

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

Docket No. 11-ALJ-22-0654-AP

CHARLES E. STUBBS,

Appellant,

vs.

**SOUTH CAROLINA
DEPARTMENT OF
EMPLOYMENT AND
WORKFORCE AND JSE
LLC,**

Respondents.

REPLY BRIEF OF APPELLANT

January 2, 2013

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SC Court of Appeals

TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
Arguments.....	1
1. The Department's failure to respond to Stubbs' argument that the Administrative Law Court erred by erroneously assuming that the mailbox at his apartment complex was not a U.S. postal box should be treated as a confession	1
2. The Appellate Panel had appellate jurisdiction to consider Stubbs' the appeal because he placed it in the mail within ten calendar days of the mailing date of the Appeal Tribunal decision.....	1
3. The Administrative Law Court's Order finding Stubbs' appeal untimely is based solely upon the erroneous assumption that his mailbox is not a mailbox, an error of law which this Court may freely and absolutely review.....	2
4. The Department cannot rely upon implicit findings of facts to support conclusions of the Appellate Panel or the Administrative Law Court.....	4
Conclusion	Error! Bookmark not defined.

TABLE OF AUTHORITIES

Cases:

<i>Able Communications, Inc. v. South Carolina Public Serv. Comm'n</i> , 290 S.C. 409, S.E.2d 151 (1986)	3
<i>Elam v. S.C. Dept. of Transp.</i> , 361, S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004)	1
<i>First Union Nat. Bank v. FCVS Communications</i> , 321 S.C. 496 469 S.E.2d 613 (Ct. App. 1996)	1
<i>Grant v. Grant Textiles</i> , 372 S.C. 196 (S.C. 2007)	4
<i>Heater of Seabrook Inc., v. Public Serv. Comm'n</i> , 332 S.C. 20, 503 S.E.2d 739 (1998)	3
<i>Houston v. DeLoach & DeLoach</i> , 378 S.C. 543, 552, 663 SE.2d 85, 90 (S.C. Ct. App. 2008)	2
<i>Lizee v. S.C. Dep't of Mental Health</i> , 367 S.C. 122, 623 S.E.2d 860 (S.C. Ct. App. 2005)	2
<i>Southbridge Properties, Inc. v. Jones</i> , 292 S.C. 198, 199 (S.C. 1987)	2
<i>State v. Allen</i> , 370 S.C. 88, 94; 634 S.E.2d 653, 656 (2006)	2
<i>Town of Honea Path v. Wright</i> , 194 S.C. 461, 9 S.E. (2d) 924 (1940)	2
<i>Walters v. Lauren Cotton Mills</i> , 53 S.C. 155, 31 S.E. 1 (1898)	2

Statutes:

S.C. Code Ann. § 1-23-350	4
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ARGUMENT

- 1. The Department's failure to respond to Stubbs' argument that the Administrative Law Court erred by erroneously assuming that the mailbox at his apartment complex was not a U.S. postal box should be treated as a confession.**

If a respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct. *First Union Nat. Bank v. FCVS Communications*, 321 S.C. 496 469 S.E.2d 613 (Ct. App. 1996). The ALC's decision is based solely upon the mistaken assumption that Stubbs "merely gave his notice of appeal to a third party, rather than to the SCDEW or the United States Postal Service." R. p. 1. This finding led the ALC to conclude that "the Petitioner's actions did not constitute timely or proper serve [*sic*] of his Notice of Appeal upon the Department." R. p. 2. In its brief, the Department did not dispute Stubbs' argument that the ALC erred by basing its decision on the erroneous assumption that the mailbox at his apartment complex was not a U.S. postal box. Indeed, the Department agreed that the ALC's sole basis for its decision was irrelevant. ("[i]t is not relevant whether Appellant properly placed his letter requesting an appeal in a proper U.S. Postal Service mailbox, the notice of appeal was untimely.") Nor did the Department disagree with Stubbs' assertion that the Department erred by failing to take judicial notice of this adjudicative fact. Because the Department did not oppose these arguments in Stubbs' brief, the Court should treat the failure to respond as a confession and should reverse the ALC's erroneous decision.

- 2. The Appellate Panel had appellate jurisdiction to consider Stubbs' the appeal because he placed it in the mail within ten calendar days of the mailing date of the Appeal Tribunal decision.**

The Department's assertion that its Appellate Panel did not have appellate

jurisdiction to proceed with the case is incorrect and misapplies longstanding case law regarding service and filing by mail. The Appellant Panel may not extend or ignore the deadline for service of the notice of appeal. *Elam v. S.C. Dept. of Transp.*, 361, S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). Both the Appellate Panel and the ALC acknowledge that Stubbs asserted he placed the notice of appeal in the outgoing mail slot on June 21, 2011. Neither the Appellate Panel nor the ALC made any finding regarding Stubbs' credibility, nor did they make any finding as to when the notice was in fact placed in the mail. Because it is uncontradicted that Stubbs placed the notice in his outgoing mail slot within the statutory deadline, it was not necessary for the Department to extend or ignore the statutory deadline to find Stubbs' appeal timely. Rather, the Department needed only to apply the law, which has long held that when service by mail is permitted, it is complete when the document is deposited with the United States Postal Service, properly addressed with sufficient postage. *Southbridge Properties, Inc. v. Jones*, 292 S.C. 198, 199 (S.C. 1987); see also *Town of Honea Path v. Wright*, 194 S.C. 461, 9 S.E. (2d) 924 (1940); *Walters v. Lauren Cotton Mills*, 53 S.C. 155, 31 S.E. 1 (1898).

3. The Administrative Law Court's Order finding Stubbs' appeal untimely is based solely upon the erroneous assumption that his mailbox is not a mailbox, an error of law which this Court may freely and absolutely review.

The Department has attempted to navigate around the ALC's errors of reasoning by asserting the "substantial evidence" standard as a defense. While the decisions finding Stubbs' appeals untimely are not supported by substantial evidence, this Court is not confined to the limitations of that standard of review. The Court's review is "plenary" when the agency's decision is controlled by an error of law. *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 126; 623 S.E.2d 860, 863 (S.C. Ct. App. 2005). An appellate court may "freely and absolutely" review a trial court's or agency's error of law. *Houston v.*

DeLoach & DeLoach, 378 S.C. 543, 552, 663 SE.2d 85, 90 (S.C. Ct. App. 2008) (citing *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 126, 623 S.E.2d 860, 863 (S.C. Ct. App. 2005)). An error of law is present when the agency's decision is based upon:

[A]pplication of the wrong legal principle; or when based upon factual conclusions, the ruling is without evidentiary support; or when the trial court is vested, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. *State v. Allen*, 370 S.C. 88, 94; 634 S.E.2d 653, 656 (2006).

This Court is fully empowered to reverse the ALC's mistaken assumption that Stubbs' mailbox is not a mailbox because that designation is, as a matter of law, solely in the authority of the United States Postal Service and the Postmaster General, and therefore such a finding is based upon the wrong legal principle and is without evidentiary support.

Moreover, the Appellate Panel's decision is affected by error of law. The Panel held in its decision that the issue of timeliness is a "matter of law." ("Therefore the appeal is dismissed as untimely, and the Appeal Tribunal decision is final as a matter of law.") R. p. 26. Despite acknowledging Stubbs' assertion that he placed the appeal letter in the outgoing mail slot at his apartment complex on June 21, 2011, well within the statutory deadline, the Panel concluded that his appeal was untimely. The Panel did not make any findings that would logically lead to its conclusion, such as a determination of Stubbs' credibility or a determination that he did not place the notice in the mail before the statutory ten-day deadline. Nor does it appear that the Panel even considered that his placing the appeal in the mail within the statutory deadline satisfied the service and filing requirements. Thus, it appears that the Panel, and subsequently the ALC, ignored a relevant legal question necessary to properly adjudicate the case. It is entirely appropriate for this Court to correct these errors of law in the interest of justice to ensure that the Appellant is not denied due process based upon flawed reasoning and a misapplication of

the law.

4. The Department cannot rely upon implicit findings of facts to support conclusions of the Appellate Panel or the Administrative Law Court.

In its brief, the Department attempts to read into both the ALC's and the Appellate Panel's decisions implicit findings to justify the conclusions reached in those decisions.

Implicit findings of fact are not sufficient, and where material facts are in dispute, the administrative body must make specific, express findings of fact. *Heater of Seabrook Inc., v. Public Serv. Comm'n*, 332 S.C. 20, 503 S.E.2d 739 (1998). The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings. *Able Communications, Inc. v. South Carolina Public Serv. Comm'n*, 290 S.C. 409, 351 S.E.2d 151 (1986). The Administrative Procedures Act sets out the requirements for a final order in an agency adjudication of a contested case.

...A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings...S.C. Code Ann. § 1-23-350.

In *Grant v. Grant Textiles*, the Court overturned a decision of the Worker's Compensation Commission and the Court of Appeals because the Commission had failed to "clearly set forth the underlying facts upon which it relied to support its conclusion. By simply repeating the statute's language, with little else, the full commission's decision failed to comply with this requirement." 372 S.C. 196, 203 (S.C. 2007). In the present case, the findings of untimeliness is based upon conclusory reasoning with no clear statement of facts. After declaring as irrelevant the ALC's sole basis for its finding of

untimeliness—that Stubbs’ mailbox is not a mailbox—the Department attempted to impose in the decision an implicit finding that “[e]ven if the mailbox is a proper receptacle for service, there is substantial evidence that the notice was not timely filed.” However, there is no indication of any such implicit finding to be found in the plain language of the ALC’s decision, and even if there were, such an implicit finding is impermissible. Likewise, the Department attempts to justify its Appellate Panel decision by manufacturing *ex post* justifications for the Panel’s finding of untimeliness. The Panel acknowledged Stubbs’ testimony that he placed the notice of appeal in his apartment complex’s outgoing mail slot on June 21, 2012. The Department attempts to raise justifications for the Panel’s decision not found in the decision itself, including implicit findings of fact that supposed inconsistencies in Stubbs’ testimony detract from his credibility. The Panel made no findings of fact as to Stubbs’ credibility, nor any findings as to when Stubbs placed the appeal into the mail. The Department may not rely upon these implicit findings to correct errors of reasoning in the previous decisions.

CONCLUSION

Appellant Charles E. Stubbs simply seeks a hearing on the merits before the Appellate Panel on his separation from employment. For the reasons stated above, he respectfully requests that this Court reverse the Decision of Administrative Law Court on the basis that it is unsupported by substantial evidence, affected by serious error of law, arbitrary and capricious, and characterized by abuse of discretion.

Respectfully submitted,

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A handwritten signature in black ink, reading "Jack E. Cohoon", with a horizontal line underneath.

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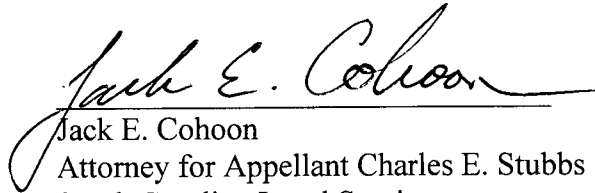
Columbia, South Carolina

January 2, 2013

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief complies with Rule 211(b),
SCACR.

Respectfully submitted,

A handwritten signature in cursive script, reading "Jack E. Cohoon", written over a horizontal line.

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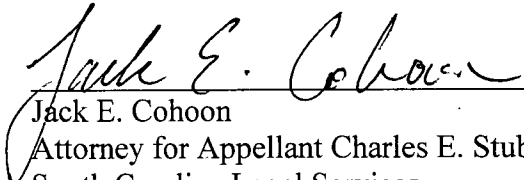
CERTIFICATE OF SERVICE

I certify that I have served the Reply Brief of Appellant on South Carolina Department of Employment and Workforce and on JSE LLC by U.S. Mail, Postage Paid on January 2, 2013 to the following addresses:

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