

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JUN 14 2021

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. PHILLIP LENSKI, ADMINISTRATIVE LAW JUDGE

Docket No. 2021-000490

Greg German..... Appellant

v.

South Carolina Department of
Employment and Workforce..... Respondent

INITIAL BRIEF OF APPELLANT

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Appellant *pro se*

June 10, 2021

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STATEMENT OF THE ISSUE ON APPEAL

Whether the Department of Employment and Workforce (hereinafter “DEW”) and the Administrative Law Court determinations were arbitrary and capricious or characterized by an abuse of discretion or involved unlawful procedure.

STATEMENT OF THE CASE

Appellant is an Army veteran who had never filed for unemployment during his forty-four-year history of employment. In a nutshell, what happened is that Appellant was laid off from work at Red Roof Inn in Myrtle Beach for seven (7) weeks because of the Covid pandemic and the concomitant mandatory lockdown ordered by the Governor of South Carolina. *See Record.* at 040; 060 at ls. 23-26.

Appellant testified that he “was unfamiliar with the unemployment system.” *Id.* at ls. 23-24.

Appellant did not know he had to certify weekly benefits, as he had never filed for unemployment before in his life, and the DEW website, when not down, was confusing. Moreover, Appellant attempted to contact DEW numerous times during the relevant period and was unable to get a human to answer the phone.

When DEW finally provided somebody to answer the phones, the DEW representative told Appellant that his file looked fine. The person on the phone was a DEW agent for the purposes of that communication.

Moreover, it is undisputed that Appellant relied upon that assertion to his detriment. The un rebutted testimony provided as follows:

“I tried to call multiple times, at least 16 times from April 4th until June and got no human response. When I finally did get a response that person told me—when I asked that person, “Please check my file. Make sure I’ve done everything right.” And she said that she did. And she said there was no problem with it, that I would get paid but it was taking longer because of the pandemic.

I waited after that for the payments, and it didn’t come....”

Id. at 061, ls. 24-31.

The undisputed evidence is that Appellee DEW provided no assistance, even though Appellant tried to call at least 16 times, and when it finally offered assistance at a time that it might have helped, the DEW agent told Appellant incorrect information that he relied on to his detriment.

When Appellant called DEW back again because no payment of unemployment benefits had been made, another DEW representative informed him of the need

to certify on a weekly basis, which is what Appellant had just learned from his neighbor.

By that time, Appellant was allowed to certify all seven weeks, but he was eventually paid for only one week. *See id.* at 065, ls. 4-12.

Appellant received one payment of \$886.00, and was not paid the \$5,316.00 for the other six (6) weeks. *See id.* at 067, ls. 11-27.

During the DEW appellate process, Appellant offered to provide his cellphone records to prove contacts and attempted contacts with DEW. *See id.* at 038. That included the statement by the first person at DEW who told Appellant that his file was fine. Additionally, Petitioner offered taped conversations of DEW representatives telling him that he would be paid for these claims very quickly. For example, these statements were by agents of DEW:

PHONE CALL WITH DEW REPRESENTATIVE 6/19/20

DEW REPRESENTATIVE: "I submitted all of your certifications for those six weeks ... the whole month of April and two weeks in May, so when you look on your account it's going to say 'pending resolution of late claim.' So, what they're going to do is just verify the information we put in, and once it's cleared, you'll get a payment for all six weeks."

PHONE CALL WITH DEW REPRESENTATIVE 7/10/20

DEW REPRESENTATIVE: "You need to reactivate your claim. You need to do it on your portal.... Reactivate your claim because you were late in certifying benefits ... so you need to reactivate the claim...."

GREG: [After reactivating claim] "Okay, it says that I successfully submitted my application."

DEW REPRESENTATIVE: "Okay, that's all you need to do now."

GREG: "All right. Then that's it? Then, they'll send me payment for the weeks that I screwed up?"

DEW REPRESENTATIVE: "Yes, Sir, they will."

Id. Besides these representations from agents of DEW, there was the confusing nature of the DEW website, the mixed messages (including saying that a job search was unnecessary), the lack of any "tickler" system about certification of benefits. *See id.*

At the contested hearing of this matter, the Hearing Officer acknowledged that "at the time of filing in March the actual work search ... was waived." *Id.* at 060, ls. 12-13. There can be no question that the certification of employment searches was no longer a requirement at the time—after the Governor closed down the state because of the Coronavirus pandemic.

The Hearing Officer stated that notice to the Appellant of the certification requirement was “implied.” She said the following during the hearing:

“HEARING OFFICER: [A]t the time of filing in March the actual work search ... was waived. However in the question *it implied* that you have to file a weekly certification. Did you understand that requirement at the time?

GREG J. GERMAN: No, Ma’am.”

Id. at ls. 11-16 (emphasis added). Indeed, Appellant testified as follows at the hearing in response to what the Hearing Officer said:

“GREG J. GERMAN: Now it is my understanding based on what you just recited and also ... from what I’ve heard on the messages on the website and on the messages I heard on the telephone that the weekly requirement was waived as you put it, that I would no longer have to seek work because of the pandemic, and so I did not.”

Id. at 060, l. 9 – 061, l. 4. The Appellee’s best argument is that it gave “implied notice” of some additional certification requirement, while at that same time the loud message that reached the public was that the work-search certification requirement was waived.

There is nothing in the Record to show the Appellee DEW told the Appellant, on its website, on their telephone message for more than six weeks, or in a letter,

“The weekly work-search certification requirement is waived, but you still must certify each week.”

Appellant Greg German attempted many times to make sure his file was in order, but the undisputed evidence is that DEW failed to answer its phones for a month and one-half. *Id.* at 061, ls. 5-7. Then, when a human answered the telephone, the agent of DEW told Appellant that his file looked fine. The next two DEW agents told Appellant that he would be paid the unemployment compensation. *Id.* at 065, ls. 5-10, 27.

On July 23, 2020, Appellant spoke with a DEW representative in the DEW Appeals Department named Ray. *Id.* at 039. Appellant mentioned that he had recorded conversations with DEW representatives who said he would get paid. *Id.* at 065, l. 30 – 066, l. 2. Appellant also noted that he had filed Freedom of Information Act requests with DEW. *Id.* at 066, ls. 12-24; *see also id.* at 044-046 (the actual FOIA requests). Ray, the DEW representative, said that his supervisor or he would call back that day. *Id.* at 039.

That didn't happen. Nobody from DEW called back that day. *Id.* Instead, Appellant found all six of his weekly claims denied on the website later that evening. *Id.*

Additional undisputed facts include the following: Appellant did not certify six (6) weeks of unemployment until after the fact. *See id.* at 037, ¶ 2.

Appellant tried numerous times to reach DEW during that relevant time frame to ensure his application for benefits was correct, but he was only able to reach a recorded message that hung up on him. The recorded message also noted that the DEW website might show problems with the claim, but not to worry, a DEW representative would fix it. *See id.* at 037, ¶ 2.

The undisputed evidence is that when the DEW representative worked with Appellant on the phone to certify the weeks, she did not read the portion of the "determination" for certification that dealt with knowing that the claim could be held as untimely. *See id.* at 058, ls. 23-29 (Regarding the individual one-page "Determinations" for each claim: "The agent who talked to me on the telephone did not ask me the third and final question on each of those six individual determinations....").

TIMELINE AND OTHER FACTS:

March 30, 2020. Original Unemployment claim filed by Appellant with DEW.

April 14, 2020. Date Respondent DEW determined Appellant was eligible for benefits.

July 23, 2020. Date Respondent decided against six (6) weeks of benefits.

July 24, 2020. Date Respondent filed appeal with DEW.

October 14, 2020. Date of Hearing before DEW Hearing Officer.

October 15, 2020. DEW Hearing officer's Date of Order denying benefits.

October 21, 2020. Date Appellant filed appeal to DEW Appellate Panel.

November 17, 2020. Date Respondent DEW's Appellate Panel filed their final order denying benefits.

December 11, 2020. Appellant serves his Notice of Appeal to the Administrative Law Court.

April 27, 2021. Administrative Law Court enters final and appealable order.

May 13, 2021. Notice of Appeal received by South Carolina Court of Appeals.

Appellant sues for \$5,316.00 in unemployment benefits with interest, court costs and attorney's fees and for such other and further relief at law or in equity to which this Court may find him justly entitled.

STANDARD OF REVIEW

The standard of review applicable to decisions of the PSC is set forth in the South Carolina Administrative Procedures Act ("APA"), S.C. Code Ann. § 1-23-310 *et seq.* For the purposes of this appeal, S.C. Code Ann. § 1-23-380 is especially significant, as it provides,

(5) 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).

The South Carolina Supreme Court and Court of Appeals have construed the statutory language in many cases. For example, in *Deese v. South Carolina State Bd. Of Dentistry*, 286 S.C. 182, 332 S.E.2d 539 (Ct. App. 1985), the court held that an agency decision "is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards."

ARGUMENT

WHETHER THE DEPARTMENT OF EMPLOYMENT AND WORKFORCE AND THE ADMINISTRATIVE LAW COURT DETERMINATIONS WERE ARBITRARY AND CAPRICIOUS, OR WERE CHARACTERIZED BY AN ABUSE OF DISCRETION, OR WERE THE FRUIT OF UNLAWFUL PROCEDURE.

An agency's decision "is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. South Carolina State Bd. of Dentistry*, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985).

The record on appeal shows that the agency acted arbitrarily and capriciously in that it provided a confusing system for a first-time user to navigate while at the same time offering no assistance to him during a pandemic.

If a capable DEW agent had been available to answer questions on the phone over the first month and one-half of the Covid lockdown, this situation would not have occurred. Moreover, when a DEW agent was finally available to answer a

phone, she found no fault with Appellant's application for unemployment benefits.

These are undisputed facts in the record.

The arbitrary and capricious nature of the decision was also evidenced by other factors, including (a) the two subsequent DEW representatives who said the Appellant would receive the benefits requested, and (b) the fact that the Appellant's claims were denied immediately after the agency became aware that Appellant had filed a FOIA request and told DEW that he had taped conversations of DEW representatives.

The unrebutted evidence in the record proves that approval of the six (6) weeks of unemployment benefits was a done deal according to two DEW representatives. Yet, somehow that changed *immediately* after Appellant mentioned that he had filed a FOIA request and had taped conversations of DEW agents.

The Appellee had discretion to provide the statutory benefits, but abused that discretion by not taking into account that it offered Appellant no assistance to ensure his application for benefits was prepared properly.

In fact, what they provided was a very confusing system—especially for a first-time claimant—and absolutely no assistance with the claim, while also sending

mixed messages about (a) not having to seek employment during the government-mandated Coronavirus lockdown, and (b) stating that the unemployment claims on the individual's website portal would be marked as in error, but that a DEW agent would fix any issue. R. at 061, ls. 9-11.

It is like they let Appellant jump into the deep end of the pool knowing that he might not be able to swim, while having no life guard or swim instructor present.

Additionally, the Appellee failed to follow proper procedures in providing unemployment compensation in that proper procedures would have included an agent available by telephone or in person to work with an applicant.

The Appellee DEW has argued that Appellant did not follow the proper procedures, but the agency also failed even the most objective reasonable duty of properly offering advice to an applicant.

That failure to follow proper procedures didn't happen just once in failing to answer their telephones for a month-and-a-half, but also when a DEW agent finally got on the line and said the Appellant's application was fine, and then for a third and fourth time when Appellee's representatives stated that everything was fine and payment should be expected within days.

Appellant relied on these misrepresentations to his detriment.

DEW may argue that it could not follow proper procedure because of the Covid lockdown, but that should not be used as a shield for them and a weapon against Appellant, as his problems (and then-lack of employment) were also caused by the Coronavirus lockdown.

The standard for judicial determination of a state agency's decision is set by statute. According to that statute a court,

“ ... 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.”

SC Code § 1-23-610(B)(2013). *See also Deese v. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985).

DEW'S PRINCIPAL/AGENT RELATIONSHIP WITH APPELLANT

The elements of apparent agency include: (1) purported principal consciously or impliedly represented another to be his agent; (2) third party reasonably relied on the representation; and (3) third party detrimentally changed his or her position in reliance on the representation. *See Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 409 S.E.2d 769 (1991); *ZIV Television Programs, Inc. v. Associated Grocers, Inc.*, 236 S.C. 448, 114 S.E.2d 826 (1960).

- Moreover, a true agency relationship may be established by evidence of actual or apparent authority. *See Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424 (1982); *Fochtman v. Clanton's Auto Auction Sales*, 233 S.C. 581, 106 S.E.2d 272 (1958).

In this case, the telephone message that was the only lifeline to DEW for more than a month and one-half indicated that DEW's agents would fix any problems.

The Principal (DEW) granted authority to its agents.

Appellant relied on the representations of DEW's official agents to the tune of \$5,316.00. DEW had an opportunity at each of the hearings at the agency level to rebut allegations about what their agents told the Appellant. He, on the other hand, provided the Appellee with exact quotes from the taped conversations. DEW did not try to rebut that evidence.

DEW acted arbitrarily and capriciously by (a) not correcting the harm caused by their agent who told Appellant—to his detriment—that his file was in good shape, and (b) not abiding by the words and promises made by the next two agents who said that the unemployment compensation payments would be forthcoming soon.

DEW had the discretion to grant the unemployment for "good cause," and there we see at least two instances of good cause. This outright denial of benefits was an abuse of discretion "governed by no fixed rules or standards." *Deese v. South Carolina State Bd. of Dentistry*, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985); *see also* SC Code Ann. Regs. § 47-104 (for good cause standard).

THE FOIA REQUESTS AND THE TAPED CONVERSATIONS

The un rebutted evidence in the record shows that Appellant was told twice—three times if you include the first agent who said that the application looked fine—by authorized agents and representatives of DEW that he would receive payment for the six (6) weeks of unemployment benefits, but then, on the day that he mentioned to another DEW agent that he had filed Freedom of Information Act requests and had taped conversations of DEW agents, his requests were *immediately* denied. R. at 065, l. 30 – 066, l. 5.

The timeline of events show that weeks and weeks passed with assurances that payment would be received, but suddenly, on one day, that hope was slammed shut.

DEW denied the benefits. That was the exact same day Appellee learned of the FOIA requests and taped conversations.

DEW had the opportunity to introduce live testimony, documentation or other evidence into the record that their knowledge of the FOIA requests or the taping of the conversations did not affect their decision-making process.

They did not.

At the first DEW appeal hearing, the agency could have provided this evidence, but they did not.

They were fully informed that this was an issue on appeal, as it was stated clearly in the record. R. at 042-046; *see also id.* at 103-04.

Appellant exercised his rights under S.C. Code Ann. §30-4-10, *et seq.* to request documents from the public agency, and the agency retaliated against him because of it.

The South Carolina General Assembly sought specifically to make records available to citizens “at a minimum cost or delay to the persons seeking access to public documents....” S.C. Code Ann. §30-4-10.

The legislature did not intend for such requests to cost six (6) weeks of unemployment benefits, a sum of \$5,316.00.

The un rebutted evidence in this case is that the very afternoon that DEW learned of the FOIA requests and the taped conversations, it denied Appellants claims, and that action was arbitrary and capricious.

THE FEDERAL CARES ACT

Besides the funds due through the state- and employer-funded unemployment system, the Appellee also withheld Federal funds under the CARES Act. The

Coronavirus Aid, Relief, and Economic Security (CARES) Act was ratified to, as the Treasury Department said on its website, “provide fast and direct economic assistance for American workers....”

Under the CARES Act, unemployed workers were to receive an additional \$600.00 per week while they were out of work. This was to assist states so that they “can provide benefits quickly.” See U.S. Dept. of Labor, News Release (April 2, 2020).

Via the CARES Act, states were afforded the ability to “[p]rovide for up to 13 weeks of benefits to individuals who ... have no rights to regular UC under any other state or federal law....” Pandemic Emergency Unemployment Compensation, Sec. 2107. (The “UC” in the quote above means “unemployment compensation,” of course.).

In effect, DEW acted as steward for Federal funds of \$600.00 per week, and even though the federal directive was to “provide benefits quickly,” it failed to provide these funds to Appellant. Even if their decision to deny the state- and employer-supported compensation wasn’t arbitrary and capricious or an abuse of discretion, they were told by the Federal government to disburse those funds even if the individual had “no rights to regular UC under any other state ... law.”

SUBSTANTIAL EVIDENCE

The Appellee did not provide any evidence for why it could not pick up a phone to answer a call for a month and one-half.

The Appellee did not provide any evidence for why one of its representatives, at a time that would have done at least some good, found no fault with Appellant's application for benefits.

The Appellee did not provide any evidence for why two of its agents—representatives of the Department of Employment and Workforce—told Appellant in no uncertain terms that he would receive the six (6) weeks of unemployment compensation.

The Appellee did not provide any evidence for why—after months of delaying payments—it suddenly chose the day it was informed about FOIA requests and taped conversations to deny Appellant's claims.

The Appellee did not provide any evidence for why it should be granted a mulligan because of the Coronavirus lockdown, but the Appellant should not receive the same consideration.

The reliable and probative evidence in the DEW appeals came from Appellant. He provided sworn testimony. He provided the taped conversations of DEW

agents in which they stated that payments would be forthcoming. If there had been no tapes of those conversations, would the agency have denied that they happened?

But they couldn't. And they didn't.

Appellee could not provide any evidence to rebut the fact that an authorized representative of DEW told Appellant there was nothing wrong with his claim, or that two additional authorized representatives of DEW told Appellant that he would get the benefits soon.

Failure to grant benefits to Appellant was an arbitrary and capricious act.

ADMINISTRATIVE LAW COURT

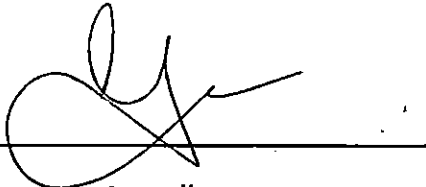
Appellant provided DEW with early notice while the matter was being heard in the agency that he would raise the issues of (1) the representations by DEW agents, and (2) the actions of DEW to immediately deny Appellant's unemployment compensation benefits the afternoon it learned about the FOIA requests and taped conversations.

DEW provided no evidence to rebut Appellant's substantial evidence.

Moreover, even though those issues were briefed in the Administrative Law Court, and even though Appellee had not adduced a single drop of evidence to rebut same, the Administrative Law Court failed to mention—even once—in its order the words “arbitrary” or “capricious” or the term “abuse of discretion.”

CONCLUSION/PRAYER

Appellant prays that this Court finds in his favor, order DEW to pay the six (6) weeks of unemployment compensation and CARES Act money to him, a total of \$5,316.00, with interest, order DEW to pay costs and attorney’s fees, and he prays for such other and further relief the Court may justly determine.

A handwritten signature in black ink, appearing to read 'Greg J. German', is written over a horizontal line.

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Docket No. 2021-000490

Greg German..... Appellant


v.

South Carolina Department of
Employment and Workforce..... Respondent

PROOF OF SERVICE

On the 10th day of June, 2021, undersigned hand delivered a true and correct copy of the Initial Brief of Appellant in a properly stamped and addressed envelope to the USPS for delivery as outgoing mail to the Honorable Clerk of Court and counsel of record.

June 10, 2021



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No. 2021-000490

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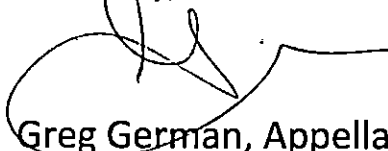
JUN 14 2021

SC Court of Appeals

Honorable Clerk of Court,

Please find enclosed Appellant's Initial Brief in the above-referenced matter. I have also enclosed Proof of Service on all counsel of record. If you have any questions or comments for me, please do not hesitate to give me a call or send an email.

Sincerely,



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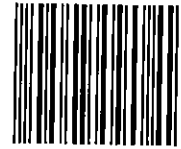
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