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S.C. SUPREME COURT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BARNWELL COUNTY
Doyet A. Early, III, Circuit Court Judge

Opinion No. 6055
Heard August 17, 2023 – Filed April 3, 2024

Lorenda Robinson, Elaine Nix, Archie Patterson, And Tami Bollerman, ... Plaintiffs,

Of Whom, Archie Patterson and Tami Bollerman are..... Petitioners,

v.

South Carolina Department of Employment and Workforce, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on June 24, 2024.

QUESTIONS PRESENTED

I. **The Court of Appeals failed to consider the Circuit Court's ruling that this declaratory judgment action was not an appeal from a determination or redetermination of claimant's eligibility for benefits and therefore not subject to DEW's administrative procedures.**

II. **The Court of Appeals erred in finding exhaustion of administrative remedies was not excused because DEW was acting outside its authority.**

III. **The Court of Appeals erred when it impermissibly reweighed the evidence presented to the Circuit Court where the appropriate standard of review was abuse of discretion.**

STATEMENT OF CASE

> The ever increasing reach of the so-called Fourth Branch of government presents a threat to our civil society, especially the principle of separation of powers. If the executive branch, through unelected bureaucrats and seemingly countless administrative agencies, is going to set policies having the force of law, the judicial branch must insist on clear delegation from the legislative branch and strict compliance with the APA, including submission of administrative policies having the force and effect of law to the legislature for review. *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 465-66, 790 S.E.2d 763, 778 (2016) (Kittredge, J., concurring).

Here, the South Carolina Department of Employment and Workforce ("DEW" or the "Department"), relying on a funding mechanism contained in a budget proviso, implemented a policy that fundamentally changed the rules governing how it determines whether an individual submitting a claim for unemployment benefits is able to work, available for work, and actively seeking work. This change resulted in over 61,900 workers being denied unemployment benefits in a period of a little over six months. DEW announced and implemented this policy not by promulgating regulations as required by the APA, but by letter. The Circuit Court held that DEW

was without authority to do so and that the policy, and the resulting benefits denials, were null and void. The Court of Appeals reversed, holding that Respondents were required to first exhaust administrative remedies before challenging DEW's actions in court.

Respondents submit that this was error for three reasons. First, this action is not an appeal from a determination of benefits eligibility subject to DEW's administrative appeal process, but a declaratory judgment action challenging DEW's authority to change the rules governing unemployment benefits eligibility without first promulgating regulations. Second, exhaustion of administrative remedies was not required because DEW was acting outside of its authority. Notably, the Court of Appeals found that none of the authorities cited by the parties addressed whether the exhaustion requirement would apply when a case involves a challenge to agency authority. *Archie Patterson v. SCDEW*, Op. No. 6055 (S.C. Ct. App. Filed April 3, 2024) (Howard Adv. Sh. No. 13 at 38). While Respondents disagree with this holding, it suggests that this is a novel question of law or at least one whose answer lacks clarity. Finally, the Court of Appeals impermissibly substituted its judgment for that of the Circuit Court on the question of exhaustion when the appropriate standard of review was for abuse of discretion. Respondents ask that the judicial branch act as a critical check on the reach of administrative agencies and that the judgment of the Court of Appeals be reversed.

To be eligible to receive unemployment benefits, a claimant must be able to work, available for work, and actively seeking work. S. C. Code Ann. §41-35-110 (1976, as amended). Claimants have the burden of proving they are entitled to receive benefits. *Hyman v. S.C. Emp. Sec. Comm'n.* 234 S.C. 369, 373, 108 S.E.2d. 554, 556 (1959). The South Carolina Department of Employment and Workforce ("DEW" or "the Department") Department has established policies and procedures for claimants to meet this burden. Historically these procedures were not

by regulation, but in 2010, the legislature revised the Unemployment law, S.C. Code Ann. Sections 41-27-10 through 41-41-50, to require the Department to promulgate regulations necessary carry out the provisions of the unemployment law. 2010 S.C. Acts. No. 146.

In March of 2012, the Department revised its work search policy to require all claimants to search for employment though the South Carolina Works Online System (SCWOS). (Supp. R. p. 38). The Department began enforcing this policy in August of 2012. As a result of this mandatory requirement, over 61,900 workers were denied benefits between August 2012 and early February 2013 (Supp. R. p. 35). This policy was not promulgated by regulation as statutorily required.

The revised policy is set forth in Procedural Transmittal Letter 1267-3 which requires a claimant to make at least 4 job searches per week with one of these job searches being conducted online through SCWOS. The letter provides that warnings for failure to conduct the online search are not acceptable, except in extraordinary circumstances.[1] It also provides that the following notice is to be sent to a claimant if the SCWOS system detects that they have not made an online job search:

> WORK SEARCH VERIFICATION FAILURE – BENEFITS STOPPED
>
> YOU ARE REQUIRED TO MAKE AT LEAST ONE (1) OF YOUR FOUR (4) WEEKLY JOB CONTACTS USING THE DEPARTMENTS JOB SERVICE WORK SEARCH WEBSITE: SC WORKS ONLINE SERVICES (JOBS.SCWORKS.ORG). OUR RECORDS INDICATE THAT YOU FAILED TO MAKE AN SC WORKS JOB SEARCH CONTACT FOR THE CLAIM WEEK ENDING [claim week date]
>
> THEREFORE, YOUR BENEFITS HAVE BEEN STOPPED.
>
> PLEASE REPORT TO YOUR LOCAL SC WORKS CENTER IMMEDIATELY

[1] This standard is higher than the good cause standard set forth in S.C, Code Ann. Section 41-35-120 (5)(a)(i)(A). When DEW finally promulgated a regulation in 2016, the standard for excusing failure to perform the online search was good cause. S.C. Reg. 47-104 The regulation conforms with the statute.

IF YOU WOULD LIKE TO RECEIVE FUTURE BENEFITS. BRING THIS NOTICE AND YOUR FORM UCB-303, REPORT OF WORK SEEKING ACTIVITIES, WHEN YOU REPORT.

This notice was mailed to all claimants who did not receive benefits because they purportedly failed to do an online job search. (Supp. R. p. 310, line 6 – p. 311, line 15; Supp. R. pp. 38-39). The notice does not inform the claimant that the purpose of the meeting is to issue a ruling on whether they complied with the work search requirement. The SCWOS system also stopped benefits in violation of S.C. Code Ann. Section 41-35-670 (1976, as amended) which requires a determination hearing before benefits are stopped.

For class representatives who appeared at the Department after receiving the above notice, determinations were then issued disqualifying them from receiving benefits. Out of the 61,900 persons who were denied benefits from August 2012 through February 2013, there were approximately 1,300 administrative appeals to the Department. Of these, 214 claimants succeeded in having their benefits reinstated. (R. p. 1085; Second Cummings affidavit, para. 25). Class representatives did not file an administrative appeal, and the Department would not have considered the question of whether it lacked authority to implement the online work search requirement without first promulgating regulations had they done so. (R. p. 926, lines 16-25; Supp. R. p. 86 line 13 – p. 87, line 22)

Both class representatives were denied weekly benefits because of their inability or failure to apply online through SCWOS for employment. No other reason was given for denial of benefits on the Department's "Determination by Claims Adjudicator on Claim for Benefits" form issued to the class representatives. (Supp. R. pp. 23 & 24)

Tami Bollerman was notified by the Department that her weekly benefits were stopped for the week of October 7, 2012, because she failed to make an SCWOS (online) job search.

Her file from the Department contains the "Work Search Verification Failure-Benefits Stopped" form (Supp. R. p. 552) directing her to report to her local SC Works Center immediately if she would like to receive future benefits. Ms. Bollerman (also known as Tammy Weber) complied with the notice and appeared at the Department office and explained she did conduct an online job search. (R. p. 863, line 14, p. 868, line 4). Although she brought in her record of work seeking activities (form UCB-303), the Department representatives did not ask to see it. The whole discussion concerned compliance with the online work search requirement. (R. p. 877, line 15, p. 879, line 8) As a result, Ms. Bollerman's benefits for the week 10/7/12 were denied. The sole reason given by the claims adjudicator for denying benefits was the failure to perform the online work search (R. p. 888, lines 6-16, Supp. R. p.23)

In August of 2012, Archie Patterson's benefits were stopped for failing to conduct an online work search. (R. p. 804, line 24 – p. 806, line 5). Like Bollerman, Patterson's SCDEW file contains the "Work Search Verification Failure – Benefits Stopped" notice form telling him his benefits were stopped for failing to conduct an online work search. He was instructed to report to the Department immediately with the notice and his UCB-303, Report of Work Seeking Activities. (Supp. R. p. 25). Patterson appeared at the Department pursuant to the Work Search Verification Failure Notice. As a result, a claims adjudicator issued a Determination denying benefits for the week of August 19, 2012, for failing to comply with the online work search requirement. The form gives no other reason for denial. (Supp. R. p. 24).

Respondents filed this declaratory judgment action as a class action seeking a ruling that the Department's failure to promulgate regulations implementing its online work search requirement resulted in a wrongful denial of unemployment benefits to themselves and others (R. p. 164). The Department answered, objecting to class certification, and denying it was required

to promulgate its online work search requirement as a regulation. It also asserted that respondents lacked standing, failed to exhaust administrative remedies, as well as other defenses (R. p. 157). This case was certified as a class action (R. pp. 93-100).

Ultimately, the Circuit Court found the Department was required to promulgate regulations before implementing the online work search requirement. (R. p. 24) It also found neither Bollerman or Patterson were required to file an appeal pursuant to Section 41-35-690 as exhaustion was not required, since neither were appealing the determination, but had filed a declaratory judgment action to challenge the online work search requirement itself (R. p. 24 and Supp. R. 83). It further found exhaustion would be futile, since the chief judge of the Department's appellate tribunal testified it would not have considered the issue of whether the Department was required to promulgate a regulation to implement the online work search requirement. The court also found the Department was acting outside its authority by not first promulgating a regulation.

On appeal, the Court of Appeals reversed. It found S.C. Code Ann. Section 41-35-690 required Bollerman and Patterson to file an administrative appeal from the Department's determination that benefits were not owed because of their failure to conduct an online work search. It then found that failure exhaust was not excused by futility or the Department acting outside its authority.

ARGUMENTS

I. The Court of Appeals failed to consider the Circuit Court's ruling that this declaratory judgment action was not an appeal from a determination or redetermination of claimant's eligibility for benefits and therefore not subject to DEW's administrative procedures.

The Court of Appeals found that, in order to challenge DEW's authority to implement its online work search policy without promulgating regulations, Respondents were first required to

exhaust administrative remedies by filing an administrative appeal with DEW. The Court pointed to S.C. Code Ann. Section 41-35-690, which provides the procedure for appeals from a determination or redetermination of a claimant's eligibility for benefits to the DEW appellate tribunal, then to the DEW appellate panel, and afterwards the administrative law court is the sole and exclusive appeal procedure. However, as noted by the Circuit Court, this is not an appeal of a determination or redetermination. It is a declaratory judgment action seeking a judgment that DEW was required to promulgate regulations before implementing the online work search requirement. R. p. 43.

The doctrine of exhaustion of administrative remedies only applies when a litigant invokes the original jurisdiction of the Circuit Court to adjudicate a claim based upon a statutory violation for which the legislature has provided an administrative remedy. *Stinney v. Sumter School Dist. 17*, 391 S.C. 547, 707 S.E.2d 397, (2011), Footnote 1, citing *Thomas Sand Inc, v. Colonial Pipeline Co.*, 349 S.C. 402, 563 S.E. 2d 109 (Ct. App. 2002)

In determining whether a statute creates an administrative remedy which must be exhausted before an action may be filed, legislative intent prevails. *Ward v. State,* 343 S.C. 14, 538 S.E.2d 245 (2000), *Charleston Trident Homebuilders, Inc v. Town Council of Summerville*, 389 S.C. 498, 632 S.E.2d 864 (2006)

The Department's determination hearing process is not designed or equipped to consider the issue of whether DEW should have promulgated a regulation to implement the online work search requirement. This Court has already held:

> [t]he purpose of the ESC [now DEW] hearings is to quickly provide benefits to persons becoming unemployed through no fault of their own. S.C. Code Ann. § 41-27-20 (1986) The legislature intended to minimize procedural hurdles before the ESC so as to enable unemployed claimants to obtain prompt decisions regarding entitlement to unemployment benefits from the ESC.... Further, the narrow issue the ESC decides is simply whether the claimant is qualified to

> receive employment benefits. *See* S.C. Code Ann. § 41–35–120. Thus, the jurisdiction of the ESC is limited. By focusing on a narrow issue, the ESC is able to expeditiously determine whether an employee is entitled to unemployment benefits. *Shelton v. Oscar Meyer Food Corporation*, 325 S.C. 248, 252, 481 S.E. 706, 708 (1997)

After it implemented its online work search policy, DEW expeditiously issued 61,900 determinations between August 2012 and February 2013 denying claims for failing to conduct an online work search. This averages 2,280 determinations per week concerning this issue and would be in addition to any other determinations it issued during this time. This quick and prompt - albeit illegal since proper notice[2] was not given - process would not have been equipped for hearing questions regarding whether DEW was required to promulgate regulations. In fact, Romi Robinson, DEW's Chief Administrative Hearing Officer over the lower authority appeals – the appellate tribunal, testified that DEW's Appellate Panel only has the power to resolve factual disputes and would not resolve issues of law concerning whether the Department was required to promulgate regulations before implementing the online work search requirement. R. p. 42. As noted in *Shelton,* employees are often unrepresented at hearings and likely would not know to raise this issue, much less how to raise it. 325 S.C. 248, 253, 481 S.E.2d 706, 708. Nor would they have adequate time to secure counsel, even if they had the means to do so, or develop their argument as they are required to file their appeal of a determination or redetermination of benefits eligibility within 10 calendar days after DEW's decision is mailed. S.C. Code Ann. Section 41-35-660. Moreover, if this issue had been raised before the appellant tribunal or appellant panel, there is no provision in DEW's appellate procedure for anyone to represent DEW's interests in defending the policy. And *Shelton* suggests that any decision regarding the policy would not have preclusive effect in all other determinations/hearings where failure to conduct the online search was the reason for denying the claim.

[2] see letter/notice above, page 7. The notice does not inform claimants of the true purpose of appearing before DEW.

While the issue in this case affects a claimant's entitlement to benefits, it goes to much more than a factual inquiry of whether claimants were able to work, available to work, and actively seeking work as contemplated by S.C. Code Ann. Section 41-35-110. In this case, DEW, without first promulgating regulations, changed the rules used to determine whether a person was actively seeking work and claimants challenge its authority to do so. The Circuit Court was correct in determining this action was not an appeal from a determination, but a declaratory judgment action designed to resolve whether the new requirement constituted an illegal regulation. R. p. 43.

This action challenges more than what is contained in DEW's determination. It challenges the authority and structural process of DEW's implementation of the online work search requirement. Respondents seek a declaration that the online work search constitutes a binding norm and is therefore invalid. This issue is beyond the normal purview of the appellate tribunal and appellate panel. The issue is one of law, and the administrative process is not needed to develop a factual record. See *Ex. parte Allstate*, infra.

The DEW statutory process was designed to allow the agency - through its claims adjudicators, appellate tribunal and appellate panel - to determine whether a person had met the prerequisites to obtain unemployment benefits. It was not designed to rule on whether the agency was required to promulgate regulations. A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body. *Charleston Trident Homebuilders v. Town Council of Summerville*, 369 S.C. 498, 632 S.E. 2d 864 (2006) In *Charleston Trident*, the court found the appellant challenging the town ordinance impact fee was not required to exhaust administrative remedies when the administrative relief provided for in the ordinance did not extend to the right to challenge the ordinance itself. Respondents

challenge more than whether they were entitled to benefits because they were able, available, and actively seeking work. They seek determination that DEW changed the rules of receiving benefits without going through the process of establishing a regulation. Further, the notice telling Claimants why their benefits were stopped and requiring them to appear at DEW did not tell them it was to issue a determination regarding whether they had complied with the online work search requirement in violation of S.C. Const. Art. I, Section 22.

The basic purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reasons for its decision, would not assist the court in this instance. The issue raised by the claimants is not whether they made an online search, but whether the Department could alter the rules of what was required to prove the claimant was actively seeking work without going through the regulatory process set forth in the APA. "The alleged wrong is not one which the administrative process was designed to redress." *Thomas Sand Company v. Colonial Pipeline Company.* 349 S.C. 402, 413, 563 S.E.2d 109, 115 (2002) On the issue presented in this case – whether DEW had the authority to implement the online work search requirement without first promulgating regulations – there simply was no administrative remedy to exhaust. Even if there was, there would be no purpose in asking DEW to confirm through the administrative process what it had already decided incorrectly – that it had the authority to implement the online search requirement without promulgating regulations. This question is a question of law for the court to decide.

II. The Court of Appeals erred in finding exhaustion of administrative remedies was not excused because DEW was acting outside its authority.

The Circuit Court found DEW was required by statute to promulgate regulations to implement the online work search requirement, and that its policy was a binding norm. Citing *Responsible Economic Development*, infra, *Brown*, infra. and *Ex parte Allstate*, infra., the Circuit

Court also found DEW was without authority to implement the online work search requirement and its action was null and void. The Court of Appeals concluded these cases did not support the Circuit Court's finding. This was error.

In enforcing the online work search policy, DEW acted outside its authority. DEW is statutorily required to promulgate regulations to carry out the provisions of the unemployment law found in Chapters 27 through 41 of Title 41 of the South Carolina Code. See S.C. Code Ann. Sections 41-27-510, 41-29-110, and 41-35-610. Failure to promulgate regulations when mandated to do so renders the actions of an agency invalid, since the agency is acting outside its authority.

In *Ex parte Allstate*, 248 S.C. 550, 151 S.E.2d 550 (1966), this Court found the South Carolina Insurance Commissioner improperly commenced an investigation into Allstate and other insurance companies for running newspaper ads opposing legislation pending in the General Assembly. The Commissioner argued the case was not properly before the courts because Allstate had not exhausted administrative remedies. The Commissioner asserted that Allstate could have let the investigation run its course and then exercised its statutorily created rights of appeal from the conclusion of the investigation. *Id.* at 248 S.C. 566, 151 S.E.2d 854. This Court concluded exhaustion was not required, since the issue of whether the Commissioner had the authority to conduct the investigation was one of law. The Court ultimately concluded that the Commissioner did not have the authority to commence the investigation. *Id.* at 248 S.C. 567, 151 S.E.2d 855.

As in *Ex. Parte Allstate*, the issue of whether DEW had to promulgate a regulation to implement the online work search is one of law. Just as the commissioner in *Allstate* did not have the authority to commence an investigation, DEW did not have the authority to change the

rules for a claimant to demonstrate he/she is actively seeking work to require an online work search without first promulgating a regulation. Benefits should not have been stopped and a determination should have been issued.

In *Brown v. James*, 389 S.C.41, 697 S.E.604 (Ct. App. 2010) the court found that Brown did not have to exhaust administrative remedies. *Brown* involved a teacher whose contract with her employer was not renewed. She timely asked for administrative review but had actually been terminated before the time to request review had expired. Nevertheless, the district asked to extend the time for a review hearing.[3] Brown agreed. Then, the district attempted to schedule her deposition before holding the review hearing. When Brown refused to be deposed, the board took the position that Brown was refusing to cooperate, and her noncooperation amounted to a voluntary withdrawal of her request for a hearing. It then again terminated her contract. Brown filed suit. The Circuit Court dismissed the case for failing to exhaust administrative remedies. The Court of Appeals reversed. First, the court noted that the district's termination of her before the time to request administrative review amounted to a final decision and there were no further administrative remedies to exhaust. As further grounds that exhaustion was not required, the court noted two exceptions, futility and the agency acting outside its authority. *Id* at 389 S.C. 54, S.E.2d 611. As to futility, the court found Brown was not required to participate in the administrative hearing process since participating in an administrative procedure after a final decision had been made would be a futile act. As to the agency acting outside its authority, it found that Section 59-25-520 of the Employment and Dismissal Act did not vest the Board with authority to dismiss Brown's request for a hearing based on her nonparticipation in a deposition. Both grounds supported excusing the requirement to exhaust remedies. As noted by the Appeals

[3] James argued its termination prior to the time for requesting administrative review was subject Brown's request for review and did not actually terminate her.

Court, the facts of Brown are convoluted, and it appears the court ruled on all possible grounds in case of further appeal

"As a creature of statutes, a regulatory body is possessed only of those powers expressly conferred or necessarily implied for it to effectively fulfill the duties for which it is charged." *Captain's Quarters Motor Inn, Inc v. South Carolina Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 12,13 (1991) see also *Responsible Economic Development v. South Carolina Department of Health and Environmental Control,* 371 S.C. 547, 641 S.E.2s 425 (2007) In *Captain's Quarters Motor Inn*, this court held invalid a damage assessment test formulated by the Coastal Counsel since it was not promulgated by regulation as required by statute. In *Responsible Economic Development*, this court agreed with DHEC that it did not have the authority to enforce the provisions of the Pollution Control Act through its regulation of the Stormwater Management Act, since neither act reference the other and were authorized under different enabling acts. Citing *Triska v. Dep't of Health & Envtl. Control,* 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987), the court noted any action taken by DHEC outside of its statutory and regulatory authority is null and void.

In *Joseph v. South Carolina Dept. of Labor, Licensing and Regulation*, S.C., S.E.2d (2016) the Supreme Court found a position statement regarding the ability of physical therapist to refer patients to other physical therapist within his/her practice constituted a binding norm. Since the policy set forth in the statement was not promulgated by regulation, the policy was declared invalid.

Numerous cases have held that the actions of an agency outside its authority are invalid, null and void or a nullity. In *Charleston Television Inc. v. South Carolina Budget and Control Board, et.al.,* 301 S.C. 468, 392 S.E.2d 671 (1990) the Supreme Court declared null and void a

lease which had been awarded pursuant to a regulation that did not comport with the statute mandating it. (The underlying statute required the regulation to have a provision for competitive bidding.) In *Vulcan Materials Co. v. Greenville County Bd. Of Zoning Appeals,* 342 S.C. 480, 536 S.E.2d 892 (2000) the court found an order signed by a board chairman and secretary, but not voted on by the board to be a nullity, since authority to act had been given to the board as a whole and not to its individual members. In *Hardy v. Francis*, 273 S.C. 677, 259 S.E.115 (1979) the court found the placement of the office of county supervisor on the ballot after the county had adopted the council-administrator form of government was not authorized by law, and the election of a county supervisor was therefore a nullity. In *Murphee v. Mottel*, 267 S.C. 80, 226 S.E.2d 36 (1986), the court found the right to hold an election must be based on authority conferred by law and therefore an election called for by a county public service authority to be a nullity since it was not the governing body of the county. In *Bazzle v. Huff (In re John W. Heaton, Inc.)*, 319 S.C. 443 462 S.E.2d 273 (1995) the court held since the Workers' Compensation Commission (WCC) lacked the authority to require the submission and approval of attorney's fees before related regulations were promulgated, that action was null & void.

In all these cases the court treated the unauthorized administrative acts as if they did not happen. Actions outside the agency's authority are null and void, invalid, and of no effect.

In this case, the Circuit Court found that DEW did not have authority to implement its online work search requirement without first promulgating a regulation. This means the procedures set forth in Procedural Transmittal Letter 1267-3 are null and void and of no effect. DEW did not have authority to stop payment or to require claimants to report to DEW for a hearing. Any determination issued denying benefits for failing to conduct an online work search are null and void and of no effect.

Section 41-35-690 is inapplicable since there is no valid determination from which to appeal, Further, Respondents are not appealing a determination or redetermination of benefits eligibility. Rather, they are challenging DEW's authority to implement the online work search requirement without first promulgating regulations. Their remedy is to seek declaration from the court that DEW was required to promulgate regulations actions were without authority and invalid.

As the Court of Appeals noted, Respondents have not challenged the constitutionality of a statute or regulation. However, as found by the Circuit Court, DEW's failure to promulgate regulations, coupled with its inadequate notice requiring claimants to appear if they wanted to receive future benefits, raises significant constitutional concerns. As noted in *Joseph*, supra, "... [i]f the executive branch, through unelected bureaucrats and seemingly countless administrative agencies, is going to set policies having the force of law, the judicial branch must insist on clear delegation from the legislative branch and strict compliance with the APA, including submission of administrative policies having the force and effect of law to the legislature for review." The issue of whether the agency acted outside its authority in creating law without legislative approval is inherently an issue for the courts to resolve-not the agency.

III. The Court of Appeals erred when it impermissibly reweighed the evidence presented to the Circuit Court where the appropriate standard of review was abuse of discretion.

The Circuit Court found that any effort by Respondents to exhaust administrative remedies concerning whether they were required to complete an online job search would have been futile and, as a result, exhaustion was not required. R. p. 86. The Court of Appeals held that the Circuit Court abused its discretion in reaching that conclusion. *Archie Patterson v. SCDEW*,

Op. No. 6055 (S.C. Ct. App. filed April 3, 2024) (Howard Adv. Sh. No. 13 at 37). That holding was in error for two reasons.

First, whether Respondents were required to exhaust administrative remedies was a matter within the discretion of the Circuit Court and that conclusion should only have been reversed upon a finding of abuse of discretion. *Cox v. S.C. Educ. Lottery Comm'n*, 441 S.C. 209, 217, 893 S.E.2d 342, 346 (Ct. App. 2023). An abuse of discretion occurs if the trial court's ruling is based upon an error of law or when factual conclusions are **without evidentiary support**. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (emphasis added). Further,

> when a trial court's . . . thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court's exercise of discretion, even when the judges on the appellate court might have made the decision differently. *Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023).

Here, the Circuit Court found that "any appeal concerning whether [Respondents] were required to complete an online job search would be futile, since by [DEW's] own admission the hearing officer could not rule on this issue." R. p. 86. *See also* R. p. 41-42. The Circuit Court based its finding on the testimony of Romi Robinson, the Chief Judge of DEW's appellate tribunal, that the appellate tribunal would not have considered the issue of whether DEW should have promulgated the online work search requirement by regulation. *Id.* In doing so, the Circuit Court appropriately applied well-settled principles of law concerning the futility of administrative remedies to its view of the facts and circumstances. The Circuit Court having done so, it was incumbent upon the Court of Appeals to defer to the trial judge's exercise of discretion even if the judges on the appellate court would have made the decision differently. 438 S.C. at 587, 885 S.C. at 397. But rather than defer to the trial court, the Court of Appeals looked to different evidence and reached a different factual conclusion. Specifically, the Court of

Appeals looked to statistical data provided by DEW's witness Kevin Cummings concerning the number of administrative appeals which resulted in a benefits disqualification being reversed. The Court of Appeals opined that while the percentage of reversals was not high, it was not so low as to support a finding that DEW took a hard and fast position that made an adverse ruling a certainty. *Archie Patterson v. SCDEW*, Op. No. 6055 (S.C. Ct. App. Filed April 3, 2024) (Howard Adv. Sh. No. 13 at 37). In doing so, the Court of Appeals failed to give appropriate deference to the Circuit Court which relied on different evidence to reach the opposite factual conclusion. The Court of Appeals should only have reversed the Circuit Court if its finding was without evidentiary support. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). Here, that was not the case and the Circuit Court's finding that Respondents were not required to exhaust administrative remedies should stand.

Second, the evidence that the Court of Appeals considered in determining that exhaustion would not have been futile is not relevant to the question presented here. The Court of Appeals cited the affidavit of Kevin Cummings who testified that, of the appeals related to the online job search requirement taken between August 2012 and early February 2013, approximately 16% were successful. The Court of Appeals then held that Respondents were required to exhaust administrative remedies because "DEW might have excused their failures to comply with the requirements and issued their benefits for the applicable week, which would have dispensed with their claims and would not have required a resolution of the question of DEW's authority." *Archie Patterson v. SCDEW*, Op. No. 6055 (S.C. Ct. App. Filed April 3, 2024) (Howard Adv. Sh. No. 13 at 39). Whether an individual could be excused from the online job search requirement is not the issue presented in this case. Rather, Respondents challenge DEW's authority to implement the online job search requirement at all without first promulgating

regulations. Mr. Cummings' testimony is not relevant to determining whether Respondents were required to exhaust administrative remedies with respect to that question because it does not establish that that question was ever raised or passed upon in DEW's administrative process. By contrast, the evidence that the Circuit Court relied upon, the testimony of Romi Robertson, does tend to establish that DEW would not have considered the question that Respondents present here. Thus, the Court of Appeals erred both by substituting its view of the evidence for that of the Circuit Court, and by relying upon evidence which is not relevant to the issue presented here.

The distinction between the issue Respondents present (whether DEW had the authority to implement the online job search without promulgating regulations) and the issue Mr. Cummings' testimony relates to (whether DEW might have excused an individual's failure to conduct an online work search) is not merely semantic. The 16% of claimants who were successful in administrative appeals related to the online work search requirement may have received benefits for the weeks they were disqualified, but they – and every other individual who sought unemployment benefits from DEW –remained subject to the online job search requirement that Respondents contend, and the Circuit Court found, is unlawful. Nothing prevented DEW from disqualifying them again for the same reason. The Court of Appeals' holding would leave no path to challenge unlawful agency action when there is the slightest possibility that the agency would grant partial relief in an individual case even while it continued with its unlawful action.

CONCLUSION

For the reasons set forth in this herein, Petitioner prays this Court grant its Petition for Certiorari.

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