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.

APPELLANT'S APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE (OCTOBER 23, 2014)

COMES NOW, Stephanie Stewart, Appellant, (hereinafter, "Stewart"), Pro-Se, in the above-captioned case moving this honorable Court for leave to present additional evidence under *S.C. Code Ann. § 1-23-380(3)* of the Administrative Procedures Act (Supp. 2012). Appellant posits the additional evidence is dispositive to the review of the forthcoming appellant issues and requests a remand to the SCDEW Appellant Panel for the taking of such evidence under conditions determined by this Court.

Dated this 23rd day of October, 2014

Respectfully Submitted,

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

MEMORANDUM IN SUPPORT OF APPELLANT'S APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE (OCTOBER 23, 2014)

Stephanie Stewart, Appellant
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Pro Se

Stephanie Stewart, Appellant,	:	
v.	:	**MEMORANDUM IN SUPPORT OF APPELLANTS' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE (OCTOBER 23, 2014)**
South Carolina Department of Employment & Workforce, and Oconee County, Respondents.	:	

COMES NOW, Stephanie C. Staggers Stewart, (hereinafter, "Stewart"), Appellant, Pro-Se, in the above-titled case moving this Court, pursuant to *S.C. Code Ann. Section 1-23-380 (3)*, "Judicial Review Upon Exhaustion of Administrative Remedies", and Rule 240 SCACR for an order granting leave for additional evidence to be taken before the South Carolina Department of Employment and Workforce (hereinafter, "SCDEW"). In support of this motion, Stewart shows good cause as follows:

The facts within the Appeal Tribunal and Appellate Panel decisions do not accurately reflect or consider actual facts embedded within the Initial Record on Appeal (IROA), Amended Record on Appeal (AROA) and Supplemental Record on Appeal (SROA). In consideration of such, the below listed facts are submitted for consideration:

STATEMENT OF FACTS

1. At close of business on April 30, 2013, Stewart forwarded an internal office email to her employer Chief Magistrate Judge M. Todd Simmons, (hereinafter, "Simmons"), refuting a "second" allegation of theft and informing Simmons of payroll abuses by Senior Lead Court Clerk Deborah A. Sheriff, (hereinafter, "Sheriff') (AROA 122).

2. On May 2, 2013, Simmons forwarded an email to each court clerk informing of payroll reporting procedures (AROA 106). In addition, Simmons forwarded an email on May 2, 2013 requiring Sheriff and Stewart to attend an HR Meeting on Friday, May 3, 2013 at 11:00 AM. No notice was provided to Stewart on the subject matter of the "HR Meeting"

(AROA 105). Stewart believed the subject matter of the meeting would be her emailed grievance (AROA 191 Ln. 11-18).

3. On May 3, 2013, Stewart entered into the audio-recorded "HR Meeting" with Simmons and Sheriff and was advised she was being transferred for staffing reasons (AROA 111, Ln. 9-24, 112, and 113, Ln. 1-5). Stewart refused to transfer due to prior incidents of racial overtones and other internal office issues as a result of such (AROA 93, 94 Ln. 9-10 and 115 Ln. 4-5). Stewart, an African-American female, was the only minority employee within the entire Oconee County Summary Court Department. Subsequently, Stewart was directed by Simmons to take disciplinary "administrative decision-making leave", pursuant to the Oconee Employee Discipline Policy, for the remainder of the business day. Stewart was directed to contact Simmons by the end of the business day with her decision to transfer, resign or be terminated (AROA 89 122 Ln. 16-23). At the conclusion of the meeting, Stewart informed Simmons "I want to talk to you personally" off the record surrounding her April 30, 2013 grievance (AROA 124).

4. In Sheriff's absence, Stewart attempted to discuss with Simmons events surrounding her April 30, 2013 emailed grievance which involved prior conversations between Sheriff, Court Clerk Lisa Lee, (hereinafter, "Lee'), and Simmons regarding work hours and payroll abuses. Stewart deduced that the close temporal proximity of time and her transfer were related to her aforementioned grievance (AROA 117 Ln. 1-3 and 121 Ln. 1-3). Stewart informed Simmons of a prior incident in which Lee specifically informed Simmons of Sheriff's improper recording of overtime hours and the specifics. Simmons denied recalling the conversation and Stewart stated, "that's inaccurate". Simmons, not Stewart, framed Stewart's disagreement of information she perceived as incorrect pertaining to her grievance as "you just called me a liar" (AROA 194, Ln. 19-23 and 195, Ln. 10-20).

5. Simmons testified it was his intent to seek Stewart's termination immediately after the May 3, 2013 "HR Meeting" (AROA 161, Ln. 15-20 and 165, Ln. 6-8). However, as delineated below, evidence within the Record does not support such testimony and indicate it was misleading.

6. Immediately after the "HR Meeting" Simmons produced a Post HR Transfer Memorandum (hereinafter, "May 3rd Post HR Transfer Memo") dated May 3, 2013 [Exhibit 1] documenting the course of events during the "HR Meeting" and notably did not document any form of misconduct by Stewart or any intent to seek her termination.[1] In fact, Simmons further testified the subject misconduct was memorialized in excess of four days later on May 7, 2013 in a subsequent memorandum (hereinafter "May 7th HR Transfer Memo" [Exhibit 2] addressed to Human Resources Manager Kay Olbon (hereinafter, "Olbon") (AROA 89). The May 7th HR Transfer Memo was not provided to Stewart prior to or during the Appeal Tribunal Hearing (AROA 171, Ln. 5-24 and 172).

7. Simmons testified the May 7th HR Transfer Memo was hand-delivered to Olbon on May 8, 2013 (AROA 173 Ln. 1-7). Simmons, as the employer, testified and utilized the May 7th Transfer Memo as evidence to refute Stewart's evidence that her termination was not sought for alleged misconduct and to document that he in fact "immediately" sought her termination after the HR Meeting on May 3, 2013 (AROA 170-173). On May 7, 2013 Stewart submitted a S.C. Freedom of Information Act request (hereinafter, "FOIA Request"), to Olbon and such was disclosed to Stewart by Olbon on May 24, 2013 (IROA 96-100 and AROA 143-146).

8. Within the documents submitted into the Grievance Hearing Record on September 30, 2013, Stewart received a printed hard copy of an email (hereinafter, "May 24th HR Email") dated Friday, May 24, 2013 from Olbon to the employer's attorney of record for the instant case, Reggie Gay. The subject email stated,

> **the attached document is the <u>only</u> piece of information forwarded to HR regarding the transfer of the said ex-employee. We have no memo that was addressed to Ms. Stewart in writing. Please advise if this**

[1] **Simmons' non-documentation of any misconduct or intent to terminate Stewart within the Post HR Transfer Memo is consistent with his multiple verbal and written statements of his satisfaction with Stewart's "stellar" work performance and repeated statements of his desire not to terminate her employment. See Simmons' "Positive Work Performance Documentation" of Stewart during the HR Meeting and in his May 3rd HR Transfer Memo (AROA 88, 110 Ln.12-22, 114 Ln. 22-23), and his "Desire Not To Terminate Stewart's Employment" commentary during the HR Meeting (AROA 114 Ln. 13-14 and 22-24, 115 Ln. 12-17, 117 Ln. 21, 123 Ln. 11-19 and 124 Ln. 6-9).**

needs to be part of the personnel file of this individual, if so we will include a copy in FOIA packet and forward per her request (Exhibit 6 and 7).

The attached memorandum was a May 3, 2013 memorandum (hereinafter, "May 3rd Pre-HR Meeting Transfer Memo") titled "Transfer" that Simmons presented to Stewart at the commencement of the HR Meeting on May 3rd (Compare Exhibit 7 and AROA 89). The subject email authored by Olbon did not in fact identify the May 7th HR Transfer Memo by Simmons as part of the entire HR file, nor did it indicate its existence or any pending status of such as of May 24, 2013. This was 16 days after the date Simmons testified under oath that,

it [the May 7th HR Transfer Memo] was transmitted to Ms. Olbon, it was actually hand-delivered on the 8th [May]..."(AROA 173 Ln. 6-7).

According to Simmons' testimony, the only documentary evidence that supports his statement that he immediately sought Stewart's termination after the May 3rd HR Meeting is the May 7th HR Transfer Memo. To which, Olbon's email evidences it was not in fact hand-delivered prior to Stewart's May 9th Racial Overtone Email and May 9th termination only 5 hours later (Exhibit 8, AROA 130)[2]. Olbon's email evidences the May 7th HR Transfer Memo was 1) not authored and filed by Simmons with HR on May 8th for the purpose of terminating Stewart's employment; 2) establishes Simmons' testimony to be false; and 3) eliminates the existence of evidence of any intent to terminate Stewart prior to the May 9th Racial Overtone Email.

9. Also as part of the Respondent's case-in-chief, Simmons, testified a "conference" between himself, Assistant County Administrator Glenn Breed (hereinafter, "Breed") and an unidentified county attorney transpired on May 9, 2013 to determine Simmons' authority to terminate Stewart's employment for the alleged May 3rd misconduct and that such took a "little bit of time" to accomplish (AROA 160, Ln. 20-26 and 165, Ln. 7-8).

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[2] **Stewart was terminated within five hours of forwarding the subject email on May 9, 2013 -- a day after Simmons purportedly delivered the May 7th HR Memo to Olbon on May 8, 2013 (AROA 173 Ln. 13-24 and 174 Ln. 1-5).**

10. Breed, contrary to Simmons, did not specifically testify that a conference between himself, Simmons, and the unidentified county attorney actually transpired, as Simmons recanted. Breed stated generically and without details that he "talked" to Simmons **after May 9, 2013** and a ultimate conclusion was made that Simmons had authority to terminate Stewart's employment (AROA 190, Ln. 5-16).

11. Simmons testified that from May 3, 2013, the date of the alleged misconduct, through May 9, 2013, he sought to obtain permission "to terminate Stewart's employment from County Administration." Simmons testified he confirmed such authority during the aforementioned conference on May 9th, which occurred after the receipt of Stewart's May 9th Racial Overtone Email.

12. On August 20, 2013, Stewart's Appeal Tribunal Hearing commenced and an adverse ruling against her was rendered on August 23, 2013 (AROA 3). Contrary to Stewart's contention of being terminated for emailing a concern surrounding racial overtones, the Tribunal found the termination was based on the alleged "liar" comment.

13. On September 6, 2013, Stewart received a memorandum from Oconee County Administrative Services informing her of a Grievance Committee Hearing surrounding her termination date scheduled for September 30, 2013 (Exhibit 3). For purposes of the Grievance Hearing, Oconee County Administrative Services Director Mark Pulliam released Stewart's entire personnel record as evidence for entry into the Grievance Hearing Record (Exhibits 4 & 5).

14. In addition, Oconee County entered into evidence "internal notes" that were part of Stewart's personnel file and released such to Stewart as outlined above (Exhibit 9, hereinafter "internal notes"). The "internal notes" specifically identify the "conference" that was convened to determine Simmons authority to "hire and fire" Stewart, transpired on May 15, 2013—after Stewart's termination date of May 9th. This documentation identifies Simmons, Breed, counsel of record for the employer, Reggie Gay (the unidentified county attorney), HR Manager Kay Olbon, and Office Manager to the County Administrator Amanda Brock as members of the "conference call". The "internal notes"

also state "Do Not Include Todd's (Simmons) Documentation". Such was stated prior and in relation to the release of Stewart's FOIA request and is consistent with Oconee County's refusal to release all the pertinent information prior to the Tribunal Hearing and failure to provide Stewart with a copy of the May 7th HR Transfer Memo.

15. The "internal notes" further evidences Simmons did not seek to terminate Stewart's employment immediately after the May 3rd HR Meeting through May 9th, as he testified during the August 20, 2013 Tribunal Hearing. This additional evidence establishes that contrary to the employer's testimonial evidence: 1) Stewart's employment as of May 8, 2013 was not being sought for termination as a result of any alleged May 3, 2013 misconduct, because Simmons stated "I have reluctantly agreed to allow [Stewart] to continue her employment in Walhalla …", 2) the existence of the May 7th HR Transfer Memo in Stewart's HR personnel file on May 8, 2013 as evidence of a precursor to termination, is false, and 3) the May 9th conference to determine Simmons' authority to terminate Stewart, which allegedly occurred the same day Stewart forwarded her racial overtone grievance email, did not transpire until May 15, 2013. Based upon this additional evidence, "[T]here is no reasonable probability that the facts could be related by [Simmons] upon whose testimony the [SCDEW] findings were based". *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dept. of Natural Res. 550 S.E. 2d 287, 292 (2001).*

16. On October 10, 2013, Stewart received a "Notice of Hearing before the Appellate Panel" dated, October 9, 2013 which informed "the hearings are limited to the record developed by the AHO as such, no new evidence is admissible". Such precluded Stewart from noticing the Appellate Panel of newly discovered evidence (AROA 35).

17. On October 22, 2013, the Appellate Panel Hearing commenced and an adverse decision was rendered against Stewart on October 25, 2013 based on Simmons' testimony (AROA 153).

CITATIONS OF AUTHORITY

Under the Administrative Procedures Act Stewart may file a motion for leave to present additional evidence pursuant to *S.C. Code Ann. Section 1-23-380 (3) (Supp. 2012)*. 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. See *Brown v. Peoplease Corp., 741 S.E. 2d 761 (2013)*. Whether to grant a motion for leave to present additional evidence is within the discretion of the judge. *Byers v S.C. Alcoholic Beverage Control Comm'n., 407 S.E. 2d 653, 654-655 (1991)*. 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. *S.C. Code Ann. Section 41-35-710* does not authorize the Appellate Panel to direct the taking of additional evidence or review just the record. *S.C. Code Ann. Regs. 47-52 (B)(1)* defines when the Appellate Panel 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(1)* that the Appellate Panel can direct the taking of additional evidence. *McCaskill v. SCDEW et. al., ALC Do.cket No.: 13-ALJ-22-0146-AP (2013).*

ARGUMENTS

I. The May 7th HR Transfer Memo And May 24th HR Email Is Material Because They Both Conclusively And Dispositively Proves The Veracity of Stewart's Defense. Their Authenticity Are Not In Dispute And Both Disproves The Employer's Purported Reason For Stewart's Termination.

The Tribunal and the Panel based its decisions on Judge Simmons' testimony that Stewart called him a liar. Ignoring Stewart's defense is impermissible. An employer's burden of proof with regard to misconduct includes the burden to prove that alleged misconduct was in fact the reason for the employee's discharge. *76 Am. Jur. 2d Unemployment Compensation Section 71*, citing *Chase v. D.C. Dept. Emp. Ser. 804 A.2d 1119 (D.C. 2002)*. Stewart submits this additional evidence is material to further prove she

was in fact discharged because of the May 9th Racial Overtone Email and not misconduct from May 3, 2013.

Specifically, Simmons testified that he "immediately" sought Stewart's termination after the May 3rd HR meeting. To support this, Simmons referenced the "May 7th HR Transfer Memo" that he said he "hand-delivered on the 8th" to Olbon. Stewart made clear that she had not received any May 7th HR Transfer Memo by way of a FOIA request for "every item" in her personnel file (AROA 144). The Record is clear that Stewart was under the impression that she had received "every item" in her personnel file by way of the FOIA request. Therefore, she was taken by surprise at the mention of a May 7th HR Transfer Memo because she did not know it even existed until that moment in the Hearing. The Respondents refused to provide Stewart with a copy of such prior to or during the Tribunal Hearing though they forwarded it to the Tribunal as evidence immediately before the start of the hearing (AROA 172).

Conveniently, Simmons added that he cannot "speak for Ms. Olbon" who did not testify. The testimony that he "hand-delivered" the May 7th HR Transfer Memo was essentially fool proof at that time. The significance of this "May 24th HR Email" evidence is that it further proves Stewart's defense that she was terminated because of her May 9th Racial Overtone Email (AROA 130). The May 24th Email evidences that as of May 24 2013, Olbon herself made perfectly clear that the **only** document in Stewart's personnel file concerning this matter was the May 3rd Post HR Transfer Memo and such was not in fact submitted in support of terminating Stewart's employment. This evidence diametrically opposes the testimony of Simmons because it shows that Ms. Olbon did not receive a "hand-delivered" memo from him for the purpose of seeking Stewart's termination. In the May 7th HR Transfer Memo Simmons stated "... [I] have reluctantly agreed to allow Mrs. Stewart to continue her employment in Walhalla ...". By withholding the May 7th HR Transfer Memo from Stewart during the hearing, Simmons framed its contents as seeking Stewart's termination, when in fact the May 7th HR Transfer Memo explained why her employment was continued. This coupled with the "May 24th HR Email", evidences no affirmative action was taken to terminate Stewart's employment before the May 9th Racial Overtone Email, as testified. Further, the May 7th HR Transfer Memo Simmons relies upon as evidence of his steps to terminate Stewart, relates to her

"transfer" as it is respectively titled and not affirmative termination actions. In fact, the subject of each of Simmons' Memorandums in the AROA are concerning Stewart's "transfer" and not any basis for termination (AROA 87-88, 89-90 and SROA 9).

II. The "Internal Notes" Evidence Is Material Because They Conclusively And Dispositively Prove The Veracity of Stewart's Defense. Their Authenticity Are Not In Dispute And Both Disproves The Employer's Purported Reason For Stewart's Termination

Simmons testified that there was a "conference" between himself, Breed, and a County Attorney, Reggie Gay on May 9, 2013, concerning his authority to terminate Stewart (AROA 160 & 165). The "internal notes" Stewart seeks to introduce as additional evidence state that:

> 5-15-13 Conference Call - w Glenn (Breed), Amanda, Todd (Simmons), Kay (Olbon), Reggie (Gay). Research statute on elected and appointed pre 1988 (1) after-main statute deal w/hire and fire, have authority to hire and fire and not subject to County Grievance procedure. Harassment and retaliation complaint-claims misappropriation of fund-not for County to address ... grievance.

The significance of this evidence is that it proves Stewart's defense that she was immediately terminated after her May 9th Racial Overtone Email and not for any misconduct. The notes make no mention of any misconduct and focuses solely on her grievances. Finally, the "internal notes" are unmistakably clear that the conference concerning Simmons' authority to hire and fire was on "5-15-13" and not on May 9, 2013. Breeds testimony that he was not in talks with Simmons regarding authority to discharge Stewart until "**after May 9th**", which further proves Stewarts' defense (AROA 190).

The notes make clear Stewart's defense: **She was terminated because of the email she forwarded on May 9th** (AROA 130). The email communicating concerns of racial overtones in the workplace, was received on May 9, 2013, at 8:44 AM by Simmons, which was the day Stewart was terminated (AROA 173). The additional evidence proves that Simmons did not in fact seek Stewart's termination via a conference with Breed and the county attorney in preparation of her termination. Such was accomplished **on May 15th after Simmons terminated Stewart on May 9th**. With this additional evidence,

Simmons' testimony that the Appellate Panel relied upon, could not be as he portrayed it to be. This evidence is vital to Stewart's defense because "[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 findings was based.**" *Sea Pines Ass'n for Prot. of Wild life, Inc. v S.C. Dep't of Natural Resources, 550 S.E. 2d 27, 292 (2001).* Stewart's defense, supported by Simmons' May 7th HR Transfer Memo, is precisely that she was not in fact terminated for the reasons portrayed by the employer. If a May 7th HR Transfer Memo entitled "transfer" existed and was hand-delivered to Ms. Olbon on May 8, 2013, then the May 3rd Post HR Transfer Memo could not be the **only** item in Stewart's personnel file (See Exhibit 4, May 24th HR Email).

Similarly, if there were no talks between Simmons and Breed about authority to terminate Stewart until **after** May 9th as Breed testified, then there could not have been a "conference" between them on May 9th as Simmons testified. The internal notes evidence the fact that the conference occurred on 5-15-2013. The May 7th HR Transfer Memo also sheds light on the mindset of Simmons. After stating, "I have reluctantly agreed to allow Mrs. Stewart to continue her employment in Walhalla", Simmons further stated, "I believe no further incidents should be tolerated" (AROA 90). First, this evidences that Simmons was fully aware that he had the authority to terminate Stewart but officially chose not to exercise such discretion on May 7, 2013. Second, the only further incident that transpired was in fact Stewart's May 9th communication emailing her concerns of racial overtones at 8:44 AM. In turn, Stewart was terminated five hours later at 2:00 PM (AROA 173). The "intolerable" further incident was in fact her May 9th Racial Overtone Email. A denial of unemployment benefits may not be based upon "the reasons [Stewart] **might** have been discharged" but rather must be based upon "the reason or reasons why [s]he was discharged". *Randle v. Administrator, LA Office of Employment SEC., 499 SO. 2d 488, 492, LA Ct. App. (1986)*; see also *Smithsonian Inst. v. Dist. Of Columbia Dept. of Emp. Servs. 514 A.2d 1191, 1194 (D.C. 1986).*

While there is presumption that the testimony of a judge should be automatically credible, the facts of this case present an exceptionally reasonable probability, that at the least, with this additional evidence, "there is no reasonable probability that the facts could

be as related by [Simmons] upon whose findings the [Appellate Panel] were based. *Sea Pines 550 S.E. 2d at 272.* As such, Stewart's defense becomes crystal clear. She was telling the truth all along and any reasonable and impartial fact finder's review of the evidence can conclude such.

III. Stewart' s Application Meets The Two Prong Factors For Presenting Additional Evidence Pursuant To *S.C. Code Ann. Section 1-23-380(3)*

A. The "Materiality" Prong For The Additional Evidence Has Been Met

First, *section 1-23-380(3)* dictates two factors this Court must consider, (1) the materiality of the additional evidence, and (2) the existence of the **"original hearing"**. *Brown*, supra. as recanted above, Stewart has fully established the "May 24th HR Email" and "internal notes" were material to her defense in conclusively proving that Simmons did not in fact terminate her employment for misconduct. The materiality of such is made vividly clear in Simmons' May 7th HR Transfer Memo when he definitively determined not to terminate Stewart in stating:

> [I] have reluctantly agreed to allow Mrs. Stewart to continue her employment in Walhalla ... (AROA 90).

The "internal notes" evidences Simmons did not in fact seek authority to terminate Stewart's employment until after Stewart forwarded the May 9th Racial Overtone Email and after "reluctantly agree[ing] to allow ... Stewart to continue her employment ..." on May 7th. This additional evidence, coupled with Breed's testimony that talks to determine Simmons' authority to terminate Stewart occurred "after May 9th" (AROA 190, Ln 5-17), conclusively show the materiality to Stewart's defense by proving no affirmative action was taken to terminate Stewart until after the transmission of the May 9th Racial Overtone Email. The May 24th HR Email further proves there was in fact no documentation submitted by Simmons on May 8th in preparation of terminating Stewart on May 9th for misconduct on May 3rd as he testified and charged. This clear and convincing evidence proves Stewart's defense of being terminated for forwarding the May 9th Racial Overtone Email and the termination being effectuated five hours thereafter. Such was material to proving Stewart's defense by submitting this evidence in support of such.

As delineated above, Stewart was precluded from proffering the "internal notes", May 24th HR Email, or May 7th HR Transfer Memo as evidence to the Appeal Tribunal on August 20, 2013. First, Stewart did not receive the "internal notes", May 24th HR Email, or May 7th HR Transfer Memo until September 30, 2013 (40 days after the Tribunal Hearing). The document were provided to her by the Respondents as part of her entire HR file submitted as discovery/exhibits in preparation of her county grievance committee hearing (Exhibits 1, 2, & 3). The May 7th HR Transfer Memo, though submitted to the AHO during the Tribunal Hearing, was not provided to Stewart until September 30, 2013 as well. (See AROA 90, August 20, 2013 10:07 AM facsimile to Appeal Tribunal; see AROA 172-173 testimony of Simmons providing admissions of Breed and Simmons not providing May 7th HR Transfer Memo to Stewart prior to commencement or during Tribunal Hearing). Of note, Stewart requested on May 7, 2013 that Oconee County release her entire personnel file prior to the commencement of the Appeal Tribunal Hearing. Such was released on May 24, 2013 and June 5, 2013 and did not include the May 7th HR Transfer Memo (IROA 96-100).

The facts establish Stewart has met prong two, "the existence of a good reason for the failure to introduce such evidence at the "**original hearing**", Appeal Tribunal, for submission and consideration. In-turn, submission of such to the Appellate Panel was not permissible. The Appellate Panel Hearing Notice (AROA 35) unequivocally instructed Stewart that:

> The Appellate Panel is a Board of Review and **hearings are limited to the record** developed by the Administrative Hearing Officer. As such, **no new evidence is admissible**.

Such precluded Stewart from moving the Panel to admit evidence not referenced or proffered during the Tribunal Hearing.

B. The "Good Reason(s)" Prong For Failing To Introduce The Additional Evidence At The "Original Hearing" Pursuant To *Brown* and *Byers* Has Been Met

As cited by Chief Administrative Law Judge Ralph K. Anderson in *McCaskill v. SCDEW et. al., S.C. Administrative Law Court Docket No. 13-ALJ-22-0146-AP.*[3]

> The [Appellate Panel] reviews the decision of the Appeal Tribunal on the basis of 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 v. S.C. Employment Sec. Comm'n 351 S.E. 2d 338, 339 (1986)* defines when the Appellate Panel 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.**

Chief Judge Anderson also stated,

> *S.C. Code Ann Regs. 47-52(B)(1) (2011)*, ... states that '[e]xcept as provided in *Appeal Regulation 47-52, D* for the hearing of appeals removed to the Appellate Panel shall be heard solely upon the evidence in the record before the Appeal Tribunal. **Because [Stewart's] case did not involve removal from the Appeal Tribunal to the Appellate Panel, the case [must be] heard upon the evidence in the record that was before the Appeal Tribunal. [Stewart] would not have been able to ... introduce additional evidence.**

Stewart submits there are a multitude of "good reasons" for her not submitting the additional evidence at the "original hearing" and the subsequent appeal before the Appellate Panel. Many of which are due to the Respondent's actions. **First**, as fully delineated above, the additional evidence sought to be introduced was released to Stewart by the Respondent on September 30, 2013 **after** the August 20, 2013 Appeal Tribunal Hearing.

Second, the Respondent explicitly informed Stewart on October 9, 2013 in its "Notice of Hearing before the Appellate Panel" that ... hearings are limited to the record developed by the AHO as such **no new evidence is admissible** ..." (AROA 35). Thus, the

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[3] See Order addressing "Requests for Leave to Present Additional Evidence" under S.C. Code Ann. § 1-23-380(3) (Supp. 2012), dated May 15, 2013 and July 30, 2013.

Respondent, from the onset of the appeal, affirmatively precluded Stewart from submitting new evidence for consideration.

Third, the Respondent's regulation *S.C. Code Ann. Regs. 47-52(B)(1)* and *47-52(D)* as determined by the ALC and publicly informed in *McCaskill*, procedurally precluded Stewart from moving the Appellate Panel to consider the aforementioned evidence on the merits. Stewart's Appeal was not "removed to the Appellate Panel from the Appeal Tribunal" as a prerequisite to consideration of an additional evidence motion and thus could not be considered by the Panel. For this reason, Stewart "would not have been able to … introduce the additional evidence" before the Panel as it was never referenced or proffered during the Tribunal Hearing.

In accordance with 1) the Respondent's instructions in the Appellate Panel Hearing Notice, Stewart adhered to the Panel's instructions and procedures, 2) adhered to established Administrative Law Court case law in *McCaskill* surrounding additional evidence motions, to include SC Appellate and Supreme Court opinions in *Brown* and *Byers*, and 3) adhered to the SCDEW regulations which only permit additional evidence on its own motion after removal from the Tribunal. As such, Stewart has provided "the existence of [three] "good reasons" for [her] failure to introduce such evidence at the "original hearing" and the subsequent Appellate Panel Hearing. Submission to the Appellate Panel according to the aforementioned regulations, case law, and agency directives would have been moot and impermissible. At the point Stewart received the additional evidence from the Respondent, the Appeal Tribunal Hearing had convened and been long adjudicated. Thus, pursuant to *S.C. Code Ann. Regs. 47-52(D)*, Stewart was precluded from moving the Appellate Panel to "remove the appeal from the Appeal Tribunal to direct the taking of additional evidence", as procedurally delineated by the Respondent's own regulations. Here the Department's regulations are dispositive and absolute.

CONCLUSION

For all the reasons stated above, this Court is permitted to and should remand this case to the SCDEW to allow Stewart to present additional evidence with specific instructions. See *Parker v. S.C. Pub Serv. Comm'n, 288 S.C. 304, 307, 342 S.E. 2d 403, 405 (1986)* (stating that a Court "may provide [ ] for the taking of additional evidence" upon remand; *Piedmont Natural Gas Co. v. Hamm, 301 S.C. 50, 389 S.E. 2d 655 (1990)*; *2 Am. Jur. 2d Administrative Law § 575 (2004)* (stating that an order requiring additional evidence on remand is appropriate if the party "shows good cause for failing to present the evidence earlier"). Lastly, Stewart moves for a stay on the adjudication of her appellate issues in this case pending remand to the lower SCDEW Appellate Panel. Accordingly, if this motion were granted at this juncture, the contemporaneously filed initial appeal brief issues would be premature, moot or lack no controversy until resolution by the lower Appellate Panel.

WHEREFORE, Stewart prays her motion be GRANTED and this case remanded with specific instructions by this Court.

Dated this 23rd day of October 2014.

Respectfully Submitted,

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Pro-Se

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Case No.: 2014-001484

Stephanie Stewart,
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CERTIFICATE OF SERVICE

I certify that I have served the above Appellant's Application for Leave to Present Additional Evidence and Memorandum in Support of Appellant's Application for Leave to Present Additional Evidence by depositing the same in the United States mail, postage prepaid, on October 23, 2014 to each parties' address of record listed in the above captioned case.

SCDEW
Office of General Counsel
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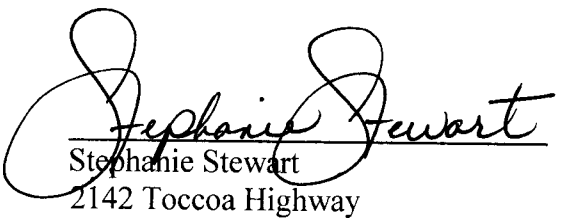
Columbia, South Carolina 29202

Oconee County
c/o: McNair Law Firm
Attn: Attorney Reginald Gay
Post Office Box 447
Greenville, South Carolina, 29602

Dated this 23rd day of October 2014.



Stephanie Stewart
2142 Toccoa Highway
Westminster, South Carolina 29693
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Pro-Se

October 23, 2014

Stephanie Stewart
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Clerk of Court, Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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