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

Sharon A. Brown, Appellant.

v.

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

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS APPELLANT'S APPEAL AS INTERLOCUTORY

Respondents South Carolina Department of Employment and Workforce ("DEW") and Cherokee County School District One ("Cherokee") move to dismiss Appellant Sharon A. Brown's ("Brown") appeal. Respondents' Motion should be granted because the Order 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. Brown's Response to Respondents' Motion is untimely and, thus, should not be considered.

Respondents filed their Motion to Dismiss on September 7, 2016. Accordingly, the deadline for Brown to file a Response was **Monday, September 19, 2016**. *See* Rule 263(a) ("The last day of the period so computed is to be included,

unless it is a Saturday, Sunday or a state or federal holiday, in which event the period runs until the end of the next day."); Rule 240(e) ("Any party opposing a motion or petition shall have ten (10) days from the date of service thereof to file . . . his return and serve on all parties."). Because Brown did not file her Response until September 21, 2016 – two (2) days after the deadline – the Response is untimely and should not be considered by the Court. *See Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992)("Appellate Court Rules are not mere technicalities, but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.").

II. The appropriate issue before the Court is whether Appellant's appeal is interlocutory, not whether Appellant has exhausted her administrative remedies.

Throughout her Response, Brown argues DEW failed to comply with Judge Lenski's Order, which she interprets as requiring an automatic reinstatement of her unemployment benefits. In support of this argument, Brown alternatively asserts that (1) she has exhausted all administrative remedies at DEW, and (2) it would be futile for her to exhaust her administrative remedies by participating in any additional proceedings. (App. Resp., p.5).

Assuming *arguendo* that DEW was noncompliant with Judge Lenski's Order, which DEW denies, the fact remains that Judge Lenksi's Order is not "a final decision of the ALC" that can be appealed to this Court because the Order expressly states there is "some further act which must be done." *Charlotte-Mecklenburg Hosp.*

Auth. v. South Carolina Dep't of Health & Envt. Control, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010). In the event Brown felt DEW failed to comply with Judge Lenski's Order, the only appropriate avenue of appeal is to seek judicial review of DEW's actions with the Administrative Law Court. The law is settled that Brown has no right to appeal an Order of remand to this Court before the case is processed on remand. *See id.*; *see also Bone v. U.S. Food Serv.*, 404 S.C. 67, 75, 744 S.E.2d 552, 557 (2013) (holding that an order remanding the matter for further proceedings before entry of a final award is an intermediate judgment that is not immediately appealable).

Moreover, in her Response, Brown all but concedes Judge Lenksi did not find she was eligible to receive unemployment benefits:

> Appellant contends that Judge Lenki's order . . . **should have** directly compelled [DEW] to immediately reinstate Appellant's benefits. Further the order **could have** stated to [DEW] that Appellant has already exhausted her administrative remedies and explained to [DEW] that the Appellant does not have to exhaust administrative remedies, even if she had not already done so.

(emphasis added). (App. Resp., p.5).

If Judge Lenski had issued this hypothetical order, there might have been a final decision of the ALC subject to appeal. However, he conspicuously declined to reach the merits of this case and, instead, remanded the case "to [DEW] for further proceedings in accordance with this Order." As discussed in Respondents' Motion, such an order is interlocutory and not immediately appealable under *Charlotte-Mecklenburg* and *Bone.*

The primary purpose of Judge Lenski's Order was to have DEW conduct further proceedings regarding the eligibility of Brown's unemployment insurance

benefits claim. "A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment." *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 894.

With regard to Brown's exhaustion of administrative remedies argument, Brown asserts she is not required to participate in any further proceedings conducted by DEW because she has already "exhausted her administrative remedies," and any additional proceedings would be "vain or futile." This assertion is without logic or support. Even assuming the issue of exhaustion of administrative remedies was properly before this Court, futility 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. Dep't of Corr.*, 368 S.C. 424, 629 S.E.2d 642 (2006). Here, Appellant cannot make such a demonstration based solely on the result of a previous Appellate Panel hearing. "Absent a clear showing that an administrative agency has taken a hard and fast position that makes an adverse ruling a certainty, a litigant's prognostication that he is likely to fail before an agency is not a sufficient reason to excuse the lack of exhaustion." *Thetford Props. IV, Ltd. P'ship v. U.S. Dep't of Hous. and Urban Dev.*, 907 F.2d 455, 450 (4th Cir. 1990).

III. It would be inequitable to Respondent Cherokee to automatically reinstate Appellant's unemployment insurance benefits without conducting additional proceedings on the merits.

Setting aside the interlocutory nature of this appeal, it would be inequitable to Respondent Cherokee if this Court were to extrapolate from Judge Lenki's Order, as Appellant urges, a factual finding that Appellant is eligible for unemployment

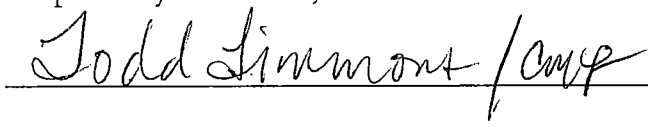
benefits, without first conducting additional proceedings on the merits. Cherokee is a school district and, as such, a reimbursable employer under S.C. Code Ann. § 41-35-130(H). In other words, DEW is statutorily required to charge Cherokee dollar-for-dollar for any unemployment benefits paid to any claimant held eligible for benefits. Therefore, it is Cherokee – not DEW – that bears the financial burden of the resulting decision. It would indeed be inequitable and illogical for Cherokee to automatically be charged for payments based on a procedural error made by DEW. *See Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421746 S.E.2d 35 (2013)("One of equity's most important aspects is the principle of right and fair dealing between parties to particular transaction. However, equitable maxims do not operate to place burdens on individuals made party to a particular transaction through no fault or expressed interest of their own, or, as in this case, through the fault and mistakes of others.").

IV. 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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September 28, 2016

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September 28, 2016

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 1
Appellate Case No: 2016-001734

Dear Ms. Kitchings:

Enclosed are the original unbound and six stapled copies of the Respondents' Return in Support of Their 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,

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

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South Carolina Department of Employment and Workforce and Cherokee County School District 1,

Respondents.

PROOF OF SERVICE

I certify that I have served the Respondents' Return in Support of Their 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 28, 2016, addressed to the parties at their addresses of record:

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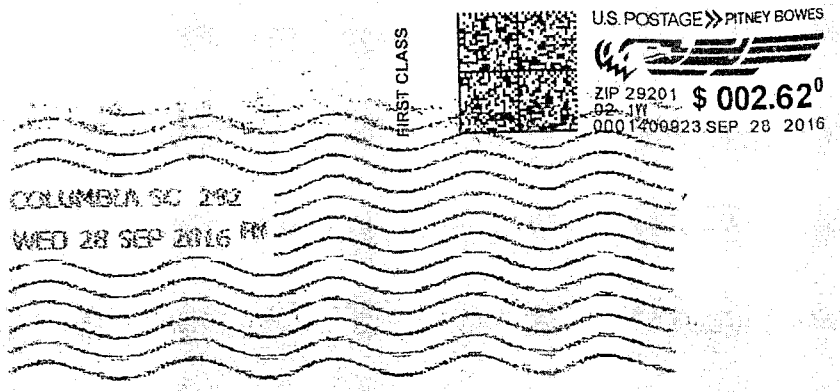

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