

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Demesvar Delva,)
)
 Appellant,)
 vs.)
)
 South Carolina Department of)
 Employment and Workforce and Beaufort)
 Housing Authority,)
)
 Respondents.)

Docket No. 16-ALJ-22-0473-AP

ORDER

RECEIVED

AUG 07 2017

SC Court of Appeals

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (“the ALC” or “the Court”) pursuant to an appeal filed by Demesvar Delva (“Appellant”) from a decision of the South Carolina Department of Employment and Workforce’s (“the Department’s”) Appellate Panel. The Appellate Panel held Appellant was disqualified from receiving unemployment benefits for twenty weeks, with a corresponding monetary reduction, upon finding he was discharged for misconduct connected to his employment with Beaufort Housing Authority (“Employer”). The ALC has jurisdiction to hear this matter pursuant to section 41-35-750 of the South Carolina Code (Supp. 2016). Upon consideration of the briefs and Record, the Appellate Panel’s decision is affirmed.¹

BACKGROUND

Appellant worked for Employer from March 17, 2007 to September 14, 2016, most recently as a maintenance foreman. On September 14, 2016, Appellant was discharged due to three tenant complaints. Following his termination, Appellant filed a claim for unemployment benefits with the Department on September 19, 2016. After conducting a fact-finding review, a Department claims adjudicator issued a decision on October 5, 2016 finding Appellant was discharged for misconduct under section 41-35-120(2)(a) of the South Carolina Code. The claims adjudicator further determined Appellant was disqualified from receiving benefit payments for twenty weeks and his maximum benefits would be reduced by twenty times his weekly benefit amount. On October 13, 2016, Appellant filed a Notice of Appeal with the

¹This case was decided without oral argument pursuant to SCALC Rule 39.

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SC ADMIN. LAW COURT

Department's Appeal Tribunal seeking review of the claims adjudicator's decision.

An evidentiary hearing was held before a Tribunal Hearing Officer on November 1, 2016. Appellant and Angela Childers, Employer's Executive Director, participated in the hearing. Following the hearing, the Appeal Tribunal issued a decision on November 4, 2016 affirming the claims adjudicator's decision. Thereafter, on November 8, 2016, Appellant sought review of the Appeal Tribunal's decision by the Appellate Panel. On December 15, 2016, the Appellate Panel affirmed the Appeal Tribunal's decision, and Appellant filed an appeal with this Court on December 20, 2016.

ISSUES ON APPEAL

Did the Appellate Panel err in finding Appellant was disqualified from receiving benefits for twenty weeks, from September 18, 2016 to February 4, 2017, with a corresponding monetary reduction, upon finding he was discharged for misconduct?²

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) (determining that the Employment Security Commission, a 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(E) (Supp. 2016); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). S.C. Code Ann. 1-23-380(5) provides the standard used by appellate bodies to review agency decisions. (Supp. 2016). See § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). S.C. Code Ann. § 1-23-380(5) states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;

² Appellant additionally states that the issues on appeal include: whether Employer violated his civil rights pursuant to the Civil Rights Act of 1964 (Title VII) and whether Employer violated the American Disabilities Act. These issues were not raised at Appellant's hearing nor were they ruled on by the Appellate Panel, and therefore, the issues were not preserved for this Court's review. Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the agency are not preserved for judicial consideration.").

- (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.

A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub Serv. Comm’n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, “a reviewing court will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” Sea Pines Ass’n for Prot. of Wildlife, Inc., v. S.C. Dep’t of Natural Res., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting Lark v. Bi-lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). When applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 319 S.C 348, 353, 461 S.E.2d 388, 391 (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, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

During the Appeal Tribunal hearing, Employer’s witness, Angela Childers, testified that on September 14, 2016 Appellant was discharged due to complaints from three tenants. In the first complaint, Ms. Childers testified that on June 13, 2016, a tenant complained that she was violated when Appellant entered her apartment and stared at her through a mirror while she was in her undergarments. Ms. Childers stated that after investigating the complaint, Employer found the allegations were unfounded. In the second complaint, Ms. Childers testified that on August

16, 2016, Employer received a complaint that Appellant got into a verbal altercation with a tenant during which Appellant told the tenant she could “move to Trump Tower or rent from someone else,” if she was not satisfied. Ms. Childers testified the Appellant admitted to having an altercation with the tenant and to making the statements alleged by the tenant. Finally, Ms. Childers testified that on September 6, 2016, Employer received a complaint from a tenant stating that Appellant hung up on the tenant and would not answer the on-call phone when the tenant called back. The tenant had sought Appellant’s assistance with water in her apartment caused by an ongoing problem with the septic tank.

Ms. Childers additionally testified that in April 2016, Appellant drove Employer’s maintenance vehicle to purchase gas. Appellant made a lottery purchase as well and became irate and yelled and screamed at the cashier for giving him the wrong change. Ms. Childers stated that because of this incident, the store manager banned Appellant from coming to the store and threatened to call law enforcement if Appellant returned. In May 2016, Ms. Childers testified that Appellant became irate and started yelling and screaming at a receptionist in Employer’s office and had to be forcibly removed from the office by other staff. Following these two incidents, coupled with the three tenant complaints, Ms. Childers testified she “felt like there was nothing left to do” and Appellant was discharged. Ms. Childers concluded her testimony by stating that Appellant was an exceptional maintenance employee and Appellant’s current behavior is not what he displayed in the past.

During the Appeal Tribunal hearing, Appellant gave testimony regarding the incidents Employer considered to discharge him. Appellant denied the sexual harassment allegations in the first tenant’s complaint and claimed the tenant was upset because he wrote her parking tickets for parking on the grass. Appellant stated that the second tenant’s complaint was a misunderstanding, and asserted that the altercation arose from a different personal issue, and the Trump Tower statement was not being directed at the tenant. Regarding the third tenant’s complaint, Appellant stated that he never refused to come out and turn off the water, and that he explained the emergency policy to the tenant, which does not say it is his job to come and clean out an apartment. Appellant contends he followed Employer’s policy and would have gone out to shut off the water but the tenant did not want that. In regards to the receptionist incident, Appellant stated that the receptionist always disrespects him for racial reasons and Employer does nothing about it. Appellant did not give testimony relative to the gas station incident.

Retaliatory Discharge

Appellant generally asserts that he was discharged in retaliation for confronting Employer's Executive Director, Angela Childers, about all her misconducts and mismanagement. However, there is nothing in the Record evidencing that Appellant was retaliatorily discharged, and this Court's review is limited to the Record³. See SCALC 36(G) ("The Administrative Law Judge will not consider any fact which does not appear in the Record."). Employer has shown several instances where Appellant deliberately disregarded the standard of behavior Employer had the right to expect, and Employer's witness testified that those were the reasons for Appellant's discharge. Furthermore, the Appellate Panel found that Appellant's assertion that he was retaliatorily discharged was not credible and the greater weight of credible evidence establishes that Appellant was discharged for engaging in inappropriate actions. See Grant v. S.C. Coastal Council, 319 S.C 348, 353, 461 S.E.2d 388, 391 (1995) ("The reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact."). This Court agrees with the Appellate Panel's finding and rejects Appellant's argument that he was retaliatorily discharged.

Racial Discrimination

Additionally, Appellant asserts that he was discharged due to racial discrimination. Even though Appellant states general assertions of racial discrimination, this Court finds that Appellant has failed to establish he was terminated under circumstances that give rise to an inference of discrimination. See Borough of Econ. v. Pennsylvania Human Relations Comm'n, 660 A.2d 143, 147-48 (Pa. Commw. Ct. 1995) (explaining that Appellant has the burden to demonstrate a *prima facie* case of racial discrimination and then the burden shifts to the Employer to establish a legitimate, non-discriminatory reasons for its action). Even if Appellant established a *prima facie* case of racial discrimination, Employer produced evidence of legitimate, nondiscriminatory reasons for discharging Appellant. See Borough of Econ. v. Pennsylvania Human Relations Comm'n, 660 A.2d 143, 149 (Pa. Commw. Ct. 1995) (holding that "the record as a whole fails to demonstrate substantial evidence to support any finding of

³ While Appellant mentions video evidence of Ms. Childers "confessing" to her misconduct during the hearing, this evidence was not submitted to the Appeal Tribunal. Therefore, this court cannot consider this video evidence, because "to hold evidence to which reference is made, but which is not offered into evidence, is admissible would severely prejudice the party opposing its introduction by virtually precluding the party from placing the grounds for his objection on the record." Roberts v. Roberts, 299 S.C. 315, 319, 384 S.E.2d 719, 721 (1989).

intentional discrimination by” Employer). Moreover, the Appellate Panel found that Appellant’s assertion that all complaints were the result of discrimination on behalf of the Employer is not credible. See Grant v. S.C. Coastal Council, 319 S.C 348, 353, 461 S.E.2d 388, 391 (1995) (“The reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact.”).

Due Process

Appellant also asserts he was denied the opportunity to bring forth witnesses for his case during the Tribunal hearing. However, the notice of appeal sent out before the hearing clearly stated that Appellant could present witnesses and to do so, he should notify prospective witnesses of the date and time of the hearing and arrange for them to be available. The notice also stated that Appellant needed to give the hearing officer the telephone number where each witness could be reached. Appellant did not do this. Appellant produced an email from Employer stating that Appellant was not allowed to contact its employees or enter the premises, therefore, Appellant asserts that Employer prevented him from bringing forth his witnesses. However, Ms. Childers stated that Appellant was notified not to enter the premises or contact employees because Appellant made statements about purchasing a gun that frightened the employees. Furthermore, the notice of appeal sent out before the hearing clearly stated that Appellant could subpoena witnesses by submitting subpoena applications to the Department no later than six business days prior to the hearing date.

S.C. Code Ann. Regs. 47-52(B) (2011) requires that all appeals to the Appellate Panel “shall be heard solely upon the evidence in the record before the Appeal Tribunal.” Nevertheless, the Appellate Panel is given discretionary power under S.C. Code Ann. § 41-35-710 with respect to the taking of additional testimony in limited circumstances. The decision to reopen or not to reopen a case for additional testimony is a matter within the Appellate Panel’s sound discretion, and that decision will not be disturbed on appeal absent an abuse of discretion. Lites v. Taylor, 284 S.C. 316, 326 S.E. 173 (Ct. App. 1985). While SCRCF 60(b)(2) provides that the court may relieve a party from a final judgment, order, or proceeding based on newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), the moving party must first show that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and

(5) is not merely cumulative or impeaching. See Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (Ct. App., 2005). In this case, Appellant has not met any of the requirements of SCRCP 60(b)(2).

Additionally, Appellant asserts that the Tribunal failed to consider the fifty pages of evidence he submitted prior to the hearing. However, the hearing officer searched through the fifty pages for a medical document Appellant referenced during the hearing, and the entire fifty pages are included in the Record. Irrespective of the weight the agency gave to the factual evidence Appellant submitted, Appellant has failed to show that the factual evidence he submitted was not considered at all. See Grant v. S.C. Coastal Council, 319 S.C 348, 353, 461 S.E.2d 388, 391 (1995) (“The reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact.”).

Discharge for Misconduct

Under South Carolina unemployment law, a claimant is ineligible for benefits if the Department finds that the claimant was discharged for misconduct connected with the employment. See S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2016). Section 41-35-120 defines misconduct as:

... wilfull [sic] and wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in the carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer.

S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2016); see also, Lee v. S.C. Emp. Sec. Comm'n, 277 S.C. 586, 588, 291 S.E.2d 378, 379 (1982). “No finding of misconduct may be made for discharge resulting from an extreme hardship, emergency, sickness, or other extraordinary circumstance.” Id. at § 41-35-120(2)(a). In this case, the Appellate Panel found:

The employer has shown the claimant deliberately disregarded the standard of behavior the employer had the right to expect.

I agree with the Appellate Panel’s finding.

Substantial Evidence

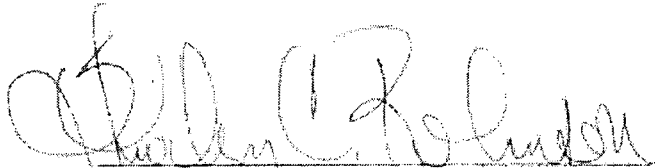
Under the APA standard, the Court reviews the case for substantial evidence to support the agency’s decision. “Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole,

would allow reasonable minds to reach the conclusion that the agency reached.” Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (citation and internal quotes omitted).

In this case, I find there is substantial evidence in the Record to support the Appellate Panel’s conclusion that Appellant’s conduct showed a deliberate disregard for the standard of behavior the Employer had the right to expect. Specifically, the Record evidences that Appellant’s behavior progressively worsened and resulted in tenant complaints and work related incidents. Therefore, because there is substantial evidence in the Record to support the Appellate Panel’s determination that Appellant was discharged for misconduct connected with the employment, the decision must be affirmed.

THEREFORE, IT IS HEREBY ORDERED that the Appellate Panel Decision shall be and hereby is **AFFIRMED**.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

July 12, 2017
Columbia, South Carolina

TESTIMONY OF COPY DE
I, _____, hereby certify that the foregoing is a true and correct copy of the original as filed with me on this _____ day of _____, 2017, at _____, South Carolina.
This _____ day of _____, 2017.
By _____
Notary Public

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA IN THE COURT OF APPEALS

DEMESVAR DELVA

APPELLANT

VS.

SC DEW. AND BHA, AND SC ALC.

Respondents

I certify that I am Demesvar Delva and I served by mail a copy of the Notice of Appeal in the above named action to the parties addressed to:

BHA

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BEAUFORT SC 29901

SC DEW

PO BOX 8597

COLUMBIA SC 29202

STATE OF SC. ALC.

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COLUMBIA SC. 29201

SC DEW

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COLUMBIA, SC 29202

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Demesvar Delva

The Honorable Clerk SC Court of Appeals

PO Box 11629

Columbia ,SC 29211

Appellant

VS.

SC Dept of Employment and Beaufort

Housing Authority.

Re: Appellate Case No.2017-001591

Dear Jenny Abbott Kitchings

I don't have a from 7 but all parties to this matter serve a copy of the order are enclosed

Demesvar Delva

4 Christine Dr.

Beaufort SC 29907

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SC Court of Appeals

Demesvar Delva
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