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**S.C. SUPREME COURT**

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.

PETITIONERS' REPLY TO RESPONDENT'S RETURN  
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**I. 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.**

This Court in *Shelton v. Oscar Meyer Foods Corp* 325 S.C. 248, 481 S.E.2d 706 (1997) set forth the purpose of DEW hearings – to “quickly provide benefits to persons becoming unemployed through no fault of their own....[t]he narrow issue the ESC decides is simply whether the claimant is qualified to receive employment benefits. *Shelton*, Id at 325 S.C. 252, 481 S.E.2d 708 - not whether DEW was required to promulgate regulations before changing the rules on how to qualify for benefits.

If this issue was presented in a claims adjudication, or before the appellate tribunal or panel, who would represent the interests of DEW in defending its policy? DEW has asserted vigorously in this case that it did not need to promulgate regulations. Who would have asserted their position in a DEW hearing? Moreover, a hearing in favor of one claimant would not have been binding on DEW in other claims. See *Shelton*, Id. – findings DEW hearings do not operate as collateral estoppel in other hearings. It would therefore have been incumbent on all 61,000 claimants to know to raise this issue.

The question of whether DEW was required to promulgate regulations is one of law and is properly before the court. After all, “[i]t is emphatically the province and duty of duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed 60 (1803)

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

In numerous cases, this Court has found the action(s) of an agency outside of its authority are null and void, invalid or a nullity. (Pet. For Cert. pp. 14-18). These illegal actions are treated

as if they did not happen. DEW claims none of these cases “connects the dots between separate questions of exhaustion and the merits.” (DEW response, p.9). This ignores that claimants only appeared before DEW because of the requirements of the illegal online work search policy/regulation. Exhaustion is triggered under S.C. Code Ann. §41-35-690 by a lawful determination. The determination in this case is the product of the illegal regulation which should have never been issued and is null and void.

Without promulgating a regulation, DEW changed the rules for establishing whether a person was actively seeking work by requiring the claimant to conduct an online job search through South Carolina Works Online (SCWOS). Procedural Transmittal Letter 1267-3 describes this illegal mandatory policy (SROA 38). It provides that warnings for failing to conduct the online search can only be given in extraordinary circumstances, a higher burden than the good cause standard for failing to apply for work set forth in S.C. Code Ann. §41-35-120(5)(a)(i)(A). If DEW’s system did not record a job search for the claimant, it automatically stopped payment of benefits and sent a letter/notice to the claimant requiring them to appear at DEW if they wanted to receive future benefits. (SROA 39). The notice did not tell them the true purpose of the hearing was to obtain a statement and issue a determination regarding whether they complied with the online search.<sup>1</sup> Class representatives appeared, and their benefits were denied for failing to conduct the online search.

This entire procedure was implemented by DEW without going through the regulatory process. Claimants’ benefits were stopped because of an illegal – and invalid – regulation. DEW’s notice misleads claimants about why they are appearing. The extraordinary cause standard used in the illegal and invalid policy is more stringent. Since DEW implemented this

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<sup>1</sup> While Petitioners did not challenge the constitutionality of any statute or regulation, there are due process concerns regarding the notice.

mandatory and binding policy without going through the regulatory process, all the above acts are invalid, null and void, and/or a nullity. This includes the stopping of benefits, the hearing, and the determination issued by the hearing. Therefore, there is nothing to appeal, and exhaustion is not required.

DEW misreads Ex parte Allstate 248 S.C. 550, 151 S.E.2d. 849 (1966) by asserting that the exhaustion requirement at issue there was not established by statute. In Allstate, the Insurance Commissioner commenced an administrative investigation, through his statutory authority, into the conduct of Allstate relating to its opposition to proposed legislation before the General Assembly. The Court ultimately ruled that the commissioner was acting outside his authority and enjoined the investigation. The Commissioner argued the court should not interfere with the administrative process and allow the investigation to run its course. The court did not wait, nor did the court reason that the commissioner in the administrative process should have the right to correct its mistakes would realize and end the proceeding. The court recognized the legal nature of the question of the Commissioner's authority and determined exhaustion was not required.

In Brown v. James, 389 S.C. 41, 697 S.E.2d. 604 (Ct. App. 2010), the court gave three reasons why administrative remedies did not have to be pursued: 1) Exhaustion was not required because a final decision had been issued, 2) futility, and 3) The agency acting outside of its authority. Any of these reasons would have excused exhaustion in this case, and none are necessarily superior to the other. Brown found the school board was acting outside its authority when it dismissed her administrative appeal for not responding to a deposition request. The court noted the board did not follow proper procedures for obtaining the deposition and therefore acted outside its authority in dismissing the appeal.

In short, an agency cannot insist a claimant be bound to administrative remedies when the agency has acted 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.**

On the question of whether Petitioners should have been required to exhaust administrative remedies, the Circuit Court made the following findings:

“At the hearing, Chief Administrative Hearing Officer Ms. Romi Robinson admitted that a hearing officer would not have the authority to rule on whether requiring on-line searches could be required without SCDEW promulgating regulations regarding on-line searches. Therefore, any appeal concerning whether Plaintiffs were required to complete an online job search would be futile, since by its own admission the hearing officer could not rule on this issue.”

R. p. 86. In addition, Ms. Robinson

“testified that SCDEW’s Appellate panel only has the power to resolve factual disputes. It would not resolve issues of law pertaining to the authority of SCDEW to implement the online work search requirement without first promulgating regulations.”

R. p. 42. DEW seeks to undermine these findings in three ways.

First, it represents that this finding is something we “contend” without also noting that it is something that the Circuit Court found as fact. Resp. at 13; R. pp. 41-42, 86. This finding, as well as the Circuit Court’s ultimate determination that exhaustion of administrative remedies would have been futile, should only have been reversed upon a finding that the Circuit Court’s conclusion was without evidentiary support even if the judges on the appellate court might have made the decision differently. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023).

Second, DEW argues that the Circuit Court “relied solely on [our] incomplete representation of [Ms. Romi] Robinson’s testimony” to find that DEW’s Appellate panel would not resolve the issue of law presented in this case. Resp. at 14. DEW cites nothing to support this contention. Rather, Ms. Robinson testified before the Circuit Court on November 2, 2016, and the entirety of her testimony, including the excerpts that DEW cites, was presented to the Circuit Court. R. p. 849. Having received that evidence, the Circuit Court found that exhaustion of administrative remedies was futile. DEW’s position that the Circuit Court relied on anything short of the whole record is entirely unsupported.

Finally, DEW cites an excerpt of Ms. Robinson’s testimony that it argues should have guided the Circuit Court to a different conclusion. DEW’s argument not only challenges how the Circuit Court weighed the evidence, a heavy burden to carry on appeal, but DEW also misconstrues the testimony it relies on. DEW states that Ms. Robinson testified that she did not “know the answer to that” when asked about “the Appellate Panel’s Authority.” Resp. at 14. However, the question that Ms. Robinson was being asked in this exchange was about whether the Appellate Panel has the authority to hear the issue of whether a statute is constitutional. R. p. 894. The constitutionality of a statute is not at issue in this case. Rather, on the relevant question – whether DEW should have promulgated a regulation – Ms. Robinson was crystal clear: “We don’t rule on that.” R. p. 895.

Whether DEW could not rule on the question presented in this case because it lacked authority to do so or would not rule on that question because it misunderstood the authority it had is ultimately immaterial. The Circuit Court’s findings and the evidence in the record support both conclusions and, in either case, any effort to exhaust DEW’s administrative appeal process would have been futile because DEW would never have reached the relevant question. Having

heard the testimony, the Circuit Court concluded that exhaustion of DEW's administrative appeal process would have been futile. The Circuit Court's finding was entitled to a degree of deference which the Court of Appeals failed to give, and its decision should be reversed as a result.

#### **IV. DEW was required to promulgate regulations before implementing the online work search requirement.**

In 2010 Act 146, the S.C. General Assembly made substantial revisions to the unemployment law. Among these revisions were amendments to various statutes mandating the department to promulgate regulations. Prior to the 2010 amendments, regulations were permissive. SC Code Ann. §§ 41-27-510<sup>2</sup>, 41-29-110<sup>3</sup>, 41-35-610<sup>4</sup>, and 41-35-110(1)<sup>5</sup> all mandate the department promulgate regulations to implement the provisions of the unemployment law.

"Regulation" includes "... each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of an agency..." S.C. Code Ann. §1-23-10(4). A policy or guideline has the force of law if it creates a binding norm. *Joseph*

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<sup>2</sup> § 41-27-510 provides: "[t]he department **must promulgate regulations** applicable to unemployed individuals, making distinctions in the procedures regarding total unemployment, part-total unemployment, partial unemployment of the individuals attached to their regular jobs and other forms of short-time work as the department considers necessary." (emphasis added)

<sup>3</sup> § 41-29-110 provides: "[t]he department **must promulgate regulations necessary** to carry out the provisions of Chapters 27 through 41 of this title, employ personnel, make expenditures, require reports not otherwise provided for in these chapters, conduct investigations or take other action as it considers necessary or suitable to administer its duties and exercise its powers pursuant to the title." (emphasis added)

<sup>4</sup> § 41-35-610 provides: "[a] request for determination of insured status, a request for initiation of a claim series in a benefit year, a notice of unemployment, a certification for waiting-week credit, and a claim for benefits **must be made pursuant to regulations the department promulgates.**" (emphasis added)

<sup>5</sup> § 41-35-110(1) provides "[a]n unemployed insured worker is eligible to receive benefits with respect to a week only if the department finds he... has made a claim for benefits with respect to that week **pursuant to regulations prescribed by the department.**" (emphasis added)

*v. South Carolina Dept. of Labor, Licensing, and Regulation*, 417 S.C. 436, 453, 790 S.E. 2d 763, 772 (2016). The “key inquiry” is:

the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm. *Joseph, id* at 417 S.C. 454, 790 S.E.2d 772.

“When there is a close question whether a pronouncement is a policy statement or a regulation, the [agency] should promulgate the ruling as a regulation in compliance with the APA.” *Joseph, id*, citing *Home Health Serv., Inc. v. S.C. Tax Com’n*, 312 S.C. at 329, 440 S.E.2d at 378.

Moreover, SC Const., Art.1, § 22 provides:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

In March 2012, the Legislative Audit Council<sup>6</sup> issued its report entitled *A Management Review of the South Carolina Department of Employment and Workforce* which found the department did not have a system to verify job contacts by claimants and recommended it implement a system to verify job contacts and ensure all communications with claimants regarding work search requirements are accurate and consistent. Legislative Audit Council Report, *A Management Review of the South Carolina Department of Employment and Workforce*, pp 35-37. The department responded to the LAC report by letter dated March 6, 2012 and stated it was “implementing a policy change to require one of the four mandatory work

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<sup>6</sup> The Legislative Audit Counsel (LAC) was created by the General Assembly and is charged with review of operation of state agencies to assist the General Assembly.

searches to be performed online through SCWOS [South Carolina Works Online] ....” See March 6, 2012 letter, response 15, from Abraham Turner to Perry Simpson attached to 2012 LAC Report. *id.* As further detailed below, DEW’s statement that it is implementing an online work search requirement occurs nearly four months before the implementation of the budget proviso that DEW claims absolved it of responsibility to promulgate regulations.

This policy change is also referenced in Procedure transmittal letter 1267-3 dated August 11, 2012 (Supp. R. 38) states:

In March of 2012, our work search policy was revised **to require all claimants** to make a minimum of four (4) job contacts per week. At least one (1) of the contacts **must** be made via at SC Works Online services [jobs.scworks.org](http://jobs.scworks.org) and all contacts **must** be documented on the Form UCB 303, Record of Work Seeking Activities.... If a claimant fails to make at least one (1) job search on SCWOS..., a letter will go to the claimant **explaining that their benefits have been stopped due to their failure to make an online search through SCWOS for a specific claim week** ending date. The letter will instruct the claimant to report to their local SC Works Center with a copy of the letter and their Form UCB-303 Record of Work Seeking Activities. ...

Warnings are NOT acceptable for SCWOS work searches. **Claimants will not be given a warning if they fail to meet this requirement.** There may be a few **extraordinary circumstances**... where a claimant may be justified in failing to make job searches through SCWOS.... (Emphasis added) (SROA 38)

DEW failed to implement this mandatory and binding policy by regulation. It asserts, in part, it was not required to promulgate regulations because of Budget Proviso 67.7, enacted as part of the 2012-2013 Appropriations Act (enacted July 1, 2012). This proviso 67.7 and subsequent provisos<sup>7</sup> provided:

(DEW: SUTA Contingency Assessment Funds) **Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on** enforcement of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code, via Eligibility Reviews, Random Verification of Job Contacts and Wage Cross Matches during those weeks covered by the South Carolina State Unemployment Tax Authority

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<sup>7</sup> The provisos enacted in subsequent years are: 2013-2014 - Proviso 83.6, 2014-2015 - Proviso 83.6, and 2015-2016 - Proviso 83.5.

(SUTA), and to ensure seated meetings with Unemployment Insurance claimants **and requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified.** The agency must also inform claimants in advance that Eligibility Reviews and Random Verification of Job Contacts will be used by the Department to verify compliance with laws administered by the agency. (emphasis added)

A budget proviso can temporarily suspend the operation of a permanent statute if the intent to do so is clearly manifest *and* if there is an irreconcilable conflict between the proviso and the permanent statute. *Amisub of South Carolina v. South Carolina Dept. of Health and Environmental Control*, 407 S.C. 583, 757 S.E.2d. 408 (2014), *Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citations omitted). However, “[b]ecause we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative.” *Amisub*, *id.* at 407 S.C. 598, 757 S.E.2d 416. “Moreover, statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.” *Amisub*, *id.* citing *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

From a plain reading, the proviso directs the department to Spend 30% of the (SUTA) Contingency Assessment Funds on the five listed items to enforce §§ 41-35-110(3) and 120(5), the proviso neither defines these items, or does it give any direction or instruction for the implementation of these items. Nor does it establish any mode of procedure for their enforcement. Moreover, there is no language which expressly or by implication suspends the department’s duty to promulgate regulations. All the Proviso does is direct the expenditure of monies from the contingency assessment funds for the purposes outlined above, including the online work search which DEW had claimed it was implementing nearly four months earlier. The Provisos are silent on how they are to be implemented. DEW points to no language in the

proviso which establishes policies and procedures for the online work search requirement. Since the legislature is presumed to be aware of the statutes it has enacted, it only makes sense that it would have expected the department to promulgate regulations to carry it into effect.

The General Assembly could have set forth procedures and policies in the proviso for the online work search requirement. For example, in the 2023-2024 Appropriations Act, Part 1A, Section 61, sets forth the amount appropriated for indigent defense. Part 1B, Budget Proviso 61.7 relates to Defense of Indigents Civil Action Application Fee. The General Assembly not only sets forth the amount of the fee, but also sets forth specific details regarding the application, including the requirement of an affidavit, application for waiver of the fee, what to do if the applicant has some, but insufficient, assets for counsel, what to do in case of a juvenile applicant, the rights of the court to appoint an attorney in emergency situations – regardless of whether an application has been submitted, and the filing of a claim against the assets of the applicant to be filed with the clerk of court which, at the discretion of the court and after 30-day's notice to the applicant, could be reduced to a judgment against the assets of the applicant.<sup>8</sup> Therefore, the

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<sup>8</sup> 61.7. (INDEF: Defense of Indigents Civil Action Application Fee):

(A) A person requesting appointment of counsel in any termination of parental rights (TPR), abuse and neglect, or any other civil court action in this state shall execute an affidavit that the person is financially unable to employ counsel and that affidavit shall set forth all of the person's assets. This affidavit must be completed before counsel may be appointed. If it appears that the person has some assets but they are insufficient to employ private counsel, the court, in its discretion, may order the person to pay these assets or a portion thereof to the Commission on Indigent Defense.

(B) A forty dollar application fee for appointed counsel services must be collected from every person who executes an affidavit that they are financially unable to employ counsel. The person may apply to the court, the clerk of court, or other appropriate official for a waiver or reduction in the application fee. If it is determined that the person is unable to pay the application fee, the fee may be waived or reduced, provided that if the fee is waived or reduced, the clerk or appropriate official shall report the amount waived or reduced to the trial judge and the trial judge shall order the remainder of the fee paid by a time payment method or such method as the trial judge deems appropriate. The clerk of court or other appropriate official shall collect the application fee imposed by this section and remit the proceeds to the Commission on Indigent Defense on a monthly basis. The monies must be deposited in an interest-bearing account separate from the general fund and used only to provide for indigent defense services. The monies shall be administered by the Commission on Indigent Defense. The clerk of court or other appropriate official shall maintain a record of all persons applying for representation and the disposition of the application and shall provide this information to the Commission on Indigent Defense on a monthly basis as well as reporting the amount of funds collected or waived.

(C) In matters in which a juvenile is brought before a court, the parents or legal guardian of such juvenile shall execute the above affidavit based upon their financial status and shall be responsible for paying any fee. In matters concerning juveniles, the parents or legal guardians of said juvenile, shall be advised in writing of this requirement at the earliest stage of the proceedings against said juvenile.

General Assembly knows how to give specific detail when enacting a proviso. It could have established policies in Proviso 67-7 which would have satisfied the requirements of Art, 1, §22 but chose not to do so, and it did not need to do so in light of the department's statutory obligation to promulgate regulations. As to any delays in implementing the policy, the legislature would have been aware of the requirements of Art. 1, §22, and all relevant statutes and would have expected a delay in the work search requirement's implementation. Moreover, if the department began the process of promulgating a regulation when it established the policy, delay would have been minimized.

DEW next asserts a regulation was unnecessary to enforce the online work search requirement. This ignores the fact that it had to implement policies for the implementation of the online work search. These policies are set forth above and are evidenced by Procedural Transmittal Letter 1267-3 (SROA 38) the affidavit of Kevin Cummings, (ROA 1081) the letter from the department to the Legislative Audit Counsel (See attachment to 2012 Legislative Audit Council Report) and the letter/notice sent to claimants requiring them to report to the department. (SROA 39). The online work search policy was established in March 2012, nearly four months before the budget took effect. The department could not have relied on the proviso in establishing the policy. The policy is binding on the department and gives them little discretion

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(D) Nothing contained above shall restrict or hinder a court from appointing counsel in any emergency proceedings or where existing statutes do not provide sufficient time for an individual to complete the application process.

(E) The appointment of counsel, as herein before provided, creates a claim against the assets and estate of the person who is provided counsel or the parents or legal guardians of a juvenile in an amount equal to the costs of representation as determined by a voucher submitted by the appointed counsel and approved by the court, less that amount that the person pays to the appointed counsel.

(F) Such claim shall be filed in the office of the clerk of court in the county where the person is assigned counsel, but the filing of a claim shall not constitute a lien against real or personal property of the person unless, in the discretion of the court, part or all of such claim is reduced to judgment by appropriate order of the court, after serving the person with at least thirty days' notice that judgment will be entered. When a claim is reduced to judgment, it shall have the same effect as judgments, except as modified by this provision.

in making individual determinations on whether a claimant actively searched for work. The policy is an illegal regulation not promulgated pursuant to the APA. Even if this court interprets the proviso to be more than a funding mechanism, the department enacted an illegal regulation without legislative approval by establishing this policy.

Moreover, this illegal regulation deviates from S.C. Code Ann.41-35-120(5)(a)(i)(A) which provides: “An insured worker is ineligible for benefits for... [f]ailure to accept work...[i]f the department finds he has failed, **without good cause...**to apply for available suitable work, when so directed by the employment office or the department....” Procedural Transmittal Letter 1267-3 heightens the good cause standard to “extraordinary circumstances.” See p. 3 above and SROA 38. When DEW finally promulgated a regulation in 2016, this error was corrected. S.C. Code of Regulations R. 47-104, consistent with 35-120(5)(a)(i)(A), now provides absent good cause a claimant must conduct two job searches through SCWOS online. Enacting the regulation not only complied with the statutory process and Art.1, § 22 of the S.C. Constitution, it also helped insure DEW’s procedures complied with § 35-120(5)(a)(i)(A). In short, regulations have a purpose.

By necessity, DEW did establish policies and procedures which created binding norms to implement and enforce compliance with the online work search requirement. The policies established were binding on the department since warnings were not acceptable for failing to conduct the online search and claimants were penalized by not receiving their weekly benefit. These policies were not promulgated by regulation as statutorily required, and when implemented by DEW, it acted beyond the scope of its statutory authority. Such acts are invalid. *Captain’s Quarters Motor Inn Inc. v. South Carolina Coastal Council*, 306 S.C.488, 413 S.E.2d. 13 (1991).

## Conclusion

For the reasons set forth herein and in its Petition for Writ of Certiorari, Petitioners ask its request be granted.

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