THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Appellate Case No. 2014-001482

Gary W. Stokes,

Appellant,

v.

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

Respondent.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

1. 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.

RESPONDENT'S RESTATEMENT OF THE ISSUE ON APPEAL

1. Did the Administrative Law Court correctly dismiss this appeal because the issues were not properly preserved for review before the Administrative Law Court?

STATEMENT OF THE CASE

Appellant Gary W. Stokes (Appellant) applied for unemployment insurance benefits with the South Carolina Department of Employment and Workforce (DEW) on or about July 16, 2013. (R.p.6-14). The claims adjudicator determined that Appellant was terminated for "foul or profane language while on duty," discharged for misconduct connected with employment, and disqualified for twenty (20) weeks on July 31, 2013. (R.p.17).

Appellant filed a Notice of Appeal to Appeal Tribunal on or about August 9, 2013. (R.p.28). The Appeal Tribunal conducted the hearing on October 22, 2013. (R.p.20-38). On November 14, 2013, the Appeal Tribunal affirmed the decision of the claims adjudicator, finding Appellant disqualified from receiving benefits for twenty (20) weeks, effective July 7, 2013 through November 23, 2013. (R.p.5).

Appellant filed an Application for Leave to Appeal to the Appellate Panel on or about November 18, 2013. (R.p.46). The Appellate Panel affirmed, finding "[t]he claimant deliberately disregarded the standard of behavior the employer had the right to expect." (R.p.2).

Appellant filed a Notice of Appeal with the South Carolina Administrative Law Court (ALC) on January 16, 2014. The ALC filed a Notice of Assignment on January 17, 2014. (Notice of Assignment).

The ALC filed an Order on June 12, 2014 dismissing the appeal due to Appellant's failure to preserve his issue for appeal.

Appellant seeks judicial review before the South Carolina Court of Appeals.

STATEMENT OF THE FACTS

Appellant worked for O'Charley's restaurant from December 13, 2011 through July 4, 2013 as a prep and line cook. (R.p.23, line 20 - p.24, line 4). He was terminated following a phone conversation with his General Manager on July 6, 2013. (R.p.27, line 13 – p.28, line 20).

Appellant applied for unemployment insurance benefits on or about July 16, 2013. (R.pp.6-14). Appellant informed the fact finder that he called his General Manager and informed her he could not come in to work because of a tooth abscess. The General Manager told him he would need to obtain a doctor's excuse. Appellant reported to work the following day without an excuse and was told to leave by the General Manager to "don't come back until Monday and talk to Jacob and see if you still have a job." (R.p.43). Appellant informed the fact finder he left O'Charley's, but later that day called the General Manager and while referring to the kitchen staff, told her "I was not like the rest of the sh** on the floor. (R.pp. 43-44). On July 26, 2013, O'Charley's provided information indicating Appellant failed to recognize management authority. (R.p.45).

On July 31, 2013, the claims adjudicator determined:

> You were discharged from your job with your most recent bona fide employer for use of foul or profane language while on duty. Such conduct is contrary to what the employer has a reasonable right to expect and is a discharge for misconduct in connection with the employment under the South Carolina Code Section 41-35-120(2)(A). You are disqualified for 20 weeks. Your maximum benefits are also reduced by 20 times your weekly benefit amount.

(R.p.40).

Appellant appealed from the initial determination and the Appeal Tribunal held a hearing on October 22, 2013. Appellant testified on his own behalf. No witnesses or a representative of O'Charley's appeared.

At the hearing, Appellant reiterated comments made to the fact finder. In response to questions from the hearing officer, Appellant indicated he had been written up three times during the course of his employment with O'Charley's; had previous disputes with the General Manager; and used profanity in a work related discussion with the General Manager to describe other O'Charley's employees. (R.pp.29 - 34).

The Appeal Tribunal found:

> [C]laimant does admit to using profanity in a conversation with a member of management when referring to his co-workers. Though he was no longer on the premises he was still and [sic] employee and interacting with a supervisor about job related issues. He acted in a manner which he knew, or should have known would jeopardize his employment. Even though he was no longer on the premises and felt he was treated unfairly, such circumstances do not give the claimant license to act inappropriately and use profanity. It was reasonable of his employer to request a doctor's note regarding his absence. An employer has a right to expect professional and respectful conduct from workers in all of their dealings in order to operate effectively. The use of profanity in a conversation with a supervisor under these circumstances is a deliberate disregard of the standards of behavior an employer has the right to expect. . .

(R.p.5).

Appellant appealed, arguing that nothing was done deliberately. (R.p.46).

The Appellate Panel affirmed, finding Appellant "deliberately disregarded the standard of behavior the employer had the right to expect. (R.p.2).

Appellant appealed to the ALC. The ALC issued an Order, finding "After reviewing the Record on Appeal, which includes a transcript of the Appeal Tribunal hearing from October 22, 2013, it is clear that Appellant failed to make any objections on the record that would preserve for appeal before this Court any of the issues contained in Appellant's brief. (Order, p.5).

ARGUMENT

Standard of Review

Respondent South Carolina Department of Employment and Workforce ("Agency") is an agency and subject to the Administrative Procedures Act. South Carolina Code § 1-23-310. The administrative procedures of the agency include an appeal to the Appeal Tribunal and further appeal to the Appellate Panel. S.C. Code Ann. § 41-35-680. Once the administrative remedies available within an agency are exhausted, the aggrieved party is entitled to a judicial review. S.C. Code Ann. § 1-23-380.

During the judicial review, the administrative law court:

> [M]ay 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:
>
> (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.

Unless there is a clearly erroneous application of the law, an agency's decision will be upheld if there is substantial evidence to support the agency's finding. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135-36, 276 S.E.2d 304, 306-07 (1981). Substantial evidence has been defined as:

> [N]ot a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.

Lark v. Bi-Lo, Inc., 276 S.C. at 135-36, 276 S.E.2d at 306-07. In viewing the record as a whole, if reasonable minds can reach the same conclusion as the agency, the Administrative Law Court shall affirm. Houston v. Deloach & Deloach, 378 S.C. 543, 550-51, 663 S.E.2d 85, 89 (Ct. App. 2008) (internal citations omitted). The fact that reasonable minds may reach a separate and distinct conclusion does not prevent an agency's decision from being upheld by substantial evidence. Id.

The Administrative Law Court's decision should be affirmed, as a matter of law, because the issues were no properly preserved for review before the Court.

A specific objection to the admission of evidence must be made to preserve the issue for appeal. "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the [hearing officer] . . . The same ground argued on appeal must have been argued to the [hearing officer]. *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996) (internal citations omitted) (emphasis added); *State v. Patterson*, 324 S.C. 5, 21, 482 S.E.2d 760, 768 (1997) (party cannot argue one ground below and another ground on appeal). *See also State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("For an objection to be preserved for appellate review, the

objection must be made at the time the evidence is presented . . . and with sufficient specificity to inform the [hearing officer] of the point being urged by the objector.").

In this case, at no point did Appellant voice an objection, to any degree, to a violation of his due process rights. Appellant, in a question to the hearing officer, asked how would the employers' failure to attend the hearing affect his case. (R.p. 37, line 24 – R.p.38, line 7). Although offered by Appellant now as an unpolished objection, no specific objection can be ascertained from the discussion.

Additionally, the hearing officer correctly stated that her decision would be based on the testimony and evidence presented at the hearing. In addition to Appellant's testimony, the hearing officer considered Agency Exhibit One:

> . . . At this time I'd like to enter into the record as Agency Exhibit One, this one page determination. I'd also like to include as part of Agency Exhibit One the claimant's initial request for determination of status as an insured worker, this is a one page document, as well as the claimant's initial discharge insubordination fact finding conducted on July 24, 2013, which is three pages, and the one page employer response to the Agency's request for information which is one page. I'd like to enter these six pages into the record as Agency Exhibit One. . .
>
> (R.p.4 lines 12-18)

Appellant argues that the ALC's decision was arbitrary and capricious and an abuse of discretion because of a violation of Appellant's due process rights. Due process requires notice, and an opportunity to be heard in a meaningful way. Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171-72, 656 S.E.2d 346, 350 (2008). Appellant received notice and had the opportunity to be heard in the Appeal Tribunal, and he had the opportunity for judicial review. As such, there is no violation of Appellant's due process rights. Additionally, the ALC correctly found that Appellant did not object in any way regarding a due process issue. Therefore, the ALC's decision should be affirmed.

CONCLUSION

Because Appellant failed to object before the Appeal Tribunal, the ALC's decision to dismiss this matter for failure to preserve an issue for review should be affirmed.

Respectfully Submitted,

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January 15, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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John D. McLeod, Administrative Law Judge
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South Carolina Department of Employment and Workforce and O'Charley's, LLC,

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PROOF OF SERVICE

I certify that I have served the Respondent's South Carolina Department of Employment and Workforce's Final Brief on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on January 8, 2015, addressed to the parties at their addresses of record:

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CERTIFICATE OF COUNSEL

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

January 20, 2015

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