IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court

The Honorable Shirley C. Robinson, Administrative Law Judge

Case No.: 2014-001484

Stephanie Stewart,
Appellant,

v.

South Carolina Department of Employment & Workforce,
and Oconee County, South Carolina,
Respondents.

INITIAL APPEAL BRIEF OF APPELLANT
OCTOBER 23, 2014

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Pro-Se

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Stephanie Stewart, Appellant,	:	
v.	:	**INITIAL APPEAL BRIEF OF APPELLANT**
South Carolina Department of Employment & Workforce, and Oconee County, Respondents.	:	

STATEMENT OF CASE

This matter is before this Court as a result of the Administrative Law Court's (hereinafter, "ALC"), Judgment entered on June 9, 2014 affirming the decision of the South Carolina Department of Employment and Workforce (hereinafter, "Respondent" or "SCDEW"). The Appellant Panel found Appellant (hereinafter, "Stewart"), was disqualified from unemployment benefits compensation for twenty weeks effective May 9, 2013 through September 21, 2013 with a corresponding monetary reduction upon finding she was discharged for misconduct (AROA 60)[1]. The ALC decision affirmed the Appeal Tribunal and Claim Adjudicator's decisions.

On May 23, 2013, the Claims Adjudicator mailed a decision to Stewart stating that she was discharged from her position with the Oconee County Summary Court as a result of misconduct

[1] As a result of multiple documentary omissions, the Respondent submitted the Record on Appeal to the Administrative Law Court on three separate instances and each Record on Appeal submitted differed: 1) The Initial Record on Appeal, "hereinafter, AROA, was filed on 2/19/14 (AROA 1-201). The Supplemental Amended Record on Appeal, "hereinafter, SROA" was filed on 3/24/14 (SROA 1-12).

for allegedly calling her supervisor "a liar". Specifically, the Claims Adjudicator determined the separation was a result of improper actions and improper behavior (AROA 60). On May 30, 2013, Stewart filed a timely Notice of Appeal of this determination contending the termination was retaliation for submission of "complaints of racial discrimination", amongst other cumulative reasons (AROA 2). On August 17, 2013, Stewart submitted a pleading with thirty-one evidentiary exhibits to the Appeal Tribunal in support of her impending defense (AROA 7-34). Stewart's Appeal Tribunal Hearing commenced on August 20, 2013 before Administrative Hearing Officer Lane K. Cook (hereinafter, "AHO"). During the Tribunal Hearing, Stewart informally moved the AHO to include pleadings with evidentiary exhibits as part of the record and subsequently cross-examined witnesses utilizing such (AROA 168). On August 23, 2013, the AHO mailed his decision that Stewart was discharged for misconduct based on her "acknowledg[ing] ... having told [her supervisor] that what he said about an earlier conversation was inaccurate" (ROA 3-4). Review of Stewart's pleading, exhibits, and defense by the AHO were excluded from the Record and not submitted to the Appellate Panel as part of the Record. On August 31, 2013, Stewart filed a Notice of Appeal. On October 13, 2013, Stewart received a copy of the Record on Appeal before the Appellate Panel and in-turn on October 18, 2013 submitted a pleading moving the Appellate Panel to include her previously proffered motion and exhibits (AROA 36-39). Stewart renewed her motion on October 22, 2013 during the Appellate Panel Hearing through submission of written arguments and testimony on the Record (AROA 40-59). On October 25, 2013 the Appellate Panel held, "We find credible the testimony of the employer-witness judge particularly since he immediately reported the claimant's disrespectful comments to the lead court clerk. Therefore, we find the claimant was discharged for misconduct connected with employment" (AROA 149-153).

PROCEDURAL HISTORY

On December 11, 2013, the SCDEW submitted the Initial Record on Appeal, (hereinafter, "IROA"). Subsequently, on December 20, 2013, Stewart filed four motions styled: (1) Motion to Compel the Respondent to Correct and Resubmit the Entire Record on Appeal, (2) Motion for Consent to File an Enlarged Initial and Reply Brief, (3) Motion for Enlargement of Time to File Initial and Reply Brief, and (4) Motion to Compel Respondent to Redact Appellant's Personal

Identification Information from Record on Appeal. On January 6, 2014, the Respondent filed a response in opposition to Stewart's motion to file an enlarged initial and reply brief contending Stewart sought to put forth racial grievance defenses not raised in the lower Appellate Panel. Stewart filed a reply in opposition on January 17, 2014 arguing such enlarged petition was to only present the facts and establish that the racial grievance defense was raised to the lower Appellate Panel. On January 22, 2014, the Respondent filed a Notice of Consent and Motion to Supplement the Record on Appeal and included a Supplemental Record on Appeal as an attachment. On January 31, 2014, Stewart submitted a response in opposition to Respondent's motion arguing the Supplemental Record on Appeal further excluded Appellate Panel Transcripts and evidence submitted during the Appeal Tribunal. On February 4, 2014, the ALC issued an Order directing the Respondent to resubmit the Record on Appeal and all other information not properly included in the original Record on Appeal filed on December 11, 2014. On February 19, 2014, the Respondent filed the Record on Appeal and again excluded Appellate Panel Transcripts, Evidentiary Exhibits before the Appeal Tribunal, and included Stewart's personal social security number in the Record[2]. On March 3, 2014, Stewart filed a motion for sanctions, correction of Record on Appeal, and requested that the briefing deadline be held in abeyance due to an incomplete Record on Appeal filed by the Respondent for the third time. On March 12, 2014, the Respondent filed a response conceding some proffered evidence was missing and refused to provide the Appellate Panel Transcripts, reasoning they were not evidence. On March 17, 2014, Stewart mailed a traverse to the Respondent's reply to her sanctions motion. On March 18, 2014, the judicial clerk of the Honorable Administrative Law Judge Shirley C. Robinson, Ms. Teckla Henderson forwarded an email denying Stewart's Sanction Motion and request for Appellate Panel Transcripts. The email, absent of a signed Order from the Judge, stated that only the Appellant's Motion and Respondent's Response were considered, presumably because the Judge's decision was made prior to receiving Stewart's Traverse. As a result, Stewart filed a Motion for Reconsideration on March 19, 2014 and Ms. Henderson forwarded an email absent a signed Order or Opinion by the ALC Judge, denying Stewart's Motion.

[2] The ALC's February 4, 2014 Order granted Stewart's Motion to compel the Respondent to redact her social security number from the entire Record on Appeal pursuant to SCALC Rule 36 (B).

STATEMENT OF FACTS

From a reasonable fact finder's perspective, the facts are simple and straightforward. On May 3, 2013, Stewart was involuntarily transferred to a work location for which she was previously reassigned as a remedy for racial animus grievances nearly two years prior. On April 30, 2013, prior to the involuntary transfer, Stewart emailed a grievance to her supervisor Magistrate Judge M. Todd Simmons (hereinafter, "Simmons"), refuting alleged theft accusations by a co-worker Deborah Sheriff (hereinafter "Sheriff") and raised a whistleblower complaint of fraudulent overtime reporting by the subject co-worker. As a result, forty-eight hours later, during an unusual "audio-recorded" closed-door Human Resource Meeting, Simmons with Sheriff directed Stewart to transfer the next business day, back to the office whereby she experienced racial animus. Initially, Stewart declined to transfer back into what she knew to be a racially insensitive and hostile environment. Subsequently, Stewart entered into an agreement with Simmons to exercise administrative leave for the remaining portion of the day to reach a definitive decision by close of business on May 3, 2013. Prior to the close of the meeting, Stewart moved to "personally" converse with Simmons in Sheriff's absence to discuss facts surrounding her grievance. In recollection of facts surrounding her grievance, Stewart queried Simmons on events involving himself and another co-worker Lisa Lee (hereinafter, "Lee") concerning payroll reporting documents and previous complaints of the same nature that supported the validity of her grievance. During the discussion of the subject grievance, Stewart replied to Simmons' non-recollection "that's inaccurate" and he characterized such as calling him a liar. Simmons ended the discussion perceiving to be called "a liar" in a circumstance where Stewart's recollection of facts concerning her grievance differed from his perspective. Immediately thereafter Stewart was directed to depart the office on administrative decision-making leave for the remainder of the day. No discussion of her being terminated was discussed or mentioned by Simmons.

After notifying Simmons of her intent to transfer, Stewart complied with Simmons directives and timely reported to her reassignment on May 6, 2013. After three hours and one day of authorized vacation leave commencing the latter portion of May 6, 2013 through May 7, 2013, Stewart, on May 9, 2013 forwarded a grievance by email, citing the prior history of racial overtones as a basis for documenting her written products within the office. Five hours later Stewart returned from lunch and was subsequently terminated by Simmons for lack of professionalism and

insubordination; allegedly exhibited approximately one week prior, on May 3, 2013. Specifically, Simmons cited the Oconee County Policy and Procedure Manual (hereinafter, "Employee Handbook") as the basis for Stewart's termination.

Stewart, from the inception of this case, vehemently denied committing the misconduct as recanted by Simmons and contended her termination was actually retaliation for emailing the racial overtone grievance. As a result of the exclusion of Stewart's pleading's from the Record by the Appeal Tribunal and Appellate Panel, marshalling of the facts embedded within the Record is necessary as the recital of the facts by both lower authorities are not accurately recanted in their respective opinions.

Notwithstanding the procedural appellate issue to follow, **Stewart's question of epic proportion, "Did substantial evidence establish that she was terminated for alleged misconduct or whether substantial documentary and testimonial evidence proves Stewart was actually terminated for emailing a grievance five hours immediately before her termination"?** Stewart submits the facts and documentary evidence within the Record establishes she was in fact terminated for submission of a grievance and Simmons, contrary to his testimony, had no intent to terminate her employment for any alleged misconduct and the evidence in the Record reflects such in a manner synonymous to a "shining star". The statement of facts are as follows:

1. Stewart, an African-American female, was employed as a Court Clerk within the Oconee County Summary Court Magistrate Department beginning January 10, 2011 through May 9, 2013 and was the only employee of minority descent.

2. Stewart was assigned to the Walhalla, SC office location and the Magistrate Judge Blake A. Norton (hereinafter, "Norton"), was her immediate supervisor. Chief Magistrate Judge Simmons retained managerial authority over all magistrate department personnel.

3. On September 19, 2011, as a remedy to issues of racial animus, among others, Stewart was reassigned to the Seneca location as a member of Simmons' staff. Stewart performed her duties exemplary with no documented disciplinary issues – resulting in multiple consecutive performance reviews and corresponding merit raises (AROA 97-99).

4. On April 30, 2013, Stewart forwarded an email to Simmons refuting theft accusations by Sheriff and presented a whistleblower complaint regarding Sheriff's reporting of payroll hours. In-turn, **48-hours later, absent any remarkable event**, on May 2, 2013, Simmons directed Stewart and Sheriff to attend a Human Resource Meeting (hereinafter, "HR Meeting"), with himself on May 3, 2013 (AROA 105). Simmons did not disclose the purpose of the HR Meeting to Stewart prior to its commencement. Stewart believed the purpose of the meeting was to address her whistleblower grievance concerning Sheriff (AROA 105 & 191, Ln. 11-21).

5. On May 3, 2013, the HR Meeting between Simmons, Sheriff, and Stewart convened. In an unusual measure, Simmons documented the meeting by way of audio recording (AROA 75 & 107-125). During the meeting, Simmons informed Stewart he decided to reassign her back to the Walhalla location due to workforce demands. In furtherance of documenting the HR meeting, Simmons presented an HR Memorandum dated May 3, 2013 (hereinafter, "May 3rd Pre-HR Memo Meeting Transfer Memo"), addressed to HR Manager Kay Olbon (hereinafter, "Olbon"). The May 3rd Pre-HR Memo Meeting Transfer Memo detailed Simmon's alleged basis for transfer and exclaimed Stewart's "substantial experience and [that she] does a great job". Stewart, flabbergasted, believed the HR Meeting's purpose was to address her grievance and declined Simmon's request to sign the May 3rd Pre-HR Memo Meeting Transfer Memo in disagreement (AROA 123 Ln. 1-9).

6. Due to the prior racial animus issues in Walhalla, Stewart declined to transfer but subsequently entered into an agreement with Simmons to adhere to disciplinary "administrative decision-making leave" the remainder of the workday to reach a definitive decision by the end of the day. During the HR Meeting, on multiple instances Simmons commended Stewart's work performance and repeatedly assured Stewart of his desire to retain her as an employee (AROA 114 Ln. 13-14 and 22-24, 115 Ln. 12-17, 117 Ln. 21, 123 Ln. 11-19 and 124 Ln. 6-9).

7. At the conclusion of the HR Meeting, Stewart requested to speak with Simmons "personally" absent Sheriff's presence to address her grievance concerning Sheriff because

Simmons, contrary to the Oconee County Grievance Policy, did not formally resolve her grievance pursuant to policy.

8. During the discussion, Stewart attempted to discuss with Simmons events surrounding her grievance, which included additional acts by Lee that involved Simmons but addressed Sheriff's actions. Simmons, in response to Stewart's comments, casually commented his non-recollections of events and Stewart casually commented the total non-recollection of their conversation was inaccurate. Simmons interpreted Stewart's statement as calling him a liar. Stewart refuted Simmons' interpretation by stating, "I did not call you a liar, I said what you said can't be accurate" and Simmons directed Stewart to start disciplinary "decision-making administrative leave" as a result (See AROA 142 "Positive Discipline" Examples Oconee County Employee Handbook).

9. Consistent with his pattern of behavior to immediately memorialize events of significance, Simmons prepared an additional HR Memorandum dated, May 3, 2013 (hereinafter, "May 3rd Post HR Transfer Memo") addressed to Olbon. The May 3rd Post HR Transfer Memo documented the course of events for the HR Meeting and was absent any allegations of misconduct or intent to seek Stewart's termination for such as recanted by Simmons (SROA 9).

10. By close of business May 3, 2013, Stewart notified Simmons by cellular phone and text message of her intent to transfer and Simmons informed Stewart she made the right decision and she would see a difference in Walhalla (AROA 159 Ln. 17-25, 161 Ln. 21-26, and SROA 7 -8). Stewart timely reported to Walhalla on May 6, 2013. In-turn, Simmons reported Stewart's absence on May 3, 2013 as "disciplinary decision-making" administrative leave with pay pursuant to the Oconee County Employee Handbook (AROA 145 and SROA 5).

11. On Monday, May 6, 2013, Stewart reported to Walhalla, on time, without incident. Upon reporting, Stewart requested three hours of vacation leave for the afternoon of May 6, 2013 and a full day of leave on May 7, 2013 (AROA 11, 2nd para.). The leave was approved by Norton, concluding a meeting in which he made unprofessional and demeaning comments

to Stewart, within minutes of her first day in Walhalla (AROA 126, 1st para. and AROA 128).

12. Simmons authored an additional Post HR Memorandum dated May 7, 2013 (hereinafter, "May 7th HR Transfer Memo") entitled "Transfer" to document Stewart's May 3, 2013 transfer and alleged misconduct. The May 7th HR Transfer Memo appeared to serve as a "letter of reprimand" of sorts and documented the alleged misconduct in the event of future similar behavior. **Notably Simmons definitively stated, he "... reluctantly agreed to allow Mrs. Stewart to continue her employment in Walhalla" and "[he] believ[ed] that no further incidents should be tolerated"** (AROA 90).[3] This May 7th HR Transfer Memo further evidences Simmons' second disciplinary act by use of "positive discipline" as outlined in the Oconee County Employee Handbook (AROA 142).

13. On May 8, 2013, Simmons based on his testimony, allegedly hand-delivered the May 7th HR Transfer Memo to HR Manager Olbon (AROA 173 Ln. 6-7).

14. On May 8, 2013, Stewart returned from leave for her first full work day since transferring. Stewart processed and prepared documents but was prohibited by Norton from placing her initials on her work product, as routinely accomplished in office settings. Stewart adhered to Norton's instructions and documented his directive in an email at the end of the business day (SROA 11).

15. Stewart also documented the subject matter of the May 6, 2013 meeting with Norton in an email as a summary. Stewart, accomplished the email due to unprofessional and demeaning statements made by Norton to her (AROA 126-127, 187-188). **NOTE, during the May 3, 2013 HR Meeting, in Simmons attempt to influence Stewart to transfer to**

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[3] The May 7th HR Memo indisputably proves that Simmons, as the Employer, had no intent to terminate Stewart's employment as of the date of its authoring and submission for filing with Human Resources on May 8, 2013. "Proof of mental state [intent] ... need not come by direct testimony from the lips of the person ... what was in a man's mind not only by what he says ... but by what he said and did. In law, as elsewhere, actions may speak louder than words." *Colonial Refrigerated Transportation, Inc. v. Mitchell 403 F.2d 541 5th Cir. (1968).* Though Simmons testified he fully intended to terminate Stewart as of May 3, 2013, this 2nd "Positive Discipline" act clearly establishes a definitive decision was made to retain Stewart's employment as late as May 8, 2013 – less than 24 hours prior to Stewart's forwarding of the May 9th Racial Overtone Email.

Walhalla, he gave her three options. He stated, "... [T]here's three choices, you can go [to Walhalla] and document things if you see that things are happening that shouldn't be happening, you can resign or you can force me to fire you ... I don't want to do the last one" (reference AROA 124, HR Tr., p.18, Lines 4-8). In accordance with Simmons' options, and coupled with Stewart's previous history of racial animus within Walhalla, Stewart documented the May 6, 2013 meeting and other material events for future reference. In response to Stewart's email summation, Norton responded the summary of events by Stewart were "fairly accurate" (AROA 128, 187 Ln. 1-9).

16. On May 9, 2013, Norton, by email, responded to Stewart's May 8, 2013, 4:16 PM email, courtesy copying Simmons, and the entire Walhalla Staff, expressing his disagreement of Stewart's initialing any internal documents (AROA 129, 187 Ln. 10-20).

17. On May 9, 2013 at 8:44 AM, Stewart responded to Norton, courtesy copied Simmons and provided a distinct grievance reason for the need to distinguish her work product. Stewart stated, **"Given the harsh and hostile history of racial overtones that have existed within this office, it is necessary that I have a way to clearly distinguish my work from other employees"** (AROA 130, 173 Ln. 11-24, 174 Ln. 1-5 and 18-21).

18. Five hours later on May 9, 2013, Stewart returned from lunch at 2:00 PM and observed Simmons' vehicle parked outside. Stewart entered, observed Norton and Simmons in a closed-door conference, began to work, and was rudely directed by Simmons to come into the courtroom where Norton and Bracket were seated at a conference table. Simmons proceeded to inform Stewart that he had been in discussions with both county administration and the county attorney and discovered that he could exercise his authority to terminate Stewart's employment for insubordination when he said Stewart refused to transfer and called him a liar on May 3, 2013. Stewart restated that she did report to Walhalla and did not call him [Simmons] a liar, and requested to review the recording. Simmons stated that he did not have a recording because the recorder was turned off and it was his word, as a judge against Stewart's. Simmons affirmatively stated that Stewart had called him a liar. Stewart then requested a signed copy of the Termination Notice, but

Simmons refused. Simmons instead stated he would provide Stewart with a copy of the termination notice, when she signed it. Stewart refused, in disagreement and proceeded to phone the Department of Labor, because she believed the Employer was mandated to furnish a written reason for termination. Stewart proceeded to her desk, began to dial the Department of Labor's number, when Brackett ran to the copier, copied Simmons' Termination Notice and provided a copy to Stewart (AROA 9, 173 Ln. 11-24, 174 Ln. 1-5 and Ln. 18-21).

19. On May 10, 2013, Stewart applied for unemployment compensation benefits (hereinafter, "UCB"). On May 24, 2013, Stewart received a UCB-103 Form dated May 23, 2013 from the SCDEW Claims Adjudicator disqualifying her for 20 weeks pursuant to *S.C. Ann § 41-35-120 (2)(A)*. On May 30, 2013, Stewart timely filed the Form App. 100-Net "Notice of Appeal to Appeal Tribunal" seeking review of the Claims Adjudicator's determination.

20. On August 17, 2013, Stewart filed a pleading styled, "Motion to Submit Declaration of Facts, Documentary Evidence, and Arguments into Tribunal Hearing Record with Brief in Support".

21. The Appeal Tribunal Hearing convened on August 20, 2013. **On August 20, 2013, during the Appeal Tribunal Hearing, Stewart informally moved for entry of the Evidence Motion into the Record by questioning the Tribunal's possession of the document.** (AROA 168 Ln. 11-16). The Tribunal's adverse decision was rendered on August 23, 2013. A timely form App-111 NET, "Application for Leave to Appeal to the Appellate Panel", was filed August 31, 2013.

22. On October 18, 2013, Stewart filed a pleading styled, "Motion to Include Claimant's Previously Submitted Motions and Documentary Evidence for the August 20, 2013 Tribunal Hearing as Part of the Appellate Panel Record" (hereinafter, "Evidence Motion"). The Appeal Tribunal excluded Stewart's Pleading and Exhibits from the Record on Appeal. The Appellate Panel convened on October 22, 2013 and Stewart hand-submitted written arguments styled, "Written Arguments in Support of Granting Unemployment

Compensation with Renewed Motion to Include Previously Submitted Tribunal Hearing Arguments and Documentary Evidence as Part of the Appellate Record". On October 25, 2013, the Appellate Panel issued a decision adversely against Stewart and reasoned her Evidence Motion with Exhibits were "additional evidence" not properly preserved for appellate review.

NATURE OF STEWART'S DEFENSE AND RESPONSE

Stewarts submits Simmons terminated her employment as retaliation for submission of grievances as a basis of her transfer and her subsequent racial grievance was the actual basis of her termination. **Stewart's position is that the Record establishes the employer had no intent prior to the HR Meeting or afterwards to terminate her until after she grievanced concerns of racial overtones, the day of her termination, a week after the alleged misconduct.** In addition, Stewart contended disagreeing with an employer and communicating such, while addressing a grievance in accordance with the employer's grievance policy, is not misconduct. Stewart states that her pleadings and documentary evidence submitted to both the Appeal Tribunal and Appellate Panel were erroneously excluded from the record, although she adhered to the directive of the SCDEW to forward evidentiary documents to the opposing party and SCDEW prior to the Hearing. Stewart informally moved for entry of such into the record and used her evidence during cross-examination to prove her case. Stewart contends such prejudiced her case before the Appeal Tribunal and Appellate Panel because her excluded documentary evidence, if reviewed as a whole, would have proven her case. Simply, at the Appeal Tribunal, Stewart put forth evidence that she was not in fact terminated for misconduct but for emailing a concern of racial overtone and evidence shows, the alleged misconduct did not occur. The Administrative Law Court abused its discretion and caused substantial prejudice in its refusal to consider the record as a whole. Such precluded Stewart's evidence from being considered.

This appeal follows.

STANDARD OF REVIEW

Effective March 30, 2010 the South Carolina Court of Appeal was granted jurisdiction to review decisions from the ALC through Act 146 of 2010 *sections 1 and 98.* As a result, Appeal decisions of the former South Carolina Employment Security Commission by our Circuit Courts and Appeal Courts are respectfully offered as the standard of review, precedent, and provide persuasive authority of the issues before this Court.

The Administrative Procedures Act (hereinafter, "APA"), *S.C. Code Ann § 1-23-310* governs appellate review of a final decision from an agency. *Shealy v. Aiken, 535 S.E. 2d 438, 442 (2000).* Under the APA, this Court must determine whether the findings of fact of the Agency's Appellate Panel are supported by substantial evidence in the record and whether the Panel's decision is affected by an error of law. *S.C. Code Ann. § 1-23-380 (A)(5)* and *Baxter v. Martin Bros., Inc., 630 S.E. 2d 42, 43 (2006).* "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the Administrative agency reached". *Merck v. South Carolina Employment Sec. Comm'n, 351 S.E. 2d 338, 339 (1986).* "It is more *than a mere scintilla of evidence*, but is something less than the weight of the evidence." *Porter v. South Carolina Pub. Serv. Comm'n. 507 S.E. 2d 328, 332 (1998).*

In matters of an appeal of an agency decision, pursuant to *S.C. Code Ann. § 1-23-610 (D) (E)*, this Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision, or as Stewart seeks, remand this case for further proceedings; the Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are: a) in violation of constitutional or statutory provisions, b) in excess of the statutory authority of the agency, c) made upon unlawful procedure, d) affected by an error of law, e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Respondent's decision to disqualify Stewart from Unemployment Benefits Compensation for twenty weeks with a corresponding monetary reduction was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record and in violation of constitutional

and statutory provisions. In addition, Respondent's erroneous findings of fact to support its erroneous conclusions are unsupported by "substantial" evidence, which demonstrates that the Respondent's decision is arbitrary or capricious and characterized by an abuse of discretion.

ARGUMENTS

I. WHETHER THE ADMINISTRATIVE LAW COURT ERRED AND OR ABUSED ITS DISCRETION OR USED THE WRONG STANDARD OF REVIEW TO DENY STEWART'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE RESULTING IN SUBSTANTIAL PREJUDICE?

Stewart's statement of facts, arguments and points of law expressed in her 1) "Application for Leave to Present Newly Discovered Evidence", 2) "Addendum to Application for Leave to Present Newly Discovered Evidence", 3) "Motion to Reconsider and 4) "Appellant's Application for Leave to Present Additional Evidence", currently before this Court are fully incorporated by reference.

As an additional ground for granting Stewart's current additional Evidence Motion and reversing the SCALC's previous order denying such, Stewart shows that the ALC improperly effected a wrong standard of review in its denial of her Application. The SCALC's Order adopted the Respondent's creative argument that Stewart was required to meet the standards of SCRCP 60(6)(2). The SCALC, without objectivity, agreed and reasoned:

> In accordance with SCALC Rule 68, the South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals, may, in the discretion of the administrative law judge, be applied to resolve questions not addressed by the ALC rules. SCRCP 60(b)(2) provides that the court may relieve a party from a final s judgment, order, or proceeding based on *newly discovered evidence* which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). In order to obtain a new hearing based on newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. See, Lanier v. Lanier, 364 S.C. 211, 612 S.E. 2d 456 (S.C. App., 2005). Having reviewed Appellant's application to present newly discovered evidence, I find that the application does not meet any of the requirements outlined in SCRCP 60(b)(2), especially in light of the fact that Appellant's primary purpose

> for wanting to introduce an email communication is that it contradicts the testimony of one of the Employer's witnesses. In addition, Appellant admits in the request that she knew about the evidence prior to the Appellant Panel's decision, but did not raise the issue to the Panel or otherwise request that her case be remanded to the Appeal Tribunal to consider the new evidence. [ENDNOTE BEGINS] SCRCP Rule 59(b) provide that "[i]n non-jury actions the motion [for a new trial] shall be made not later than 10 days after the receipt of the written notice of the entry of judgment or the filing of an order disposing of the action ..." [ENDNOTE ENDS]. For the foregoing reasons, I find that the Appellant's request to introduce new evidence, or alternatively remand the matter to the Department for a new evidentiary hearing, is denied.

Stewart's Application invoked *S.C. Code Ann. Section 1-23-380(3)* (Supp. 2012), *Brown v. Peoplease 402 S.C. 476, 741 S.E. 2d 761 (2013)* and *Byers v. S.C. Alcoholic Beverage Control Comm'n, 305 S.C. 243, 245, 407 S. E. 2d 653, 654-55 (1991)*. In rendering this decision, The Court based its decision on *SCALC Rule 68* and *SCRCP Rule 60(b)(2)*. The Court made absolutely no mention of *S.C. Code Ann. Section 1-23-380-(3) (Supp. 2012)* which reads in pertinent part:

> If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court (cited by Chief Administrative Law Judge Ralph K. Anderson, III, in *McCaskill v. SCDEW, et. al. Docket No: 13-ALJ-22-0146-AP (2013).*

This is the authority that was expressly cited by Stewart in her Application to Present Additional Evidence at pages (2) and (4). Stewart cited *Brown*, which correctly provides the two-prong standard applicable to this case. This Court stated in *Brown* that:

> In ruling on a motion to submit additional evidence, the Court is to consider two factors: (1) the materiality of the additional evidence and (2) the existence of a good reason for the failure to introduce such evidence at the original hearing (also cited by Chief Administrative Law Judge Ralph K Anderson, in *McCaskill*).

In denying Stewart's Application, the SCALC stated that the Application did not meet any of the requirements outlined in *SCRCP 60(b)(2)*. In *McCaskill*, Chief Judge Anderson cited a different standard of review and ruled that introduction of additional evidence is not possible by a claimant

at the Panel level unless the case is removed from the Tribunal to the Appellate Panel **upon its own motion**:

> This decision was based upon *S.C. Code Ann. Regs. 47-52(B)(1) (2011)*, which states '[e]xcept as provided in Appeal Regulation 47-52, D for the hearing of appeals removed to the Appellate Panel from an Appeal Tribunal, all appeals to the Appellate Panel shall be heard solely upon the evidence in the Record before the Appeal Tribunal'(fn. 4). Because this case did not involve removal from the Appeal Tribunal to the Appellate Panel, the case was heard solely upon the evidence in the record before the Appeal Tribunal. ... Appellant would not have been able to testify or introduce additional evidence.

Chief Judge Anderson's Ruling specifically stated such in footnote four of his opinion, which held:

> The language in the regulation relied on by the Court of Appeals in *Degroot* was the same as it is today. It is also noteworthy that the South Carolina Supreme Court, in *Merck v S.C. Employment Sec. Comm'n, 351 S.E. 2d 338, 339 (1986)*, quoted *S.C. Ann Section 41-35-710*, which contains essentially the same language as the current statute: 'the [Appellate Panel] reviews the decision of the appeal tribunal on the basis of the evidence previously submitted in such case or [it may] direct the taking of additional evidence.' *Section 41-35-710* does not authorize the Appellate Panel to direct the taking of additional evidence (or review just the record), **but *S.C. Code Ann. Regs.47-52(B)(1)*, which existed at the time *Merck* was decided, defines when the Appellate may direct the taking of additional evidence; and it is only when the appeal is removed to the Appellate Panel from the Appeal Tribunal pursuant to *Reg. 47-52(D)* that the Appellate Panel can direct the taking of additional evidence**."

An abuse of discretion occurs when a decision is based upon an error of law, such as application of the wrong legal principal ... or when the ruling does not fall within the range of permissible decisions applicable in a particular case. *Exparte Capital U-Drive-It, Inc 369 S.C. 1, 5, 630 S.E. 2d 464, 467 (2006)*. Non-uniform, inconsistent or **selective application of authority can indicate arbitrariness**. See *Mungo v. Smith 289 S.C. 560, 571, 347 S.E. 2d 514, 521. (Ct. App. 1986)*. The SCALC selection of *SCRCP 60(b)* to heighten the standard of review, contrary to the two statutory prongs of *1-23-380(3)*, *Byers*, and *Brown* was an error in law and exhibits a select application of authority.

Further exacerbating this matter, the SCALC order failed and or refused to address Stewart's Addendum to her Application for Leave to Present Additional Evidence, which in fact,

presented additional facts and evidence for a ruling on the Applications' merits. Such further supports remanding this case for further proceedings.

II. WHETHER THE ADMINISTRATIVE LAW COURT'S REVIEW OF A VARIANT RECORD ON APPEAL VIOLATED STEWARTS' APPELLATE DUE PROCESS RIGHTS BECAUSE THE RECORD ON APPEAL WAS NOT SUBMITTED TO OR CONSIDERED BY THE LOWER APPELLATE PANEL, RESULTING IN SUBSTANTIAL PREJUDICE?

The Record on Appeal on this issue is clear and unambiguous. On August 17, 2013, Stewart in accordance with SCDEW policy filed a pleading styled, "Motion to Submit Declaration of Factual Points with Documentary Evidence into Tribunal Hearing Record in Support of Appellant's Petition for Unemployment Compensation" (the "Evidence Motion") in preparation of her August 20, 2013 Appeal Tribunal Hearing (AROA7-34)[4]. The "Evidence Motion" had attached thirty-one exhibits supporting and evidencing Stewart's defense (AROA 9-13). Such was submitted to the AHO prior to the Tribunal Hearing as instructed by the SCDEW's "Notice of Telephone Hearing" with a mailing date of August 7, 2013 (IROA 29). The Notice of Telephone Hearing explicitly directed:

> **Evidence: This is your only chance to testify and present evidence ... any documents that you want considered in this hearing must be mailed to the Appeal Tribunal ... or ... faxed. In addition ..., you must mail or fax copies to the opposing party.**

In compliance to this SCDEW directive, Stewart submitted her "Evidence Motion" to the AHO and Respondent prior to the commencement of the Tribunal Hearing. During the Appeal Tribunal Hearing, Stewart on the record moved for entry of her pleading into the record on three separate

[4] The Respondent inexplicably excluded pages 29 and 30 of this Motion from the Record and they were attached as Exhibits 6 and 7 of the ALC Initial Appeal Brief. These missing pages of the pleading were proffered to the Appeal Tribunal and to the Appellate Panel in a written argument and attached in its entirely as Exhibit 1 on October 18, 2013 but excluded by the Respondent. (AROA 38-39). See (1/21/14 Supp. ROA.) The Respondent repeated this error again and excluded pages 21 and 22 of Stewart's October 22, 2013 Pleading before the Appellate Panel. (AROA 59-60). Such were attached as Exhibits 8 and 9 of the ALC Initial Appeal Brief. The submission of an incomplete Record on Appeal is a consistent "theme" by the Respondent in the instant case. Stewart noticed the ALC of this issue and Exhibit on page 3 and 4 of her December 20, 2013 Motion styled, "Application for an Order to Compel the SCDEW to Correct and Resubmit the Entire Record on Appeal". The Notice is part of the ROA, p. 29, released on December 11, 2013.

instances; twice within the "Evidence Motion" (AROA 16 and page 29 Exhibit 1) and a third request was accomplished verbally on the Record (AROA 168 Ln. 11-16). Correspondingly, Stewart used multiple exhibits from her "Evidence Motion" to cross-examine three of the Respondent's witnesses (AROA 171-173, 180, 184-187). As such, the AROA is replete with the context and substance of Stewart's "Evidence Motion" and Evidentiary Exhibits informally submitted during the Tribunal Hearing. After the Appeal Tribunals' denial of Stewart's petition and her filing of an appeal to the Appellate Panel, Stewart received the Record on Appeal on October 9, 2013 (AROA 38). The entire record consisted of: 1.) A transcript of the August 20, 2013 Tribunal Hearing, 2.) SCDEW UCB 103 Form dated May 23, 2013, 3.) SCDEW UCB-102 Form dated May 21, 2013, 4.) SCBOS NET101 Form dated May 14, 2013, 5.) Employer Termination Notice, dated May 9, 2013, 6.) Employer Policy Manual 7-2, 7.) Employer Exhibit 1 submitted on August 20, 2013, and 8) Claimant Exhibit # 1 HR Meeting Compact Disc Recording dated May 3, 2013 (AROA 38).

Stewart moved the Appellate Panel in two pleadings to enter her previously submitted evidence into the record for appellate consideration (AROA 36-39 and 40-59). On October 25, 2013, the Panel issued its decision denying entry of Stewart's pleading and evidence into the record. Specifically, the Panel deemed Stewart's evidence, that was previously submitted to the Appeal Tribunal, as "Additional Evidence", after fully acknowledging the evidence was used to cross- examine witnesses.

Stewart, in-turn appealed to the ALC and the Initial Record on Appeal, (IROA), initially forwarded to the ALC on December 11, 2013, significantly differed from the eight documents on appeal before the Panel. In addition to the eight aforementioned documents and Appellate Panel Decision, the ROA now included the Employers proffered evidence, not provided to Stewart during the Tribunal Hearing (12/11/13 ROA 30-43). Exhibits of Stewart's "Evidence Motion" were absent as well as the two aforementioned Appellate Panel Motions (12/11/13 ROA 45-100). After the multiple pre-hearing motions listed above, the ALC ordered the missing Pleadings and Evidence to be included as part of the ROA as outlined above in this cases' procedural history.

Stewart's Substantial Rights Were Prejudiced Because Of The Administrative Law Court and Appellate Panel's Decision Not To Review The Whole Record.

The *S.C. Const. Art I § 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 opportunity to be heard". The Department's Appeals Regulations accord the process that is due and the record reflects the AHO failed to follow that process – its own regulations. *S.C. Code Ann. Reg. Article 3, "Appeals Regulations", 47-51 Appeals to Appeal Tribunal, C. Hearing of Appeals, paragraph 1* states:

> All Appeal Tribunal hearings shall be ... conducted informally in conformity with the S.C. Administrative Procedures Act and in a manner as to ascertain the substantial rights of the parties ... all issues relevant to the appeal shall be considered and passed upon.

In submitting her "Evidence Motion", Stewart, by asking the AHO if he was in receipt of such for entry into the record, utilizing the "Evidence Motion" Exhibits for cross-examination of witnesses, and the explicit request within the Motion to be included as part of the Record, "required the AHO to consider it and pass upon its request". Contrary to this requirement, the AHO did not render any ruling pursuant to Department Regulations. By failing to accomplish this requirement and subsequently not including the "Evidence Motion" as part of the Record on Appeal, the AHO adversely affected Stewart's appeal right's at the Appellate Panel level. Specifically, this action prevented Stewart from having any opportunity (for her defense supported by the "Evidence Motion") to be heard on appeal because the Appellate Panel was limited to the Record on Appeal submitted by the AHO. See *S.C. Ann. Reg § 47-52, B. Hearings on Appeal, Para.1*, "Appeals to the Appellate Panel shall be heard solely upon the evidence in the Record before the Appeal Tribunal". In-turn, judicial review of Stewart's claims were denied by the Panel effectively precluding judicial review of her purported defense and claims (AROA 40-59 and 151). Stewart recognizes "the requirement of due process includes notice, an opportunity to be heard **in a meaningful way and judicial review**." *Ogburn-Matthews v Loblolly Partners, 505 S.E. 2d, 598, 603 (Ct. App. 1998)*. Certainly, that did not occur here. The *Administrative Procedures Act 1-23-380* states, as a matter of entitlement that Stewart as "a party who has exhausted all administrative remedies available within the agency ... aggrieved by a final decision is **entitled** to judicial review". Paragraph four states, "the review ... conducted by the court must be confined to the record". *SCALC Rule 36, Record on Appeal (B) (1) and (2)* promulgated by Administrative

Procedures Act § *1-23-600*, "Hearings and Proceedings", (G) provides a "party ... may apply ... for relief ... as provided in the Rules of the Administrative Law Court." Specifically, *SCALC Rule 36 (B) (1) (2)* defines the Record as "all pleadings, motions, and intermediate rulings" and "all evidence received or considered". The AHO did not conform to the *S.C. Administrative Procedures Act* in a manner ascertaining Stewart's substantial right to a meaningful appeal and judicial review. The procedural protections this particular situation demanded was forwarding of the complete Record on appeal by the AHO and review by the Appellate Panel. *Ogburn-Matthews at 603*. As a result, Stewart's ability to obtain a meaningful review was substantially hindered and prejudiced by a denial of the issues prevented from review due to an absence of the entire evidence and issues presented at the Tribunal Level. "To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process", *Leventis v. S.C. Dep't. of Health and Envt. Control, 590 S.E. 2d 643, 650 (Ct. App. 2000).*

The ALC was charged with performing appellate review of a Record the Appellate Panel clearly did not review as a lower court. On its face, the ALC should have remanded this case to the Appellate Panel for substantial violations of Stewart's constitutional rights and the aforementioned statutory provisions. Alternatively, Stewart now moves this Court, pursuant to the AHO's failure to submit the entire Record to the Appellate Panel as procedurally required under its own regulations.

III. WHETHER THE ADMINISTRATIVE LAW COURT AND APPELLATE PANEL ERRED OR ABUSED ITS DISCRETION IN REFUSING TO CONSIDER AND ENTER INTO THE HEARING RECORD STEWART'S PLEADING WITH DOCUMENTARY EVIDENCE CONTRARY TO S.C. CODE ANN REGS. § 47-52(B)(1) AND SCRE 103(A)(2) AND DID SUCH RESULT IN SUBSTANTIAL PREJUDICE?

It goes without being said that the ALC and Appellate Panel's role in reviewing the decisions of the Appeal Tribunal are synonymous to that of an appeal court. That similarity also comes with other comparable responsibilities. *S.C. Code Ann. Reg. 47-52 (B) (1)* provides that "all appeals to the Appellate Panel shall be heard solely upon the evidence in the record before the Appeal Tribunal." The record as recanted above, without dispute, reveals Stewart's "Evidence Motion" is in fact part of the Tribunal Hearing Record because it was; 1) submitted timely to the

Tribunal for consideration on August 17, 2013; prior to the Tribunal Hearing date of August 20, 2013 (1/21/14 Supp. ROA 29-30). 2) Stewart informally moved for entry of such into the record and 3.) cross-examined witnesses with the attached documentary exhibits (AROA 16, 168 Ln. 11-16, 171-173, 180, 184-187). The "Evidence Motion" and attached exhibits were used by Stewart to put forth her defense that she was terminated for reasons other than misconduct and no misconduct actually transpired, as factually articulated above. *S.C. Code Ann. Regs. 47-52 (B) (1)* mandates that, "all appeals to the Appellate Panel shall be heard solely upon the evidence in the record before the Appeal Tribunal". The "Evidence Motion" was "in the record" (AROA 168 Ln. 11-16, 171-173, 180, 184-187). It was not forwarded to the Appellate Panel by the AHO. Further, Stewart noticed the Appellate Panel by moving for the "Evidence Motion" to be included in the Appellate Panel Record through a written pleading filed on October 18, 2013 (AROA 36-39). On October 22, 2013, Stewart renewed the subject Motion with written arguments preserving the issue for appellate review (AROA 40-59). The Appellate Panel decision deemed Stewart's "Evidence Motion" to be "Additional Evidence" and denied Stewart's Motions (AROA 149-152). The Panel reasoned that Stewart "did not request specific documents to be entered as exhibits during the presentation of her case". Such was stated after acknowledging "[Stewart's] documents were not formally entered into evidence by the hearing officer" but "[Stewart] made several references to the documents during the Hearing and she was permitted to testify and ask questions of the witnesses from the documents." After stating such, Stewart submits that the Panel's opinion effectively acknowledges the "Evidence Motion" was not "additional evidence" and was in the record.

The Appellate Panel in denying Stewart's Motions "hung their hat" on the fact that the AHO did not formally enter the "Evidence Motion" into the record because Stewart did not request specific documents to be entered as exhibits". *S.C. Code Ann. Reg. "47-51 Appeals to the Appeal Tribunal" C.* Hearing Appeals, *Para.1, s*tates, "all appeal Tribunal Hearings shall be conducted informally in conformity with the S.C. Administrative Procedures Act ...". The *S.C. Administrative Procedures Act § 1-23-600, "Hearings and Proceedings", (G)* states, "A party aggrieved by an administrative process issued by the department ... may apply for the Administrative Law Court". *SCALC Rule 36, Record on Appeal, B. Content, Para. (1) (2)*, states "The Record shall consist of the following: (1) All pleadings, motions, and intermediate rulings; (2) all evidence received or considered.

First, the Panel erred in deeming Stewart's "Evidence Motion" submitted to the Appeal Tribunal, as "additional evidence". The *Administrative Procedures Act § 1-23-380 (3)* indirectly defines additional evidence as "material" and "failure to present it in the proceeding before the agency". In the instant case, the "Evidence Motion's" exhibits were material to Stewart's defense that she committed no misconduct and was terminated for reasons other than misconduct. Stewart did not fail to present the evidence to the Tribunal. As delineated above, she filed such in accordance with SCDEW Rules and instructions pursuant to the "Notice of Appeal Hearing by Telephone" (12/11/13 ROA 29) and informally moved for entry of such into the record.

Second, Tribunal Hearings are to be conducted informally in conformity with the *APA*. Stewart, in writing, formally asked the "Evidence Motion" to be entered into the record and again verbally. Reiterated, Stewart moved for her entire Pleading, not "specific documents" to be entered into the record. Pursuant to the *APA* and *S.C. Code Ann. Reg. 47-51 C (1)* "all issues relevant to the appeal **shall** be considered and passed upon". As an appellate authority, the ALC and Panel were required to review the decision of the Appeal Tribunal "on the basis of evidence previously submitted in the case". *Sparks v. SCDEW* and *Newark Electronics Corp., Docket No.: 10-ALJ-22-0953-AP (2011)*. Further, in reviewing the Appeal Tribunal's decision pursuant to SCALC Rules, the ALC and Panel were required to review and to take notice of and consider all pleadings, motions, and intermediate rulings, to include all evidence received or considered. *SCALC Rule 36 B (1) and (2)*. The Panel's decision to not consider Stewart's "Evidence Motion" and deeming it "additional evidence", is clear on its face that equitable review of the entire Record did not occur.

The Administrative Law Court Decision's Reliance On Rule 103 SCRE To Preclude Consideration Of Stewart's Evidence Motion And Its Evidentiary Exhibits Was In Error And Displaced.

In rendering its ruling to uphold the Appellate Panel decision, the Administrative Law Court explicitly held:

> ... [t]he Appeal Tribunal is only required to include in the record and consider as evidence the *Agency's* records that are material to the issue. For the claimant's records to be included in the record and considered as evidence, the claimant must

enter them in evidence at the hearing. See Rule 103, SCRE (implicitly providing a party must admit evidence to the record it can be reviewed on appeal as part of the record); S.C. Code Ann. § 1-23-330 ("Except in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed."). In Roberts v. Roberts, the supreme court held "[f]undamental principals of evidentiary procedure dictate evidence must be offered before an opposing party may object to its introduction or its admissibility may be ruled upon by a trial court judge." 299 S.C. 315, 319, 384 S.E.2d 719, 721 (1989). The supreme court went on to state: "To hold evidence to which reference is made, but which is not offered into evidence, is admissible would severely prejudice the party opposing its introduction by virtually precluding the party from placing the grounds for his objection on the record." Here, Appellant argues her reference to Motion 1 and its attached exhibits during the hearing was sufficient to move Motion 1 and it exhibits into evidence. However, a reference alone is insufficient; a party must offer the evidence and the hearing officer must rule on its admission. **Because Appellant never offered Motion 1 and its exhibits into evidence with the exception of Claimant's Exhibit 1, Motion 1 and its exhibits, with the noted exception, were not part of the evidence in front of the Appeal Tribunal. Accordingly, I find the Appeal Tribunal did not err in submitting the record to the Appellate Panel without these documents.** Next, regarding the Appellate Panel's review of the record, section 41-35-710 of the South Carolina Code states the Appellate Panel may review a decision of an appeal tribunal "on the basis of evidence previously submitted in the case" or it may "direct the taking of additional evidence." Importantly, the Appellate Panel "has the authority to make its own findings of fact consistent with or inconsistent with those of the appeal tribunal." Merck v. S.C. Emp't Sec. Comm'n 290 S.C. 459, 460, 460-61, 351 S.E.2d 338, 339 (1986) (interpreting a prior, but substantially similar, version of section 41-35-710). Further Regulation 47-52(B) provides "all appeals to the Appellate Panel shall be heard solely upon the evidence in the record before the Appeal Tribunal." Accordingly, because Motion 1 and its exhibits with the noted exception were not part of the evidence before the Appeal Tribunal, they were properly excluded from the record before the Appellate Panel.

The record reflects that Stewart cross-examined the Respondent's witnesses with a multitude of exhibits in the Evidence Motion she sought to enter into the Hearing Record (AROA 169-188, 196 & 197). To opine that Stewart's Evidence Motion request to be admitted as part of the Tribunal Hearing Record, "were not part of the evidence before the Tribunal" due to formality, is an "act of form over substance." "In order to preserve error Rule 103(A)(2) does not require that a formal offer of proof be made or that the grounds of error be precisely specified, it is enough if the record shows either in the form of a questioned asked, or otherwise, what the substance of

the proposed evidence is". *US v. Sweiss 800 F.2d 684 (1986).*[5] Viewing the record as a whole, the AHO, Appellate Panel and ALC were certainly aware of the contents of the Evidence Motion and its Exhibits. More importantly, they were aware of Stewart's wish to have it admitted in its entirety. Thus, the context is known and apparent.

"Generally a proffer of testimony is required to preserve the issue of whether that testimony was properly excluded by the trial court. **It is well settled that a reviewing court may not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been.** *State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979)*; *see also State v. Cabbagestalk, 281 S.C. 35, 314 S.E.2d 10 (1984)* (stating that failure to make offers of proof prevents appellate court from determining whether exclusion of testimony is prejudicial and thus precludes appellant from raising the issue on appeal). **However, when it is clear from the record that prejudice exists, the issue will be preserved on appeal despite the absence of a proffer.** See *State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990).* **The reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice. That rule has been relaxed where the record clearly demonstrates prejudice.**" *State v. King 367 S.C. 131, 623 S.E. 2d 865 (2005).* The record reflects Stewart was utilizing the Evidence Motion's Exhibits to establish she was terminated for forwarding a racial overtone grievance versus misconduct as a defense of the employer's allegations. The record clearly indicates Stewart would be prejudiced by the exclusion of the documentary evidence presented via the Evidence Motion and during Stewart's cross-examinations. Further, the Evidence Motion explicitly sets forth the evidentiary value of each exhibit and its probative value as well. The record reflects the AHO and Appellate Panel were in receipt of and thus had knowledge of the Evidence Motion's content. Therefore, the issue of whether Stewart's evidence was properly excluded is preserved for review despite an inarticulate informal proffer. Here, the ALC and the Appellate Panel substantially affected Stewart's right to a meaningful appellate review and her right to a defense of the charges by the employer.

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[5] Rule 103 SCRE Notes instructs that "[t]his rule is identical to the federal rule with the exception of the omission of subsection (d) relating to plain error" and "subsection (A)(2) is the federal rule modified to require the grounds for admission to be stated .... The rule does change South Carolina Law by dispensing with the requirement of a proffer and statement of the grounds for admissibility where the substance of the evidence and the grounds are apparent from the content." Stewart's "Evidence Motion", cross examination of witnesses with the Evidence Motion's Exhibits and her testimony was apparent from their context.

The ALC and Panel applied an improper standard of review in this case, in that it considered Stewart's "Evidence Motion" with documentary evidence as "additional evidence". The "additional evidence" defined by the ALC and Panel were previously proffered to the Tribunal by Stewart and subsequently submitted as Exhibit 1 with her written arguments to the Panel as well. "An abuse of discretion occurs when a decision is based upon an error of law such as application of the wrong legal principle ..." *Deese, 332 S.E. 2d 541.* For this reason, this Court should reverse the decision of the ALC and SCDEW.

IV. WHETHER THE ADMINISTRATIVE LAW COURT ERRED OR ABUSED ITS DISCRETION IN UPHOLDING THE APPEAL TRIBUNAL'S ERROR OR ABUSE OF DISCRETION IN SUBMITTING AN INCOMPLETE RECORD ON APPEAL TO THE APPELLATE PANEL, CONTRARY TO S.C. CODE ANN REGS § 47-52(B)(1) AND SCRE 103(A)(2) AND IN DOING SO, DID SUCH VIOLATE STEWART'S PROCEDURAL AND SUBSTANTIVE CONSTITIONAL DUE PROCESS APPEAL RIGHTS, RESULTING IN SUBSTANTIAL PREJUDICE?

The Record on Appeal straightforwardly resolves this issue on its face. Stewart contends the AHO abused his discretion in failing to include Stewart's "Evidence Motion" with exhibits as part of the Record on Appeal forwarded to the Appellate Panel. As recanted above, Stewart filed her "Evidence Motion" to the Appeal Tribunal on August 17, 2013 (1/21/14 Supp. ROA 29-30).[6] During the Tribunal Hearing Stewart implicitly moved for entry of the "Evidence Motion" into the record when she specifically asked the AHO if he in fact was in possession of her Pleading before she utilized such for cross-examination of three of the employer's witnesses (AROA 168 Ln. 11-16, AROA 16, 1/21/14, Supp. ROA 30 and AROA 171-173, 180, 184-187). The record is silent on the AHO ruling on Stewart's Motion by specifically addressing the evidence attached or by simply stating whether such was admissible or inadmissible. However, what is certain is that Stewart explicitly in writing and on the record verbally moved to enter her Pleading into the record.

CLAIMANT:	I do, I do, the first thing is I just want to make sure, Mr. Cook, do you have a copy of the Motion to Submit Declaration of Facts Documentary Evidence and Arguments into the Tribunal hearing record?

[6] Pages 29-30 of this Pleading are missing from the Amended Record on Appeal (AROA) filed 2/19/14.

HEARING OFFICER: Yeah, I do have those ...

CLAIMANT: [UNCLEAR].

HEARING OFFICER: ... I do have those documents, yes.

(AROA 168 Ln 11-16)

Stewart Made An Informal Offer Of Proof Sufficient For Preservation of Appellate Review

Stewart argues before this Court that the above evidence was a sufficient "informal" offer of proof. Clearly, the captioned title of Stewart's pleading, "Motion to Submit Declaration of Facts Documentary Evidence and Arguments into the Tribunal Hearing Record", noticed the AHO she sought to admit her pleading and exhibits into the record. Through the motion's wording and the AHO's complicit consent, Stewart utilized the very exhibits to cross-examine multiple witnesses (AROA 169-174, 180-181, 184-188 and 196-197). Throughout such, the AHO at no point questioned the materiality of Stewart's use of such for exclusion. Such draws a reasonable inference the exhibits were relevant to Stewart's defense and were admitted into the record. At this point, a formal offer of proof was not necessary. By explaining to the AHO the substance of the proffered exhibits through cross-examination and the pleading itself, Stewart made a sufficient "informal" offer of proof. *Clements, 73 F.3d at 1336.* (Excluded evidence is sufficiently preserved for review when the trial court has been informed as to what counsel intends to show by the evidence and way it should be admitted and [the appeal court] has a record upon which [it] may adequately examine ..."). The Evidence Motion in verbatim stated Stewart was "moving [the] Tribunal to enter the ... Documentary Evidence ... as part of the Tribunal Hearing Record" and provided an explicit material value of each exhibit to her defense. Issues concerning excluded evidence is apparent from the content. Since the Tribunal was aware of and the transcript discloses the general nature of the evidence, which was excluded, this issue may be considered on appeal. Stewart exercised due diligence to follow the instructions of the Tribunal and Panel by forwarding her evidence to both the Tribunal and Employer prior to the hearing and, though not succinctly, moved to enter her evidence into the record. Subsequently, the Tribunal arbitrarily excluded and ignored her evidence in favor of the employer. The U.S. Court of Appeals for the 4th Circuit. in *Beaudelt v. City of Hampton, 775 F.2d 1274, 4th Cir. (1985)* describes Tribunal's action best.

Citing *Gordon v. Leeke, 574 F.2d 1147* the 4th Circuit stated courts should adopt the "indisputable desire that [pro-se] litigants with meritorious claims should not be 'tripped up' in court on technical niceties" *574 F.2d at 1151.*

The Administrative Law Courts Reliance Upon Roberts v. Roberts To Preclude Consideration Of Stewart's Evidence Motion And It's Evidentiary Exhibits Was In Error And Misplaced.

The ALC's characterization of Stewart's use of her Evidence Motion to cross-examine witnesses as a reference is legally wrong. As stated above, Stewart in fact moved to enter her Evidence Motion into the record informally. What is distinguishable in the instant case from *Roberts v. Roberts, 299 S.C. 315, 319, 384 S.E. 2d 719, 721 (1989)*, is that in *Roberts* the record reflects that the Respondent did not reflect any formal or informal offer of proof into evidence. Thus, principles of appellate review prevent the court from reviewing any alleged error. However, in the instant case the evidence was informally offered by way of the evidence in writing and Stewart's implicit verbal request for admission during the Tribunal Hearing (AROA 14 and AROA 186, Ln. 11-16). As such, *Roberts* is distinguishable to Stewart's case and circumstance, as Stewart offered her evidence to the Tribunal. "Rule 103(a)(2) does not require a formal offer of proof be made, or that the grounds be precisely specified, instead, it is sufficient if "the record shows, either from the form of the question asked, or otherwise, what the substance of the proposed evidence is." *US v. Arden 476 F.2d 378, 381 7th Cir. (1973)* and *US v. Gonzalez 700 F.2d 196, 201 5th Cir (1983).*

V. WHETHER THE ADMINISTRATIVE LAW COURT ERRED IN FAILING TO STRIKE FROM THE RECORD "STATEMENT OF FACTS" FROM THE RESPONDENT'S FIRST RESPONSE BRIEF NOT PRESENTED TO THE APPEAL TRIBUNAL AND APPELLATE PANEL

Stewart fully incorporates facts and arguments in her SCALC Reply Brief dated May 23, 2014 as fully stated verbatim in the instant appeal. In summary, the Respondent presented statements of fact before the SCALC for the first time in its response brief that were not presented

for consideration before the Appeal Tribunal or Appellate Panel. In her reply, Stewart anchored her objection upon the provisions of *SCALC Rule 36(G)* and *S.C. Code Ann Section 1-23-380(A)(4). Section 1-23-380* is entitled "Judicial Review upon exhaustion of administrative Remedies", and the first sentence of *1-23-380(4)* provides that the review conducted by the Court "must be confined to the record." ALC Rule of Procedure 36 is entitled "Record on Appeal", and Rule 36(G), which is entitled "Review Limited to Record", provides that the Court "will not consider any fact which does not appear in the Record." Stewart moved the SCALC to strike the "Statement of Facts" within pages (5) through (10) of the Respondent's brief, which did not appear in the record. The SCALC clearly did not rule on Stewart's motion and considered the additional facts in rendering its decision. Such constituted an abuse of discretion and prejudiced Stewart's substantial rights. As such, Stewart moves this Court of a remand to the lower court for additional proceedings as it may direct.

VI. WHETHER THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD ESTABLISHED THE APPELLATE PANEL'S RULING THAT STEWART WAS TERMINATED FOR EMPLOYEE MISCONDUCT OR FOR EMAILING CONCERNS OF RACIAL OVERTONES AND WHETHER THE ADMINISTRATIVE LAW COURT AND AGENCY ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW RESULTING IN SUBSTANTIAL PREJUDICE?

During the Appeal Tribunal Hearing, Simmons testified that from the conclusion of the May 3, 2013 HR Meeting his intent was to immediately seek Stewart's termination with county administration for allegedly calling him a liar and subsequently terminated Stewart's employment for such, a week later on May 9, 2013 (AROA 160 Ln. 10-13 and AROA 91). However, a closer examination of the documentary and testimonial evidence reveals Simmons in fact did not terminate Stewart for the reasons recanted during the Appeal Tribunal Hearing or Termination Notice entered into the AROA. In fact, the employer, Simmons, served as Stewart's star witness actually proving her case.

In the case at bar, the AROA is replete with substantial direct documentary evidence and testimony presented to the Appeal Tribunal by the employer and Stewart, that reflects first-hand that Simmons, prior to the HR Meeting, had no intent to terminate Stewart due to her stellar work performance (AROA 88, 110 Ln. 12-22, 114 Ln. 22-23, 117 Ln. 21, 124 Ln.6-9). Though she

initially refused to transfer, Simmons' actions and his own documentation established he actually made an affirmative decision not to terminate Stewart. In addition, his actions subsequent to the HR Meeting were contrary to the actions of an employer so offended by an employee's unprofessionalism that he would pursue immediate termination. The record provided substantial corroborative evidence supporting Stewart's position. A close examination of the facts embedded within the record reveals what the Appeal Tribunal and Appellate Panel refused to consider:

Facts In The Record Establishing Stewart Was Terminated For Forwarding An Email Grievancing Racial Overtones And Not Terminated For Misconduct

1. During the HR Meeting, after Stewart's refusal to transfer and the alleged misconduct, Simmons placed Stewart on "disciplinary decision-making administrative leave" for her to decide whether to transfer, resign or be terminated for refusing to transfer and to notify him by close of business of her intent (AROA 122 Ln. 16-23, AROA 159 Ln. 4-8 and SROA 89, para. 1). Such was accomplished to influence Stewart's continued employment.

> Pursuant to the *Oconee County Personnel and Policy and Procedure Manual*, dated September 2012, *Policy Number 7-2*, "*Employee Code of Conduct and Discipline*", *Positive Discipline Examples*, Simmons in taking this action instituted Oconee County's Policy, "that allows an employee every opportunity to meet the requirements, policies, rules and regulations necessary for continued employment. (AROA 141-142). In taking this action, Simmons immediately applied "Positive Discipline" to Stewart's alleged misconduct verses delayed cumulative "Termination" discipline a week later on May 6, 2013. This action inferred his intent to continue Stewart's employment. (AROA 141-142).

2. Conforming to Simmons' directives, at 4:37 PM Stewart contacted Simmons by cellular telephone call and SMS text messaging of her intent to transfer to her reassignment (SROA 7, AROA 159 Ln. 4-8, AROA 159 12-23. Affirming Stewart's continued employment, at 5:21 PM, Simmons responded in a SMS text message stating "I have made all the **arrangements** for your transfer. I believe you made the right choice and believe you will see a difference in Walhalla" (SROA 8, AROA 159 Ln. 14-23). Such does not draw an inference of the mindset of an employer so disrespected by unprofessionalism that immediate termination was being pursued. In fact, Simmons statement that he made all

the arrangements for Stewart's transfer confirms additional steps taken by him for Stewart to work effectively from her new Walhalla location. The HR Meeting identifies the SMS text message "arrangements" taken by Simmons for Stewart's transfer (AROA 120, Ln. 16-23). A reasonable mind surely would not conclude that transferring IT access and physically transporting Stewart's new office chairs for her comfort in his personally owned vehicle as actions conducive to seeking an immediate termination of an employee. To the contrary, this supports Simmons' mindset of preparing Stewart for continued employment.

3. With respect to the circumstances surrounding Simmons' "You made the right decision" comment, when asked by the AHO why would he communicated such to Stewart when he was allegedly seeking termination, Simmons was dumbfounded in his reply. Simmons, unknowingly as Stewart's star witness, replied, "I can't explain that other than I wanted her to feel comfortable ... I can't tell you why just words of comfort for lack of a better explanation" (AROA 161 Ln. 21-26). Although, this as well is not conducive with immediately seeking termination, it does establish Simmons' intent to "comfort" Stewart in her transition to Walhalla. Generally, employers seeking immediate termination of an employee do not cajole, delay or "comfort" them. Employers immediately terminate or suspend employees until such termination can be permanently effectuated.

4. Further evidence that Simmons, as Stewart's star witness, had no intent and did not terminate Stewart for the alleged misconduct is the May 3rd Post HR Transfer Memo authored and signed by Simmons (SROA 9). This Memorandum provided a single paragraph summary of the events of the May 3, 2013 HR Meeting. Interestingly, the Memorandum, produced immediately after the meeting, did not memorialize any alleged misconduct or any subsequent immediate intent to seek Stewart's termination as a result. This action is not characteristic of Simmons' propensity to document, document, and document. Consider Simmons' "documentary behavior". 1.) The HR Meeting on May 3, 2013, was though unusual, documented by way of audio recording (AROA 75, 107 Ln. 7-8). 2.) Simmons prepared a Pre-HR Memorandum ("May 3rd Pre-HR Meeting Transfer Memo") prior to the HR Meeting on May 3, 2013 to document Stewart's transfer (AROA 87). 3.) After the HR Meeting Simmons documented such by preparing a Post HR

Memorandum ("May 3rd Post HR Transfer Memo") dated May 3, 2013. 4.) Four days later on May 7, 2013, Simmons prepared an additional HR Memorandum ("May 7th HR Transfer Memo") entitled "Transfer" purportedly documenting the events of May 3, 2013 more adversely to Stewart for her HR file (AROA 89). The May 3rd Post HR Transfer Memo provides immediate insight into the mindset of Simmons immediately following the HR Meeting held on May 3, 2013. If this Court were to believe Simmons' words in his official Memorandum, he stated, "she [Stewart] was ... asked to contact ... Simmons by the end of the day to relay her decision for further employment with Oconee County". Simmons' mindset here was not as he testified, to seek immediate termination. Simmons did not document any misconduct or any intent to terminate Stewart. A reasonable objective fact finder can draw an inference from Simmons' words that his intent was not termination but a determination from Stewart on her decision to continue her employment and documenting the events leading up to the incidents of May 3, 2013. However, the alleged decision to seek termination and the alleged liar comment were of no significance based on Simmons' Memorandum. Even Simmons' trusted "right-hand" Sheriff, did not testify and confirm that Simmons sought Stewart's immediate termination. When asked for her "hearsay" of what Simmons says transpired, she could only say that Simmons said, "she just called me a liar". With no additional details provided, when pressed further, Sheriff only confirmed that Stewart would make a decision whether to continue her employment by close of business (AROA 178, Ln. 16-24).

5. Simmons decision to place Stewart on "disciplinary administrative decision-making leave" further illustrates Simmons non-intent to seek Stewart's immediate termination. Prior to the alleged "liar" statement and after informing Stewart of his decision to transfer her, Simmons stated to Stewart, "This is heavy this is significant ... so ... take the rest of the day off okay ... and please let me know by the end of the day what your intent is ..." (AROA 122, Ln. 16-20). Is this Simmons, again, "comforting" Stewart? Interestingly, here Simmons' position does not change. During the timeframe, Simmons testified he was purportedly seeking Stewart's immediate termination. However, on Monday, May 6, 2013, Simmons emailed Kim Hopkins of Oconee County Payroll and directed Stewart's "administrative leave" would be with pay (SROA 5 and AROA 89). Yet, another action

by Simmons that is contrary to the mindset of an employer seeking to terminate a disrespectful employee. Simply, as stated above, this action was more aligned to "Positive" discipline for Stewart's decision to not transfer as directed in the HR Meeting. Employers rarely "compensate" an employee they intend to terminate with hours of unearned wages.

6. On May 7, 2013, Simmons allegedly prepared the May 7th HR Transfer Memo detailing Stewart's misconduct (AROA 89-90 & 171-172). Here, Stewart truly views Simmons as her star witness. **A close examination of the May 7th HR Transfer Memo provides direct unequivocal substantial evidence that Simmons had no intent, as he testified, to immediately seek the termination of Stewart's employment. The May 7th HR Memo actually proves her employment was retained after the alleged misconduct.** Simmons testified that on Friday, May 3, 2013 at the time he informed Stewart she made the right decision to transfer he planned to seek her termination (AROA 160, Ln. 10-13). Simmons specifically testified:

> ... [I]t was my intent at that time to go straight to the County Administration ... it was Friday afternoon through Monday morning, it was that time that I made the decision to ask for permission to terminate "her employment" (AROA 161, Ln. 15-20).

Notwithstanding the above facts and those to follow below, this testimony contradicts Simmons' May 7, 2013 HR Memorandum, which states in no uncertain terms:

> **While I have reluctantly agreed to allow Mrs. Stewart to continue her employment in Walhalla, I feel there are sufficient grounds for termination. I believe no further incidents should be tolerated.**

The aforementioned May 7th HR Transfer Memo was entitled "Transfer", just as the two preceding HR Memorandums written by Simmons, to further document with Human Resources Stewart's alleged behavior as a possible terminal offense for recording in her HR file for zero tolerance of any similar future incident. This May 7th HR Transfer Memo served more as a letter of reprimand than as a basis for termination. Simmons, four days after the alleged incident, specifically identifies his decision to allow Stewart to continue her employment. However, his sworn testimony states that he sought to immediately

terminate her on May 3, 2013. The aforementioned facts and Simmons' own Memorandum has a "tale of two cities". In the "first tale" Simmons is doing whatever is reasonably necessary to retain Stewart before and after the alleged liar incident up through the May 7, 2013 HR Transfer Memorandum. In the "second tale", on May 9, 2013, Simmons cannot terminate Stewart quick enough. Why? Before Stewart uses the record to materialize the why in the "second tale", she points to additional relevant facts. The record clearly establishes that the conduct Stewart was alleged to have committed has never transpired within her work environment (AROA 163, Ln 23-26, 172 Ln. 3-24 & 177 Ln. 19-21). "A single instance of minor misconduct will not generally disqualify a claimant from receiving unemployment compensation benefits, but recurrent violations of the standards of behavior which an employer has the right to expect of an employee constitutes misconduct warranting disqualification. *Schwan's Home Services, Inc. v. SCDEW, Docket No.: 11-ALJ-22-0317-AD* citing *76 Am. Jur. 2d Unemployment Compensation 69 (Nov. 2010)*. The record clearly establishes Simmons acknowledges Stewart has never committed the alleged misconduct previously and no prior disciplinary recording of such exists (AROA 164, Ln. 1-3).

7. In the "second tale", Simmons actions are revealing. As recanted above, and as the record reflects, Stewart's SMS text message receipt was the last interaction or direct communication between Stewart and Simmons until May 9, 2013 (SROA 8). On May 9, 2013 at 8:44 AM Stewart forwarded an email to Simmons documenting concerns of racial overtones as a basis to document her work product (AROA 130 & 171 Ln. 13-24, 174 Ln. 1-5). At approximately 2:00 PM on May 9, 2013, Stewart was terminated by Simmons for alleged misconduct on May 3, 2013 (AROA 131 and 173, Ln. 11-17). The only intervening "incident" since Simmons' "May 7th HR Transfer Memo" that qualifies as an "intolerable incident", pursuant to the Memorandum is in fact Stewart's May 9th Racial Overtone Email, **the actual reason for Stewart's termination.**

8. Simmons' testimony explains why he would immediately terminated Stewart after this email. Simmons testified that the racial incidents Stewart identified in grievances that transpired in Walhalla, (AROA 94), were not inappropriate in his opinion. He further

stated, "Ms. Staggers construed some incidents in an exaggerated and embellished manner". Simmons further opined, "I would not classify it as anything significant and certainly would not classify it as harsh hostile or racist". He further describes the incidents Stewart reported but clearly omits Stewart's grievance of the use of the term "Nigger" with her within the Walhalla office setting (AROA 162, Ln. 12-29 and 94):

EMPLOYER WITNESS-2:	**(Line 14) I don't agree that the incidents were inappropriate ...**
	(Line 21-23) I would not classify it as anything significant and certainly would not classify it harsh, hostile or racist.
	(Line 25-27) ... there was nothing that took place from my staff that in my opinion would be grounds to refuse to go back to the office considering that I have made great strides with the personnel

Exhibits 5, 6, 7, and 8 of Stewart's Initial Appeal Brief to the ALC referenced at AROA 94 illuminates what Simmons deems as embellished and exaggerated. Simmons deems such behavior acceptable based on his testimony. Further, Simmons opined, "[t]here was nothing that took place from my staff in my office that would be grounds to refuse to go back to that office", which is inherently false and misleading. Stewart, in fact, experienced racial insensitivity; see Exhibits 1-4 of the ALC Initial Appeal Brief, which shows his staff, forwarding a racially insensitive inner office email concerning minorities and internal office racial jokes posted on the employee bulletin board by "his staff". The rapper Simmons references, "Lil Kim", is known to be sexually explicit and raunchy. This for Stewart was a racial insult.[7] Simmons makes much of his corrective actions for the record; however, a close review of the same does not identify any corrective action on racial sensitivity nor any notification to Stewart on what the corrective action consisted of.

[7] Stewart is a graduate of the University of South Carolina with two bachelor degrees, is a hardworking professional and nothing synonymous to the stereotype of a "African-American" sexually promiscuous woman depicted in Exhibit 5 of ALC Initial Appeal Brief, "Lil' Kim".

Simmons, as a white Caucasian male insensitively stated an "African-American" female in an all-Caucasian majority workplace, was "exaggerating" and immediately terminated her when she raised concerns of racial overtones due to the aforementioned office history. Simmons words on the record evidences his insensitivity and disagreement with Stewart's complaints of racial overtones.

9. Though Simmons testifies that he immediately sought Stewart's termination with county administration as of May 3, 2013, the record actually betrays his contentions. First and foremost, in this "second tale" Simmons testified that the decision to terminate Stewart was ultimately made on Thursday, May 9, 2013 after conferencing with the county administrator (AROA 160, Ln 15-26).[8] Simmons attempts to explain the failed attempts to contact the administrator from Monday, May 6 through Thursday May 9, 2013. Though he falsely testified he prepared the May 7th HR Transfer Memo on Wednesday, May 8, 2013, Simmons, in our age of digital communication, provided no evidence of any conversations or attempts of communication with the county administrator prior to Stewart forwarding the racial overtone email. This is uncharacteristic of Simmons' document, document, and document persona. Even more damaging, Assistant County Administrator Glenn Breed (hereinafter, "Breed"), testified about his involvement in discussions to terminate. Breed testified he initially was directed by the county administrator to address the issue with Simmons May 9, 2013 (AROA 189, Ln. 13-16). Ever more damaging the AHO questioned Breed about his involvement in discussions to terminate Stewart from May 3rd to May 9th and Breed could only testify he was only involved **after May 9th**. Further, the AHO specifically asked whether Breed spoke to Simmons concerning Stewart's discharge prior to May 9th and Breed answered "No" (AROA 190, Ln 5-14).

> HEARING OFFICER: In the time between that May 3rd meeting and Ms. Staggers' [Ms. Stewart] discharge on May 9th, were you in talks with Mr. Simmons to decide whether he had the authority to

[8] **All of Oconee County Court personnel, to include Simmons, hours are 8:30 AM to 5:00 PM according to Simmons. (AROA 90 and 106). This meeting transpired after the 8:44 AM Racial Overtone Email forwarded to Simmons from Stewart.**

	discharge Ms. Staggers [Ms. Stewart]?
EMPLOYEE WITNESS-1:	I was after May the 9th.
HEARING OFFICER:	So, prior to her discharge date, you did not speak to Mr. Simmons about whether he had the authority to discharge Ms. Staggers [Ms. Stewart]?
EMPLOYEE WITNESS-1:	No, sir, it was my understanding that he was trying to talk with Mr. Moulder that was a very busy time, we were right in the middle of preparing for third reading of the budget, the County budget and Mr. Moulder's schedule did not allow a meeting to occur ... a meeting to occur.

Again, no corroborating evidence of such in the record (AROA 190, Ln. 5-14). This is significant on its face, substantial evidence shows Simmons proceeded to terminate Stewart, in fact on May 9th, no evidence in the record establishes such occurred prior to her May 9th Racial Overtone Email and the Assistant County Administrator admits no discussions transpired surrounding Stewart's alleged termination until after Stewart forwarded her May 9th Racial Overtone Email. Simmons confirmed receipt of Stewart's May 9th Racial Overtone Email on May 9, 2013 at 8:44 AM, a minimal of 14 minutes after office hours commenced (AROA 173, Ln. 11-24). In turn, Simmons also confirmed he terminated Stewart's employment on May 9th at 2:00 PM – five hours after receipt of the email and after meeting with county administration. It is here that the record further reveals the "why" of Stewart's termination and the "second tale" of Simmons' story. The facts in the record establishes Stewart was retained for continued employment by Simmons, and subsequently terminated after Simmons received Stewart's email, and subsequently met with county administrators on May 9, 2013. As delineated in Stewart's "Addendum to Application for Leave to Present Newly Discovered Evidence", "Internal Notes" from

Stewart's Personnel File were released on September 30, 2013 by the employer in preparation of a county grievance hearing surrounding Stewart's termination. The "Internal Notes" specifically identify the meeting that was convened to determine Simmons' authority to "hire and fire" actually transpired on May 15, 2013 after Stewart's May 9, 2013 termination date. Such confirms Breed's testimony of his involvement after May 9, 2013. In addition, such establishes "there is no reasonable probability that the facts [of Simmons seeking Stewart's termination prior to May 9, 2013] could be as relayed by [Simmons] upon whose testimony the [Appellate Panel's] findings [were] based." See *Pines Ass'n for Prot. of Wildlife, Inc. S.C. Dept. of Natural Res 550 S.E. 2d 287, 292 (2001).*

In applying the "substantial evidence" standard of review, Stewart understands this Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact but may reverse where the decision is affected by an error of law. *Liberty Mutual Ins. Co. v. S.C. Second Injury Fund, 611 S.E. 2d 297 (Ct. App. 2005).* However, this Court has the authority to reject the findings of fact of the Appellate Panel when those findings are "clearly erroneous in view of reliable, probative, and substantial evidence on the whole record" under the same "substantial evidence" rule. *Todd's Ice Cream, Inc. v. S.C. Dept. of Emp. Sec. Comm., 315 S.E. 2d 373, 375 (Ct. App. 1984).*

Stewart disputed every allegation of the alleged basis for her termination and has offered substantial unrebutted evidence to contradict the bare, unsupported allegations made by Simmons with no evidence to support his claims of terminating Stewart for misconduct. Considering the aforementioned fact, "considering the record as a whole" no reasonable fact finder's objective review of the record could come to the conclusion that Stewart's alleged misconduct was the cause of her termination. *Merck at 339.* An employer who alleges that a claimant is ineligible for unemployment compensation by reason of misconduct bears the burden of proof on that issue. *76 Am. Jur. 2d Unemployment Compensation § 71 (Nov. 2010).* **"An employer's burden of proof with regard to misconduct includes the burden to prove that the alleged misconduct was in fact the reason for the employees discharge".** Here, the SCALC and Appellate Panel affirmed the Appeal Tribunal because it determined "[Stewart] was discharged for misconduct connected with the employment" (AROA 149). However, the record, which

the Tribunal, Panel, and ALC did not consider as a whole, shows that Stewart was not discharged for misconduct but rather was terminated for emailing concerns of racial overtones. Simmons' "May 7th HR Transfer Memo" expressly stated, **"... I have reluctantly agreed to allow Mrs. Stewart to continue her employment in Walhalla ..."**. Then, Simmons reverses on May 9, 2013 and terminated Stewart five hours after emailing concerns of racial overtones. A denial of unemployment benefits may not be based upon "the reasons why a claimant might have been discharged" but rather must be based upon "the reason or reasons why [she] was discharged", *Barton v. SCDEW, Docket No.: 10-AW-30-0438-AP* citing *Randle v. Administrator, La. Office of Employment Sec., 496 So. 2d 488, 492 (La Ct. App. 1986).*

The South Carolina Supreme Court in *Porter* stated, the "'substantial evidence' standard of review does not mean the Court will accept an ... agency's decision at face value" and the agency "must fully document its findings of fact and base it decision on reliable, probative, and substantial evidence on the whole record". *Porter* further stated, "an administrative body must make findings, which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings". Moreover, "if material facts are in dispute, the administrative body must make specific, express findings of fact". The Appellate Panel did not accomplish the mandates of *Porter* and in fact refused to include Stewart's evidence and pleadings at the tribunal level as part of the Appellate Panel Hearing (AROA 7-34, 36-59, and 149-152).

Given that the Panel did not rule on the above issues the case should be remanded. In order for the ALC to perform the necessary review under the "substantial evidence" standard, the lower Appellate Panel must have performed the same review. More importantly, the Appellate Panel opinion is entitled to no deference because it did not consider the record as a whole. There was no meaningful analysis of the evidence on the record as a whole under the "substantial evidence" standard as statutorily required. As such, Stewart moves this Court to modify, reverse, or remand as this Court deems appropriate.

VII. WHETHER AS A MATTER OF AND CONCLUSION OF THE LAW THE ADMINISTRATIVE LAW COURT AND THE APPELLATE PANEL ERRED IN CONCLUDING STEWART'S ALLEDGED MISCONDUCT, MET THE STANDARD OF CAUSE FOR TERMINATION AS DELINEATED IN THE EMPLOYER'S EMPLOYEE HANDBOOK POLICY FOR EMPLOYEE CODE OF CONDUCT AND DISCIPLINE, RESULTING IN SUBSTANTIAL PREJUDICE?

Simmons' Termination Notice, AROA 131, specifically alleged Stewart displayed a lack of professionalism and insubordination for stating to him, "You're a liar" following a refusal to be transferred. To which, Simmons alleges this statement was made by Stewart while disagreeing with Simmons' response to questions pertaining to her whistleblower complaint emailed on April 30, 2013 (AROA 102). Whereas, Stewart reasserts Simmons' allegations are inaccurate, misleading, and an over-simplified mischaracterization of content surrounding the May 3, 2013 HR Meeting. The Employee Handbook's, *Policy Number 7-2, "Employee Code of Conduct and Discipline, Termination Examples,"* dated, September 2012, exemplifies termination for insubordination as "refusal to perform assigned work" (AROA 142). Thus, Stewart's actual adherence, transferring to Walhalla, as per the Employer's instruction, is not analogous to criteria satisfying elements of insubordination contained within the Employee Handbook and was not the basis for her termination.

In the Termination Notice, AROA 13, Simmons purports to terminate Stewart for stating to her supervisor, "You're a liar", which Simmons described as a lack of professionalism. Simmons alleges this statement was made by Stewart while disagreeing with his response to questions pertaining to her grievance. The characterization by Simmons of the alleged statement is not conducive to the Employee Handbook's description of employee misconduct. The alleged statement does not constitute a "refusal by Stewart to perform assigned work". Although the "termination examples" contained within the Employee Handbook are not all-inclusive but illustrative, the basis for immediate termination provided by them, such as fighting, theft, refusal to perform assigned work, harassment, are not found in the present facts (AROA 142). Simmons' termination of Stewart was dissembled for reasons extrinsic of misconduct. Specifically, as argued and proven above, Simmons effectuated this termination on May 9, 2013, five hours after an email by Stewart for concerns of racial overtones. Stewart stating to Simmons "that can't be accurate", (or as Simmons alleges "You're a liar"), surrounding a difference in recollection of events pertaining to her whistleblower complaint of fraudulent overtime reporting, is not a lack of

professionalism or a known and deliberate act, committed by Stewart, harming Simmons' operation objectives. Stewart's demeanor and communication during the HR Meeting was a calm expression of concern, absent any offensive language or unprofessionalism. This is strong evidence that such continued during the unrecorded portion of the HR Meeting in which the alleged misconduct transpired. On the contrary, there is a strong inference the close temporal proximity in time "before" Stewart's whistleblower complaint that the complaint triggered her involuntary transfer back to Walhalla, where racial animus occurred. Merely, informing Simmons of inaccuracies, after an Employer's denial of facts surrounding her whistleblower complaint, is not employee misconduct, within the meaning of the Employee Handbook, or *S.C. Ann § 41-35-120 (2) (a)*. Disagreeing with an employer on his participation and recollection of events with which he was involved in, is not "[c]onduct evidencing such willful and wanton disregard of an employer's interest or disregard of standards of behavior the employer has a right to expect from his employee". Even assuming Stewart was, which she was not, "being merely argumentative, [as Simmons interprets] it is not sufficient for discharge for misconduct." *Payne v. Antoine's Restaurant, 217 So. 2d 514 (La. App 1969)*. Even assuming, arguendo, that Stewart was argumentative, the alleged comment transpired privately, did not threaten management's authority over co-workers, there were no threats physically or verbally and there was no abusive language or vilification of Simmons. *Sheff v. Board of Review Illinois, 470 N.E. 2d 1044 (Ct. App. IL 1984)*. Rather, in the context of Stewart's professionally courteous response and demeanor, her communication during the HR Meeting was a calm expression of concern absent any offensive language or unprofessionalism[9] (AROA 75 and 107-125).

[9] Claimant's exhibit 1, AROA 75, was excluded from the Record by this Court and deemed duplicative by this Court. Such precluded Stewart from establishing she did not communicate in a disrespectful tone during the HR meeting or afterwards. "Actually" listening to the audio recording, as opposed to reading from a cold record, reveals the tone and mannerism of communications between both parties.

VIII. WHETHER STEWART AS A PUBLIC EMPLOYEE EXERCISING HER FIRST AMENDMENT CONSTITUTIONAL RIGHT TO PURSUE A GRIEVANCE, PURSUANT TO THE EMPLOYER'S EMPLOYEE HANDBOOK, DISPLAYED MISCONDUCT BY VERBALLY DISAGREEING WITH THE ACCURACY OF THE EMPLOYER'S RECOLLECTION OF FACTS SURROUNDING HER GRIEVANCE AS A MATTER OF LAW? WHETHER THE ADMINISTRATIVE LAW COURT ERRED IN DETERMINING THIS ISSUE WAS NOT RAISED TO THE APPELLATE PANEL RESULTING IN SUBSTANTIAL PREJUDICE?

In the capacity of a public employee and as a private citizen, Stewart possessed the constitutionally protected right in freedom of speech, which precludes her employer from discharging her, when presenting complaints of public concern such as misappropriation of county payroll funds. See *Rankin v. McPherson, 483 U.S. 378, 97 L. Ed. 2d 315 U.S. Supreme Court (1987)* and *Urofsky v. Gilmore, 216 F.3d 401, 406 4th Circuit Court of Appeals (2000).* In accordance with the Employee Handbook, the lack of professionalism proclaimed by the employer alone is not an identifiable act that would have provided sufficient notice of immediate termination to Stewart.

As a threshold matter, constitutional protections for freedom of expression for public employees is protected under the *First Amendment* of the United States and *Article 1* and *Section 2* of the South Carolina Constitution. Our U.S. Supreme Court has held that protection of such expression must 1) relate to a matter of public concern, 2) must balance the competing interests of the employee's rights and employer's interest in the efficient operation of government. *Pickering v. Bd. of Edu, 157 F3d 271, 277, 278 (4th Cir. 1994)*, freedom of expression was deemed a "public concern" in grievances attacking the school's use of funds. Our 4th Circuit Court of Appeals has also held that "public employees do not forfeit the protection of free expression simply because they decide to express their views privately rather than publicly" as Stewart accomplished with Simmons during the HR Meeting on May 3, 2013. Stewart's grievances on the Misappropriation of overtime and payroll funds by Sheriff and her subsequent discussion and disagreement of the facts by Simmons was constitutionally protected free speech. For the above stated reasons, Stewart submits she was terminated for exercising her right to freedom of expression in a manner of "public concern" when she utilized the employer's grievance process. The Appellant Panel's decision should be reversed and/or modified for failure to address the issues raised and error in law.

Stewart, through her pleading, that the AHO excluded from the record, submitted a grievance dated, April 30, 2013, AROA 102 & 135-142,[10] Employee Handbook to the Appeal Tribunal to become part of the record. In the Employee Handbook, *Policy Number 7-1, "Employee Grievance and Appeal Procedure Step One: Discussion Between Employee & Immediate Supervisor"* states:

> The Employee should **first discuss the problem or grievance with [her] immediate supervisor**. The supervisor will investigate the matter and seek an appropriate solution to the situation. A written response to the employee will be provided within three working days.

In conversing with Simmons after the May 3, 2013 HR Meeting, Stewart was simply exercising her right to seek resolution of a grievance submitted three days prior to the HR meeting. Further, the discipline policy does not preclude an employee, such as Stewart, from impugning or rather "challenging" the accuracy of information pertaining to a grievance with her Employer. It is unreasonable to classify Stewart's disagreement with Simmons' recollection or version of facts as misconduct because Stewart states that what is being stated is inaccurate or allegedly untruthful; such nullifies the employers' grievance process as ineffective. Stewart submits that in actuality the standard of behavior, which the Employer had the right to expect, was in fact what Stewart exhibited in reporting what she believed to be misappropriations of payroll funds by Sheriff and communicating disagreement of what she believed to be inaccurate surrounding Simmons' version of events. The decision of the Appellate Panel effectively states, that an employee exercising the employee grievance procedures and verbally disagreeing with an Employer's statements within that process, is effectively misconduct. It further conveys Stewart had no right to verbally disagree with Simmons' recollection of facts surrounding the grievance, which is opposite of the Employee Handbook that **mandates** discussing problems or grievances with the supervisor.

[10] The Respondent again excluded from the Record on Appeal relevant documents. AROA 13 lists Exhibit 29 of the "Evidence Motion" as Employee Handbook" pgs. 53-60. The AROA 135-142 omits pg. 56 of the "Employee Handbook" attached to this brief as Exhibit 10.

This Constitutional Issue Was Raised To The Appellate Panel And The And The Appellate Panel Erred In Concluding Such Was Not Resulting In Substantial Prejudice To Stewart's Right To Appellate Review.

In refusing to rule on this issue the ALC specifically stated:

> ... Appellant contends the Appellate Panel erred in finding she was terminated for misconduct when she was exercising her First Amendment right to free speech when she engaged in insubordination. This constitutional argument was not raised to or ruled upon by the Appellate Panel. Consequently, it is not preserved for this Court's review. See In re Care & Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal").

The Administrative Law Court's opinion further stated:

> One of the issues with the Department's previous fling was the omission of pages 21-23 of Motion 2, which the Department claimed to have lost. In its March 18, 2014, order the Court ruled the pages were not considered evidence, and did not need to be included in the record.

Motion 2 identified by the ALC is in fact Stewart's written arguments submitted to the Appellate Panel. The pages the ALC permitted the Respondents to exclude from the record actually preserved the argument the ALC incorrectly deemed was not preserved for review. Exhibits 8 and 9 of Stewart's Initial Appeal Brief were submitted in support of this argument without objection from the Respondent. Stewart clearly raised the issue with Appellate Panel that she was terminated for exercising her "right" to pursue a grievance under the Employee Handbook (See AROA 45).

Whether Stewart In Exercising Her Right To Pursue A Grievance, Displayed Misconduct By Stating To The Employer "That Can't Be Accurate" In Disagreement To the Employer's Recollection Of Facts Surrounding A Whistleblower Complaint?

The "right" Stewart has as a county clerk of court (public employee) is constitutional. It is well established that the right to file grievances by public employees is inherently constitutional in nature. *Connick v. Myers 461 U.S. 138, 145, 103 S. Ct. 1684 (1983).* A careful review of pages

29-30, what the ALC deems as Motion 2 before the Appellate Panel, is dispositive. That pleading, Exhibit 8 of the ALC Initial Brief, states:

> ... Stewart was exercising her right to seek resolution of a grievance.

In Stewart's subsequent Appeal to the Administrative Law Court, she raised the same issue:

> **Whether Stewart, As A Public Employee, Exercising Her First Amendment Constitution Right To Pursue A Grievance, Pursuant to the Employer's Handbook, Displayed Misconduct By Verbally Disagreeing With The Accuracy Of The Employer's Recollection Of Facts Surrounding Her Grievance As A Matter of Law?**

Substantively this is the exact argument Stewart presented before the ALC. Stewart submits that the ALC in refusing to address this issue abused its discretion, causing her substantial prejudice to a meaningful appellate review. In short, the ALC abused its discretion. The ALC in *S.C. Dep't of Corrections v. Bryant, Docket No.: 12-ALJ-30-0014-AP (2013)* stated, "an abuse of discretion occurs when [a] ruling is based upon an error of law, such as application of the wrong legal principle or, when based upon factual conclusions, the ruling is without evidentiary support; or when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be arbitrary and capricious", citing *State v. Allen, 634 S.E. 653, 656 (2006).*

IX. WHETHER AS A MATTER OF AND CONCLUSION OF LAW THE ADMINISTRATIVE LAW COURT AND APPELLATE PANEL ERRED IN CONCLUDING STEWART'S ALLEGED MISCONDUCT, MET THE STANDARD OF CAUSE FOR TERMINATION AS DELINEATED IN THE EMPLOYER'S EMPLOYEE HANDBOOK POLICY FOR EMPLOYEE CODE OF CONDUCT AND DISCIPLINE, RESULTING IN SUBSTANTIAL PREJUDICE?

A decision of the administrative department or agency "is supported by 'substantial

evidence' when the record as a whole allows reasonable minds to reach the same conclusion as the agency". *Friends of the Earth v. Pub Serv. Comm'n of S.C. 692 S.E. 2d 910, 913 (2010).* In applying this the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based". *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 550 S.E. 2d 287, 292 (2001).*

As recanted in the above statement of facts, on May 9, 2013, Stewart was terminated for allegedly calling her employer, Simmons, a "liar" after an HR Meeting on May 3, 2013. During the Tribunal Hearing Stewart refuted those allegations. In a "nutshell", the Appellate Panel made additional findings of fact and ruled, "we find credible the testimony of [Simmons], particularly since he immediately reported the claimant's disrespectful comments to [Sheriff]" (AROA 151). Simply, the Panel's decision was based on uncorroborated hearsay testimony of Sheriff (AROA 178, Ln. 16-24), whom Stewart filed a grievance against forty-eight hours before the alleged final incident. Interestingly, Sheriff's testimony on this matter was extremely brief and not detailed. More importantly, Stewart provided direct proof that "there is no reasonable probability that the facts could be as related by Sheriff or Simmons upon whose testimony the finding was based". Simmons testified to Sheriff being his "right hand" to an array of issues within the county's magistrate department offices and deemed her his "senior or lead court clerk" (AROA 167 Ln. 9-13). A close examination of the record establishes Sheriff and Simmons both produced documentary evidence prior to Stewart's termination and Appeal Tribunal Hearing that expressively documents the significant events of May 3, 2013. After the "HR Meeting", Simmons and Sheriff prepared the May 3rd Post HR Transfer Memo that explicitly outlined events that transpired during and after the HR Meeting (SROA 9). As have been noted previously, the May 3rd Post HR Transfer Memo documented no misconduct or details of any incident in which Stewart allegedly called Simmons "a liar". The May 3rd Post HR Transfer Memo was prepared by both Simmons and Sheriff. Both are listed as the preparers and communicators of the HR Memorandum as documented in the lower left corner with the initials of "MTS/das" (SROA 9, AROA 170 Ln 19-22, 171-172). Both Sheriff and Simmons identified themselves within the record upon their initial testimony and provided their full names corresponding with the aforementioned initials (AROA 158, Ln. 1-2 and 176 Ln. 8-9). Here, both prior to any termination or the instant litigation, attested in their official employment capacities what transpired during and after the "HR Meeting"

for formal documentation in Stewart's personnel file. However, now the tale of both has shifted. Sheriff further evidences a "shift" in her testimony on the record and establishes she did not know what was discussed between Stewart and Simmons (AROA 177, Ln. 8-14). Immediately thereafter, she testifies that she knows what happened because Simmons told her that Stewart said that he was "a liar" (AROA 178, Ln. 16-24). This statement is uncorroborated "hearsay" that contradicts Simmons' and Sheriff's May 3rd Post HR Transfer Memo. Based upon the Appellate Panel's decision, the testimony of Simmons' as a judge and Sheriff's uncorroborated "hearsay" was the sole basis for its decision to determine Stewart committed misconduct.[11]

Our Supreme Court in *Porter supra* stated, "substantial evidence is more than a mere scintilla of evidence" *507 S.E. 2d at 332*. Here, the evidence relied upon by the Panel is solely unreliable and the Panel did not sufficiently detail why Stewart's documentary evidence and the May 3rd Post HR Transfer Memo were not sufficient evidence for Stewart's defense. The Panel "must fully document its findings of fact and base its decision on reliable, probative, and substantial evidence on the *whole* record". *Id.* Here, the Panel was silent on Stewart's entire "Evidence Motion" that contained material facts in dispute supporting her defense. To this regard, the Panel "must make specific express findings of fact". Here, the Appellate Panel did not weigh the evidence submitted by Stewart but moved to resolve the factual disputes in favor of the employer. Simmons to this end presented personnel to show that Stewart did call him "a liar" and utilized uncorroborated "hearsay" testimony of Sheriff in an attempt to prove his claim. Stewart directly refuted such with her own sworn testimony and direct documentary evidence and the May 3rd Post HR Transfer Memo, which establishes Simmons' and Sheriff's attestation that no misconduct or "liar" comment transpired (AROA 194 Ln. 17-23, 195 Ln. 10-20, and SROA 9). Further, there was also ample evidence in the record that Stewart never exhibited any propensity to communicate in a disrespectful or insubordinate manner leading up to her termination. In fact, Simmons after being asked by the AHO if Stewart had ever communicated inappropriately in a similar manner stated, "with me personally, no" (AROA 163 Ln. 23-26). When Sheriff was questioned by the AHO whether she knew of any unprofessional communication by Stewart, she responded, "No" (AROA 177 Ln. 19-21). Simmons actually rated and praised Stewart as recently

[11] The Panel made a material statement that Stewart used poor judgment in questioning Simmons' honesty. (AROA 151). Pursuant to *Boynton v. Neubeck 296 N.W. 636, 642 (Wis. 1941)* adopted by *Lee v. S.C. Employment Sec. Comm'n 291 S.E.2d 378, 379 (S.C. 1982)*, errors in judgment or discretion are not to be deemed misconduct.

as January 10, 2013 in her latest employee performance evaluation and described her communication as "dealing tactfully with associates, expresses with clear statements, and handles her affairs professionally" (AROA 97). As of May 3, 2013, Simmons retained this perspective when he stated in the May 3rd Pre-HR Meeting Transfer Memo "... [S]tephanie ... does a great job. She has received good reviews from me ..." (AROA 88).

The record is absent any substantial evidence that Stewart met the statutory definition of misconduct pursuant to *S.C. Code Ann. § 41-35-120 (2)(a)*. In fact, there is substantial evidence in the record that Stewart did not engage in any inappropriate workplace misconduct. More importantly, the record establishes the ALC Panel and Tribunal failed to consider the "record as a whole" and this case should be remanded for further proceedings, or modify the Panel's ruling. The evidence "as a whole", particularly Simmons' and Sheriff's attestations in the Post HR Memorandum, established there is no reasonable probability the facts could be related by [Simmons or Sheriff] upon whom the testimony the finding was based". *Sea Pines Supra 550 S.E. 2d at 292*. Such resulted in substantial prejudice to Stewart's right to a meaningful appeal on all her appellate issues.

CONCLUSION

For the above stated reasons, Stewart respectfully requests that this Court reverse the ALC and remand this case to the Appeal Tribunal so, 1) the SCDEW can consider the "previously submitted" evidence not considered or ruled upon by the Appeal Tribunal and Appellate Panel; 2) so Stewart can introduce the "additional evidence", as briefed in her attached Motion, for further fact-finding proceedings consistent with this Court's opinion, or in the alternative; and, 3.) find the decision of the ALC and Appellate Panel should be reversed for the aforementioned reasons with a corresponding adjustment to the 20 week unemployment benefits disqualification period and amount of benefits affected by the SCDEW's error in law.

Dated this 23rd day of October, 2014

Respectfully Submitted,

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court

The Honorable Shirley C. Robinson, Administrative Law Judge

Case No.: 2014-001484

Stephanie Stewart,
Appellant,

v.

South Carolina Department of Employment & Workforce, and Oconee County, South Carolina,
Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the above Initial Appeal Brief of Appellant, regarding Appeal Case No.: 2014-001484, on all required parties by depositing a copy of such in the United States mail, postage prepaid, on October 23, 2014 to each parties' address of record listed in the above captioned case.

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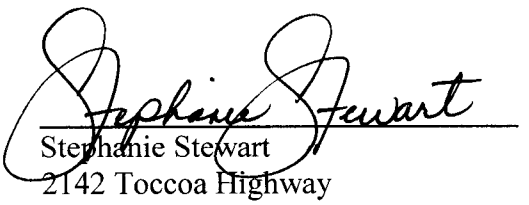
Dated this 23rd day of October 2014.



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RE: Stewart v. SCDEW et. al., Case No.: 2014-001484

Ms. Kitchings:

Pursuant to Rule 240 (c) (1) (2) (3), SCACR, please find enclosed:

1. The original of "Designation of Matter to be Included in the Record on Appeal",
2. The original of "Appellant's Application for Leave to Present Additional Evidence";
3. "Memorandum in Support of Appellant's Application for Leave to Present Additional Evidence" with (9) nine attached exhibits and Certificate of Service;
4. Pertinent excerpts of SCDEW 12/11/13 Initial Record on Appeal, (IROA), forwarded to SCALC and Appellant:
   a. 12/11/13 SCDEW Memorandum to SCALC
   b. Record on Appeal caption page
   c. Certification
   d. Excerpts of ROA (95-100);
5. SCDEW 2/19/14 Amended Record on Appeal in its entirety;
6. SCDEW 3/24/14 Supplement to Record on Appeal in its entirety; and
7. Initial Appeal Brief of Appellate

Should you have any questions or need additional information, please do not hesitate to contact me.

Respectfully Submitted,

Stephanie Stewart

cc: Trey McLeod
Reginald Gay