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24363 THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Appellate Case No. 2017 – 002378

Shirley C. Robinson, Administrative Law Judge

Case No. 17-ALJ-22-0224-AP

Ross Buchanan, Appellant,

v.

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

AMENDED RECORD ON APPEAL

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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**

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).

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~~ 12, 2017
Columbia, South Carolina

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

FILED
OCT 12 2017
SC ADMIN. LAW COURT

Caption:

Ross Eric Buchanan - V- South Carolina D.E.W. and Stan Cannon

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Docket No. 17-ALJ-22-0224-AP

Statement of Issues on Appeal:

1.) Unemployment benefits were denied based on misconduct of employee. The actions given in testimony by both parties do not meet the statutory requirement of misconduct.

2.) The appeal history in South Carolina indicates an obvious bias against employees and are weighted in favor of employers. Unfortunately both are to be represented equally by government offices and treated equally under the law. This is the reason I have had to go to such lengths as to appeal to the courts, because justice is not available in the present South Carolina D.E.W.

3.) Statements made by one of the defendants, Stan Cannon, were libelous and were agreed with by SCDEW in their appellate rulings.

4.) Statements made by same defendant under oath are perjury.

Statement of Case:

1.) On February 8th 2017 I was asked to set up a job on a CNC Lathe, that I recently overhauled and precision aligned in order to meet future specifications of upcoming orders. While doing so lunch time approached, I asked for a few minutes to speak with my employer Stan Cannon. The meeting lasted about two sentences when I asked if we could resolve a previous financial issue, which now amounts to about $17,000 of back pay agreed to when I was hired. Stan Cannon responded, " If that's the way you feel about it, pack your ___ and get the ___ out of my shop!"

2.) I filed for unemployment that same week of February 2017.

3.) I was denied benefits and appealed on 2/28/17, 3/22/17, and 3/28/17 per SCDEW procedures. All appeals were denied despite testimony in the record that I had the responsibility for the creation and deletion of programs. I was also responsible for the management of employees on the 1st and and shifts, and I had increased production levels.

4.) After exhausting all SCDEW appeals, I filed with SCALC on 6/12/17

5.) The unresolved financial inequity started on 9/7/15 when without notice my salary and position was changed in violation of SC Statute 41-10-20

6.) I continued my employment and earnestly tried to resolve this unilateral breach of contract regarding my pay and duties.

7.) The determination of SCDEW was that on 2/8/17 I attempted to "extort " money from my employer. I deny this false allegation and note this claim is not supported anywhere by the facts in the recorded testimony.

8.) My actions were ruled as misconduct under SC Statute 41-35-120 (2) (a) I deny my conduct was careless, negligent, or unexpected behavior. In fact I took great care in the maintenance and production of the shop while the pay issue remained unresolved.

9.) In January of 2017 I took my first and only vacation per company policy.

10.) Upon completion of my vacation, I returned to work and again met with my employer. We discussed the fact that I was having to earn additional income outside of his employment, and that he was aware of this and he encouraged me to do so as he was unable to reinstate my previous salary, and /or increase my wages. Any additional time taken off was approved per this conversation and I have documentation of this fact.

Arguments:

Essentially my argument is that the preceding facts are not in dispute and are on record.
1.) On page 44 of the record, lines 4-12 is Mr. Cannon's statement, claiming I was trying to blackmail him and asking for a raise.
This is the primary piece of "evidence" the SCDEW used in ruling I was ineligible.
On page 63 of the record lines 2-12 is where I asked my exhibit 1 to be entered and it was.
This was a letter given to Mr. Cannon days before a meeting I had with him in the presence of another witness, Craig Travis.
During that meeting the terms of my employment and responsibilities were discussed at length, with the primary one being I was NOT making $1,000 a week as we had agreed upon and which I DID receive until September of 2015.

This repeated allegation that on February 8th 2017 I asked for a "raise" is absolutely false. I never asked for a raise, simply the back pay I was owed and I had been asking about it for a year and a half. It was an ongoing discussion and I am NOT a blackmailer.

2.) Is a matter of record, page 3.

3.) Is a matter of record, pages 23, 90 and 100.

4.) Was filed with this court.
5. & 6.) Is on the record pages 27-28.

I will briefly summarize this.
I was hired to run Upstate Machine as production manager for $1,000 a week. My wage records at the IRS and SCDOR will confirm this.
On the Tuesday after Labor Day 2015, I found upon arrival at work that Craig Travis had been hired. At noon that day Stan called me in his office and informed me that pay was now going to be less but he didn't know how much. I later learned I was going to paid 20 dollars an hour not $1000 a week salary.
I objected to this but stayed in the hope this would be resolved eventually to our prior agreement.
I did so until February 8th of this year when I was fired.
7.) This is the most troubling and I addressed it in point #1.
8.) Is also addressed in point #3.
9.) Is discussed on page 43 of the record briefly, lines 18-23.
This I found out was mischaracterized by the employer's reply, page 15 of the record.
The employer made it sound as if I was just "missing work" when in fact it is his testimony on page 43 that it was mutually consensual.
The other deception was that I 'used up all PTO time', which is true, but it was my one week's vacation that I worked a year and a half to EARN.
10.) This is also a matter of record from the employer's own testimony on page 43, lines 18-23.

This issue of pay was ongoing and civil. At NO time did I blackmail anyone and I will strenuously refute that libelous statement.
This is on the record on pages 59 lines 16-29 and page 60 lines 1-8.

In the hearing on 3/22/17, page 10 of the record, my employer was asked by SCDEW hearing officer Leland M. Caulder, Jr. if my employer was concerned about the status of the programs and Mr. Cannon stated, "No". That exchange is at the end of the recorded testimony and shows clearly that neither myself or Stan Cannon considered my actions careless, negligent or unusual.
An example of this is on page 60 of the record, lines 9-26 and on page 61, lines 24 –31 continuing on page 62, lines 1-6.
There is more of the employer's testimony stating that the missing programs were of "no concern" to him starting at the end of page 70 and continuing to page 71, lines1-15.

In fact due to the unreliability of the shop's input/output device, I had recorded essential programs in a notebook, and it was available to my employer until the last minute of my employment.
*On the issue of deleting programs, there are several points on the record I'd like to note for the court. On page 64, lines 15-19 the witness Craig Travis testifies that using existing programs to create others is understood to be a common practice. What may NOT be apparent to those unfamiliar with CNC's is that means that former program is now GONE, unless it has been recorded somehow.
Careless people may do that, but I always kept a record of them somehow, usually written in a program notebook.
Despite Mr. Travis' testimony on page 65, lines 16-17, he was aware of this as well as most people in the shop.
Even a part time operator such as another witness, Chad Treadway testified to that on page 69 lines 17-27 and continuing on page 70, lines 1-22. On page 70 you find that this was even done by my predecessor, Rusty.
My method may seem outdated but as Mr. Treadway's testimony proves it was most effective and ensured even the less experienced operators were capable of getting programs loaded and machines running quickly that way. That also refutes the false allegation that I did this hurt the shop. The exact opposite is true.

Conclusion:

In light of the record, no misconduct is seen or proven according to cited Statue SC 41-35-120 (a).
It is also worth noting that I was unable to download any document for this case off of the SCDEW web site, and as of this date all documents in this appeal have vanished from the site.

The other disturbing part of the SCDEW's ruling was the fact they deemed my employer more credible than me.
I will point out a few instances of perjury in his testimony in the hope that this court will find what I already know, that he is NOT a person whose words can be trusted.
On page 46, lines 1-14 and page 47 lines 12-14 Mr. Cannon states he never knew of a program being deleted, ran the same programs on the same machines for years, had more than enough memory on those old machines and never gave me permission to do so.
Ask ANY CNC machinist you can find, anywhere, and ask them if that could possibly be true.
You MIGHT find 1 or 2 in this country working in a garage somewhere, but all the rest of them will just laugh.
Every shop I've ever worked in, and I have over 25 years of experience, has deleted programs for one reason or another. You don't let just anybody do it, but it IS common and as production manager I was certainly one who had that authority.

In another place I was cut off of my questioning by the hearing officer on page 51 line 17.
It' a lengthy discussion but on page 52 line 16 after being asked about the "relevance" of my questions by the hearing officer several times, I point out the "relevancy" is what Mr. Cannon stated was untrue and I wasn't going to let it go unchallenged.
Any CNC technician, which I AM a certified one, will tell you what I said was true.
I go on to explain the technical aspects of the battery backup system and the vulnerabilities that his machines had on pages 56 and 57. My experience has taught me over the years how to ensure that programs and parameters are not lost because if it happens your shop shuts down.
On pages 58 and 59 I explain that deleting programs was common and part of my job.
On page 72 is another example of the employer giving contradictory testimony.
At the top of the page he claims I didn't have "people skills" and on line 19 of that page he admits to me running 2nd shift multiple times AFTER this apparent demotion for lack of people skills.
The fact of the matter is I was running 2nd shift at Wright Metals in Geeneville when I came to work for HIM. And I wouldn't have taken that position for less money than I was making, no one would.

There is another issue of Mr. Cannon's credibility vs. mine that I would like the court to be aware of involving two separate cases of insurance fraud.
One of my witnesses in the SCDEW hearing has knowledge of, the other involves a current employee there who is afraid to speak of it. Nevertheless, I'm prepared to ask the Spartanburg county Sheriff to open an investigation of those instances and those witnesses will have to testify if called.
Defrauding an insurance company is a serious offense, I'm sure the Court would agree.
So is demanding an employee work for no wages.
Sheena Schwartz, an employee of South Carolina Department of Labor legal department has knowledge Mr. Cannon attempted to force me to do just that.
I have her phone number if the Court would like to verify my claim.

So, if the issue is credibility and honesty, I'm more than prepared to show the Court who lacks it and who has it.

I request all earned benefits going back to February 8th, 2017 be paid to me per South Carolina Law.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Ross Buchanan,

Appellant/Petitioner,

vs.

SCDEW,

Respondent.

SCDEW, STAN CANNON, THOMAS A. BLENCHIA

Docket No. 17-ALJ-22-0224-AP

PROOF OF SERVICE

I hereby certify that I have served the AMENDED BRIEF (Description of the document) in the above-captioned matter by depositing it in the United State Mail, postage prepaid, on 8-22-2017 (Month/Day/Year) to the below named parties at their address of record:

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AUG 22 2017
SC ADMIN. LAW COURT

13 (6)

THE STATE OF SOUTH CAROLINA
In The Administrative Law Court

APPEAL FROM THE SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE

Appellate Panel

Case No.: 17-ALJ-22-0224-AP

Ross Buchanan,

Appellant,

v.

South Carolina Department of Employment
and Workforce and Upstate Machine
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Respondents.

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STATEMENT OF ISSUE ON APPEAL

IS THE DECISION OF THE SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE APPELLATE PANEL FINDING APPELLANT DISCHARGED FOR MISCONDUCT SUPPORTED BY SUBSTANTIAL EVIDENCE?

STATEMENT OF THE CASE

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

On March 22, 2017, the Tribunal conducted an evidentiary hearing on Appellant's claim, at which both parties participated. (R.pp.35-89). On March 24, 2017, the Tribunal affirmed the initial determination, finding Appellant had been discharged for misconduct. (R.pp.90-91). Appellant timely appealed the Tribunal's decision to the Appellate Panel (Panel) on March 28, 2017. (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. (R.pp.1-2, Decision No. 2017-P-04668).

Appellant commenced this action seeking judicial review of the Department's final administrative decision on June 12, 2017.

FACTS

Appellant worked for Employer from June 15, 2015, until his termination on February 8, 2017. (R.p.1; p.5) Employer's business includes providing computer controlled machining services and Appellant worked most recently as a CNC operator of three of Employer's machines. (R.p.5; pp.43-44). Employer is owned by Stan Cannon, who also served as Appellant's direct supervisor. (R.p.43).

As a CNC operator, Appellant was responsible for writing and entering programs onto the three machines, out of the fourteen owned by Employer. (R.p.53). Shortly before his termination, Appellant took a week of vacation time. (R.p.43). During Appellant's time off from work, Mr. Cannon went out to the three machines at issue and discovered that every program on Appellant's machines had been deleted. (R.pp.43-44). Appellant admitted that he deleted every program out of these three machines, and the deletion was not caused by power failure or battery backup failure. (R.p.56). Mr. Cannon testified that an operator would need to get permission from him prior to deleting any programs and Appellant did not get such permission prior to deleting the programs on the three subject machines. (R.pp.45-47). Employer's handbook contains policies instructing employees to refrain from sabotaging, destroying, tampering, moving, or changing company property. (R.pp.46-47). Mr. Cannon testified he believed deletion of programs from the machines without permission constituted sabotage under this policy. (R.p.47).

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. (R.p.57). Craig Travis, a fellow employee,

testified that it was not normal practice to delete programs and put them in a notebook. (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. (R.p.54; p.56; p.65). Appellant testified he believed the battery within the card reader malfunctioned, however Mr. Travis testified the reader operated properly if plugged into a power source. (R.p.65). Chad Treadway, another fellow employee, denied that it was a common practice to delete programs, testified he had never done such a thing, and testified he was not aware that Appellant had written programs in a notebook. (R.p.68, line 25-p.69, line 21).

Due to the deletion of the programs, Mr. Cannon was forced to require another operator to rewrite programs into the machines, so that they could be used when Appellant was on vacation. (R.pp.44-45). This process required a minimum of four hours. (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. (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." (R.p.44). Appellant admits that he approached Mr. Cannon to discuss longstanding financial issues and his pay. (R.pp.57-58). 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." (R.p.44, p.47; p.71). Appellant denied that his intent was to blackmail or extort. (R.p.60). As a result of this conduct, Mr. Cannon terminated Appellant. (R.pp.47-48).

In Appeal Tribunal Decision No. 2017-A-03284, the Tribunal held Appellant was discharged for misconduct. (R.pp.90-91). The Tribunal found that "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." (R.p.91)

The Panel affirmed the Tribunal's decision, also finding that Appellant was discharged for misconduct connected with the employment. (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 lacks 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.

(R.p.2).

ARGUMENTS

I. 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. 2016). *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.*

II. The Appellate Panel's 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, if the Department finds that an unemployment insurance claimant has been discharged for "misconduct connected with his most recent work," then the claimant will be disqualified from receiving benefits for twenty weeks. S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2016). 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 reach the same conclusion that the Panel reached in this case, being that Appellant was discharged for misconduct. The record reveals that Appellant acted with deliberate disregard of the standard of behavior the employer had the right to expect when he provoked his

termination by deleting programs from Employer's machine and then demanding to negotiate a pay increase, rather than immediately correcting the issue he caused.

More specifically, Mr. Cannon testified he discovered Appellant had "wiped out" all the programs on the computer machines before he left on vacation, without first receiving approval from Mr. Cannon. Rather than saving such programs using the approved method, Appellant wrote the programs in a notebook that only he knew about. Without these programs, the machines could not perform the necessary functions and were in essence unusable. When Appellant returned, Mr. Cannon instructed Appellant to begin working on a project that required him to re-install programs on his machines. Instead of complying with this directive, Appellant confronted Mr. Cannon about "unresolved financial issues" and made clear that "he (Appellant) can get 'em [sic] running for some more money and he'd get the programs back in the machines." Mr. Cannon testified he "felt like [Appellant] was blackmailing me" and concluded that Appellant deliberately deleted the programs as an act of sabotage. Such specific and substantial evidence supports the Panel's findings.

The only disputed material fact is: whether Appellant demanded a raise in exchange for re-installing the programming on the machines. Although Appellant denies he attempted to coerce a pay raise after deleting the programs, the timing of his demand and discussion regarding compensation when viewed in conjunction with his conduct suggests otherwise: (1) Appellant did not obtain permission from Mr. Cannon to delete programs from Employer's machines; (2) Appellant wiped all programs form three machines without telling anyone; (3) neither of Appellant's witnesses had ever heard of

anyone wiping a machine under similar circumstances; and (4) Appellant left for vacation without informing anyone that he had recorded the programing in a notebook or that he even kept a notebook. Resolution of this disputed fact required the Panel to assess the credibility of Appellant and Mr. Cannon, and their differing versions of the discharge event. The Panel resolved this key disputed fact in favor of Employer. 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); *see also Merck v. S.C. Emp. Sec. Comm'n*, 290 S.C. 459, 460, 351 S.E.2d 338, 339 (1986) (The Department's Appellate Panel is the ultimate finder of fact in a UI benefits case). In its decision, the Panel specifically found that Appellant's testimony lacked credibility given that Appellant admitted he had discussed the pay increase in the past with Mr. Cannon combined with the fact that he had not been terminated following those discussions. The Panel found the greater weight of credible evidence established that Appellant demanded a pay increase in exchange for reinstalling the programs he deleted on the employer's equipment. Ultimately, the Panel concluded that Appellant deliberately disregarded the standard of behavior the employer had the right to expect and was discharged for misconduct.

The Panel committed no legal error in so holding. Employer reasonably expected to be able to use its CNC machines during Appellant's vacation, but could not until a program was rewritten and installed into the machines. Employer reasonably expected Appellant to reprogram the machines when he returned to work. However, after being on premises several hours Appellant did not complete this task but instead marched into

Employer's office and demanded that they "talk about money." (R.p.49). Appellant approached Employer and said "he (Appellant) can get 'em [*sic*] running for some more money and he'd get the programs back in the machines." (R.p.44). Employer had the right to expect Appellant would restore the functionality of its machines without first insisting on negotiating a pay increase for himself. The Panel found, and the substantial evidence contained within the record supports, that 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 that 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. Again, 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. 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).

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." (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.

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, Respondents respectfully request this Court affirm the decision of the Appellate Panel.

Respectfully submitted,

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