THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT
Ralph K Anderson, III, Administrative Law Judge
Case No.: 14-ALJ-22-0405-AP

Appellate Case No. 2014-002489

Billie D. Mueller, Appellant,

v.

South Carolina Department of Employment and Workforce, and Ebtron, Inc. Respondents,

FINAL JOINT BRIEF OF RESPONDENTS

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RE-STATEMENT OF ISSUE ON APPEAL

DID THE ALC CORRECTLY AFFIRM THE DEW APPELLATE PANEL'S DECISION FINDING THAT APPELLANT MUELLER WAS DISCHARGED FOR MISCONDUCT CONNECTED WITH EMPLOYMENT?

STATEMENT OF THE CASE

Appellant Billie D. Mueller ("Appellant" or Mueller") filed an initial claim for unemployment benefits with Respondent South Carolina Department of Employment and Workforce ("DEW or Department") on April 4, 2014. (Amended ROA[1] pp.43-49). Appellant and her former employer, Ebtron, Inc. ("Employer"), both furnished fact finding statements to the Department. (AROA pp.23-30; 51; 56; 59). The DEW claim adjudicator determined Mueller was discharged for misconduct and held her fully disqualified from benefits for twenty (20) weeks, pursuant to S.C. Code Ann. § 41-35-120 (2)(a). (AROA pp.22; 61; 83; 100). Mueller timely appealed this claim determination to the Appeal Tribunal. (AROA p.62).

On May 27, 2014, the Appeal Tribunal conducted an evidentiary hearing, and both parties participated. (AROA pp.66-91). On May 28, 2014, the Appeal Tribunal affirmed the initial determination, finding Mueller had been discharged for misconduct. (AROA pp.1-2; 39-40; 92-93).

On June 5, 2014, Mueller appealed to the DEW Appellate Panel. (AROA p.95). On July 2, 2014, the Appellate Panel reviewed the Record and affirmed the Appeal Tribunal's decision, finding that Mueller was discharged for misconduct connected with the employment. (AROA pp. 3-5, Decision No. 2014-P-1030; 36-37).

Mueller timely appealed the DEW Appellate Panel decision to the Administrative Law Court ("ALC") on July 25, 2014. Following submission of Briefs by all parties, the ALC issued an Order finding the Appellate Panel's decision that Appellant was discharged for misconduct was supported by substantial evidence in the record. (AROA

[1] Amended ROA is the Amended Record on Appeal filed by Appellant on October 31, 2016, hereinafter referenced as AROA.

pp. 31-35, ALC Order dated November 7, 2014.) On November 18, 2014, Mueller filed a Notice of Appeal from the ALC's Order to the South Carolina Court of Appeals in this matter.

FACTS

Appellant was employed by Respondent Employer as a Sales Administration Supervisor. (AROA p.70). She was terminated after numerous incidents of misconduct, about which she had been counseled. (AROA pp.72-73). She was ultimately terminated for failing to process paperwork over a period of many months, resulting in $55,000 worth of errors to the Company, affecting the sales associates' bonuses, and creating substantial tax implications. (AROA p.71).

Appellant has never denied the behavior that resulted in her termination. (AROA p.75). Appellant admitted in the May 27, 2014, appeal hearing that she failed to process the paperwork properly, stating "...I sent the spreadsheet to the only person in inside sales that had stuff on there and asked him to find out the stats. I never got it returned to me. Maybe I wasn't proactive enough to, you know, keep on her, but you know, I had other things that I was doing, and it just kinda fell by the wayside....." (AROA p.75). Appellant also admitted that during the six months she was responsible for the commission processing she never apprised her superiors that the tasks were not being completed and that nothing had been done on the project. (AROA pp.71,79).

It was this attitude and admitted failure that resulted in the $55,000 error for which Appellant was ultimately terminated, which SCDEW found, at every level, constituted misconduct sufficient to disqualify her from receiving unemployment benefits.

ARGUMENT

Standard of Review

DEW is an agency governed by the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding DEW's predecessor, the Employment Security Commission, subject to the APA). Therefore, judicial review of a final agency decision made by the DEW Appellate Panel is governed by S.C. Code Ann. §§ 1-23-380 & -600(E) (Supp. 2014). *See McEachern v. S.C. Emp. Sec. Comm'n*, 370 S.C. 553, 557, 635 S.E.2d 644, 646 (Ct. App. 2006).

Under the APA, a reviewing court:

> [M]ay not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5).

This standard of review is commonly referred to as the substantial evidence rule. Under the substantial evidence rule, a reviewing court "may reverse or modify an administrative decision if such decision is affected by errors of law, characterized by an abuse of discretion, or clearly erroneous in view of the "substantial evidence" on the whole record." *Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984).

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

Id.; see also Friends of Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) (Substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency"). Furthermore, "[t]he findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." *Kearse v. State Health & Human Servs. Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).). "A reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Prot.Of Wildlife, Inc., v S.C. Dep't of Natural Res.*, 345 S.C.594, 603-04, 550 S.E.2d 287, 292 (2001). Appellant bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." *Id.*

THE ADMINISTRATIVE LAW COURT CORRECTLY AFFIRMED BECAUSE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE DEW APPELLATE PANEL'S DECISION THAT APPELLANT WAS DISCHARGED FOR MISCONDUCT CONNECTED WITH EMPLOYMENT.

DEW properly found at all levels of adjudication and appeal that Appellant was discharged for "misconduct connected with employment," warranting a disqualification of unemployment benefits, in accordance with S.C. Code Ann. § 41-35-120(2)(a).

According to South Carolina law, "'misconduct'...includes deliberate violations or disregard of the standards of behavior which an employer has the right to expect of an employee, and carelessness or negligence of such a degree or frequency as to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." *Id.*

In this case, Appellant had been with the Company since 1986. She held a management position as Sales Administration Supervisor. Appellant was not a low-paid hourly employee who the Company would expect to make minor mistakes. Instead, she was an experienced employee who was well paid and who held a position of responsibility. She was well aware of her job duties and that she was to be responsible for the calculation of bonuses. Instead of completing her duties, she failed to process the bonuses and then concealed her failure to do so from the Company for months. By the time the Company finally discovered the error of $55,000, it had resulted in a domino-effect of other negative ramifications to the Company. Appellant's now-cavalier attitude about the cascade of continued negligence is the very definition of "misconduct," as defined above.

Further, contrary to Appellant's assertion in her Brief, "misconduct" does not mandate some willful or deliberate act as Appellant infers, as defined above and by South

Carolina statute and the appellate courts. *Lee v. South Carolina Employment Security Commission,* 277 S.C. 586, 291 S.E.2d 378 (1996). Misconduct also can include acts or omissions which cause loss to the employer and having to re-do an employee's work. *Id.*

In *DeGroot v. Employment Security Commission,* 285 S.C. 209, 328 S.E.2d 668 (Ct. App. 1985), Ms. DeGroot was terminated for her refusal to follow instructions and for carelessness. Her supervisor testified that she made too many mistakes and that some of her work had to be redone. Ms. DeGroot testified that she was discharged because she was unable to keep up with the work; she stated that her manager failed to inform her of its heavy typing load when she took the job. *Id.* The Court of Appeals upheld the Commission's disqualification of Ms. DeGroot from receiving benefits because her actions "manifested disregard of the behavior ... an employer can rightfully expect from an employee" and constituted misconduct. *Id.*

The facts and arguments here are strikingly similar to those in DeGroot, with the exceptions of two items. Where Ms. DeGroot was a secretary, Appellant was a manager. Where Ms. DeGroot's work required "re-doing" at a cost to the employer, Appellant's work not only required "re-doing," her errors themselves were costly.

Throughout her appeal, Appellant attempted to divert attention from her negligent acts and omissions that resulted in the $55,000 error. Instead, she complained that her manager McKibben was rude and mean to her, that she never knew her job was in jeopardy, and that she was not given the help she needed.

None of those complaints address her admitted failure to follow up to collect the appropriate information to process the bonuses. Appellant's admitted "dropping of that ball" over a long period of time and her concealment of it clearly is a disregard for the

standard of behavior that her employer had a right to expect from her, and therefore, constitutes misconduct sufficient to result in her disqualification of benefits. *Mickens v. Southland Exchange-Joint Venture,* 305 S.C. 127, 406 S.E.2d 363 (1991)

Appellant contends she had no idea her job was in jeopardy (and indeed, it may not have been before the discovery of this incident). Respondent is aware of no South Carolina law or statute requiring that an employee be given notice that his or her job is in jeopardy when they have committed egregious mistakes. Regardless, Appellant cannot deny or refute that she previously had demonstrated other unacceptable behavior of which she was notified on numerous occasions, including her performance review and probation which indicated subpar behavior and performance.

Finally, Appellant's remaining issues and arguments are not preserved for Appellate review. More specifically, Appellant argues (1) the Panel erred in allowing the testimony of employer witness Greg McBride, whom she subpoenaed; and, (2) Appellant was denied due process at the Tribunal Hearing because she was not given copies of DEW documents identified as Agency Exhibits 1 and 2 or a copy of telephone hearing regulations.

These issues and arguments were never raised to or ruled upon by the DEW Appeal Tribunal, DEW Appellate Panel, or the ALC. "Courts sitting in an appellate capacity may not consider issues not raised or ruled on by [an] administrative agency." *Carson v. South Carolina Dep't of Natural Res.,* 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002). Further, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal." *Herron v. Century BMW,* 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011); *Wilson v. Builders Transp., Inc.*, 330 S.C. 287, 294, 498 S.E.2d 674, 679 (Ct. App. 1998)

(finding that an argument not presented to the trial court is not preserved for appellate review)."

CONCLUSION

In summary, the decision of the DEW Appellate Panel is supported by substantial evidence in the record as a whole, is in accord with applicable law, and is not arbitrary, capricious, characterized by abuse of discretion, or controlled by an error of law. Therefore, the S.C. Administrative Law Court correctly affirmed the DEW Appellate Panel Decision.

Respectfully submitted,

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