UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1424

September Term, 2015

ROCHELLE BOYD

v.

DEPARTMENT OF HEALTH
AND MENTAL HYGIENE

Eyler, Deborah S.,
Woodward,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: October 25, 2016

On May 29, 2014, the Department of Health and Mental Hygiene ("Department"), appellee, terminated Rochelle Boyd, appellant, from her position as Director of Payroll. Appellant appealed her termination to the Office of Administrative Hearings ("OAH"), and an Administrative Law Judge ("ALJ") upheld the Department's action. In turn, appellant filed a petition for judicial review in the Circuit Court for Baltimore City. The Department again prevailed, and appellant filed this timely appeal.

Appellant presents two questions for our review,[1] which we have rephrased:

1. Did the ALJ err in denying appellant the right to call witnesses in defense of the charges against her?

2. Was the ALJ's decision supported by substantial evidence?

For the reasons set forth below, we affirm the decision of the ALJ and thus affirm the judgment of the circuit court.

---

[1] Appellant's issues, as stated in her brief, are as follows:

> 1. Whether the ALJ erred in denying the Employee the right to call witnesses in defense of the charges against her[.]
>
> 2. Whether the Employee's termination is supported by substantial evidence, and whether the sanction of termination itself was an abuse of discretion, arbitrary and capricious, and effected by other error of law[.]

As to appellant's second issue, this Court will not address whether appellant's sanction of termination was an abuse of discretion, arbitrary and capricious, or error in law, because appellant waived that part of the issue by failing to argue it as required by Maryland Rule 8-504(a)(6). *See Honeycutt v. Honeycutt*, 150 Md. App. 604, 618, *cert. denied*, 376 Md. 544 (2003).

BACKGROUND

Appellant began her employment at the Department on November 12, 1998, and in November 2006, the Department promoted her to Director of Payroll. In this position, appellant was "responsible for managing the timekeeping and payroll processes within the [Department's] Office of Human Resources (OHR)." Specifically, appellant's duties included "plan[ning], assign[ing], supervis[ing], audit[ing][,] and evaluat[ing] the work of timekeeping/payroll supervisors and processors in order to ensure the accuracy of leave balances and pay of the [Department's] eight to nine thousand employees." OHR, which included appellant, "regularly deal[t] with timesheet discrepancies involving [the Department's] employees."

During the relevant times in this case, appellant was required to fill out a timesheet each day indicating her arrival and departure time from work and then submit that timesheet every two weeks. Appellant also enjoyed being on a flex-time schedule, which meant that she could begin work at any time between 7:00 a.m. and 9:00 a.m. and depart work as late as 5:30 p.m., as long as the she worked eight hours daily.

On November 1, 2012, OHR sent an email to all of the Department's employees reminding them that it is their responsibility to keep accurate timesheets as "[p]ositive time-keeping is the essence of accountability in government; our salaries are paid with tax-payer dollars. Failure to keep an honest and accurate accounting of work time shall be subject to progressive discipline." The email also reminded employees that they were not permitted to allow anyone to use their state-issued security identification card to gain access to any real property owned or leased by the State of Maryland, including parking garages and

parking lots. In October 2013, appellant received the privilege of parking in Parking Lot F, which she could access only by using her state-issued security identification card.

In early 2014, the Department's Chief of Payroll and Administration, Cathie Thompson, began to notice that, when she arrived at work, her payroll employees were not there to process payroll. She suspected that the Department's flex-time schedule may be the cause and decided to investigate by examining the timesheets of her payroll employees. On May 2, 2014, Thompson verbally requested from Tom Jackson, the Department's Chief of Central Services Division ("CSD"), the parking lot activity of all payroll supervisors. Specifically, she requested the parking lot activity of appellant, Ladonna Kelly, and Monet Maddox. After discovering that Kelly and Maddox did not have parking privileges, Thompson submitted a written request to CSD for an audit of appellant's parking lot activity and her timesheets. CSD conducted an audit of appellant's timesheets and her parking lot entry and exit from October 25, 2013, to April 29, 2014. CSD's audit revealed that appellant's timesheets were inaccurate, because they reflected that appellant was at work longer than her car was in the parking lot.

On May 9, 2014, Thompson, Jennifer McMahan, the Department's Director of OHR, and Tammy Speights, the Department's Chief of Employment Services Unit, (collectively "appellant's supervisors") scheduled a meeting with appellant to discuss the discrepancies found in CSD's audit. At the conclusion of this meeting, appellant's supervisors scheduled a meeting for May 13, 2014, for appellant to explain why there were discrepancies between her timesheets and parking lot activity.

They also placed appellant on administrative leave.

When appellant returned for her follow-up meeting on May13, 2014, she could not give any explanation as to why there were discrepancies between her timesheets and parking lot activity. She did acknowledge that, "as the Director of Payroll, she should have done a better job [recording] her time." Appellant's supervisors then asked her to leave. A Notice of Termination, approved by the Department's appointing authority and head of principal unit, was delivered to appellant in person on May 29, 2014. The Notice of Termination stated that appellant was terminated because she "falsified 17 hours and 46 minutes between October 25, 2013[,] and April 29, 2014[,] which resulted in a theft of $470.49." According to the Department, appellant's actions were subject to discipline under COMAR 17.04.05.04(B)(3), (8), (10), and (15), thus warranting her termination.

On July 7, 2014, appellant filed a timely appeal to the OAH. In preparation for the contested hearing, appellant requested subpoenas for four witnesses: Maddox, Kelly, Janice Maith, and Amelia Johnson; the subpoenas were issued on October 10, 2014. On October 16, 2014, the Department filed a motion to quash the subpoenas, and on October 21, 2014, appellant filed a response.

On October 23, 2014, the ALJ held a hearing in this case, which began with a consideration of the Department's motion to quash. After hearing arguments from both parties, the ALJ granted the Department's motion to quash, ruling that appellant's subpoenaed witnesses would not offer any relevant evidence. The Department then proceeded with its case, which consisted of testimony from Thompson, McMahan, Speights, and Garry Spurrier.

Spurrier, an Administrative Officer II at the Department's CSD, testified that he conducted and compiled appellant's audit report by entering appellant's timesheets and entry and exit from the parking lot into a Microsoft Excel spreadsheet. Spurrier explained that in order to determine whether there were discrepancies in appellant's timesheets and parking lot activity, he would calculate the difference between the entry into the parking lot and the arrival time on the timesheet. He would then do the same for the exit from the parking lot and the departure time on the timesheet. Spurrier testified that, if the parking lot did not record an entry or exit time, he would not log a discrepancy. According to Spurrier, the audit revealed that appellant recorded a total of nineteen hours and nineteen minutes more on her timesheets than was indicated by the entry and exit of her car from the parking lot.

Thompson testified that she created a condensed worksheet from CSD's audit, which reduced the discrepancies between appellant's timesheets and her entry and exit from the parking lot from a total of nineteen hours and nineteen minutes to seventeen hours and forty-six minutes, because she listed only discrepancies that were more than six minutes. Thompson also testified that appellant was aware that the Department had terminated an employee of thirty years for falsifying timesheets a few months prior to appellant's own termination.

Appellant's supervisors all testified that at the May 9, 2014 meeting, appellant admitted that she guessed on her timesheets and should have done a better job keeping her timesheets due to her position of Director of Payroll.

Appellant's case began with the testimony of Sharon Boyd, appellant's mother. Boyd testified that appellant would drive to work every day, because she had to pick up her daughter after work. Boyd further testified that "from time to time" appellant requested that she pick up appellant's daughter. Boyd explained that on those days appellant would leave work, remove her car from the parking lot, give the car to Boyd, and then return to work. Boyd could not give specific dates for when she picked up appellant's daughter, but stated, "I don't think it's that often."

Next, appellant testified in her own defense. Appellant stated that she understood that her state-issued security identification card was used to access the parking lot, and that she never let anyone else use her card to enter or exit the parking lot. Appellant also admitted that she was honest with her supervisors about guessing on her timesheets. She explained that she did not fill out her timesheets daily, because she was busy with other work related tasks. Instead, appellant testified that she would fill out her timesheets every two weeks just before they were due, and that she would reconstruct her daily activities for the entire previous two-week period.

On November 17, 2014, the ALJ issued an opinion upholding appellant's termination. The ALJ found that "the evidence [was] overwhelming that [appellant] repeatedly and significantly falsified her timesheets between October 25, 2013[,] and April 22, 2014[,]" which amounted to a seventeen hour and forty-six minute discrepancy. The ALJ then addressed whether the Department had proven by a preponderance of the evidence the alleged causes for discipline. First, the ALJ determined that the Department had met its burden as to COMAR 17.04.05.04(B)(3), which states that an employee who

has engaged in "conduct that has brought or, if publicized, would bring the State into disrepute" is subject to discipline. The ALJ found that, because appellant's position required her to oversee the accuracy of timesheet preparation, the fact that appellant was falsifying timesheets would diminish the public's "confidence in the honesty and integrity of State government[,]" if known.

Second, the ALJ ruled that the Department had met its burden as to COMAR 17.04.05.04(B)(8), which states that an employee who has engaged "in conduct involving dishonesty, fraud, deceit, misrepresentation, or illegality" is subject to discipline. The ALJ found that appellant's "conduct was clearly dishonest, fraudulent and deceitful[,]" because she misrepresented the hours she worked in her timesheet. For the same reason, the ALJ concluded that the Department had proven COMAR 17.04.05.04(B)(10), which states that an employee who has "[w]illfully ma[de] a false official statement or report" is subject to discipline.

Finally, the ALJ determined that the Department did not carry its burden in proving a violation of COMAR 17.04.05.04(B)(15), which provides for discipline of an employee for "[c]ommitting another act, not previously specified, when there is a connection between the employee's activities and an identifiable detriment to the State." The ALJ found that "[t]here [was] no evidence of another, previously unspecified act[,] which violate[d] this section of COMAR."

Regarding the sanction of termination, the ALJ decided that the Department's decision to terminate appellant was not an abuse of discretion or clearly unreasonable under the circumstances, because there were "serious concerns regarding [the Department's]

ability to place any level of trust in [appellant] to adequately, earnestly[,] and honestly perform the functions of her job."

Appellant filed a petition for judicial review in circuit court, and the court affirmed the ALJ's decision. Appellant then filed this timely appeal. Additional facts will be included as necessary to the resolution of the questions presented in this appeal.

STANDARD OF REVIEW

In an appeal involving an administrative decision, we review only the administrative agency's decision. *Crosby v. Md. Dep't of Human Res.*, 425 Md. 629, 637 (2012). In reviewing an agency's factual findings and conclusions, a reviewing court applies the substantial evidence test. *Schwartz v. Md. Dep't. of Nat. Res.*, 385 Md. 534, 553-54 (2005). Under this test,

> a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court must review the agency's decision in the light most favorable to it; . . . the agency's decision is *prima facie* correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence.

Md. Aviation Admin. v. Noland, 386 Md. 556, 571 (2005) (citations and internal quotation marks omitted). Conclusions of law, on the other hand, do not receive such deference and are to be reviewed *de novo*. *Schwartz*, 385 Md. at 554.

In short, a reviewing court will not reverse an administrative decision that

> does not exceed the agency's authority, is not unlawful, and is supported by competent, material and substantial evidence . . . unless, under the facts of a particular case, the disproportionality or

> abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be "arbitrary or capricious."

Md. Transp. Auth. v. King, 369 Md. 274, 291 (2002).

DISCUSSION

I. Motion to Quash

At the hearing on the Department's motion to quash, the parties and the ALJ addressed the relevancy of the testimony of Maddox, Kelly, Maith, and Johnson. Pertinent portions of their colloquy are as follows:

> [ALJ]: I didn't understand, [appellant counsel] from your response, exactly what each of those witnesses had to contribute to this hearing in terms of specific information about the facts of this case.
>
> * * *
>
> This case apparently from, I - - I looked at the file, involves a question as to whether your client was at work when she said she was at work.
>
> **Tell me specifically with respect to each of these witnesses, and start with number one, Kelly, what she knew specifically about your client's presence at work on the dates that are relevant to this case, which I don't know what are dates are.**
>
> * * *
>
> [APPELLANT'S COUNSEL]: Well, first of all let me say that [appellant] has been a 16-year employee of the state, so to the extent that she has worked with all these individuals for many, many years and to the extent that the notice of termination goes to charges impugning her truthfulness, impugning her character, then all of these witnesses and their ability to testify as to those aspects we believe is entirely relevant.
>
> The fact that [appellant] has been charged with fraud, dishonesty, misrepresentation and **we have witnesses who have worked with her for a significant period of time who would be able to testify**

to her nature and character for truthfulness, honesty, being a reliable and trustworthy at times coworker and now supervisor.

With regards specifically taking them in turn, Ladonna Kelly is, in looking at the chain of command, she is a direct report to - - [appellant]. She had worked with her directly as a coworker for over 10 years in the same unit, same position, and now in fact reports to her.

* * *

Also she is able to testify as frankly are all the other witnesses. Ms. Maddox is also a direct report to [appellant]. The other two individuals, Ms. Maith and Ms. Johnson, are one step below, so they report directly to Ms. Maddox.

* * *

But there are - - [the Department's] claim here is that there are 17 plus hours during a 6-month period that [appellant] claimed to be at work when she wasn't at work, that she was not there for some significant chunks of time and **these individuals will be able to testify both to their experience that she is always there when they are there.**

In other words, that there has never been a time when they have looked for her and she hasn't been there, that she has been present, that she has been actively supervising them and in the office during all the time that she had claimed to be in the office and that she often worked through lunch which is also not accounted for in the hours that [the Department] has claimed that has been shorted the state.

* * *

So again, Ms. Kelly is someone with whom she has worked as a direct coworker and then has supervised, but in this relatively small arena, **these individuals are all able to testify as to her presence at the workplace, her conscientiousness as far as supervisor and her attention to detail as far as making sure that not that just that the work gets done,** but that the flex time that they are responsible for is covered by employees including significantly, [appellant].

* * *

They will be able to testify to the fact that there were times during the course of the 6-month period where [appellant] had childcare issues and had to have her mother come and take her car to go pick up the child or she had mechanic issues where she had to have her mother come and take the car to a mechanic and she would leave the car and come back into work.

Those are the specifics of the testimony of these four individuals.

* * *

[ALJ]: Okay. [Department's counsel], your response?

[DEPARTMENT'S COUNSEL]: **[T]hese employees were not tasked with actually watching [appellant's] comings and goings. They were her subordinates,** they - - . . . weren't in a position that even during the day be able to watch her come and go.

We were just talking about Ms. Kelly. Ms. Kelly's usual start time is 8:00. The bulk of the time that [appellant] started is 8:30. Ms. Kelly would leave before [appellant] actually left, so she would have no way to know what time she actually did leave if she was trying to track her time.

On the truthfulness, there is - - Ms. Kelly is not in a position to know what her time sheets actually say because she didn't approve them.

* * *

On days where [appellant] had emergencies and had to make special arrangements with her supervisor, again Ms. Kelly wouldn't know what those arrangements were.

She could say yeah, I saw [appellant] leave and yeah, I know [appellant] might have had vehicle problems on this day, but did [appellant] actually tell that information to her supervisors to let them know this is what I'm getting ready to do, this is what my circumstances are.

> Ms. Kelly isn't in the position to do that, and actually none of the witnesses would be in a position to know exactly what was going on with [appellant] because [appellant] is their supervisor.
>
> * * *
>
> [ALJ]: Okay. I'm going to rule. I - - this - - the motion is granted.
>
> **I haven't heard one bit of relevant evidence that these - - these employees are offering in this case.**
>
> The fact that she was a good coworker, the fact that she was accommodating to her coworkers, the fact that she had - - is a trustworthy coworker, the fact that she works through lunch, **none of these things are relevant to the question in this case which is whether or not on particular instances she put down [ ] [on] her time sheet a time that she was not there.**
>
> **I have not heard any testimony that these witnesses have firsthand information about what she put on her time sheet, that they were there when she filled out her time sheet or that they saw her on any particular day being there when she is alleged not be have been there.**
>
> **Therefore, the witnesses are improper and the motion is granted.**

(Emphasis added). Neither the administrative hearing transcript nor appellant's response to the Department's motion to quash contain any further specifics about what each witness was expected to testify about, except for the above colloquy.

On appeal, appellant argues that the ALJ abused her discretion when she denied appellant the right to call witnesses pursuant to Md. Code (1984, 2009 Repl. Vol.), § 10-213(f) of the State Government Article ("SG"). Appellant contends that the witnesses were relevant, because they would have provided corroborating evidence that appellant was at work even when her car was not in the parking lot. According to appellant, the ALJ

denied appellant "the right and ability to present a defense[,]" and this error warrants reversal.

In response, the Department asserts that pursuant to SG § 10-213, the ALJ had "the discretion to exclude evidence that is incompetent, irrelevant, immaterial, or unduly repetitious." The Department contends the ALJ did not abuse her discretion in excluding the testimony of the four witnesses, who were appellant's subordinate coworkers. According to the Department, appellant failed to proffer to the ALJ that the coworkers would be able to testify as to any of the specific dates in question, which made the testimony irrelevant on the issue of whether appellant was or was not in the office on the dates and times listed on her timesheets. Moreover, the Department states that the ALJ properly excluded the testimony, because none of the witnesses would have had firsthand knowledge about when appellant came to work in the morning and left work in the afternoon. We agree with the Department.

SG § 10-213 states, in relevant part:

> (a) *In general.* - (1) Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record.
>
> (2) If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency shall make the evidence part of the record.
>
> * * *
>
> (d) *Exclusions.* - The presiding officer may exclude evidence that is:
>
> (1) incompetent;
> (2) irrelevant;
> (3) immaterial; or
> (4) unduly repetitious.
>
> * * *

> (f) *Scope of evidence.* - On a genuine issue in a contested case, each party is entitled to:
>
> (1) call witnesses;
>
> (2) offer evidence, including rebuttal evidence;
>
> (3) cross-examine any witness that another party or the agency calls; and
>
> (4) present summation and argument.

Appellant correctly states that each party is entitled to call witnesses under SG § 10-213(f). A party's right to call witnesses under SG § 10-213(f), however, is limited by the discretion conferred on the ALJ by SG § 10-213(d) to exclude evidence, including testimony that is incompetent, irrelevant, immaterial, or unduly repetitious. SG § 10-213(d), (f); *see also Solomon v. State Bd. Of Physician Quality Assurance*, 155 Md. App. 687, 705 (2003), *cert. denied*, 381 Md. 676 (2004). "We do not disturb such rulings absent an abuse of the ALJ's discretion." *Solomon*, 155 Md. App. at 705 (stating that "'as long as an administrative agency's exercise of discretion does not violate regulations, statutes, common law principles, due process and other constitutional requirements, it is ordinarily unreviewable by the courts'") (quoting *Md. State Police v. Zeigler*, 330 Md. 540, 557 1993)).

Here, the ALJ properly determined that the issue in this case was whether appellant falsified her timesheets from October 25, 2013, to April 29, 2014, which gave the Department grounds under COMAR to terminate her. When the ALJ asked appellant's counsel to state, "with respect to each of these witnesses," "what she knew specifically about [appellant's] presence at work on the dates that are relevant to this case," appellant's counsel responded that the witnesses would "be able to testify [ ] to their experience that

appellant [was] always there when they [were] there[,]" that "there ha[d] never been a time when they [had to look] for [appellant] and she ha[d]n't been there," and that appellant would "work[] through lunch." The ALJ correctly observed that such proffer of testimony failed to show that the witnesses "saw [appellant] on any particular day being there when she [was] alleged not to have been there." In other words, appellant failed to proffer that any of her witnesses could testify as to any specific date and time that appellant indicated on her timesheet that she was present at work and the Department claimed that she was not present at work. Moreover, the ALJ properly determined that none of the witnesses had firsthand knowledge about what times appellant recorded on her timesheet.

Appellant's counsel also proffered that the witnesses "would be able to testify to [appellant's] nature and character for truthfulness, honesty, being a reliable and trustworthy at times coworker and now supervisor." In her ruling, the ALJ responded that "none of these things are relevant to the question in this case which is whether or not on particular instances [appellant] put down [on] her time sheet a time that she was not there." Appellant's counsel did not offer the witnesses as character witnesses. Instead, the witnesses were offered as fact witnesses; the purpose of their testimony was to contradict the Department's evidence that appellant was not present at work when she said she was on her timesheets. Therefore, any testimony regarding appellant's truthfulness or trustworthiness in general would not be relevant to the accuracy of dates and times on appellant's timesheets, of which the witnesses had no personal knowledge.

Finally, as to Kelly, appellant's counsel proffered that she could testify as to the times that appellant was in the office. In response, the Department's counsel argued that

Kelly could testify as to the morning, because Kelly would arrive at 8:00 a.m., and appellant usually would arrive at 8:30 a.m. The Department's counsel asserted that Kelly, however, could not testify as to the afternoon, because Kelly left before appellant**.** Even if Kelly could testify as to when appellant arrived in the morning, Kelly's testimony could never prove that appellant was present at work *before* the time indicated by the parking lot entry. Appellant's mother testified that appellant drove to work every day. Appellant testified that she used her state-issued security identification card to enter and exit the parking lot and that she never allowed anyone else to use the card, even to park her car. Given these undisputed facts, it would be physically impossible for appellant to be at work before she drove into the parking lot. Thus Kelly's testimony would be irrelevant as to whether appellant was present at work when she claimed to be on her timesheets.

For the above reasons, we conclude that the proffered testimony of the four witnesses subpoenaed by appellant was irrelevant to the central factual issue in the case *sub judice*, namely, whether appellant falsely stated on her timesheets that she was at work on the dates and times when she was not. Accordingly, the ALJ did not abuse her discretion by granting the Department's motion to quash, which precluded appellant's witnesses from testifying.

II. ALJ's Decision

Appellant argues that the ALJ's finding that she falsified her timesheets is not supported by substantial evidence, because the Department's entire case was premised on the accuracy of the recording system in the parking lot. Appellant contends that the ALJ erred by not considering that, when the parking lot did not record an exit time, appellant

may have left work later than she recorded on her timesheet. Moreover, appellant claims that she was never told that her entry and exit from the parking lot would be a time keeping mechanism for when she was present at work. Lastly, appellant asserts that she herself testified that she may have guessed on timesheets, but she was sure that she always worked eighty hours during each pay period. We find appellant's arguments unpersuasive.

The crux of appellant's argument is that the ALJ did not find her evidence creditable and did not make factual inferences in her favor. As stated above, this Court gives deference to the ALJ's factual findings, because the ALJ is responsible for "resolv[ing] conflicting evidence and [ ] draw[ing] inferences from that evidence." *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005) (citations and internal quotation marks omitted). We will not overturn an ALJ's factual findings unless a reasoning mind could not reach the same factual findings. *Id.*

Here, the ALJ was presented with a plethora of evidence indicating that appellant falsified her timesheets. Most compelling was appellant's own testimony that she simply guessed when entering her arrival and departure times in her timesheets. Appellant's admission was not the first time that she had admitted to improperly recording her work hours on her timesheets. Appellant's supervisors all testified that, when she was confronted with CSD's audit and Thompson's condensed worksheet, appellant admitted that she should have done a better job recording her hours on her timesheets.

In addition, the Department submitted, and the ALJ admitted, the audit by the CSD and Thompson's condensed worksheet as exhibits. The ALJ determined, as did the Department in its Notice of Termination, that Thompson's condensed worksheet was the

most accurate calculation of the inaccuracies in appellant's timesheets. When the parking lot did not record an exit time, it does not follow, as appellant argues, that the ALJ should have inferred that appellant left later than the departure time on her timesheets. The ALJ's finding that there was a seventeen hour and forty-five minute discrepancy in appellant's timesheets, thus, was well supported by the evidence. Finally, in light of the evidence described above, the ALJ had the discretion to reject appellant's testimony that any discrepancies in her timesheets were compensated for by her always working eighty hours in a pay period. *See Noland*, 386 Md. at 571. Accordingly, we conclude that the ALJ had substantial evidence to support her finding that appellant falsified her timesheets.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; APPELLANT TO PAY COSTS.