STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles E. Stubbs, Appellant, vs. South Carolina Department of Employment Workforce and JSE, LLC, Respondents.	Docket No. 14-ALJ-22-0454-AP **ORDER**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to a Notice of Appeal filed by Charles E. Stubbs ("Appellant"). Appellant appeals from an Appellate Panel ("Panel") decision, dated August 29, 2014, finding that Appellant's appeal was untimely filed. The ALC has jurisdiction to hear this appeal pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2014). Upon consideration of the record and the briefs, this Court affirms the decision of the Panel.

BACKGROUND

Appellant was initially granted benefits by the Claims Adjudicator on April 29, 2011. However, his former employer, JSE, LLC ("Employer"), filed an appeal of the determination of the Claims Adjudicator. A hearing before the Appeal Tribunal was held on June 14, 2011. The Appeal Tribunal found that Appellant was disqualified from receiving benefits, thereby reversing the determination of the Claims Adjudicator. The Appeal Tribunal mailed the decision on June 17, 2011. Appellant mailed an appeal of the Appeal Tribunal decision, postmarked June 29, 2011. In a letter dated August 3, 2011, the South Carolina Department of Employment and Workforce ("DEW" or "Department") dismissed Appellant's appeal as untimely.

Appellant appealed the dismissal of his appeal and on October 27, 2011, DEW informed Appellant that the case was remanded to conduct an evidentiary hearing regarding the timeliness of the appeal. The hearing was held on November 9, 2011.

At the hearing, the Appellant stated that the decision of the Appeal Tribunal, mailed on June 17, 2011, was received by Appellant on June 20, 2011. Appellant stated that he mailed his appeal of the Appeal Tribunal decision on June 21, 2011. However, the letter was received by the Department on July 1, 2011, and was postmarked on June 29, 2011. Appellant had no idea why the postmark date was June 29, 2011, but he reiterated that he put his appeal in the mail on June 21, 2011. The Panel determined that the appeal was untimely. Specifically, the Panel found:

> The Department properly mailed the Appeal Tribunal decision to the [Appellant's] address of record, and the [Appellant] received it in time to file a timely appeal. Although the [Appellant] asserts he mailed the appeal June 21, 2011, it was not postmarked until June 29, 2011, which was eight (8) days later. The [Appellant] was aware he was mailing a time sensitive document, and it was his responsibility to ensure that the appeal was timely filed. The [Appellant] filed an untimely appeal due to his own error or neglect. Therefore, the appeal is dismissed as untimely, and the Appeal Tribunal decision is final as a matter of law.

Appellant filed an appeal with the ALC. The ALC affirmed the decision of the Panel. Appellant moved for reconsideration, but that was denied by the ALC on May 15, 2012. Appellant then filed an appeal with the South Carolina Court of Appeals. The Court of Appeals vacated the ALC decision and remanded the appeal back to the ALC. On April 15, 2014, the ALC remanded the case back to the Panel "to make specific findings of fact, separately stated and to be supported by specific citation of the law applicable to those findings."

A hearing before the Panel was held on August 27, 2014. Again the Panel determined that the appeal was untimely. The Panel concluded:

> The Department properly mailed the Appeal Tribunal decision to the [Appellant's] address of record. The Department has no authority to extend the appeal time limit unless the delay was caused by the Department or Postal error. Although the [Appellant] consulted a calendar to deduce when he probably mailed his appeal, we do not find his statement that he mailed the appeal June 21, 2011, to be credible. His statements show he was not certain as to when he actually received the decision. The [Appellant] has provided inconsistent information regarding the date he appealed: in his October 2011 supplementary appeal he wrote he mailed his letter on June 25, 2011, and in testimony on November 9, 2011, he stated he "probably' put it in the outgoing mail slot at his apartment complex on Tuesday, June 21, 2011. Further, the [Appellant] has not shown that the 8-day delay between the date he allegedly place his letter in the apartment complex's mail slot and the date the letter was postmarked by the Postal Service was due to postal error. He noted that the mail was usually picked up the following day. The [Appellant] has not provided evidence of other outgoing mail being delayed in being picked up by the Postal Service, and has not provided any testimony from witnesses to support his assertion

> he placed the appeal in the mail before June 27, 2011. In the absence of consistent and verifiable testimony and evidence, we rely on the Postal Service postmark to determine the point in time when the [Appellant] provided notice to the Department of his intent to appeal the Appeal Tribunal decision. As the postmark was stamped on June 29, 2011, two (2) days after the expiration of the appeal period, we find the greater weight of the credible evidence shows the [Appellant's] appeal to the Appellate Panel was not mailed on June 21, 2011, as the [Appellant] stated, but was mailed on June 29, 2011, after the appeal period expired. Therefore, the appeal is dismissed as untimely, and the Appeal Tribunal decision is final as a matter of law.

Appellant filed his appeal to the ALC arguing that the Panel erred by finding that Appellant's appeal was untimely.

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act ("APA"). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E. 2d 365, 367 (1984) (determining that the Employment Security Commission, a predecessor of DEW, was an "agency" within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of DEW. See S.C. Code Ann. §§ 1-23-380, 1-23-600(D) (Supp. 2014); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2014). See S.C. Code Ann. § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner proscribed in § 1-23-380(5)). Section 1-23-380(5) reads:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the 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:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
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> (f) arbitrary or capricious or characterized by abuse of discretion or clearly

unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2014).

A decision 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., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying 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., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting Lark v. Bi-Lo, Inc., 267 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). The ALC is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995); see also S.C. Code Ann. §1-23-380(5). A judgment with which reasonable people may differ will not be overturned. Todd's Ice Cream, Inc. v. S.C. Employment Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984). The party challenging an agency action bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." Waters, 321 S.C. at 226, 467 S.E.2d at 917.

ISSUE ON APPEAL

Did the Appellate Panel err in finding that Appellant's appeal was untimely?

DISCUSSION

Appellant argues that the Panel erred in finding that Appellant's appeal was untimely. The Court disagrees.

S.C. Code Ann. § 41-35-680 reads:

> Unless an appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for a fair hearing, after notice of not less than seven days, must make findings and conclusions promptly and on the basis of the findings and conclusions affirm, modify, or reverse the determination or redetermination within thirty days from the date of the hearing. Each party promptly must be furnished a copy of the decision, including the reasons for the decision. This must be considered the final decision of the department, unless within ten days after the date of mailing the decision a further appeal is initiated pursuant to Section 41-35-710.

S.C. Code Ann. Regs. 47-52(a)(1) reads:

> Any party aggrieved by the decision of an Appeal Tribunal, may apply for leave to appeal from such decision to the Appellate Panel, by filing at the office where the claim was filed, or at the office of the Appellate Panel in Columbia, South Carolina, within ten (10) calendar days after the date of notification or mailing of the decision of the Appeal Tribunal, an Application for Leave to Appeal to the Appellate Panel on the form provided, setting forth the information required thereon and the grounds for the appeal. Such application may be accompanied by reference from the original record of the hearing before the Appeal Tribunal. Copies of the Application for Leave to Appeal shall be mailed to all interested parties to the decision of the Appeal Tribunal.

The South Carolina Supreme Court has held that where "the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). However, "where a statute is ambiguous, the Court must construe the terms of the statute." Wade v. Berkeley County, 348 SC 224, 229, 559 S.E.2d 586, 588 (2002). Further, "[i]n construing a statute, the Court looks to its language as a whole in light of its manifest purpose." Adams v. Texfi Indus., 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) (citing Simmons v. City of Columbia, 280 S.C. 163, 311 S.E.2d 732 (1984)). An "ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." State v. Hudson, 336 S.C. 237, 247, 519 S.E.2d 577, 582 (Ct. App. 1999). Although courts give great weight to an agency's long-standing construction of a statute, such construction is not dispositive of the issue. Plyler v. Evatt, 313 S.C. 405, 408, 438 S.E.2d 244, 246 (1993) (citing Gilstrap v. S.C. Budget & Control Bd. 310 S.C. 210, 423 S.E.2d 101 (1992)). While a court typically defers to an agency's construction of its own regulation, where the plain language of the statute is contrary to the agency's interpretation, the Court will reject its interpretation. Brown v. S.C. Dept. of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Hodges v. Rainey, 341 S.C. at 85, 533 S.E.2d at 581 (2000) (citations omitted).

"Regulations are construed using the same canons of construction as statutes." S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012). Therefore, "[t]he words of a regulation must be given their plain and ordinary meaning without

resort to subtle or forced construction to limit or expand the regulation's operation." Byerly v. Connor, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992).

Appellant, in his brief, argues that an appeal must be filed within ten days after the date of notification or mailing as stated in Regulation 47-52(a)(1). South Carolina Code Section 41-35-680 states that an appeal must be filed within ten days of the mailing of the decision. The statute bears no mention of the date of notification. While a regulation does have the force of law, a regulation cannot "alter or add to a statute." Goodman v. City of Columbia, 318 S.C. 488, 491, 458 S.E.2d 531, 533 (1995); see also 73 C.J.S. Public Administrative Law and Procedure § 260 (noting courts "may not interpret the regulation as to go beyond the authority of the statute or to conflict with, or enlarge upon, the statute."). Regulation 47-52(a)(1) adds to the statute. The lone date of importance in the statute is the date of mailing of the decision. However, as interpreted by Appellant, the regulation has two dates of importance, the date of mailing, along with the date of notification. The regulation cannot add to the statute, and therefore the date of mailing of the decision is the only date of importance in determining whether an appeal is timely filed.

Also, if the regulation is read as Appellant interprets, the term "mailing" would be irrelevant, as the date of notification would always be after the date of mailing, and therefore the term "mailing" would not be needed, as what would be important would be the date of notification. However, nothing in the statute mentions "notification", as the lone focus is the date of mailing. Therefore, in order to timely file an appeal, an appellant must file within ten days of the date of mailing.

In this case, the Appeal Tribunal mailed the decision on June 17, 2011. Therefore, pursuant to South Carolina Code Section 41-35-680, the deadline for filing the appeal was June 27, 2011. The postmark containing his appeal was dated June 29, 2011, which was found to be untimely. Appellant, however, testified that he mailed the appeal on June 21, 2011. The Panel considered that testimony, but ultimately did not find the testimony to be credible, and determined that the greater weight of evidence showed that the appeal was mailed on June 29, 2011. Appellant, in his brief, argues that a postmark date is not dispositive to establish the date of mailing. Appellant is correct in this assertion. In Green v. Green, 320 S.C. 347, 465 S.E.2d 130 (Ct. App. 1995), the Court noted that although a postmark date is not dispositive, it is compelling evidence. Green at 350, 465 S.E.2d at 132. The Panel evaluated the evidence and concluded that the appeal was untimely. An "appellate court lacks jurisdiction to consider the appeal and has no authority or

discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004).

When reviewing a final decision of the Panel, this Court may reverse or modify only "if such decision is affected by errors of law, characterized by an abuse of discretion, or clearly erroneous in view of the substantial evidence on the whole record." Todd's Ice Cream, Inc. v. S.C. Employment Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984). "Substantial Evidence" is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. Id.

The Court finds that the Panel's decision was not clearly erroneous in light of the substantial evidence in the record, and that the record supports the decision. The Court further finds that the Panel's decision was not arbitrary, capricious, an abuse of discretion, or a clearly unwarranted exercise of discretion.

ORDER

IT IS HEREBY ORDERED that the decision of the Appellate Panel is **AFFIRMED. AND IT IS SO ORDERED.**

June 12, 2015
Columbia, S.C.

John D. McLeod, Judge
South Carolina Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

June 12, 2015
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk

Palmetto Health Richland Springs
April 8 – 10, 2015
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