THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge
Case No.: 17-ALJ-22-0224-AP

Appellate Case No. 2017-002378

Ross Buchanan, Appellant,

v.

South Carolina Department of Employment and Workforce, and Upstate Machine and Manufacturing, LLC, Respondents.

INITIAL JOINT BRIEF OF RESPONDENTS

Sandra Grooms (SC Bar #640)
S.C. Dept. of Employment & Workforce
Post Office Box 8597
Columbia, SC 29202
(803) 737-0395
legal@dew.sc.gov

Attorney for Respondent South Carolina Department of Employment and Workforce

Thomas A. Belencia (SC Bar #2371)
Chelsea R. Rikard (SC Bar# 102355)
A Business Law Firm, LLC
P.O. Box 3421
Spartanburg, SC 29304
(864) 699-9801
tab@abizlaw.com
crr@abizlaw.com

Attorneys for Respondent Upstate Machine and Manufacturing, LLC

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RE-STATEMENT OF ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW COURT CORRECTLY AFFIRM THE DEPARTMENT OF EMPLOYMENT AND WORKFORCE APPELLATE PANEL DECISION FINDING THAT APPELLANT WAS DISCHARGED FOR MISCONDUCT CONNECTED WITH EMPLOYMENT, AND ACCORDINGLY WAS DISQUALIFIED FROM RECEIVING UNEMPLOYMENT BENEFITS?

STATEMENT OF THE CASE

Appellant Ross Buchanan (Appellant) filed a claim for unemployment benefits with Respondent South Carolina Department of Employment and Workforce (Department) on February 10, 2017. (ALC R. pp.3-13). Appellant and his former employer, Upstate Machine and Manufacturing, LLC (Employer), both furnished fact-finding statements to the Department. (ALC R. pp. 14-22). The claim adjudicator determined Appellant was discharged for misconduct due to his "improper actions on the job" which were "contrary to what the employer ha[d] a right to expect", and held Appellant disqualified from benefits for twenty (20) weeks, pursuant to S.C. Code Ann. § 41-35-120(2)(a). (ALC R. p. 24). Appellant timely appealed this adjudication to the Appeal Tribunal (Tribunal). (ALC R. pp. 25-28).

On March 22, 2017, the Tribunal conducted an evidentiary hearing on Appellant's claim, during which both parties participated. (ALC R. pp.35-89). On March 24, 2017, the Tribunal affirmed the initial determination, finding Appellant had been discharged for misconduct. (ALC R. pp.90-91). Appellant appealed the Tribunal's decision to the Appellate Panel (Panel) on March 28, 2017. (ALC R. pp.93-99).

On May 12, 2017, the Panel affirmed the Tribunal's decision, finding that Appellant was discharged for misconduct connected with the employment. (ALC R. pp.1-2, Decision No. 2017-P-04668).

Appellant filed an appeal of the Department's Appellate Panel decision to the Administrative Law Court (ALC) on June 12, 2017. (Appellant's Notice of appeal to ALC). Following submission of Briefs by all parties, Administrative Law Judge Shirley C. Robinson issued an Order affirming the Appellate Panel, finding substantial evidence in the record

supports the Panel's decision that Appellant was discharged for misconduct. (ALC Order dated October 12, 2017).

On November 13, 2017, Appellant filed a Notice of Appeal from the ALC's Order to the South Carolina Court of Appeals in this matter.

STANDARD OF REVIEW

The Department 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 the Department's predecessor, the Employment Security Commission, subject to the APA). Therefore, judicial review of a final agency decision made by the Department's Appellate Panel is governed by S.C. Code Ann. §§ 1-23-380 & -600(E) (Supp. 2017). *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 ALC may not substitute 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); *see also* S.C. Code Ann. § 1-23-380(5). 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.*

FACTS

Appellant worked for Employer from June 15, 2015, until his termination on February 8, 2017. (ALC R.p.1; p.5). Employer is owned by Stan Cannon, who also served as Appellant's direct supervisor. (ALC R.p.43). Employer's business includes providing computer-controlled machining services and Appellant worked most recently as a computer numerical control (CNC) machine operator. (ALC R.p.5; pp.43-44). As a CNC machine operator, Appellant was responsible for writing and entering programs onto Employer's machines. (ALC R.p.43; p.72). Shortly before his termination, Appellant took a week of vacation time. (ALC R.p.43). During Appellant's vacation from work, Mr. Cannon discovered that all the programs had been deleted on three particular machines for which Appellant was responsible. (ALC R.pp.43-44). Due to the deletion of the programs, Mr. Cannon was forced to require another operator to rewrite programs into the machines, so they could be used while Appellant was on vacation. (ALC R.pp.44-45). This process required a minimum of four hours. (ALC R.p.71).

Following Appellant's return to work, Mr. Cannon instructed him to begin working on a project that required the use of one of the subject machines. (ALC R.p.45). Several hours later, Appellant approached Mr. Cannon and said "he (Appellant) can get 'em [*sic*] running for some more money and he'd get the programs back in the machines." (ALC R.p.44). Mr. Cannon interpreted Appellant's statements as a request for money in exchange for reinstalling the programs on his machines, or as he testified, "blackmail." (ALC R.p.14, p.44; p.47; p.71). As a result of this conduct, Mr. Cannon terminated Appellant. (ALC R.pp.47-48).

Appellant stated he approached Mr. Cannon to discuss his longstanding financial issues and his pay. (ALC R.pp.57-58). Appellant denied his intent was to blackmail or extort his employer. (ALC R.p.60).

Appellant admitted he deleted every program out of the three machines, and the deletion was not caused by power failure or battery backup failure. (ALC R.p.56). Moreover, Appellant admitted that after deleting the programs from the machines, he recorded the programs in a notebook, which he stored privately, but did not inform any other employee about such notebook. (ALC R.p.57).

Mr. Cannon testified an operator would need to get his permission prior to deleting any programs and he did not give Appellant permission to delete the programs on the three subject machines. (ALC R.pp.45-47). Further, Employer's handbook contains policies instructing employees to refrain from sabotaging, destroying, tampering, moving, or changing company property. (ALC R.pp.46-47). Mr. Cannon testified he believed deletion of programs from the machines without permission constituted sabotage under this policy. (ALC R.p.47).

Craig Travis, a coworker, testified it was not normal practice to delete programs and put them in a notebook. (ALC R.p.65). Rather, it was the practice of Employer to store these programs on a card reader, called a GoBox, and save them to a computer. (ALC R.p.54; p.56; p.65). Although Appellant testified he believed the battery within the card reader malfunctioned, Mr. Travis testified the reader operated properly if plugged into a power source. (ALC R.p.65). Chad Treadway, another coworker, testified it was not a common practice to delete programs, he had never done such a thing, and he was not aware Appellant had written programs in a notebook. (ALC R.pp.68-69).

In Appeal Tribunal Decision No. 2017-A-03284, the Tribunal held Appellant was discharged for misconduct for deleting the programs without permission, and retaining them in a notebook only Appellant knew about. (ALC R.pp.90-91). The Tribunal found "though the [Appellant] denied using his knowledge of programming as something to extort extra pay from

the employer, the employer's depiction of events explains the perception. Despite the claimant's denial of extortion, the fact that he deleted the programs without permission displays a substantial disregard for the employer's interest." (ALC R.p.91)

The Panel affirmed the Tribunal's decision, also finding Appellant was discharged for misconduct connected with the employment. (ALC R.pp.1-2, Decision No. 2017-P-04668).

In its decision, the Panel unanimously found as follows:

> The statements presented are in dispute; however the greater weight of credible evidence establishes the [Appellant] requested a pay increase in exchange for restoring programs he deleted on the employer's equipment. . . . we find the [Appellant's] testimony lack credibility that he was terminated for requesting a pay increase based upon the undisputed testimony that the [Appellant] regularly spoke with the manager about a pay increase. The [Appellant'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 has the right to expect. Therefore, we find the [Appellant] was discharged for misconduct connected with the employment. The Appeal Tribunal decision is affirmed.

(ALC R.p.2).

ARGUMENT

Substantial evidence in the record supports a finding that Appellant was discharged for misconduct and, therefore, disqualified from receiving unemployment benefits. Further, Appellant's brief includes matters that should be excluded by this Court.

The Administrative Law Court correctly affirmed because the Department's Appellate Panel decision finding Appellant was discharged for misconduct pursuant to S.C. Code Ann. § 41-35-120(2)(a) is supported by substantial evidence in the record as a whole.

Pursuant to statute, an unemployment insurance claimant shall be disqualified from receiving benefits for twenty weeks if the Department finds the claimant has been discharged for

"misconduct connected with his most recent work." S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2017). Misconduct is defined as follows:

> "Misconduct" is limited to conduct evincing such willful 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 an employer's interests or of the employee's duties and obligations to his employer.
>
> *Id.*

Moreover, the public policy underlying the State's unemployment system is that only those who are "unemployed through no fault of their own" are entitled to benefits. *See* S.C. Code Ann. § 41-27-20 (1986) The term 'fault' has been construed as meaning failure or volition. *See Stone Mfg. Co. v. South Carolina Employ. Sec. Com'n,* 219 S.C. 239, 64 S.E.2d 644 (1951).

Considering the record as a whole, reasonable minds could find that substantial evidence exists to support the Panel's conclusion that Appellant was discharged for misconduct. 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). The record reveals Appellant acted with deliberate disregard of the standard of behavior the employer had the right to expect and provoked his termination by deleting programs from Employer's machine and then demanded to negotiate a pay increase, rather than immediately correcting the issue he caused.

The Tribunal, Panel, and ALC found Appellant engaged in misconduct when he deleted the programs then sought to coerce a pay increase in exchange for re-installing such programs. Substantial evidence in the record supports that finding. Mr. Cannon testified he discovered

Appellant had "wiped out" all the programs on the CNC machines before he left on vacation, without first receiving permission from Mr. Cannon. (ALC R.pp. 43-44; 45-47). Rather than saving such programs using the approved GoBox storage method, Appellant wrote the programs in a personal notebook only he knew about; a fact he admitted to. (ALC R. pp.56-57). Two co-workers subpoenaed at Appellant's request testified that it was not normal practice to delete programs and maintain them in writing in a notebook. (ALC R.p.65; p.69). Without these programs, the machines were in essence unusable until Employer expended time and resources for other employees to rewrite programs and put them back in the machines. (ALC R. pp.44-45; p.71). When Appellant returned, Mr. Cannon instructed Appellant to begin working on a project that required him to re-install programs on his machines. (ALC R.p.45). Instead of complying with this reasonable directive, Appellant confronted Mr. Cannon about "unresolved financial issues" and made clear "he (Appellant) can get 'em [sic] running for some more money and he'd get the programs back in the machines." (ALC R.p.44). Mr. Cannon testified he "felt like [Appellant] was blackmailing me" and concluded Appellant deliberately deleted the programs as an act of sabotage. (ALC R.p.14; p.44; p.47; p.71). Moreover, Appellant had attempted to discuss pay or wage issues with Mr. Cannon in the past, and such discussions did not result in his termination. (ALC R.p. 57-58). Such specific and substantial evidence supports the Panel's findings that the employer did not terminate Appellant for merely asking for more money, but instead for tying his request for more money to complying with a reasonable directive.

The Panel did not commit legal error in holding Appellant deliberately disregarded the standard of behavior the employer had the right to expect and was discharged for misconduct. Employer reasonably expected to be able to use its CNC machines during Appellant's vacation; reasonably expected Appellant would not render its machines inoperable with no communication

to those employees not on vacation; and reasonably expected Appellant to reprogram the machines as directed when he returned to work. However, after being on premises several hours, Appellant did not complete this task but instead attempted to coerce payment of wages that he believed were owed to him, stating to Mr. Cannon that he "can get 'em [*sic*] running for some more money and he'd get the programs back in the machines." (ALC R.p. 44-45). The Panel agreed with Employer's interpretation that Appellant sought these wages in exchange for re-installing the programs he deleted. The Panel's conclusion was reasonable and supported by substantial evidence.

Employer had the right to expect Appellant would restore the functionality of its machines without first insisting on negotiating a pay increase for himself. Therefore, the Panel found, the Appellant was discharged for misconduct because he acted in deliberate disregard of the standard of behavior rightfully expected by his employer.

The Appellant argues in his Brief the Panel's decision was not supported by substantial evidence because the Panel should have believed his testimony and disbelieved his Employer's testimony. Essentially, Appellant challenges the Panel's credibility determination. The basis for Appellant's argument is, ultimately, a mere disagreement with the Panel's factual findings and conclusions. The Appellate Panel is the ultimate finder of fact in cases before the Department. *See Merck v South Carolina Employment Sec. Comm'n,* 290 S.C. 459, 351 S.E.2d 338 (1986). Issues of credibility of witnesses and weight to be afforded their testimony are matters for the Panel to determine. As the ultimate finder of fact, the Panel has the sole authority to "judge the demeanor and veracity of the witnesses." *Hofer v. St. Clair*, 298 S.C. 503, 510, 381 S.E.2d 736, 740 (1989). Under appellate review, this Court reviews the record to determine if there is evidence for the Department to reach its decision, not the weight of the evidence presented.

Allstate Ins .Co. v. State Farm Mut. Auto. Ins. Co., 260 S.C. 350, 352, 195 S.E.2d 711, 712 (1973). The Court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *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 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). There is clearly a reasonable probability the facts could be as related by Employer and this Court should not substitute its own judgment for that of the Department.

Though Appellant testified differently on factual points, the Appellate Panel weighed the conflicting evidence between the parties and resolved the factual disputes presented by the testimony in favor of Employer, specifically finding the "greater weight of the credible evidence establishes the [Appellant] requested a pay increase in exchange for restoring programs he deleted on the employer's equipment . . . The [Appellant'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 the right to expect. Therefore, we find the [Appellant] was discharged for misconduct connected with the employment." (ALC R. p. 2). This conclusion is supported by substantial evidence in the Record, specifically the testimony of Appellant, Mr. Cannon, and Appellant's own two witnesses. Therefore, this Court should affirm the Panel's decision.

Appellant's brief contains matters that should not be considered by this Court.

The case before this Court is an appeal of Appellant's unemployment benefits claim. Accordingly, the true issue before the Court in its appellate review is whether substantial evidence exists in the record to support the Department's decision that Appellant was disqualified from receiving unemployment benefits because he was discharged for misconduct. As Respondent has explained in its Brief, substantial evidence in the record supports the Panel's decision, and Appellant was properly disqualified from receiving unemployment benefits in accordance with S.C. Code Ann. § 41-35-120(2)(a).

Appellant's brief contains matter that should not be considered by this Court. First, during the course of his appeals Appellant has asserted facts and arguments, as he does in his Brief, that pertain to separate matters outside of Appellant's unemployment benefits claim, such as actions related to the payment of back wages and an alleged wrongful termination. Such matters are beyond the scope of the Department's Tribunal and Panel jurisdiction, and such bodies did not rule upon or offer any opinion on those issues. As such, those issues are not preserved for appeal, are not properly before the Court, and the Court should not consider them. "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).

Second, Appellant's brief attempts to introduce new evidence and arguments that were not raised prior to the present action and are also wholly irrelevant to the issues on appeal. Indeed, many facts, such as alleged investigations by the South Carolina Department of Labor, Licensing, and Regulation and a medical condition of another employee, were not presented to the Department and, thus, cannot be considered for the first time on appeal. "It is well-settled

that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v City of Folly Beach,* 339 S.C. 406, 412, 529 S.E.2d 543 (2000) (*E.g., Creech v. South Carolina Wildlife and Marine Resources Dep't,* 328 S.C. 24, 491 S.E.2d 571 (1997)).

Lastly, Respondents note that Appellant's brief explains his version of facts and circumstances leading to his termination from employment; however, Appellant discusses many alleged facts and evidence in his brief without proper page citations to the Record[1]. Respondents urge this Court to rely upon the testimony and exhibits actually presented during the Tribunal hearing and not give weight to the unsupported facts and evidence alleged in Appellant's brief. *See Timms v. Timms*, 286 S.C. 291, 294, 333 S.E.2d 74, 75 (Ct.App. 1985). ("We are confined to the record in deciding issues on appeal.").

CONCLUSION

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

[signatures on following page]

[1] Rule 208(b)(4) SCACR, states a brief "shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal to support the salient facts alleged.

Respectfully submitted,

Sandra Grooms (SC Bar 640)
SC Department of Employment and Workforce
P.O. Box 8597
Columbia, South Carolina 29202
(803) 737-0395
legal@dew.sc.gov
Attorney for Respondent South Carolina Department of Employment and Workforce

Thomas A. Belenchia (SC Bar 2371)
Chelsea R. Rikard (SC Bar 102355)
A Business Law Firm, LLC
P.O. Box 3421
Spartanburg, South Carolina 29304
(864) 699-9801
crr@abizlaw.com
Attorneys for Respondent Upstate Machine and Manufacturing, LLC

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Respondent (s).

PROOF OF SERVICE

I certify that I have served the Respondents' Joint Designation of Matter and Joint Initial Brief on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on July 10, 2018, addressed to the parties at their addresses of record:

Ross Buchanan
73 Doris Lisa View Dr
Hendersonville NC 28792

Chelsea R. Rikard
PO Box 3421
Spartanburg SC 29304

July 10, 2018

Kristi Chesley
Administrative Legal Assistant
South Carolina Department of Employment and Workforce
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-0395

P.O. Box 995
1550 Gadsden Street
Columbia, SC 29202
dew.sc.gov

Henry McMaster
Governor

Cheryl M. Stanton
Executive Director

Post Office Box 8597
Columbia, SC 29202
Telephone: (803) 737-2666
Fax: (803) 737-0124

July 10, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Ross Buchanan v. South Carolina Department of Employment and Workforce and Upstate Machine & Manufacturing LLC
Appellate Case No: 2017-002378

Dear Ms. Kitchings:

Enclosed are the Respondents' Joint Designation of Matter and Joint Initial Brief. A Proof of Service is also included in this packet.

Please let me know if you have any questions.

Sincerely,

Kristi Chesley

Kristi Chesley
Administrative Legal Assistant for
Sandra Grooms
Attorney for Respondent South Carolina
Department of Employment and Workforce

SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE
P.O. BOX 995
COLUMBIA, S.C., 29202

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211