

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

Appeal from
South Carolina Administrative Law Court
John D. McLeod, Administrative Law Judge

Unpublished Opinion No. 2012-UP-523 (Filed Sept. 12, 2012)

Anthony Upshaw,

Petitioner,

v.

South Carolina Department of Employment and Workforce
and Urban Services Group, Inc.,

Respondents.

APPENDIX

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from
The Administrative Law Court

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-22-0340

Anthony Upshaw,

Appellant

v.

South Carolina Department of
Employment and Workforce and
Urban Services Group, Inc.,

Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Respondents.

ORDER

SC ADMIN. LAW CI

notification impractical.... [Is] considered a resignation without notice and unpaid.

'A-6 Three instances of unexcused absences within a 6-month period. Absences confirmed by a doctor's note will not count towards the three instances. [results in] Termination.'

Prior to November 2010, the Appellant was counseled and given a verbal warning about an attendance violation. He was to report absences to either his project manager or immediate supervisor. In November 2010, the Appellant again violated the attendance policy by not calling in an absence or reporting to work. He was given a written reprimand for this second instance.

Approximately four months later, the Appellant was absent from work February 9 and 10, 2011. The Appellant asserted that he called his supervisor and left a message that he would be absent on February 9th and late to work on February 10th. There is no evidence that these calls were made. The employer denied receiving notice of the absences. There was no contact from the claimant for the remainder of the week.

The Appellant asserts he went work after hours on February 10, 2011, but was unable to get into the building. He did not contact his supervisor or project manager; rather the Appellant says that he called and left a message for an individual in an office in Atlanta on February 11 or 12, 2011. The Employer unsuccessfully attempted to contact the Appellant by telephone. The Appellant was discharged on February 11, 2011. The Employer attempted to notify the Appellant of his termination by certified mail, also without success.

Appellant subsequently filed for unemployment benefits with the Department. Following an initial fact-finding, a claims adjudicator determined that the Appellant was discharged for cause and imposed a disqualification. On March 15, 2011, the Appellant appealed the initial determination to the Department's Appeal Tribunal. The Appeal Tribunal conducted an evidentiary hearing on the on April 14, 2011. The Appellant testified on his own behalf and

his Project Manager testified on behalf of the Employer. Exhibits included the employer's attendance policy, documented reprimands of the Appellant for violation of the attendance policy, the Appellant's time card for the week ending February 11, 2011, and the Appellant's acknowledged receipt for the Employee's Handbook. The Tribunal's decision, mailed April 18, 2011, affirmed initial disqualification upon finding the Appellant was discharged for cause. Appellant appealed the Tribunal's decision to the Appellate Panel on April 21, 2010. Upon review of the record, the Panel issued the Department's final decision on June 7, 2011, which affirmed the Tribunal's determination. Appellant commenced this action seeking judicial review of SCDEW's final administrative decision.

ISSUES

- I. Did the Department err in finding that the Employer discharged the Appellant for cause?
- II. Did the Agency commit reversible error by reliance upon hearsay?

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. 2010); *Gibson*, 282 S.C. at 386, 318 S.E.2d at 367; *McEachern v. S.C. Employment Security Comm'n*, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). Section 1-23-380(5) 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), to-wit, S.C. Code Ann. § 1-23-380 (5) (Supp. 2010):

The court may reverse or modify the decision [of an agency]. 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 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.

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. Service 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, "as 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. Dept. of Natural Resources*, 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). Furthermore, the reviewing court is prohibited from substituting its judgment for that 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.

LAW / ANALYSIS

1. *Did the Department err in finding that the Employer discharged the Appellant for cause?*

The Appellant argues that the Department erred in finding that the Employer discharged him for cause. The Court disagrees.

When the Department determines that an employer has discharged an employee for cause in connection with the worker's most recent employment, it must reduce the period in which the worker is qualified for unemployment benefits. S.C. Code Ann. § 41-35-120(2)(Supp.2010)(as amended by 2010 S.C. Act No. 146. § 77). A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee such as when the employee refuses to comply with a reasonable request of the employer. *Mickens v. Southland Exch.-Joint Venture*, 305 S.C. 127, 130. 406 S.E.2d363, (1991), *Citing Lee v. S.C. Employment Security Comm'n*, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated "for cause" in the current version of statute with the term misconduct in the predecessor statute. *Id.* A finding of misconduct does not require some willful or deliberate act on the part of the employee. *Lee*, 277 S.C. at 588, 291 S.E.2d 378 (1982). Upon finding that an employee has been discharged for cause, the Department determines the length of the employee's disqualification based on the seriousness of the cause for discharge. § 41-35-120(2). The disqualification period can extend from a minimum of five weeks to a maximum of 26 weeks. *Id.*; S.C. Jur. *Labor Relations* § 24 (Westlaw through August 2010).

In this case, the Court finds substantial evidence supporting the Department's determination that the Employer terminated the Appellant for cause. A careful review of the record reveals only minor factual disputes below, and the decision of the Appellate Panel is legally sound. The Court has held that when the Court review an administrative agency's decision in its appellate capacity, it is not permitted to re-evaluate the credibility of a witness. See e.g. *Milliken & Co. v. S.C. Employment Security Comm'n*, 321 S.C. 349, 350, 468 S.E.2d 638, 639 (1996); *Dixon v. Dixon*, 336 S.C. 260, 263, 519 S.E.2d 357, 358 (Ct. App. 1999); *Armstrong v. Union Carbide*, 308 S.C. 235, 237, 417 S.E.2d 597, 599 (Ct. App. 1992). The trier of fact is in the best position to determine the witness's credibility, based on his observation of the witness's live testimony. *Dixon*, 336 S.C. at 263, 519 S.E.2d at 358.

Employees were to call their supervisor or project manager to report an absence. Absences confirmed by a doctor's note were excused. It is uncontroverted that the Appellant knew of the Employer's Attendance Policy.

In November 2010, prior to the unexcused absences in February 2011, that resulted in his separation, the Appellant had been reprimanded for violating the company attendance policy by not calling to report an absence and not reporting to work. It is uncontroverted that the Appellant did not report to work on February 9 and 10, 2011. A doctor did not confirm his absences; therefore the Appellant's absences were unexcused.

According to the Attendance Policy, Work Rule A-6, three unexcused absences within a six month period, regardless of whether the absences were properly reported or not, results in termination. It is uncontroverted, and by his own admission, that the Appellant had one unexcused absence in November 2010 and two more in February, 2010. This evidence established that Appellant had three unexcused absences within less than six months, in violation

of Work Rule A-6, and in disregard of his Employer's interests. The Employer had the right to expect the Appellant to dependably report to work.

Appellant next argues that he called and left a message on his supervisor's voice mail, that he was going to be absent on February 9, 2011, and late to work on February 10, 2011. The Project Manager testified that he did not receive a call from the Appellant, and the supervisor reported that she did not receive a message from the Appellant. The Appellant did not assert that he tried to call the Project Manager. The Project Manager, upon learning that the Appellant did not report to work or personally call in his absences and unsuccessfully tried to telephone the Appellant, ultimately sent the Appellant a certified letter advising him that he was terminated. The letter was returned unclaimed. Pursuant to Work Rule A-4, the employer considers that an employee has resigned without notice, when an individual is absent for two consecutive days without calling to report the absence, unless documentation proves notification impractical. The Appellant produced no evidence of telephone calls or that notice was impractical.

II. *Did the Agency commit reversible error by reliance upon hearsay?*

"A 'hearsay' evidence objection cannot be made for the first time on appeal. *Perry v. Mabius*, 125 S.C. 292, 126 S.E.487 (1925)," *Wimberly v. Sovereign Camp. W.O.W.*, 190 S.C. 159, 2 S.E.2d 532, 535 (1939). The appellant did not object to testimony of the project manager that the Appellant's supervisor reported that she did not receive a message from the Appellant about his absence.

The only objection raised at the hearing by the Appellant was as to his November 3, 2010 written reprimand. First, the November 3, 2010 was a record that the employer kept in the normal course of business and is therefore an exception to the hearsay rule. Second, the

Appellant himself, independently corroborated that he was a "no call, no show to work" in November 2010, and confirmed the discipline and his signature on the document.

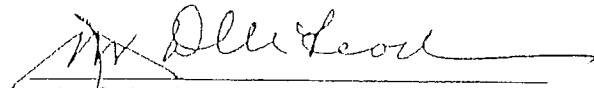
Finally, there is substantial, independent, first hand testimony and evidence in the record to support the conclusion that the Employer terminated the Appellant for cause. The Department's decision is not based solely on hearsay, the record is not flawed, and there is no error of law. Accordingly, the Department's decision must be confirmed.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **AFFIRMED**.

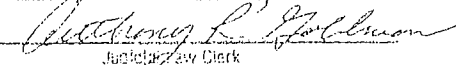
AND IT IS SO ORDERED.

October 31, 2011
Columbia, SC


John D. McLeod, Judge
S.C. Administrative Law Court

This is to certify that on or about the date
served this order in the above entitled action upon all
parties to this cause by depositing a copy hereof,
in the United States mail, postage paid, or in the Interagency
Mail Service addressed to the party(ies) or their attorney(s).

This 31 day of October, 2011

By: 
Justine R. Holloman
Judicial Law Clerk

SUMMONS AND PETITION FOR JUDICIAL REVIEW

COUNTY OF RICHLAND

Petitioner,

V.

Respondents.

CASE NO.:

SUMMONS

YOU ARE HEREBY SUMMONED and required to answer the Petition for Judicial Review in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Petition on the subscriber at 320 S. Coit Street, Florence, South Carolina 29501, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Petition within that time, the Petitioner shall apply to the Court for a judgment by default against you for the relief demanded in this Petition.

Susan J. Girmonto
SOUTH CAROLINA LEGAL SERVICES
320 S. Coit Street
Florence, South Carolina 29501
Office: (843) 413-9500 Fax: (843) 413-1013
S.C. Bar No.: 15064

Florence, South Carolina
June 21, 2011

JUN 21 2011

9

STATE OF SOUTH CAROLINA	)	IN THE ADMINISTRATIVE LAW
	)	COURT
COUNTY OF RICHLAND	)	
Anthony Upshaw,	)	CASE NO.:
	)	
Petitioner,	)	
	)	
v.	)	PETITION FOR JUDICIAL REVIEW
	)	OF THE FINAL DECISION OF THE
Urban Services Group, Inc. and	)	SOUTH CAROLINA DEPARTMENT
South Carolina Department of Employment	)	OF EMPLOYMENT AND WORKFORCE
And Workforce,	)	
	)	
Respondents.	)	
	)	

Now comes the Petitioner, complaining of the Respondents herein, and respectfully shows this Court that:

1. This action for judicial review of the Final Decision of the South Carolina Department of Employment and Workforce is brought pursuant to S.C. Code Ann. §§ 1-23-380 and 41-35-750.
2. Petitioner is a resident of Florence County, South Carolina.
3. Respondent South Carolina Department of Employment and Workforce (hereinafter "Respondent Department") is an administrative agency of the State of South Carolina as defined in S.C. Code Ann. § 1-23-310(1) and is authorized by § 41-35-710 to hear and decide appeals of awards or denials of unemployment benefits.
4. Petitioner was separated from his job with Urban Services Group, Inc. (hereinafter referred to as "Employer") on February 11, 2011.
5. Petitioner applied with Respondent Department for unemployment benefits and by Initial Determination was found disqualified for benefits.
6. Petitioner appealed the Initial Determination to the Respondent's Appeal Tribunal and an evidentiary hearing was conducted on April 14, 2011. After receiving evidence and testimony

from the Petitioner and the Employer, the Appeal Tribunal issued its decision (Decision No. 2011-P-1256) affirming the previous holding and finding Petitioner discharged for cause. Petitioner was disqualified from receiving benefits for fourteen weeks effective February 13, 2011 through May 21, 2011, along with a corresponding reduction in the claimant's maximum potential benefit amount.

7. Petitioner appealed the Appeal Tribunal decision to the Appellate Panel (Appeal No. 04424-14589). The Appellate Panel affirmed the Appeal Tribunal with its decision dated June 7, 2011.

8. Petitioner has exhausted all administrative remedies available to him within Respondent Department's appeals process.

9. Petitioner asserts that Respondent Department committed serious errors in holding him discharged for cause:

(a) The Petitioner was wrongly denied unemployment compensation benefits where the Petitioner's testimony that he fully complied with the Employer's policy was not contradicted by any first-hand (non-hearsay) testimony or evidence.

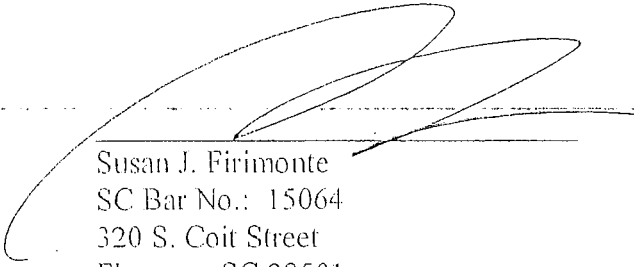
(b) The Respondent Department improperly shifted the burden of proof in this matter and failed to require the Employer to prove the alleged misconduct which would result in a disqualification for benefits under the statute.

(c) The reliable record does not support a finding that the Petitioner was discharged for cause.

WHEREFORE, Petitioner prays that this Court, pursuant to S.C. Code Ann. §§ 1-23-380 and 41-35-750, reverse the Respondent Department's decision and find Petitioner entitled to unemployment compensation benefits.

Respectfully Submitted,

SOUTH CAROLINA LEGAL SERVICES



Susan J. Firimonte
SC Bar No.: 15064
320 S. Coit Street
Florence, SC 29501
843-413-9500
843-413-1013 (Fax)

ATTORNEYS FOR PETITIONER

Florence, South Carolina
June 21, 2011

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

Anthony Upshaw)
2571 Old Sansbury Road)
Timmonsville, SC 29161)
Claimant SSN: [REDACTED])
Urban Services Group, Incorporated)
c/o Stephen Bryant)
120 Hammond Drive, Northeast)
Atlanta, GA 30328)
Liable Employer)
Appellant: Claimant)

APPELLATE PANEL
DECISION

The claimant appealed Appeal Tribunal Decision 2011-A-6419 to the Appellate Panel. The Tribunal held the claimant disqualified from receiving benefits for fourteen (14) weeks, upon finding he was discharged for cause. This decision affirmed the claims adjudicator's determination.

The Appellate Panel issued its decision upon review of the record.

DECISION

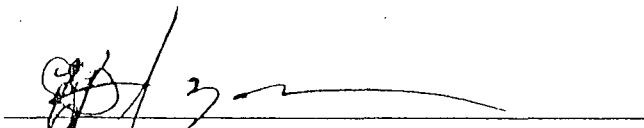
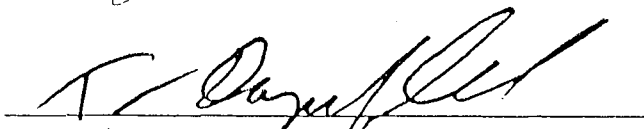
Appeal Tribunal Decision 2011-A-6419 is affirmed. The claimant is disqualified for fourteen (14) weeks, from February 13, 2011, to May 21, 2011, with a corresponding monetary reduction, upon finding the claimant was discharged for cause connected with the employment.

The claimant worked from July 11, 2009, to February 11, 2011, most recently as a housekeeper. The claimant was discharged for violating the employer's attendance policy. The employer's policy states that an employee will be terminated if he misses two or more days without notifying the employer. On October 7, 2010, the claimant received a verbal warning and November 3, 2010, the claimant received a written warning for attendance issues. On February 9, 2011, and February 10, 2011, the claimant was absent from work. The employer did not receive notice that the claimant was going to be absent. On February 11, 2011, the employer discharged the claimant.

S.C. Code Ann. § 41-35-120 (2) requires disqualification from benefits for five to twenty-six weeks, with a corresponding monetary reduction, when the Department finds that a claimant has been discharged for cause connected with the employment. "Cause" is interpreted as disregard for the standard of behavior an employer has the right-to-expect-from an employee.

The record establishes that the claimant violated the employer's attendance policy by missing two days of work without notifying the employer. In this case, the claimant had received two prior warnings and failed to modify his behavior. The claimant's actions demonstrated a disregard for the standard of behavior the employer had the right to expect of the claimant. Therefore, we find the claimant was discharged for cause connected with the employment. The Appeal Tribunal decision is affirmed.

**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**


E. B. Ayers
Tim Dangerfield
Stephen S. Kelly, Jr.

Review Date: 06/06/11
Date Mailed: 06/07/11
Mailed By: _____

June 7, 2011

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
(SCDEW)
Columbia, South Carolina

NOTICE OF MAILING OF APPELLATE PANEL DECISION

Attached is a copy of the final agency decision of SCDEW in this case. Any further appeal is to the South Carolina Administrative Law Court. To obtain judicial review of this decision, you must comply with the requirements of S.C. Code Ann. §41-35-750 and the Rules of Procedure of the Administrative Law Court. The Court may require a filing fee.

The law requires that a Petition for Judicial Review must be filed with the Court and served on all parties and SCDEW within thirty (30) days from the date of mailing of the agency's final decision (see the mailing date above).

Service of the Petition on SCDEW must be addressed and mailed to:

Legal Department
S.C. Department of Employment and Workforce
Post Office Box 995
Columbia, SC 29202

SCDEW cannot advise a party on any legal matter. For legal advice or assistance in filing an appeal to the Administrative Law Court, you should consult an attorney licensed to practice in South Carolina.

Form App-115
Rev. 4/27/11

APPLICATION FOR LEAVE TO APPEAL TO COMMISSION

Form App-111...Rev. 2/05
Catalog#: 05170

Appeal No. 1104844

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

APPLICATION FOR LEAVE TO APPEAL TO COMMISSION

Bye 02-12-12

Claimant's Name ANTHONY UPSHAW

SSN [REDACTED]

Sent

Address 2571 OLD SANSBURY RD TIMMONSVILLE SC 29161

Date of

Initial Claim 02/17/11

4/02

Employer's Name URBAN SERVICES GROUP INC

HHS

Address 120 HAMMOND DR NE ATLANTA GA 30328

Party Appealing CLAIMANT

On 04/19/2011, I received Appeal Tribunal Decision Number 2011-A-6419

mailed to me on 04/18/2011 and ask for review of the record on the following grounds:

I DISAGREE WITH THE DECISION BECAUSE VANESSA, SUPV, SAID SHE DID NOT RECEIVE THE MESSAGE; PHYLLIS, VANESSA'S SUPV, SAID SHE GOT MY MESSAGE. I CALLED BOTH OF THEM, TO LET THEM KNOW THAT I WOULD NOT BE IN. PHYLLIS SAID SHE COULD WRITE A LETTER SAYING THAT SHE GOT MY MESSAGE. SHE SAID SHE WOULD HAVE IT READY FOR ME TOMORROW. MY LAWYER IS REQUESTING THE LETTER TOO.

*If appeal is untimely, state the reason. If appellant failed to attend Appeal Tribunal hearing, state the reason and whether postponement was requested:

I know that I must continue to file my claims for each week of unemployment during the pendency of this appeal, I know that I can only be paid for those weeks that I have timely claimed. If I have received benefits and am ruled disqualified or ineligible, I know that I will be required to repay the benefits I have received for that time period.

**As a Board of Review, the Commission is confined solely to the record submitted by the Appeal Tribunal and does not accept additional evidence or testimony in its consideration of the appeal.

Appellant ANTHONY UPSHAW--CLAIMANT

Signed by

Anthony Upshaw

Title HOUSEKEEPING/FLOOR MAINT

Date 04/21/2011

Does claimant need an interpreter? ☐ YES ☒ NO What language/dialect? N/A

Claimant is ☐ Deaf ☐ Mute

(For Workforce Center Use Only)

Filed at FLORENCE 210

(Workforce Center Name and Number)

Date 04/21/2011

Received by 21010

(Workforce Center Representative)

SC Employment Comm.

APR 22 2011

Received by [REDACTED]

NOTICE OF CLAIMANT APPEAL TO APPELLATE PANEL

SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE
631 Hampton Street
P.O. Box 995
Columbia, SC 29202

NOTICE OF CLAIMANT APPEAL TO THE APPELLATE PANEL

DATE: April 29, 2011

APPEAL NO: 04424-14589

CLAIMANT: Anthony Upshaw
2571 Old Sansbury Road
Timmonsville, SC 29161
SSN: [REDACTED]

LIABLE EMPLOYER: Urban Services Group, Inc.
c/o Stephen Bryant
120 Hammond Dr., NE
Atlanta, GA 30328

SEPARATING EMPLOYER:

The claimant in this case appealed the Appeal Tribunal Decision to the Appellate Panel for review. A copy of the appeal is attached.

The Panel will review your case as soon as possible. If a hearing is scheduled, a copy of the transcript and the hearing notice will be mailed to you at a later date.

Any benefits received by the claimant might be subject to recovery if the Appeal Tribunal Decision is reversed. The claimants must continue filing a weekly claim pending the appeal in order to receive benefits.

Legal Department
Telephone: (803) 737-1105

cc: Claimant:
Liable Employer:
Separating Employer:
Local Office: Florence
Claimant's Attorney:
Employer's Attorney:
Imaging
File

DECISION OF APPEAL TRIBUNAL

SOUTH CAROLINA

DEPARTMENT OF EMPLOYMENT AND WORKFORCE

DECISION OF APPEAL TRIBUNAL

Hearing Date: April 14, 2011

ANTHONY UPSHAW
2571 OLD SANSBURY RD
TIMMONSVILLE, SC 29161

CLAIMANT

URBAN SERVICES GROUP INC
C/O STEPHEN BRYANT
120 HAMMOND DR NE
ATLANTA, GA 30328

EMPLOYER

APPELLANT: Claimant

SS NO: [REDACTED]

APPEARANCES

FOR THE
CLAIMANT: Present

FOR THE
EMPLOYER: One Witness

FINDINGS OF FACT

The issue in this case is whether the claimant was discharged for "cause."

The claimant appealed the determination mailed March 14, 2011, which held the claimant disqualified from receiving benefits for fourteen (14) weeks, effective February 13, 2011, through May 21, 2011, along with a corresponding reduction in the maximum potential benefit amount, upon a finding the claimant was discharged for cause.

The claimant worked from July 11, 2009, to February 11, 2011, with the subject employer, most recently as a housekeeper. The claimant was discharged for failing to report to work as scheduled on February 9, 2011 and February 10, 2011. The claimant asserts that he called and left a message for his supervisor that he would not be to work on February 9, 2011, and would be late arriving on February 10, 2011. The employer had no record of a call. When he arrived at work on February 10, 2011 he was unable to enter the facility because his badge had been inactivated. The claimant had been previously reprimanded for failing to report to work and informed that any further incidents could result in termination of his employment.

REASONS

South Carolina Code provides in §41-35-120(2) for a disqualification of from five (5) to twenty-six (26) weeks, with a corresponding monetary reduction, if the Agency finds the claimant was discharged for "cause" connected with the most recent bona fide employment.

"Cause" includes, but is not limited to, a violation of the employer's reasonable rules or regulations, or a disregard for the standards of behavior that an employer has a right to expect of an employee.

In this case, an employer has a right to expect employee's to report to work when scheduled or notify them of their absence. The best available evidence shows that the claimant failed to report to work for two consecutive days. His actions were not in the reasonable interest of the employer. Therefore, the Tribunal finds that the claimant was discharged for cause and the original disqualification is deemed proper.

DECISION

The Tribunal hereby holds the claimant disqualified from receiving benefits for fourteen (14) weeks, effective February 13, 2011, through May 21, 2011, along with a corresponding reduction in the maximum potential benefit amount, upon a finding the claimant was discharged for cause. This decision affirms the determination mailed March 14, 2011.

This will be the final decision of the Agency, unless you file an appeal to the Appellate Panel setting forth in detail the grounds for appeal within ten (10) calendar days, including weekends and holidays, from the mailing date of this decision. If the tenth day falls on a Saturday, Sunday or holiday, the appeal period is extended to the next business day. Your appeal may be filed in person at any Workforce Center, or by mail, addressed to "Appellate Panel," Post Office Box 995, Columbia, South Carolina 29202. For additional information or assistance in filing an appeal, contact your local Workforce Center.

Erika S. Davis

Erika S. Davis
Administrative Hearing Officer

ESD:alw

Decision Mailed: 04/18/11

Mailed on the above Date By: 

NOTICE OF HEARING BEFORE APPEAL TRIBUNAL

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
P.O. Box 995, Columbia, South Carolina 29202

APP-105
Revised 7/02

NOTICE OF HEARING BEFORE APPEAL TRIBUNAL

Claimant's Name: ANTHONY UPSHAW Social Security Number: [REDACTED]
Address: 2571 OLD SANBURY RD
TIMMONSVILLE SC 29161-0000

Employer's Name: URBAN SERVICES G

Appeal Number: 1104424 Hearing Date: 04/14/11 Hearing Time: 9:00 AM
Month/Day/Year Hour/Minute

Hearing Location: SC DEPARTMENT OF EMPLOYMENT & WORKFORCE
1558 WEST EVANS STREET FLORENCE SC 29501

Before: ERIKA S. DAVIS

IMPORTANT: IF YOU HAVE APPEALED AND FAIL TO APPEAR WITHIN TEN (10) MINUTES AFTER THE SCHEDULED TIME FOR THE HEARING TO BEGIN, YOUR APPEAL MAY BE DISMISSED. FAILURE OF EITHER PARTY TO PARTICIPATE MAY RESULT IN YOUR INTERESTS BEING ABANDONED.

THE HEARING WILL NOT BE POSTPONED EXCEPT FOR AN EMERGENCY. Contact a representative of the Commission at (803) 737-2520. AT ONCE, if you cannot be present at the time scheduled and wish to request a postponement of the hearing. Also, if you require any special needs, such as an interpreter, please contact us prior to the hearing.

ISSUES

☒ Voluntary Quit (for good cause)	☐ Voluntary Retirement	☐ Timeliness of Appeal
☒ Discharge (for disqualifying cause)	☐ Absence from Hearing	☐ Fraud & Overpayment
☐ Availability	☐ Overpayment	☐ Job Offer & Referral
☐ Eligibility	☐ Other	

EVIDENCE: This hearing is your only chance to testify and present evidence. Sworn testimony is required from witnesses with first-hand knowledge. Only documents, such as business records (for example: timesheets, employer's policies or handbook, warnings) can be considered and must be submitted with an original and two copies. The original will be returned. No testimony or evidence will be considered from witnesses who are not present.

SUBPOENAS: If a witness is reluctant to appear, you may apply for a subpoena through the Commission's local office or the Appeal Tribunal at (803) 737-2520.

LEGAL REPRESENTATION: An attorney licensed to practice in South Carolina may represent you. It is your responsibility to obtain representation prior to the hearing. Fees charged to represent claimants are limited by the Commission.

BENEFITS: A claimant should continue to file for benefits during the appeal process. Weeks not claimed cannot be paid, even if the claimant is held eligible.

THIS NOTICE SUPERSEDES ANY PREVIOUS HEARING NOTICE YOU MAY HAVE RECEIVED. IF THE DATE ON THIS NOTICE IS LATER THAN THE DATE ON ANY OTHER NOTICE, YOU SHOULD ASSUME THAT THE PREVIOUS HEARING HAS BEEN POSTPONED AND FOLLOW THE INSTRUCTIONS ON THIS NOTICE.

MAILING DATE: 03/31/2011

SMALL CHILDREN AND PETS ARE NOT ALLOWED IN HEARINGS

GENERAL INFORMATION ON THE S.C. EMPLOYMENT SECURITY LAW IS ON THE BACK OF THIS NOTICE.

NOTICE OF APPEAL TO APPEAL TRIBUNAL

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

P.O. Box 995, Columbia, South Carolina 29202

Notice of Appeal To Appeal Tribunal

Claimant's Name: Anthony Upshaw

Social Security Number [REDACTED]

Claimant's Address: 2571 Old Sansbury Rd.; Timmonsville, SC 29161

Date of Birth: 04/07/66

Date of initial Claim: 02/13/11

Telephone: 843-250-2410

(Month/Day/Year)

(Month/Day/Year)

Employer's Name: Urban Services Group, INC

Telephone: 404-315-1540

Employer's Address: 120 Hammond Dr. NE; Atlanta, Ga. 30328

On 03/15/11 I received a claims examiner's determination mailed 03/14/11 from
(Date) (Date)

which I appeal and hereby apply for a hearing because I believe it was issued in error for the following reasons: I disagree with the 14 weeks disqualification. I wish to appeal my decision because I feel I was terminated unjustly. I had contacted my supervisor and left a message I would not be on time. I was scheduled for 2:00pm but in the message I told her I would be in between 5:00pm and 6:00pm. When I got there my badge would not swipe and I could not get in. I was having car problems and unable to get there on time. I always notify my supervisor whenever I would be late or out.

MAR 16 2011

If appeal is untimely, state the reason

Received Benefits Div

I know that I must continue to file my claim for each week of unemployment until I receive the Appeal Tribunal's or Commission's decision, until I return to work, or until my claim is exhausted. If I win the appeal, I know I can only be paid for those weeks that I have claimed timely.

AU
(Claimant's Initials)

Does claimant need an interpreter? ☐ YES ☒ NO What language/dialect?

Claimant is ☐ Deaf ☐ Mute

(If it appears necessary to subpoena witnesses or documents, the Workforce Center representative should use Form 107 and attach them to this form at the time of transmittal to the Central Office.)

SUBPOENA ☐ YES ☒ NO

Appellant: Anthony Upshaw

Signed By: *Anthony Upshaw*

Title: Claimant

Date: 03/15/11

Date Determination Delivered

By Workforce Center:

(Date)

Signed: _____

(Workforce Center Representative)

Filed at: Florence 210
(Workforce Center Name and Number)

Date: 03/15 2011
(Month) (Date) (Year)

DETERMINATION BY CLAIMS ADJUDICATOR ON CLAIM FOR BENEFITS

1 UCB-103
REV. May 2007

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

P.O. BOX 995, COLUMBIA, S.C. 29202

1 ANTHONY UPSHAW

DATE OF THIS NOTICE 03/13/11

1 2571 OLD SANSBURY RD

1 TIMMONSVILLE SC 29161

CLAIMANT'S NAME				SOCIAL SECURITY NUMBER	EFFECTIVE DATE	DISQUALIFICATION ENDS	
ANTHONY UPSHAW				[REDACTED]	02/13/11	05/21/11	
IO NO	TYPE	CATEGORY	WEEKLY BENEFIT AMOUNT	MAXIMUM POTENTIAL ENTITLEMENT	LESS REDUCTION OF	NET TOTAL BENEFITS	BENEFIT YEAR ENDS
210	I	01	\$ 272.00	\$ 7072.00	\$ 3808.00	\$ 3264.00	02/12/12

DETERMINATION BY CLAIMS ADJUDICATOR ON CLAIM FOR BENEFITS

1 ☐ You are eligible for benefits from the above effective date.

1 ☒ You have been disqualified from receiving benefits or have been found to be ineligible for benefits for the following reason(s).

1 YOU WERE DISCHARGED FROM YOUR JOB WITH YOUR MOST RECENT BONA FIDE EMPLOYER FOR EXCESSIVE
1 ABSENTEEISM. YOU HAD BEEN ADEQUATELY WARNED THAT YOUR ATTENDANCE WAS NOT SATISFACTORY. YOUR
1 ATTENDANCE VIOLATIONS WARRANT A DISCHARGE FOR CAUSE CONNECTED WITH THE WORK UNDER THE SOUTH
1 CAROLINA CODE, SECTION 41-35-120(2). YOU ARE DISQUALIFIED FOR 14 WEEKS. YOUR MAXIMUM BENEFITS
1 ARE ALSO REDUCED BY 14 TIMES YOUR WEEKLY BENEFIT AMOUNT.

1 ☐ LAST SEPARATION FROM NON-LIABLE EMPLOYER

UI CLAIMS ADJUDICATOR

1 MAILING DATE 03/14/2011

IMPORTANT: THIS DETERMINATION WILL BE THE FINAL DECISION OF THE COMMISSION UNLESS YOU FILE AN APPEAL SETTING FORTH IN DETAIL THE GROUNDS FOR APPEAL WITHIN TEN (10) CALENDAR DAYS, INCLUDING WEEKENDS AND HOLIDAYS, FROM THE MAILING DATE SHOWN ABOVE IF THE TENTH DAY FALLS ON A SATURDAY, SUNDAY, OR HOLIDAY. THE APPEAL PERIOD IS EXTENDED TO THE NEXT BUSINESS DAY YOUR APPEAL MAY BE FILED IN PERSON AT ANY EMPLOYMENT SECURITY OFFICE, OR BY MAIL, ADDRESSED TO THE "APPEAL TRIBUNAL," P.O. BOX 995, COLUMBIA, SOUTH CAROLINA 29202 FOR ADDITIONAL INFORMATION OR ASSISTANCE IN FILING AN APPEAL, CONTACT YOUR LOCAL EMPLOYMENT SECURITY OFFICE

TRANSCRIPT OF TESTIMONYSOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND
WORKFORCE

Columbia, South Carolina

Transcript of Testimony

Before

Erika Davis, Administrative Hearing Officer

Anthony Upshaw	)	CLAIMANT
2571 Old Sansbury Road	)	
Timmons ville, SC 29161	)	
Claimant SSN: XXX-XX-5954	)	

Urban Services Group, Inc.	)	LIABLE EMPLOYER
c/o Stephen Bryant	)	
120 Hammond Drive, NE	)	
Atlanta, GA 30328	)	

PLACE OF HEARING:

SC Dept. of Employment & Workforce
1558 West Evans Street
Florence, South Carolina

DATE OF HEARING: April 14, 2011

APPEARANCES:

For Claimant: Present

For Employer: One witness

TESTIFYING WITNESSES

CLAIMANT:

Anthony Upshaw

EMPLOYER WITNESS:

Stephen Eisenecker, Project Manager

1 BEFORE: Erika Davis, Administrative Hearing Officer

2
3 HEARING OFFICER'S PREAMBLE

4
5
6 ~~WITNESSES SWORN~~

7
8
9 HEARING OFFICER: Initially, I will ask questions and you'll
10 have an opportunity to answer those questions and to provide any
11 additional testimony that is relevant to this case. Each party will have
12 the opportunity to cross examine the opposing witness at the
13 conclusion of the testimony that is given. Each party also has the
14 opportunity to present any documents or exhibits that they feel should
15 be considered in the decision during your testimony, okay. I cannot
16 accept any documents, testimony nor evidence once I go off record
17 and I turn the recording off. Are there any questions gentleman
18 regarding the issues or the procedures of this hearing before we go
19 forward with testimony. Mr. Upshaw do you have any questions?

20
21
22 CLAIMANT: No ma'am.

23
24
25 HEARING OFFICER: Mr. Eisenecker?

26
27
28 EMPLOYER WITNESS-1: No.

29
30
31 HEARING OFFICER: Both parties will be notified of the
32 decision as soon as possible. That decision is mailed to the address I
33 have on record. Mr. Upshaw I'm showing your address as 2571 Old
34 Sansbury Road, Timmonsville, SC 29161, is that correct?

35
36
37 CLAIMANT: Yes.

1 HEARING OFFICER: And your telephone number area code,
2 843-346-5022?

3

4

5 CLAIMANT: Yes.

6

7

8 HEARING OFFICER: Thank you. Mr. Eisenecker, I'm showing
9 the address of record for Urban Services Group, c/o Stephen Bryant,
10 120 Hammond Drive, NE, Atlanta, GA 30328, is that correct?

11

12

13 EMPLOYER WITNESS-1: Yes.

14

15

16 HEARING OFFICER: And the telephone number area code
17 404-315-1940?

18

19

20 EMPLOYER WITNESS-1: Yes.

21

22

23 HEARING OFFICER: Thank you. Since the initial
24 determination was ruled a discharge, I'm going to begin testimony
25 with the employer in this case. Before I begin testimony, Mr. Upshaw,
26 I have in my hand a determination that disqualifies you from receiving
27 benefits for 14 weeks and also reduced your maximum benefits by 14
28 times your weekly benefit amount based on a finding that you were
29 discharged for excessive absenteeism. Is that the determination you
30 have appealed in this case?

31

32

33 CLAIMANT: Yes.

34

35

36 HEARING OFFICER: Is that the only determination you have
37 appealed?

38

39

40 CLAIMANT: Yes.

1
2
3 HEARING OFFICER: Do you have any objection to me
4 entering that document into the record to show the purpose of this
5 appeal today?

7
8 CLAIMANT: Yes.

10
11 HEARING OFFICER: Why do you object? Is that not the
12 document you appealed?

14
15 CLAIMANT: Oh, yes, yes this is the document I
16 appealed, yes.

18
19 HEARING OFFICER: So do you have any objection to me
20 entering it to show what we're here for?

22
23 CLAIMANT: No.

25
26 HEARING OFFICER: Okay. Mr. Eisenecker if you'll please
27 look at that document and let me know if you have any objection to
28 me entering that document into the record? Any objection?

30
31 EMPLOYER WITNESS-1: No.

33
34 HEARING OFFICER: The without objection it will be entered
35 as Agency Exhibit Number One. It is a one page claims adjudicator's
36 determination that holds the claimant disqualified from receiving
37 benefits for 14 weeks, effective February 13, 2011 through May 21,
38 2011 based upon a finding that discharge for cause had been
39 established. Mr. Eisenecker, if you would please state your name for
40 the record, spelling your first and last name.

TESTIMONY OF STEPHEN EISENECKER

ANTHONY UPSHAW..

FILE # 04424-14589

1 EMPLOYER WITNESS-1: Stephen Eisenecker, S-t-e-p-h-e-n E-i-
2 s-e-n-e-c-k-e-r.

3

4

5 HEARING OFFICER: And your job title Mr. Eisenecker?

6

7

8 EMPLOYER WITNESS-1: Project manager.

9

10

11 HEARING OFFICER: Thank you. Mr. Eisenecker I show that
12 Mr. Upshaw worked for Urban Services Group as a housekeeper is
13 that correct?

14

15

16 EMPLOYER WITNESS-1: That's correct.

17

18

19 HEARING OFFICER: And he was employed with the company
20 from July 11, 2009 through February 11, 2011, is that correct?

21

22

23 EMPLOYER WITNESS-1: The dates again please.

24

25

26 HEARING OFFICER: July 11, 2009 to February 11, 2011.

27

28

29 EMPLOYER WITNESS-1: Yes.

30

31

32 HEARING OFFICER: On February 11, 2011, was Mr. Upshaw
33 discharged from his job or did he voluntarily quit?

34

35

36 EMPLOYER WITNESS-1: According to the employee handbook,
37 noted at the top two days absent from work without notifying a
38 supervisor is a term offense.

39

40

1 HEARING OFFICER: So on the 11th was Mr. Upshaw
2 discharged from his job because of this, is that what you're stating?
3

4
5 EMPLOYER WITNESS-1: Yes.
6

7
8 HEARING OFFICER: Okay. Did you yourself terminate Mr.
9 Upshaw?
10

11
12 EMPLOYER WITNESS-1: No.
13

14
15 HEARING OFFICER: Specifically—I'm sorry, let me rephrase
16 it. What happened on the 11th that caused Mr. Upshaw to be
17 discharged?
18

19
20 EMPLOYER WITNESS-1: Mr. Upshaw failed to come to work for
21 three consecutive days. He was notified by registered mail. The mail
22 came back to me. I have it right here. He did not pick up his
23 registered letter that was sent to him.
24

25
26 HEARING OFFICER: Let me see that, thank you.
27

28
29 EMPLOYER WITNESS-1: I tried calling him several times as his
30 immediate supervisor and there was no return call.
31

32
33 HEARING OFFICER: What three days was Mr. Upshaw
34 scheduled to work and did not report?
35

36
37 EMPLOYER WITNESS-1: I have a copy of his timecard right here
38 for the four weeks in question.
39
40

1 HEARING OFFICER: This was February 9th and February
2 10th, is that correct, which would be the two days?

3

4

5 EMPLOYER WITNESS-1: Correct.

6

7

8 HEARING OFFICER: Mr. Upshaw if you'll please look at these
9 documents. The first document I'm handing you is the policy. The
10 second is a certified letter that was returned to the employer and the
11 third is the copy of the timesheet for the period in question.

12

13

14 EMPLOYER WITNESS-1: I have one more. This is where Mr.
15 Upshaw signed that he had read the employee handbook at the
16 beginning of service with the company. So he should have been
17 aware of the policy for absenteeism.

18

19

20 HEARING OFFICER: Mr. Upshaw began in 2010, not 2009, is
21 that correct? This is dated 2010, that's why I'm asking.

22

23

24 EMPLOYER WITNESS-1: He started 2009. I was not there at that
25 time. I don't know when he signed the paper there, but...

26

27

28 HEARING OFFICER: Just a moment Mr. Eisenecker. Mr.
29 Upshaw would you please look at the documents and let me know if
30 you have any objections to the documents being entered into the
31 record?

32

33

34 CLAIMANT: Yes, I didn't receive no phone call from
35 him....

36

37

38 HEARING OFFICER: Okay, I'm going to take testimony in just
39 a moment. I'm just asking about the documents that have been
40 presented by Mr. Eisenecker.

1 CLAIMANT: Okay. You can put that in.

2
3
4 HEARING OFFICER: Okay. Then without objection, I will enter
5 them as Employer's Exhibit Number One. This is a four page
6 document. Page one is the work rules, specifically, A4 regarding
7 absenteeism for two consecutive days. Page two is a certified letter
8 that was returned undelivered. Page three is a copy of the timecard
9 for the week of February 11, 2011 and page four is acknowledgement
10 and receipt of the employee handbook. Now, Mr. Eisenecker, prior to
11 Mr. Upshaw not reporting for work for those two days, February 9th
12 and February 10th, had he received any reprimands or warnings
13 regarding his attendance?
14

15
16 EMPLOYER WITNESS-1: Yes he had. He had one, there's a
17 written warning November by my predecessor who was a temporary
18 project manager and then one by myself during his termination.
19

20
21 HEARING OFFICER: The last one is the termination not a
22 reprimand, correct?
23

24
25 EMPLOYER WITNESS-1: Right.
26

27
28 HEARING OFFICER: Mr. Upshaw, look at those documents
29 and let me know if you have any objection?
30

31
32 CLAIMANT: I have an objection an objection on this
33 one right here.
34

35
36 HEARING OFFICER: Which one are you referring to?
37

38
39 CLAIMANT: This is the one that, this would be my,
40 this would be my first write up.

1 HEARING OFFICER: Your reprimand for November 3rd, okay,
2 what do you object to?

3

4

5 CLAIMANT: Because he wasn't even working there
6 ~~then and this one right here, she had made a mistake and the lady~~
7 that, the lady that was...

8

9

10 HEARING OFFICER: I don't want to take testimony. I just
11 want to know why you don't want it entered into the record. Did you
12 receive that document?

13

14

15 CLAIMANT: This one right here?

16

17

18 HEARING OFFICER: Yes sir.

19

20

21 CLAIMANT: I had signed on this document.

22

23

24 HEARING OFFICER: Okay. Did you receive anything after
25 that that said that that was null and void, that it no longer existed?

26

27

28 CLAIMANT: Yeah, but they had fired the lady during
29 that time.

30

31

32 HEARING OFFICER: Okay, did you receive something that
33 said that that was not....

34

35

36 CLAIMANT: No ma'am.

37

38

39 HEARING OFFICER: no longer in effect?

40

1 CLAIMANT: No ma'am. I think I was suspended 3
2 days and he got 4 days here.
3
4

5 HEARING OFFICER: Any objection to me entering the
6 document?
7

8
9 CLAIMANT: Yeah, I object both of these.
10

11
12 HEARING OFFICER: On what grounds? What do you object
13 to?
14

15
16 CLAIMANT: He said it was three days, first he said I
17 didn't call in two days, he got four days...
18

19
20 HEARING OFFICER: He's got two days on here.
21

22
23 CLAIMANT: ...four days absent, what's that right
24 there.
25

26
27 HEARING OFFICER: A-4 absent, is the policy.
28

29
30 CLAIMANT: Okay, I'll accept this one, but that one I
31 object.
32

33
34 HEARING OFFICER: I'll note your objection Mr. Upshaw. I'm
35 going to overrule it and allow the document as Employer's Exhibit
36 Number Two. It is a two page document, page one being November
37 3, 2011 regarding no call, no show. Page two is a discharge of
38 termination of February 11, 2011. Mr. Eisenecker you made the
39 statement that the first reprimand was issued by your predecessor,
40 when did you become the project manager?

1 EMPLOYER WITNESS-1: January 2, 2011.

2

3

4 HEARING OFFICER: When an employee is absent from work,
5 are they to call you as the project manager?

6

7

8 EMPLOYER WITNESS-1: No, he can call his immediate
9 supervisor, Vanessa Simon.

10

11

12 HEARING OFFICER: On the days in question did Ms. Simon
13 notify you that Mr. Upshaw had not called her?

14

15

16 EMPLOYER WITNESS-1: Yes.

17

18

19 HEARING OFFICER: And had Mr. Upshaw called you during
20 those days?

21

22

23 EMPLOYER WITNESS-1: No.

24

25

26 HEARING OFFICER: Are these the only two individuals who
27 can be called by an employee, their immediate supervisor and the
28 project manager?

29

30

31 EMPLOYER WITNESS-1: That is a general rule, yes.

32

33

34 HEARING OFFICER: I don't think I have any other questions
35 at this time. Mr. Eisenecker do you have anything else regarding Mr.
36 Upshaw's separation?

37

38

39 EMPLOYER WITNESS-1: No.

40

1 HEARING OFFICER: I do have one other question, I'm sorry.
2 Who is the individual who separated Mr. Upshaw or terminated his
3 employment?
4
5

6 EMPLOYER WITNESS-1: That would be our HR manager, Sonnie
7 Arnau.
8
9

10 HEARING OFFICER: Arnau?
11
12

13 EMPLOYER WITNESS-1: Yes, A-r-n-a-u.
14
15

16 HEARING OFFICER: And is that person involved in the day to
17 day activities with the public?
18
19

20 EMPLOYER WITNESS-1: He's just the HR manager. He's not
21 involved in the day to day, just on matters of this sort, termination or
22 disciplinary, progressive disciplinary measures. He advises.
23
24

25 HEARING OFFICER: Mr...
26
27

28 EMPLOYER WITNESS-1: Arnau.
29
30

31 HEARING OFFICER: Arnau, advised you of separation, is that
32 correct?
33
34

35 EMPLOYER WITNESS-1: Yes.
36
37

38 HEARING OFFICER: Okay, thank you.
39
40

1 EMPLOYER WITNESS-1: And he may be reached at the same
2 number as Mr. Bryant.

3
4
5 HEARING OFFICER: Thank you. Anything else Mr.
6 Eisenecker?

7
8
9 EMPLOYER WITNESS-1: No ma'am.

10
11
12 HEARING OFFICER: Mr. Upshaw do you have any questions
13 for Mr. Eisenecker? This is your opportunity to ask questions, not to
14 give testimony and not to dispute the testimony. I'm going to take that
15 from you in just a moment.

16
17
18 CLAIMANT: Oh no, I have no questions for him.

19
20
21 HEARING OFFICER: Then if you would Mr. Upshaw would
22 you please state your name for the record, spelling your first and last
23 name.

24
25
26 CLAIMANT: My name is Anthony Upshaw. A-n-t-h-o-
27 n-y U-p-s-h-a-w.

28
29
30 HEARING OFFICER: Mr. Upshaw, on the 9th and 10th of
31 February, it is the testimony of Mr. Eisenecker that you did not report
32 to work during those two days, is that correct?

33
34
35 CLAIMANT: Yes.

36
37
38 HEARING OFFICER: And did you call anybody to let them
39 know that you were not going to be at work those two days?
40

1 CLAIMANT: I had called my supervisor, Vanessa
2 and let her know that I wasn't coming in for one day, but I'll be late for
3 the next day. During that time, I always leave, I left a voice message
4 on her phone to tell her that. And at that time, I still had called the
5 head manager that's over Vanessa, she's in Columbia and called her
6 to let her know I left a message saying that I won't be coming in
7 today, but I'll be coming in tomorrow, but I won't be coming in at 2:00.
8 I'll be coming in about 5:00 or 6:00. And during that time that's when
9 they had got rid of, I didn't know they had got rid of my head manager
10 in Columbia. So that's probably why they didn't get the information
11 going through saying I didn't call in because I did call in.

12
13
14 HEARING OFFICER: This was in February?

15
16
17 CLAIMANT: Yes. I mean, no. This was...

18
19
20 HEARING OFFICER: I'm talking about February when you
21 were let go.

22
23
24 CLAIMANT: Yes, yes, yes.

25
26
27 HEARING OFFICER: Mr. Eisenecker was not your supervisor
28 at that time, as the account manager, at that time?

29
30
31 CLAIMANT: At that time I still was reporting to
32 another lady in Columbia. He knows who I'm talking about.

33
34
35 HEARING OFFICER: Did you speak to either of those
36 individuals or just left a message?

37
38
39 CLAIMANT: I left a message for Vanessa and I left a
40 message for—I left a message for the both of them.

1 HEARING OFFICER: Did you hear back from either Vanessa
2 or the manager in Columbia?

3

4

5 CLAIMANT: No I what I heard back is from, my girl
6 ~~works at the same building that I work at. She told me that I had to~~
7 return the keys and the badge or the U.S. Marshalls will be coming to
8 my house because I was fired.

9

10

11 HEARING OFFICER: When was that?

12

13

14 CLAIMANT: That would be three days, that would
15 have been like—because as a matter of fact I tried to go back to work
16 and get in the building and my badge would not work.

17

18

19 HEARING OFFICER: What day was that?

20

21

22 CLAIMANT: That would have been the—the first day
23 I called in, I told them I wasn't coming, but the second day I told them
24 I was coming in late. So I'm not sure what days that is, if he got two
25 days that I was absent, the last day.

26

27

28 HEARING OFFICER: He's got the 9th and the 10th and the two
29 days.

30

31

32 CLAIMANT: Well, the 10th. I came in late and when I
33 tried to use my badge to get in, I was already, I couldn't get back in
34 the building. So right then and there they must have terminated me
35 without telling me.

36

37

38 HEARING OFFICER: Did you talk to anybody about you
39 couldn't get in the building?

40

1 CLAIMANT: No, I couldn't get in. I couldn't talk to
2 nobody, you know, I didn't talk to nobody because I figured hey, they
3 must have terminated me. So what I did was, the next day I was
4 getting up and my girl called and said we need, Vanessa just came in
5 my office. We need you to return your keys and your badge. If you
6 don't do that then the U.S. Marshalls will report to your house.

7
8
9 HEARING OFFICER: On the 10th when you went in, as you
10 said you were reporting late, after you had notified Vanessa that you
11 were going to be late, why would you not call her to find out what was
12 going on, why you couldn't get in the building?

13
14
15 CLAIMANT: That's when I got in contact with a lady
16 named Phyllis, that was our other, she was over Vanessa and I told
17 Phyllis, but usually when I leave a message they usually call me
18 back. I sat there and waited and waited and I didn't get no message
19 back from them. And during that time, it's certain hours that I have to
20 call Vanessa because at that time, me and Vanessa used to go
21 together. I used to date my supervisor, Vanessa and right then and
22 there she got mad at me during the time I started talking to another
23 lady in the building. So she already had grudge against me anyway.
24 So she was out for me anyway.

25
26
27 HEARING OFFICER: Okay. But if you couldn't get in the
28 building, why didn't you contact someone to find out what was going
29 on?

30
31
32 CLAIMANT: I did call Atlanta. I kept calling Atlanta. I
33 left a lot of messages on Atlanta office, the numbers that I had.

34
35
36 HEARING OFFICER: What day was that that you called
37 Atlanta?

1 CLAIMANT: That would have to be, if that was the
2 10th, that probably would have had to be, I probably called between
3 the 11th and the 12th, both days.
4
5

6 HEARING OFFICER: I'm trying to, the question I'm asking Mr.
7 Upshaw is on the 10th when you went to work and your badge would
8 not work in the building, why would you not contact someone at that
9 time to find out why you could not get in the building?
10
11

12 CLAIMANT: Oh, because, to be honest with you, it
13 was after hours. It was like, it had to be about 7:00 or 8:00 at night
14 and I didn't know who to contact during that late. That's why I called
15 Phyllis and let her know.
16
17

18 HEARING OFFICER: Prior to this night in February, had
19 anybody told you that your job was in jeopardy, with your
20 attendance?
21
22

23 CLAIMANT: No, nobody never talked to me about it,
24 you mean like my supervisor or somebody like that, no.
25
26

27 HEARING OFFICER: Has anybody told you with the company
28 that your attendance was an issued?
29
30

31 CLAIMANT: No, nobody never said nothing. We had
32 so much he say, she say gossip going on in the building, so I tried to
33 keep to myself.
34
35

36 HEARING OFFICER: I'm asking about your supervisor...
37
38

39 CLAIMANT: No.
40

1 HEARING OFFICER: Or anybody that is over you. Did they
2 tell you that your job was in jeopardy because of your attendance?
3
4

5 CLAIMANT: No.
6

7
8 HEARING OFFICER: In November when you were given the
9 reprimand for failing to report to work or call in, were you told at that
10 time that any further attendances issues could result in you being
11 terminated from your employment?
12
13

14 CLAIMANT: No, they told me I would be suspended,
15 that was the only thing. They said I would be suspended. They didn't
16 say nothing about no termination or nothing like that. They just said I
17 would be suspended.
18
19

20 HEARING OFFICER: Were you aware of the policies of the
21 company?
22
23

24 CLAIMANT: Well all I know is we had two policies.
25 We had two companies. First I was with—well, this is the second
26 company. The other company I was with...
27
28

29 HEARING OFFICER: But this company is the one I'm
30 speaking of.
31
32

33 CLAIMANT: Okay.
34
35

36 HEARING OFFICER: This company here, Urban Services,
37 were you aware of their policies?
38
39

40 CLAIMANT: Not really.

1 HEARING OFFICER: Did you get a handbook from the
2 company when you were hired in 2010?

3
4
5 CLAIMANT: Yes we did. Yes I did receive a
6 handbook:

7
8
9 HEARING OFFICER: Did you read the handbook when you
10 received it?

11
12
13 CLAIMANT: I briefed over it.

14
15
16 HEARING OFFICER: Were you aware that failing to report to
17 work for two days it could result in termination of your employment?

18
19
20 CLAIMANT: No I didn't.

21
22
23 HEARING OFFICER: Okay.

24
25
26 CLAIMANT: As long as I still had time left, I thought it
27 would be all right, as long as I called in. And I still had time because it
28 was coming up on my birthday week and I know I still had time left.

29
30
31 HEARING OFFICER: When you left a message for Vanessa,
32 did she ever call you back?

33
34
35 CLAIMANT: She never did call me back. I never did
36 get no response from her. The only way I got through to her was by
37 her going through my mom and telling my mom certain things, that
38 was the only thing.

39
40

1 HEARING OFFICER: Thank you. I don't believe I have any
2 questions Mr. Upshaw. Do you have anything else regarding your
3 separation?
4

5
6 CLAIMANT: No.
7

8
9 HEARING OFFICER: Okay. Mr. Eisenecker do you have any
10 questions for Mr. Upshaw?
11

12
13 EMPLOYER WITNESS-1: Not at this time.
14

15
16 HEARING OFFICER: Do you have any additional testimony or
17 any rebuttal to any of the testimony that's been given?
18

19
20 EMPLOYER WITNESS-1: No, I was just going to present the
21 employee handbook that everyone receives when they're hired.
22

23
24 HEARING OFFICER: You've already given me the
25 acknowledgment of that so we don't need that.
26

27
28 EMPLOYER WITNESS-1: Okay.
29

30
31 HEARING OFFICER: Anything else?
32

33
34 EMPLOYER WITNESS-1: No ma'am.
35

36
37 HEARING OFFICER: Mr. Upshaw anything further?
38

39
40 CLAIMANT: No ma'am.

1 HEARING OFFICER: Well, there being no further questions
2 and no further testimony, I declare this hearing closed.

3
4
5 **HEARING CLOSED**

6
7

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40

C E R T I F I C A T E

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

This is to certify that the following is a true and correct copy of transcript of testimony transcribed to the best of my ability.

Tanaka Chandler

SWORN to before me this the

_____ day of _____, 2011

Notary Public for South Carolina

My Commission Expires: _____

AGENCY EXHIBITS

1 UCB-103
REV. May 2007

SOUTH CAROLINA

SECURITY COMMISSION

P.O. # EXHIBIT A-1 S.C. 29202

1 ANTHONY UPSHAW
1 2571 OLD SANSBURY RD
1 TIMMONSVILLE SC 29161

DATE OF THIS NOTICE 03/13/11

CLAIMANT'S NAME				SOCIAL SECURITY NUMBER	EFFECTIVE DATE	DISQUALIFICATION ENDS	
ANTHONY UPSHAW				[REDACTED]	02/13/11	05/21/11	
L.O. NO	TYPE	CATEGORY	WEEKLY BENEFIT AMOUNT	MAXIMUM POTENTIAL ENTITLEMENT	LESS REDUCTION OF	NET TOTAL BENEFITS	BENEFIT YEAR ENDS
210	I	01	\$ 272.00	\$ 7072.00	\$ 3808.00	\$ 3264.00	02/12/12

DETERMINATION BY CLAIMS ADJUDICATOR ON CLAIM FOR BENEFITS

- 1 _____ You are eligible for benefits from the above effective date.
- 1 X You have been disqualified from receiving benefits or have been found to be ineligible for benefits for the following reason(s).

1 YOU WERE DISCHARGED FROM YOUR JOB WITH YOUR MOST RECENT BONA FIDE EMPLOYER FOR EXCESSIVE
1 ABSENTEEISM. YOU HAD BEEN ADEQUATELY WARNED THAT YOUR ATTENDANCE WAS NOT SATISFACTORY. YOUR
1 ATTENDANCE VIOLATIONS WARRANT A DISCHARGE FOR CAUSE CONNECTED WITH THE WORK UNDER THE SOUTH
1 CAROLINA CODE, SECTION 41-35-120(2). YOU ARE DISQUALIFIED FOR 14 WEEKS. YOUR MAXIMUM BENEFITS
1 ARE ALSO REDUCED BY 14 TIMES YOUR WEEKLY BENEFIT AMOUNT.

1 _____ LAST SEPARATION FROM NON-LIABLE EMPLOYER

UI CLAIMS ADJUDICATOR

1 MAILING DATE 03/14/2011

IMPORTANT: THIS DETERMINATION WILL BE THE FINAL DECISION OF THE COMMISSION UNLESS YOU FILE AN APPEAL SETTING FORTH IN DETAIL THE GROUNDS FOR APPEAL WITHIN TEN (10) CALENDAR DAYS, INCLUDING WEEKENDS AND HOLIDAYS, FROM THE MAILING DATE SHOWN ABOVE. IF THE TENTH DAY FALLS ON A SATURDAY, SUNDAY, OR HOLIDAY, THE APPEAL PERIOD IS EXTENDED TO THE NEXT BUSINESS DAY. YOUR APPEAL MAY BE FILED IN PERSON AT ANY EMPLOYMENT SECURITY OFFICE OR BY MAIL, ADDRESSED TO THE "APPEAL TRIBUNAL," P.O. BOX 995, COLUMBIA, SOUTH CAROLINA 29202. FOR ADDITIONAL INFORMATION OR ASSISTANCE IN FILING AN APPEAL, CONTACT YOUR LOCAL EMPLOYMENT SECURITY OFFICE.

EMPLOYER EXHIBITS

WORK RULES SYSTEM
DISCIPLINARY
FOR AVOIR

EXHIBIT E-1

PROGRESSIVE
DISCIPLINES
CONCEPTS

ATTENDANCE		First Offense	Second Offense	Third Offense	Fourth Offense
A-4	Absent for two consecutive days without calling to notify supervisor of absence and reason, unless documentation proves notification impractical (i.e. in intensive care, etc.) Includes failing to return to work from extended LOA after notification that work is available.	Considered Resignation without Notice & Unpaid	N/A	N/A	N/A
A-5	Two instances of unexcused absences within first 90-day period. See Attendance Policy on Pg. 10.	Termination	N/A	N/A	N/A
A-6	Three instances of unexcused absences within a 6-month period. <i>Absences confirmed by a doctor's note will not count towards the three instances.</i>	Termination	N/A	N/A	N/A
A-7	Tardiness. Defined as being more than 15 minutes late reporting for work, returning from break or meal period	Written Warning	Written Warning and 90-day probation	Written Warning, One day suspension without pay	Termination
A-8	Failure to work scheduled holiday when required	Written Warning, 90- day Probation, no pay for the Holiday, forfeiture of Holiday	Termination and no pay for the Holiday	N/A	N/A

4/2/00

EXHIBIT

E# 1

FILE NO: 1104424

U.S. Postal ServiceTM
CERTIFIED MAILTM RECEIPT
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Sent To Anthony Upshaw
 Street, Apt. No.,
 or PO Box No.
 City, State, ZIP+4

PS Form 3800, August 2008 See Reverse for Instructions

9511 149E 0000 0901 0102

W
 FEB 17 2011
 3:21

R11172
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7010 1060 0000 3641 1158



MR. Anthony Upshaw
 2571 Old Strandsburg Rd
 Timmonsville, SC 29161

NIXIE

292 4C 1

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[illegible]

ACKNOWLEDGEMENT OF RECEIPT OF THE COMPANY EMPLOYEE HANDBOOK

I received my copy of the Company's Employee Handbook, which I have read and understand. I also have been given an opportunity to ask questions I may have concerning any of the policies in this handbook.

I have been trained on the Company's Open Door, Sexual Harassment, Work Rules, and Drug and Alcohol Free Workplace Policies.

I understand that the Handbook does not provide any contractual rights or guarantees of employment and that my employment is for no definite duration. I further understand that my employment relationship is not an employment contract and may be terminated at any time with or without notice or cause; either by me or the Company and that this understanding cannot be modified except by written agreement signed by the Company's President. I agree that the Company's policies and benefits may be changed from time to time at its discretion without advance notice. I will keep my handbook for future reference and observe the personnel policies and rules outlined in this Handbook.

I further acknowledge that I am aware of my employment classification and the benefits eligibility involved with this classification, and I acknowledge receipt of all applicable Summary Plan Descriptions. My initials and date below confirm acknowledgement of my position classified in this Handbook as:

Temporary Full-Time Date

Regular Full-Time Date

A.U 7-21-10
Part-Time Date

Witnesses:

Employee:

Vanessa R. Simon
Print Name and Title

ANTHONY UPSHAW
Employee Print Name

Vanessa R. Simon
Signature

Anthony Upshaw
Signature

July 21, 2010
Date

7-21-10
Date

EXHIBIT E-2

URBAN SERVICES GROUP NOTICE OF MISCONDUCT; PROGRESSIVE DISCIPLINE FOR
WORK RULE VIOLATIONS

The issues denoted below have been clearly explained to me. I, Anthony UPshaw
(print full name), acknowledge these issues must be corrected. I further acknowledge disciplinary action
may be required if immediate attention is not directed towards resolving these issues; OR problems have
not been corrected and my progressive discipline is resulting in termination

Describe specific examples of Work Rule Violation, Performance Issue or Inappropriate Action. Include
alphanumeric code for Work Rule Violation:

Most recent incident: NO CALL, NO show to work

Prior incidents: Verbal warning was given

Expectations: CALL your Lead Custodian if not reporting to work

Offense: () 1st (x) 2nd () 3rd () 4th

Action Taken as a result of Offense:

(x) Written Warning () Probation () Suspension () Termination

Employee's Name/Signature: Anthony Upshaw Date: 11-3-10

Company Rep Name/Signature: Shan [Signature] Date: 11-2-10

Witness Name/Signature: Vanessa Simon Date: 11-3-10

2nd EXHIBIT

E# 2

FILE NO: 1104424

USO #4-02.02

URBAN SERVICES GROUP NOTICE OF MISCONDUCT; PROGRESSIVE DISCIPLINE FOR
WORK RULE VIOLATIONS

The issues denoted below have been clearly explained to me, I, Anthony Upshaw
(print full name), acknowledge these issues must be corrected. I further acknowledge disciplinary action
may be required if immediate attention is not directed towards resolving these issues; OR problems have
not been corrected and my progressive discipline is resulting in termination

Describe specific examples of Work Rule Violation, Performance Issue or Inappropriate Action. Include
alphanumeric code for Work Rule Violation:

Most recent incident: B4 absent for two consecutive days
without calling or notify supervisor of absence
and reason, unless documentation proves notification
improper.

Prior incidents: _____

Expectations: _____

Offense: ☒ 1st ☐ 2nd ☐ 3rd ☐ 4th

Action Taken as a result of Offense:

☐ Written Warning ☐ Probation ☐ Suspension ☒ Termination

Employee's Name/Signature: _____ Date: _____

Company Rep Name/Signature: Hermosa Simon Date: 2-11-11

Witness Name/Signature: [Signature] Date: 2-11-11

USG #4-02.02

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(I)

REQUEST FOR DETERMINATION OF INSURED STATUS

NAME: ANTHONY UPSHAW		SSN: [REDACTED]	BYE: 02/12/12
CLAIMSTAKER ID: DABRW	LO #: 210	FILED: 02/17/11	EFF DATE: 02/13/11
MAILING ADDRESS: 2571 OLD SANSBURY RD			
CITY: TIMMONSVILLE		STATE: SC	ZIP: 29161-0000
OTHER NAME:			

☒ 1-UI	☐ 4-UI/UCFE/UCX	☐ 7-UCX	☒ NEW	☐ TRANSITIONAL
☐ 2-UI/UCFE	☐ 5-UCFE	☐ 8-CW	☐ ADDITIONAL	☐ R-ADD
☐ 3-UI/UCX	☐ 6-UCFE/UCX	☐ OTHER	☐ CONTINUED	

BONA FIDE EMPLOYER NAME & PAYROLL ADDRESS INFORMATION:		DATES OF EMPLOYMENT:	
NAME: URBAN SERVICES GROUP INC			
STREET: C/O STEPHEN BRYANT, 120 HAMMOND DR NE		FROM:	TO:
		09/05/08	02/11/11
CITY: ATLANTA	ST: GA	ZIP: 30328-4806	EMP. ACCT. # 501760

BONA FIDE EMPLOYER LOCAL ADDRESS INFORMATION:			
STREET:			
CITY: FLORENCE	ST: SC	ZIP:	PHONE #:(404) 315-1940

SEPARATION REASON:	☐ LOW	☐ VQ	☒ DISCHARGE	☐ STILL WORKING
--------------------	------------------------------	-----------------------------	---	--

ISSUE CODES: 01

LIABLE EMPLOYER INFORMATION:		DATES OF EMPLOYMENT:	
NAME:	EMP. ACCT #	FROM:	TO:
JOB LOCATION (CITY/STATE):			

SEPARATION REASON:	☐ LOW	☐ VQ	☐ DISCHARGE	☐ STILL WORKING
--------------------	------------------------------	-----------------------------	------------------------------------	--

NARRATIVE REASON FOR SEPARATION FROM LIABLE EMPLOYER:

DISCHARGE FOR CAUSE FACT FINDING

UCB-102DC
8/99
08122

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

UNEMPLOYMENT INSURANCE DIVISION
DISCHARGED FOR CAUSE

SC Employment ~~CAUSE~~ FACT FINDING

Effective Date of Issue 2/13/2011	
Type of Claim	
New ☒	Add ☐
Trans ☐	Rein ☐
Cont ☐	
BYE 2/12/2012	

L O No 2100

MAR 09 2011

CLAIMANT'S

SOCIAL

NAME ANTHONY-UPSHAW

Received Benefits Div

SECURITY NUMBER [REDACTED]

1 Most recent BONA FIDE employer (Name of Company) URBAN SERVICES GROUP INC

Address of Company 120 HAMMOND DR NE ATLANTA GA 30328

Telephone No of Company 404-315-1540

Name of individual at Company to contact for more information VANESSA SIMS

X103

2 Dates of employment with this company beginning 071109 ending 021111

Hours worked from 12MDNT to 6A or which shift _____ for 5 days per week

Ending salary \$ 13.72 per HR Occupation HOUSEKEEPING/FLOOR MAINT

3 CLAIMANT'S STATEMENT.

a I was discharged by (Name of Person) VANESSA SIMS Title SUPV

because (Include reason for discharge on that particular day) I RECEIVED MY FINAL WARNING IN NOV 2010 AND DID NOT GET ANYMORE SINCE THAT TIME ON 021011, I CAME HOME AND HAD CAR TROUBLE I CALLED MY SUPV AND TOLD HER I WOULD NOT BE ABLE TO REPORT FOR WORK AT 2PM THAT DAY BUT WHEN I REPORT IN I WOULD DO MY 6 HOURS I DID NOT GET TO WORK UNTIL 7PM AND MY BADGE WOULD NOT SWIPE I THEN CALLED MY SUPERVISOR AND DID NOT GET A CALL BACK I KEPT CALLING AND MY GIRLFRIEND CALLED AND SAID THEY CALLED HER AND TOLD HER IF I DID NOT BRING IN MY BADGE AND KEYS, THE CO WOULD BE THERE TO I GAVE THE KEYS TO MY GIRLFRIEND AND CALLED PHYLLIS, VANESSA'S SUPV AND WAS TOLD THAT I HAD BEEN TERMINATED I DID THE WORK TO THE BEST OF MY ABILITY I AM ABLE AVAILABLE AND ACTIVELY SEEKING FULL-TIME WORK

b If you were discharged for violation of a company rule, please explain rule and violation
TERMINATED BECAUSE I DID NOT REPORT FOR WORK UNTIL 7PM BECAUSE I HAD CAR TROUBLE, CAR WOULD NOT CRANK

c Has your employer ever warned you about the condition causing your discharge? Yes ☐ No ☒
If "Yes," when were you warned (Dates) and by whom? _____

d Did you discuss your discharge with your employer? Yes ☒ No ☐ If "Yes," with whom VANESSA
What were the results of this discussion? TERMINATED

4 CLAIMANT'S CERTIFICATION. I certify that the information stated herein is true I understand that the Law prescribes penalties for false statements for the purpose of securing benefits to which I am not entitled

CLAIMANT'S SIGNATURE VIA [Signature]

DATE 3/8/2011

5 INTERVIEWER'S STATEMENT Employer Reply received? Yes ☒ No ☐ (If "Yes" all the employer's allegations not covered in claimant's initial statement must be presented to the claimant for rebuttal in item 7 If "No," or information was not adequate, was employer contacted to obtain adequate information?

Yes ☒ No ☐ If "No," give a date of attempt(s) to contact and explain EMPLOYER/CLAIMANT AGREES [Signature]

EMPLOYER REPLY SUFFICIENT [Signature]

INTERVIEWER'S SIGNATURE [Signature]

DATE OF REPORT 3/8/2011

NAME ANTHONY UPSHAW

SOCIAL SECURITY # [REDACTED]

6 EMPLOYER'S STATEMENT (ALSO USE FOR REBUTTAL OF CLAIMANT'S STATEMENT)

TELEPHONE?

IN PERSON

EMPLOYER'S SIGNATURE OR NAME OF INDIVIDUAL CONTACTED

TITLE OF INDIVIDUAL CONTACTED

3/8/2011

DATE

7 REBUTTAL OF EMPLOYER REPLY

INTERVIEWERS SIGNATURE

[Handwritten Signature]

DATE 3/8/2011

CLAIMANT'S SIGNATURE

DATE

3a CLAIMANT'S STATEMENT CONTINUED (USE ONLY IF ADDITIONAL SPACE IS NEEDED FOR FACT-FINDING STATEMENTS)

BENEFIT DEPARTMENT

CO Employment Comm.

CLAIMANT'S SIGNATURE

MAR 09 2011

Received Benefits Div.

REQUEST FOR SEPARATION INFORMATION

T-110 P0002/0002 F-997

NET A11 SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
REQ-101

UNEMPLOYMENT INSURANCE BENEFITS

CLAIMANT'S NAME: ANTHONY URSUIN

NAME WORKED UNDER

EMPLOYER'S ACCOUNT # 60106

EMPLOYER'S NAME: URSIN SERVICES GROUP INC
C/O URSIN SERVICES GROUP
1300 BURNING WOOD DR
ATLANTA, GA 30328-4400

RETURN WITHIN 10 DAYS OF THE 10th OF EACH MONTH

ABOVE DATE TO: 10/10/11, 10/10/11

FAX NUMBER: 404-511-3000

This person has filed a claim for Unemployment Insurance Benefits and would like to know if you are a person who has been notified that person no longer works for you so that a determination can be made as to eligibility for benefits. If you reply by letter by email, you must include all information requested, as well as the claimant's name and social security number for verification. If you are unable to provide this information, please call the agency at 1-800-768-6262. YOU WILL RECEIVE A DETERMINATION ON THIS CLAIM ONLY IF IT IS FOUND THAT YOU ARE THE EMPLOYER OR FORMER EMPLOYER.

☒ CLAIMANT'S Reason for Separation: ☒ DISCHARGED / REASON SPECIFIED

YES

☒ I have been interviewed and I have been notified that the claimant on 02/24/2011 at 04:43 PM. I have been notified by mail, fax, email, telephone or personal visit to the local DWS office about the claimant's separation.

SEPARATION INFORMATION

☐ LACK OF WORK (NO additional information is necessary)

☒ DISCHARGED (Give specific reason) Employee discharged for Absenteeism

I am completing this claimant's information. It is applicable and describes the final incident leading to the separation.

Employee was absent for two consecutive days without notifying supervisor.

Let my manager know of verbal warning on 02/24/2011 and one written warning on 02/24/2011.

Employee received one verbal warning on 02/24/2011 and one written warning on 02/24/2011.

Employee was discharged for absenteeism, the date of discharge.

Date of discharge: 2/24/11

Voluntarily QUIT (Give specific reason): 2/24/11

OTHER (Specify in detail):

☐ OTHER (Specify in detail):

RECEIVED

FEB 25 2011

SC Employment Security Comm
Florence Workforce Center

SC Employment Comm.

MAR 09 2011

Received Benefits Div.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

January 17, 2012



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ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from
The Administrative Law Court

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-22-0340-AP

Anthony Upshaw,

Appellant,

v.

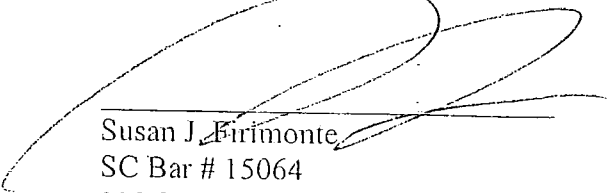
South Carolina Department of Employment and Workforce
and Urban Services Group, Inc.,

Respondents.

BRIEF OF APPELLANT

January 23, 2012

SOUTH CAROLINA
LEGAL SERVICES



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ATTORNEYS FOR APPELLANT

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<i>Coy v. Virginia Employment Comm'n</i> , 23 Va. Cir. 428 (1991)	9
<i>De Groot v. Employment Sec. Comm'n</i> , 285 S.C. 209, 328 S.E.2d 668 (S.C. Ct. App. 1985)	4
<i>Doyle v. Fla. Unemployment Appeals Comm'n</i> , 635 So.2d 1028 (Fla. 2d DCA 1994)	11
<i>Garris v. Governing Board of S.C. Reinsurance Facility</i> , 333 S.C. 432, 511 S.E.2d 48 (1998)	6
<i>Georgia-Carolina Bail Bonds, Inc v. County of Aiken</i> , 354 S.C. 18, 579 S.E.2d 334 (S.C. Ct.App. 2003)	3
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ERR IN FINDING THAT THE APPELLANT WAS DISCHARGED FOR CAUSE, AS STATED IN S.C. CODE ANN. §41-35-120(2)(a), FOR VIOLATING AN EMPLOYER POLICY WHEN THERE WAS NO COMPETENT EVIDENCE THAT THE APPELLANT VIOLATED THE POLICY?
- II. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW WHEN IT ALLOWED HEARSAY, STANDING ALONE, TO SERVE AS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT A DENIAL OF BENEFITS?
- III. DID THE ADMINISTRATIVE LAW COURT ERR IN FAILING TO ASSESS THE REASONABLENESS OF THE EMPLOYER'S POLICY AS APPLIED TO THE FACTS AND CIRCUMSTANCES IN EVIDENCE IN THE PRESENT CASE?

STATEMENT OF THE CASE

The Appellant, Anthony Upshaw ("Upshaw"), was employed with Urban Services, Inc. ("Employer"), as a housekeeper until he was terminated on February 11, 2011. Upshaw timely applied for unemployment benefits through the South Carolina Department of Employment and Workforce ("Department"). Upshaw received an initial determination that he was disqualified from receipt of unemployment benefits. (R. p. 22) Upshaw timely appealed this decision to the Department's Appeal Tribunal (R. p. 21), and a hearing was held on April 14, 2011. Upshaw represented himself at the hearing. The Administrative Hearing Officer, Erika S. Davis, affirmed the prior decision and found Upshaw disqualified from receiving benefits for fourteen (14) weeks, together with a corresponding reduction in his maximum potential benefit amount. (R. p. 18) Upshaw timely filed a Notice of Claimant Appeal to the Department's Appellate Panel seeking review of the Appeal Tribunal decision.

No hearing was held by the Appellate Panel in this matter. The Appellate Panel delivered Decision No. 2011P-1256, which affirmed the decision of the Appeal Tribunal. (R. p. 13) On June 21, 2011, Upshaw filed a Petition for Judicial Review of the Agency Action of the ~~South Carolina Department of Employment and Workforce. The Administrative Law Court~~ (ALC) issued its decision affirming the decision below on October 31, 2011. (R. p. 1) Upshaw timely appealed this decision to the Court of Appeals.

FACTS

Upshaw began working for Employer on July 11, 2009 (R. p. 28, lines 19-20) as a housekeeper. Employer discharged him on February 11, 2011 for purportedly failing to call or show to work, in violation of the Employer's procedures. (R. p. 28, lines 32-38).

The Employer's policy, as referenced in the termination notice, provided that an employee may call in as unable to work on any given day without penalty, as long as the employee calls in. The testimony by Employer's sole witness at the hearing was that he had no personal knowledge of the alleged failure to call or show. Upshaw testified that he did call and was unable to reach his immediate supervisor but left messages for her. (R. p. 37, lines 1-4) Additionally, because he was unable to speak personally with his supervisor, he also called his supervisor's supervisor and left detailed messages for her as well. (R. p. 37, lines 4-11) No first-hand testimony was presented at the hearing contradicting Upshaw's testimony that he called in.

Although Employer's witness asserted that he was told by Upshaw's supervisor that Upshaw did not call or show (R. p. 34, lines 4-16), the supervisor was not present and did not testify. Further, the Employer neither requested a continuance nor offered any reason for not

producing the first-hand witness at the hearing.

ARGUMENTS

I. **THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THAT THE APPELLANT WAS DISCHARGED FOR CAUSE, AS STATED IN S.C. CODE ANN. §41-35-120(2)(a), FOR VIOLATING AN EMPLOYER POLICY WHEN THERE WAS NO COMPETENT EVIDENCE THAT THE APPELLANT VIOLATED THE POLICY.**

S.C. Code § 41-35-120(2)(a) states that a claimant may be partially or fully disqualified from unemployment benefits if discharged “for cause connected with his most recent work.” As held by this Court in *Georgia-Carolina Bail Bonds, Inc v. County of Aiken*, “all rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” 354 S.C. 18, 22, 336, 579 S.E.2d 334, 336 (Ct. App. 2003). “A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute.” *Id.*

Here, the legislature’s intended purpose and expressed policy in providing for unemployment benefits was to protect the worker and society by maintaining purchasing power of individuals involuntarily separated from work. S.C. Code §41-27-20 provides, in part:

Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family. *Id.*

“The principal purpose and object under the act of alleviating the evils of unemployment by cushioning the shock of a lay-off.” S.C. Code §41-27-20 The importance of considering the

“serious social consequences” of denying unemployment benefits in considering the scope of exceptions to eligibility further demonstrate the intent to liberally construe the act in favor of the unemployed worker. *Id.*

~~While the present statute refers to “discharge for cause” rather than the prior statutory~~
language of “misconduct,” case law defining misconduct continues to be the touchstone for interpreting the current statutory formulation of discharge for cause. *Mickens v. Southland*, 305 S.C. 127, 406 S.E.2d 363 (1991) The Department follows these definitions, interpreting “cause” as “ a disregard for the standard of behavior an employer has a right to expect of an employee.” *Id.* at 130, 365 (citing *Lee v. S.C. Employment Sec. Comm’n*, 277 S.C. 586, 291 S.E.2d 378, 379 [S.C. 1982])

Courts have defined “misconduct” to include: the wanton and willful disregard of the employer’s interests; deliberate violation of rules; disregard of the standard of behavior which an employer can rightfully expect from an employee; or intentional and substantial negligent disregard for the employer’s interests, duties, or obligations. *DeGroot v. Employment Sec. Comm’n*, 285 S.C. 209, 328 S.E.2d 668 (1985); *Lee v. Employment Sec. Comm’n*, 277 S.C. 586, 291 S.E.2d 378 (1982). Generally, where there is a reasonable rule or request by the employer, a refusal to comply will justify a finding of discharge for cause for purposes of disqualification. *Mickens v. Southland*, 305 S.C. 127, 406 S.E.2d 363 (1991) What is “reasonable” depends upon the circumstances of the individual case. *Id.*

Applying these standards to the facts of the present case, it is evident that the Department’s finding that Upshaw violated a reasonable rule of the employer was not supported by any direct, reliable evidence or testimony. It is necessary to first clarify the

alleged policy violation in this matter. The ALC opinion discusses an employer policy covering unexcused absences and that absences confirmed by a doctor's note would not count as unexcused; this policy is not at issue. Upshaw was not terminated because of an excess of unexcused absences, and there is no evidence that the employer ever considered the reason for the absence in question. He was terminated for his alleged failure to report that he would be absent.

As set forth in the termination notice, Upshaw's alleged violation was a failure to call in to notify Employer that he would not be at work. (R. p. 52) The policy provided that an employee was subject to be considered resigned without notice if he was "(a)bsent for two consecutive days without calling to notify supervisor of absence and reason, unless documentation proves notification impractical." (R. p. 47) Employer did not present any first-hand evidence at the hearing in this matter to support a finding that Upshaw violated this policy. While the ALC found that, "employees were to call their supervisor or project manager to report an absence" (R. p. 6), Employer's witness admitted that he is not the person Upshaw was to call to report an absence from work, as follows:

Hearing Officer: When an employee is absent from work, are they to call you as the project manager?

Employer Witness-1: No, he can call his immediate supervisor, Vanessa Simon. (R. p. 34, lines 4-9)

Upshaw testified unequivocally that he called his immediate supervisor and left her a message when he could not reach her and that he even called Ms. Simon's supervisor. (R. p. 37, lines 1-11, lines 27-32 and 39-40) The Employer deliberately chose not to have available at the hearing the only person who could present evidence that Upshaw did not call Ms.

Simon, namely, Ms. Simon herself. Thus, Employer presented only hearsay evidence to support its case, depriving Upshaw of his ability to cross examine this evidence and leaving the Administrative Hearing Officer with only unreliable incompetent evidence as the sole support for Employer's version of events. ~~Due process is required even in administrative~~ proceedings. "A fair trial in a fair tribunal is a basic requirement of due process, (and) this applies to administrative agencies which adjudicate as well as to courts." *Garris v. Governing Board of S.C. Reinsurance Facility*, 333 S.C. 432, 443, 511 S.E.2d 48, 54 (1998) The Constitution of South Carolina, in Article I, Section 22, specifically grants due process in administrative hearings. By treating the hearsay testimony of Employer as reliable, the ALC deprived Upshaw of his due process rights.

The admission and reliance on this hearsay was in direct contravention with S.C. Code Ann. §1-23-330, which states in part that, "[e]xcept in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas *shall* be followed." (*emphasis added*) As mandated in the statute, in any and all hearings before officers of the South Carolina Department of Employment and Workforce, the Administrative Hearing Officers must follow the South Carolina Rules of Evidence. The South Carolina Rules of Evidence state that, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this state or by Statute." (S.C.R.E. 802) Under well-established rules, evidence of an out-of-court statement by someone other than the person testifying that is used to prove the truth of the matter asserted is hearsay. Such evidence is inadmissible unless it falls under an exception. There is no contention that the statement in the instant case falls within any exception to the hearsay

rules.

Our Supreme Court has confirmed that the hearsay evidence rule should be applied even in administrative proceedings. *S.C. Dept. of Motor Vehicles v. McCarson*, 391 S.C.

136, 705 S.E.2d 425 (2011). *McCarson* dealt with a license revocation hearing, and being “a final adjudication of an important interest” (*Id.* at 148), the Court declined to allow the Department to “circumvent the well-established rules against hearsay.” (*Id.* at 149)

Like *McCarson*, the instant case involves a final adjudication of an important interest. The penalty applied in this matter not only disqualifies Upshaw from the set number of weeks of benefits, but also makes him ineligible for any emergency unemployment benefits, which could be many more weeks. Because the inadmissible hearsay testimony of Employer’s witness concerning the alleged misconduct was the only evidence presented by Employer in support of its case, the disqualification cannot stand. The testimony was not supported by any other evidence and was, in fact, directly contradicted by Upshaw in his testimony. The fact that Upshaw, a layman, did not interpose a formal objection pursuant to S.C.R.E. 802 to this hearsay should not be a basis to salvage this fundamental legal defect in the proceedings. It is anticipated by the statute that the proceedings are to be such that working men or women can effectively vindicate their rights without having to incur the additional expense of an attorney. It is also the mandate of the legislature that hearsay not be admissible. Harmonizing these two principles, the Department should not have predicated its decision on this hearsay.

The ALC erred as a matter of law in relying on this hearsay testimony to disqualify Upshaw from receiving unemployment benefits, and the decision of the ALC must be

reversed accordingly.

II. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW WHEN IT ALLOWED HEARSAY, STANDING ALONE, TO SERVE AS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT A DENIAL OF BENEFITS.

Even if the hearsay statement could be considered, the Department's reliance on it as the sole basis for its finding of a policy violation goes against the fundamental requirement that a decision of the Department denying benefits must be supported by substantial evidence. *Merck v. S.C. Employment Sec. Comm'n.*, 290 S.C. 459, 351 S.E.2d 338 (1986). As detailed above, under applicable South Carolina Rules of Evidence, hearsay is not considered competent, substantial evidence. Thus, the ALC erred in relying on this hearsay as the sole basis for its findings that Upshaw was discharged for cause.

South Carolina case law has not specifically addressed the issue of hearsay admitted in unemployment insurance hearings. However, jurisdictions that have addressed the issue in this context are in overwhelmingly accord that even if admitted, such hearsay, standing alone, cannot serve as substantial evidence supporting a disqualification for termination for cause. See, e.g., *King v. Administrator, Unemployment Compensation Act*, 51 Conn. Supp. 302, 981 A.2d 1082, 1084 (2008) (holding that "a finding of act based solely on hearsay will not stand."); *Jones v. Truly*, 670 So.2d 1294, 1297 (La. App. 5th Cir. 1996) (affirming "the rule that administrative findings be supported by competent evidence and not 'second hand or hearsay'" and holding that "findings of fact supported only by incompetent or hearsay evidence are improper."); *Taylor v. Board of Review* (1984), 20 Ohio App. 3d 297, 299, 20 Ohio B. 389, 485 N.E.2d 827, 829 (holding that "the phone call to the employer was hearsay

evidence...[and] where the sworn testimony of a witness is contradicted only by hearsay evidence, to give credibility to the hearsay statement and to deny credibility to the claimant testifying in person is unreasonable.”); *Chaves v. Employment Sec. Comm’n*, 98 N.M. 462, 464, 649 P.2d 1375, 1377 (1982) (finding “an absence of legally competent evidence showing that appellant was guilty of misconduct ... (because) while the testimony in the record is in conflict as to whether appellant gave proper notice regarding her absences, the testimony favoring appellees is hearsay.”); *Coy v. Virginia Employment Comm’n*, 23 Va. Cir. 428, 430 (1991) (holding hearsay admissible but reversing decision denying benefits for misconduct based solely on hearsay evidence).

Various cases have considered this principle in analogous circumstances. For example, in Tennessee, the Court of Appeals held that although hearsay was admissible in Tennessee administrative hearings, “uncorroborated hearsay does not constitute substantial and material evidence.” *Green v. Neeley*, No. M2006-004810-COA-R3CV, 2007, Tenn. App. LEXIS 374, 2007 WL 1731726, at *5 (Tenn. Ct. App. June 15, 2007). In *Green*, the Court reviewed a determination that the employee was disqualified for unemployment compensation for allegedly violating the company policy. As here, the only witness for the employer had no first-hand knowledge of the incident. Like South Carolina, the appellate court’s factual review was limited to whether the findings of fact were supported by substantial material evidence. (*Id.* at 7) Because the findings of facts were based solely on uncorroborated hearsay, the Court found that the substantial evidence test was not met and the denial of benefits was reversed. (*Id.* at 14)

Similarly, the Pennsylvania appellate court held in *Walker v. Unemployment*

Compensation Bd. Of Review of the Commonwealth of PA, 27 Pa. Commw., 522, 367 A.2d 366 (1976), that factual findings could not be based solely on hearsay. In *Walker*, the issue of hearsay at unemployment compensation hearings was addressed by the Court due to the development of two potentially inconsistent lines of authority on this issue. The two lines of decisions held that 1) a finding based solely on hearsay cannot stand even if that hearsay was admitted without objection; and 2) evidence, admitted without objection, may be given its natural and probative effect and may support the Board's findings. *Id.* at 527, 370. The Court resolved the issue squarely in favor of the principle that uncorroborated hearsay will not support a denial of unemployment benefits, holding that:

1) Hearsay evidence, properly objected to, is not competent evidence to support a finding of the Board. ... 2) Hearsay evidence admitted without objection, will be given its natural probative effect and may support a finding of the Board, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand. *Id.* at 527, 370

Finally, Florida has several decisions on point. In *Gomez v. Unemployment Appeals Comm'n*, 884 So.2d 1033 (Fla. 2d DCA 2004), the employee was denied unemployment compensation benefits for allegedly violating company policy on internet abuse. In that case, the only evidence of misconduct after the final warning was a computer-generated report which was not introduced into evidence. The Court found that "hearsay evidence is admissible only for the purpose of explaining or supplementing other evidence. It is not sufficient, standing alone, to prove a material fact in issue unless it would be admissible over objection in a civil proceeding." *Id.* at 1034. The denial of benefits was reversed.

In *Yost v. Unemployment Appeals Comm'n*, 848 So.2d 1235 (Fla. 2d DCA 2003), the employee was denied benefits based on time log entries which were not shown to have

qualified under the business records exception to the hearsay rule and were not entered into evidence. The Court held that Yost's failure to object to the hearsay at the hearing did not preclude review, as the Court found it had authority to review the sufficiency of the evidence to support the hearing officer's order. *Id.* at 1237, 1238.

In *Doyle v. Fla. Unemployment Appeals Comm'n*, 635 So.2d 1028 (Fla. 2d DCA 1994), a bank teller was denied benefits for allegedly having an unbalanced drawer. The Court noted that, at the hearing in this matter, the employer's representative "had no direct, first-hand knowledge of the two critical incidents ... (and held that) competent, substantial evidence supporting a denial of benefits cannot be based exclusively on hearsay evidence." *Id.* at 1031, 1032.

Here, although Upshaw (representing himself *pro se* at the administrative hearing) did not formally object to this hearsay, nevertheless, such evidence cannot serve as the exclusive basis to support a denial of unemployment benefits under the substantial evidence standard. The ALC erred as a matter of law in upholding the disqualification of Upshaw from unemployment compensation benefits on the sole basis of the hearsay testimony of Employer's witness.

III. THE ADMINISTRATIVE LAW COURT ERRED IN FAILING TO ASSESS THE REASONABLENESS OF THE EMPLOYER'S POLICY AS APPLIED TO THE FACTS AND CIRCUMSTANCES IN EVIDENCE IN THE PRESENT CASE.

South Carolina allows for a violation of an employer's policy to serve as grounds for discharge for cause sufficient to support a disqualification from unemployment benefits only where the employer's policy is reasonable as interpreted and applied in the particular case at issue.

While an Employer is free to discharge an at will employee for any reason, a violation of an employer policy cannot serve as a basis for disqualification of unemployment benefits unless that policy is reasonable and reasonably applied under the particular circumstances of each case. (*Mickens v. Southland*, *supra*). In *Mickens*, the Court looked at the employer's policy on confidentiality and whether the employee breached that policy in attending a press conference and then refusing to sign a document requested by the employer. The Court considered what conduct the employer could rightfully expect from an employee and stated that the general rule is that "where an employer's request is reasonable, a refusal to comply will constitute misconduct." *Id.* at 130. The Court went on to state that what is reasonable "will vary according to the circumstances of each case." *Id.* at 130 citing *Sandstrom v. Douglas Machine Corp.*, 372 N.W.2d 89 (Minn. App. 1985); *Simpson v. Commonwealth Unemployment Compensation Board*, 69 Pa. Commw., 120, 450 A.2d 305 (PA 1982). The Court held that there was no evidence that the employee actually made any comments at the press conference, and, therefore, the policy prohibiting employees from revealing confidential information could not reasonably be seen to have been breached for purposes of establishing a discharge for cause so as to disqualify the employee from unemployment benefits. (*Mickens* at 130)

Similarly here, Upshaw's conduct could not reasonably be seen to have breached the policy; only an unreasonable interpretation and application of the policy could result in such a finding. Upshaw's discharge was based solely on the purported violation of Employer's policy alleging that Upshaw failed to call in that he would not be at work. The specific policy at issue states: "absent for two consecutive days without calling to notify supervisor of

absence and reason, unless documentation proves notification impractical.” (R. p. 47) As set forth in his discharge notice, he was terminated pursuant to “A-4 (a)bsent for two consecutive days without calling to notify supervisor.” (R. p. 52)

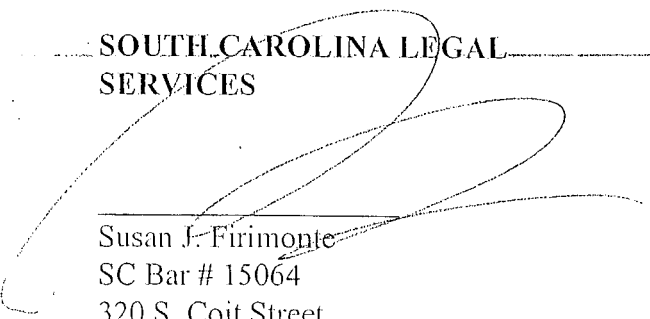
Here, the only first-hand evidence offered at the hearing was Upshaw’s testimony that he called and left messages. Under these facts, the only way the policy could be deemed to have been violated would be if it required that, no matter what the circumstances and regardless of the reason for the absence and the unavailability of his supervisor, Upshaw would be terminated if he did not actually reach and speak with his supervisor. This would also be the case even if the hearsay statement attributed to his supervisor were considered. According to the project manager, Upshaw’s supervisor merely stated that Upshaw had not called her. (R. p. 34, lines 12-16) In either case, such a policy would be patently unreasonable and inconsistent with the policy’s language as communicated to Upshaw.

Applying the reasonableness analysis required by *Mickens*, there was no violation of the reasonable expectations of the employer, as set forth in the policy. The policy did not prohibit leaving messages for the supervisor. Upshaw was not given a local person to call and could not reach his supervisor in Columbia when he tried to call her. (R. p. 37, lines 1-8). Further, he learned too late that one of his supervisors (also whom he left messages for) was no longer working for Employer. (R. p. 37, lines 8-11).

In addition to having reasonably reported under the policy, Upshaw was not deliberately absent for two days within the meaning of the policy language. Upshaw reported that he would be absent one day and late (but not absent) the following day; however, when he reported to work the following day, his pass would not let him in the

Respectfully submitted,

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Florence, South Carolina
January 23 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 2011-AJT-22-0340

Case No. 2011-204326

Anthony Upshaw,

Appellant

v.

SC Department of Employment and Workforce

and Urban Services Group, Inc.,

Respondent

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

- I. The Administrative Law Court correctly affirmed the Department's decision because the Department's decision is supported by substantial evidence in the record and accords with applicable law.

- II. The Department's Decision is not Based Solely on Hearsay and is not Flawed; therefore the Administrative Law Court did not Err in its Affirmation of the Department's Decision.
- III. Reasonableness of the Employer's Policy has not previously been raised by the Appellant as an issue in this case, and therefore has been waived.

STATEMENT OF THE CASE

Anthony Upshaw (hereafter "Appellant") was employed with Urban Services Groups, Inc. (hereafter "Employer") as a housekeeper from July 11, 2009, to February 11, 2011. (R.55). The Appellant filed for unemployment benefits with the South Carolina Department of Employment and Workforce (hereafter "SCDEW" or "Department") on February 17, 2011. (R.54). Facts were gathered from the Appellant and the Employer, (R.54-57), and a SCDEW claims adjudicator held the Appellant partially disqualified from receiving benefits upon finding that the Appellant was discharged from his employment as a result of attendance violations. (R.22, 46).

The Appellant appealed the adjudicator's determination to the SCDEW Appeal Tribunal. (R.21). Sworn testimony and evidence was presented by the parties before the Tribunal. (R.23-52). The Tribunal concluded that the claimant was discharged for cause connected with work and held him disqualified from receiving benefits for fourteen (14) weeks. (R.8-19).

The Tribunal's decision was appealed to the Department's Appellate Panel. In its decision mailed June 7, 2011, the SCDEW Appellate Panel upheld the Tribunal's decision. (R.13-15). The Appellant sought administrative review of the Department's decision. (R9-

12). In its Order entered October 31, 2011, in Case No. 11-ALJ-22-0340-AP, the Administrative Law Court affirmed the Department's determination. (R.1-8). It is the Order of the Administrative Law Court that is on appeal to this Court.

FACTS

The Appellant was employed as a housekeeper by Urban Services Group, Inc., from July 11, 2009, to February 11, 2011. (R.55). The Appellant received a copy of the Employer's Employee Handbook (R.50, R.42, L.1-13), which included the company's Attendance Policy. (R.47). Before November 2010, the Appellant was counseled and given a verbal warning for violation of the Employer's policy. (R.51). On November 3, 2010, the Appellant was given a written warning for a second work rule infraction, to-wit: no call, no show, in violation of the attendance policy. (R.41,51). The Appellant, again, did not call or report to work on February 9 and 10, 2011. (R.49, 52). On February 11, 2011, the Appellant was terminated for his attendance violations. (R.49, 52).

The Employer's attendance policy reflects that an employee is considered resigned without notice if he is absent for two consecutive days without calling to notify his supervisor and unless documentation proves notification impractical. (R.47). (emphasis added). This same attendance policy calls for termination upon three instances of unexcused absences within a 6-month period. (R.47).

Spokesperson for the Employer, before the Tribunal, was the Appellant's Project Manager and supervisor. (R.29, L.29-30). If the Appellant was going to be absent from work he was to notify either the Project Manager or his immediate supervisor. Neither of them heard from the Appellant regarding his absences. (R.34, L.4-31). Once the Appellant failed to report to work on February 9 and 10, 2011, (R.49), without notifying his Employer that he would be absent, (R.34, L.12-23), the Project Manager, himself, unsuccessfully attempted

to correspond with the Appellant several times via telephone and registered mail. (R.29, L.20-30).

Employer's Group Exhibit #1, including, work rules, a certified letter that was ~~returned-undelivered, timecard for the week of February 11, 2011, and acknowledgement of~~ receipt of the employee handbook were admitted into evidence without objection. (R.31, L.4-13). Employer's Exhibit # 2, two written reprimands for the November 2010, and February 2011, unexcused absences were admitted into evidence over an unclear objection to the November 2010, write-up. (R.33, L.1-37).

The Appellant admitted that he missed work on February 9 and 10, 2011, (R. 36, L 30-35). He was counseled for failing to report to work or call in an absence in November 2010. (R.41, L 8-17). As to the February 2011, absences, the Appellant alleged that he called and left a message with his immediate supervisor that he would not be at work on the 9th, and would be late to work [arriving at 5 or 6 o'clock rather than 2 o'clock] on the 10th. (R.37, L.1-4). The Appellant agreed that he never spoke with anyone; but asserts that he left voice mail messages for both his immediate supervisor and a manager in Columbia. (R.37, 39-40). The Appellant states that when he went back to work three days later he was unable to access entry into the building. (R. 38, L.14-16). The Appellant testified that he did try to enter his place of work, after hours, on February 10, 2011. (R.40, L 6-15). The Appellant admittedly did not call his supervisor or anyone local to find out why he could not get in the building, but rather, allegedly, called Atlanta on February 11 and 12, 2011, and left messages for someone named Phyllis. (R.39, L 9-37, R.40, L.1-3).

The record is void of any medical or other documentation to support that any of the Appellant's absences should have been excused; nor does the Appellant claim that his

absences should have been excused. The record is void of evidence of the Appellant's alleged telephone calls to report his absences to anyone within the Employer's organization.

ARGUMENT

Standard of Review

“Section 1-23-610 of the South Carolina Code (Supp. 2006) sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an Appeal from an administrative agency. ‘The review of the administrative law judge’s order must be confined to the record.’ *Id.* The court of appeals may reverse or modify the decision only if substantive rights of the appellant [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion or affected by other error of law. *Id.*”

South Carolina Department of Corrections v. Mitchell, 377 S.C. 256, 258, 659 S.E.2d 233, 234 (S.C. App. 2008).

The SCDEW¹ is an “agency” within the meaning of the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 218, S.E.2d 365, 367 (1984). This court reviews ALC examinations of SCDEW Appellate Panel decisions pursuant to the judicial review provisions of the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-380 and 1-23-600 (2010). *See Gibson*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984); *McEachern v. S.C. Employment Sec. Comm’n*, 370 S.C. 553, 557, 635 S.E.2d 644, 646-647 (Ct. App. 2006).

“The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence of 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;

¹ The South Carolina Department of Employment and Workforce was formerly known as the Employment Security Commission.

- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probable and substantial evidence on the whole record;
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 4-23-380(A)(5).

Where there is conflicting evidence on the status of a worker, it becomes a question of fact. *Todd's Ice Cream, Inc. v. South Carolina Employment Security Comm.*, 281 S.C. 254, 315 S.E.2d 373 (S.C. App. 1984). In accord with the deferential standards, "[t]he findings of an agency are presumed correct and will be set aside only if unsupported by substantial evidence" *Kearse v. State Health and Human Services Finance Commission*, 318 S.C. 198, 456 S.E.2d 892, 893 (1995). The burden is on the party seeking to overturn an agency decision "to prove convincingly that the agency's decision is unsupported by the evidence." *Waters v. South Carolina Land Resources Commission*, 321 S.C. 219, 467 S.E.2d 913, 917 (1996).

"Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Glenn v. South Carolina Dep't of Mental Health*, 291 S.C. 279, 353 S.E.2d 284, 286 (1987). The testimony of a single witness, where credited by the administrative agency, constituted substantial evidence sufficient to support a factual finding "unless there is no reasonable probability that the fact could be as related by the witness." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304, 307 (1981). The possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding. *Id.*

In contrast to factual findings, statutory interpretation is a matter of law and, as such, subject to *de novo* review by the Court. See *Transportation Inc. Co. and Flagstar Corp. v. South Carolina Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 287, 289 (2010). Nevertheless, "[t]he construction of a statute by the agency charged with its administration will be accorded the

most respectful consideration and will not be overruled absent compelling reasons.” *Id.*
(internal citations omitted).

Law / Analysis

~~I. The Administrative Law Court correctly affirmed the Department's decision because the Department's decision is supported by substantial evidence in the record and accords with applicable law.~~

The Administrative Law Court correctly affirmed Department's decision to partially disqualify the Appellant from receiving unemployment benefits upon finding that he was discharged from his employment for cause, specifically, for violation of employer attendance policies and procedures. In accordance with the standard of review heretofore prescribed, the Administrative Law Court's order must be affirmed because it is supported by substantial evidence in the record, is not clearly erroneous, and comports with applicable statutes and case law.

An individual may be totally or partially ineligible for unemployment benefits if the agency “finds that he has been discharged for cause connected with his most recent work”. S.C. Code Ann. § 41-35-120 (2). The term “misconduct”² has been defined to include: (1) the wanton and willful disregard of the employer's interests; (2) the deliberate violation of rules; (3) the disregard of the standard of behavior which an employer can rightfully expect from an employee; or (4) intentional and substantial negligent disregard for the employee's interests, duties or obligations. *Lee v. South Carolina Employment Security Commission*, 277 S.C. 586, 291 S.E.2d 378, 379. (S.C. 1982). A discharge for cause is justified when an employee disregards the standard of behavior that an employer can rightfully expect from the employer. *Mickens v. Southland Exch.-Joint Venture*, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991).

² The term “cause” was substituted for “misconduct” by Act 154 of 1985, § 6. The terms are synonymous.

The Appellant acknowledged that he received a copy of the Employer's Employee Handbook, which included the attendance policy. This is corroborated by the business records, Employer's Group Exhibit #1, admitted into evidence without objection. (R.47-50).

-----In-pertinent-part:-----

"A-4 Absent for two consecutive days without calling to notify supervisor of absence and reason, unless documentation proves notification impractical... [Is] considered a resignation without notice and unpaid.

'A-6 Three instances of unexcused absences within a 6-month period. *Absences confirmed by a doctor's note will not count towards the three instances.* [results in] Termination."

The Appellant acknowledged that in November 2010, he was reprimanded because was absent from work and failed to timely report his absence to his Employer as required. (R.41, L 8-17, R.51). It is uncontroverted that the Appellant was absent two days in February 2011. In the absence of doctor's excuses, the November 2010, violation, coupled with the two unexcused absences in February 2011, constitutes a violation the Employer's work rule A-6. Three unexcused absences within a six (6) month period results in termination, regardless of whether the Appellant attempted to contact his employer or not. The Appellant did not assert or offer evidence that he had medical excuses.

The parties dispute whether or not the claimant attempted to report his February 2011, absences to his employer. As to whether or not the Appellant violated Work Rule A-4, thereby "resigning" his employment, both the SCDEW and Administrative Law Court found the Employer's testimony to be more credible:

* The Appellant had at least one documented "no call, no report" previously;

* Uncontroverted testimony from the Employer's witness, the Project Manager for whom the Appellant worked, included that:

a) The witness had first-hand knowledge of the Appellant's February 2011 absences;

- b) The Appellant could have timely notified either the Project Manager or the Appellant's immediate supervisor of his absences;
- c) The Manager witness did not receive a call from the Appellant, nor did the Appellant claim to have called him;
- d) The Appellant's immediate supervisor reported to the witness that she had not heard from the Appellant; (There was no objection to the hearsay.); and
- e) Inasmuch as the Employer had no communication from the Appellant, the Manager personally, unsuccessfully made phone calls to the Appellant and sent the Appellant a certified letter concerning his employment.

Inapposite, the Appellant recited the incredible story of how he left voice messages for his supervisor and someone in Columbia, that he would be absent from and late to work on February 9, and February 10, 2011, respectively. There is no evidence, phone records, witnesses, or otherwise to support this assertion. It was not unreasonable to expect the Appellant to call his Project Manager if he could not speak with his immediate supervisor, since that was the unquestioned protocol. Yet, the Appellant admittedly never even attempted to speak with his Project Manager. Rather, the Appellant's incredible journey continued with the Appellant arriving at work after hours, perhaps on February 10, perhaps on February 11, 2011. Then, upon being unable to get into the building the Appellant called and allegedly left a voice message for someone in Atlanta, rather than making an attempt to speak with anyone local.

The Employer had the right to expect the Appellant to dependably report to work. There is substantial evidence in the record to support a finding that the Appellant did not abide by work rules on more than one occasion. The Appellant's repeated violations of the Employer's attendance policy demonstrated a disregard for the standard of behavior the Employee had a right to expect. The Administrative Law Court's affirmation of the Department's finding that the Appellant was discharged for cause must be upheld.

II. The Department's Decision is not Based Solely on Hearsay and is not Flawed; therefore the Administrative Law Court did not Err in its Affirmation of the Decision.

The Appellant asserts that the decision of the Panel, confirmed by the Administrative Law Court, is based on hearsay testimony solely. This is untrue. Both the Department and the Administrative Law Court considered the totality of the evidence in accord with law. The Appellant's Project Manager testified as to his first hand knowledge. There was no objection raised to his testimony during the hearing about the Manager's testimony, therefore it may not be raised for the first time on appeal. *State v. Caldwell*, 283 S.C. 350, 351, 322 S.E.2d 662 (S.C. 1984) citing *State v. Newton*, 274 S.C. 287, 262 S.E.2d 906 (1980).

Rule 801(c), SCRE, defines "hearsay" as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Any testimony that the Project Manager gave at the hearing that could even be considered hearsay, did not constitute inadmissible hearsay. The account of the supervisor merely corroborates the independent testimony of the Project Manager and other evidence that established the normal course of business and the reprimands, (R.51-52), which was admitted without objection.

Moreover, there is significant evidence and testimony in the record to support the Department's decision without regard to hearsay. Direct testimony shows that:

- * As a general rule, the only two individuals that should be called by an employee to report an absence are the Project Manager or the Immediate Supervisor. (R.34, L.26-31).
- * The Project Manager had no contact from the Appellant. The Appellant does not claim to have attempted to contact his Manager.
- * When the Appellant failed to come into work in February 2011, the witness personally, tried to telephone the Appellant several times and never received a return phone call. (R.29, L.29-30).

* The Project Manager sent the Appellant a registered letter concerning his employment, (R. 29, L 20-23); the said unclaimed letter being admitted into evidence (R.48)

The Employee Handbook specifies that the Appellant could have offered doctor's excuses or relevant documentation to prove notification was impractical. (R.47). He did not. The Appellant could have brought in his telephone records; he did not. The Appellant, though, does corroborate the events as set forth by his Project Manager. The Appellant admits that he was absent both February 9 and 10, 2011. He admits that he never spoke with anyone at work personally about and prior to his absences.

The Appellant now claims that he was denied due process because he couldn't cross examine his supervisor because she did not attend the Tribunal hearing. This argument has not been made previously in this case and is waived. However, the Appellant could have requested that a subpoena issue to guarantee the presence of his supervisor. He did not. *See* Notice of Hearing, (R.20).

The one piece of evidence the Appellant did object to, was the November 2010, reprimand for violation of the no call no report policy. It is a business record, an exception to hearsay, and is cumulative evidence of the November infraction to which the Appellant already admitted. (R.41, L 8-17). The Appellant himself admitted that his signature appears both on the employee handbook acknowledgement (R.42, L.1-13, R.50), and on the November reprimand. (R.32, L.1-21). Error, if any is harmless.

III. Reasonableness of the Employer's Policy has not previously been raised by the Appellant as an issue in this case, and therefore has been waived.

The Appellant has not previously challenged the reasonableness of the Employer's Policy before either the Department or the Administrative Law Court. Nor did the Appellant seek review of the Department's acceptance of the policy as reasonable before the

Administrative Law Court. Therefore, this issue has been waived and should not be considered by the Appellate Court.

“An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review.” *State v. Nichols*, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997) (citation omitted); accord *State v. Fleming*, 254 S.C. 415, 175 S.E.2d 624 (1970); *State v. Adams*, 354 S.C. 361, 580 S.E.2d 785 (Ct.App.2003), cert. denied. . . . “Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review.” *State v. Morris*, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct.App.1991). A contemporaneous objection is required to preserve issues for direct appellate review. *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Thomason*, 355 S.C. 278, 584 S.E.2d 143 (Ct.App.2003); *State v. Greene*, 330 S.C. 551, 499 S.E.2d 817 (Ct.App.1997). Cf. *State v. McCrary*, 242 S.C. 506, 131 S.E.2d 687 (1963) (opining the court was without authority to consider question on appeal where defendant consented to being tried on two indictments at same time and raised no objection to such mode of trial in trial court).”

State v. Carlson, 363, SC 586, 611 S.E.2d 283, 287 (S.C. App. 2005).

However, if this Court were to consider this argument, it is important to note that the Department made a specific finding that “The claimant’s actions demonstrated a disregard for the standard of behavior the employer had the right to expect of the claimant.” By virtue of this statement, the Department recognizes the Employer’s policy is reasonable, in accord with the analysis in *Mickens v. Southland Exchange-Joint Venture*, 305 S.C. 127, 406 S.E.2d 363 (S.C. 1991).

It is disingenuous for the Appellant to argue that he was not deliberately absent for two days within the meaning of the employer’s policy. The Appellant never produced requisite documentation to show that his absences could be excused. Although the Appellant claims to have left a message that he would be absent on February 9, 2011, and late to work on February 10, 2011, there is no evidence of such a call being placed. Even if he did call, the Appellant was absent both days without requisite documentation to excuse the absences. The Appellant asserts that he arrived at work late on February 10, 2011. However, even he is

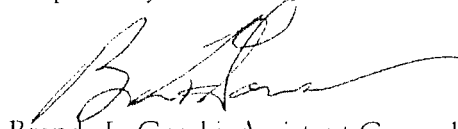
unsure of whether he arrived to work on February 10 or 11, 2011. Further, whichever date he decided to come to work, he did not come at 2, 5, or 6 o'clock – it was after hours. If a person arrives so late to work that it is after shift hours and the buildings have already been secured, that is not being late to work – that is having been absent from work.

CONCLUSION

There are no errors of legal or factual matters by either the Administrative Law Court or the Department of Employment and Workforce that warrant an outcome other than affirmation of the decisions of both. The Appellant has the burden to prove convincingly that the Department's decision is unsupported by evidence or that the Administrative Law Court abused its discretion or issued a decision that was clearly erroneous. The Appellant has not succeeded in meeting his burden.

The decisions of the Department and Administrative Law Court are supported by substantial evidence, common sense, and sound legal basis. In absence of harmful error, the order of the Administrative Law Court must be affirmed.

Respectfully submitted,



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February 6, 2012
Columbia, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from
The Administrative Law Court

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-22-0340-AP

Anthony Upshaw,

Appellant,

v.

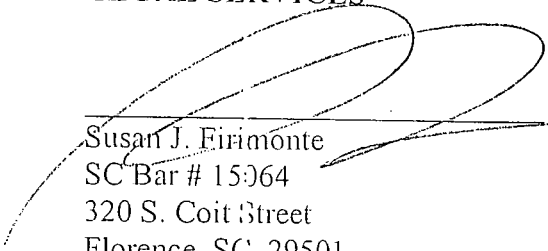
South Carolina Department of Employment and Workforce
and Urban Services Group, Inc.,

Respondents.

REPLY BRIEF OF APPELLANT

January 23, 2012

SOUTH CAROLINA
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ARGUMENTS

- I. THE DEPARTMENT ERRED AS A MATTER OF LAW IN FINDING APPELLANT DISQUALIFIED FROM UNEMPLOYMENT COMPENSATION BENEFITS WHEN THERE WAS NO RELIABLE SUBSTANTIAL EVIDENCE TO SUPPORT SAID FINDING.
- II. THE DEPARTMENT ERRED IN IMPROPERLY SHIFTING THE BURDEN OF PROOF, THEREBY PLACING AN IMPROPER BURDEN ON CLAIMANTS IN UNEMPLOYMENT COMPENSATION HEARINGS.
- III. THE DEPARTMENT ERRS IN ARGUING THAT REASONABLENESS OF AN EMPLOYER'S POLICY AS APPLIED TO THE FACTS AND CIRCUMSTANCES PRESENTED IS NOT SUBJECT TO REVIEW.

INTRODUCTION

Appellant, Anthony Upshaw, was terminated from his position for purportedly failing to call or show to work, in violation of the Employer's procedures. (R. p. 28, lines 32-38). The Employer's policy, as referenced in the termination notice, provided that an employee may call in as unable to work on any given day without penalty, as long as the employee calls in. The testimony by Employer's sole witness at the hearing was that he had no personal knowledge of the alleged failure to call or show. Upshaw testified that he did call and was unable to reach his immediate supervisor, Ms. Simon, but left messages for her. (R. p. 37, lines 1-4) Additionally, because he was unable to speak personally with Ms. Simon, he also called his supervisor's supervisor and left detailed messages for her as well. (R. p. 37, lines 4-11) No first-hand testimony was presented at the hearing contradicting Upshaw's testimony that he called in. Although Employer's witness

asserted that he was told by Ms. Simon that Upshaw did not call or show (R. p. 34, lines 4-16), the employer deliberately chose not to present Ms. Simon, the only witness with first-hand knowledge and the only person who could be cross examined on this key issue.

Further, the Employer neither requested a continuance nor offered any reason for not producing the first-hand witness at the hearing.

ARGUMENT

As set forth in Appellant's opening brief, the Department's sole reliance on hearsay to support a disqualification from unemployment benefits violates the South Carolina Administrative Procedures Act, well established case law, and the Department's own policies and procedures. The Department's attempt to shift the burden of proof to the claimant to negate an allegation of discharge for cause similarly contravenes well-established case law. Finally, in failing to evaluate the reasonableness of the purported policy violation in light of the facts and circumstances involved, the Department plainly erred as a matter of law.

Respondent argues in its Opposition Brief, that the disqualification can be upheld on the basis of new arguments about an entirely different policy, that Respondent who worked after hours on the night shift can be faulted for showing up to work at night after office hours, that hearsay is sufficient and that it is, in any event, a claimant's burden to negate an unproven basis for disqualification. All of these arguments are without merit and should be rejected.

- I. THE DEPARTMENT ERRED AS A MATTER OF LAW IN FINDING APPELLANT DISQUALIFIED FROM UNEMPLOYMENT COMPENSATION BENEFITS WHEN THERE WAS NO RELIABLE SUBSTANTIAL EVIDENCE TO SUPPORT SAID FINDING.

In its Brief, Respondent repeatedly misstates the facts which gave rise to Upshaw's discharge. The policy provided by Employer's witness at the hearing and the reason for the discharge of Upshaw was violation of Employer's work rule A-4, which states that an employee may be discharged if he has been "absent for two consecutive days without calling to notify supervisor of absence and reason." (R. p. 47) The Respondent improperly utilizes a different policy, work rule A-6, to support the finding of cause. Work rule A-6, while on the same page as A-4, requires three instances of unexcused absences. (R. p. 47) This work rule was not the basis for Upshaw's discharge. (R. p. 52) Respondent cannot now on appeal argue a completely new basis for discharge never raised at the hearing. The issue of whether Upshaw's absence was excusable was never reached by the Employer; Upshaw was immediately terminated because he allegedly failed to report that he would be absent. (R. p. 28, lines 36-38)¹

Even if the facts were different, and work rule A-6 had been involved, Respondent's analysis could not stand. Upshaw testified that he was absent only one day, (February 9th) and reported late the second day (February 10th). (R. p. 38, lines 22-24) Respondent concedes that work rule A-6 would require two additional days of absence to give rise to termination. (Respondent's Brief p. 7) Respondent concludes that Appellant was absent the second day as well, and not merely late, because he came to work "after hours" and "if a person arrives so late to work that it is after hours and the buildings have already been secured, that is not being late to work—that is having been absent."

¹ In addition, although unnecessary to reach the issue, Respondent misconstrues the plain terms of this other policy. The policy does not limit excused absences to those involving a doctor's note. Rather, if a doctor's note is provided, such absences "will not count." [R. p. 47]

(Respondent Brief p. 12.) If Respondent had carefully reviewed the record in this case, Respondent would have learned that Appellant worked the night shift (i.e. “after hours”) as a janitor in a federal building to which he had access with a key card. The only evidence on this point is that Appellant did show up for work on the second day but his badge would not let him into the building and because he was a night maintenance worker, his Employer’s office was closed and there was no one for him to call at that hour. (R. p. 38, lines 32-35.)

In any event, as clearly indicated in Employer’s own exhibit (R. p. 52), the sole basis for Upshaw’s termination and the only policy legitimately at issue is the policy on calling in, and his alleged failure to do so. Upshaw testified unequivocally that he did call in. (R. p. 37, lines 1-11) The only evidence to the contrary was unreliable, untested hearsay which, regardless of whether a formal hearing objection was interposed by this worker, could not, as a matter of law, serve as substantial evidence to support a disqualification. (Appellant’s Brief pp. 8-11). Respondent’s Brief offers no credible response to this. While Respondent admits that the out of court statement offered for the truth of the matter asserted is hearsay, it relies on the lack of a formal hearsay objection by this Appellant-janitor as its reason for not just admissibility but sole reliance by the Administrative Hearing Officer in disqualifying Upshaw. (Respondent’s Brief p. 8)

Agencies are required to follow the South Carolina Administrative Procedures Act’s rules, including the prohibition against hearsay, in administrative proceedings. See e.g. *S.C. Department of Motor Vehicles v. McCarson*, 391 S.C. 136, 149, 705 S.E.2d 425 (2011) (holding that Department would not be allowed to “circumvent the well-established rules against hearsay”). The unemployment compensation statute

contemplates that unsophisticated and unemployed workers will be able to pursue the administrative process *pro se*. In such circumstances, to allow the lack of a formal legal objection by the *pro se* worker to excuse exclusive reliance on plainly improper evidence contravenes legislative intent and fundamental fairness and should not be countenanced by this Court.

Further, as set forth in Appellant's Brief at pp. 8-11, even if hearsay is, for some reason, allowed in to the hearing record, jurisdictions are overwhelmingly in accord that it cannot serve as the exclusive basis for a key fact supporting a disqualification under the substantial evidence standard. See, e.g. *Doyle v. Fla. Unemployment Appeals Comm'n.*, 635 S.2d 1028, 1031 (Fla. 2d DCA 1994) (noting that employer's representative "had no direct, first-hand knowledge of the two critical incidents" and holding that "competent substantial evidence supporting a denial of benefits cannot be based exclusively on hearsay evidence.") (See also *Hollis v. Wade's Restaurant*, Decision No.: 2012-P-5, Appeal No. 16490-16491, Appellate Panel Decision dated January 4, 2012, finding in a case where Employer only presented hearsay evidence that the "claimant's testimony must be given the greater weight." *Id.*

Respondent's alternative argument that the Employer's witness had first-hand knowledge pertaining to the alleged misconduct (Respondent's Brief p. 7) is equally unavailing. There is no testimony or evidence in the record which indicates that Employer's witness had any first-hand knowledge of the alleged absence. In fact, Employer's witness testified that he was notified by Ms. Simon of the absence. (R. p. 34, lines 12-16) Even the termination notice has Ms. Simon's signature as the company representative, not the witness. (R. p. 52) The Employer's witness also testified that he is

not the person Upshaw was to call to report an absence. His testimony unequivocally stated that Upshaw was not to call him but his immediate supervisor, Ms. Simon. (R. p. 34, lines 4-9) The Respondent's assertion that "the Manager had no contact from the Appellant. The Appellant does not claim to have attempted to contact the Manager" (Respondent's Brief p. 9) has nothing to do with the key issue of whether Appellant left messages with Ms. Simon and merely underscores that this witness has no first-hand knowledge of the events which gave rise to the discharge of Upshaw. 2

The only evidence that Upshaw failed to call in was the hearsay testimony presented by Employer's witness. Ms. Simon's out of court statement (as presented by Employer's witness) was the sole basis for Upshaw's discharge. It is this discharge which Employer alleged disqualifies Upshaw from unemployment compensation benefits. A disqualification for unemployment compensation benefits should not be predicated on hearsay evidence alone, whether or not the hearsay was objected to at the hearing by a *pro se* worker. (Appellant's Brief pp. 8-11). To do so would insulate employers from any effective cross-examination or other challenge and deprive workers of a fair and meaningful hearing.

II. THE DEPARTMENT ERRED IN IMPROPERLY SHIFTING THE BURDEN OF PROOF, THEREBY PLACING AN IMPROPER BURDEN ON CLAIMANTS IN UNEMPLOYMENT COMPENSATION HEARINGS.

Faced with the Employer's failure to offer any evidence sufficient to establish work related misconduct, the Department attempts to salvage its disqualification by shifting the burden and arguing that Upshaw failed to establish that he was not terminated

2 Respondent's assertions regarding a letter sent by the manager and attempts to contact Appellant (Respondent's Brief pp. 3, 8, 10) are not relevant because all were after the discharge.

for misconduct. The Department's argument is unsupported by the record and contradicts well-established law and its own rulings on the burden of proof in unemployment compensation cases.

~~The Department persists in arguing that Upshaw failed to produce evidence, as~~ follows: "Appellant did not assert or offer evidence that he had medical excuses" (Respondent's Brief p. 7); "no phone records, witnesses or otherwise to support (Upshaw's testimony)" (Respondent's Brief p. 8); "the Appellant could have brought in his telephone records" (Respondent's Brief p. 10); "the Appellant could have requested that a subpoena issue to guarantee the presence of his supervisor." (Respondent's Brief p. 10) All of these assertions clearly shift the burden of proof off of the employer and onto the claimant. The Department's attempt to shift the burden to prove Upshaw is disqualified from the receipt of unemployment compensation benefits from the employer to Upshaw is contrary to law.

Under South Carolina law, the employer bears this burden. The Supreme Court reversed a disqualification based on a purported violation of an employer's policy where "[the employer] produced no evidence" that the employee engaged in any conduct that could reasonably be deemed to have violated the policy. *Mickens v. Southland*, 305 S.C. 127, 129, 406 S.E.2d 363 (1991) Indeed, the Department's own rulings in other cases acknowledge that the employer has the burden of proof to establish a disqualification. (See *Hollis v. Wade's Restaurant*, Decision No.: 2012-P-5, Appeal No. 16490-16491, Appellate Panel Decision dated January 4, 2012, ("[t]he employer bears the burden of

proving that an employee is discharged for cause.”)³

Other states are in accord that the burden of proof is on the employer to show discharge for cause and not the employee to prove a negative. See, e.g., *Ark. Midland RR v. Director*, 87 Ark. 311, 191 S.W.3d 544 (2004); *Amador v. Unemployment Ins. Appeals Bd.*, 35 Cal. 3d 671, 677 P.2d 224 (1984); *Ward v. Industrial Claim Appeals Office*, 916 P.2d 605 (Colo. App. 1995); *Brighton Hotels, LLC v. Gennett*, 2002 Del. Super. LEXIS 372 (2002); *Colton v. District of Columbia Dept. of Employment Services*, 484 A.2d 550 (D.C. 1984); *Dingley v. Boise Cascade Corp.*, 104 Idaho 476, 660 P.2d 941 (1983); *Norland v. Iowa Dept. of Job Services*, 412 N.W.2d 904 (1987); *Holbrook v. Kentucky Unemployment Ins. Comm’n*, 290 S.W.3d 81 (Ky. App. 2009); *City of Monroe v. Tolliver*, 954 So.2d 203 (La. App. 2d Cir. 2007); *Lumpkin v. North Central Airlines*, 296 Minn. 456, 209 N.W.2d 397 (1973); *Shannon Engineering and Construction, Inc. v. MESAC*, 549 So.2d 446 (Miss. 1989); *Banal v. Administrator*, 1985 Ohio App. LEXIS 8225, Ct. of Appeals, 7th Dist., Jefferson County (1985); *Babcock v. Employment Division*, 25 Ore. App. 661, 550 P.2d 1233 (Ct. App. 1976); *Kelly v. Unemployment Compensation Board of Review*, 747 A.2d 436 (Pa. Cmwlth. 2000); *Allen-Pentkowski v. Dept. of Labor*, 2011 Vt. LEXIS 71, 26 A.3d 55 (2011); *Barkley v. Peninsula Transportation Dist. Comm’n*, 11 Va. App. 317, 398 S.E.2d 94 (1990).

Here, the Employer, which failed to produce its only witness who had first-hand knowledge of the basis for the discharge, failed to meet its burden. Indeed, although it was not his burden to do so, Upshaw established through first-hand evidence at the hearing that he had complied with the policy. Respondent’s complaint that Upshaw

³ This case is attached hereto as an Addendum to this Reply Brief.

should have offered additional evidence and incurred additional time and expense to bolster his testimony is without merit, and would eviscerate well-established law on the burden of proof in unemployment compensation hearings.

**III. THE DEPARTMENT ERRS IN ARGUING THAT
REASONABLENESS OF AN EMPLOYER'S POLICY AS APPLIED
TO THE FACTS AND CIRCUMSTANCES PRESENTED IS NOT
SUBJECT TO REVIEW.**

Where a discharge is based on a purported violation of a written employer policy, it is axiomatic that the policy must have been reasonably implemented by the employer. *Mickens v. Southland*, 305 S.C 127, 130, 406 S.E.2d 363, 365 (1991). Here, the record affirmatively establishes that the policy used by the Employer for discharge and presented as the basis for disqualification at the unemployment hearing was failing to call in an absence. On its face, the policy only requires that employees call in an absence and not that they actually speak with their supervisor. Upshaw's direct testimony, uncontradicted by any witnesses with personal knowledge, is that he called his supervisor and his supervisor's supervisor and left messages with both of them. (R. p. 37, lines 1-11) Accordingly, the only way a determination of disqualification could be made on this record is if the policy were read to require that the employee actually reach their supervisor and that, in the absence of this, even detailed messages would not prevent a termination based on failure to report. Such a reading and application of the policy would be patently unreasonable for purposes of disqualifying a worker from his unemployment benefits. ("Not only must the reasonableness of the employer's request be evaluated, but also the employee's reason for noncompliance." *Id.* at 130)

Respondent urges that this analysis cannot be considered by the Appellate Court

and cites a string of criminal cases involving whether counsel preserved an issue for appeal. Unlike the criminal law context where criminals have a right to counsel at the trial level, unemployment claimants have no such right and typically appear *pro se*, as was the case here. In such circumstances, a hyper-technical reading of preservation requirements should not prevail. The issue of whether Upshaw was discharged for violation of a reasonable employer policy has been part and parcel of this case from the beginning.

Moreover, not only does the Respondent go on to substantively address this issue in its brief on appeal, the issue of reasonableness of the Employer's policy was argued below by Respondent and, therefore, was effectively preserved for review. In Respondent's Brief before the ALC, it argued "Appellant's repeated violations of the Employer's attendance policy demonstrated a disregard for the standard of behavior the Employee (sic) had a right to expect" (at p. 8) and "appellant is at fault for his unemployment because he intentionally and willfully violated a reasonable Employer policy." (at p. 10). Respondent has opened the door on this issue and cannot now close it.

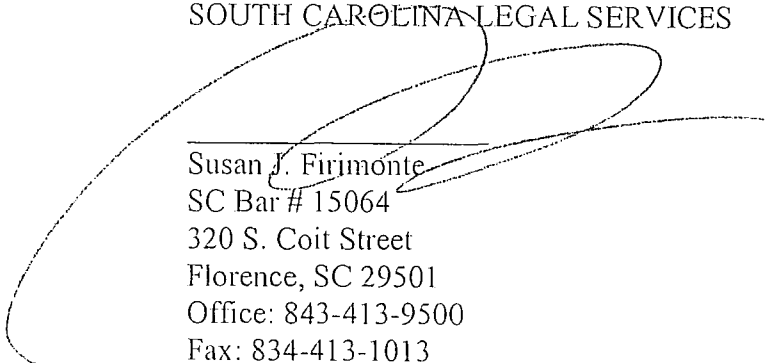
Finally, Respondent misconstrues the argument. The issue is whether there was substantial evidence in the record demonstrating that the Employer's policy was violated. Neither the tribunal nor the ALC concluded that Upshaw's testimony established this. The only testimony presented at the hearing based on first-hand knowledge was Upshaw's. Based on the plain terms of the policy as written, the reasonableness requirement set forth in *Mickens* and South Carolina law on employee misconduct, the finding that Upshaw was disqualified from unemployment compensation benefits was not supported by substantial evidence.

CONCLUSION

For the foregoing reasons and upon the foregoing authorities, the Order of the Administrative Law Court upholding Appellant's disqualification from unemployment ~~benefits should be reversed and Appellant's benefits should be reinstated without~~ disqualification.

Respectfully submitted,

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Florence, South Carolina

January 23 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from
The Administrative Law Court

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-22-0340-AP

Anthony Upshaw,

Appellant

v.

South Carolina Department of
Employment and Workforce and
Urban Services Group, Inc.,

Respondents.

ADDENDUM TO REPLY BRIEF

Hollis v. Wade's Restaurant, Decision No. 2012-P-5, Appeal No. 16490-16491, Appellate Panel Decision, January 4, 2012.

January 23, 2012



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SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

DeLores K. Hollis
64 Royal Avenue
Buffalo, NY 14207
Claimant SSN:

Wade's Restaurant
c/o Lou P. Lindsey
964 South Pine Street
Spartanburg, SC 29302
Liable Employer

APPELLATE PANEL
DECISION

Appellant: Claimant

The claimant appealed Appeal Tribunal Decision 2011-A-20011 to the Appellate Panel. The Tribunal held the claimant disqualified from benefits for fifteen (15) weeks, upon finding she was discharged for cause. This decision affirmed the claims adjudicator's determination.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2011-A-20011 is reversed. The claimant is eligible for benefits without disqualification effective August 21, 2011, upon finding she was discharged without cause connected with her employment.

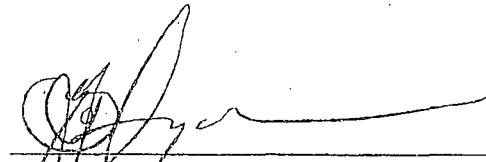
The claimant worked from November 11, 1999, to August 22, 2011, most recently as a kitchen employee. She was discharged for not getting along with fellow employees. The claimant had a history of conflict with another employee. The claimant complained to management, but she asserts that nothing was done. In the final incident, the claimant touched the other employee, and they had two brief exchanges about the incident. The claimant asserts that she did not start the argument, that she had tried to avoid the other employee, and that she had sought to resolve the ongoing conflict by reporting it to management. The employer witness had no firsthand knowledge of the final incident, but he had received reports from other employees concerning the claimant's behavior.

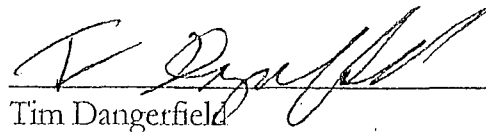
S.C. Code Ann. § 41-35-120 (2) requires disqualification from benefits for five to twenty-six weeks, with a corresponding monetary reduction, when the Department finds that a claimant has been discharged for cause connected with the employment. "Cause" is interpreted as disregard for the standard of behavior an employer has the right to expect from an employee.

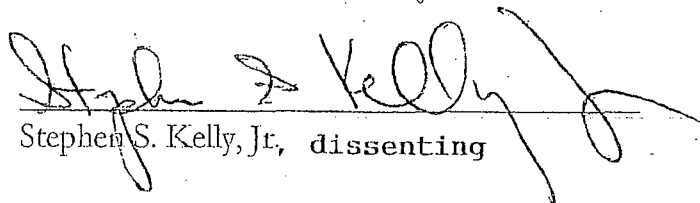
The record establishes that the claimant was discharged for allegedly causing conflict among the employees. The employer bears the burden of proving that an employee is discharged for cause. In this case, the employer has not met this burden. The employer witness did not have firsthand knowledge of the final incident, and the employer did not present as witnesses the current employees who were involved in the incident. The claimant denies that she was the cause of the conflict, and she denies any wrongdoing. She had reported the other employee's behavior to management, but there had been no satisfactory resolution. The claimant's testimony must be given the greater weight. Therefore, we find the claimant was discharged without cause connected with her employment. The Appeal Tribunal decision is reversed.

Mr. Kelly dissents.

**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**



E.B. Ayers

Tim Dangerfield

Stephen S. Kelly, Jr., dissenting

Hearing Date: 1/4/12
Date Mailed: 1/4/12
Mailed By: LB

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

THE STATE OF SOUTH CAROLINA
~~In The Court of Appeals~~

Anthony Upshaw, Appellant,

v.

South Carolina Department of Employment and
Workforce and Urban Services Group, Inc., Respondents.

Appellate Case No. 2011-204326

Appeal From the Administrative Law Court
John D. McLeod, Administrative Law Court Judge

Unpublished Opinion No. 2012-UP-523
Submitted September 4, 2012 – Filed September 12, 2012

AFFIRMED

Susan J. Firimonte, of Florence, and Daniel R. Unumb,
of Columbia, both of South Carolina Legal Services, for
Appellant.

Brenda L. Gorski, of the South Carolina Department of
Employment and Workforce, of Columbia, for
Respondents.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the Administrative Law Court (ALC) erred in finding Upshaw was discharged for cause: *Risher v. S.C. Dep't of Health & Env'tl. Control*, 393 S.C. 198, 204, 712 S.E.2d 428, 431 (2011) ("A decision of the ALC should be upheld . . . if it is supported by substantial evidence in the record."); *Murphy v. S.C. Dep't of Health & Env'tl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 194-95 (2012) ("When finding substantial evidence to support the ALC's decision, the [appellate c]ourt need only determine that, based on the record as a whole, reasonable minds could reach the same conclusion."); S.C. Code Ann. § 41-35-120(2) (Supp. 2011) (stating a person may become partially ineligible for unemployment benefits, and the maximum benefit amount may be reduced, if SCDEW finds that the person was discharged for cause); *Mickens v. Southland Exch.-Joint Venture*, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991) (stating a discharge for cause is justified when an employee disregards the standard of behavior that the employer can rightfully expect from the employee).
2. As to Upshaw's remaining issues: *Burke v. AnMed Health*, 393 S.C. 48, 54, 710 S.E.2d 84, 87 (Ct. App. 2011) (stating a contemporaneous objection is required to preserve an issue for appellate review); *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (stating an issue cannot be raised for the first time on appeal).

AFFIRMED.¹

SHORT, KONDUROS, and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from
South Carolina Administrative Law Court

John D. McLeod, Administrative Law Judge

RECEIVED

SEP 25 2012

SC Court of Appeals

Case No. 11-ALJ-22-0340-AP
Appellate Case No. 2011-204326

Anthony Upshaw,

Appellant,

v.

South Carolina Department of Employment and Workforce
and Urban Services Group, Inc,

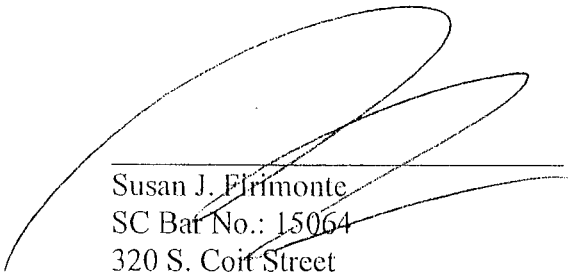
Respondents.

PETITION FOR REHEARING

The Appellant, Anthony Upshaw, by and through his undersigned counsel, respectfully petitions this Court pursuant to Rule 221 of the Appellate Court Rules, for a rehearing in this matter. As detailed in the accompanying Memorandum, the Appellant would show that points have been misapprehended or overlooked by the Court. The Appellant has previously been granted *in forma pauperis* status in these proceedings and respectfully requests that this motion also be filed without cost to him.

September 24, 2012

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from
South Carolina Administrative Law Court

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-22-0340-AP
Appellate Case No. 2011-204326

RECEIVED

SEP 25 2012

SC Court of Appeals

Anthony Upshaw,

Appellant,

v.

South Carolina Department of Employment and Workforce
and Urban Services Group, Inc,

Respondents.

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

September 24, 2012

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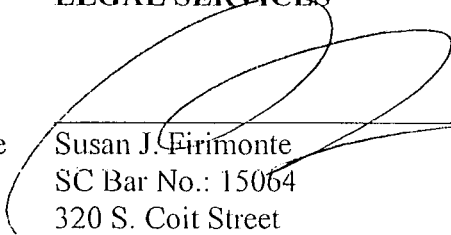

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TABLE OF AUTHORITIES

CASES

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<i>Gomez v. Unemployment Appeals Comm'n</i> , 884 So.2d 1033 (Fla. 2d DCA 2004)	5
<i>Green v. Neeley</i> , No. M2006-004810-COA-R3CV, 2007, Tenn. App. LEXIS 374, 2007 WL 1731726, (Tenn. Ct. App. June 15, 2007)	4
<i>Hollis v. Wade's Restaurant</i> , Decision No.: 2012-P-5, Appeal No. 16490-16491, January 4, 2012.....	1, 2
<i>Industrial Claims Appeals Office v. Flower Stop Marketing Corp.</i> , 782 P.2d 13 (Colo. 1989)	6
<i>Jones v. Truly</i> , 670 So.2d 1294 (La. App. 5 th Cir. 1996)	3, 4
<i>King v. Administrator, Unemployment Compensation Act</i> , 51 Conn. Supp. 302, 981 A.2d 1082 (2008)	3
<i>Taylor v. Board of Review</i> (1984), 20 Ohio App. 3d 297, 20 Ohio B. 389, 485 N.E.2d 827	4
<i>Walker v. Unemployment Compensation Bd. Of Review of the Commonwealth of PA</i> , 27 Pa. Commw. 522, 367 A.2d 366 (1976)	2, 5
<i>Yost v. Unemployment Appeals Comm'n</i> , 848 So.2d 1235 (Fla. 2d DCA 2003)	5, 6

MEMORANDUM

I. INTRODUCTION

This is an appeal of a Decision of the Administrative Law Court affirming a denial of Appellant's unemployment compensation benefits. This case involves the use of hearsay testimony as the sole basis to disqualify a claimant from unemployment compensation benefits. The Appellant seeks a Re-Hearing of the Decision of the Court which failed to address this issue, asserting that it was not preserved; however, this issue was raised at the Appellate Panel and thereafter. Moreover, requiring a *pro se* claimant to raise a formal evidentiary objection to exclude this hearsay as a predicate for raising the issue of substantial evidence on appeal is inconsistent with South Carolina law and contrary to the majority rule in other states. Further Respondent's own administrative decisions have held that even where hearsay is admitted without objection at the administrative hearing, it cannot, by itself, support a disqualification from unemployment benefits.

Hearings for unemployment compensation benefits are conducted by non-attorney hearing officers and primarily attended by claimants appearing *pro se*. Upshaw was denied a fair hearing because a decision denying him unemployment compensation benefits was based solely on hearsay evidence. Hearsay evidence, not supported by any other direct evidence and directly contradicted by the Claimant's testimony, cannot be considered substantial evidence to support the decision below.

In *Hollis v. Wade's Restaurant*, Decision No. 2012-P-5, Appeal No. 16490-16491 (January 4, 2012), the Appellate Panel of the South Carolina Department of Employment and Workforce held that where the employer only presented hearsay, "the claimant's

testimony must be given the greater weight.” *Id.* at 2. Courts in other jurisdictions which have dealt with the issue are overwhelmingly in accord and have consistently held that “a finding of fact based solely on hearsay will not stand.” *Walker v. Unemployment Compensation Bd. Of Review of the Commonwealth of PA*, 27 Pa. Commw., 522, 527, 367 A.2d 366, 370 (1976)

II. FACTS

The Administrative Law Court found that Upshaw was discharged from his employment with Employer for just cause, after he allegedly failed to call or show for work. The testimony by Employer’s sole witness at the hearing was that he had no personal knowledge of the alleged failure to call or show. Upshaw, who attended his hearing without an attorney, testified that he did call but was unable to reach his immediate supervisor and, instead, left messages for her. (R. p. 37, lines 1–4) Additionally, because he was unable to speak personally with his supervisor, he called his supervisor’s supervisor and left detailed messages for her as well. (R. p. 37, lines 4–11) No first-hand testimony was presented at the hearing contradicting Upshaw’s testimony that he called in. Although Employer’s witness asserted that he was told by Upshaw’s supervisor that Upshaw did not call or show (R. p. 34, lines 4-16), the supervisor was not present and did not testify. Further, the Employer neither requested a continuance nor offered any reason for not producing the first-hand witness at the hearing.

Despite the lack of any first-hand testimony or evidence that Upshaw violated the Employer’s policy, he was found discharged for cause and penalized fourteen weeks of benefits.

ARGUMENT

THE APPROPRIATE WEIGHT TO BE GIVEN HEARSAY EVIDENCE SHOULD NOT BE DEPENDENT ON A TIMELY OBJECTION WHERE INFORMAL HEARINGS ARE CONDUCTED BY NON-ATTORNEY HEARING OFFICERS AND PRIMARILY ATTENDED BY *PRO SE* PARTIES.

The Court's refusal to review the appropriate weight, if any, that should be given to hearsay evidence in an unemployment compensation hearing because Appellant did not make a contemporaneous objection was reversible error.

To require a *pro se* claimant to interpose timely objections to hearsay testimony and evidence is simply not practical, realistic or fair. This is true, particularly where, as here, the presiding officer is not even an attorney and, thus, unlikely to have received any formal legal training. Nevertheless, the issue of hearsay was, in fact, raised at the earliest opportunity – that being, the Appellate Panel, which is the first level of appellate review and a *de novo* review.

The overwhelming majority of jurisdictions have held that in unemployment compensations hearings, even if evidence which is hearsay is admitted, the hearsay evidence, standing alone, cannot serve as substantial evidence supporting a disqualification for termination for cause. See, *e.g.*, *King v. Administrator, Unemployment Compensation Act*, 51 Conn. Supp. 302, 981 A.2d 1082, 1084 (2008) (holding that “a finding of fact based solely on hearsay will not stand.”); *Jones v. Truly*, 670 So.2d 1294, 1297 (La. App. 5th Cir. 1996) (affirming “the rule that administrative findings be supported by competent evidence and not ‘second hand or hearsay’” and holding that “findings of fact supported only by incompetent or hearsay evidence are

improper”); *Taylor v. Board of Review* (1984), 20 Ohio App. 3d 297, 299, 20 Ohio B. 389, 485 N.E.2d 827, 829 (holding that “the phone call to the employer was hearsay evidence...[and] where the sworn testimony of a witness is contradicted only by hearsay evidence, to give credibility to the hearsay statement and to deny credibility to the claimant testifying in person is unreasonable”); *Chaves v. Employment Sec. Comm’n*, 98 N.M. 462, 464, 649 P.2d 1375, 1377 (1982) (finding “an absence of legally competent evidence showing that appellant was guilty of misconduct ... (because) while the testimony in the record is in conflict as to whether appellant gave proper notice regarding her absences, the testimony favoring appellees is hearsay”); *Coy v. Virginia Employment Comm’n*, 23 Va. Cir. 428, 430 (1991) (holding hearsay admissible but reversing decision denying benefits for misconduct based solely on hearsay evidence).

The Court of Appeals in the neighboring jurisdiction of Tennessee has recently ruled on a case with facts similar to the instant matter. In *Green v. Neeley*, No. M2006-004810-COA-R3CV, 2007, Tenn. App. LEXIS 374, 2007 WL 1731726, (Tenn. Ct. App. June 15, 2007), the Court reviewed a determination that the employee was disqualified for unemployment compensation for allegedly violating the company policy. As here, the only witness for the employer had no first-hand knowledge of the incident. Like South Carolina, the appellate court’s factual review was limited to whether the findings of fact were supported by substantial material evidence. *Id.* at 7. Because the findings of facts were based solely on uncorroborated hearsay, the Court found that the substantial evidence test was not met and the denial of benefits was reversed. *Id.* at 14. Specifically, the court held that “uncorroborated hearsay does not constitute substantial and material evidence.” *Id.* at 5.

Similarly, the Pennsylvania appellate court held in *Walker v. Unemployment Compensation Bd. Of Review of the Commonwealth of PA*, 27 Pa. Commw., 522, 367 A.2d 366 (1976), that factual findings could not be based solely on hearsay. In *Walker*, the issue of hearsay at unemployment compensation hearings was addressed by the Court due to the development of two potentially inconsistent lines of authority on this issue. One line held that a finding based solely on hearsay cannot stand even if that hearsay was admitted without objection, while the other held that evidence, admitted without objection, may be given its natural and probative effect and may support the Board's findings. *Id.* at 527, 370. The Court resolved the issue squarely in favor of the principle that uncorroborated hearsay will not support a denial of unemployment benefits, holding that:

1) Hearsay evidence, properly objected to, is not competent evidence to support a finding of the Board. ... 2) Hearsay evidence admitted without objection, will be given its natural probative effect and may support a finding of the Board, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand.

Id. at 527, 370.

In Florida, the District Court of Appeal found that "hearsay evidence is admissible only for the purpose of explaining or supplementing other evidence. It is not sufficient, standing alone, to prove a material fact in issue unless it would be admissible over objection in a civil proceeding." *Gomez v. Unemployment Appeals Comm'n*, 884 So.2d 1033, 1034 (Fla. 2d DCA 2004). Concerning the need for a timely objection, this same court found in *Yost v. Unemployment Appeals Comm'n*, 848 So.2d 1235 (Fla. 2d DCA 2003), that Yost's failure to object to the hearsay at the hearing did not preclude review, as the Court found it had authority to review the sufficiency of the evidence to

support the hearing officer's order. *Id.* at 1237, 1238.

Even where hearsay is admissible, states evaluate its reliability, trustworthiness and probative value. In Colorado, their Supreme Court held that hearsay evidence must be reliable, trustworthy and have probative value. *Industrial Claims Appeals Office v.*

Flower Stop Marketing Corp., 782 P.2d 13, 18 (Colo. 1989) That Court set out factors to determine whether the hearsay evidence meets this criteria. These factors include: 1) whether the statement was written and signed; 2) whether the statement was sworn to by the declarant; 3) whether the declarant was a disinterested witness or had a potential bias; 4) whether the hearsay statement is denied or contradicted by other evidence; 5) whether the declarant is credible; 6) whether there is corroboration for the hearsay statement; 7) whether the case turns on the credibility of witnesses; 8) whether the party relying on the hearsay offers an adequate explanation for the failure to call the declarant to testify; 9) whether the party against whom the hearsay is used had access to the statements prior to the hearing or the opportunity to subpoena the declarant. *Id.*

Although Upshaw (representing himself *pro se* at the administrative hearing) did not formally object to this hearsay, nevertheless, the hearsay evidence offered, without any assessment of its reliability, trustworthiness and probative value, cannot serve as the exclusive basis to support a denial of unemployment benefits under the substantial evidence standard. The inconsistent treatment of hearsay evidence by the Department at unemployment hearings results in the failure to provide fair hearings. The issue of the appropriate weight to be given hearsay testimony and evidence in unemployment compensation hearings must be resolved so that consistent, reasonable and fair applications are made. Until there is clear law on this issue, claimants are subject to the

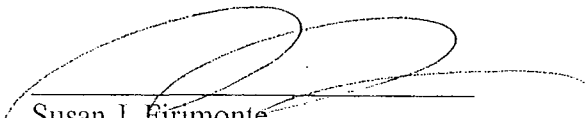
legal understanding of the non-attorney Hearing Officer.

III. CONCLUSION

For the foregoing reasons and upon the foregoing authorities, the Appellate
respectfully requests a rehearing in this matter.

September 24, 2012

RESPECTFULLY SUBMITTED,



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ATTORNEYS FOR APPELLANT

The South Carolina Court of Appeals

Anthony Upshaw, Appellant,

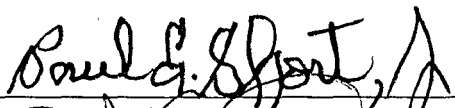
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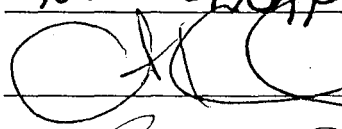
South Carolina Department of Employment and
Workforce and Urban Services Group, Inc., Respondents.

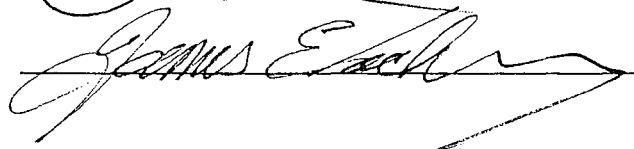
Appellate Case No. 2011-204326

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc:

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October 18, 2012



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November 19, 2012

The Honorable Daniel Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Anthony Upshaw v. S.C. Department of Employment and Workforce
Unpublished Opinion No. 2012-UP-523 (Filed Sept. 12, 2012)

Dear Mr. Shearouse:

Enclosed please find two copies of the Appendix (one bound, one unbound) with regard to the above filed Petition. Thank you for your kind attention to this matter.

Very truly yours,

Susan J. Firimonte
Managing Attorney

SJF/
Enclosures

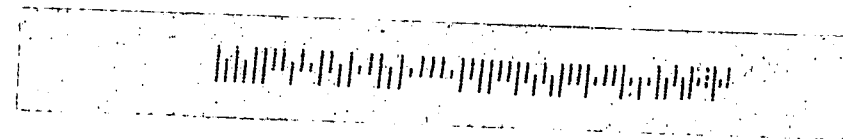


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