STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Tedura S. Hannibal, Appellant vs. South Carolina Department of Employment Workforce and NCT Restaurants, Inc. Respondents.	)	Docket No. 17-ALJ-22-0459-AP **ORDER OF DISMISSAL**

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This matter comes before the Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed by Tedura S. Hannibal (Appellant) on December 14, 2017. Appellant is challenging a July 11, 2017, decision rendered by the South Carolina Department of Employment and Workforce's (Department or Respondent) Appellate Panel (Panel Decision). The effect of the Panel Decision is to disqualify Appellant from receiving unemployment benefits indefinitely.

On January 9, 2018, the Department filed a Motion to Dismiss (Motion) asserting that this Court lacks jurisdiction because Appellant failed to timely file her appeal. Specifically, the Department contends that because the Panel Decision was mailed to Appellant on July 13, 2017, the deadline to properly appeal would have been August 14, 2017, which Appellant failed to do. [1] While acknowledging that Appellant attempted to file a Notice of Appeal with the Court on or about July 21, 2017, the Department contends that she failed to serve it with said purported Appeal. Upon receipt of Appellant's July 21, 2017, Notice of Appeal, the ALC Clerk of Court (Clerk) sent a memorandum dated the same day (July 21, 2017) notifying Appellant that the Notice of Appeal she sent was incomplete and that it would be returned unprocessed if the deficiencies were not

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[1] Pursuant to S.C Code Ann. § 41-35-750 (Supp. 2017), a party aggrieved by a decision of the Appellate Panel may file an appeal of said decision within thirty (30) days of the date the Appellate Panel decision is mailed to the party's last known address. Here, the decision was mailed to Appellant on July 13, 2017. Because the thirtieth day, August 12, 2017, fell on a Saturday, the deadline ran until Monday, August 14, 2017. *See* SCALC Rule 52 ("The last day of the period so computed is 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 which is neither a Saturday, Sunday nor such holiday.")

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corrected within ten (10) days.[2] On September 19, 2017, the Clerk returned the Notice of Appeal to Appellant unprocessed because she failed to correct the deficiencies. Appellant thereafter filed (and properly served on all parties) the second Notice of Appeal on December 14, 2017. The Department further maintains that Appellant's December 14, 2017, Notice of Appeal is untimely.

On February 14, 2018, the Court convened a hearing by telephone conference (Hearing) to inquire into the matters raised in the Department's Motion.[3] Present were the Appellant and Eugene B. McLeod, III, Esquire, attorney for the Department. A representative from the employer also listened to the discussion but did not actively participate. [4] Based on issues raised during the Hearing, Appellant was given until February 20, 2018, to file additional documents referenced in her arguments to the Court. [5] The Department was allowed the same amount of time to file an affidavit. [6] Both parties timely filed and served their respective post-hearing submissions.

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[2] The Clerk's memorandum advised Appellant that the following information was needed in order to assign and process her appeal: 1) The name, address, and telephone number of the party requesting the appeal, and the name, address, and telephone number of the attorney or other authority representative, if any representing that party; 2) a general statement of the grounds for appeal as provided in S.C. Code Ann. 1-23-380(5). The grounds for appeal may be amended, supplemented, or modified in the statement of issues in the brief required by Rule 37(B)(1); 3) A proof of service showing you sent your request for hearing to all parties. (A proof of service form is enclosed, which you may use.) The memorandum also enclosed instructions for filing appeals with the ALC.

[3] Appellant failed to respond to the Department's Motion within the time allowed by SCALC Rule 19(A), as she did not respond within ten (10) days of the Department filing its Motion. *See Id.* ("Any party may file a written response to the motion within ten (10) days of the filing of the motion unless the time is extended or shortened by the administrative law judge.") Nevertheless, because the Department's Motion, if granted, would be dispositive, the Court believed it necessary to inquire whether Appellant had any response to the Department's contentions.

[4] The employer, NCT Restaurants, Inc., is a corporation and must be represented before the Court by an attorney licensed in South Carolina. SCALC Rule 8(A) ("Any party which is not a natural person must be represented by an attorney"). *See also, Renaissance Enterprises, Inc., v. Summit Teleservices, Inc.,* 334 S.C. 649, 515 S.E.2d 257 (1999) (holding that corporations may not be represented by non-lawyers in circuit or appellate courts.)

[5] Appellant provided the Court with a copy of a Proof of Service indicating that she served a Notice of Appeal on the Department and employer on January 30, 2018. Attached to that document were copies of the last page of the Panel Decision, a handwritten letter dated July 31, 2017, and the September 19, 2017, notice from the Clerk returning her original unprocessed appeal.

[6] As an exhibit to its Motion, the Department included the Clerk's July 21, 2017, letter to Appellant noting that she had not filed a Proof of Service with her original Notice of Appeal. In response to Appellant's arguments during the Hearing and at the Court's request, the Department provided an affidavit from Kristi Chesley, an Administrative Assistant in the Department's Office of General Counsel responsible for opening and processing mail addressed to that area. Ms. Chesley's affidavit attested that she "did not receive any correspondence from Appellant constituting a notice of appeal until September 25, 2017, in the matter of *Tedura S. Hannibal v. South Carolina Department of Employment and Workforce and NCT Restaurants*

The statute governing review of Department decisions, S.C. Code Ann. § 41-35-750, provides, in pertinent part:

> Within thirty days from the date of mailing the department's decision, a party to the proceeding whose benefit rights or whose employer account may be affected by the department's decision may initiate an action in the administrative law court against the department for the review of its decision, in which action every other party to the proceeding before the department must be made a defendant. In this action a petition, which need not be verified but which must state the grounds on which a review is sought, must be served on the executive director or on a person designated by the department within the time specified by this section. Service is considered complete service on all parties, but there must be left with the person served as many copies of the petition as there are defendants, and the department promptly shall mail one copy to each defendant. (Emphasis added).

Additionally, SCALC Rule 33 states that "[i]n appeals from decisions of the Department of Employment and Workforce, the notice of appeal must be filed and served within thirty (30) days of the date of mailing of the decision of the Department of Employment and Workforce Appellate Panel.

In pertinent part, S.C. Code Ann. § 1-23-600(E) (Supp. 2017), which governs the ALC's appellate authority, provides:

> Review by an administrative law judge of a final decision in a contested case, heard in the appellate jurisdiction of the Administrative Law Court, must be in the same manner as prescribed in Section 1-23-380 for judicial review of final agency decisions with the presiding administrative law judge exercising the same authority as the court of appeals, provided that a party aggrieved by a final decision of an administrative law judge is entitled to judicial review of the decision by the court of appeals pursuant to the provisions of Section 1-23-610.

Finally, the appeals process to the ALC is provided for by S.C. Code Ann. § 1-23-380(1):

> Proceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency or, if a rehearing is requested, within

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Inc., Docket No: 17-ALJ-22-0459-AP." During the Hearing, the Department asserted that it received Appellant's July 31, 2017 letter but the envelope containing the letter was postmarked September 25, 2017.

> thirty days after the decision is rendered. Copies of the notice of appeal must be served upon the agency and all parties of record. (Emphasis added). [7]

Filing a Notice of Appeal and service of the document on all parties is essential to perfecting a valid appeal with this Court. For instance, in *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004), the South Carolina Supreme Court observed:

> The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.

While the timeliness issue in *Elam* arose under different circumstances, its principle regarding appellate jurisdiction is applicable here. Appellant first attempted to file her Notice of Appeal on or about July 21, 2017. Had this been a complete filing with proper service on the Department, the July 21, 2017, Notice of Appeal would have been timely. However, the Clerk notified Appellant that her Notice of Appeal contained several defects; most notably, the absence of proof that it had been served on the Department. Ms. Chesley, the Department's affiant, attests that the Department received nothing pertaining to an appeal from Appellant until September 25, 2017. Appellant has not provided the Court with any evidence that she served the Department with her July 21, 2017, Notice of Appeal. As set forth above, Appellant's deadline for filing a valid appeal from the July 11, 2017, Panel Decision was August 14, 2017. Unfortunately, Appellant's failure to serve her July 21, 2017, Notice of Appeal on the Department deprives this Court of appellate jurisdiction pursuant to S.C. Code Ann. § 41-35-740 and SCALC Rule 33.

During the Hearing, Appellant indicated that she visited the Court on July 31, 2017, to correct her Notice of Appeal. The Court has no record of such a visit. [8] The July 31, 2017, letter that Appellant provided after the Hearing does not contain an ALC file-stamp and was not in the Court's files prior to February 20, 2018. Nevertheless, even if Appellant had filed this letter with the Court on July 31, 2017, as alleged, the failure to serve the Department with the same until September 25, 2017, is still fatal to her appeal.

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[7] Rule 203(b)(6), SCACR requires that "...the notice of appeal shall be served on the agency, the administrative law court (if it has been involved in the case) and all parties of record within thirty (30) days after receipt of the decision."

[8] Had Appellant corrected her July 21, 2017, Notice of Appeal, the Court would not have returned the appeal to her unprocessed on September 19, 2017.

Appellant then filed and served a second Notice of Appeal on December 14, 2017, in an attempt to appeal the July 11, 2017, Panel Decision. This filing is well past the August 14, 2017, appeal deadline. Accordingly, pursuant to S.C. Code Ann. § 41-35-750 and SCALC Rule 33 Appellant's December 14, 2017 Notice of Appeal cannot properly invoke this Court's appellate jurisdiction.

Moreover, Appellant's failure to serve the Department with the July 21, 2017, Notice of Appeal is not a "clerical error" that this Court has the authority to excuse. In *Charleston Lumber Company v. Miller Housing Corp.*, 318 S.C. 471, 477, 458 S.E.2d 431, 435 (Ct. App. 1995), the South Carolina Court of Appeals rejected an effort to dismiss an appeal where the appellant neglected to list one of five lawsuits tried together in its Notice of Appeal from adverse decisions in all five cases. In support of this determination, the Court of Appeals found that the appellant's omission of one of the cases from its properly filed and served Notice of Appeal was "clerical in nature, and does not warrant a dismissal of the appeal." *Id.* at 478, 458 S.E.2d at 436. In *Mason v. Mason*, 412 S.C. 28, 59, 770 S.E.2d 405, 421 (Ct. App. 2015), one of several co-defendants was not originally listed as a respondent in the Notice of Appeal, but the appellant amended its Notice of Appeal within the thirty (30) day period to add the omitted party as a respondent. The appellant did not, however, attach a copy of the court order referencing the omitted party until after the 30-day period had run in a second amended notice of appeal. *Id.* The Court of Appeals noted that the failure to add the order was a "clerical error" that did not destroy the appeal. *Id.* at 60, 770 S.E.2d at 422; *See also Weatherford v. Price*, 340 S.C. 572, 577-78, 532 S.E.2d 310, 313 (Ct. App. 2000) (failure to refer to one of two trial court orders in a Notice of Appeal was considered clerical error where a copy of the omitted order was filed and served along with Notice of Appeal).

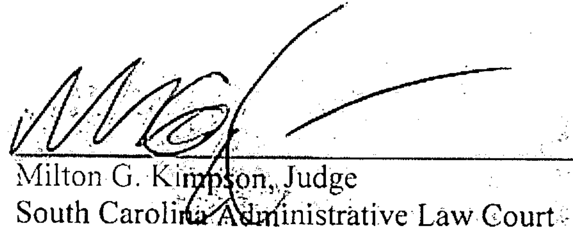
The results in these cases must be contrasted with the result in *Connor v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002). In that case, our Supreme Court ruled that the appellant's failure to list two of three co-defendants as respondents in the original Notice of Appeal was not a clerical error that would allow the filing of an Amended Notice of Appeal to include these parties where the Amended Notice of Appeal was not filed until well after the expiration of the 30-day period. *See Id.* at 461-62, 560 S.E.2d at 609-10 ("Clearly Rowe and Langley were not served with a Notice of Appeal naming them as respondents within the 30-day time period prescribed by Rule 203(b)(1), SCACR.") Unfortunately for Appellant, the error at issue here is

substantive and thus, much more like the error in *Connor* than those characterized as "clerical" in *Mason* and *Charleston Lumber.* [9]

Here, Appellant failed to file and properly serve a correct Notice of Appeal within thirty days of the date of mailing of the July 11, 2017, Panel decision. As such, this Court lacks appellate jurisdiction and the Department's Motion to Dismiss must be granted.

THEREFORE, IT IS ORDERED that the above captioned matter be and hereby is **DISMISSED, WITH PREJUDICE** for lack of appellate jurisdiction.

AND IT IS SO ORDERED.



Milton G. Kimpson, Judge
South Carolina Administrative Law Court

March 1, 2018
Columbia, SC

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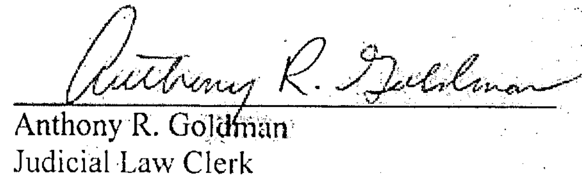
[9] In *Carolyn Reed v. S.C. Dep't of Soc. Servs*, Docket No. 95-ALJ-18-0651-AP (April 4, 1996), the ALC recognized two limited exceptions to the requirement that notices of appeal be timely filed:

> A fundamental fairness exception has been recognized in criminal cases where a defendant either was not informed of the right to appeal, was not furnished an attorney to perfect an appeal or was furnished an attorney for that purpose who failed to perfect and complete an appeal. State of Kansas v. Ortiz, 640 P.2d 1255 (Kan. 1982). Second, a "reasonable cause" exception has been noted when the appellant demonstrates to the court circumstances surrounding the delay which justify the relaxing of the time limits for the filing of a notice of appeal. See Freeman v. City of Plymouth 1995 WL 228177 (Minn. 1995) (unpublished opinion).

In finding that neither exception was applicable to the claimant in *Reed*, the ALC observed that "the fundamental fairness exception has only been employed in the context of criminal cases" and further, that the appellant had not offered any reason for her failing to serve the notice of appeal to trigger the reasonable cause exception. This Court has not found any other South Carolina decision referencing these two exceptions. Nevertheless, because the instant matter is not a criminal case, the fundamental fairness exception does not apply. Additionally, Appellant has not offered any reason for failing to serve the Department which might trigger a reasonable cause exception. While this Court is sensitive to the difficulties encountered by *pro se* litigants, it is axiomatic that "the court will not hold a layman to any lesser standard than is applied to an attorney." *Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988); see also *Rouvet v. Rouvet*, 388 S.C. 301, 310, 696 S.E.2d 204, 208 (Ct. App. 2010); Compare *with*, *Hooper v. Ebenezer Senior Servs. and Rehabilitation Ctr.*, 386 S.C. 108, 687 S.E.2d 29 (2009) (equitable tolling of statute of limitations because of defendant's failure to properly list registered agent.)

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



March 1, 2018
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk