THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley Robinson, Administrative Law Judge

Case No. 2011-ALJ-22-0440

Kimberly Morrow, Respondent,

v.

SC Department of Employment and Workforce and A Wing and A Prayer

of whom SC Department of Employment and Workforce is

Appellant,

And A Wing and A Prayer, Inc. is also

Respondent.

FINAL REPLY BRIEF OF APPELLANT

Debra S. Tedeschi
SC Bar # 15307
E.B. "Trey" McLeod, III
SC Bar # 73642
Assistant General Counsel
Department of Employment and Workforce
P.O. Box 8597
Columbia, South Carolina 29202
(803) 737-2666
legal@dew.sc.gov

Attorneys for Appellant SCDEW

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I. BECAUSE RESPONDENT ATTACHED AN "APPELLATE COURT BRIEF APPENDIX" TO HER BRIEF WHICH INCLUDES EVIDENCE THAT WAS NOT BEFORE THE ADMINISTRATIVE LAW COURT, THIS COURT SHOULD STRIKE THE APPENDIX ITSELF, AS WELL AS ALL REFERENCES TO, AND ARGUMENTS RELYING ON, THIS EXTRINSIC MATERIAL.

Respondent's Designation of Matter includes only the following statement: "Appendix of Respondent's Brief." Respondent then attaches a 23-page appendix to her brief; all the documents in this appendix were **not** before the Administrative Law Court (ALC) or the Appellate Panel. In her brief, she refers to this material as an "Appellate Court Brief Appendix." Respondent improperly seeks to include evidence in the Record on Appeal (ROA) which was not part of the original record before the Appellate Panel and likewise was not before the Administrative Law Court. Therefore, this Court should strike this matter, and disregard all references to, and arguments relying on, this improper evidence.

Rule 209, SCACR states the Designation of Matter "may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal." Additionally, the ROA shall not include matter "which was not presented to the lower court or tribunal." Rule 210(c), SCACR; *see also* Rule 210(h), SCACR (the appellate court's review is limited to facts appearing in the record); S.C. Code Ann. § 1-23-610(B) (Supp. 2011) ("the review of the administrative law judge's order must be confined to the record").

Because this Court is confined to make a decision only upon the record that was before the lower tribunal, Respondent's Appendix should not be included in the ROA, and the Court should strike all references to this material from her brief. *See id.; Dorman v. Dep't of Health &*

Envtl. Control, 350 S.C. 159, 167-68, 565 S.E.2d 119, 124 (Ct. App. 2002) (where the Court held "the ALJ is confined to make his decision on the record before him, as are we").

II. JUST AS THE ALC ERRED IN SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE DEPARTMENT ON QUESTIONS OF FACT, RESPONDENT ALSO RE-ARGUES FACTUAL ISSUES THAT ARE BEYOND THIS COURT'S SCOPE OF REVIEW.

Respondent attempts to re-argue in her brief that she was, as a matter of fact, available for work and therefore eligible for unemployment benefits. However, the issue on appeal is not a factual one, but rather whether the ALC erred in re-weighing the factual issues resolved by the Appellate Panel and substituting its own judgment for that of the Department.

Pursuant to South Carolina statute, in order to be eligible for unemployment benefits, a claimant must demonstrate that he "is able to work and is **available** for work." S.C. Code Ann. § 41-35-110(3) (Supp. 2011) (emphasis added). The Court has held that 'available for work' as referenced in the statute "means an **'unrestricted exposure'** to the labor market." *Murphy v. S.C. Emp. Sec. Comm'n.*, 328 S.C. 542, 544, 49 S.E.2d 625, 627 (Ct. App. 1997) (*quoting Wellington v. S.C. Emp. Sec. Comm'n,* 281 S.C. 115, 314 S.E.2d 37 (Ct. App.1984) (emphasis added). Whether a claimant has unrestricted exposure to the labor market is a question of fact for the Appellate Panel which determined by looking at the facts and circumstances of each case. *Id.* Moreover, "[t]he burden is upon the claimant for benefits to show that he has met the benefit eligibility conditions and that he is available for work." *Hyman v. S.C. Emp. Sec. Comm'n*, 234 S.C. 369, 379, 108 S.E.2d 554, 559 (1959); *accord Wellington*, 281 S.C. at 117, 314 S.E.2d at 38 ("The burden is on a claimant to show compliance with benefit eligibility requirements. This includes a duty to show availability for work and a reasonable effort to obtain employment.").

Furthermore, "a reviewing court 'shall not substitute its judgment for that of the agency as to the weight of the evidence on the questions of fact.'" *Murphy*, 328 S.C. at 544, 492 S.E.2d at 627 (*quoting* S.C. Code Ann. § 1-23-380(A)(6)).

In the instant case, the Appellate Panel found respondent's "exposure and attachment to the general labor market...restricted, and that she [did] not meet the availability requirements of the statute." (R.pp.12-13). The Appellate Panel based its ruling on the evidence **directly from Respondent own testimony** that she spent approximately 20 hours per week actively looking for places to open a new restaurant and also spent 16 hours per week as a student taking classes for her G.E.D. The ALC reversed, however, finding that respondent: "cannot be considered to be self-employed by the mere action of looking for a location to open a restaurant." (R.p.6).

The ALC erred because it disregarded the Appellate Panel's factual finding that due to Respondent's activities **both as a student and in looking for restaurant space**, she did not have unrestricted exposure to the labor market. This was error because the ALC re-weighed the same facts presented to the Panel and therefore improperly substituted its judgment for that of the agency as to the weight of the evidence on the questions of fact. *Murphy*, *supra*.

Likewise, Respondent in her brief re-argues her eligibility by focusing solely on the fact that she was actively looking for work. However, neither Respondent nor the ALC can avoid the facts conclusively established in the record that Respondent's own testimony showed she was encumbered by both business-related and student activities that took up 36 hours per week.

Moreover, there is no evidence in the record from Respondent explaining how her search for business locations and attendance at school did not restrict her exposure to the labor market. The burden is upon Respondent to show that she was available for work. *See Wellington*, *supra; Hyman*, *supra*. Here, she failed to carry that burden at the agency level. She cannot now, on

appeal, supplement the record with additional factual evidence and argument to bootstrap the ALC's decision.

Accordingly, because it was improper for the ALC to substitute its own judgment on the primary factual issue of availability, this Court should reverse the ALC's order and reinstate the Appellate Panel's decision.

III. BECAUSE THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLATE PANEL'S DECISION THAT APPELLANT DID NOT MEET HER BURDEN IN ESTABLISHING HER UNEMPLOYMENT ELIGIBILITY, THE ALC ERRED IN REVERSING.

Review of an administrative agency's factual findings is governed by the "substantial evidence" test of the Administrative Procedures Act. S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2011). Under the substantial evidence rule, a reviewing court "may reverse or modify an administrative decision 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. Emp. Sec. Comm'n*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984).

> "Substantial evidence" is something less than the weight of the evidence; it 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. The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.

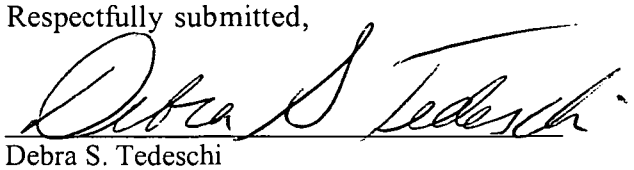
Id.; see also S.C.Code Ann. § 1-23-380(A)(6) (Supp. 2011) (a reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on the questions of fact").

In the instant case, substantial evidence supports the Appellate Panel's finding that Respondent failed to meet her burden to show availability; thus, the Appellate Panel's decision

CONCLUSION

Based on the foregoing, Appellant respectfully submits the decision of the Panel is supported by substantial evidence on the record as a whole and is in accord with applicable law. Therefore, this Court should reverse the ALC's Order which reversed the Appellate Panel's decision.

Respectfully submitted,



Debra S. Tedeschi
SC Bar# 15307
E.B. "Trey" McLeod, III
SC Bar# 73642
Assistant General Counsel
Department of Employment and Workforce
P.O. Box 8597
Columbia, South Carolina 29202
(803) 737-2666
legal@dew.sc.gov

Attorneys for Appellant SCDEW

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