

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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Case No: 14-ALJ-22-0015-AP

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Gary W. Stokes . . . . . Appellant

v.

South Carolina Department of  
Employment and Workforce and  
O'Charley's, LLC. . . . . Respondent,

---

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ERR IN RAISING THE MATTER OF ISSUE PRESERVATION SUA SPONTE; THE ERROR BEING THAT THE COURT INCORRECTLY APPLIED THE RULE ON ISSUE PRESERVATION TO THE CIRCUMSTANCES OF THE PRESENT CASE.

STATEMENT OF THE CASE

Appellant, Gary Stokes filed a claim for unemployment compensation benefits on July 16, 2013 based on his separation from the employer O'Charley's, LLC which occurred on or about July 8, 2013. The initial determination (R.p. 30) was issued on July 31, 2013 imposing a 20 week disqualification effective July 7, 2013 with a corresponding reduction in benefits for his having purportedly been discharged for misconduct within the meaning of the law.

Appellant appealed this determination and participated in a telephone hearing on October 22, 2013 and testified in regard to the facts and circumstances leading up to his separation from employment. Appellant was the only party to participate in the hearing and testify; no representative of the employer made any attempt to participate nor was any evidence at all presented on behalf of the employer.

Even though no evidence at all was presented by the employer, the Administrative Hearing Officer affirmed the determination of the Claims Adjudicator and concluded that Appellant had been discharged for misconduct connected with his work.

Appellant, appealed the decision of the Administrative Hearing Officer to the South Carolina Department of Employment and Workforce Appellate Panel resulting in an affirmation of the

20 week disqualification. This decision was made by the Appellate Panel still without any input whatsoever from the Employer and concluded that Appellant/Claimant allegedly acted unprofessionally and inappropriately in using a "profanity" to describe his co-workers.

#### ARGUMENTS

- I. The Administrative Law Court erred in ruling sua sponte that Appellant failed to properly preserve the issues for review, the error being that due process and fairness in conjunction with a liberal construction of applicable law and regulations mandate otherwise.

Claimant/Appellant appeared without the benefit of counsel at both the hearing before the Administrative Hearing Officer and the South Carolina Department of Employment and Workforce Appellate Panel. The Employer did not appear at any level of appeal and provided no evidentiary input into the decisions of the agency. The agency found throughout its proceedings that Appellant was discharged for misconduct connected with his work. The burden of proving that a Claimant was discharged for misconduct connected with the work rests entirely with the employer. In the present case, the employer failed to participate in any proceedings conducted by the South Carolina Department of Employment and Workforce in connection with Appellant's claim for unemployment compensation benefits. The decisions adverse to Appellant made by the SCDEW based on the

evidence before it had the effect of shifting the burden of proof to the Appellant.

The requirement of due process is a fundamental tenet of the Fifth Amendment of the United States Constitution. The shifting of the burden of proof even in administrative proceedings is tantamount to the deprivation of an individual's unassailable right to have government follow the exact course of law in connection with such proceedings. The employer clearly and unequivocally failed to carry its undeniable burden of proving through reliable evidence that disqualification from benefits was proper under the circumstances herein and the decision by the SCDEW as affirmed by the Administrative Law Court is therefore unconstitutionally improper under the applicable standards.

As stated, Appellant appeared before an Administrative Hearing Officer without the benefit of legal counsel. These hearings are by nature informal but are conducted as adversarial proceedings. In regard to whether the issue raised in the present case was preserved for review by the Appellate Court, the Appellant (Claimant) and the Hearing Officer engaged in the following discourse:

Claimant: No, I would just like to ask you a question if possible.

Hearing Officer: Sure go right ahead.

Claimant: What's the stipulation when the employer ..  
When the employer doesn't...doesn't consent  
(sic) to the Administrative Hearing?

Hearing Officer: It's - we went forward with the hearing.

Claimant: Okay.

Hearing Officer: They were...they received notice of the  
hearing and were given the option to attend,  
and no one was available to do so when I  
contacted them, so that's - (sic) we went  
forward. And a decision will be made based  
upon the testimony and evidence presented in  
the hearing today.

Claimant: Well, did they...did they take into  
consideration that the employ..also that the  
employer did not participate?

Hearing Officer: As I said the decision will be made based  
upon the testimony and evidence presented in  
the hearing today.

Claimant: Okay.

(R.p. 56, line 24 - R.p. 57, line 7)

In the preceding discourse, the Hearing Officer specifically  
represented to the Appellant that the decision would be based on  
the testimony and evidence presented in the hearing today thus  
ruling by implication that no evidence would be considered on

behalf of the employer because none was presented at the hearing. Although rudimentary in content, the preceding discourse constituted Claimant's attempt to raise a due process issue which was subsequently inferentially denied when the Hearing Officer ruled in favor of the employer in contravention of her own specific statements. Thus the administrative agency effectively exercised its opportunity to rule on the issues by the very thrust of its decision. See Atlantic Coast Builders and Contractors, LLC v. Laura Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012), citing Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 2d 902, 919 (Ct. App. 2006).

Thus, the Hearing Officer's decision and subsequent affirmations were arbitrary and capricious and violative of Appellant's due process rights. Of course, it should be noted that there are no formal pleadings, petitions or forms required in connection with an unemployment compensation appeal. Appellant as a participant in an informal administrative hearing cannot be required to object in anticipatory fashion to a finding that has not been made. Simply stated, there is nothing to object to contemporaneously. There is no objectionable evidentiary offering; there is only an objectionable decision based on improper grounds which Appellant appealed. Thus, Appellant objected at "his first opportunity." State v.

Sullivan, 426 S.E.2d 766 (1993); State v. Simmons, 494 S.E.2d 460 (1997).

Further, the Administrative Law Court incorrectly invoked the provisions of Section 1-23-320 (G)(4) of the Administrative Procedures Act stating that the record in contested cases must include objections. A review of this statutory provision indicates a "laundry list" of the requirements for inclusion the record. Appellant would posit that the requirement that objections and rulings thereon be a part of the record are requirements for the purposes of having a complete record of the proceedings which actually took place below.

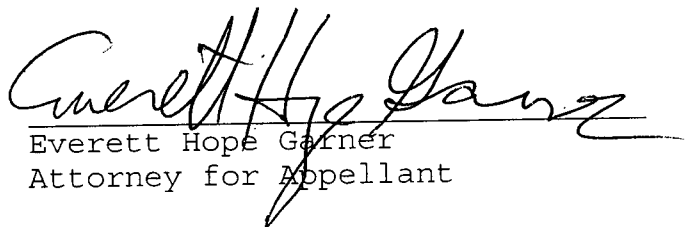
#### CONCLUSION

The Employment Security Act is remedial legislation which is entitled to a liberal construction in order to accomplish the ends and purposes for which the Act was enacted.

In the present case, Appellant asserts that his disqualification from unemployment compensation benefits was clearly erroneous in view of the reliable, probative and substantial evidence of the whole record and made in an arbitrary and capricious manner. Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981). This disqualification effectively shifted the burden of proof away from the employer in violation of specific statutory provisions and case law and in contravention of due

process of law. The decisions of the SCDEW which were made without the benefit of evidence from the employer constitute an inferential ruling on the issue of due process attempted to be raised by Appellant in his discourse with the Administrative Hearing Officer. The Court should reach the merits of this case in order to effectuate the fundamental purpose of the unemployment compensation system and the fundamental constitutional rights of Appellant as a participant in the system. To require a formal motion or objection on issues of this nature would impose an essentially insurmountable burden on such participants in what would amount to a deprivation of the opportunity for a fair determination of rights under the law.

Respectfully Submitted,

  
Everett Hope Garner  
Attorney for Appellant

January 6, 2015

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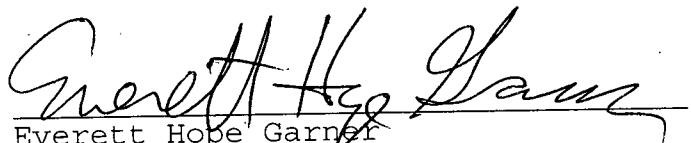
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CERTIFICATE OF COUNSEL

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The undersigned certifies that this Final Brief complies  
with Rule 211(b), SCACR.

January 6, 2015

  
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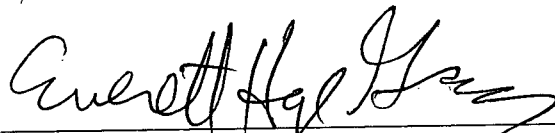
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I certify that I have served the Appellant's Final Brief on Derrick McFarland, Esquire, Attorney for Respondent SCDEW, and O'Charley's, LLC by depositing a copy of it in the United States mail, postage prepaid, addressed to the following:

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