

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE S.C. ADMINISTRATIVE LAW COURT

J. Phillip Lenski, Administrative Law Judge

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

RECEIVED

SEP 09 2016

SC Court of Appeals

Sharon A. Brown,

Appellant.

v.

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

Respondents,

**RESPONDENTS' MOTION TO DISMISS APPELLANT'S
APPEAL AS INTERLOCUTORY**

Respondents South Carolina Department of Employment and Workforce (“DEW”) and Cherokee County School District One move to dismiss Appellant Sharon A. Brown’s appeal. Respondents’ Motion should be granted because the Order that Brown seeks to appeal is not a “final decision of an administrative law judge” within the meaning of S.C. Code Ann. § 1-23-610.

I. Background and procedural history

On January 29, 2016, DEW’s Appellate Panel (the “Panel”) mailed its decision No. 2016-P-00236 finding Brown disqualified from receiving unemployment insurance (UI) benefits because she was discharged for misconduct:

The employer has presented sufficient credible evidence to show during the meeting on June 1, 2015, the human resources director

instructed [Appellant] to not speak to any school district employees while she was on administrative leave. We find this instruction was reasonable, given the nature of the investigation. Contrary to the Appeal Tribunal, we find [Appellant's] assertion, that she did not initiate the conversation and was unaware she could not speak with school district employees, lacks credibility. [Appellant] acknowledges she asked the witness whether the witness had been in contact with the human resources director. We find [Appellant] introduced the subject of the investigation into her conversation with the witness, and she knew or should have known having a conversation with the witness about the investigation was a violation of the employer's protocol. [Appellant's] refusal to follow the employer's reasonable directive constituted a deliberate disregard of the standard of behavior the employer had the right to expect of [Appellant]."

(Exhibit A, Panel Decision.)

On February 10, 2016, Brown filed a Notice of Appeal with the Administrative Law Court ("ALC") arguing, among other things, that the Panel committed an error of law by taking additional testimony from witnesses without placing them under oath. *(Exhibit B, Notice of Appeal to ALC.)* On July 8, 2016, Judge Lenski held a telephone hearing regarding this procedural issue. On July 22, 2016, Judge Lenski issued his Order finding that "procedural errors" by the Panel required that the case be remanded to DEW for further proceedings:

Here, the court is unwilling to find that the compound procedural errors committed by the [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 [Panel] reversed the Appellate Tribunal's Order.

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

(*Exhibit C, ALC Order*) (emphasis in original). In remanding the case to DEW for further proceedings, Judge Lenski did not address the substantive issue in the ALC appeal: whether substantial evidence supported the Panel's decision that the circumstances of Brown's termination constituted misconduct.

On August 18, 2016, Brown filed her Notice of Appeal with this Court seeking further judicial review of Judge Lenski's Order.

II. Judge Lenski's Order, which remanded the case to DEW for further proceedings, is not a "final decision," and, thus, this appeal should be dismissed as interlocutory.

a. Legal Standards

Judicial review of disputes arising from DEW is governed by the Administrative Procedures Act ("APA"). S.C. Code Ann. § 41-35-750 (Supp. 2015); see also *Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of DEW, was an "agency" within the meaning of the APA). Under the APA, "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review." *Nucor Corp. v. S. Carolina Dep't of Employment & Workforce*, 410 S.C. 507, 514, 765 S.E.2d 558, 562 (2014) (quoting S.C. Code Ann. § 1-23-380).

After exhausting all administrative remedies within DEW, parties may pursue an appeal to the ALC. S.C. Code Ann. § 41-35-750. Further judicial review, which is governed by S.C. Code Ann. § 1-23-610, "may only be sought from a *final* decision of the ALC." *Charlotte-Mecklenburg Hosp. Auth. v. South Carolina Dep't of Health & Env't.*

Control, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010) (emphasis in original). “A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what was been determined.” *Id.* at 267, 692 S.E.2d at 895; *see also Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942) (holding that a judgment determining the applicable law but “leaving questions of fact unsettled, is not final”).

b. Judge Lenki’s Order of remand back to DEW for further proceedings is not an appealable “final decision.”

The Order here is akin to the remand orders in *Charlotte-Mecklenburg* and *Bone v. U.S. Food Service*, 404 S.C. 67, 77, 744 S.E.2d 552, 558 (2013), which the Supreme Court found to be interlocutory and not appealable. In *Charlotte-Mecklenburg*, the ALC granted partial summary judgment to one party and summary judgment to another and “remanded the case to DHEC for a determination as to which party, if any, was entitled to a certificate of need.” 387 S.C. at 266, 692 S.E.2d at 894. When the parties appealed the ALC’s order, the Court of Appeals dismissed the consolidated appeal finding the ALC’s order was not immediately appealable. *Id.* The Supreme Court upheld this decision applying S.C. Code Ann. § 1-23-610(A)(1) and reasoning that “[a]lthough the ALC decided questions of law,” it did not make a “final decision” on the underlying issue. *Id.* at 267, 692 S.E.2d at 896.

Bone, a worker’s compensation case, addressed the appealability of a circuit court order remanding a case to the worker’s compensation commission for further proceedings. 404 S.C. at 74, 744 S.E.2d at 556. Citing *Charlotte-Mecklenburg*, the

Supreme Court held that the circuit court's order was not a final judgment and, thus, was not appealable:

We agree that the order remanding the matter to the Commission for further proceedings before entry of a final award was an intermediate judgment that did not dispose of the entirety of the action leaving nothing else for determination, nor did it terminate the proceedings, as articulated in *Charlotte-Mecklenburg*.”

Id. at 75, 744 S.E.2d at 557.

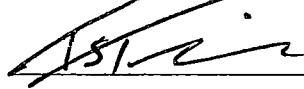
Like the orders in *Charlotte-Mecklenburg* and *Bone*, Judge Lenski's Order remanded the present case for further proceedings. He specifically based his ruling on “procedural errors” and did not reach the merits of the case, much less issue a ruling that could be characterized as “final” or “leaving nothing else for determination.”

Therefore, although Judge Lenski found the Panel committed errors of law by not recording the hearing and taking unsworn testimony, he did not address the underlying factual question of whether the circumstances of Brown's termination entitle her to UI benefits. That question is left to be resolved on remand. Hence, Judge Lenski's Order is not a final decision and Brown's appeal should be dismissed as interlocutory.

III. Conclusion

Because Brown does not seek review of a “final decision” of the ALC, as required by S.C. Code Ann. § 1-23-610(A)(1) and established South Carolina Supreme Court precedent, Respondents respectfully request that this Court dismiss her appeal and hold all deadlines in abeyance pending resolution of this Motion.

Respectfully submitted,



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Attorney for Respondent Cherokee County School District 1

September 7, 2016

**SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE**
Columbia, South Carolina

Sharon A. Brown)

[REDACTED])
[REDACTED])
[REDACTED])

Claimant SSN: [REDACTED]

**APPELLATE PANEL
DECISION**

Cherokee County School District One)
c/o Human Resources)
PO Box 460)
Gaffney, SC 29342)

Appellant: Employer

The employer appealed Appeal Tribunal Decision 2015-A-10160 to the Appellate Panel. The Tribunal held the claimant eligible for benefits upon finding she was discharged without cause. This decision reversed the claims adjudicator's determination, which held the claimant disqualified from benefits upon finding she was discharged for misconduct.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2015-A-10160 is reversed. The claimant is disqualified from benefits for twenty (20) weeks, from October 4, 2015, through February 20, 2016, with a corresponding monetary reduction, upon finding the claimant was discharged for misconduct connected with the employment. This decision may result in an overpayment in benefits to the claimant.

The claimant worked from August 1, 1999, to October 7, 2015, most recently as a second grade school teacher. She was terminated for refusing to follow a directive from the human resources director. The claimant was under investigation for allegedly grabbing a student by the lower jaw and neck on May 28, 2015. The teacher who made this complaint to the administration was present at the Appeal Tribunal hearing, and he explained what he observed that day. On June 1, 2015, the human resources director placed the claimant on administrative leave while the employer investigated the allegation. The human resources director states that during the meeting on June 1, 2015, he specifically instructed the claimant

Exhibit A

DECISION NO: 2016-P-00236

APPEAL NO: 1517782

she was restricted from going to any school properties without permission from the employer, and she should not have any contact with district employees or students in any manner concerning the investigation while on administrative leave. During the meeting, the claimant gave the human resources director the names of two (2) witnesses she wanted the employer to interview in connection with the investigation. Both witnesses were employees of the school district. On June 5, 2015, the claimant came in contact with one of the witnesses while at a store. The human resources director contends when the witness testified at the claimant's grievance hearing, the witness stated the claimant initiated a conversation about the investigation. The claimant was terminated as a result of the employer's investigation into the May 28, 2015 incident, for speaking with the witness after she was specifically directed not to, and for dishonesty to the employer in the course of the investigation.

The claimant agrees she confronted the student about his use of negative language on May 28, 2015, but she denies physically touching the child during the confrontation. She acknowledges she spoke with the witness on June 5, 2015; however, she contends the witness initiated the conversation. She acknowledges after they exchanged greetings, she asked the witness if she had spoken with the human resources director. The claimant notes she talked with the witness for three to five minutes. She does not recall whether she was told during the June 1, 2015 meeting that she could not speak with school district employees while the investigation was ongoing. The claimant further denies she engaged in the inappropriate actions on May 28, 2015, and she denies she was dishonest during the investigation.

S.C. Code Ann. § 41-35-120(2)(a) requires disqualification from benefits for twenty weeks, with a corresponding monetary reduction, when the Department finds that a claimant has been discharged for misconduct connected with the employment. "Misconduct" includes deliberate violations or disregard of the standards of behavior which an employer has the right to expect of his employee, and carelessness or negligence of such a degree or frequency as to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

The evidence establishes the claimant refused to comply with the human resources director's instruction to not speak with school district employees during the investigation. The employer has presented sufficient credible evidence to show during the meeting on June 1, 2015, the human resources director instructed the claimant to not speak to any school district employees while she was on administrative leave. We find this instruction was reasonable, given the nature of the investigation. Contrary to the Appeal Tribunal, we find the claimant's assertion, that she did not initiate the conversation and was unaware she could not speak with school district employees, lacks credibility. The claimant acknowledges she asked the witness whether the witness had been in contact with the human resources

Date Mailed: 1/29/2016

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DECISION NO: 2016-P-00236

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director. We find the claimant introduced the subject of the investigation into her conversation with the witness, and she knew or should have known having a conversation with the witness about the investigation was a violation of the employer's protocol. The claimant's refusal to follow the employer's reasonable directive constituted a deliberate disregard of the standard of behavior the employer had the right to expect of the claimant. Therefore, we find the claimant was discharged for misconduct connected with the employment. The Appeal Tribunal decision is reversed.

The claimant may request a waiver of the overpayment caused by this decision by completing an Application for Waiver of No-Fault Overpayment, form BPC-252, found on the Department's website: http://dew.sc.gov/documents/forms/BPC-252_Application_for_Waiver.doc

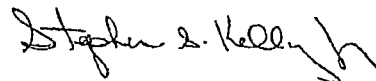
SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE



E.B. Ayers, Concurring



Tim Dangerfield



Stephen S. Kelly, Jr.

Hearing Date: 01/26/16

Date Mailed: 1/29/2016

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
(SCDEW)
Columbia, South Carolina

NOTICE OF MAILING OF APPELLATE PANEL DECISION

Attached is a copy of the final agency decision of SCDEW in this case. Any further appeal is to the South Carolina Administrative Law Court. To obtain judicial review of this decision, you must comply with the requirements of S.C. Code Ann. § 41-35-750 and the Rules of Procedure of the Administrative Law Court. The Court may require a filing fee.

The law requires that a Petition for Judicial Review must be filed with the Court and served on all parties and SCDEW within thirty (30) days from the date of mailing of the agency's final decision (**see the mailing date above**).

The address of the Administrative Law Court is:

**S.C. Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Ste. 224
Columbia, SC 29201**

Service of the Petition on SCDEW must be addressed and mailed to:

**Office of General Counsel
S.C. Department of Employment and Workforce
Post Office Box 8597
Columbia, SC 29202**

SCDEW cannot advise a party on any legal matter. For legal advice or assistance in filing an appeal to the Administrative Law Court, you should consult an attorney licensed to practice in South Carolina.

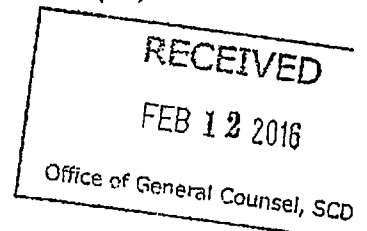
Form App-115
Rev.8/12

Date Mailed: 1/29/2016

Exhibit B

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ATTORNEY AT LAW

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112 WAKEFIELD STREET GREENVILLE, SOUTH CAROLINA 29601
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VIA MAIL DELIVERY

Clerk of Court
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, S.C. 29201

Re: Sharon Brown (P.O. Box 1442, Spartanburg S.C. 29304, telephone number(864)253-9975)
vs. Cherokee County School District One
c/o Human Resources, P.O. Box 460
Gaffney, S.C. 29342

February 10, 2016

Dear Clerk of Court,

Enclosed herewith for filing please find the original and three copies of Claimant's, Sharon Brown, PETITION FOR AN APPEAL with the South Carolina Administrative Law Court. According to Ms. Mary Jane Snelling, there is no filing fee for appeals from the Department of Employment and Workforce Appellate Panel to the Administrative Law Court. Appellant/Petitioner received the Appellate Panel's decision on February 1, 2016.

PETITION FOR AN APPEAL

The Grounds for Appeal are as follows:

- 1. The Appellate Panel for the Department of Employment and Work Force used an unlawful procedure to disqualify the claimant, Sharon Brown, for unemployment benefits. The appellant panel took additional testimony from witnesses in violation of S.C. Code Regulations §47--52(B) during the hearing on January 26, 2016.**
- 2. The Appellate Panel's decision to disqualify Ms. Sharon Brown for unemployment benefits is affected by an error of law. All testimony taken from witnesses during an unemployment**

appeal must be taken under oath . The Appellate Panel took additional testimony without placing witnesses under oath.

3. The unannounced taken of testimony by the Appellate Panel during the hearing on January 26, 2016 violated Claimant's procedural due process rights and the requirements of a fair hearing. If additional evidence or testimony is required it should have been taken in the manner prescribed for the conduct of hearings before the Appeal Tribunal.

4. The Appellate Panels' decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Ms. Sharon Brown was not insubordinate. Nowhere in Dr. Carl Carpenter's, Director of Human Resource, letter dated June 1, 2016 is there a reference/mention of a conversation that he had with Ms. Sharon Brown about not having any contact with employees or students.

5. The Appellate Panel erred in reversing the Administrative Hearing Officer's decision that claimant was discharged under non-disqualifying circumstances. There is substantial evidence that Ms. Sharon Brown was not insubordinate.

6. The Appellate Panel's decision to disqualify Ms. Sharon Brown for unemployment benefits is arbitrary, capricious, characterized by abuse of discretion, and clearly an unwarranted exercise of discretion.



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Exhibit B

SHARON A BROWN
PO BOX 1442
SPARTANBURG, SC 29304-1442

Date Mailed: 1/29/2016

DECISION NO: 2016-P-00236

APPEAL NO: 1517782

SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

Sharon A. Brown)

[REDACTED])
[REDACTED])
[REDACTED])

Claimant SSN: [REDACTED]

APPELLATE PANEL
DECISION

Cherokee County School District One)
c/o Human Resources)
PO Box 460)
Gaffney, SC 29342)

Appellant: Employer

The employer appealed Appeal Tribunal Decision 2015-A-10160 to the Appellate Panel. The Tribunal held the claimant eligible for benefits upon finding she was discharged without cause. This decision reversed the claims adjudicator's determination, which held the claimant disqualified from benefits upon finding she was discharged for misconduct.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2015-A-10160 is reversed. The claimant is disqualified from benefits for twenty (20) weeks, from October 4, 2015, through February 20, 2016, with a corresponding monetary reduction, upon finding the claimant was discharged for misconduct connected with the employment. This decision may result in an overpayment in benefits to the claimant.

The claimant worked from August 1, 1999, to October 7, 2015, most recently as a second grade school teacher. She was terminated for refusing to follow a directive from the human resources director. The claimant was under investigation for allegedly grabbing a student by the lower jaw and neck on May 28, 2015. The teacher who made this complaint to the administration was present at the Appeal Tribunal hearing, and he explained what he observed that day. On June 1, 2015, the human resources director placed the claimant on administrative leave while the employer investigated the allegation. The human resources director states that during the meeting on June 1, 2015, he specifically instructed the claimant

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The claimant agrees she confronted the student about his use of negative language on May 28, 2015, but she denies physically touching the child during the confrontation. She acknowledges she spoke with the witness on June 5, 2015; however, she contends the witness initiated the conversation. She acknowledges after they exchanged greetings, she asked the witness if she had spoken with the human resources director. The claimant notes she talked with the witness for three to five minutes. She does not recall whether she was told during the June 1, 2015 meeting that she could not speak with school district employees while the investigation was ongoing. The claimant further denies she engaged in the inappropriate actions on May 28, 2015, and she denies she was dishonest during the investigation.

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The evidence establishes the claimant refused to comply with the human resources director's instruction to not speak with school district employees during the investigation. The employer has presented sufficient credible evidence to show during the meeting on June 1, 2015, the human resources director instructed the claimant to not speak to any school district employees while she was on administrative leave. We find this instruction was reasonable, given the nature of the investigation. Contrary to the Appeal Tribunal, we find the claimant's assertion, that she did not initiate the conversation and was unaware she could not speak with school district employees, lacks credibility. The claimant acknowledges she asked the witness whether the witness had been in contact with the human resources

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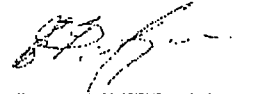
DECISION NO: 2016-P-00236

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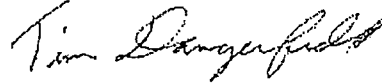
director. We find the claimant introduced the subject of the investigation into her conversation with the witness, and she knew or should have known having a conversation with the witness about the investigation was a violation of the employer's protocol. The claimant's refusal to follow the employer's reasonable directive constituted a deliberate disregard of the standard of behavior the employer had the right to expect of the claimant. Therefore, we find the claimant was discharged for misconduct connected with the employment. The Appeal Tribunal decision is reversed.

The claimant may request a waiver of the overpayment caused by this decision by completing an Application for Waiver of No-Fault Overpayment, form BPC-252, found on the Department's website: http://dew.sc.gov/documents/forms/BPC-252_Application_for_Waiver.doc

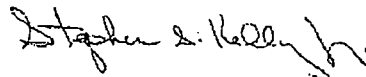
SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE



E.B. Ayers, Concurring



Tim Dangerfield



Stephen S. Kelly, Jr.

Hearing Date: 01/26/16

Date Mailed: 1/29/2016

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sharon Brown)
Appellant/Petitioner,)

Docket No. ___-ALJ-____-____-____

vs.)

CERTIFICATE OF SERVICE

Cherokee County School District One)
Respondent)
_____)

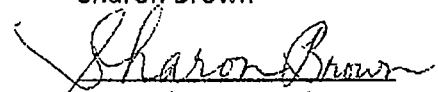
I hereby certify that I am the Appellant/Petitioner in the above-captioned matter and that on the 10th day of February, 2016, in Spartanburg, South Carolina, I served a copy of the forgoing Petition for Appeal on the following person(s) by depositing the same in the United States Mail, postage paid, and addressed as follows:

Office of General Counsel
S.C. Department of Employment and Workforce
Post Office Box 8597
Columbia, S.C. 29202

Cherokee County School District One
c/o Human Resources
P.O. Box 460
Gaffney, S.C. 29342

Ms. Andrea E. White, Esquire
Duff, White & Turner, LLC
P.O. Box 1486
Columbia, S.C. 29202

Sharon Brown


216 Ardmore Road
Spartanburg, S.C. 29306

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sharon A. Brown,

Appellant,

vs.

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

Respondents.

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

ORDER

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 21, 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, 2016.¹

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

¹ 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.

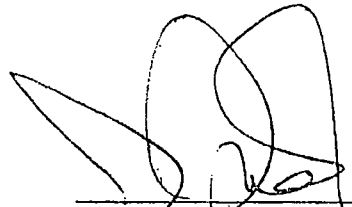
The Department takes the position that while the Appellate Panel hearing proceedings may have run afoul of procedural requirements, any error committed was harmless and should not be cause for a reversal of its decision. However, for any party asserting harmless

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 (4th 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

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States Mail, postage paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s).

This 22nd day of July 2016

Administrative Law Clerk

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT
J. Phillip Lenski, Administrative Law Judge

Case No.: 16-ALJ-22-0050-AP

Appellate Case No. 2016-001734

Sharon Brown,

Appellant,

v.

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

Respondents.


PROOF OF SERVICE

I certify that I have served the Motion to Dismiss Appellant's Appeal as Interlocutory on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on September 7, 2016, addressed to the parties at their addresses of record:

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September 7, 2016



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September 7, 2016

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SC Court of Appeals

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

RE: Sharon Brown v. SCDEW and Cherokee County School District One
Appellate Case No: 2016-001734

Dear Ms. Kitchings:

Enclosed are the original unbound and six stapled copies of the Respondents' Motion to Dismiss Appellant's Appeal as Interlocutory in the above case with a Certificate of Service to the other parties.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Kristi Chesley".

Kristi Chesley
Administrative Legal Assistant for
Todd Timmons
Attorney for Appellant SCDEW

SOUTH CAROLINA
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