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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

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SC Court of Appeals

Case No.: 16-ALJ-22-0380-AP
Appellate Case No. 2017-000669

Patricia Crawford,

Respondent,

v.

South Carolina Department of Employment and Workforce and Allserv Inc.,

Appellants.

# FINAL REPLY BRIEF OF APPELLANTS

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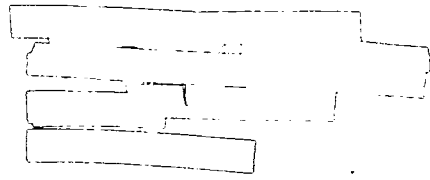

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Appellants South Carolina Department of Employment and Workforce ("DEW") and Allserv Inc. ("Allserv," together with DEW, "Appellants") hereby reply to Respondent Patricia Crawford's Brief of Respondent.[1] In her Brief, Crawford argues (1) certain facts and documents show she intended to continue working and (2) case law cited by the Administrative Law Court ("ALC") supports the ALC's decision to reverse the Panel. As explained fully below, neither argument justifies the ALC's decision.

## I. Facts and Evidence Not Presented to the DEW Appeal Tribunal Hearing Cannot Be Considered on Appeal.

Crawford devotes most of her Brief to explaining her version of the circumstances leading to the employment separation. However, because her Brief includes no citations to the proceedings below, certain facts and references to documents find their way into Crawford's Brief despite not having been presented at the DEW Appeal Tribunal ("Tribunal") hearing. For example, Crawford twice asserts she has documentation showing Vice President Tanya Calvin knew she was returning to work on Tuesday, April 19th. (Resp. Brief, p. 5.) Yet she provided no such communications to the Tribunal or Allserv.[2]

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[1] As an initial matter, this Reply is timely filed. Although the proof of service attached to Crawford's Brief indicates she mailed it on April 11, 2017, the postmark shows it was not mailed until April 13th. Ten days from April 13th would be April 23rd, a Sunday. Pursuant to Rule 263(a), SCACR, the deadline is carried over until April 24th.

[2] From the texts provided by Allserv, Crawford only texted Calvin, "I will not be in tomorrow." As the Panel correctly found, Crawford did not "confirm . . . that she was going to return to work on April 19, 2016." (R.p.3.) Thus, it was logical for Calvin to conclude Crawford resigned, when she learned her desk had been cleared out over the weekend.

Also, Crawford claims to have texts that reveal "discrepancies" to the ones Allserv submitted as evidence. (Resp. Brief, p. 6.) Yet she did not provide those to the Tribunal or Allserv either. In any event, she still does not describe the so-called discrepancies and explain how they are meaningful.

A party's documents are not included in the record and considered as evidence unless that party enters them as an exhibit at the Tribunal hearing. *See* Rule 103, SCRE (implying that a party must seek to admit evidence before it can be reviewed on appeal as a part of the record); S.C. Code Ann § 1-23-330 (providing that the rules of evidence apply in cases, such as this one, following the Administrative Procedures Act); *Roberts v. Roberts*, 299 S.C. 315, 319, 384 S.E. 2d 719, 721 (1989).[3] "To hold evidence to which reference is made, but which is not offered into evidence is admissible would severely prejudice the party opposing its introduction by virtually precluding the party from placing the grounds for his objection on the record." *Roberts,* 299 S.C. at 319, 384, S.E. 2d at 721. Further, interjecting new facts during the appeal process would create a moving target, as this Court is now being asked to judge evidence which was not before the agency.

[3] To the extent Crawford argues her failure to provide these exhibits should be excused due to technical glitches, Resp. Brief, p. 9, this argument is not preserved for appellate review. Appellant did not object to the hearing going forward, ask to submit the rebuttal evidence, or otherwise alert the Tribunal on the record that she desired to introduce evidence. Having failed to contemporaneously raise this issue, she is prohibited from doing so on appeal. *Carson v. South Carolina Dept't of Natural Res.,* 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (holding that allegations of due process violations are not preserved for appellate review if not raised and ruled upon by the agency); *Kiawah Resort Assoc. v. South Carolina Tax Comm'n,* 318 S.C. 502, 505-06, 458 S.E.2d 542, 544 (1995).

Here, Appellant did not seek to introduce her alleged evidence during the Tribunal hearing, much less provide the documents to Respondents in advance of the hearing per the instructions on the hearing notice. (R.p.100.) ("Send legible copies of the documents to the hearing officer and the other side before the hearing. . . . If you don't, the documents may not be considered as evidence."). Thus, the prejudice that the Supreme Court warns of in *Roberts* would occur here, as Allserv had no notice at the Tribunal stage of the exhibits Appellant now urges this Court to consider.

In sum, culling through Crawford's Brief to determine what evidence is actually in the ALC Record is neither the Court nor Respondents' responsibility.[4] Thus, Respondents urge this Court to rely upon the testimony and exhibits actually presented during the Tribunal hearing and not give weight to the unsupported facts and evidence in Crawford's Brief.

## II. Cases Cited by Appellant and the ALC Do Not Support Reversal of the Panel's Voluntary Quit Finding.

In her Brief, Crawford highlights the cases cited in the ALC's Order and argues they support reversal of the Panel's voluntary quit finding.[5] But a close

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[4] Appellants recognize Crawford is representing herself on appeal. But compliance with Rule 208(b)(4), SCACR, which plainly states briefs "shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal to support the salient facts alleged," is not an onerous burden even for *pro se* litigants.

[5] *See* Resp. Brief, p. 7 (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E. 2d 591 (1998); *Samuel v. S.C. Empl. Sec. Comm'n*, 285 S.C. 476, 330 S.E.2d 300 (1985); *Greenray Indus. v. Unemp Comp. Bd. of Review*, 135 A 3d 1140 (Pa. Commw. Ct. 2016); *Cook v. Accord Bldg. Servs.*, 481 S.W.3d 893 (Mo. Ct. App. 2016); *Posey v. Securitas Sec. Servs., USA, Inc.*, 879 N.W.2d 662 (Minn. Ct. App. 2016); *Kelly v.*

reading of these cases reveals none actually support the proposition that the Panel acted unreasonably in concluding Crawford's calculated actions amounted to voluntarily leaving work:

- The ALC cited *Futch* only for the principle that courts need not take up additional issues presented when the one ruled upon is dispositive. (R.p.4.) Similarly, the ALC cited *Porter* only for its description of the substantial evidence standard of review. (R.p.3.)

- The Court in *Greenray Industries* actually held the agency erred by <u>not</u> finding the employee voluntarily quit, notwithstanding the fact the employer technically acted to end the employment relationship. 135 A.3d at 1143-44. Thus, rather than support the ALC's narrow interpretation of a voluntary quit, *Greenray Industries* confirms "well-established law" that "an express resignation is not necessary to constitute a voluntary [quit]; conduct which is tantamount to a voluntary [quit] . . . is sufficient." *Id.* at 1143 (citations omitted).

- *Cook* involved a different issue than is present here, namely whether the employer provided suitable replacement work for the claimant after it removed her from an assignment. 481 S.W. 3d at 901. In fact, the *Cook* court made the finding that she neither quit nor was discharged. The court merely found that that claimant was still job attached at the time she filed for benefits and was eligible for benefits because she was "temporarily 'totally unemployed' through no fault of her own." *Id.* at 902.

- The voluntary quit analysis in *Posey* is inapplicable because, in Minnesota, the theory of "constructive quit does not apply," MSA § 268.095 Subd 2 (b); whereas, in South Carolina, *Samuel* clearly provides "[a]n employee may be charged with quitting a job by action or inaction with unavoidable ramifications." 285 S.C. at 466, 330 S.E.2d at 301.

- The ALC's quotes from *Kelley* do not represent a universal principle of unemployment law. 223 Cal App. 4th at 1076; ALC Order, p. 3. Rather the

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*California Unemployment Ins. Appeals Bd.,* 223 Cal. App. 4th 1067 (Cal. Ct. App. 2014); *Porter v. SC Pub. Serv. Comm'n,* 333 S.C. 12, 507 S.E.2d 328 (1998)).

quotes are a paraphrasing of a nuanced California regulation that has no equivalent in South Carolina.

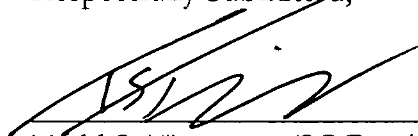
Having shown the cases relied upon by the ALC do not support reversing the Panel's finding that Crawford voluntarily left work, it becomes evident the ALC exceeded its scope of review by "substitut[ing] its judgment for that of the agency as to the weight of the evidence on questions of fact." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). The controlling South Carolina precedent on this issue provides "[a]n employee may be charged with quitting a job by action or inaction with unavoidable ramifications." *Samuel*, 285 S.C. at 466, 330 S.E.2d at 301. As explained fully in Appellants' Brief, the Panel reasonably concluded Crawford's actions in clearing her desk and texting her supervisor that she would not be in, combined with prior statements about quitting and looking for work elsewhere, amount to leaving work voluntarily, without good cause, under S.C. Code Ann. § 41-35-120(1).

## III. Conclusion

Accordingly, Appellants respectfully request this Court reverse the ALC's order and reinstate Panel Decision No. 2016-P-10234 disqualifying Crawford for unemployment benefits for having left work voluntarily, without good cause.

[signatures on following page]

Respectfully Submitted,



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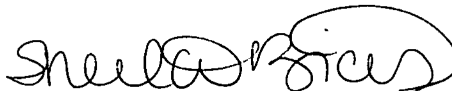

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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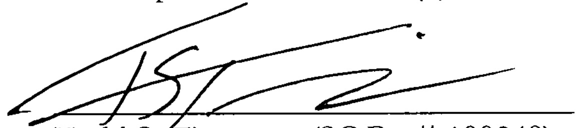

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