THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2014-001484

Stephanie Stewart,

Appellant,

v.

South Carolina Department of
Employment and Workforce
and Oconee County, SC,

Respondents.

INITIAL BRIEF OF RESPONDENT

E.B. "Trey" McLeod, III, SC Bar #73642
SC Dept. of Employment and Workforce
PO Box 8597
Columbia, SC 29202
Attorney for Respondent SCDEW

Stephanie Stewart
2142 Toccoa Highway
Westminster, SC 29693
Appellant

Reginald Gay
PO Box 447
Greenville, SC 29602
Attorney for Respondent Oconee County

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issue on Appeal 1

Statement of the Case 2

Arguments

I. WHETHER THE DECISION OF THE ADMINISTRATIVE LAW COURT AFFIRMING THE APPELLATE PANEL'S DECISION THAT EMPLOYER DISCHARGED APPELLANT FOR MISCONDUCT PURSUANT TO S.C. CODE ANN. § 41-35-120(2)(a) IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE 9

II. WHETHER THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THE APPELLATE PANEL DID NOT ERR AS A MATTER OF LAW IN HOLDING THAT ITS FACTUAL FINDINGS SUPPORTED THE CONCLUSION THAT APPELLANT WAS DISCHARGED FOR MISCONDUCT UNDER S.C. CODE ANN. § 41-35-120(2)(a). 10

III. WHETHER THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THE APPELLATE PANEL DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW REMAND TO TAKE ADDITIONAL EVIDENCE 13

IV. WHETHER APPELLANT'S ADDITIONAL ARGUMENTS WERE PRESERVED FOR REVIEW BY THE ADMINISTRATIVE LAW COURT OR THIS COURT. 20

Conclusion 21

TABLE OF CONTENTS

Cases

Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001) 8
Bandemer v. Department of Employment Security, 204 Ill.App.3d 192, 195, 149 Ill.Dec. 699, 562 N.E.2d 6, 7 (1990) 12
Bonaparte v. Floyd, 291 S.C. 427, 354 S.E.2d 40 (Ct. App. 1987) 19
Caterpillar, Inc. v. Department of Employment Security, 313 Ill.App.3d 645, 654, 246 Ill.Dec. 472, 730 N.E.2d 497, 505 (2000) 12
Converse Power Corp, 350 S.C. 39, 47 564 S.E.2d 341, 345 (Ct. App. 2002) 9
Cross v. Concrete Materials, 236 S.C. 440, 448, 114 S.E.2d 828, 832 (1960) 10
Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) 9
DeGroot v. Employment Security Commission, 285 S.C. 209, 328 S.E.2d 668, 669 (S.C.App. 1986) 8
Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S. Carolina Dep't of Health & Envtl. Control, 755 S.E.2d 444, 448 (S.C. 2014) 10
Gold Kist, Inc. v. Citizens and Southern Nat'l Bank of South Carolina, 286 S.C. 272, 333 S.E.2d 67 (Ct. App. 1985) 19
Greenlaw v. Department of Employment Security, 299 Ill.App.3d 446, 448, 233 Ill.Dec. 532, 701 N.E.2d 175, 177 (1998) 12
Hamm v. Am. Telephone & Telegraph Co., 315 S.C. 119, 432 S.E.2d 454 (1993) 8
Hamm v. Pub. Serv. Comm'n of S.C., 310 S.C. 13, 425 S.E.2d 28 (1992) 8
Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999) 8
Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985) 10
Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 225–26, 333 S.E.2d 338, 340 (Ct.App.1985) 18
In re Care & Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) 20
In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) 16
In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) 13
Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) 17
Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304, 306 (1981). 8
Merck v. S. Carolina Employment Sec. Comm'n, 290 S.C. 459, 460, 351 S.E.2d 338, 339 (1986) 18
Nelson v. Dep't of Employment Sec., 801 P.2d 158, 162 (Utah Ct. App. 1990) 13
Oxley v. Med. Rock Specialties, Inc., 139 Idaho 476, 480, 80 P.3d 1077, 1081 (2003) 12
Palmetto Alliance, Inc. v. S. C. Pub. Serv. Commn 13
Roberts v. Roberts, 299 S.C. 315, 319, 384 S.E.2d 719, 722 (1989) 17
S.C. Code Ann. § 41-35-750 (Supp. 2010) 8
State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) 9
State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) 16
State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983) 14
State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) 15

State v. King, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005) 15
Stovall v. Department of Employment Security, 262 Ill.App.3d 1098, 1102, 203 Ill.Dec. 640, 640 N.E.2d 299, 303 (1994) 12
Todd's Ice Cream v. South Carolina Employment Security Commission, 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984) 8
Tuomey Reg'l Med. Ctr., Inc. v. McIntosh, 315 S.C. 189, 432 S.E.2d 485 (1993) 19
Unisys Corp. v. S.C. Budget and Control Bd. Div. of General Services Info. Tech. Mgmt. Office, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001) 17
United States v. Valenti, 60 F.3d 941 (2d Cir. 1995) 16
Zaman v. S.C. State Bd. of Medical Examiners 13

Statutes

S.C. Code Ann. § 1-23-320 19
S.C. Code Ann. § 1-23-330 16
S.C. Code Ann. § 1-23-330(1) 14
S.C. Code Ann. § 1-23-380(3) 19
S.C. Code Ann. § 41-35-120(2) 1,10
S.C. Code Ann. § 41-35-710 18

Rules

Rule 801(c), SCRE 17
Rule 802, SCRE 17
Rule 103, SCRE 15

Regulations

S.C. Regs. 47-51 14

RESTATEMENT OF THE ISSUES ON APPEAL

I. WHETHER THE DECISION OF THE ADMINISTRATIVE LAW COURT AFFIRMING THE APPELLATE PANEL'S DECISION THAT EMPLOYER DISCHARGED APPELLANT FOR MISCONDUCT PURSUANT TO S.C. CODE ANN. § 41-35-120(2)(a) IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

II. WHETHER THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THE APPELLATE PANEL DID NOT ERR AS A MATTER OF LAW IN HOLDING THAT ITS FACTUAL FINDINGS SUPPORTED THE CONCLUSION THAT APPELLANT WAS DISCHARGED FOR MISCONDUCT UNDER S.C. CODE ANN. § 41-35-120(2)(a).

III. WHETHER THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THE APPELLATE PANEL DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW REMAND TO TAKE ADDITIONAL EVIDENCE.

IV. WHETHER APPELLANT'S ADDITIONAL ARGUMENTS WERE PRESERVED FOR REVIEW BY THE ADMINISTRATIVE LAW COURT OR THIS COURT.

STATEMENT OF THE CASE

Stephanie Staggers-Stewart, (hereinafter "Appellant" or "Stewart") worked for Employer from January 10, 2011 to May 9, 2013, with the most recent job title of court clerk. (R. p.__) Appellant was originally hired to be a court clerk at Employer's Walhalla branch of Magistrate's Court. Appellant received initial training at the Seneca branch under Chief Magistrate Judge M. Todd Simmons ("Judge Simmons") before reporting to Walhalla under Magistrate Judge Blake Norton ("Judge Norton"). (R. p.__). In September 2011, Judge Norton and Judge Simmons agreed to transfer Appellant to the Seneca branch for more training, and to address Appellant's complaints about unprofessional and racially insensitive behavior at the Walhalla branch. (R. p.__). Appellant remained at the Seneca branch until Friday, May 3, 2013. (R. p.__). On May 3rd , Judge Simmons composed a memorandum for Appellant's file indicating she was being transferred back to the Walhalla branch. Approximately mid-day, Judge Simmons conducted a Human Resources ("HR") meeting, which included himself, the head Seneca clerk, Deborah Sheriff, and Appellant. (R. p. __). Judge Simmons recorded the meeting. During the meeting, Appellant refused to accept the transfer back to Walhalla. Judge Simmons explained the workload at Walhalla necessitated three court clerks, Appellant was originally hired for the Walhalla Office, and Oconee County refused his request to hire another clerk for the Walhalla office. (R. p. __). Judge Simmons also suggested that based on seniority and skill set, Appellant was the only current clerk he could transfer to the Walhalla branch. (R. p.___). At the close of the meeting, Judge Simmons told Appellant she had three options: (1) transfer to the Walhalla branch and document any problems she has there; (2) resign; or (3) force him to terminate her for failing to comply

with a directive. (R. p.___). Judge Simmons instructed Appellant to take the rest of the day off with pay to think about it, and give him her decision before the conclusion of the work day. (R. p.__).

At the conclusion of the HR meeting, Appellant requested to speak with Judge Simmons personally off the record. (R. p.__). Judge Simmons agreed and asked Sheriff to leave the room. (R. p.__). Appellant then spoke to Judge Simmons about a grievance she had initiated concerning an allegation that Sheriff was recording fraudulent over-time. (R. p.__). Appellant asked whether Judge Simmons recalled a conversation with another employee about the issue, and Judge Simmons responded that he did not recall the alleged conversation. (R. p.___). Judge Simmons claims Appellant then called him a "liar." (R. p.__). Appellant insists she merely stated Judge Simmons's recollection was "inaccurate." (R. p.___). Sheriff asserted Judge Simmons came into her office immediately after the incident and told her Appellant called him a liar in his own courtroom. (R. p.__). Judge Simmons asserted that he did not immediately fire Appellant that day because he had an agreement with Employer to discuss all hiring and firing decisions with Employer first, and he was not sure of his authority to fire Appellant at that moment. (R. p. __). Judge Simmons composed a memorandum of the meeting, but did not mention Appellant's insubordinate comment at the time.

Before the end of the workday, Appellant informed Judge Simmons she would accept the transfer to the Walhalla branch. On Monday, May 6, 2013, Appellant arrived for work at the Walhalla branch. (R. p. __). On May 7, 2013, Judge Simmons wrote another memorandum for Appellant's file, which documented Appellant's initial refusal to accept the transfer, and her assertion that he was a liar. (R. p. ___). At the conclusion of

the memorandum, Judge Simmons stated, "While I have reluctantly agreed to allow [Appellant] to continue her employment in Walhalla, I feel there are sufficient grounds for immediate termination. I believe that no further incidents should be tolerated." (R. p.___). Shortly thereafter, Judge Simmons was able to communicate with Employer, and determined he had the authority to fire Appellant for unprofessionalism and insubordination. (R. p.___). Employer's policy specifically stated termination could result from insubordination.

During her first week back at the Walhalla branch, Appellant began initialing her work so it could not be sabotaged by other employees. On the morning of May 9, 2013, Judge Norton sent Appellant an email instructing her not to place her initials on her work product because Judge Norton only wanted his signature on out-going orders and other related documents. That same morning, Appellant sent an email reply to Judge Norton explaining: "Given the harsh and hostile history of and racial overtones that have existed within this office, it is necessary that I have way to clearly distinguish my work from other employees." That afternoon, Judge Simmons informed Appellant she was terminated for lack of professionalism and insubordination; he specifically stated her termination was a result of the incident when she called him a liar. Judge Simmons explained in Appellant's termination letter that he did not immediately fire Appellant on May 3, 2013, when the incident of insubordination occurred because he had to first consult with Employer about his firing authority.

Following her termination, Appellant filed a timely claim for unemployment benefits with the Department. The Department conducted fact finding and, on May 24, 2013, a Department claims adjudicator determined Appellant was discharged due to

improper action on the job, which constituted a discharge for misconduct under section 41-35-120(2)(a) of the South Carolina Code (Supp. 2012). The claims adjudicator further determined Appellant was disqualified from receiving benefit payments for twenty (20) weeks and Appellant's maximum benefits would be reduced by twenty (20) times Appellant's weekly benefit amount. On May 30, 2013, Appellant filed a Notice of Appeal with the Department's Appeal Tribunal seeking review of the claims adjudicator's decision.

An evidentiary hearing was scheduled for August 20, 2013. Prior to that, Appellant submitted a "Motion to Submit Declaration of Facts, Documentary Evidence, and Arguments into Tribunal Hearing Record with Brief in Support" ("Motion 1 "). Motion 1 included thirty-one attached exhibits. The Hearing Officer did not rule on Motion 1 prior to the Hearing on August 2, 2013. At the hearing, Appellant, Judge Simmons, Judge Norton, and Sheriff testified. Appellant entered one exhibit into evidence, the audio recording of the HR meeting ("Claimant's Exhibit 1 "), which corresponded with Motion 1's exhibit 1. Appellant referred to several of her other exhibits from Motion 1 during cross-examination and her testimony, but did not move for any of the other exhibits to be admitted as evidence.

On August 23, 2013, the Appeal Tribunal issued a decision affirming the claims adjudicator's finding that Appellant was discharged for misconduct. On August 31, Appellant appealed to the Appellate Panel. Subsequently, on October 18, 2013, Appellant filed a motion entitled "Motion to Include Claimant's Previously Submitted Motions and Documentary Evidence for the August 20, 2013 Tribunal Hearing as Part of the Appellate Panel Record" ("Motion 2"). In Motion 2, Appellant contested the record as submitted to

the Appellate Panel, arguing it improperly omitted Motion 1 and its thirty-one exhibits. Appellant requested the Appellate Panel add Motion 1 and its exhibits to the record. On October 22, 2013, Appellant renewed Motion 2.

Following a hearing, the Appellate Panel affirmed the Appeal Tribunal's decision to hold Appellant was terminated for misconduct and disqualified from receiving benefits for twenty (20) weeks with a corresponding monetary reduction. Specifically, the Appellate Panel found Judge Simmons's testimony was credible. It further found the manner in which Appellant questioned Judge Simmons's truthfulness disregarded the standard of behavior Employer had a right to expect from Appellant. Regarding Motion 2, the Appellate Panel denied the motion.

The Appellate Panel determined Appellant never offered Motion 1 or its exhibits into evidence, except Claimant's Exhibit 1. The Appellate Panel noted that although Motion 1 and its exhibits were not admitted into evidence, Appellant utilized them extensively during cross-examination and during her testimony. As a result, the Appellate Panel held Appellant "was afforded a full, fair, and meaningful opportunity to present her case." Moreover, it determined:

> The record was fully and fairly developed by the administrative hearing officer and is sufficient for us to render a fair decision. Reopening the record in order to admit additional evidence as described in the claimant's written brief to the Appellate Panel is unnecessary and would not affect the outcome of this decision. Therefore, we find no cause to remand this case for further proceedings, and the claimant's request is denied.

On November 18, 2013, Appellant filed a Notice of Appeal with the ALC challenging the Appellate Panel's decision. DEW filed an initial copy of the record on December 11, 2013. Subsequently, on December 20, 2013, Appellant filed four motions, including a motion entitled "Application for an Order to Compel the South Carolina

Department of Employment and Workforce to Correct and Resubmit the Entire Record on Appeal and Motion to Reset the Brief Filing Schedule Deadline" ("Motion 3"). In Motion 3, Appellant alleged the record on appeal was deficient because it failed to include: Motion 1 and its exhibits (specifically exhibits 12-15, 17-20 and 30); Motion 2 and its renewal; the transcript of the Appellate Panel hearing; and the audio recording of Claimant's Exhibit 1. On January 21, 2014, the Department consented to supplementing the record with Appellant's requests and, on February 4, 2014, the ALC issued an order directing the Department to file a supplemental record in accordance with ALC Rule 36(B). The Department submitted an amended record on February 19, 2014, but did not include all the supplemental documents Appellant requested in Motion 3. Thereafter, the Department submitted another supplement to the record on March 12, 2014. This supplemental record again failed to include all the missing documents. As a result, this Court issued another order on March 18, 2014, commanding the Department to submit a supplement to the record to include exhibits 11-20, and 30 from Motion 1.5 Subsequently, the Department finally submitted a completed record and supplemental record, which was the record before the ALC.

STANDARD OF REVIEW

Appellant argues that the Administrative Law Court erred in affirming the Panel's decision holding her disqualified from receiving benefits upon a finding Employer discharged her for misconduct. Appellant contends this decision is unsupported by substantial evidence or controlled by an error of law.

In considering an appeal from the ALC's review of a Panel decision, "the findings of the [Panel] regarding facts, if supported by [substantial] evidence and in the

absence of fraud, must be conclusive and the jurisdiction of the [reviewing court] must be confined to questions of law." S.C. Code Ann. § 41-35-750 (Supp. 2010). The standard for judicial review for decisions of DEW is whether the agency's decision is clearly unsupported by substantial evidence or controlled by an error of law. Todd's Ice Cream v. South Carolina Employment Security Commission, 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984). "Substantial evidence" has been defined as "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. 130, 276 S.E.2d 304, 306 (1981). The Court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Id. "Substantial evidence is something less than the weight of the evidence." DeGroot v. Employment Security Commission, 285 S.C. 209, 328 S.E.2d 668, 669 (S.C.App. 1986). Under this "substantial evidence" standard of review, "the findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999). The burden is on the appellant to show convincingly that the Panel's decision is without evidentiary support as a matter of law. See Hamm v. Am. Telephone & Telegraph Co., 315 S.C. 119, 432 S.E.2d 454 (1993); Hamm v. Pub. Serv. Comm'n of S.C., 310 S.C. 13, 425 S.E.2d 28 (1992).

Further, a court's determination that an abuse of discretion occurred is limited to instances in which an administrative agency's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the

ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) (application of standard to circuit court); see also Converse Power Corp, 350 S.C. 39, 47 564 S.E.2d 341, 345 (Ct. App. 2002), quoting Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("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.")

ARGUMENT(S)

I. THE DECISION OF THE ADMINISTRATIVE LAW COURT AFFIRMING THE APPELLATE PANEL'S DECISION THAT EMPLOYER DISCHARGED APPELLANT FOR MISCONDUCT PURSUANT TO S.C. CODE ANN. § 41-35-120(2)(a) IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

Appellant asserts that the Panel's decision is not supported by substantial evidence in the record on appeal ("Record") as a whole. This argument is without merit and must be rejected. There are ultimately two factual issues which were necessarily decided by the Panel; (1) whether Appellant called her employer a "liar" during a confrontation and (2) whether the actual conduct which did occur constitutes misconduct for purposes of the statute. Regarding both issues the Panel made the specific findings:

> The record establishes [Appellant] was discharged for disrespectful conduct during a meeting with her superior. In the final incident, the [Appellant] used poor judgment when questioning the truthfulness of the judge's statement to her. We find credible the testimony of the employer-witness...

(R. p. ___.) In this case the Record reveals that witnesses gave conflicting testimony. Where there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the Panel as triers of the fact are conclusive. Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985) Therefore, this Court may not pursue "judicial fact-finding, or the substitution of judicial judgment for agency judgment." Todd's Ice Cream, Inc., supra. In determining whether the Panel's decision is supported by substantial evidence, this Court "need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the Panel reached." Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S. Carolina Dep't of Health & Envtl. Control, 755 S.E.2d 444, 448 (S.C. 2014); see also Cross v. Concrete Materials, 236 S.C. 440, 448, 114 S.E.2d 828, 832 (1960)("[T]he court will affirm a factual finding of the [Panel] if there is [substantial] evidence in the record to sustain it, and reverse only if there is not.")

II. THE ADMINISTRATIVE LAW COURT DID NOT ERR IN FINDING THE PANEL WAS CORRECT AS A MATTER OF LAW IN HOLDING THAT ITS FACTUAL FINDINGS SUPPORTED THE CONCLUSION THAT APPELLANT WAS DISCHARGED FOR MISCONDUCT UNDER S.C. CODE ANN. § 41-35-120(2)(a).

Under S.C. Code Ann. § 41-35-120(2)(a), an individual is ineligible for benefits if the Department finds that he has been discharged "for misconduct connected with the employment." Id. A person found to have been discharged for misconduct is disqualified from receiving unemployment benefits for twenty (20) weeks, with a corresponding reduction in the maximum potential benefit amount. Id. The term misconduct is defined by statute to mean:

> [C]onduct evincing such willful and wanton disregard of an 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.

Id. Based on the Panel's findings of facts above, it properly concluded:

> [Appellant] deliberately disregarded the standard of behavior the employer had the right to expect. Therefore, we find the [Appellant] was discharged for misconduct connected with the employment.

In affirming the Panel's Decision, the ALC stated:

> Here, Appellant's version of events and Employer's version of events are in conflict.
> Employer asserts Appellant initially refused a transfer directive and then called Judge Simmons a liar to his face in his courtroom. Appellant maintains she merely stated Judge Simmons's recollection of an alleged event was inaccurate. The Appellate Panel found Judge Simmons was credible. See Milliken & Co. v. S.C. Emp't Sec. Comm'n, 321 S.C. 349, 350, 468 S.E.2d 638, 639 (1996) ("[O]n questions of witness credibility we defer to the judgment of the agency."). This Court find the manner in which Appellant addressed Judge Simmons constituted insubordination and a disregard for the standard of behavior Employer had a right to expect from Appellant.

Appellant asserts that her outburst against Simmons at the meeting was merely argumentative and not sufficient to meet the definition of insubordination found in Employer's Handbook and therefore not legally sufficient to be characterized as misconduct under the statute. This argument is without merit. Appellant's behavior at the meeting was clearly sufficient reason to discharge her, and the Panel correctly concluded that her action rose to the level of misconduct as contemplated by S.C Code Ann. § 41-35-120(2)(a). The ALC affirmed the Panel's finding in this regard and held:

> Because Appellant engaged in insubordination, which is specifically delineated as an appropriate reason to terminate employment, this Court finds Appellant's argument that her actions were not appropriate grounds

> for termination under Employer's policy to be without merit. Additionally, Employer had no obligation under its policy to issue a warning prior to termination.

Furthermore, a reasonable rule encompasses standards of behavior that an employer has a right to expect from an employee. Bandemer v. Department of Employment Security, 204 Ill.App.3d 192, 195, 149 Ill.Dec. 699, 562 N.E.2d 6, 7 (1990). Notably, such a rule need not be written or otherwise formalized. Caterpillar, Inc. v. Department of Employment Security, 313 Ill.App.3d 645, 654, 246 Ill.Dec. 472, 730 N.E.2d 497, 505 (2000). Nor is the employer required to prove the existence of the rule by direct evidence. Greenlaw v. Department of Employment Security, 299 Ill.App.3d 446, 448, 233 Ill.Dec. 532, 701 N.E.2d 175, 177 (1998). The Panel, held "[Appellant] deliberately disregarded the standard of behavior [E]mployer had the right to expect." (R. p. 151.) The Panel could reach such a conclusion without reference to the Employer's handbook "through a common sense realization that some behavior intentionally and substantially disregards an employer's interests." Stovall v. Department of Employment Security, 262 Ill.App.3d 1098, 1102, 203 Ill.Dec. 640, 640 N.E.2d 299, 303 (1994). Calling a judge a liar or in any way insinuating that he is dishonest in his capacity as a judge undoubtedly rises to the level of misconduct. It is a clear violation of the standard of behavior a judge should expect from his or her court clerk. Therefore, no specific prohibition against calling a magistrate judge a liar need be explicitly stated in Employer handbook to qualify as a deliberate disregard of a standard of behavior Employer had a right to expect. See Oxley v. Med. Rock Specialties, Inc., 139 Idaho 476, 480, 80 P.3d 1077, 1081 (2003)("An employer need only communicate those standards and expectations that do not flow naturally from the employment relationship."); see also

Nelson v. Dep't of Employment Sec., 801 P.2d 158, 162 (Utah Ct. App. 1990) (an employer must provide an "explanation of expected behavior...unless the conduct involved is a 'flagrant violation of a universal standard of behavior.'")

III. WHETHER THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THE APPELLATE PANEL DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW REMAND TO TAKE ADDITIONAL EVIDENCE.

Appellant argues that the decision of the Panel is controlled by an error of law because (1) a violation of her substantive and/or procedural due process rights at the administrative hearing level by failure to admit into the Record the written arguments and documents included in her August 17th Motion. (2) The Panel abused its discretion by failing to remand the case back to the Tribunal for the taking of additional evidence for the purpose of rectifying Appellant's failure to submit the aforementioned written arguments and documents. (3) This Court's review of the current Record in light of the allegations above further violates her due process rights. These arguments are wholly without merit and should be rejected.

Due process requires "(1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). To prove the denial of due process, a party must show that it has been substantially prejudiced by the administrative process. Palmetto Alliance, Inc. v. S. C. Pub. Serv. Commn, 282 S.C. 430, 319 S.E.2d 695 (1984); However, **"[o]ne cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it."** Zaman v. S.C. State Bd. of Medical Examiners, 305 S.C. 281, 408 S.E.2d 213, 215 (1991)(emphasis added.). Pursuant to S.C.

Regs. 47-51, "All Appeal Tribunal hearings shall be de novo in nature and conducted informally in conformity with the South Carolina Administrative Procedures Act." Id; see also S.C. Code Ann. § 1-23-330(1)("Except in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed.")

PROCEEDINGS BEFORE THE TRIBUNAL

The Record shows Appellant did not admit into evidence nor did she proffer her written arguments or any of her thirty-one (31) documents. As a result, they were not considered by the hearing officer nor made part of the Record on review by the Panel. Appellant contends that the hearing officer committed procedural error by failing, *sua sponte*, to admit all of Appellant's written arguments and thirty-one (31) attached documents. Her assertion is based on the requirement in the regulation that "All issues relevant to the appeal shall be considered and passed upon." S.C. Regs. 47-51. Appellant's argument mistakes the term "issues" for the term "evidence." The "issue(s)" before the hearing officer were whether, "Appellant was discharged from [her] job with [her] most recent bona fide employer for improper action on the job, whether Appellant's actions were contrary to what an employer has a right to expect, and whether Appellant was therefore discharged for misconduct connected with the employment under the South Carolina code section 41-35-120(2)(a)." (R. p. __.) A review of the Tribunal Decision illustrates that the hearing officer fulfilled this obligation. On the other hand, Appellant, not the hearing officer, had the duty to present her case by introducing her evidence. The hearing officer would have then been required to make a relevancy determination. State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983)("[hearing officer] is given broad

discretion in ruling on questions concerning the relevancy of evidence..."). Employer would have had the right to raise any objections to such evidence. Concerning offers of "excluded"[1] evidence, SCRE 103 (a) provides that "the substance of the evidence and the specific evidentiary basis supporting admission" must be made known to the finder of fact "by offer or were apparent from the context." SCRE 103 (a)(2). "The reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice." State v. King, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005); Thus, any evidence allegedly excluded would require some explanation of the evidence to properly establish an offer of proof for this Court to consider. Here, however Appellant attempted at the hearing and now attempts before this Court to admit evidence by written motion which was and continues to be improper under the APA as well as this Court's established procedures in a contested case hearing. See ALC Rules

This Court may only review a hearing officer's evidentiary ruling in light of the evidence actually introduced and/or proffered in the hearing and not such evidence offered before the hearing as is the case at present. See State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) ("[A]ppellant...did not raise this issue at any point during trial. Consequently, this issue is not preserved for review.")

Appellant's pre-hearing motion can most properly be equated to a motion *in limine,*[2] however, Department regulations do not provide for the admission of evidence

[1] Using the term excluded suggests that Appellant offered or introduced such evidence. However the Record is clear that Appellant never moved the hearing officer to do so.

[2] Generally, a motion *in limine* seeks a pretrial ruling preventing the disclosure of potentially prejudicial matter to the jury. State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct.App.1995). Any *in limine* ruling by a hearing officer and the testimony encapsulated within that proceeding is, in essence, a temporary decision on admissibility. A ruling *in limine* is not a final ruling on the admissibility of evidence. State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). Evidence developed during trial may warrant a change in the *in limine* ruling. See State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct.App.1997). "The final ruling on admissibility of evidence is nexed directly to trial testimony." State

by pretrial motion. C.f. S.C. Code Ann. Regs. 47-51 ("The parties to an appeal, ***with the consent*** of the Appeal Tribunal, ***may stipulate*** the facts involved in writing."); see also S.C. Code Ann. § 1-23-330 ("Objections to evidentiary offers may be made and shall be noted in the record."). Even if SCRE Rule 103, allows such a motion, failure to obtain a specific ruling either before or during the hearing prevents review of the issue by this Court. See In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to ***and ruled upon*** by the trial court.")(emphasis added); see also State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001)(Pretrial ruling on the admissibility of evidence is preliminary, and is subject to change based on developments at hearing). See United States v. Valenti, 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

With regard to the transcript of the administrative hearing, the Record does not reflect an offer of the written arguments or documents into evidence, an objection to such an offer, or a ruling on the evidence's admissibility. While, Appellant moved to have her written arguments and documents admitted via a pretrial motion, none of this documentation was actually introduced at the hearing. As a consequence, Appellant deprived Employer of its opportunity to object and/or offer rebuttal evidence. As the South Carolina Supreme Court has stated:

> To hold evidence to which reference is made, but which is not offered into evidence, is admissible would severely prejudice the party opposing its introduction by virtually precluding the party from placing the grounds for his objection on the record. Therefore, as the record clearly reflects the

---

v. Humphries, 346 S.C. 435, 449, 551 S.E.2d 286, 293-94 (Ct. App. 2001) rev'd on other grounds, 354 S.C. 87, 579 S.E.2d 613 (2003)

> contested items were never entered into evidence we believe the Court of Appeals erred in holding the [evidence] was admissible.

Roberts v. Roberts, 299 S.C. 315, 319, 384 S.E.2d 719, 722 (1989)

In any event, Appellant's written statements must be excluded as impermissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute. Rule 802, SCRE. Had Appellant properly moved to have the hearing officer make a ruling on the admissibility of her documents, such evidence should have properly been excluded as hearsay. Additionally, allowing Appellant to introduce written arguments would improperly bolster Appellant's testimony.

The determination in this case hinges on the Appellant's credibility, and the written testimony in her motions are cumulative to Appellant's testimony. As our courts have held, where credibility is the ultimate issue in a case, the admission of corroboration evidence that is merely cumulative to the party's testimony is improper. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) Because the Appellant's credibility was the ultimate determination to make in deciding Appellant's eligibility for unemployment benefits it would have been error to admit the written testimony.

REVIEW BY THE PANEL

Even assuming, *arguendo*, the Tribunal did err, "[a]n adequate de novo review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body." Unisys Corp. v. S.C. Budget and Control Bd. Div. of General Services Info. Tech. Mgmt. Office, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001). The

Panel reviewed the issue regarding any error by the Tribunal in not admitting and/or considering the additional/excluded evidence. Here the Panel reviewed the Tribunal's alleged error in not admitting the evidence. The Panel found:

> Although the [Appellant]'s documents were not formally entered into evidence by the hearing officer, the [Appellant] made several references to the documents during the hearing and she was permitted to testify and ask questions of the witnesses from the documents. Further, she did not request specific documents to be entered as exhibits during the presentation of her case.

(R. pp. ___.) The Panel therefore concluded:

> We find the [Appellant] was afforded a full, fair, and meaningful opportunity to present her case. The record was fully and fairly developed by the administrative hearing officer and is sufficient for us to render a fair decision. Reopening the record in order to admit additional evidence as described in the [Appellant]'s written brief to the Appellate Panel is unnecessary and would not affect the outcome of this decision. Therefore, we find no cause to remand this case for further proceedings and the [Appellant]'s request is denied.

Id.

"Under S.C. Code Ann. § 41-35-710[], the [Panel] reviews the decision of the [Tribunal] 'on the basis of the evidence previously submitted in such case or [it may] direct the taking of additional evidence.'" Merck v. S. Carolina Employment Sec. Comm'n, 290 S.C. 459, 460, 351 S.E.2d 338, 339 (1986). The decision whether to take additional evidence is within the sound discretion of the Panel. See Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 225–26, 333 S.E.2d 338, 340 (Ct.App.1985). There is no regulation controlling when the Panel should direct the taking of additional testimony. However, the APA instructs that additional evidence may be taken if it is "shown to the satisfaction of the court that the additional evidence is ***material*** and that there were ***good reasons for failure*** to present it in the [lower] proceeding." S.C. Code

Ann. § 1-23-380(3). First, Appellant raised no good reasons for her failure to present the evidence at the first proceeding. Second, the arguments and documents in the written motion are not material. As stated above, the written arguments are inadmissible hearsay, and, the documents Appellant wishes to include in the record were sufficiently referenced in the Record to allow the Panel to make a fair decision on the Record as it stood.

For all the reasons stated above, the Department submits that this Court should reject Appellant's argument on this point. In short, the evidence that Appellant now wishes to admit is not material and she has not presented any good reasons why she could not have presented this evidence during the hearing before the single hearing officer.

REVIEW BY THE ALC

South Carolina cases have consistently recognized that a court may not consider evidence not properly introduced in the record. See S.C. Code Ann. § 1-23-320(g)(2) and (i); see also Tuomey Reg'l Med. Ctr., Inc. v. McIntosh, 315 S.C. 189, 432 S.E.2d 485 (1993)(hospital failed to proffer a further charge as to effect of the amended complaint); Gold Kist, Inc. v. Citizens and Southern Nat'l Bank of South Carolina, 286 S.C. 272, 333 S.E.2d 67 (Ct. App. 1985) (failure to set forth in the transcript a record of proffer of the evidence prevents consideration of error on appeal). This rule protects the parties from bias by the finder of fact through the rules of evidence and procedure. In Bonaparte v. Floyd, 291 S.C. 427, 354 S.E.2d 40 (Ct. App. 1987), certain medical bills were marked for identification during examination of a witness but not proffered into evidence. In its opinion the South Carolina Court of Appeals stated: "We cannot see from this record any attempt to introduce into evidence the 1982 physicians' bills and prescription receipts...In the absence of such a record, this issue cannot be considered on appeal." Id., 291 S.C. at

444, 354 S.E.2d at 50. Applied to the present facts, case law dictates that Appellant's written arguments and allegedly proffered documents were never properly accepted as a part of the Record, and therefore cannot be used in the determination or consideration of the outcome.

The ALC properly denied Appellant request for remand by finding:

> Furthermore, pursuant to section 1-23-380(4), this Court considered whether Appellant's "alleged irregularities in procedure" required this Court to remand the case to the agency for further action as this court considers appropriate. I find this is not necessary because, as previously noted, Appellant was not denied due process or prejudiced as a result of the Appellate Panel's review of the record before it. Therefore, although the record before this court differs from the record before the Appellate Panel, I find no impropriety in this Court's review based on the current record and supplemental record before it.

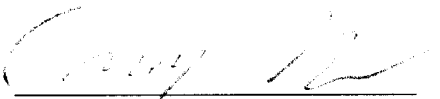
IV. APPELLANT'S ADDITIONAL ARGUMENTS WERE NOT PRESERVED FOR REVIEW BY THE ALC OR THIS COURT.

Appellant raises numerous additional arguments that were not raised to and/or not ruled on by the Panel. The ALC properly held that "Appellant's other statutory and/or constitutional arguments...were not raised to or ruled upon by the Appeal Tribunal or the Appellate Panel. Consequently, they are not preserved for this Court's review. See In re Care & Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal.")."

CONCLUSION

For the reasons set forth herein, the Department respectfully requests that this Court affirm the ALC's decision in its entirety.

Respectfully submitted,



E.B. "Trey" McLeod, III
Department of Employment & Workforce
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-2666
legal@dew.sc.gov

February 23, 2015

Attorney for Respondent DEW

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley Robinson, Administrative Law Judge
Appellate Case No. 2014-001484

Stephanie Stewart,

Appellant,

v.

South Carolina Department of Employment and Workforce and Oconee County, SC,

Respondents.

PROOF OF SERVICE

I certify that I have served the Respondent's South Carolina Department of Employment and Workforce's Initial Brief and Designation of Matter on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on February 23, 2015, addressed to the parties at their addresses of record:

Stephanie Stewart
2142 Toccoa Highway
Westminster, SC 29693

Reginald Gay
PO Box 447
Greenville, SC 29602

February 23, 2015

Kristi Chesley
Administrative Legal Assistant
SC Dept of Employment and Workforce
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-0395

P.O. Box 995
1550 Gadsden Street
Columbia, SC 29202
dew.sc.gov

Nikki R. Haley
Governor

Cheryl M. Stanton
Executive Director

Post Office Box 8597
Columbia, SC 29202
Telephone: (803) 737-2666
Fax: (803) 737-0124

February 23, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Stephanie Stewart v. SC Department of Employment and Workforce and Oconee County, SC
Appellate Case No: 2014-001484

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of the Initial Brief and Designation of Matter of the Respondent DEW in the above case. Also enclosed is a Proof of Service to Ms. Stewart and Counsel for Oconee County.

Please let me know if you have any questions.

Sincerely,

Kristi Chesley

Kristi Chesley
Administrative Legal Assistant for
Trey McLeod
General Counsel

ORKFORCE

le Jenny Abbott Kitchings
Carolina Court of Appeals
ox 11629
outh Carolina 29211

2-24-15

AAH2SMP 29211

Central 10