

STATE OF NORTH CAROLINA  
BOARD OF REVIEW



IN THE MATTER OF:

Higher Authority Decision No.

ATTN:

Claimant

Employer

Pursuant to N.C. Gen. Stat. § 96-15(e), this cause came before the Board of Review (“Board”) to consider the **employer’s appeal** from Appeals Decision No. . The evidentiary hearing in this case was conducted on before Appeals Referee . The record evidence and any briefs or written arguments timely submitted have been reviewed in their entirety.

The Employment Security Law requires that the Division conduct hearings in a manner that preserves the substantial rights of the parties. See N.C. Gen. Stat. §§ 96-15(c) and (f); 04 N.C. Admin. Code 24C .0209. In other words, all parties must be afforded procedural fairness and substantive due process. Minimal procedural fairness requires providing the parties an opportunity to be heard. In order that the parties might enjoy the right to be heard, they must be notified. Substantive due process requires a fair and equal application of the law to all parties. When a claimant has been discharged from work, the employer has the burden of proving that the claimant’s discharge was for a reason that would disqualify the claimant for unemployment insurance benefits. Guilford Cty. v. Holmes, 102 N.C. App. 103, 401 S.E.2d 135 (1991); Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 376, 289 S.E.2d 357, 359 (1982); Umstead v. Emp’t Sec. Comm’n, 75 N.C. App. 538, 331 S.E.2d 218, cert. denied, 314 N.C. 67, 336 S.E.2d 405 (1985). According to the employer, the claimant was discharged from this job for . The employer also asserts that it is, or was, in possession of an electronic recording that supports the reasons for the claimant’s separation from employment. However, the employer did not submit a recording to the Appeals Referee and the claimant for the hearing.

The Division placed the employer on notice of its obligation to present all testimony, recordings, documents, and other evidence at the hearing. A blue pamphlet entitled *Appeals & Hearings: Level 1-Appealing an Initial Determination*, was mailed to each party with a copy of Determination by Adjudicator Docket No. on . Panels 5 and 6 of the pamphlet contained the following language:

**What should I do to prepare for the hearing?**

Read the hearing notice carefully. Read all documents that came with the hearing notice to know what has been said about the case. This will help you decide which witnesses should testify in the hearing. Gather all documents, recordings, and other evidence that support your case. If the hearing will be held by phone, you



must provide copies of your evidence to the Appeals Referee and to each party before the hearing date. For in-person hearings, make enough copies to give to each party and the Appeals Referee. If you do not provide copies to the other party and the Appeals Referee, the Appeals Referee may not take that evidence into consideration when making a decision in the case. Choose your witnesses and arrange for them to be available for the hearing. Eyewitness and first-hand testimony is always the best evidence. First-hand testimony includes witnesses who themselves smelled, felt, saw, or heard what was said or done. If there is a recording of alleged conduct, the recording is the best evidence, not a witness's testimony about what he or she saw or heard on a recording that is not offered as evidence. If there is an allegation that a party signed documents or submitted something in writing that you believe is relevant to the case, you can submit this evidence, but you must provide a copy of the documents to the Appeals Referee and the other party. For telephone hearings, provide your witnesses' names and phone numbers by contacting the Appeals Referee, or by completing and returning the Telephone Hearing Questionnaire that came with your hearing notice. See 04 N.C. Admin. Code 24C .0209.

A Notice of Hearing, Division Exhibit No. , was mailed to all parties on , ( ) days before the date of the hearing. In addition to other information, the hearing notice stated:

**HOW TO GIVE EVIDENCE:** Sworn testimony is required. If you want witnesses to testify, they must do so at the hearing. If you have documents, electronic recordings or other evidence that you want considered by the hearing official, you must mail or deliver them to the hearing official and to each party. The evidence must be received before the hearing.

The hearing notice also informed the parties that they could request a postponement of the hearing, and provided information about the process for doing so. Upon a showing of good cause, and prior to the hearing, the employer could have requested additional time to obtain and/or submit its evidence. Good cause must be a legally sufficient reason amounting to a legal excuse for failing to perform an act required by law in the exercise of due diligence. See 04 N.C. Admin. Code 24A .0105(26). "Due diligence" means the measure of carefulness, precaution, attentiveness, and good judgment expected from, and exercised by a reasonable and prudent person under the particular circumstances. 04 N.C. Admin. Code 24A .0105(21).

It is clear from the foregoing written notice that the employer was made aware of the obligation to appear at the evidentiary hearing to present all testimony and other evidence. The record is absent any indication that the employer was prevented from appearing at the hearing as defined in 04 N.C. Admin. Code 24C .0201. There is also no indication in the record that the employer was prevented from presenting all testimony or documentary evidence, or requesting a rescheduling of the hearing pursuant to 04 NCAC 24C .0207. Where there is evidence in the record that supports a conclusion on a material issue, the Board may not grant an employer additional opportunities to produce other evidence to prove that a claimant is disqualified from receiving unemployment insurance benefits. To do so would violate the claimant's due process rights, and allow employers repeated opportunities to meet their burden of proving that an employee should be disqualified from receiving benefits. Dunlap v. Clarke Checks, Inc., 92 N.C. App. 581, 375 S.E.2d 171 (1989). The Board therefore concludes that the employer was afforded procedural due process. The Board elects not to reopen this matter merely because the employer did not safeguard its right to present testimony or other evidence, or shown good cause as defined in 04 N.C. Admin. Code 24A .0105(26) for rescheduling the hearing. Good cause



must be a legally sufficient reason amounting to a legal excuse for failing to perform an act required by law in the exercise of due diligence. See also Douglas v. J.C. Penney Co, 67 N.C. App. 344, 313 S.E.2d 176 (1984). In this instance, the Board is restricted to considering only that evidence presented at the hearing. Patrick v. Cone Mills Corp., 64 N.C. App. 722, 308 S.E.2d 476 (1983).

The employer, as the party offering testimony about an electronic recording as evidence to prove that the claimant should be disqualified from receiving unemployment insurance benefits, must carry its burden in making a prima facie showing of the competence of the evidence. The employer's witness(es) described the contents of the recording. The witness(es) testimony about the recording's contents, which was relied upon by the employer to meet its burden of proof, was not the "best evidence" available to the employer to show the contents of the recording or the claimant's conduct, and could not be used to support a finding of fact unless it was competent evidence. N.C. Gen. Stat. § 96-15(i).

For purposes of the North Carolina Evidence Code, "writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. "Photographs" include still photographs, x-ray films, video tapes, and motion pictures. N.C. Gen. Stat. § 8C-1, Rules 1001. N.C. Gen. Stat. § 8C-1, Rules 1002 and 1003, otherwise known as the "best evidence rule," requires the production of the original or authentic duplicate of a writing, recording or photograph in order to prove its contents. In other words, the best evidence rule requires the exclusion of secondary evidence offered to prove the contents of a recording when the recording is, or was reasonably available to, or obtainable by the party offering the evidence. If the claimant had testified that the contents of the recording were as testified to by the employer's witness (es), then it would not have been necessary for the employer to produce the recording. See N.C. Gen. Stat. § 8C-1, Rule 1007. However, since the claimant denied both that the events occurred as the employer claimed, and that the recording would show the employer's version of the events, the production of the recording was essential if its contents were to be proven by the employer. In this case, the best evidence of what occurred involving the claimant is not the testimony of the witness(es) as to what (he) (she) (they) saw or heard on a recording, but the recording itself.

As the ultimate fact finder in cases involving contested claims for unemployment insurance benefits, the Board concludes that the best evidence was reasonably available to, or obtainable by the employer. As such, the facts found by the Appeals Referee are supported by competent and credible evidence contained in the record, and adopts them as its own. The Board also concludes that the Appeals Referee properly and correctly applied the Employment Security Law (N.C. Gen. Stat. § 96-1 et seq.) to the facts as found, and the resultant decision was in accordance with the law and facts. As such, the employer failed to meet its burden of proving that the claimant was discharged for misconduct and should be denied benefits within the meaning of N.C. Gen. Stat. § 96-14.6.

The decision of the Appeals Referee is (**AFFIRMED**)(**REVERSED**)(**MODIFIED**).

The claimant is **DISQUALIFIED** for unemployment insurance benefits beginning .  
(**NOT DISQUALIFIED** and will receive unemployment insurance benefits beginning .



Board of Review members Susan Doe and John Doe participated in this appeal and concur with this decision.

This the .

BOARD OF REVIEW

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Chairman

**NOTE:** This Higher Authority Decision will become final thirty (30) days after mailing unless a petition for judicial review is filed with the superior court as indicated below. The date of mailing is found on the last page of this decision. Although the Board does not impart legal advice, please see the enclosed pamphlet for additional guidance on how to appeal a Higher Authority Decision. The pamphlet is available in the public employment offices throughout the State, and on the Division of Employment Security's website. You may also visit the *Frequently Asked Questions* section on the Division of Employment Security's website at [www.des.nc.gov](http://www.des.nc.gov), and consult an attorney of your choosing.

**APPEAL RIGHTS FOR JUDICIAL REVIEW**

Appeals from this Higher Authority Decision must be filed with the Clerk of Superior Court by the petitioner in the county in which he or she resides, or in which the petitioner has its principal place of business. If a party does not reside in any county or have a principal place of business in any county in North Carolina, appeals must be filed with the Clerk of Superior Court of Wake County, North Carolina *or* with the Clerk of Superior Court of the North Carolina county in which the controversy arose.

This Higher Authority Decision will become final thirty (30) days after mailing unless a timely petition for judicial review is filed with the superior court pursuant to N.C. Gen. Stat. §§ 96-15(h) and (i).

Copies of any Petition for Judicial Review filed with the Clerk of Superior Court must be served upon the Division of Employment Security ("Division") and upon all parties of record to the proceedings within ten (10) days of the filing of the petition. Copies of the petition must be served by personal service or by certified mail, return receipt requested. Petitions for superior court review must be served on and addressed to the registered agent for service of process for the Division:

Frank Doe  
Chief Counsel  
North Carolina Department of Commerce  
Division of Employment Security  
**Mailing Address:** Post Office Box 25903, Raleigh, NC 27611-5903  
**Physical Address:** 700 Wade Avenue, Raleigh, NC 27605-1154

**IMPORTANT – SEE FOLLOWING PAGE**



**NOTE:** If you are served with a Petition for Judicial Review by another party, you will not be a party to the judicial review proceedings unless you: (1) notify the superior court within ten (10) days after you receive the petition that you want to become a party to the proceedings, or (2) file a motion to intervene as provided in N.C. Gen. Stat. § 1A-1, Rule 24.

**NOTICE TO ALL INTERESTED PARTIES**

A legal representative as defined in 04 N.C. Admin. Code 24A .0105(32) (including individuals from a third-party company serving as an employer's unemployment insurance administrator) must be a licensed attorney, or a person supervised by a licensed attorney in accordance with N.C. Gen. Stat. Ch. 84 and § 96-17(b). Notices and/or certification of attorney supervision must be in writing pursuant to 04 N.C. Admin. Code 24C .0504. **Legal representation in judicial proceedings must comply with N.C. Gen. Stat. Ch. 84.**

Pursuant to 04 N.C. Admin. Code 24C .0504, when a party has a legal representative, all documents or information required to be provided to the party will only be sent to the legal representative. Any information provided to a party's legal representative will have the same force and effect as if it had been sent directly to the party.

**For claims filed on or after June 30, 2013, claimants are subject to repayment of benefits received from any administrative or judicial decision that is later reversed on appeal.** N.C. Gen. Stat. § 96-18(g)(2).

**SPECIAL NOTICE TO CLAIMANTS:** If you were receiving or have previously received unemployment insurance benefits in connection with the underlying claim and this Higher Authority Decision rules you ineligible or disqualified for all or part of such benefits, you may now have an overpayment of benefits pursuant to N.C. Gen. Stat. § 96-18(g)(2). If an overpayment is created by this Higher Authority Decision, you will be mailed a separate Notice of Overpayment or Determination of Overpayment from the Division's Benefits Integrity/Benefit Payment Control Section. The Notice of Overpayment or Determination of Overpayment will specify, among other things, the amount of your overpayment and any penalties that apply. Please note that the only way you may contest the overpayment is to file a petition for judicial review of this Higher Authority Decision with the superior court as provided above, and in accordance with North Carolina law. In your petition, you must specify whether you are appealing (1) the issue of disqualification or eligibility and/or (2) the resulting determination that you received an overpayment of benefits.

Appeal Filed:

Decision Mailed: