THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 18-ALJ-22-409-AP

Appellate Case No.: 2019-001033

Cortez M. Jiles,

Respondent,

vs.

South Carolina Department of Employment and House of Raeford Farms, Inc.,

Of Which South Carolina Department of Employment and Workforce is the Appellant,

Appellant.

INITIAL BRIEF OF RESPONDENT

November 22, 2019

SOUTH CAROLINA LEGAL SERVICES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

STATEMENT OF ISSUES ON APPEAL

1. **Did the Department fail to preserve its argument that the ALC committed an error of law by relying on a facially defective proof of service?**

2. **Did the ALC correctly deny the Department's motion to dismiss based upon Jiles' proof of service?**

3. **Did the ALC correctly reverse the Department's final agency decision holding that Jiles did not have good cause to be absent from the Appeal Tribunal?**

4. **Is it an additional sustaining ground that the Department committed an error of law by relying upon an unpromulgated "guideline" to find Jiles' absence from the hearing to be without good cause?**

STATEMENT OF THE CASE

After being separated from his job, Respondent Cortez Jiles filed a claim for unemployment insurance benefits with Appellant South Carolina Department of Employment and Workforce. ALC ROA at 5 to 8. The Department issued an initial determination on March 8, 2018 finding Jiles discharged for misconduct. *Id.* at 11 to 12. Jiles represented himself to file a timely appeal to the Department's Appeal Tribunal on March 13, 2018 through the Department's online portal. *Id.* at 13. A telephone hearing was set for April 12, 2018 at 9:30 a.m. before Administrative Hearing Officer Daniel Beach on the issue of his separation from employment. *Id.* At the time of the hearing, Hearing Officer Beach was unable to reach Jiles on the phone. The Appeal Tribunal dismissed the appeal based upon a finding that Jiles had failed to participate in the hearing. *Id.* at 20-21.

Jiles appealed the dismissal to the Appellate Panel, which remanded the case back to the Appeal Tribunal for an evidentiary hearing on Jiles' absence from the previous hearing. *Id.* at 26-27. This Appeal Tribunal hearing was conducted on May 31, 2018 before Administrative Hearing Officer Kennen Shortt. The Appeal Tribunal found that Jiles had not shown good cause for his absence. *Id.* at 44-45. Jiles then appealed to the Appellate Panel. In a decision purporting to be mailed on August 14, 2018, the Panel affirmed that Appeal Tribunal's finding that his absence from the first Appeal Tribunal hearing was without good cause. *Id.* at 2 to 4. Jiles filed a timely motion for reconsideration which was denied by letter that the Department purported to mail on September 4, 2018. This was the Department's final agency decision.

Jiles filed a Notice of Appeal with the Administrative Law Court (ALC) on

September 21, 2018. He also served a copy of the Notice of Appeal on the Department. Jiles' Proof of Service, filed on September 27, 2018, shows that he served the Department by mail to its address at 1550 Gadsden Street, Columbia, SC 29201 on September 27, 2018 (Proof of Service). The case was assigned to Administrative Law Judge Deborah Brooks Durden. The Department moved to dismiss the appeal on November 19, 2018 alleging that Jiles had not served it with the Notice of Appeal. The ALC denied the Department's motion in an order dated December 5, 2018 which included the Notice of Appeal and Proof of Service and set a scheduling order for briefing (ALC Order Denying Motion to Dismiss; Notice of Appeal; Proof of Service). The Department did not make a motion for rehearing at that time.

Jiles retained South Carolina Legal Services, and both the Appellant and the Respondent filed briefs to the ALC. In a May 21, 2019 Order, the ALC reversed the Appellate Panel decision upon a finding that certain findings and conclusions were unsupported by substantial evidence of the whole record. (ALC Final Order). The Department did not file a motion for rehearing of the ALC's Order. This appeal proceeds therefrom.

STANDARD OF REVIEW

The Unemployment Benefits Law provides that "an appeal may be taken from the decision of the administrative law court pursuant to the South Carolina Appellate Court Rules and Section 1-23-610 [the Administrative Procedures Act]." S.C. Code Ann. 41-35-750 (Supp. 2018). That provision sets the standard of review for unemployment benefits appeals to the Appellate Courts as follows:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (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.

S.C. Code Ann. 1-23-610(B) (Supp. 2018) This provision mirrors the APA's standard of review for the ALC's review of agency decisions:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision 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.

S.C. Code Ann. 1-23-380(5) (Supp. 2018).

Substantial evidence requires a showing of more than a "mere scintilla of evidence." *Houston v. DeLoach & DeLoach*, 378 S.C. 543, 550, 663 SE.2d 85, 89 (Ct. App. 2008). A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Pub Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010).

FACTS

The facts regarding the Jiles' absence from the April 12, 2018 Appeal Tribunal hearing were developed at a telephone hearing before Administrative Hearing Officer Kennen Shortt on May 31, 2018. Jiles represented himself in the hearing. He testified that, at the time of filing for benefits, he had listed his fiancée's telephone number with the Department because he did not have a working telephone. ALC ROA at 36, line 31, to 37, line 7.

The hearing officer in the previous Appeal Tribunal hearing called the fiancée at the call of the case, and the fiancée called Jiles to let him know of the call. He testified that he called the Department within fifteen to twenty minutes after the scheduled time. Jiles explained that his phone was not completely on and "acted like it was dead." *Id.* at 37, line 31. Jiles explained that he had called prior to the hearing so the Department could change his contact number. He explained that when he got up he found out he had missed a call from the Department. *Id.* at 37, lines 30-35. He agreed with Department records which indicated that he spoke with a representative at 10:30 but explained that this was after he got through all the recordings in the telephone system and finally reached someone in Appeals. *Id.* at 38, lines 5 to 8.

When asked why he wasn't ready for the hearing at 9:30, the scheduled time, Jiles acknowledged that he may have forgotten about the hearing on the scheduled morning because he works night shifts. However, he had taken steps to try to ensure that the telephone call would go through. Jiles explained "I'm thinking it was my phone, I did go to the workforce and change my contact number, because that's what I had to do. I think my phone

was dead at the time. I get off work at 8:00 and when I got off that's when I charged it. I had really just got in from work." *Id.* at 38, lines 10 to 14. Jiles testified that "my son had the dentist that day at 12:15 for me and my son because I'm a single parent right now...." *Id.* at 39, lines 23-25. He talked about the challenge of being a single father of a child whose mother is incarcerated.

ARGUMENTS

1. **The Department failed to preserve its argument that the ALC committed an error of law by relying on a facially defective proof of service.**

After receiving notice of Jiles' appeal from the Court, the Department filed a motion to Dismiss stating that Jiles had not served the Department with his Notice of Appeal within thirty days of receiving the final agency decision from which he was appealing. The ALC denied the Department's motion to dismiss because "[t]he Court has in its file the Notice of Appeal, including the Certificate of Service, filed September 27, 2018, indicating it served Respondent with a copy, addressed to, "SCDEW, 1550 Gadsden Street, Columbia, S.C. 29201." (Proof of Service). The Court provided a copy of the Notice of Appeal and the Proof of Service with its Order and set forth the briefing deadline. (ALC Final Order; Proof of Service).

The Department argues that the ALC erred by relying upon what it describes as a defective proof of service. However, the Department never made this argument to the ALC and therefore has not preserved its argument for this Court's review. "It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (*citing* Jean Hoefer Toal *et al., Appellate Practice in South Carolina* 57 (2d ed. 2002).

Issue preservation is required of the parties in administrative proceedings in the same manner as in other proceedings. The South Carolina Supreme Court has explained the basic principles of issue preservation:

> In reviewing the final decision of an administrative agency, the circuit court sits as an appellate court. *See Al-Shabaz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). Consequently, issues not raised to and ruled on by the agency are not preserved for judicial consideration. *Id.*; *Kiawah Resort Assoc. v. South Carolina Tax Comm'n*, 318 S.C. 502, 458 S.E.2d 542 (1995). Likewise, issues not raised to and ruled on by the ALJ are not preserved for appellate consideration. *Food Mart v. South Carolina Dep't of Health and Envtl. Control*, 322 S.C. 232, 471 S.E.2d 688 (1996) (matters not argued to or ruled on by the trial court are not preserved for review).

Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002). Rule 40 of the Administrative Law Court Rules of Procedure provides motions for rehearing as a vehicle to correct errors ("Motions for rehearing may be allowed in the discretion of the presiding administrative law judge. Any motion for rehearing must be filed within ten days of receipt of the order. The time for appeal is stayed by a timely motion for rehearing and runs from receipt of an order granting or denying the motion.")

The Department was required to raise the issue of the claimed facial defects of the proof of service to the ALC to provide that court an opportunity to rule on the issue before seeking appellate review. It could have made the argument in its motion to dismiss, or, if the Department was unaware of the proof of service at that time, it could have raised the issue in a timely motion for rehearing of the ALC's Order Denying Respondent's Motion to Dismiss and Scheduling Order.[1] It did not address this issue in its brief. The Department then failed to raise this issue in a motion for rehearing following the ALC's May 21, 2019 Order. Instead,

1 The ALC's Order Denying Respondent's Motion to Dismiss and Scheduling Order referenced the Proof of Service and the Court attached Jiles' Petition and Proof of Service to its order.

the Department raises its argument about the supposed insufficiency of the proof of service for the first time on appeal to this Court. The Department's argument regarding timely filing is predicated upon its claim that the proof of service was facially defective. Because the Department never raised the issue before the ALC and never obtained a ruling on that issue from the ALC, its argument regarding the insufficiency of the proof of service as evidence of timely service is abandoned and has not been preserved for review by this Court.

2. The ALC correctly denied the Department's motion to dismiss based upon Jiles' proof of service.

The ALC correctly denied the Department's motion to dismiss because Jiles' Proof of Service was evidence of service sufficient to survive a motion to dismiss. According to the Court's order, Jiles' Proof of Service, filed on September 27, 2018, indicates that he served the Department with a copy of the Notice that day by placing it in the mail, addressed to, "SCDEW, 1550 Gadsden Street, Columbia, S.C. 29201" on September 21, 2018. (Proof of Service). Jiles' service by mail was legally sufficient. SCALC Rule 5 provides that

> Any document filed with the Court shall be served upon all parties to the proceeding. Service shall be made upon counsel if the party is represented, or if there is no counsel, upon the party. Service shall be made by delivery, by mail to the last known address, or as otherwise approved by the Court through administrative order. *Service is deemed complete upon mailing*...[emphasis added]

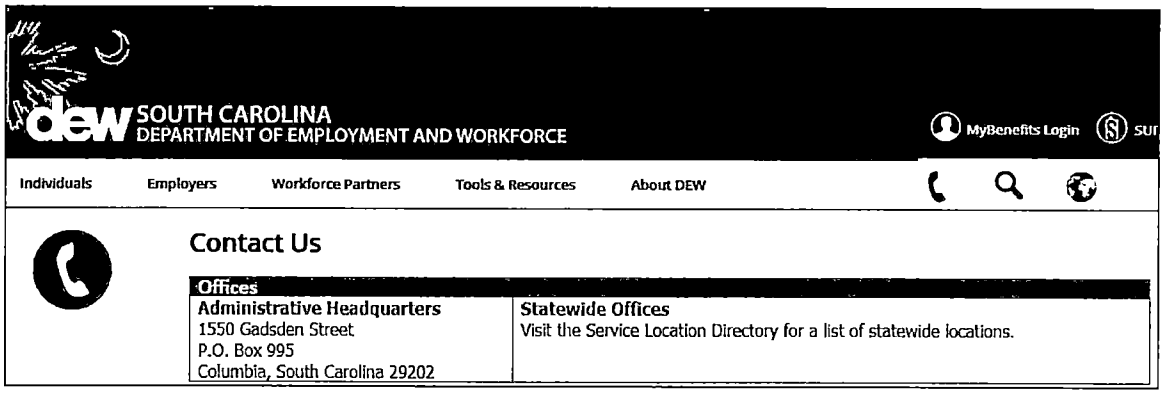
Courts of this state have consistently held that, when service by mail is permitted, it is complete when the document is deposited with the United States Postal Service, properly addressed with sufficient postage. *Southbridge Properties, Inc. v. Jones*, 292 S.C. 198, 199 (1987); *see also Town of Honea 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). Service occurs at the time a party

places the document in a "designated mail depository box, whether in a building or along mail route." *Green v. Green*, 320 S.C. 347, 465 S.E.2d 130 (Ct. App.1995). The Proof of Service is sufficient evidence that the Notice of Appeal was placed in the mail within thirty days after the Appellate Panel's denial of Jiles' motion for reconsideration.

How Jiles referred to the Notice of Appeal in the Proof of Service is immaterial. There is no requirement that the Notice of Appeal be called by that name—it is variously referred to as a petition for judicial review in the Unemployment Benefits Law, S.C. Code Ann. § 41-35-670 (Supp. 2018), and notice of appeal by the APA, S.C. Code Ann.§ 1-23-380(1) (Supp. 2018). While the proof of service lists the description of document as "SCDEW," it is evident that Jiles was referring to the Notice of Appeal. The strongest evidence that he was referring to the Notice of Appeal in the Proof of Service is the fact that on September 27, 2018, when he filed the Proof of Service, there would not have been any other documents to be served on the Department. Briefing had not commenced at that point. There were no other filings due. The Proof of Service was filed only six days after the Notice of Appeal, and it could only refer to the service by mail of that document.

Regarding the address Jiles used for serving the Department, 1550 Gadsden Street, Columbia, South Carolina, 29201, this is the street address for the Department's main administrative office. Both the Executive Director's and the General Counsel's offices are located at that address. *See* S.C. Code Ann. § 41-35-750 (Supp. 2018) (the petition "must be served on the executive director or on a person designated by the [Department].") The Department's website lists 1550 Gadsden Street, Columbia, South Carolina, as the Department's "Administrative Headquarters" on its "Contacts" page. There is no specific

address listed on this page for the filing of appeals or other legal matters.



"Contact Us," S.C. Dept. of Emp. and Workforce. https://dew.sc.gov/contact (accessed Nov. 22, 2019).

There is a significant public policy interest in ensuring that workers are not denied an opportunity to reverse an erroneous denial of this important benefit on a mere technicality. The Proof of Service was sufficient to establish that the Notice of Appeal was timely filed and served and that the ALC had jurisdiction over the case. The Department would impose unnecessary technical requirements on unemployed workers. This issue should be considered in the context of the General Assembly's stated public policy goal of alleviating the burden of unemployment "which so often falls with crushing force upon the unemployed worker and his family" through implementation of a system of unemployment insurance. S.C. Code Ann. § 41-27-20. Our Supreme Court has held that the Unemployment Compensation Law is remedial in nature and should be liberally construed to give effect to its beneficent purposes. *Hartsville Cotton Mill v. S.C. Emp. Sec. Comm.*, 79 S.E.2d 381, 224 S.C. 407 (1953). Dismissing a worker's *pro se* appeal based upon a claimed deficiency in a proof of service would run counter to the Supreme Court's directive for how to address these appeals.

Virtually no workers who are denied benefits obtain the services of an attorney. By

their very nature as unemployed workers, most are unable to afford counsel, and access to free legal services is severely limited. Moreover, the Department places strict caps on the amount that attorneys can be paid which eliminates any private market for legal representation. *See* S.C. Code Ann. § 41-39-30 (Supp. 2018).[2] To require workers to abide by strict technical requirements while also eliminating any market for them to obtain legal help is illogical and contrary to any notion of justice.

3. The ALC correctly reversed the Department's final agency decision holding he did not have good cause to be absent from the Appeal Tribunal is not supported by substantial evidence of the whole record.

The Department's contention that the ALC erred by reversing its decision because substantial evidence supported its previous decision to find Jiles absent from the Appeal Tribunal without good cause is without merit. The ALC correctly identified factual errors in the Department's final agency decision.

The Appellate Panel justified its conclusion of lack of good cause for absence in part upon a factual finding that "[Jiles] also indicated he had a scheduling conflict with a dental appointment for his son at 10:00 a.m. on the same day" as the hearing." *Id.* at 3. Contrary to the Appellate Panel's decision, Jiles did not indicate that he had a scheduling conflict at 10:00 a.m. on the same day for a dental appointment. He testified that "my son had the dentist that day at 12:15 for me and my son because I'm a single parent right now...." *Id.* at 39, lines 23-25. Had the call gone through to his phone for the 9:30 a.m. hearing, Jiles would have had sufficient time to get his son to the dental appointment, which was not scheduled for another two hours and 45 minutes. In its brief, the Department acknowledges that the

2 The Department has limited attorney compensation to the weekly benefit of the amount of the claimant, which can be no more than $326, an amount too low for any attorney to find profitable, considering the time-

Appellate Panel decision listed the incorrect time for the dental appointment. The Panel's error is neither immaterial nor harmless, as the Panel cited it as a supporting fact to justify its finding of lack of good cause for absence.

The Department argues that the Panel's characterization of the dental appointment as a conflict was not the result of the Panel's independent judgment, but rather that the Panel was taking Jiles at his word that the dental appointment was a conflict. This argument is without merit, as Jiles never characterized the dental appointment as a conflict. He simply recounted to the hearing officer his other obligation of the day, the 12:15 dental appointment. The ALC correctly found that the Panel erred by finding that the dental appointment was a conflict when that finding was not supported by substantial evidence of the whole record.

Also without merit is the Department's attempt to overturn the ALC's conclusion that the Appellate Panel's finding that "the Claimant contacted the Department approximately one hour and ten minutes after the scheduled hearing time" was unsupported by substantial evidence. Regarding the Appellate Panel's very specific factual finding on this issue, there is no evidence to support the Department's contention that Jiles first contacted the Department at 10:40 a.m., one hour and ten minutes after the scheduled hearing time. This claim is not supported by the record. It appears the Panel confused the apparent recorded time of a Department employee's entry of a note, listed as 10:40:17, as the time of the call, when the employee recorded his or her conversation with Jiles as having occurred at 10:30 a.m. ALC ROA at 42.

Even construing the Panel's factual finding more loosely, it is still not supported by substantial evidence. Substantial evidence requires a showing of more than a "mere scintilla

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consuming nature of effectively briefing an appeal.

of evidence." *Houston v. DeLoach & DeLoach*, 378 S.C. 543, 550, 663 SE.2d 85, 89 (S.C. Ct. App. 2008). The only witness in the hearing, Jiles, testified that he contacted the Department after having not received a call twenty minutes after the scheduled time. ALC ROA at at 36, lines 22 to 23. He testified that he finally spoke with someone at the Department at 10:30, after he "got through all the recordings and got someone in appeals." *Id.* at 38, lines 7 to 8. Department records include a note that Jiles spoke with a Department employee at 10:30 a.m. but do not record how long it had taken him to navigate through the telephone system and wait on hold. *Id.* at 42. Jiles' sworn testimony was not directly contradicted by any other evidence, including the records the Department refers to in its argument, because the employee notes do not address how long it took Jiles to reach a Department employee after first making his call. Jiles' testimony that he called at 9:50 and that it took forty minutes to "get through all the recordings to finally reach someone in appeals," is plausible and not outside the realm of reason. Without contrary evidence to dispute Jiles' plausible testimony there is no substantial evidence to support the Panel's finding that he "contacted the Department approximately one hour and ten minutes after the scheduled hearing time." *Id.* at 3. The ALC correctly reversed the Panel's decision on these bases.

4. **There is an additional sustaining ground that the Department committed an error of law by relying upon an unpromulgated "guideline" to find Jiles' absence from the hearing to be without good cause.**

The Department's decision relies heavily upon the fact Jiles did not call in within ten minutes of the hearing date: "The notice also provided clear and specific instructions to contact the Appeal Tribunal at a specified telephone number if [Jiles] did not receive a call

from the hearing officer within ten minutes of the scheduled hearing time or if there was a schedule conflict." ALC ROA at 51. However, the stated requirement to call within ten minutes of the scheduled hearing time is not a requirement of any regulation or law governing the Department. It is without statutory basis.

Our Supreme Court has examined the issue of agency "guidelines" in other contexts:

> [W]e hold an agency guideline does not have the force of law, and in any event, can never trump a regulation. Our law provides that "[r]egulation" means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. *Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.* S.C. Code Ann. § 1-23-10(4) (2005) [emphasis added]. *Doe v. S.C. HHS*, 398 S.C. 62, 68 n.7, 727 S.E.2d 605, 608 (2011).

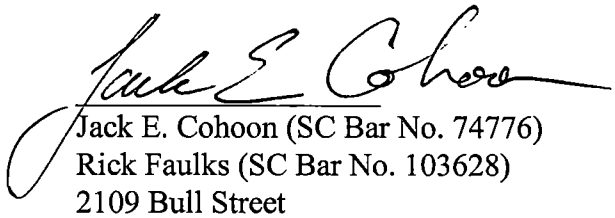
The requirement for claimants to call within ten minutes of the scheduled hearing is not a promulgated regulation, and therefore does not have the force or effect of law. If the Department wished to set a hard and fast rule that claimants call in within ten minutes of the hearing time, the correct vehicle for doing so is described in the Administrative Procedures Act. S.C. Code Ann. § 1-23-110 *et seq.* It is erroneous for the Department to treat compliance or noncompliance with this requirement as dispositive. This additional sustaining ground supports the affirmance of the ALC's decision.

CONCLUSION

The ALC's decision is well-founded and well-reasoned. The Department's argument about the insufficiency of the Proof of Service is not preserved for this Court's review, and even if it was, is without merit because the supposed defects complained of do not undermine it as evidence that Jiles met his obligation to serve the Department with his Notice of Appeal. The ALC correctly found that the Appellate Panel's decision was not supported by substantial evidence. Moreover, the Department's argument that Jiles was required to call in within ten minutes of the scheduled hearing does not have the force and effect of law because it has never been promulgated as a regulation as required by the APA. The Court should affirm the ALC's November 21, 2019 Order on these grounds.

Respectfully Submitted,

SOUTH CAROLINA LEGAL SERVICES



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November 22, 2019

CERTIFICATE OF SERVICE

I certify that I have served the *Initial Brief of Respondent* on the parties in this case by depositing it in the United States Mail, postage prepaid, on November 22, 2019 to the following address.

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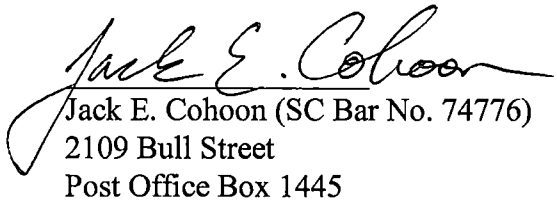
Respectfully Submitted,

SOUTH CAROLINA LEGAL SERVICES



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November 22, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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BY HAND-DELIVERY

Re: Cortez M. Jiles v. S.C. Dept. of Employment and Workforce and House of Raeford Farms
Appellate Case No.: 2019-001033
Our File No.: 18-0664287

Dear Ms. Kitchings:

Enclosed please find an original and six copies of the Respondent's *Initial Brief* and *Designation of Matter for the Record on Appeal* in the above-referenced case.

Please do not hesitate to call me at (803) 744-4166 if you have any questions.

Sincerely,

Jack E. Cohoon
Senior Litigation Attorney

Enclosures

Cc: Paul Famolari, Esq.
Benjamin Cook, Esq.
House of Raeford Farms