

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Sharon A. Brown,

Docket No. 16-ALJ-22-0050-AP

Appellant,

vs.

**ORDER**

South Carolina Department of Employment  
and Workforce and Cherokee County  
School District One,

Respondents.

**RECEIVED**

AUG 22 2016

SC Court of Appeals

**STATEMENT OF THE CASE**

This matter is before the Administrative Law Court (ALC or court) pursuant to the appeal of Sharon Brown (Appellant), filed February 10, 2016. The Appellant seeks review of the Department of Employment and Workforce's (Department's) decision concluding that the Appellant was terminated from her position with Cherokee County School District One (School District) for misconduct. The court has jurisdiction over this appeal pursuant to South Carolina Code Section 41-35-750. S.C. Code Ann. § 41-35-750 (Supp. 2015). After reviewing the record in this matter, the court reverses the decision of the Department's Appellate Tribunal and remands the case to the Department for proceedings in accordance with this Order.

**BACKGROUND**

The Appellant was terminated from the School District in October 2015 and filed for unemployment benefits. After reviewing her application, a claims adjudicator determined that the Appellant was discharged for a violation of the School District's policy, which amounted to misconduct under South Carolina Code Section 41-35-120(2)(A) and required a complete disqualification from benefits. The Appellant appealed that determination on November 20, 2015, and a hearing was held before the Department's Appeal Tribunal on December 17, 2015. Following the hearing the Appeal Tribunal issued an order finding in favor of the Appellant and fully reinstating her benefits. The School District appealed the order to the Department's Appellate Panel. After a Notice of Hearing on January 13, 2016, the Panel held a hearing on January 26, 2016, at the offices of the Department in Columbia, South Carolina. The Panel issued an order

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reversing the Appeal Tribunal's order, concluding that the Appellant was terminated for misconduct.

The Appellant then filed with this court for review. On March 16, 2016, the Appellant filed a Motion for the Record on Appeal to Be Supplemented. The Appellant alleged that, contrary to the laws and regulations of this state, the Appellate Panel took additional, unsworn testimony at the hearing on January 26, 2016. *See* S.C. Code Ann. Regs. § 47-52(B)(1) (2011) (providing that all appeals to the Appellate Panel must be heard solely on the evidence in the record before the Appeal Tribunal). In response, the Department averred that no record, audio or otherwise, was kept of the Panel's hearing.

After finding that the Department had erred in failing to keep a full and complete record of the proceedings required by S.C. Code Ann. § 41-35-720 (Supp. 1015), the court issued an Order Granting Motion to Supplement the Record on Appeal on June 8, 2016. [*See* S.C. Code Ann. § 1-23-380(4) (Supp. 2015) (“In cases of alleged irregularities in procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate.”); *Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 380–81, 453 S.E.2d 880, 882–83 (1994) (Construing an earlier version of the statute, the Supreme Court held that section 1-23-380 empowers the reviewing court, “in its discretion, to order discovery and admit extrinsic evidence in [Administrative Procedure Act] cases upon alleged irregularity in the agency proceeding.”)]. In response, the Department filed an Affidavit of Dr. Carl A. Carpenter, II, on June 27, 2016.<sup>1</sup>

### **STANDARD OF REVIEW**

The Department is an agency under the Administrative Procedures Act (APA). *See Gibson v. Florence*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, the predecessor of the Department, was an agency within the meaning of the APA). It is “well-settled that decisions of administrative agencies should be upheld on appeal where they are supported by substantial evidence.” *Parsons v. Georgetown Steel*, 318 S.C. 63, 456 S.E. 2d 366 (1995). Section 1-23-380(5) of the South Carolina Code (Supp. 2014) provides the standard used by appellate courts to review agency decisions. *See* § 1-23-600 (directing administrative law

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<sup>1</sup> The Appellant filed a Supplemental Objection with the court on July 1, 2016. In light of this court's decision to remand the matter to the Department for further proceedings, the Appellant's Motion is deemed denied.

judges to conduct appellate review in the same manner prescribed in § 1-23-380). That section states:

The court may reverse or modify the decision [of an agency] 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 other 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.

§ 1-23-380(5).

This 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 in 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). 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.

### DISCUSSION

In this case the Appellant argues that the Department’s Appellate Panel took unsworn testimony its hearing, and that its decision was based on unlawful procedure. After reviewing the Affidavit of Dr. Carl A. Carpenter, II, dated June 23, 2016, it appears that the Appellate Panel did take additional unsworn testimony from Dr. Carpenter and the Appellant. The review of a matter by the Appellate Panel of tribunal decisions is to be based solely on the record. S.C. Code Ann. § 41-35-710 (Supp. 2015); S.C. Code Regs. 47-52(B)1(2011). While the Appellate Panel may direct the taking of additional testimony, it may not do so at the panel hearing. *Id.* Additionally, any testimony taken should be sworn.

The Department takes the position that while the Appellate Panel hearing proceedings may have run afoul of procedural requirements, any error committed was harmless and should not be cause for a reversal of its decision. However, for any party asserting harmless

error, that party must demonstrate to the court that the error almost surely did not affect the outcome of the case. *Sam Wayne Vetro, M.D. v. South Carolina Department of Labor, Licensing, and Regulation, State Board of Medical Examiners*, Docket No. 06-ALJ-11-0120-AP (December 7, 2006), citing *Persinger v. Norfolk and Western Railway Co.*, 920 F.2d 1185 (4<sup>th</sup> Cir., 1990). Here, this court is unwilling to find that the compound procedural errors committed by the Appellate Panel, to include failing to keep a record of the proceedings, taking testimony in violation of procedural statutes and regulations, and considering unsworn testimony, were harmless. Additionally, it is difficult to find that the errors did not affect the outcome, as the Appellate Panel reversed the Appellate Tribunal's Order.

**ORDER**

For the forgoing reasons, **IT IS HEREBY ORDERED**, that the Appellate Panel's decision is **REVERSED**, and this matter is **REMANDED** to the Department for further proceedings in accordance with this Order.

**AND IT IS SO ORDERED.**



S. Phillip Lenski  
Administrative Law Judge

July 22, 2016  
Columbia, South Carolina

221 July 2016  
