

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT
Ralph King Anderson III, Chief Administrative Law Judge
Case No.: 15-ALJ-22-0204-AP

Appellate Case No. 2015-002631

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APR 22 2016

SC Court of Appeals

Bobby Smith,

Appellant,

v.

South Carolina Department of Employment
and Workforce and Greenwood Mills,

Respondent.

INITIAL BRIEF OF RESPONDENT

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RESTATEMENT OF THE ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT CORRECTLY DECIDE THAT APPELLANT'S DUE PROCESS/PROCEDURAL ARGUMENTS WERE NOT RAISED AT THE APPEALS TRIBUNAL HEARING AND, THUS, ARE NOT PRESERVED FOR APPELLATE REVIEW?

- II. DID THE ADMINISTRATIVE LAW COURT CORRECTLY DECIDE THAT SUBSTANTIAL EVIDENCE SUPPORTED DEW'S FINDING THAT APPELLANT WAS DISCHARGED FOR CAUSE OTHER THAN MISCONDUCT CONNECTED WITH HIS EMPLOYMENT?

STATEMENT OF THE CASE

Appellant Bobby Smith (Appellant) filed a claim with Respondent South Carolina Department of Employment and Workforce (DEW or Department) for unemployment benefits. (ALC R. p. 5-13.) Respondent Greenwood Mills, Incorporated (“Greenwood Mills”), Appellant’s former employer, responded to the claim. (ALC R. pp. 16-18.) On January 2, 2015, the Department’s claims adjudicator determined that Appellant voluntarily left his employment without good cause and indefinitely disqualified Appellant from receiving benefits pursuant to S.C. Code Ann. §41-35-120. (ALC R. pp. 25;77).

Appellant appealed the determination to the Appeal Tribunal (“Tribunal”). (ALC R. pp. 26-29.) In Decision No. 2015-A-1119, the Tribunal modified the claims adjudicator’s determination, finding that Appellant was discharged for cause, other than misconduct, connected to his employment and partially disqualified from receiving unemployment benefits for seventeen (17) weeks. (ALC R. pp. 89-90). Appellant appealed the Tribunal decision to the Appellate Panel (“Panel”). In Decision No. 2015-P-383, the Panel affirmed the Tribunal’s discharge for cause, other than misconduct. (ALC R. pp.1-3).

Appellant appealed the Panel’s decision to the Administrative Law Court (“ALC”). On November 25, 2015, the ALC issued an Order affirming the Panel’s finding of discharge for cause connected with the employment. (ALC Order dated November 25, 2015.) The ALC found that the Panel’s fact finding was supported by substantial evidence and that the Panel did not err as a matter of law in relying upon

hearsay evidence. (*Id.* at pp. 6-9.) Appellant timely appealed to this Court seeking further judicial review of the ALC decision.

STATEMENT OF THE FACTS

BACKGROUND

Appellant formerly worked as an electrician for Greenwood Mills. (ALC R. 8, lines 15-18.) As to the circumstances of Appellant's employment separation, Greenwood Mills' Vice President of Human Resources Warren Moore gave the following explanation in response to Appellant's application for unemployment benefits:

Mr. Smith left his job 1 hr. after shift started because he was upset over a work space issue. He told 3 people in management and finally Warren Moore, VP, HR, he was "so emotional that he could not work." Mr. Moore asked him if [he] was aware the plant would be left with no electrician on duty. Mr. Smith said yes. Mr. Moore allowed him to go home with the understanding he must call or see Bryan Hardman by 10:00 a.m. the next day if he wanted to keep the job. He did not call or come see Mr. Hardman. (ALC R. 18.)

Appellant gave a similar explanation on his application, except he claimed Moore

instructed him to call in **only if** he was not planning to report to work that day:

I told my HR manager that I may not come in for work the following day. He told me to call my manager 6hr prior to my shift start of 4pm [i.e., 10 AM] to let him know if I was not going in, so that way he could schedule someone in my place. [T]here was no need to call because I was planning to go in, although I did call in 2.5hrs early prior to my shift start for other reasons [M]y manager said I was suppose[d] to call at 10am therefore he fired me. (ALC R. 7.)

EMPLOYER'S TESTIMONY

James Nicholson,¹ Plant Engineer Brian Hardman, and Assistant Human Resources Manager Janet Alexander testified at the hearing for Greenwood Mills. Vice President of Human Resources Warren Moore was not available for the hearing.

¹ Nicholson's job title was not stated in the record.

Nicholson testified that Appellant was upset that another employee had put his/her toolbox in his workspace. (ALC R. 39, lines 11-21.) Nicholson tried to calm Appellant down and get him to continue working rather than raising the issue to other managers and Moore. (*Id.*) However, after speaking with Moore, Appellant came back to Nicholson, turned in his phone, and told him that “he was too upset to run his job and he was going to go home.” (ALC R. 41, lines 1-3; ALC R. 47, lines 10-13.) Nicholson advised Appellant not to leave for the day. (ALC R. 47, lines 14-15.) According to Nicholson, Moore allowed Appellant to go home that day with the understanding that he would call Brian Hardman by 10 AM the following day to discuss whether he would report to work for his scheduled shift starting at 4 PM. (ALC R. 41, line 5 – ALC R. 43, line 11.) When he did not call Hardman by 10 AM, the Employer terminated Appellant’s employment. (*Id.*)

Hardman testified Appellant was terminated “[b]ecause he did not make contact with me by 10 A.M. the following morning to let me know whether he was coming in or if he was quitting or what his state of mind was.” (ALC R. 51, lines 10-12.) Hardman was not present for the conversation between Moore and Appellant regarding the 10 AM call-in requirement; however, Hardman testified that Moore told him directly that Appellant must call him by 10 AM the next day or his employment would be terminated. (ALC R. 54, lines 13-15.) Appellant did not call Hardman by 10 AM; rather, Appellant called around 2 PM “[t]o tell me his state of mind and why he had done what he done on the previous day.” (ALC R. 53, lines 7-10.) At that time, Hardman informed Appellant that he was terminated for not following the instruction to call by 10 AM. (ALC R. 53, lines 20-24.)

Lastly, Alexander testified she discussed with Moore the fact that Appellant left work early. She stated Moore told her that Appellant was to call Hardman and that, if Appellant called her, she should transfer him to Hardman. (ALC R. 60, lines 18-23.)

APPELLANT'S TESTIMONY

Appellant testified that when he left work early, he was so upset over the toolbox/workspace issue that he was not sure whether he would come into work the next day. (ALC R. 68, lines 1-17.) He admitted that Moore also did not know whether he (Appellant) would show up for work. (ALC R. 68, line 22 – 69, line 5.) At times during the hearing, Appellant said Moore instructed him to call by 10 AM regardless to let Hardman know if he was coming or not. (ALC R. 67, line 21 – 26; ALC R. 69, lines 1-8; ALC R. 72, lines 5-6.) At other times, Appellant asserted, as he now maintains on appeal, that Moore told him to call in only if he was not reporting to work. (ALC R. 67, lines 9-10; ALC R. 69, lines 15-16; ALC R. 74, lines 12-13.) Appellant testified that when he called later in the day at 1:37 PM, Hardman told him he was terminated because he did not comply with Moore's instruction to call by 10 AM. (ALC R. 72, lines 15-26.)

DOCUMENTARY EVIDENCE

Documents relating to Appellant's initial claim for benefits were admitted into evidence without objection as Agency Exhibit 1. (ALC R. pp. 77-88.) In his application, Appellant explained the final incident resulting in his discharge: "I told my HR manager that I may not come in for work the following day. He told me to call my manager 6hr prior to my shift start of 4pm to let him know if I was not going in, so that way he could schedule someone in my place. There was no need to call because I was planning to go in." (ALC R. p. 88).

On December 10, 2014, Employer responded to Appellant's application. The contact person listed on the Employer Response is Warren Moore with an email address listed as wmoore@greenwoodmill.com. In this response, Moore wrote:

Mr. Smith left his job 1hr. after shift started because he was upset over a work space issue. He told 3 people in management and finally Warren Moore, VP, HR he was 'so emotional that he could not work.' Mr. Moore asked him if (sic) aware the plant would be left with no electrician on duty. Mr. Smith said yes. Mr. Moore allowed him to go home with the understanding he must call or see Bryan Hardman by 10:00 a.m. the next day if he wanted to keep the job. He did not call or come see Mr. Hardman. (ALC R. p. 82).

On December 11, 2014 and December 12, 2014, Appellant provided additional details on his separation and essentially saying that Moore told him to call Hardman by 10 AM if he was not coming in, which he did not do because he was planning to come in. (ALC R. p. 79; 85.)

THE PANEL AND ALC DECISIONS

Based upon the above information and testimony, the Panel found that Appellant had been discharged for cause and imposed a 17-week disqualification from benefits.

(ALC R. pp. 1-3.) The Panel explained the basis for its decision as follows:

The record is in dispute; however, we find **the greater weight of credible evidence establishes the claimant failed to follow the employer's directive to call in at 10:00 a.m. . . . The Employer has presented sufficient credible evidence to show the claimant was informed he needed to call in by 10:00 a.m., regardless of whether he would report to work or not. We find the claimant was at fault in his discharge.** The employer reasonably required the claimant to inform the employer in the morning whether he would be at work that afternoon, so that the employer had sufficient time to ensure coverage of the claimant's position . . . The claimant has not presented sufficient justification for failing to call in the morning as instructed. The claimant's actions constituted a disregard for the reasonable standard of behavior the employer had a right to expect. (ALC R. 2) (emphasis added).

Appellant timely appealed the Panel's decision to the ALC. In his brief, Appellant raised four arguments. First, he argued the Employer and DEW's claim adjudicator "made false statements to prevent [Appellant] from receiving benefits." (Brief of Appellant, pp. 1; 3-4.) Second, he argued the hearing officer at the Tribunal "improperly allowed [Employer] to argue that [Appellant] was properly discharged where that argument was not set forth in the notice of the hearing." (*Id.* at pp. 1; 5-8.) As to these issues, the ALC found they were not preserved for appellate review because they were not raised to DEW. (ALC Order, pp. 5-6.)

Third, Appellant argued that the Panel erred in relying on hearsay testimony presented during the Tribunal Hearing. (Brief of Appellant, pp. 1; 8-9.) The ALC ruled that Appellant had not shown "how he was prejudiced by the statements of [Employer's] witnesses, which corroborates other evidence that is contained in the record." (ALC Order, p. 7.) The ALC further held that Appellant is precluded from arguing hearsay was improperly considered because similar testimony "was subsequently offered into the record by Appellant during his own line of questioning on cross-examination without any preservation of his previous objection." (ALC Order, pp. 7-8.)

Fourth, Appellant argued erred in denying him benefits when the "proper and credible evidence showed [he] acted reasonably in calling in 2.5 hours before his shift." (Brief of Appellant, pp. 1; 9-10.) Contrary to Appellant's argument, the ALC found that "the Panel's decision was not an abuse of discretion and was supported by substantial evidence." (ALC Order, p. 9.)

ARGUMENT

STANDARD OF REVIEW

DEW is an agency governed by the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding DEW's predecessor, the Employment Security Commission, subject to the APA). Under the APA, a reviewing 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(5).

This standard of review is commonly referred to as the substantial evidence rule:

“Substantial evidence” is something less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.

Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984); *see also Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) (Substantial evidence is “evidence which,

considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency.”).

Under the substantial evidence rule, the party challenging an agency action bears the burden “to prove convincingly that the agency's decision is unsupported by the evidence.” *Waters v. S.C. Land Resources Conservation Comm’n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); *see also 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) (“ . . . [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.’”) (citations omitted).

I. THE ADMINISTRATIVE LAW COURT CORRECTLY DECIDED THAT APPELLANT’S DUE PROCESS/PROCEDURAL ARGUMENTS WERE NOT RAISED AT THE APPEALS TRIBUNAL HEARING AND, THUS, ARE NOT PRESERVED FOR APPELLATE REVIEW

In his Brief to this Court, Appellant argues the ALC erred by finding that his procedural arguments argument regarding (1) “false statements” by the Employer and claims adjudicator and (2) issues for appeal were not set forth on the hearing notice were not preserved for appellate review. (Initial Brief of Appellant, pp. 1; 3-5.) The ALC correctly held that these two issues were not preserved for review.

Appellant, who was represented by legal counsel during the Tribunal hearing, did not raise these issues at the Tribunal or the Panel. Therefore, this Court may not consider them now. *Carson v. South Carolina Dept’t of Natural Res.*, 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (holding that allegations of due process violations are not preserved for appellate review if not raised and ruled upon by the agency); *Kiawah Resort Assoc. v. South Carolina Tax Comm’n*, 318 S.C. 502, 505-06, 458 S.E.2d 542, 544 (1995).

Setting aside Appellant's failure to raise this issue below, the fact that the claims adjudicator ruled this case a voluntary quit but the hearing officer at the Tribunal phase found those same facts constituted a discharge for cause, is not evidence that Appellant was denied due process. See S.C. Code Ann. Regs. § 47-51(C)(1) (stating that the Tribunal should conduct a *de novo* review by considering "as evidence all records of [DEW] that are material to the issues"). Additionally, the Tribunal hearing notice specifically noted the issues for the hearing were: "Voluntary Quit (for good cause)" and "Discharge (for disqualifying cause)." (ALC R. p. 30). Lastly, the hearing officer obtained stipulations from both parties that Appellant was discharged (i.e., he did not quit). (ALC R. p. 37, line 14 – ALR R. p. 38, line 8.) The hearing proceeded from there, during which time Appellant, with the assistance of counsel, had the opportunity to present evidence and question witnesses.

In short, due process requires notice and opportunity to be heard,² and that is precisely what Appellant received.

II. THE ADMINISTRATIVE LAW COURT CORRECTLY DECIDED THAT SUBSTANTIAL EVIDENCE SUPPORTED DEW'S FINDING THAT APPELLANT WAS DISCHARGED FOR CAUSE, OTHER THAN MISCONDUCT, CONNECTED WITH HE EMPLOYMENT

S.C. Code Ann. § 41-35-120(2)(b) requires disqualification from benefits for five to nineteen weeks when SCDEW finds that an employee was discharged for cause, other than misconduct. "Cause other than misconduct" is:

conduct that demonstrates a level of fault of the employee but does not rise to the level of deliberate disregard for the standards of behavior which

² See generally *Garris v. Governing Bd. of S.C. Reins. Facility*, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998) (under the South Carolina Constitution, due process is met where notice, an opportunity to be heard, an impartial adjudicator, and judicial review are provided).

the employer has the right to expect of his or her employee. Fault includes those acts or omissions of employees over which an employee exercised reasonable control and which violate reasonable requirements of the job.

S.C. Code Ann. Regs 47-100; *see also Mickens v. Southland Exch. – Joint Venture*, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991) (“ . . . [W]here the employer’s request is reasonable, a refusal to comply will constitute misconduct, justifying a discharge for cause.”)

In light of the “cause other than misconduct” definition, the question before the Panel was whether Appellant’s failure to call Hardman by 10 AM demonstrated that Appellant had a level of fault in his termination. Because Appellant admittedly did not call by 10 AM, the only real factual question is whether Moore instructed Appellant to call only if he was not reporting to work or whether Moore instructed Appellant to call regardless of whether he would report to work or not. Every individual who gave information during DEW’s initial fact-finding process or testified at the hearing, **including Appellant himself**, said Moore told Appellant to call in by 10 AM, **regardless of whether he would report to work or not:**

Appellant	“[Moore] said, ‘Bobby, you call in by 10 A.M. and let Brian know if you’re not coming in’ of if you’re . . . he said, “Let Brian Know . . .”	ALC R. 67, lines 24-25
Appellant	“[Moore] told me to call by 10 A.M. and let Brian known if I was [coming in] or not . . . ”	ALC R. 69, lines 3-4.
Appellant	HEARING OFFICER: All right and that was to advise Mr. Hardman whether you were coming in or not , is that correct? CLAIMANT: That’s correct.	ALC R. 69, lines 6-8
Appellant	“[T]he conversation was is that I just call in to let them know that I was going to be there or not be there . . . ”	ALC R. 72, lines 5-6
Warren Moore	“Mr. Moore allowed him to go home with the understanding he must call or see Bryan Hardman by 10:00 a.m. the next day if he wanted to keep the	ALC R. 18

	job.	
James Nicholson	“ . . . [T]hat is when [Moore] then had the conversation with him about going home and calling tomorrow if you value your job and he never called.”	ALC R. 39, lines 20-21
Brian Hardman	“[Moore] told me that Bobby was to contact me by 10 A.M. the next morning or he was going to be terminated. ”	ALC R. 52, lines 21-23
Janet Alexander	“[Moore] said, “Okay, I’m going to allow you to go home with the understanding that you are to contact Brian Hardman, your boss, by ten o’clock tomorrow morning . . . ”	ALC R. 62, lines 23-25

To be sure, Appellant stated at times during the hearing, as he does in his Brief to this Court, that Moore instructed him to call only if he would not be coming in. This assertion conflicts with Appellant’s own testimony, the testimony of three other witnesses, and Moore’s statement during fact finding. Therefore, the Panel reasonably found it less-than-credible and concluded “the greater weight of credible evidence establishes [Appellant] failed to follow the employer’s directive to call in at 10:00 AM [regardless of whether he would report to work or not].” (ALC R. 2.) As the ALC found, it was not an abuse of discretion for the Panel to reach this conclusion. (ALC Order, p. 9.)

As to Appellant’s argument that the Panel erred in relying upon alleged hearsay testimony in finding he was discharge for cause (Initial Brief of Appellant, pp. 1; 5-6), the ALC correctly identified that that Appellant has not shown he was prejudiced by the consideration of the testimony. (ALC Order, pp. 6-8.) As this Court has stated, “[t]hough testimony may constitute inadmissible hearsay evidence, no prejudice is shown when it merely corroborates other evidence admitted in the case. *Starkey v. Bell*, 281 S.C. 308, 315-16, 315 S.E.2d 153, 157 (Ct. App. 1984) (internal citations omitted); *Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 86 504 S.E.2d 311, 317 (1998) (stating

that though testimony may constitute inadmissible hearsay evidence, no prejudice is shown when it merely corroborates other evidence). Corroborative evidence entered into the record without objection included:

- (1) Appellant's own testimony during the Tribunal Hearing;³
- (2) Alexander's testimony regarding Moore's instructions;⁴ and
- (3) Employer's Response to Appellant's initial claims application.⁵

Furthermore, as the ALC correctly observed, Appellant may not now complain that hearsay evidence was improperly admitted where similar testimony "was offered through his own line of questioning" on cross examination. (ALC Order, pp. 7-8.). Specifically, after earlier objecting to testimony regarding the instruction given by Moore to Appellant, Appellant's counsel then asked the following questions to Hardman:

CLAIMANT ATTORNEY: And your testimony is there were instructions to call him . . . call you at 10 A.M. the next morning?

EMPLOYER WITNESS-2: Yes, sir, there was.

...

CLAIMANT ATTORNEY: And he called you sometime between 1:30 and 2:00 prior to his shift beginning?

EMPLOYER WITNESS-2: Yes, sir, I'd say it was right around 15 to two to 15 after two in that neighborhood.

...

CLAIMANT ATTORNEY: And did he inform whether he was planning on coming back to work that day?

EMPLOYER WITNESS-2: I will be honest; not that I recall but . . . as soon as he got done telling me why he had done what he done the day before I told him that I was instructed due to the situation of not calling at 10:00 this

³ See ALC R. p. 67, lines 24-25; ALC R. p. 69, lines 3-4; ALC R. p. 69, lines 6-8; ALC R. p. 72, lines 5-6.

⁴ See ALC R. p. 62, lines 23-25.

⁵ See ALC R. p. 82.

morning . . . or that morning that I was instructed to terminate him . . .

CLAIMANT ATTORNEY: Yeah, when did you know that he was terminated, when the decision had been made?

EMPLOYER WITNESS-2: When he didn't call me at 10:00. I came up and discussed it with Mr. Moore. I told him that I did not get a call and [Moore] told me that if [Appellant] did call to let [Appellant] know and of course that I was instructed to terminate him

(ALC R. 56, line 17 – ALR R. 59, line 3.)

Thus, even if Hardman's testimony constituted hearsay, Appellant waived the right to object to such testimony when his counsel, without preserving the objection, cross-examined Hardman at length about the same statements and issues. *See Merrill v. Barton*, 250 S.C. 193, 197-98, 156 S.E.2d 862, 864 (1967) (finding no error in admitting evidence when the same evidence was then inquired about on cross-examination without preserving any objections).⁶

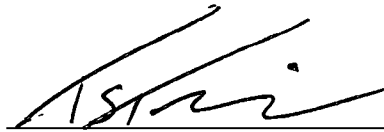
CONCLUSION

For the above stated reasons, DEW respectfully requests that the Court affirm the judgment of the Administrative Law Court. The mere fact that the record presents the possibility of two conclusions does not mean the agency's findings are not supported by substantial evidence. *Waters*, 321 S.C. at 226, 467 S.E.2d at 917. Here, the Panel reasonably concluded that Appellant's failure to call in by 10 AM as directed by his

⁶ Also, Alexander testified, without objection, to the issue, Respondent notes for the record that Appellant never objected to the hearsay testimony of Alexander on the issue of Moore's oral and written instructions to both her and Hardman. Thus, her testimony is properly admitted into evidence.

employer demonstrated a level of fault in his termination. Appellant has given this Court no credible reason to disturb that conclusion on appeal.

Respectfully Submitted,



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