pfeiffer’s employment effective June 15, 2012. Record at 56.

Pfeiffer filed a claim for benefits with the South Carolina Department of Employment and Workforce (DEW) on June 17, 2012. Record at 14.

On July 2, 2012, the DEW denied Pfeiffer’s claim, determining that he was ineligible for benefits. Record at 20. Pfeiffer filed a Notice of Appeal to the Appeal Tribunal on July 10, 2012. Record at 22.

On July 10, 2012, the DEW determined that Pfeiffer was disqualified from receiving benefits for 17 weeks, stating that “failure to obtain or maintain the required licensing for performing the duties for which you were hired constitutes discharge for

cause in connection with the work". Record at 26. Pfeiffer filed a Notice of Appeal to the Appeal Tribunal on July 18, 2012. Record at 27.

Administrative Hearing Officer Robin Bradley conducted a Telephone Hearing on August 10, 2012. Record at 29 - 46. On August 21, 2012, Hearing Officer Bradley ruled for Pfeiffer on his appeal regarding ineligibility, but ruled for the DEW with regard to Pfeiffer's 17 week disqualification. Record at 57-59.

Pfeiffer appealed the decision of the Hearing Officer regarding disqualification to the Appellate Panel on August 29, 2012. Record at 61-64. DEW did not appeal the Hearing Officer's determination on ineligibility.

The Appellate Panel upheld Pfeiffer's disqualification. Record at 01-03.

Pfeiffer timely appealed the decision of the Appellate Panel to the South Carolina Administrative Law Court.

In its Appellate Brief, the DEW abandoned the theory that Pfeiffer was disqualified due to termination for misconduct, as the Appellate Panel had ruled, and instead argued that Pfeiffer was disqualified from receiving benefits due to cause other than misconduct. Pfeiffer replied that the disqualification for cause other than misconduct was not made a part of the law until after Pfeiffer's termination and application for benefits.

The Administrative Law Judge decided against the DEW on the grounds of cause other than misconduct, but nonetheless sustained the ruling of the Appellate Panel that Pfeiffer was rightfully disqualified for cause.

This appeal followed.

ARGUMENT

Standard of Review

In an appeal from an ALC decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. S.C. Code Section 1-23-610(B). The APA provides:

The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380 (A)(6).

This Court may not substitute his judgment for that of the agency unless the agency's determination is affected by error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. S.C. Code Ann. § 1-23-380(A)(6) (2005); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132-133, 276 S.E.2d 304, 305 (1981). A decision is supported by "substantial evidence" when the record as a

whole allows reasonable minds to reach the same conclusion reached by the agency. *Bilton v. Best Western Royal Motor Lodge*, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). The well-settled case law in this state has also interpreted the rule to mean that a decision will not be set aside simply because reasonable minds may differ on the judgment. *See Lark, supra*. The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *See Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996); *see also Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995), *Palmetto Alliance, Inc. v. South Carolina Public Service Comm'n*, 282 S.C. 430, 319 S.E.2d 695 (1984).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. *Rodney v. Michelin Tire Co.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996), (citing *Kearse v. State Health and Human Finance Comm'n*, 318 S.C. 198, 456 S.E.2d 892 (1995)). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. *See Grant*, 319 S.C. at 353, 461 S.E.2d at 391 (citing *Gibson v. Florence Country Club*, 282 S.C. 384, 318 S.E.2d 365 (1984)). Finally, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. *See Waters*, 321 S.C. at 226, 467 S.E.2d at 917.

The Decision of the Appellate Panel was Affected by Error of Law

The decision of the Appellate Panel that Mr. Pfeiffer was disqualified from employment benefits for 17 weeks following his termination from employment by order of the South Carolina Supreme Court due to the interim suspension of his license to practice law was affected by an error of law, namely that the interim suspension of a professional license is, by itself, cause sufficient to warrant disqualification where the employer testified that the Appellant was not terminated for cause and where there is no evidence in the record to demonstrate any cause other than suspension of the license.

The cardinal rule of statutory construction is that the legislative intent must be ascertained and it must prevail. *Gardner v. Biggart*, 308 S.C. 331, 417 S.E.2d 858 (1992). In *Hitachi Data Sys. Corp. v. Leatherman*, a case involving a statutory interpretation of the South Carolina Code, the South Carolina Supreme Court found that:

In construing statutes, we seek to effectuate legislative intent. The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operations. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (citations omitted). "On the other hand, where a statute is ambiguous, the Court must construe the terms of the statute." *Wade v. Berkeley County*, 348 S.C. 224, 229, 559, S.E.2d 586, 588 (2002) (citations omitted). "If the language of an act gives rise to doubt or uncertainty as to legislative

intent, the construing court may search for that intent beyond the borders of the act itself An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law, ... [and i]n light of its manifest purpose. *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 25, 579 S.E.2d 334, 337-38 (Ct. App. 2003) (citations omitted).

South Carolina Code Section 41-35-120 governs disqualification from receiving unemployment benefits. That statute disqualifies an unemployed worker who (i) voluntarily quit, (ii) was discharged for cause connected with employment, (iii) was discharged for illegal drug use, (iv) was discharged for gross misconduct¹, (v) fails to accept work, (vi) is involved in a labor dispute, (vii) is receiving other benefits, or (viii) voluntarily retired.

If suspension of a professional license alone was enough to disqualify, the Legislature could have made that a specific category of disqualification, as it did for drug and alcohol abuse, employee theft and assault, and neglect of a duty in a written job description. If Section 41-35-120(2) is interpreted the way the Agency has interpreted it in this case – to include violation of an implied job duty to maintain a license, especially where the Employer has testified that it does not consider this to have been a termination for cause – then the Agency has made Sections 41-35-120(3) and (4) redundant and meaningless, as one could find each of the items listed in those subsections to have been “implied duties” as well.

¹ Including certain criminal activity, such as employee theft and assault, and also including neglect of a duty in a written job description.

Furthermore, the Court has already determined what constitutes “discharge for cause connected with employment”. In *Lee v. SC Employment Security Commission*, 291 S.E.2d 378, 277 S.C. 586 (1982) the South Carolina Supreme Court held that discharge for cause includes the following circumstances "(1) the wanton and wilful disregard of the employer's interests; (2) the deliberate violation of rules; (3) the disregard of the standard of behavior which an employer can rightfully expect from an employee; or (4) intentional and substantial negligent disregard for the employee's interests, duties or obligations" Lee, 291 S.E.2d at 379. Importantly, the Court did not interpret the statute to provide for automatic disqualification for loss of a license or indictment for a crime. The Agency included loss of a license under *Lee* factor three – disregard of a standard of behavior the employer can rightfully expect (Record at 003). But loss of a license is not a behavior, and the Employer testified that the Company believed that the suspension of Pfeiffer’s license was done “for very spurious reasons” (Record at 036, Lines 2-10) because the indictment of Pfeiffer for aiding and abetting and conspiring with a former client was “spurious and we are in the process of fighting it because it was spurious”. (Record at 036, Lines 14-19). The Employer further testified that it did not believe that Pfeiffer disregarded any standard of behavior the Employer expected of Pfeiffer. Record at 038, Lines 7-9.

The Appellate Panel’s decision is in error because it makes interim suspension of a professional license a *de jure* matter of disqualification, even where the Employer does not believe the behavior causing the suspension was cause related to employment, thus adding a category to S.C. Code Section 41-35-120 that does not appear in the statute.

The Decision of the Appellate Panel was Clearly Erroneous

The decision of the Appellate Panel that Mr. Pfeiffer was disqualified from employment benefits for 17 weeks following his termination from employment by order of the South Carolina Supreme Court due to the interim suspension of his license to practice law was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

An ALJ "will not substitute [the ALJ's] judgment for that of the [Board] as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2001). Thus, once a factual determination is made by the Board, the ALJ cannot re-weigh the evidence in an attempt to come to an independent conclusion on the factual dispute. Rather, the ALJ will rely upon the Board's factual determinations unless those determinations are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23- 380(A)(6)(e) (Supp. 2001). Thus, the analysis is one of identifying the factual determinations made and then deciding if the determinations on the record as a whole can be viewed as supported by substantial evidence. *Homes America, Inc. v. SC Department of LLR*, 092702 SCADMLCD, 02-ALJ-11-0069-AP (2002). In determining if substantial evidence supports the Board's factual determinations, the ALJ does not look for "a mere scintilla of evidence nor evidence viewed blindly from one side, but [rather looks for] evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached." *Palmetto Alliance*,

Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

The decision of the Agency was predicated on the factual finding that Mr. Pfeiffer's actions "constituted a disregard for the reasonable standard of behavior that the employer had a right to expect". The Agency did not find what those actions were – other than suspension of Pfeiffer's license to practice. The question is, then, whether there is evidence in the record to support a finding that Pfeiffer engaged in any behavior that constituted a disregard for the reasonable standard of behavior that the employer had a right to expect

The employer and the employee both testified that Mr. Pfeiffer's discharge was not for a cause connected to work, was not for wanton or willful disregard of the employer's interests, was not for deliberate violation of work rules, was not for disregard of standards of behavior which the employer rightfully expected, and was not for intentional or substantial negligent disregard for employer interests, duties or obligations. (Record at 037, Line 21 – 038, Line 9; Record at 042, Line 24 – 043, Line 8). The employer testified that it believed the charges against Mr. Pfeiffer that led to his automatic, interim suspension were baseless and that Mr. Pfeiffer was terminated only because of the Order of the South Carolina Supreme Court placing him on interim suspension. (Record at 036, Lines 2-10 and 14-19). The employer testified that licensure was not an employer requirement for Mr. Pfeiffer's employment and that, but for the Court's Order, Mr. Pfeiffer would have been retained in employment as a paralegal during the interim suspension period (Record at 037, Lines 6-9) and the employer testified that the employer was willing and able

to rehire Pfeiffer in a licensed or unlicensed capacity should the Supreme Court's Order be amended (Record at 043, Lines 20-26). The employer and the employee further testified that the interim suspension by the Supreme Court is automatic and is done without notice or an opportunity to be heard and is not an adjudication of fault on the merits (Record at 036, Lines 6-10 and 16-19; 039, Line 21 through 040 Line 2; and 043 Lines 20-26).

There is no evidence in the record from which the Appellate Panel could have determined that Pfeiffer was discharged for cause, and therefore the Appellate Panel's determination that Pfeiffer was discharged for cause is clearly erroneous.

The Decision of the Appellate Panel was Arbitrary or Capricious

The decision of the Appellate Panel that Mr. Pfeiffer was disqualified from employment benefits for 17 weeks following his termination from employment by order of the South Carolina Supreme Court due to the interim suspension of his license to practice law was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. South Carolina State Bd. of Dentistry*, 286 S.C. 182, 184-185, 332 S.E.2d 539, 541 (Ct. App. 1985), *see also Kennedy v. Griffin*, 358 S.C. 122, 130, 595 S.E.2d 248, 252 (Ct. App. 2004) (holding, "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.").

The employer and the employee both testified that Mr. Pfeiffer's discharge was not for a cause connected to work, was not for wanton or willful disregard of the employer's interests, was not for deliberate violation of work rules, was not for disregard of standards of behavior which the employer rightfully expected, and was not for intentional or substantial negligent disregard for employer interests, duties or obligations. (Record at 037, Line 21 – 038, Line 9; Record at 042, Line 24 – 043, Line 8). The employer testified that it believed the charges against Mr. Pfeiffer that led to his automatic, interim suspension were baseless and that Mr. Pfeiffer was terminated only because of the Order of the South Carolina Supreme Court placing him on interim suspension. (Record at 036, Lines 2-10 and 14-19). The employer testified that licensure was not an employer requirement for Mr. Pfeiffer's employment and that, but for the Court's Order and rules, Mr. Pfeiffer would have been retained in employment as a paralegal during the interim suspension period (Record at 037, Lines 6-9), and the employer testified that the employer was willing and able to rehire Pfeiffer in a licensed or unlicensed should the Supreme Court's Order be amended. (Record at 043, Lines 20-26). The employer and the employee further testified that the interim suspension by the Supreme Court is automatic and is done without notice or an opportunity to be heard and is not an adjudication of fault on the merits. (Record at 036, Lines 6-10 and 16-19; 039, Line 21 through 040 Line 2; and 043 Lines 20-26).

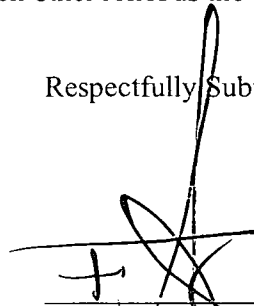
There was no testimony or evidence before the Agency to contradict this testimony. Because there is no evidence in the record from which the Appellate Panel could have determined that Pfeiffer was discharged for cause, the Agency's

determination that Pfeiffer was discharged for cause was arbitrary, capricious, and an abuse of discretion amounting to a denial of Mr. Pfeiffer's constitutional right to due process of laws under the United States and South Carolina Constitutions.

CONCLUSION

For all of these reasons, the determination of the DEW that Pfeiffer was disqualified from receiving unemployment benefits for seventeen weeks should be reversed, and the matter remanded to the DEW with instructions to pay Pfeiffer back benefits for the seventeen weeks, with costs taxed to the Agency pursuant to Rule 68 of the Rules of Procedure for the Administrative Law Court and Rule 222 of the Appellate Court Rules, and for such other relief as the Court deems just and proper.

Respectfully Submitted

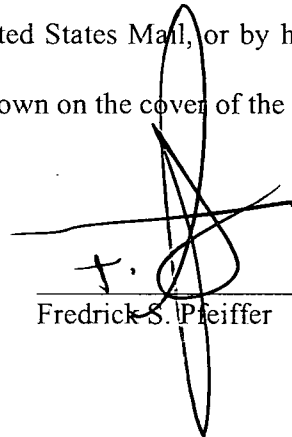


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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this Brief of Appellant in the above titled action upon all parties to this cause by depositing an original and one copy thereof in the United States Mail, or by hand-delivery, to the address of the parties or their attorneys shown on the cover of the Brief.

~~Thursday, July 25, 13~~
August 7, 2013



Fredrick S. Pfeiffer