THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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Case No. 11-ALJ-22-0354-AP

Appellate Case No. 2012-207906

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AnMed Health, ..... Appellant,

v.

South Carolina Department of Employment and Workforce and Pamela S. Crowe, ..... Respondents.

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Did the Administrative Law Court err in finding that substantial evidence exists to support the Department's decision that the claimant was terminated without cause when the medical documentation on which the Department relied to find she qualified for an exemption to the mandatory flu vaccine policy was inaccurate and the policy, based on leading national and state health care systems, that reflected AnMed Health's commitment to protect the safety of its patients, staff, and community was fairly and consistently applied?

## STATEMENT OF THE CASE

On January 20, 2011, the UI Claim Adjudicator ("Adjudicator") sent Pamela Crowe a notice informing her that she had been disqualified from receiving benefits for ten weeks, effective December 12, 2010, through February 19, 2011, along with a corresponding reduction in the maximum potential benefit amount. R. pp. 36, 82. This decision was based on the finding that the claimant was discharged for cause for failure to comply with AnMed Health's mandatory flu shot policy. *Id.*

Ms. Crowe appealed the Adjudicator's decision to the Appeal Tribunal ("Tribunal"). The Tribunal overturned the Adjudicator's decision finding that discharge for cause had not been established because Ms. Crowe "had medical documentation as required which would exempt her under the new policy." R. p. 102.

AnMed Health appealed the Tribunal's decision to the Appellate Panel ("Panel"). The Panel upheld the Tribunal's decision based on its finding that AnMed Health's policy "was unreasonable, particularly as applied to the claimant's unique circumstances. . . [Ms. Crowe] presented credible medical documentation that such an immunization would jeopardize her health." R. p. 10.

On July 1, 2011, Appellant AnMed Health filed a Notice of Appeal with the Administrative Law Court. Appellant filed its initial brief to the South Carolina Administrative Law Court on August 18, 2011 and a reply brief on September 22, 2011. No oral arguments were held before the Administrative Law Court. On January 19, 2012, Appellant received Respondent's Proposed Order. On January 23, 2012, Appellant filed a Response to Respondent's Proposed Order. On January 24, 2012, the

Honorable John D. McLeod affirmed the South Carolina Department of Employment and Workforce final agency decision. Appellant filed a Notice of Appeal with the South Carolina Court of Appeals on February 14, 2012.

## STATEMENT OF FACTS

In September 2010, AnMed Health instituted a mandatory flu vaccine policy. R. pp. 83-84. Recognizing that "each year thousands of Americans die as a result of the flu and flu-related illnesses," the AnMed Health Board of Trustees approved the policy after reviewing "the practices of some of the nations' leading health care networks." R. p. 83. In announcing the policy, AnMed's President and CEO, John Miller, stated that:

> Because of the environment we work in, we are our community's greatest asset in protecting and caring for those that are facing illness. This responsibility means that we must take every conceivable step to make patient, employee, and community safety a priority.

*Id.* After citing measures AnMed Health has taken in recent years to advance public health and safety, Mr. Miller stated "[t]his year we are going to take yet another step in making patient, employee, and community safety a priority." *Id.* "This step," Mr. Miller added, "involves every employee of AnMed Health." *Id.*

AnMed Health was so committed to the need for comprehensive coverage that it did not limit the application of its policy to its employees, but also required flu immunizations of its students, volunteers, contract workers, and temporary agency employees. Citing the thousands of deaths annually attributable to the flu and flu-related illnesses, Mr. Miller concluded the announcement of the new policy by reminding everyone in the AnMed Health network of their responsibilities to patient,

employee, and community safety. "We must do our part to reduce the risk of infection and in turn help save the lives of those we care for and those we care about. Everyone's understanding is appreciated." *Id.*

The September 15, 2010 memorandum announcing the policy was accompanied by the "Influenza Immunization Protocol" ("Flu Policy"). Similar to policies of other leading health care networks, including two South Carolina hospitals (Georgetown Hospital and the Medical University of South Carolina, R. p. 46, lines 5-15; *id.* at 83), the Flu Policy provides that health care workers, including employees, students, volunteers, temporary agency staff and others may request an exemption from the vaccination based on guidelines from the Centers on Disease Control (CDC). R. pp. 83-84. More specifically, the Flu Policy states:

> [Health Care Workers] may request exemption from vaccination based on guidelines from the Centers of Disease Control (CDC). Those CDC guidelines for exemptions currently include: severe egg allergy, severe allergy to any component of the vaccine, a past severe reaction to the influenza vaccine, or a history of Gillian-Barre syndrome. NO OTHER FORM OF OR REASON FOR EXEMPTION WILL BE MADE.

R. p. 84 (emphasis in original). The Flu Policy explains that "[u]nless an approved exemption is made (as described herein) the influenza vaccination will be a condition of initial and continued employment of all AnMed Health employees, and a condition of permissive entrance onto the premises of any AnMed Health service delivery site for all other [Health Care Workers] regardless of whether direct patient contact is expected." *Id.* The Protocol further stresses that "[e]mployees without an approved exemption, who fail to timely take the vaccination, or who with an approved exemption fail to

comply with any applicable restriction will be allowed to resign or will be terminated." *Id.*

On December 14, 2010, the claimant, Pamela S. Crowe, was discharged for failure to comply with the Flu Policy. R. p. 45, lines 7-17. In order to request an exemption under the Flu Policy, employees were required to have a physician complete an "Exemption Request – Flu Vaccination" form. R. p. 86. Ms. Crowe did not have her physician complete or sign the exception request form that identified the CDC sanctioned grounds for an exception. Instead, she submitted a physician statement referencing a "strong" family history of Guillain-Barré Syndrome that Ms. Crowe acknowledged in both her exemption request and later in her testimony before the hearing officer did not actually exist. R. pp. 86-87; R, p. 54, lines 11-22, p. 70, lines 9-27, p. 74, lines 19-21, and p. 85. The short, handwritten note from Erin L. Cooksey, M.D., Ms. Crowe's attending physician, stated:

> This patient must be medically exempt from the flu shot. She has a strong history of Guillian-Burr (sic) and MS. The flu shot can activate these processes and must be avoided!

R. p. 85.

AnMed Health's infectious disease physician, Dr. David Potts, made the decisions as to whether to grant or deny exemption requests. R. p. 48, lines 12-16, p. 58, lines 10-16. Dr. Potts had a discussion with Ms. Crowe regarding her exemption request. R. p. 58, lines 17-18 – p. 59, line 1. In her written exemption request that was accompanied by the physician's statement, Ms. Crowe explained the "strong" family history of Guillain-Barré Syndrome and Multiple Sclerosis in the following way:

> The neurologist thought [my daughter's condition at the time of her admission to the hospital] was Guillain-Barré Syndrome but after many

> tests, blood work, MRI, spinal tap, etc. ... she was diagnosed with Multiple Sclerosis. The neurologist asked what [my daughter] had done within the past two weeks that could have activated the MS gene, that ALL humans carry and - she replied, "I took the flu shot." [The neurologist] said that could be what activated the MS.

R. p. 85.

Ms. Crowe thus had no personal or family history of Guillain-Barré Syndrome. In the absence of such a medical history and because the CDC has not identified individuals with a family history of Multiple Sclerosis as being at risk for an adverse reaction to the influenza vaccine, Dr. Potts denied Ms. Crowe's request for medical exemption under the Flu Policy because "it [did] not meet the exemption guidelines specified by the Centers for Disease Control." R. pp. 22, 86.

## STANDARD OF REVIEW

The Administrative Procedures Act ("APA") sets forth the standard of review for appeals of South Carolina Department of Employment and Workforce ("SCDEW") final decisions. *Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984); *McEachern v. S. C. Employ. Security Comm.*, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006); *Todd's Ice Cream, Inc. v. S.C. Employ. Security Comm.*, 281 S.C. 254, 257-58, 315 S.E.2d 373, 375 (Ct. App. 1984). The SCDEW (formerly known as the Employment Security Commission) "is an agency governed by the [APA]." *Gibson*, 282 S.C. at 386, 318 S.E.2d at 367; *McEachern*, 370 S.C. at 557, 635 S.E.2d at 646. Therefore,

> [u]nder the APA, a reviewing tribunal may reverse or modify the decision of the agency where it is arbitrary or capricious or constitutes an abuse of discretion. Reviewing courts apply the substantial evidence rule, under which the agency's decision is upheld unless it is "clearly

> erroneous in view of the reliable, probative and substantial evidence on the whole record."

*McEachern*, 370 at 557, 635 S.E.2d at 646-47; *see also* S.C. Code Ann. § 1-23-380 (5)(e) ("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: . .(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.").

Substantial evidence has been interpreted to mean as follows:

> 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. A judgment upon which reasonable men might differ will not be set aside.

*Todd's Ice Cream*, 281 S.C. at 258, 315 S.E.2d at 375; *see also McEachern*, 370 S.C. at 557, 635 S.E.2d at 646-47 (applying the substantial evidence standard in an Employment Security Commission case); *Gibson*, 282 S.C. at 386, 318 S.E.2d at 367 (applying the substantial evidence standard in an Employment Security Commission case). Thus, to be successful AnMed Health must show that considering the record as a whole, reasonable minds would not have come to the conclusion that the Panel reached in this matter.

## ARGUMENT

**I. The Department's Decision Should Be Reversed Because In Deciding that AnMed Health Did Not Have Good Cause to Terminate Ms. Crowe the Agency Relied on Inaccurate Medical Information as the Basis for Findings and Conclusions That Were Clearly Erroneous.**

At every stage of the review of this case, the decision makers relied on one key finding to justify the conclusion that AnMed Health did not have good cause to terminate the claimant because of her refusal to receive the flu vaccine, namely that she had medical documentation of a history of Guillain-Barré Syndrome, a condition that demonstrated she qualified for one of the exemptions for the vaccine recognized by the CDC.

A. The Appeal Tribunal Found Claimant Presented Medical Documentation that Qualified Her to be Exempt Under the Flu Policy

In the decision of the Appeal Tribunal, the administrative hearing officer found that the claimant requested an exemption based on a note from her physician "that recommended the claimant be exempt due to a strong family history of Guillian-Burr (sic) and MS" and concluded that Ms. Crowe "had medical documentation as required which would exempt her under the new policy." R. pp. 101-102. Ms. Crowe, however, testified that her daughter had not been diagnosed with Guillain-Barré Syndrome, but with Multiple Sclerosis instead. R. p. 70, lines 6-10.

B. The Appellate Panel Found the Claimant Presented Medical Documentation Requiring an Exemption Under the Flu Policy

Similarly, in reviewing AnMed Health's appeal, the Department's Appellate Panel found that "the claimant presented medical documentation requiring an exemption from the new policy due to a family history of Guillain-Barré Syndrome and Multiple Sclerosis" and that she had, in doing so, "presented credible medical documentation that such an immunization would jeopardize her health." R. pp. 9-10. The Appellate Panel failed to acknowledge Ms. Crowe's testimony that, in fact, she had produced no

medical history recognized by the CDC that would have qualified her for an exemption under AnMed Health's Flu Policy.

C. The Administrative Law Court Found the Claimant was Diagnosed Guillain-Barré Syndrome Notwithstanding Ms. Crowe's Testimony to the Contrary

In considering AnMed Health's further appeal, the Administrative Law Court (ALC) perpetuated the clearly erroneous factual error that was central to the Department's decision by stating "[i]t was believed that the flu vaccine activated what was diagnosed as Guillain-Barre Syndrome and later believed to be Multiple Sclerosis ...." R. p. 2. This statement is directly contradictory to Ms. Crowe's testimony that the neurologist thought her daughter may have Guillain-Barré Syndrome, but later ruled it out, finding that she had Multiple Sclerosis instead. R. p. 70, lines 6-10. The ALC concluded that "based on Crowe's family history and the information and advice of her physician, the requirement that Crowe take the influenza vaccination was not reasonable and her reason for non-compliance is reasonable." R. p. 4.

D. The Department's Decision is Clearly Erroneous in View of the Reliable, Probative, and Substantial Evidence on the Whole Record

The record established before the Department's Appeal Tribunal is clear and uncontroverted as to the following matters:

- Ms. Crowe had no personal history of Guillain-Barré Syndrome.
- Ms. Crowe was never tested by her physician to determine whether she was a carrier of Guillain-Barré Syndrome and presented no proof that she had been. R. p. 71, lines 1-5.
- Ms. Crowe's daughter was never diagnosed with Guillain-Barré Syndrome. Instead, she reportedly was suspected of having the disease once when she was hospitalized, but her condition was determined before

her discharge to be Multiple Sclerosis, not Guillain-Barré Syndrome. R. p. 70, lines 6-10; R. p. 85.

The claimant herself is the source of these reports. She first informed AnMed Health in her written exemption request that although her daughter's neurologist initially thought she had Guillain-Barré Syndrome, she was diagnosed instead with Multiple Sclerosis. R. p. 85. Similarly, the claimant testified before the administrative hearing officer that the neurologist who suspected her daughter may have Guillain-Barré Syndrome when she was hospitalized reported at the time of her discharge some ten days later that "[w]e don't believe it's Guillain-Barré, we believe it is Multiple Sclerosis." R. p. 70.

Based on these uncontradicted facts in the record reported by the claimant herself, the finding of the Appeals Tribunal, the Appellate Panel and the ALC that the claimant demonstrated a history of Guillain-Barré Syndrome and met the CDC standards for an exemption is simply wrong.

The source of confusion by the Department and ALC concerning Ms. Crowe's history of Guillain-Barré Syndrome apparently is the note the claimant provided from her personal physician, Erin L. Cooksey, M.D. The doctor's three-sentence, handwritten note is not based on any medical diagnosis, test, or treatment the physician conducted. Moreover, Dr. Cooksey made no reference to having had a physician-patient relationship with Ms. Crowe's deceased daughter who was diagnosed with Multiple Sclerosis. Therefore, any information the doctor would have received about Ms. Crowe's daughter's condition would be expected to have come from a third party, presumably the claimant, who knew that her daughter in fact was never diagnosed with Guillain-Barré Syndrome.

The repeated and uncontradicted testimony of the claimant herself leaves no room for doubt that Ms. Crowe has no personal or family history of Guillain-Barré Syndrome. Therefore, her physician's statement of fact that Ms. Crowe has a strong family history of Guillain-Barré is inaccurate, unreliable, and contradicted entirely by unambiguous statements from the claimant herself. It cannot stand as the basis for the Department's action.

Based on the record as a whole, Ms. Crowe failed to present any evidence of a history of Guillain-Barré Syndrome. As a result, she has failed to provide any evidence to show she qualified for an exemption under AnMed Health's Flu Policy. Therefore, the decision of the Department of Employment and Workforce is not supported by the reliable, probative, and substantial evidence on the whole record. The decision was clearly erroneous and should be reversed.

## II. The Final Agency Decision Should be Reversed Because AnMed Health's Mandatory Flu Policy is Lawful and Reasonably Related to AnMed Health's Interest in Protecting its Patients, Employees, and the Public.

AnMed Health's mandatory Flu Policy is a reasonable employment requirement, and the claimant failed to provide evidence of reasonable noncompliance. The general rule is that, where the employer's request is reasonable, a refusal to comply will constitute misconduct, justifying a discharge for cause. *Mickens v. Southland Exch.-Joint Venture*, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991). What is reasonable will vary according to the circumstances of each case. *Id.* Not only must the reasonableness of the employer's request be evaluated, but also the employee's reason for noncompliance. *Id. American Jurisprudence* explains:

> an employee will not be found guilty of misconduct disqualifying him or her from receiving unemployment compensation for violation of a rule unless: (1) the employee knew or should have known the rule; (2) the rule was lawful and reasonably related to the job environment and job performance; and (3) the rule is fairly and consistently enforced.

76 Am. Jur.2d *Unemployment Compensation* § 72 (2005).

AnMed Health's Flu Policy is lawful and reasonably related to its intent in protecting and improving the health and safety of its patients, employees, and the public. In recognizing that thousands of Americans die each year from the flu and flu-related illnesses, AnMed Health adopted a policy that was expressly designed to reduce the risk of influenza infection and help save lives by taking "every conceivable step to make patient, employee, and community safety a priority." R. p. 83.

The adoption of AnMed Health's Flu Policy was not an isolated event. For years, the system has demonstrated its commitment to improving the health and safety of its patients and employees, as well as the community, through initiatives that established system-wide policies for hand-washing, surgical protocols, sterile environments, and investments in the best technology. R. p. 83. Moreover, to move toward a system of uniform immunization, AnMed Health required not only employees to receive the immunization if they did not qualify for a CDC-recognized exemption, but a wide range of other personnel who have a physical presence on the AnMed Health campus whether or not they have patient contact, including volunteers, students, temp workers, and independent contractors. *Id.* AnMed Health's Board of Trustees instituted the mandatory policy "[a]fter reviewing the practices of some of the nations' leading health care networks and after presenting to and receiving approval from [the] AnMed Board of Trustees." R. p. 83. In addition, AnMed Health's Flu Policy is

similar to policies of other leading health care networks, including two South Carolina hospital systems – Georgetown Hospital System and the Medical Center of the Medical University of South Carolina. R. p. 46, lines 5-15; *id.* at 83.

AnMed Health's Flu Policy is fairly and consistently enforced. Based on the standards provided in the policy, 15 members of the staff were granted exemptions for conditions recognized by the Centers for Disease Control. R. p. 64, line 10-12. Six employees, including the claimant, were terminated as a result of their noncompliance with the policy. R. p. 55, lines 12-13.

In mitigating an employee's noncompliance with an employer's rule, *American Jurisprudence* provides that relevant considerations include "the importance of the business interest at risk, the nature and purpose of the rule, prior enforcement of the rule, good cause to justify the violation, and consistency with other rules." 76 Am. Jur.2d *Unemployment Compensation* § 72 (2005). Here, the only evidence in the record concerning the purpose of AnMed Health's Flu Policy is that noncompliance could put at risk the healthcare system's patients and workforce. On the other hand, the Department can offer only inaccurate medical information and the fact that the claimant did not have direct contact with patients as evidence in support of Ms. Crowe's noncompliance. As sympathetic as her circumstances may be on a personal level, the claimant's subjective concern regarding the flu shot vaccine does not amount to good cause for noncompliance of a reasonable healthcare policy, particularly one advanced by the federal Centers for Disease Control and leading healthcare institutions where the employer is a licensed provider of health care services.

Although there are no South Carolina cases on point, a Pennsylvania unemployment compensation case, *Dougherty v. Unemployment Compensation Board of Review*, 686 A.2d 53 (Pa. Commw. Ct. 1996), addresses the issue of a subjective explanation offered by an employee to justify noncompliance. In *Dougherty*, a certified nursing assistant ("Claimant") was discharged by his employer (a geriatric care center) for refusing to work with Acquired Immunodeficiency Syndrome ("AIDS") patients. *Dougherty*, 686 A.2d at 54. Claimant contended that "he had good cause to refuse Employer's directive [to provide services on a unit where three AIDS patients were being treated] because he believed working with AIDS patients threatened his health and welfare." *Id.* After concluding that Claimant had been adequately trained to work with AIDS patients, the court held as follows:

> Our careful review of the record reveals solely that Claimant, despite his training, harbored unnecessary fears and misconceptions concerning AIDS. Claimant has only demonstrated to this Court that he had *subjective* beliefs that these patients posed a special risk to him and that Employer had inadequately equipped him to deal with those risks. ***A subjective belief alone does not constitute good cause for actions that would otherwise disqualify a claimant from benefits.***

*Id.* at 55 (emphasis added). Likewise, in the present case, the claimant here has only presented subjective reasons for her noncompliance with AnMed Health's mandatory Flu Policy. While Ms. Crowe clearly has fears concerning the flu vaccine, her fears have not been supported by objective evidence. The inaccurate statement from her physician, contradicted on multiple occasions in the record by the claimant herself, cannot satisfy the showing the Department must make to prevail. Respondent is unable to present reliable evidence that claimant should have been exempted under AnMed Health's Flu Policy or that the policy to promote the health and safety of its patients

and workforce was unreasonable. As such, the final agency decision of the Department of Employment and Workforce is clearly erroneous in view of the entire record and, therefore, should be reversed.

## CONCLUSION

Pursuant to the grounds set forth above, AnMed Health respectfully requests that the Court of Appeals reverse the final decision of the South Carolina Department of Employment and Workforce.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that the **FINAL BRIEF OF APPELLANT and FINAL REPLY BRIEF OF APPELLANT** comply with Rule 211(b), SCACR.

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