

NOTICE OF APPEAL FROM ADMINISTRATIVE TRIBUNAL **RECEIVED**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

FEB 01 2016
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 15-ALJ-22-0497-AP

South Carolina DEW's &
South Carolina ALC

Respondent,

v.

Billie D. Mueller

Appellant.

NOTICE OF APPEAL

Billie D. Mueller appeals the decision of the Honorable John D. McLeod dated January 4, 2016. Appellant received a copy of this decision on January 4, 2016 via Email.

January 5, 2016

Billie D. Mueller
Billie D. Mueller
1341 Rockfish Drive
Manning, SC 29102
(803) 410-6935
Appellant has no Attorney

Other Counsel of Record:
Trey McLeod
Office of General Counsel SCDEW
Post Office Box 8597
Columbia, SC 29202
legal@dew.sc.gov
Attorney for Respondent

2016-000037

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Billie D. Mueller,)
)
 Appellant,)
)
 vs.)
)
 South Carolina Department of)
 Employment and Workforce,)
)
 Respondents.)
)

Docket No. 15-ALJ-22-0497-AP

ORDER

FILED

JAN 04 2016

SC ADMIN. LAW COURT

This matter is before the Administrative Law Court ("ALC" or "Court") pursuant to a Notice of Appeal that was filed by Billie D. Mueller ("Appellant"). Appellant appeals from an Appellate Panel Decision of the South Carolina of the South Carolina Department of Employment and Workforce ("Department"), dismissing the appeal as untimely pursuant to S.C. Code Ann. § 41-35-660 (Supp. 2014). The ALC has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2014).

BACKGROUND

After separating from her employer, Appellant filed an initial claim for unemployment insurance benefits with the Department's Claims Adjudicator that was denied. Appellant appealed the denial of her claim to the Appeal Tribunal ("Tribunal"), which upheld the denial of benefits in an order that was mailed to Appellant on May 7, 2015. The Record on Appeal ("Record") shows that Appellant did not file her appeal with the Appellate Panel ("Panel") until May 29, 2015.

The Panel remanded the appeal back to the Tribunal for an evidentiary hearing regarding the timeliness of Appellant's appeal. The Panel would render a decision regarding the timeliness of Appellant's appeal based upon the record established on remand to the Tribunal.

The Tribunal hearing commenced as scheduled for June 18, 2015, with Appellant appearing *pro se* before the hearing officer. It was Appellant's position that she tried to appeal as soon as she read the Tribunal decision. However, Appellant was not certain whether she was required to file her appeal within 10 days of it being mailed or received. More importantly, Appellant admitted that she does not know when the decision arrived in the mail at her house.

because she does not check her mail regularly. Appellant only checks her mail once every two weeks.

Upon review of the Tribunal record, the Panel determined that the Department properly mailed the Tribunal decision to Appellant on May 7, 2015 and that the deadline to file an appeal was May 18, 2015. The Panel found that Appellant filed her appeal eleven (11) days after the appeal period expired and concluded that the greater weight of the evidence indicated that if Appellant had checked her mail on a regular basis, she would have received the decision earlier and could have filed a timely appeal.

Appellant now appeals to the ALC.

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) (finding that the Employment Security Commission, the 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 the Department. See S.C. Code Ann. §§ 1-23-380, 1-23-600(D) (Supp. 2014); 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). Section 1-23-380(5) of the South Carolina Code (Supp. 2014) provides the standard used by appellate bodies to review agency decisions. See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). That section states:

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:

- (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.

§ 1-23-380(5) (Supp. 2014).

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., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

When 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, 466 S.E.2d 357 (1996). Thus, the party challenging an agency action has the **burden** of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. 219, 467 S.E.2d 913 (citing Hamm v. AT&T, 302 S.C. 210, 394 S.E.2d 842 (1994)). 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. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995). Finally, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 467 S.E.2d at 917.

ISSUE ON APPEAL

1. Did the Appellate Panel err in finding that Appellant neglected to file her appeal in a timely manner?
2. Did the Appellant Panel err in finding that the Appellant received the decision in a timely manner?
3. Did the Appellate Panel and Appeal Tribunal err in the decision on severance payments and bonus no being wages for which Appellant paid all Federal, State and FICA taxes?

DISCUSSION

Appellant argued in her brief on appeal that the Department did not present any certified proof that the Tribunal decision was mailed in a timely manner. The Department argued in its brief that Appellant's appeal was untimely and that the Tribunal decision became the final decision in this appeal pursuant to Section 41-35-680.

Section 41-35-660 provides that, " The claimant or any other interested party may file an appeal from an initial determination, redetermination, or subsequent determination not later than ten days after the determination was mailed to his last known address." S.C. Code Ann. § 41-35-660 (Supp. 2014). Here, the record is clear that the Tribunal decision was mailed on May 7, 2014 and that the last day to file an appeal was May 18, 2015. However, Appellant filed her appeal on May 29, 2014, which was eleven (11) days beyond the time allowed under Section 41-35-660. As a result, Appellant's appeal to the Panel was untimely. The Court finds that the Panel decision that Appellant appealed from is supported by the substantial evidence in the record.

With regard to the remaining issues that were raised by Appellant, this Court will only review issues that were raised and ruled upon below.

The South Carolina Supreme Court has stated the following regarding the preservation of an issue for appellate review:

It is axiomatic that an issue cannot be raise for the first time on appeal, but that must have been raised to and ruled upon by the trial judge to be preserved for appellate review. (Emphasis supplied) (Internal citation omitted).

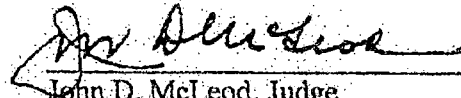
Wilder Corporation v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

The remaining issues and facts that were argued in Appellant's brief were neither raised before the Tribunal nor ruled upon by the Panel and are therefore not subject to review by this Court.

IT IS HEREBY ORDERED that the Appellate Panel decision is **AFFIRMED**.

AND IT IS SO ORDERED.

January 4, 2015
Columbia, S.C.



John D. McLeod, Judge
South Carolina Administrative Law Court

H

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
INITIAL DETERMINATION OF STATUS AS AN INSURED WORKER

SC WORKS CENTER 430

EFFECTIVE DATE 03/30/15

DATE FILED 03/31/15

DATE PREPARED 03/31/15

0

527-76-0453

BILLIE D MUELLER
1341 ROCKFISH DR

MANNING

SC 29102

*BENEFITS YOU MAY BE ELIGIBLE FOR:

MILITARY ASSIGNMENTS

WEEKLY BENEFIT AMOUNT 326.00

MAXIMUM TOTAL BENEFITS 6520.00

BENEFIT YEAR ENDS

03/29/16

*This statement establishes that you have the necessary wages to qualify for unemployment insurance. However, to receive benefits your job separation must also be considered. If you qualify, this is the maximum you may be entitled to receive.

SEE BACK FOR CLAIMANT INFORMATION

EMPLOYMENT RECORD		STANDARD-BASE PERIOD QUARTERLY EARNINGS							
EMPLOYER	ACCOUNT NO.	YEAR	*QTR	YEAR	*QTR	YEAR	*QTR	YEAR	*QTR
EBTRON, INC.	289798	2013	04	2014	01	2014	02	2014	03
		15454.23		13317.36		35010.49			.00

NOTE: The weekly benefit amount on this form reflects your **GROSS PAYMENT EACH WEEK BEFORE ANY DEDUCTIONS** are made. Possible deductions to this amount include, but are not limited to, tax withholding, pension, child support, offset of overpayment, and part-time earnings. **ALSO, YOUR FINAL PAYMENT MAY BE LESS THAN THE FULL WEEKLY BENEFIT AMOUNT BASED ON THE BALANCE REMAINING IN YOUR ACCOUNT.**

*QTR. STANDARD BASE QUARTER TOTAL 15454.23 13317.36 35010.49 .00
1 - JAN, FEB, MAR, 3 - JULY, AUG, SEPT.

15

Void <input type="checkbox"/>		a. Employee's social security number 527-76-0453		OMB No. 1545-0008 X4A		006115		000150					
b. Employer identification number (EIN) 22-2455232				1 Wages, tips, other compensation 48327.85		2 Federal income tax withheld 6271.81							
c. Employer's name, address, and ZIP code EBTRON INC 1663 HIGHWAY 701 S LORIS SC 29569				3 Social security wages 48327.85		4 Social security tax withheld 2996.33							
				5 Medicare wages and tips 48327.85		6 Medicare tax withheld 700.75							
				7 Social security tips		8 Allocated tips							
d. Control number 000150 CHAR/X4A				9		10 Dependent care benefits							
e. Employee's first name and initial Last name BILLIE MUELLER POST OFFICE BOX 98 DAVIS STATION SC 29401				11 Nonqualified plans		12a See instructions for box 12 W 446.15							
				13 Statutory employee <input type="checkbox"/> Retirement plan <input type="checkbox"/> Third-party sick pay <input type="checkbox"/>		12b							
				14 Other		12c							
						12d							
f. Employee's address and ZIP code				16 State wages, tips, etc. 48327.85		17 State income tax 3180.96		18 Local wages, tips, etc.		19 Local income tax		20 Locality name	
15 State Employer's state ID number SC 25319905 1													

Form **W-2** Wage and Tax Statement
Copy D - For Employer

2014

Department of the Treasury - Internal Revenue Service
For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* QUALITY STORES, INC., ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 12–1408. Argued January 14, 2014—Decided March 25, 2014

Respondent Quality Stores, Inc., and its affiliates (collectively Quality Stores) made severance payments to employees who were involuntarily terminated as part of Quality Stores' Chapter 11 bankruptcy. Payments—which were made pursuant to plans that did not tie payments to the receipt of state unemployment insurance—varied based on job seniority and time served. Quality Stores paid and withheld, *inter alia*, taxes required under the Federal Insurance Contributions Act (FICA), 26 U. S. C. §3101 *et seq.* Later believing that the payments should not have been taxed as wages under FICA, Quality Stores sought a refund on behalf of itself and about 1,850 former employees. When the Internal Revenue Service (IRS) did not allow or deny the refund, Quality Stores initiated proceedings in the Bankruptcy Court, which granted summary judgment in its favor. The District Court and Sixth Circuit affirmed, concluding that severance payments are not wages under FICA.

Held: The severance payments at issue are taxable wages for FICA purposes. Pp. 4–15.

(a) FICA defines “wages” broadly as “all remuneration for employment.” §3121(a). As a matter of plain meaning, severance payments fit this definition: They are a form of remuneration made only to employees in consideration for employment. “Employment” is “any service . . . performed . . . by an employee” for an employer. §3121(b). By varying according to a terminated employee’s function and seniority, the severance payments at issue confirm the principle that “service” means not only work actually done but the entire employer-employee relationship for which compensation is paid.” *Social Security Bd. v. Nierotko*, 327 U. S. 358, 365–366. This broad definition is reinforced by the specificity of FICA’s lengthy list of exemptions. The

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FORM 7

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Trey McLeod, South Carolina
DEW's & John D. McLeod,
South Carolina ALC

Respondent,

v.

Billie D. Mueller,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Trey McLeod by depositing a copy of it sent via email, on January 5, 2016, addressed to his Office of Record, Trey McLeod, Post Office Box 8597, Columbia, SC 29202, legal@dew.sc.gov.

January 5, 2016

Billie D. Mueller

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Dinkerboy49@gmail.com

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Attorney for Respondent

FORM 7
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Trey McLeod, South Carolina
DEW's & John D. McLeod,
South Carolina ALC

Respondent,

v.

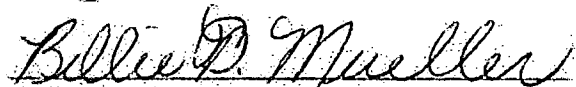
Billie D. Mueller,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on John D. McLeod by depositing a copy of it sent via email, on January 5, 2016, addressed to his Office of Record, John D. McLeod, 1205 Pendleton Street, Suite 224, Columbia, SC 29201

January 5, 2016



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SC Court of Appeals

Billie D. Mueller
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Ph.(803) 410-6935
Cell (803) 460-2812

January 29, 2016

South Carolina Court of Appeals
Jenny Abbot Kitchings, Clerk
PO Box 11629
Columbia, SC 29211

RE: Billie D. Mueller v, South Carolina Department of Employment and
Workforce
Docket No.: 15-ALJ-22-0497-AP

Dear Ms. Kitchings:

Enclosed for filing please find an original and one copy of Appellant's Notice of Appeal to the Court of Appeals. I have already sent in the \$100.00 filing fee for this Notice because of my limited finances being on Social Security had to wait on my monthly check.

If you have any questions please feel free to contact me.

Very truly yours,

Billie D. Mueller

Billie D. Mueller
1341 Rockfish Drive
Manning, SC 29102
(803) 410-6935

Cc: Trey McLeod General Counsel SCDEWS
Honorable John D. McLeod SCALC

Billie D. Mueller
1341 Rockfish Drive
Manning, SC 29102

COLUMBIA SC 290

29 JAN 2016 PM 2 L



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South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
PO Box 11629
Columbia, SC 29211

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SC Court of Appeals

Case # 2016-000037

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