STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Ross Buchanan, Appellant, vs. South Carolina Department of Employment and Workforce and Upstate Machine and Manufacturing, LLC, Respondents.	Docket No. 17-ALJ-22-0224-AP **ORDER**

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SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) on Ross Buchanan's (Appellant) appeal from Respondent South Carolina Department of Employment and Workforce's (Department) Appellant Panel Decision No. 2017-P-04668. The Appellate Panel Decision affirmed Appeal Tribunal Decision No. 2017-A-03284 finding that Appellant was discharged for misconduct connected with employment, and disqualifying him from benefits for twenty (20) weeks.[1] This appeal was filed on July 3, 2017. The Administrative Law Court has jurisdiction to hear this matter pursuant to Sections 1-23-380[2] and -600(E)[3] and Section 41-35-750[4] of the South Carolina Code. Upon consideration of arguments raised in the parties' briefs, and a review of the record on appeal and the law, the decision of the Department's Appellate Panel is affirmed.

BACKGROUND

Appellant was employed by Respondent Upstate Machine and Manufacturing, LLC (Employer) from June 15, 2015 to February 8, 2017, and most recently as a CNC machine operator. As a CNC operator, Appellant was responsible for writing and entering programs onto three of fourteen machines owned by Employer. Employer is owned by Stan Cannon who also serves as Appellant's supervisor.

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[1] On November 15, 2016, the initial unemployment claims adjudicator found that Appellant was discharged for misconduct connected with his employment pursuant to Section 41-35-120(2)(a). S.C. Code Ann. § 41-35-120 (Supp. 2016). Appellant was disqualified from benefits for twenty (20) weeks.

[2] (Supp. 2016).

[3] (Supp. 2016).

[4] (Supp. 2016).

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Employer granted Appellant one week of vacation. While Appellant was on leave, Employer noticed that every program had been deleted from the three computers regularly used by Appellant. Employer had other employees rewrite and install the programs so that work could continue.

When Appellant returned to work, Employer asked him to run a specific job. According to Employer, Appellant returned to Employer a few hours later and said that he would run the jobs but that he would need a pay raise. Employer perceived Appellant to be blackmailing him and terminated Appellant.

Appellant denied that this was his intent, and said that he only approached Appellant to discuss an unresolved financial issue. Appellant testified that a few months after he was hired, Employer unilaterally reduced Appellant's pay, and that while Appellant continued working for Employer, he routinely talked with Employer hoping that Employer would resume paying him at a higher rate. On this particular day, Appellant testified that he was merely broaching the subject of pay increase once again with Employer.

Appellant admitted to deleting all the programs from his three computers prior to taking leave. However, Appellant testified that he kept all of the programs written down in a notebook so that they could be reprogrammed into the computer. Appellant claims Employer terminated him before he could tell Employer that he had retained the programs in writing.

The Appeal Tribunal found that Appellant was discharged for misconduct connected with his employment for deleting the programs without permission, and retaining them in a notebook that only he knew about. The Tribunal noted that while Appellant denied extortion, Appellant's actions in deleting the programs absent permission displayed a substantial disregard for Employer's interest. Appellant was disqualified from benefits for twenty weeks. The Appellate Panel affirmed the Tribunal's decision.

ISSUE ON APPEAL

Whether substantial evidence exists in the record to support the Appellate Panel's decision that Appellant was discharged for misconduct connected with his employment.

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, a predecessor of the Department, was an agency within the meaning of the APA). The ALC reviews decisions of the Department in an appellate capacity and is "restricted to reviewing the decision[s] below." Al-Shabazz v. State, 338 S.C. 354, 377, 527 S.E.2d 742, 754 (2000). According to Section 1-23-600(E) of the South Carolina Code, when acting in an appellate capacity, the ALC must apply the criteria of Section 1-23-380(5) which states:

> (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This section requires the ALC to apply the "substantial evidence" rule. See e.g., Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996); Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 319 S.E.2d 695 (1984). Substantial evidence is "'not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached . . . .'" Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (citation omitted). A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best W. Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984).

The possibility of drawing two (2) inconsistent conclusions from the evidence does not mean that the agency's conclusion was unsupported by substantial evidence. Id. See also, Waters, 321 S.C. at 227, 467 S.E.2d at 917 (citing Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). The well-settled case law in this State has also interpreted the rule to mean that a decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct and will be set aside only if unsupported by substantial evidence. Rodney v. Michelin Tire Co., 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996) (citing Kearse v. State Health and Human Serv. Fin. Comm'n, 318 S.C. 198, 456 S.E.2d 892 (1995)). Thus, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917 (citing Hamm v. AT & T, 302 S.C. 210, 394 S.E.2d 842 (1994)). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant, 319 S.C. at 353, 461 S.E.2d at 391 (citing Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984)). However, "[d]etermining the proper interpretation of a statute is a question of law, and [an appellate court] reviews questions of law de novo." Palmetto Co. v. McMahon, 395 S.C. 1, 3, 716 S.E.2d 329, 330 (Ct. App. 2011) (citation omitted).

LAW/ANALYSIS

Appellant argues that his actions do not meet the statutory definition of misconduct. The Court disagrees.

Section 41-35-120(2)(a) requires disqualification from benefits for twenty weeks when the Department finds that an employee was discharged for "misconduct connected with his most recent work." S.C. Code Ann. § 41-35-120 (Supp. 2016). Section 41-35-120(2)(a) defines misconduct as:

> ... For the purposes of this item, "misconduct" is limited to conduct evincing such wilfull 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. No finding of misconduct may be made for discharge resulting from an extreme hardship, emergency, sickness, or other extraordinary circumstance.

S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2016).

Discharge for misconduct includes the disregard of the standard of behavior which an employer can rightfully expect from an employee. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991) (citing Lee v. South Carolina Emp't Sec. Comm'n,

277 S.C. 586, 588, 291 S.E.2d 279, 379 (1982). What constitutes a reasonable request by the employer will vary according to the circumstances of each case. Mickens, 305 S.C. at 130, 406 S.E.2d at 365.

Here, substantial evidence exists that Appellant deliberately violated the standard of conduct that Employer had a right to expect. Appellant readily admitted that he deleted whatever programs existed on his three machines prior to taking a week of leave. He did so without Employer's knowledge or approval as required by Employer. While Appellant testified that he deleted them because Employer's computers had limited memory and Employer's battery backup often failed, he neglected to save the programs in an approved manner. Employer had approved the use of the GoBox as an acceptable portable storage device for the transfer of programs. Moreover, Appellant neither advised Employer nor any co-worker that he had written down the programs in a notebook so that they could be later reinstalled.

Because the programs were deleted, three computers were unusable in Appellant's absence until such time as Employer expended time and resources for other employees to reprogram the machines. This Court agrees with the Panel that Appellant's actions constitute a substantial disregard of the employer's interest pursuant to Section 41-35-120(2)(a).[5] Also, the record reflects the Employer's testimony that its written employee handbook prohibited the sabotage or destruction of company property.

Appellant testified as to multiple reasons why he routinely deleted programs and in his opinion, why Employer's back-up systems were insufficient,[6] although Employer testified otherwise.[7] Appellant failed, however, to provide any explanation as to why he deleted all programs from his computer prior to his vacation. Moreover, Appellant had no plausible justification as to why Employer was never told about Appellant's surreptitiously maintained written copies of the programs.[8] Two other employees subpoenaed at Appellant's request

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[5] Appellant cites to instances in which he claims to have taken great care in the maintenance of Employer's equipment in furtherance of production. For purposes of this appeal, it matters not that in the course of his twenty months of employment, there may have been occasions on which Appellant acted in a manner that was consistent with the Employer's interest.

[6] Appellant also provided a rationalization as to why the GoBox, was not a viable option for him although Appellant was aware it had been successfully used by another employee.

[7] Employer testified that programs were not to be deleted without its approval. Employer also testified that its computers had sufficient memory.

[8] Appellant said he had maintained written copies of all programs over the years, and the only excuse he offered as to why he did not advise Employer of the same is because Employer did not give him an opportunity to do so after Employer terminated him. The Court notes that Appellant was within Employer's employ for almost twenty months.

confirmed that it was not normal practice to delete programs and maintain them in writing in a notebook. One employee testified that normally, programs were placed on a card reader and downloaded onto a computer.

On appeal, Appellant argues that some of Employer's testimony was not truthful. In its decision, the Panel noted the existence of conflicting testimony between Appellant and Employer and resolved the issue in favor of Employer. The Panel specifically stated:

> The statements presented are in dispute; however, the greater weight of credible evidence establishes the claimant requested a pay increase in exchange for restoring programs he deleted on the employer's equipment. For the limited purposes of determining unemployment insurance benefits, we find the claimant's testimony lacks credibility that he was terminated for requesting a pay increase based upon the undisputed testimony that the claimant regularly spoke with the manager about a pay increase. The claimant's conduct in demanding the employer pay him additional money in exchange for reinstalling programs onto the employer's equipment was a deliberate disregard for the standard of behavior the employer had a right to expect.

The Department is the ultimate finder of facts in an unemployment insurance benefits case. See Merck v. S.C. Emp't Sec. Comm'n, 290 S.C. 459, 351 S.E.2d 338 (1986). As the trier of fact, the Department is in the best position to judge the demeanor and veracity of the witnesses. Hofer v. St. Clair, 298 S.C. 503, 381 S.E.2d 736 (1989). Thus, this Court cannot substitute its judgment as to the weight of the evidence on questions of fact, particularly where there is substantial evidence to support the hearing officer's findings. Grant, 319 S.C. at 353, 461 S.E.2d at 391.

Simply because the evidence presented creates the possibility of drawing inconsistent conclusions upon which reasonable minds may differ does not mean that the decision was unsupported by substantial evidence. Waters, 321 S.C. at 227, 467 S.E.2d at 917. Finally, there is no evidence that the Panel acted outside of its statutory authority, or that it issued a decision made upon unlawful procedure or affected by error of law.

Appellant next claims that the appeal history in South Carolina evidences an obvious bias against employees and is weighted in favor of employers. While this Court has not conducted a survey of all appellate decisions involving unemployment benefits, its review is limited to that which is permitted by law. Further, the public policy underlying the State's unemployment system is that it is "for the benefit of persons unemployed through no fault of their own." See S.C. Code Ann. § 41-27-20 (1986). The term, "fault," has been construed as meaning failure or volition. Stone Mfg. Co., v. S.C. Emp't Sec. Comm'n, 219 S.C. 239, 247, 64 S.E.2d 644, 646 (1951). Here,

substantial evidence in the record supports the Panel's finding that Appellant's separation from employment was a result of his own actions.

Finally, in the hearing before the Tribunal and on appeal, Appellant recounts numerous grievances against Employer, and he also alleges illegal conduct by Employer. However, these issues are tangential to the only issue before this court which is whether substantial evidence exists on the record to support the Panel's decision that Appellant was discharged for cause. Also, these matters are outside of the jurisdiction of this court.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that the decision of the South Carolina Department of Employment and Workforce's Appellate Panel is **AFFIRMED.**

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

~~September~~ October 12, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served the above action upon all parties to this cause by depositing a copy thereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or the attorney(s).
This 12th day of October, 2017
By: Judy S. Kitchens
Judicial Law Clerk

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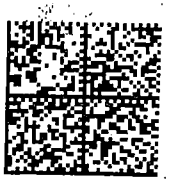

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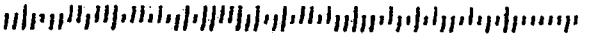

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V. Claire Allen
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Re: Ross Buchanan v. Stan Cannon and SCDEW
Appellate Case No. 2017-002378

Thank you for sending me the notice for correction. I enclosed the latest copy of the SCALC decision in my case with the Notice of Appeal or at least thought I had. I'm not sure what happened to it. In any event enclosed in this letter is another copy of the October 12, 2017 decision.

It should be obvious by now that since I can't afford an attorney in this case and finding one without exceeding the case's net worth is impossible, I am doing this pro se.
I will do my best to follow the rules of this court, but the state of South Carolina has put me in a position of great disadvantage.
Nevertheless as the court has its rules, so do I.

Rule no. 1 is – I don't tolerate liars and thieves.

Had I known the SCALC was a kangaroo court of the executive branch, I would not have wasted so much time and effort in my appeals to them, preferring to wait for the independent judicial branch of government for a fair hearing of this case.
You will undoubtedly find my terminology unusual in a court of law. I speak in bunt, honest terms, not lawyer language.
Hopefully, this case will be resolved soon so I can get back to my normal life again. Getting almost $25,000 of my earnings withheld from me has not been an easy burden to shoulder. This includes not only the wrongfully denied unemployment benefits, but also contested unpaid wages.

I realize the clerks are the backbone of the court system and appreciate your time and attention to detail in these matters. If there is anything I can do to assist you in this endeavor, please don't hesitate to contact me.
Thank you again,
Ross Buchanan

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