STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

John Estep, Appellant, vs. South Carolina Department of Employment and Workforce and Greatwide Dedicated Transport III, LLC, Respondents.	Docket No. 14-ALJ-22-0026-AP **ORDER** **May 14, 2014**

STATEMENT OF THE CASE

John Estep ("Appellant") appeals the decision of the South Carolina Department of Employment and Workforce ("DEW" or "Department"), which disqualified him from receiving unemployment benefits for twenty (20) weeks upon finding that Appellant was discharged for misconduct connected with his employment with Greatwide Dedicated Transport III, LLC ("Greatwide"). The Administrative Law Court ("ALC") has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2013).

Appellant filed a Notice of Appeal on January 17, 2014. The ALC issued the Notice of Assignment on January 23, 2014. The Appellant filed his Brief on January 27, 2014.[1] The ALC issued an Order Governing Procedure on February 3, 2014. The Record on Appeal was filed on February 11, 2014 by the Department. The Appellant filed a Motion to Dismiss on February 18, 2014, claiming that the Record on Appeal was filed untimely. The Appellant further claimed that the Record on Appeal contains an error. On February 26, 2014, the ALC denied Appellant's Motion to Dismiss as the Department timely filed and served the Record on Appeal. The ALC also ordered DEW to review the Record on Appeal and make corrections to any errors. On February 28, 2014, the Appellant filed a Motion to Dismiss for failure of the Department to comply with the Freedom of Information Act as personal information of the Appellant had not been redacted from the Record on Appeal.[2] The ALC denied Appellant's Motion to Dismiss on March 10, 2014, but required the Department to redact all personal information from the Record

[1] Appellant resubmitted his Brief on February 19, 2014 and February 20, 2014.
[2] Appellant resubmitted this Motion to Dismiss on March 3, 2014.

on Appeal. Also on March 10, 2014, DEW filed the Corrected Record on Appeal. The Department also filed a Motion for Extension on March 10, 2014; this Motion was granted by the ALC in the Amended Scheduling Order issued on March 18, 2014. On March 12, 2014, the Appellant filed a Motion with the ALC informing the Court of the errors submitted by DEW.[3] On March 13, 2014, the Department submitted a redacted version of a page in the Record on Appeal as ordered by the ALC and brought to the Department's attention by the Appellant. The Appellant submitted notice to the Court that he filed a report with the Richland County Sheriff's Department regarding a violation of the Freedom of Information Act.[4] On March 17, 2014, Appellant filed a Motion to the ALC to state that DEW violated the Freedom of Information Act and gave a false statement to the ALC.[5] The Appellant filed a Motion on March 24, 2014 to inform the Court that DEW provided false statements to the Court and violated the Freedom of Information Act.[6] The Department filed Respondent's Brief on April 7, 2014. Appellant filed his Reply Brief on April 14, 2014.[7]

Upon consideration of the record and the briefs of the parties, this Court affirms, finding that substantial evidence supports the Department's Appellate Panel decision that Appellant is disqualified from benefits for twenty (20) weeks.

BACKGROUND

Appellant worked for Greatwide as a truck driver from March 1, 2013 to October 3, 2013. Appellant was discharged after it was discovered that he falsified his driving time in violation of employer policy and state regulation. The Appellant described the final incident that caused discharge in his application for unemployment benefits as, "my log book did not match up with the gps in the truck but the people net log book went out so I had to use paper and I did not line it up right to the tee."

During his time with Greatwide, the Appellant admitted that he had received two prior warnings. In May of 2013, Mr. Estep was suspended for three (3) days for, according to Appellant, "driving back to South Carolina without a load, and my employer wanted a full load." In August of 2013, Appellant was given a warning for not spending enough time on an inspection of the vehicle before driving.

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[3] Appellant resubmitted this Motion on March 22, 2014.
[4] Appellant resubmitted this notice on March 17, 2014.
[5] Appellant resubmitted this Motion on March 22, 2014.
[6] Appellant resubmitted this Motion on April 3, 2014.
[7] Appellant resubmitted his Reply Brief on April 15, 2014 and April 16, 2014.

In Appellant's Fact Finding Interview, he indicated that he entered information in the logbook incorrectly. Appellant stated that "[t]he dispatcher gave me permission to drive the empty truck onto the yard." Although Appellant had exceeded the driving hours allowed, he said it was common practice with the company to allow drivers who are close to yard to return even if they have exceeded the allowed driving hours for the day. Appellant also felt that the discharge was "personal and not work related."

On October 23, 2013, the Claims Adjudicator issued a determination which concluded that Appellant was discharged from employment due to "falsification of [his] log book." Therefore, the Claims Adjudicator found that Appellant was discharged for misconduct in connection with employment under S.C. Code Ann. § 41-35-120(2)(A). Appellant filed a Notice of Appeal to the Appeal Tribunal on October 28, 2013, which he updated on October 29, 2013.

An Appeal Tribunal hearing was held on November 26, 2013. During the hearing, Appellant testified on his behalf and Don Criscoe, Operation Center Manager, testified on behalf of Greatwide.

Mr. Criscoe testified that Appellant was discharged because "he drove without logging his trip properly, something that Mr. Estep had been talked to and warned about many times." Mr. Criscoe indicated that a truck driver can work for 14 hours in a day, but can only drive for 11 hours. Mr. Criscoe stated that the Appellant was well over the amount of hours a driver is allowed to drive. According to Mr. Criscoe, a driver is required by Department of Transportation ("DOT") regulation "to fill out a log book as to what they do at each stop that they make plus the hours of driving, and their off duty time." According to Mr. Criscoe, Appellant was trained on how to properly log his time. Mr. Estep was also retrained on the procedure. Mr. Criscoe stated that falsification of log books is grounds for "automatic termination by the company." Mr. Criscoe further testified that the Appellant was found to have provided false log books when the company looked at Appellant's logs and the gate logs, which would provide the time Appellant arrived back to the warehouse, and found that the times did not match.

The Appellant testified that he was not discharged for falsifying log books but rather for lying. Appellant stated that "the electronical system went out and I got stopped by the DOT that day, Department of Transportation, to monitor your log books that day and I passed." Appellant testified that he spoke with Dean Kessler and requested a "safe haven" to return to the yard.[8]

[8] Appellant stated that a "safe haven is bring [the truck] back in, even when you're out of hours."

Appellant was asked by Mr. Kessler how far from the yard he was, to which he responded that he "was about an hour and a half out" and had "about 30 minutes left of driving time." Appellant stated that he received permission from Dean Kessler to bring the truck to the yard. However, Appellant acknowledged that he did not tell Mark Hadley, a supervisor, that Dean Kessler told him to bring the truck in because Mr. Kessler was in the office and Appellant had concerns that Appellant would not receive any work if he informed Mr. Hadley that Mr. Kessler told him to bring the truck back to the yard. The Appellant described his view of the situation as "I was told one thing by one supervisor and something else by another."

In regards to the DOT regulations, Appellant stated that "[t]he safe haven didn't seem right to me neither, but I been with this company for almost six months and they allow drivers to ask for a safe haven." Appellant further acknowledged that with DOT regulations "you're not supposed to drive over the hours and, but with this company they had a safe haven." Mr. Criscoe asked Appellant if he was aware that a safe haven was only fifteen minutes, in which Appellant replied that he was not aware of the rule.

After hearing all of the testimony presented, the Appeal Tribunal affirmed the Claims Adjudicator's decision stating:

> A After considering the evidence in this case, the Tribunal concludes that the claimant was at fault in bringing about his discharge. In this case, an employer has a right to expect employee's to complete company documents accurately in accordance with company procedures. The claimant's conduct displayed negligence of such a degree and to show an intentional and substantial disregard of the employer's interests. Therefore, the Tribunal finds the claimant was discharged for misconduct and the original disqualification is deemed proper.

The Appeal Tribunal decision was issued on December 4, 2013. Appellant filed his appeal to the Appellate Panel on December 6, 2013.

The Appellate Panel made the following findings of fact:

> B On or about October 3, 2013, the log clerk discovered a discrepancy between the claimant's logbook and the vehicle's global positioning system. The Claimant acknowledged he was 1 ½ hours over his allowable time, but asserts he requested permission from a supervisor to return to the terminal. He further asserts the supervisor did not ask how many hours he had worked that day. Upon consideration of prior warnings for falsifying information, the employer discharged the claimant. The claimant stated it did not occur to him to advise the general manager upon his termination that he was granted permission to return to the terminal. The claimant asserts

> that drivers regularly violated employer policy and state regulation by driving extended hours.

On January 15, 2014, The Appellate Panel mailed their decision, which affirmed the decision of the Appeal Tribunal. The Appellate Panel stated:

> The record establishes the claimant falsified his driving time in violation of employer policy and state regulations. The claimant knew or should have known that falsifying his driving records would lead to his discharge. He was warned in the past for similar actions, but continued to falsify his records. The claimant's falsification of his driving records is a deliberate disregard of the standard of behavior the employer had the right to expect. Therefore, we find the claimant was discharged for misconduct connected with the employment. The Appeal Tribunal decision is affirmed.

The Appellant then commenced this action before the ALC on January 17, 2014, seeking judicial review of the Appellate Panel's decision.

ISSUE ON APPEAL

Did the Department err in finding that Appellant was discharged for misconduct connected with employment?

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act ("APA"). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E. 2d 365, 367 (1984) (determining that the Employment Security Commission, a predecessor of the Department, was an "agency" within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of DEW. See S.C. Code Ann. §§ 1-23-380, 1-23-600(D) (Supp. 2013); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2012). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner proscribed in § 1-23-380(5)). Section 1-23-380(5) reads:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. 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:
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> (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(5) (Supp. 2013).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). 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 findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting Lark v. Bi-Lo, Inc., 267 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). The ALC is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995); see also S.C. Code Ann. §1-23-380(5). The party challenging an agency action bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." Waters, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

The Appellant argues that the DEW erred in finding that Appellant was discharged for misconduct connected with his employment. The Court disagrees.

Pursuant to S.C. Code Ann. § 41-35-120, an insured worker is ineligible for unemployment benefits if the Department finds that the worker has been discharged for misconduct connected with employment. The statute defines "misconduct" as:

[C]onduct evincing such wilfull and wanton disregard of any employer's interests

> as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in the carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer.

S.C. Code Ann. § 41-35-120 (2)(a) (Supp. 2012).

The statute notes that misconduct which results in discharge may not be found in situations of emergency, sickness, extreme hardships, or other extraordinary circumstances. Id. A condition for eligibility for unemployment benefits is that the claimant must have been "separated, through no fault of his own." S.C. Code Ann. § 41-35-110(5) (Supp. 2012).

In the case before the Court, there is substantial evidence in the record to find that Appellant engaged in misconduct connected with his employment. Further, Appellant was given two prior warnings before his dismissal. As the Appellate Panel found in its decision, Appellant's actions reflected a deliberate violation of the standard of behavior that the Employer had a right to expect.

The Department made specific factual findings that the Appellant did not accurately complete his log book. The Appellant admitted that he "did not line [the log book] right to the tee." Appellant also stated that he was an hour and a half from the yard and had only thirty minutes of driving time left when he asked for a safe haven. Mr. Criscoe, Greatwide's witness, testified that Appellant was discharged because he did not properly log his trip and that he drove over his hours.

The Appellate Panel weighed the evidence between the parties and resolved the factual disputes presented by the testimony in favor of Greatwide. The South Carolina Supreme Court has stated that witness credibility should be deferred to the judgment of the agency. Milliken & Co. v. S.C. Employment Sec. Comm'n, 321 S.C. 349, 350, 468 S.E.2d 638, 639 (1996) (citing Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995)). The Appellant, in his brief, argues that the Appellate Panel was incorrect in ruling against him. The Appellant states that he was told by his supervisor, Dean Keesler, to bring the truck back to the yard. He further states that he was given a safe haven. Therefore, the Appellant believes that he did not do anything that would amount to misconduct connected with employment. Specifically, the Appellant contends that he did not do anything deliberate nor did he disregard the standards of behavior which an employer has the right to expect. However, there is no statement in Appellant's brief in regards to why his log book was incorrect. Regardless of whether an immediate supervisor ignored

regulatory law, the Appellant had a responsibility, and an expectation from his employer, not to submit falsified driving records. There was substantial testimony stating that Appellant did in fact falsify his driving record, along with other evidence submitted in the record, specifically Appellant's application for unemployment benefits. The ALC cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. See Sea Pines Ass'n for Prot. of Wildlife, Inc., 345 S.C. at 604, 550 S.E.2d at 292; see also Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). In this case, there is substantial evidence in the record to support the Appellate Panel's decision.

The evidence in the record supports the Appellate Panel decision that the Appellant was dismissed from employment for misconduct, specifically for inaccurately keeping log books and driving over the allowed time period. While the Appellant presented personal testimony to show that he was allowed to drive over the allowed time limit by his immediate supervisor, there was no evidence presented to show that he did not falsify his log books. However, the Appellant admitted that his log books were not correct. The Court finds that the Department's decision was not erroneous in light of the substantial evidence in the record, and that the record supports the decision.

ORDER

IT IS ORDERED that the Department's decision is **AFFIRMED**.

AND IT IS SO ORDERED.

CAROLYN C. MATTHEWS
Administrative Law Judge

May 14, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the party(ies) or their attorney(s).

This 14th day of May 2014

BY Mary Beth Caywood
Judicial Law Clerk

ALC