

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED

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

SEP 22 2016

SC Court of Appeals

Case No.: 16-ALJ-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 RESPONSE TO RESPONDENT'S MOTION TO DISMISS APPELLANT'S  
APPEAL AS INTERLOCUTORY**

**I. INTRODUCTION**

**NOW COMES** the Appellant, Sharon Brown, in the above captioned action who hereby opposes the Respondents' Motion to Dismiss Appellant's Appeal as Interlocutory, and alleges that the Respondents are not entitled to a judgment as a matter of law because of the circumstances of Judge Lenski's order. Said opposition is based upon the pleadings, case law and statutory law, rules of court, and the record of this case.

## II. STATEMENT OF THE 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. (Exhibit A, Order of Judge Lenski, pgs. 1-4). The Respondents seek to have Appellant's appeal dismissed as interlocutory.

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." (Exhibit A, 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. (Exhibit B, 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. (Exhibit D, Determination by Claims Adjudicator Letter; Exhibit C, Appeal Tribunal Decision No. 2015-A-10160; and Exhibit B, 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.

### III. STATEMENT OF THE FACTS

The Appellant was terminated from Cherokee County School District One on October 7, 2015 and filed for unemployment benefits (benefits) on October 8, 2015. 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.

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

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.

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.

#### IV. DISCUSSION

The respondents have moved in this Court for dismissal of Appellant's appeal alleging that the ACL Judge's Order was not a final order because Judge Lenski did not address the underlying factual question of whether the circumstances of Brown's termination entitle her to UI benefits.

Appellant contends that Judge Lenski's order reversing the Appellant Panel's decision was a final decision. Appellant contends that the case was reversed and remanded to SCDEW to carry out the payment of Appellant's unemployment benefits. Appellant contends that SCDEW circumvented Judge Lenski's intent by claiming that "Judge Lenski's order remanded this matter to the agency without specific instructions on what the next step should be."

Further, Appellant contends that SCDEW is disqualified from having any additional final rulings on the merits of her unemployment case due to SCDEW having been cited for acting outside the scope of their authority by ALC Judge. 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 & Env'tl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428(2007).**

Further, 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's unemployment benefits should have been immediately restored by SCDEW after Judge Lenski 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.

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

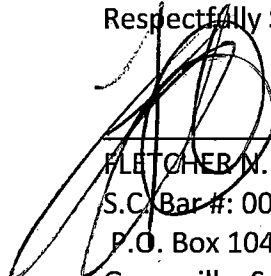
find that the errors did not affect the outcome, as the Appellate Panel reversed the Appellate Tribunal's Order. For the forgoing reasons, It Is Hereby Ordered, that the Appellate Panel's decision is Reversed, and this matter is Remanded to the Department for further proceedings in accordance with this 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.

#### **V. Conclusion**

Appellant contends that Judge Lenski's order reversing SDEW's Appellate Panel's decision disposed of all issues in controversy concerning the Appellant and the Respondent. Appellant contends that SCDEW failed to carry out enforcement of the reversal decision that indicated that Appellant was to receive her unemployment benefits.

Respectfully Submitted,



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**ATTORNEY FOR APPELLANT**

September 21, 2016

# EXHIBIT A

**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.

**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 20, 2016, at the offices of the Department in Columbia, South Carolina. The Panel issued an order

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SC ADMIN. LAW COURT

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. Philip 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 22<sup>nd</sup> day of July 2016

by \_\_\_\_\_

Judicial Law Clerk

# EXHIBIT B

**SOUTH CAROLINA  
DEPARTMENT OF EMPLOYMENT AND WORKFORCE**

Columbia, South Carolina

Sharon A. Brown )

[REDACTED] )  
[REDACTED] )

Claimant SSN: [REDACTED]

**APPELLATE PANEL  
DECISION**

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

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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

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

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](http://dew.sc.gov/documents/forms/BPC-252_Application_for_Waiver.doc)

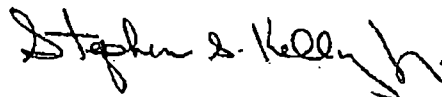
SOUTH CAROLINA DEPARTMENT OF  
EMPLOYMENT AND WORKFORCE



E.B. Ayers, Concurring



Tim Dangerfield



Stephen S. Kelly, Jr.

Hearing Date: 01/26/16

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

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**NOTICE OF MAILING OF APPELLATE PANEL DECISION**

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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.

# EXHIBIT C

SOUTH CAROLINA  
DEPARTMENT OF EMPLOYMENT AND WORKFORCE

**DECISION OF APPEAL TRIBUNAL**

Hearing Date: 12/17/2015

SHARON A BROWN )  
[REDACTED] ) CLAIMANT  
[REDACTED] )

CHEROKEE COUNTY SCHOOL DISTRICT 1 )  
PO BOX 460 ) EMPLOYER  
GAFFNEY , SC 29342 )

APPELLANT: Claimant

SS NO: [REDACTED]

APPEARANCES

FOR THE Present with 1 attorney  
CLAIMANT:

FOR THE Present with 2 witnesses and 1  
EMPLOYER: attorney

FINDINGS OF FACT

The issue in this case is whether the claimant was discharged for misconduct.

The claimant appealed the claims adjudicator's determination mailed November 16, 2015, which held the claimant disqualified from receiving benefits for twenty (20) weeks, effective October 4, 2015 through February 20, 2016, along with a corresponding reduction in the maximum potential benefit amount upon a finding the claimant was discharged for misconduct.

The claimant worked from August 1, 1999 to October 7, 2015 with the subject employer, most recently as a second grade school teacher. The claimant was terminated effective October 7, 2015 for conduct violation(s). On May 28, 2015, the claimant admittedly and verbally addressed a second grade student for what she deemed inappropriate language. The incident, witnessed by a first year art teacher, co-worker and one (1) of the two (2) employer witnesses participating in the evidentiary hearing, alleged that the claimant used both violent force and verbal assault against the student but admittedly failed to report the incident until the following day; this, notwithstanding that both the principal and human resources (HR) director were on the premises at the time. There was no third party administrative and/or law enforcement agency notification of any kind, the child simply returned to his class, according to the employer witness and no substantive follow-up thereafter relative to that matter. The claimant

was not made aware of the allegation until June 1, 2015 when the claimant was summoned to meet with among others, the HR supervisor; the other employer witness participating. The HR supervisor contends that at the time of the June 1, 2015 meeting, he placed the claimant on an administrative leave for the duration of the subsequent investigation and verbally informed the claimant not to have any contact with District employees or students during her leave; the claimant maintains that she has no recollection of that specific directive. The claimant provided the HR director with the name of a co-worker/behavior interventionist as her requested witness at that time. A June 1, 2015 letter was then forwarded certified mail to the claimant whose receipt of same was not until June 11, 2015; all parties stipulated to the date of receipt as in fact having been June 11, 2015. The letter, although stating that the claimant was restricted from going on any school property without expressed permission and/or having any contact with school district employees or students in any manner while on leave, failed to memorialize the June 1, 2015 meeting relative to latter of the two (2) directives contained in the letter. In the interim and on June 5, 2015, the claimant acknowledged that she had a chance meeting with her requested witness in a local department store and did engage the co-worker in a three (3) to five (5) minute conversation. On June 31, 2015, the claimant, her attorney, the school superintendent, HR manager and counsel for the employer met wherein the claimant was informed her encounter with the co-worker/witness in the department store had significantly and adversely impacted the District's ability to complete its investigation into the May 28, 2015 incident; this, irrespective of the fact that the District had in fact already secured a signed statement from the co-worker on June 1, 2015. The employer at that time concluded and informed the claimant that the District deemed her to have been dishonest in her reporting the facts, questioned her denial of the May 28, 2015 incident and recommended her dismissal to the District Board of Trustees who upheld the superintendent's recommendation. The claimant was formally terminated effective October 7, 2015.

### REASONS

S.C. Code Ann. § 41-35-120(2)(a) requires disqualification from benefits for twenty (20) 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.

S.C. Code Ann. § 41-27-20 requires that unemployment benefits to be set aside for persons unemployed through no fault of their own.

S.C. Code Ann. § 41-35-120(2)(b) requires disqualification from benefits for five (5) to nineteen (19) weeks, with a corresponding monetary reduction, when the Department finds that a claimant has been discharged for cause, other than misconduct, connected with the employment. "Cause" may include an unintentional disregard for the standards of behavior the employer can rightfully expect of his employee or the negligence of an employee that does not rise to the level of misconduct.

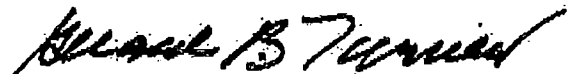
With the sole onus on the part of the employer to establish the requisite criteria for a discharge under the guidelines of the law, based solely upon the totality of the parties' respective testimony and submitted documentation, the Tribunal finds that the mandatory greater weight of credibility rests with the claimant in negating the necessary degree of inappropriate claimant conduct that would create the criteria to form a discharge for cause under the guidelines of the law. The employer had the opportunity to

to present several witnesses for the Tribunal hearing but chose instead to rely upon the transcript of the teacher dismissal hearing conducted by the Board of Trustees of the Cherokee County School District from an October 7, 2015 hearing, erroneously inferring that testimony having been taken therein and under oath was sufficient evidence. This Department has long held that as an independent Tribunal, the Department is under no obligation to accept an employer's reasons and/or decisions made in an employment termination. The employer's alleged eye-witness testimony lacked the requisite credibility to establish believability regarding the May 28, 2015 incident; the June 1, 2015 letter from the HR manager clearly failed to establish that the letter was to memorialize the directive that the claimant adamantly denied as having been given on June 1, 2015 and as a direct consequence, the claimant's chance meeting with her co-worker on June 5, 2015 could not have been in violation of such directive if she had not been issued same. Accordingly, the Tribunal therefore further finds and so holds the claimant discharged for non-disqualifying reason(s) and as such, no disqualification shall be imposed upon the claimant.

### DECISION

The Tribunal hereby holds the claimant eligible for benefits, effective October 4, 2015, upon a finding the claimant was discharged under non-disqualifying circumstances. This decision reverses the determination mailed November 16, 2015.

This will be the final decision of the Department, unless you file an appeal to the Appellate Panel setting forth in detail the grounds for appeal within ten (10) calendar days, including weekends and holidays, from the mailing date of this decision. If the tenth day falls on a Saturday, Sunday or holiday, the appeal period is extended to the next business day. Your appeal may be filed by mail addressed to "Appellate Panel, Post Office Box 1752, Columbia, South Carolina, 29202", by fax at 803.737.3166 or by claimants through your MyBenefits Portal or by employers via your SCBOS portal. For additional information on filing an appeal, visit our web site at [www.dew.sc.gov/appeals.asp](http://www.dew.sc.gov/appeals.asp).



Gerald B. Turner

Administrative Hearing Officer

Mailed By: TDD

# EXHIBIT D

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE  
P.O. BOX 995, COLUMBIA, S.C. 29202

1 SHARON A BROWN

DATE OF THIS NOTICE 11/13/15

1 [REDACTED]  
1 [REDACTED]

CLAIMANT'S NAME				SOCIAL SECURITY NUMBER	EFFECTIVE DATE	DISQUALIFICATION ENDS		
SHARON A BROWN				[REDACTED]	10/04/15	02/20/16		
WFC. NO.	TYPE	CATEGORY	WEEKLY BENEFIT AMOUNT	MAXIMUM POTENTIAL ENTITLEMENT	LESS REDUCTION OF	NET TOTAL BENEFITS	BENEFIT YEAR ENDS	
420	I	01	\$ 326.00	\$ 6520.00	\$ 6520.00	\$ 0.00	10/03/16	

1

DETERMINATION BY CLAIMS ADJUDICATOR ON CLAIM FOR BENEFITS

1 \_\_\_\_\_ You are eligible for benefits from the above effective date.

1  You have been disqualified from receiving benefits or have been found to be ineligible for benefits for the following reason(s).

1 YOU WERE DISCHARGED FROM YOUR JOB WITH YOUR MOST RECENT BONA FIDE EMPLOYER FOR VIOLATION OF  
1 COMPANY POLICY. POLICIES VIOLATED WERE NOT UNREASONABLE, AND YOU DID HAVE OPPORTUNITY TO HAVE  
1 KNOWLEDGE OF THE COMPANY POLICIES. FAILURE TO COMPLY WITH COMPANY POLICIES WAS CONTRARY TO THE  
1 EMPLOYER'S BEST INTERESTS. YOU WERE DISCHARGED FOR MISCONDUCT IN CONNECTION WITH THE WORK UNDER  
1 THE SOUTH CAROLINA CODE SECTION 41-35-120(2)(A). YOU ARE DISQUALIFIED FOR 20 WEEKS. YOUR MAXIMUM  
1 BENEFITS ARE ALSO REDUCED BY 20 TIMES YOUR WEEKLY BENEFIT AMOUNT.

1 THE RECORD SHOWS THAT THE TERMINATION OCCURRED DUE TO A CONDUCT VIOLATION.

1 \_\_\_\_\_ LAST SEPARATION FROM NON-LIABLE EMPLOYER

\_\_\_\_\_  
UI CLAIMS ADJUDICATOR

1 MAILING DATE 11/16/2015

IMPORTANT: THIS DETERMINATION WILL BE THE FINAL DECISION OF THE DEPARTMENT UNLESS YOU FILE AN APPEAL SETTING FORTH IN DETAIL THE GROUNDS FOR APPEAL WITHIN TEN (10) CALENDAR DAYS, INCLUDING WEEKENDS AND HOLIDAYS, FROM THE MAILING DATE SHOWN ABOVE. IF THE TENTH DAY FALLS ON A SATURDAY, SUNDAY, OR HOLIDAY, THE APPEAL PERIOD IS EXTENDED TO THE NEXT BUSINESS DAY. YOUR APPEAL MAY BE FILED IN PERSON AT ANY WORKFORCE CENTER, BY MAIL, ADDRESSED TO THE 'APPEAL TRIBUNAL,' P.O. BOX 995, COLUMBIA, SOUTH CAROLINA 29202, OR BY FAX (803) 737-0287. FOR ADDITIONAL INFORMATION OR ASSISTANCE IN FILING AN APPEAL, CONTACT YOUR LOCAL WORKFORCE CENTER OR THE APPEALS DEPARTMENT AT (803) 737-2520.

**RECEIVED**

CERTIFICATE OF SERVICE

SFP 22 2016

SC Court of Appeals

I, Sharon Brown, hereby certify that I have this 21<sup>st</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 Response To Respondent's Motion to Dismiss Appellant's Appeal as Interlocutory

PARTY SERVED:

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

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 21, 2016

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SEP 22 2016

SC Court of Appeals

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

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 six (6) copies of Appellant's Response To  
Respondent's Motion To Dismiss Appellant's Appeal As Interlocutory/ certificate of service to be  
filed with your court.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Fletcher N. Smith Jr.", written over a horizontal line.

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

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**FLETCHER N. SMITH, LLC**  
ATTORNEY AT LAW

P.O. BOX 10496, F.S.  
GREENVILLE, SOUTH CAROLINA 29603

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SFP 22 2016

SC Court of Appeals

South Carolina Court of Appeals  
ATTN: Honorable Jenny Abbott Kitchings  
Clerk of Court  
PO Box 11629  
Columbia, SC 29211

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