

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

SEP 20 2016

SC Court of Appeals

Appeal From The Administrative Law Court  
S. Phillip Lenski, Administrative Law Judge

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

Appellate Case No. 2016-001734

Sharon Brown,

Appellant.

vs.

SC Department of Employment  
and Workforce and Cherokee County  
School District One,

Respondents.

**APPELLANT'S INITIAL BRIEF**

FLETCHER N. SMITH JR.  
SC Bar #: 005165  
P.O. Box 10496, F.S.  
Greenville, South Carolina 29603  
(864)-232-6541  
(864)232-6756 Fax  
fnsmith@bellsouth.net  
**ATTORNEY FOR APPELLANT**

**OTHER COUNSELS OF RECORD:**

Todd Timmons  
Office of General Counsel-SCDEW  
P.O. Box 8597  
Columbia, S.C. 29202  
(803)737-0395  
legal@dew.sc.gov  
**ATTORNEY FOR RESPONDENT**

Andrea White  
David Lyon  
P.O. Box 1486  
Columbia, S.C. 29202  
(803)790-0603  
awhite@dwtlawfirm.com  
dlyon@dwtlawfirm.com  
**ATTORNEYS FOR RESPONDENT (Employer)**

**TABLE OF CONTENTS**

	<b>Page</b>
Table of Authorities . . . . .	iii
Statement of Issues On Appeal . . . . .	1
Statement of the Case . . . . .	2 - 3
Statement of Facts . . . . .	4 - 5
Argument . . . . .	6 - 12
Conclusion . . . . .	13

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>CASES</b>	
<u>Anders v. S.C. Parole &amp; Cmty. Corr. Bd.</u> , 279 S.C. 206, 209, 305 S.E.2d 229, 230 (1983).....	6
<u>Andrews Bearing Corp. v. Brady</u> , 261 S.C. 533, 536, 201 S.E. 2d 241, 243 (1973).....	10
<u>Canteen v. McLeod Regional Medical Center</u> , 384 S.C. 617, 624, 682 S.E.2d 504, 507 (Ct. App. 2009).....	9
<u>Horn v. Davis Elec. Constructors, Inc.</u> , 307 S.C. 559, 563, 416 S.E.2d 634, 636 (1992).....	6
<u>Law v. S.C. Dept. of Corr.</u> , 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006).....	10
<u>Moore v. Sumter County Council</u> , 300 S.C. 270, 273, 387 S.E. 2d 455, 458 (1990).....	10
<u>Responsible Econ. Dev. v. S.C. Dept. of Health &amp; Envtl. Control</u> , 371 S.C. 547, 553, 641 S.E.2d 425, 428(2007).....	10
<u>Thetford Props. IV Ltd. P'ship v. U.S. Dept. of Hous. &amp; Urban Dev.</u> , 907 F. 2d 445, 450 (4th Cir. 1990).....	10
<b>STATUTES</b>	
S.C. Code Ann. §1-23-380.....	8
S.C. Code Ann. §1-23-380(5) of South Carolina Code (2005 & Supp. 2009).....	9
S.C. Code Ann. §1-23-380(5) of South Carolina Code (Supp. 2014).....	7
S.C. Code Ann. §1-23-600.....	7
S.C. Code Ann. §1-23-610 (2005 Amended).....	12
S.C. Code Ann. §1-23-610 (2013).....	12
<b>OTHER AUTHORITIES</b>	
Article 1, section 22, of the South Carolina State Constitution.....	11
Jean Hoefler Toal, et al., Appellate Practice in South Carolina 49 (2d ed. 2002).....	9
Rules of Procedure for S.C. Administrative Law Court (Section 69).....	12

## STATEMENT OF ISSUES ON APPEAL

1. Whether Judge Lenski's order reversing the Appellate Panel's decision was specific enough to compel South Carolina Employment and Workforce to pay appellant her benefits?
2. Whether Judge Lenski's order is written in a fashion that would compel S.C. Department of Employment and Workforce to acknowledge that Brown exhausted her administrative remedies before their agency when the Appellate Panel reached a final decision on the merits of Brown's unemployment case on January 26, 2016 ?
3. Whether Judge Lenski's order is written in a fashion that would let a reasonable person realize that Appellant would be an exception to the exhaustion requirement, even though Appellant did in fact exhaust her administrative options?
4. Whether Judge Lenski's reversal of the Appellate Panel's decision is a final decision for purposes of this appeal?

## STATEMENT OF CASE

This matter is before the South Carolina Court of Appeals pursuant to the appeal of Sharon Brown (Appellant), filed August 18, 2016. The Appellant seeks review of an Administrative Law Court's (ALC) reversal decision in an action filed by the appellant against the Respondents in ALC Court. (Order of Judge Lenski, pgs. 1-4).

In the ACL decision, Judge Lenski (Administrative Law Court Judge) held that "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." (Order of Judge Lenski, pg. 1)

Prior to the reversal decision of Judge Lenski , the Appellant sought review from the ALC concerning a South Carolina Department of Employment and Workforce (SCDEW) Appellate Panel decision which concluded that the Appellant was terminated from her position with *Cherokee County School District One* for misconduct. (Appellate Panel Decision).

After the July 22, 2016 reversal decision by Judge Lenski, Appellant expected her unemployment benefits to be restored by SCDEW. However, SCDEW wrote (e-mail) Appellant's counsel after the court decision and stated the following: "Judge Lenski's order remanded this matter to the agency without specific instructions on what the next step should be." Appellant counsel's response was that he believes that the lower court's decision awarding benefits is in effect.

SCDEW sought to have another review by their agency on whether Appellant qualifies for unemployment benefits. Appellant has already exhausted her administrative remedies with

SCDEW. (Determination by Claims Adjudicator Letter; Appeal Tribunal Decision No. 2015-A-10160; and Appellate Panel Decision No. 2016-P-00236). Additionally, even if she had not exhausted her administrative remedies with SCDEW, Appellant believes that her case with SCDEW qualifies as being an exception to the exhaustion of administrative remedies because of Judge Lenski's finding that the SCDEW Appellate Panel acted outside of its authority.

Judge Lenski order held the following: "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. 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." (Order of Judge Lenski, pgs. 1-4).

Appellant contends that Judge Lenski 's order reversing the Appellate Panel's decision should have directly compelled SCDEW to immediately reinstate Appellant's benefits. Further, the order could have stated to SCDEW that Appellant has already exhausted her administrative remedies with SCDEW and explained to SCDEW that the Appellant does not have to exhaust administrative remedies, even if she had not already done so.

Appellant contends that SCDEW acted outside of its authority. Therefore, even if appellant had not exhausted her administrative remedies within the agency, she would qualify as an exception to having to exhaust administrative remedies within SCDEW agency.

## STATEMENT OF THE FACTS

The facts relevant to this appeal primarily are those related to the procedural history of the case.

The Appellant was terminated from Cherokee County School District One on October 7, 2015 and filed for unemployment benefits (benefits) on October 8, 2015. (Claimant's Initial Claims Application, pgs. 1-8). After reviewing her application for benefits, a claims adjudicator for SCDEW determined that the Appellant was discharged for a violation of the School District's policy and disqualified Appellant from receiving benefits for 20 weeks. Additionally, the Appellant's maximum benefits were reduced by 20 times her weekly benefit amount. (Determination by Claims Adjudicator Letter).

The Appellant appealed the claims adjudicator's determination on November 20, 2015, and a hearing was held before the SCDEW's Appeal Tribunal On December 17, 2015. (Claimant Appeal Letter to Appeal Tribunal; Appeal Tribunal Decision No. 2015-A-10160). 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 SCDEW Appellate Panel. (Notice of Employer Appeal to the Appellate Panel with appeal). After a Notice of Hearing on January 13, 2016, the Panel held a hearing on January 26, 2016, at the offices of the SCDEW in Columbia, S.C. (Notice of Hearing Before the Appellate Panel). The Panel issued an order reversing the Appeal Tribunal's order, concluding that the Appellant was terminated for misconduct. (Appellate Panel Decision No. 2016-P-00236).

The Appellant then filed an Appeal with the Administrative Law Court (ALC) for review. The ALC issued an order reversing the Appellate Panel's Order and Remanded to the SCDEW for further proceedings in accordance with ALC's Order. (Administrative Law Court Order, Judge Lenski).

When the case was back in the hands of SCDEW, SCDEW's counsel contacted (e-mail) Appellant's attorney and stated the following in the e-mail: "Judge Lenski's order remanded this matter to the agency without specific instructions on what the next step should be." Appellant counsel's response was that he believes that the lower court's decision awarding benefits is in effect. SCDEW sought to have another review by their agency on whether Appellant qualifies for unemployment benefits.

On August 18, 2016 Appellant filed with this Court for review of Judge S. Phillip Lenski's Order dated July 22, 2016. (Notice of Appeal, dated August 18, 2016).

## ARGUMENT I

### **WHETHER JUDGE LENSKI'S ORDER REVERSING THE APPELLATE PANEL'S DECISION WAS SPECIFIC ENOUGH TO COMPEL SOUTH CAROLINA EMPLOYMENT AND WORKFORCE TO PAY APPELLANT HER UNEMPLOYMENT BENEFITS?**

Judge Lenski's order should have directly compelled South Carolina Department of Employment and Workforce (SCDEW) to immediately reinstate appellant's unemployment benefits. SCDEW has refused to reasonably infer that Judge S. Lenski 's order reversing the Appellate Panel's decision means that SCDEW must pay the unemployed claimant her benefits. Appellant should not have to participate in another hearing with South Carolina Employment and Workforce as SCDEW is seeking, given that the Appellate Panel reached a final decision on the merits of Brown's case on January 26, 2016. (Appellate Panel Decision No. 2016-P-00236). Judge Lenski reversed the Appellate Panel's decision on July 22, 2016. (Administrative Law Court Order, Judge Lenski).

Further, our legislature procedures for hearings before the Appellate Panel were set in place to afford the unemployed claimant a meaningful review of the evidence of record by the Appellate Panel prior to the Appellate Panel making a final determination, as a review of the evidence of record on a final decision by the Appellate Panel a second time (after the reversal by the administrative law court) would be futile. "The elementary and cardinal rule of statutory construction is that the Court ascertain and effectuate the actual intent of the legislature." *Horn v. Davis Elec. Constructors, Inc.*, 307 S.C. 559, 563, 416 S.E.2d 634, 636 (1992). Where, as here, the terms are clear and unambiguous, "the Court must apply them according to [their] literal meaning." *Anders v. S.C. Parole & Cmty. Corr. Bd.*, 279 S.C. 206, 209, 305 S.E.2d 229, 230 (1983).

South Carolina Administrative Law Court does not permit any motions for reconsideration. Appellant cannot request that Judge Lenski , in a revised order, compel SCDEW to pay Appellant her unemployment benefits. SCDEW , upon belief, are pretending that they are unable to infer that the reversal means pay the unemployed claimant her benefits.

Many unemployment compensation claimants will face destitution if benefits are denied, so it is important not only that their claims be given fair consideration by the Appellate Panel, but paid immediately after reversal of Appellate Panel's decision by our Administrative Law Court. Judge S. Lenski's order clearly indicated that SCDEW failed to give Appellant fair consideration of her unemployment claim.

Judge Lenski's Order( on page 4) states the following: "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. 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." (Administrative Law Court Order, Judge Lenski)

S.C. Code Section 1-23-380 (5) of South Carolina Code (Supp. 2014) provides the standard used by appellate courts to review agency decisions. See § 1-23-600 (directing

administrative law judges to conduct appellate review in the same manner prescribed in §1-23-380). S.C. Code Section 1-23-380, 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.

The question devolves as to whether Judge Lenski's order should have compelled SCDEW to pay Appellant her unemployment benefits immediately. By Judge Lenski's order not directly telling SCDEW to pay appellant her unemployment benefits, SCDEW was able to circumvent Judge Lenski's intent.

## **ARGUMENT II**

**WHETHER JUDGE LENSKI'S ORDER IS WRITTEN IN A FASHION THAT WOULD COMPEL S.C. DEPARTMENT OF EMPLOYMENT AND WORKFORCE TO ACKNOWLEDGE THAT BROWN EXHAUSTED HER ADMINISTRATIVE REMEDIES BEFORE THEIR AGENCY WHEN THE APPELLATE PANEL REACHED A FINAL DECISION ON THE MERITS OF BROWN'S UNEMPLOYMENT CASE ON JANUARY 26, 2016?**

In the case at hand, whether or not to terminate Brown's unemployment benefits was the only issue to be determined by the Appellate Panel, and when the Appellate Panel unanimously voted on January 26, 2016 to terminate Appellant Brown's unemployment

benefits, it reached a final decision on the merits. In Canteen v. McLeod Regional Medical Center, 384 S.C. 617, 624, 682 S.E.2d 504, 507 (Ct. App. 2009), the Appellate Panel of the Workers' Compensation Commission reversed the findings of the single commissioner regarding a brain injury and remanded the case for a determination of permanency to body parts other than the claimant's brain. The claimant immediately sought judicial review and the employer filed a motion to dismiss, arguing the Appellant Panel's decision was interlocutory because it had remanded the case for further proceedings. Id. However, this Court held, "because the appellate panel ruled on the only issue before it, there was a final agency decision on the merits in the case and the claimant exhausted all of her administrative remedies." Id.

Further, Section 1-23-380 of the South Carolina Code (2005 & Supp. 2009) states in part, "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Id., see also Jean Hoefer Toal, et al., Appellate Practice in South Carolina 49 (2d ed. 2002)."

Here, like in Canteen v. McLeod, the appellate panel ruled on the only issue before it. Judge Lenski's order could have addressed that the appellant exhausted all administrative remedies within SCDEW agency. This may have prevented SCDEW from attempting to circumvent his (Judge Lenski's Order) intent that Ms. Brown, appellant, be paid her unemployment benefits.

### ARGUMENT III

#### **WHETHER JUDGE LENSKI'S ORDER IS WRITTEN IN A FASHION THAT WOULD LET A REASONABLE PERSON REALIZE THAT APPELLANT WOULD BE AN EXCEPTION TO THE EXHAUSTION REQUIREMENT, EVEN THOUGH APPELLANT DID IN FACT EXHAUST HER ADMINISTRATIVE OPTIONS?**

Judge Lenski's order should have addressed the fact that Appellant exhausted her administrative remedies within SCDEW. This could have prevented SCDEW from seeking to reach an additional final decision on the merits of Appellant's unemployment benefits claim after Judge Lenski's ruling. Further, Appellant asserts that even if she failed to exhaust her administrative remedies before SCDEW, exhaustion was not required because her case satisfied one of the exception to the exhaustion requirement. The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule. Andrews Bearing Corp. v. Brady, 261 S.C. 533, 536, 201 S.E. 2d 241, 243 (1973); A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act: Moore v. Sumter County Council, 300 S.C. 270, 273, 387 S.E. 2d 455, 458 (1990). "Futility, however, must be demonstrated by a showing comparable to the administrative agency taking "a hard and fast position that makes an adverse ruling a certainty." Law v. S.C. Dept. of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (citing Thetford Props. IV Ltd. P'ship v. U.S. Dept. of Hous. & Urban Dev., 907 F. 2d 445, 450 (4th Cir. 1990) . Another exception to the exhaustion requirement is recognized when an agency has acted outside of its authority. Responsible Econ. Dev. v. S.C. Dept. of Health & Envtl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428(2007).

Appellant asserts that she was not required to participate in a hearing after a final determination had already been made by the Appellate Panel regarding her unemployment benefits, as such a pursuit would constitute a futile act. Consequently, Ms. Brown unemployment benefits should have been immediately restored by SCDEW after Judge Lenski's issued his ruling reversing the Appellate Panel's decision on July 22, 2016. Additionally, Judge Lenski's order highlights how SCDEW acted outside of its authority when not following legislature procedures when conducting an Appellate Panel review.

As mentioned earlier, Judge Lenski's Order (on page 4) states the following: "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. 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."

Article 1, section 22, of the South Carolina State Constitution states: No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard... and he shall have in all such instances the right to judicial review.

#### ARUGMENT IV

#### **WHETHER JUDGE LENSKI'S REVERSAL OF THE APPELLATE PANEL'S DECISION IS A FINAL DECISION FOR PURPOSES OF THIS APPEAL?**

Arguments 1-3 above are restated. Appellant contends that she is entitled to appeal Judge Lenski's ruling directly to S.C. Court of Appeals and she does not have to allow SCDEW to do an additional final agency ruling on whether the claimant is qualified to receive unemployment benefits before she can be able to file an appeal with this court. Appellant exhausted all of her administrative remedies with SCDEW already and even if she had not exhausted her administrative options, she is an exception to the exhaustion rule. Appellant contends that Judge Lenski's intent, when reversing the Appellate Panel decision, was for SCDEW to reinstate Appellant's unemployment benefits.

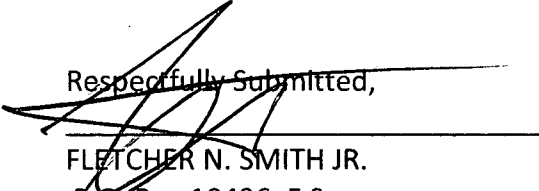
The Rules of Procedure for S.C. Administrative Law Court (Section 69) states the following: "The decision of the Administrative Law Judge is a final decision and motions for reconsideration will not be considered. Judicial review of any decision of the Court shall be as provided in S.C. Code Ann §1-23-610 (2005 Amended)."

S.C. Code § 1-23-610 (2013) states in part: "For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right."

**CONCLUSION**

The ACL order dated July 22, 2016 should be modified to compel SCDEW to pay Appellant her benefits.

Respectfully Submitted,

  
FLETCHER N. SMITH JR.

P.O. Box 10496, F.S.

Greenville, South Carolina 29603

(864)-232-6541

(864)232-6756 Fax

fsmith@bellsouth.net

**ATTORNEY FOR APPELLANT**

September 15, 2016

---

**CERTIFICATE OF SERVICE**

---

I, Sharon Brown, hereby certify that I have this 16<sup>th</sup> day of September 2016, served a copy of the herein below listed document to the addresses listed below by depositing a copy of same in the United States Postal System postage prepaid, and mailing same to:

PLEADING(S): APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

**PARTY SERVED:**

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

**RECEIVED**  
SEP 20 2016  
SC Court of Appeals

Ms. Andrea E. White/David Lyon, Esq.  
Duff, White & Turner, LLC  
P.O. Box 1486  
Columbia, S.C. 29202

  
SHARON BROWN  
Appellant

FLETCHER N. SMITH, LLC  
ATTORNEY AT LAW



P.O. BOX 10496, F.S. GREENVILLE, SOUTH CAROLINA 29603  
112 WAKEFIELD STREET GREENVILLE, SOUTH CAROLINA 29601  
(864) 232-6541 FAX (864) 232-6756

September 16, 2016

South Carolina Court of Appeals  
ATTN: Jenny Abbott Kitchings, Clerk of Court  
P.O. Box 11629  
Columbia, S.C. 29211

**RECEIVED**  
SEP 20 2016  
SC Court of Appeals

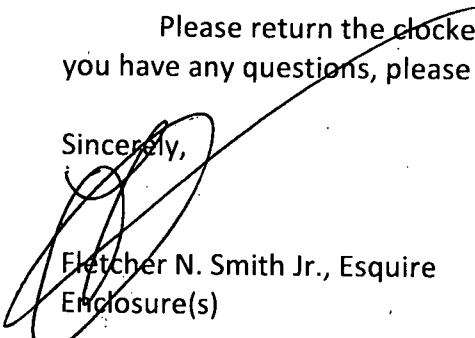
Re: Sharon A. Brown, Appellant vs. South Carolina Department of Employment and Workforce and Cherokee County School District One, Respondents.  
Docket No. 16-ALJ-22-0050-AP  
Appellate Case No. 2016-001734

Dear Clerk of Court,

Enclosed you will find one (1) original and three (3) copies of each of the following: APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL. Additionally, you find a certificate of service.

Please return the clocked copies in the self addressed stamped envelope provided. If you have any questions, please contact my office.

Sincerely,

  
Fletcher N. Smith Jr., Esquire  
Enclosure(s)

Cc: Mr. Todd Timmons, Esquire  
Office of General Counsel  
S.C. Department of Employment and Workforce

Ms. Andrea E. White, Esquire  
Mr. David Lyon, Esquire  
Duff, White & Turner, LLC

Fletcher N. Smith, Esquire  
P.O. Box 10496, F.S.  
Greenville, S.C. 29603

 1024

 29211

U.S. POSTAGE  
PAID  
SPARTANBURG, SC  
29306  
SEP 16, 16  
AMOUNT  
**\$6.45**  
R2304M113546-26

RECEIVED  
SEP 20 2016  
SC Court of Appeals

S.C. Court of Appeals  
Attn: Jenny Abbott Kitchings, Clerk of Court  
P.O. Box 11629  
Columbia, S.C. 29211

Expected Delivery Day: 09/19/2016  
USPS TRACKING NUMBER



9505 5134 3619 6260 0236 33

PRIORITY MAIL

 UNITED STATES POSTAL SERVICE

For Domestic Use Only

TRACKED INSURED

Label 107R, July 2013