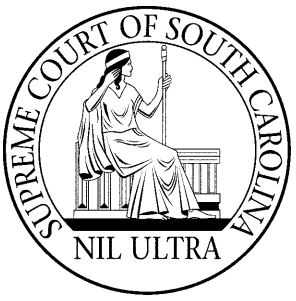

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21
May 28, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Bruce Robert Hoffman, Respondent

Appellate Case No. 2014-000735

Opinion No. 27388
Submitted May 6, 2014 – Filed May 28, 2014

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Harvey MacLure Watson, III, Esquire, of Ballard Watson Weissenstein of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand with other conditions. We accept the Agreement and issue a public reprimand with conditions as discussed hereafter. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent was hired by a family friend to assist with the administration of a trust. Respondent performed some services before entering into a formal fee agreement. In the written fee agreement, Client agreed to pay respondent $300 per hour and

respondent required Client to provide a $5,000 retainer which respondent referred to as an initial deposit. The fee agreement stated "[t]his initial deposit is nonrefundable, paid in exchange for the Attorney's agreement to represent Client."

Respondent deposited Client's check into his trust account on a Friday and transferred the entire $5,000 from the account the following Monday. Respondent acknowledges this withdrawal was improper because he had not yet earned the entire $5,000 and his fee agreement was insufficient for him to treat the funds as an advanced fee earned upon receipt under Rule 1.5(f), RPC, Rule 407, SCACR. However, respondent submits he was unaware of the requirements of Rule 1.5(f) because that portion of the rule had become effective only weeks before the fee agreement was executed. At the time of his withdrawal, respondent believed he was entitled to remove the entire $5,000 because his fee agreement with Client clearly identified the sum as "nonrefundable."

On Tuesday, Client's check was returned for insufficient funds. The bank reported to the Commission on Lawyer Conduct (the Commission) that a $5,000 item was presented on respondent's trust account against insufficient funds. The Commission referred the bank's report to ODC for an investigation.

Client was traveling when she learned her check to respondent was dishonored. She had her husband send respondent a $3,000 payment to respondent's PayPal account which she believed would leave her "significantly ahead in payments." When she arrived home, Client requested respondent provide an invoice of the work performed to date so she would know where she stood on payments. Respondent expressed dismay at the request and indicated he would not have time to prepare an invoice until after a specific date. By that date, Client decided she did not need any further assistance from respondent.

After the date passed, Client made a second request for an invoice and asked for a refund of any unearned fees. Respondent sent Client an invoice via email. The invoice was not itemized but indicated that, including the time he spent dealing with the "fallout" of her dishonored check, he had performed ten hours of work and thus earned $3,000. However, respondent claimed that he was entitled to receive the full $5,000 initial deposit plus a $30 statutory service charge for the dishonored check and the fees PayPal charged him for the payment from Client's husband. Additionally, respondent only gave Client credit for the net amount he received from PayPal, thus resulting in Client being charged the PayPal fees twice. In his

accompanying email, respondent indicated Client was subject to criminal prosecution and a $500 penalty for writing a bad check. Respondent closed the email by stating, "I don't expect to hear from you about this again, but reserve all my rights in the event I do."

In responding to the Notice of Investigation, respondent attempted to show that his trust account was never overdrawn and that the bank's report was erroneous. Respondent explained that, before depositing Client's check, the account balance was $7,351 and, of this amount, $7,200 was earned fees he had not withdrawn from the trust account.

Respondent did not provide all of the records requested in the Notice of Investigation and did not fully comply with two further requests for information and documentation. Respondent was unable to produce the requested records because he was not maintaining the financial records required by Rule 417, SCACR. However, he did not explain the reason for his failure to produce the records, triggering ODC to issue a subpoena for one year of trust account records and to schedule his interview.

In response to the subpoena, respondent was only able to produce bank statements for the account in question. The bank statements included images of the front of his canceled checks but those images were insufficient in size and image quality to be legible. Respondent acknowledges he failed to create and maintain many of the other records required by Rule 417, SCACR, including a receipt and disbursement journal, client ledgers, accountings, reconciliation reports, trial balances, and legible images of the front and back of canceled checks.

During his interview with ODC, respondent explained he did not maintain these records because he believed that, based on the minimal volume of transactions in his trust account, he would be able to sufficiently recall particular transactions by memory if necessary. Respondent notes he had exclusive control and access to the account, but admits he was unable to identify specific transactions involving his trust account when asked for details during his interview.

When asked about the $7,200 he had in his trust account when he deposited Client's check, respondent stated most or all of that sum constituted earned legal fees for a particular client and that he had left the fees in the account for at least sixty days. Respondent explained he had the money earmarked for a specific

purpose and was using the account like a savings account. He admitted he had no operating account and would sometimes deposit his own funds into the trust account in order to advance costs on a case.
Since the investigation by ODC began, respondent has opened a separate operating account and completed a trust accounting course accredited by the South Carolina Bar.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5 (lawyer shall not charge unreasonable fee); Rule 1.15 (lawyer shall safeguard client funds; absent advance fee agreement, lawyer shall deposit unearned fees into trust account and withdraw funds only when earned; lawyer shall not commingle personal funds with funds of clients and third parties); Rule 4.5 (lawyer shall not threaten criminal prosecution solely to obtain advantage in civil matter); and Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority). In addition, respondent admits he failed to maintain proper records pertaining to his trust account as required by Rule 417, SCACR.

Respondent also admits his conduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to lawful demand from disciplinary authority).

Conclusion

We find respondent's misconduct warrants a public reprimand.[1] In addition, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this order. Within six (6) months of the date of this order, respondent shall complete the South Carolina Bar's Legal Ethics and Practice Program. Further, for one (1)

[1] Respondent's disciplinary history includes an admonition issued in 2001. Rule 7(b)(4), RLDE (admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon issue of sanction to be imposed).

year from the date of this order, respondent shall file copies of the following trust account(s) records with the Commission: monthly reconciliation reports with a list of outstanding items; trial balance reports; active client ledgers; bank statements; front and back images of canceled checks; deposit records including images of items of deposit; and records of electronic transfers. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur. BEATTY, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David Allen Swanner, Respondent

Appellate Case No. 2014-000725

Opinion No. 27389
Submitted May 6, 2014– Filed May 28, 2014

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Harvey MacLure Watson, III, Esquire, of Ballard Watson Weissenstein, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of any sanction contained in Rule 7(b), RLDE, with conditions. We accept the Agreement and suspend respondent from the practice of law in this state for two (2) years and impose conditions as stated hereafter. The facts, as set forth in the Agreement, are as follows.

Facts

Trust Account Mismanagement

For approximately fifteen years, respondent has practiced law as a solo practitioner. For several years, he delegated monthly reconciliation of the trust account and operating account to his spouse and bookkeeping to other non-lawyer staff in his office. Respondent's spouse and non-lawyer assistants were not specially trained in accounting and respondent provided them with no specific instructions regarding proper recordkeeping and reconciliation of a law firm trust account.

During the time that respondent's spouse was supposed to be conducting monthly reconciliations, respondent did not review any accounting reports. In fact, respondent's spouse was not conducting the reconciliations each month. Further, the reconciliations that she was conducting were not compliant with Rule 417, SCACR. Specifically, respondent's wife was not reconciling the adjusted bank balance to the client ledger balance for a three-part reconciliation required by the rule. In September 2010, respondent separated from his spouse and she discontinued her accounting work for the law firm. From that time forward, respondent failed to conduct any monthly reconciliations of his trust account.

During the time period relevant to this disciplinary investigation, respondent's practice consisted mainly of personal injury and workers' compensation cases handled for claimants on a contingency fee basis. Respondent's routine practice for disbursing settlements was to have a non-lawyer staff person deposit the settlement check (endorsed by respondent with the client's power of attorney) into the trust account, then prepare the disbursement statement and trust account checks. The non-lawyer assistant would enter the deposit and the checks into respondent's accounting software. The checks prepared by the non-lawyer assistant would be typed and would reflect the client's name or file number and the purpose of the check in the memo line.

In a five day period in early 2011, respondent negotiated three handwritten trust account checks for round numbers payable to himself totaling $6,500.00. This unusual trust account activity caused a bank representative to alert the Commission on Lawyer Conduct (the Commission). At the time the disciplinary investigation

was initiated, respondent's records reflected a number of negative client ledger balances. Respondent's client trust account was short approximately $42,500.00.

The disciplinary investigation revealed that, on at least fourteen occasions in 2011, respondent issued trust account checks payable to himself outside of his normal practice. These checks did not reflect a client name, file number, or other reference. None of these checks were recorded in the accounting journal or any client ledger in respondent's accounting software. Most of these checks were handwritten by respondent. These checks totaled approximately $59,485.12.

Respondent asserts that he issued these checks outside his normal practice because of urgent needs for funds and the unavailability of his non-lawyer assistant. Respondent claims that he believed he had sufficient earned fees in trust at the times he issued the checks, although he did not refer to any documentation or software records to confirm this prior to issuing the checks. The $42,500.00 defalcation in respondent's trust account resulted from the fact that the checks he wrote outside his normal practice were not entered into his accounting software and appropriate checks for fees had either previously, or were subsequently, issued in the normal course of disbursement by his non-lawyer staff. The resulting client ledger shortages and a number of other accounting and transcription errors were not discovered because respondent was not conducting the required monthly reconciliations.

During the course of the investigation, respondent restored the funds to his trust account through a combination of depositing personal funds and leaving earned fees on new settlements in the account. Respondent has now retained the services of an outside accountant to reconstruct his records and reconcile his account.

Loans to Clients

On occasion, respondent arranged for his father to loan funds to respondent's clients with the understanding that the loans would be repaid at the time the clients' claims were resolved. Respondent arranged loans from his father to clients approximately ten times over a five year period. In each case, respondent drafted promissory notes to memorialize these loans. The promissory notes set forth certain repayment terms, including the interest rate and the requirement that the loans be paid in full at the time of recovery of funds from the client's claim. However, the promissory notes did not contain important terms necessary to

protect the clients' interests, such as how the interest would be calculated and whether or not the client would be responsible for repayment in the event no recovery was obtained.

Although respondent told his clients that his father was the source of the loans, he did not obtain his clients' informed consent to the conflict of interest as required by Rule 1.7(b) of Rule 407 of the Rules of Professional Conduct. As defined by the Rules of Professional Conduct, informed consent required respondent to communicate to the client reasonably adequate information about the conflict of interest presented by the loan and an explanation about the material risks of, and reasonable alternatives to, obtaining a loan from respondent's close family member, and the informed consent must be confirmed in writing. See Rule 1.0(g), RPC (defining informed consent).

Although no complaints have been made by any client about respondent's arrangement of loans from his father and respondent received no personal benefit from any of the loans, respondent admits he failed to comply with the disclosure and writing requirements of the Rules of Professional Conduct regarding this conflict of interest.

Client Matter

Client hired respondent to assist him in a workers' compensation claim arising from an incident on May 28, 2010. A hearing was held on December 8, 2010. Respondent received the order denying the claim on January 12, 2011. Respondent prepared a Request for Commission Review with a cover letter and a certificate of service on opposing counsel dated January 26, 2011. The envelope addressed to opposing counsel containing the Request for Commission Review, cover letter, and certificate of service was postmarked on February 2, 2011. The Request for Commission Review was received by the Commission on February 3, 2011.

Workers' compensation regulations state that the "Commission will not accept for filing a [Request for Commission Review] that is not postmarked or delivered to the Commission by the fourteenth day from the date of receipt of the [order]." 8 S.C. Code Ann. Reg.67- 701 (2012). The regulations further state that a Request for Commission Review is deemed filed on the date of service on the Commission as reflected on an accompanying certificate of service or, in the absence of such,

on the date of actual receipt by the Commission. Respondent's certificate of service reflected only service on opposing counsel, not on the Commission; therefore, according to the regulations, the request was deemed filed on the date it was received by the Commission.

Respondent's Request for Commission Review was dismissed on February 3, 2011, on the grounds that it was not timely filed, citing the appeal deadline as January 31, 2011 (fourteen days plus a five day grace period for mailing) and the filed date as February 3, 2011.

On March 17, 2011, approximately six weeks after the dismissal of the Request for Commission Review, respondent sent a letter requesting that his request for review be reinstated. On March 25, 2011, respondent received an email from the Commission informing him of the basis for the dismissal and advising him that he could file a Motion to Reinstate the Appeal.

On August 2, 2011, approximately nineteen weeks after receipt of the Commission's email, respondent filed and served a Motion to Reinstate Appeal. In that motion, respondent asserted that he mailed his Request for Commission Review on January 26, 2011. Even if that were accurate, the regulations specifically state that the appeal is deemed filed on the date reflected on the certificate of service on the Commission or, absent such a certificate, on the date of actual receipt by the Commission. Respondent did not prepare a certificate of service on the Commission; therefore, the date of filing was February 3, 2011, the date of actual receipt by the Commission. Respondent's Motion to Reinstate Appeal was denied.

Respondent admits he failed to diligently pursue the appeal of the decision denying his client's claim.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.7 (lawyer may represent client where there is a concurrent conflict of interest only under circumstances provided by rule, including affected client gives informed consent in writing); Rule 1.15(a) (lawyer shall hold client property separately from lawyer's

own property); Rule 5.3 (lawyer shall be responsible for conduct of non-lawyer employee); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). In addition, respondent admits he violated the provisions of Rule 417, SCACR.

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rules 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or other rules of this jurisdiction regarding professional conduct of lawyers); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice); and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate oath of office taken to practice law in this state).

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for two (2) years.[1] In addition, respondent shall: 1) pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion; 2) complete the Legal Ethics and Practice Program Ethics School and Trust Account School and submit proof of completion to the Commission within nine (9) months of date of this opinion; 3) if reinstated, for the two (2) year period following his reinstatement, respondent shall retain the services of an accountant trained in law office accounting to conduct monthly reconciliations and respondent shall file monthly reconciliations and all relevant source documents with the Commission; 4) for two years from the date of this opinion, respondent shall retain a medical

[1] Respondent's disciplinary history includes admonitions issued in 1999 and in 2001. *See* Rule 7(b)(4), RLDE (admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon issue of sanction to be imposed). In addition, respondent received a letter of caution warning him to adhere to some of the same Rules of Professional Conduct cited in the current opinion. *See* Rule 2(r), RLDE (fact that letter of caution has been issued shall not be considered in subsequent disciplinary proceeding against lawyer unless the caution or warning contained in letter of caution is relevant to the misconduct alleged in new proceedings).

doctor or mental health professional and submit quarterly reports from the treatment provider to the Commission; and 5) within twenty (20) days from the date of this opinion, respondent shall enter into a two (2) year monitoring contract with Lawyers Helping Lawyers and submit quarterly reports from his monitor to the Commission.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur. BEATTY, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ricky Cheeks, Petitioner.

Appellate Case No. 2012-213690

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 27390
Submitted May 20, 2014 – Filed May 28, 2014

AFFIRMED AS MODIFIED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General Julie Kate Keeney and Assistant Attorney General Mary Shannon Williams, all of Columbia, for Respondent.

PER CURIAM: Ricky Cheeks seeks review of the Court of Appeals' opinion in *State v. Cheeks*, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012), affirming his convictions and sentences and finding the trial judge did not err in charging the jury that "actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use." Based on earlier precedent of this Court, the Court of Appeals determined the jury charge did not negate the mere presence charge that Cheeks was entitled to. *See State v. Kimbrell*, 294 S.C. 51, 362 S.E.2d 630 (1987); *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994).

Following the issuance of the Court of Appeals' opinion, this Court, in *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013), affirmed co-defendant Derrick Cheeks' convictions and sentences; however, this Court held the "strong evidence" charge unduly emphasized the evidence, and deprived the jury of its prerogative to draw inferences and to weigh evidence. This Court stated the charge converted all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug and largely negated the mere presence charge, and erroneously conveyed that a mere permissible evidentiary inference was, instead, a proposition of law.

Based on *State v. Derrick Cheeks*, we find the same charge was improper in the case at hand. However, we also find petitioner was not prejudiced by the charge. There was no evidence that petitioner was "merely present;" rather, petitioner provided financial assistance to the drug operation, aided and abetted the operation, and was in actual possession of the drugs. Accordingly, the Court of Appeals' opinion is

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Allegro, Inc., Respondent-Petitioner,

v.

Emmett J. Scully, Synergetic, Inc., George C. Corbin, and Yvonne Yarborough, Petitioners-Respondents.

Appellate Case No. 2012-213386
Lower Court Case No. 2004-CP-40-1915

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
The Honorable L. Casey Manning, Circuit Court Judge

Opinion No. 27391
Submitted May 20, 2014 – Filed May 28, 2014

REMANDED

Robert L. Widener and Richard J. Morgan, both of McNair Law Firm, of Columbia, for Respondent-Petitioner.

Amy L. Gaffney, of Gaffney Lewis & Edwards, LLC, C. Mitchell Brown, William C. Wood, and Brian P. Crotty,

all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Petitioners-Respondents.

PER CURIAM: Petitioner-respondent (Defendants) and respondent-petitioner (Allegro) each seek a writ of certiorari to review the Court of Appeals' decision in *Allegro, Inc. v. Scully*, 400 S.C. 33, 733 S.E.2d 114 (Ct. App. 2012). We deny Allegro's petition, grant Defendants' petition, dispense with further briefing, and remand to the Court of Appeals for consideration in accordance with this opinion.

Defendants argue the Court of Appeals erred in failing to address their claims that the trial judge erred in denying their motions for directed verdict and JNOV. We agree.

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. An appellate court need not address remaining issues when disposition of a prior issue is dispositive. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010); *see also Futch v. McAllister Towing of Georgetown, Inc*. 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

The Court of Appeals' decision reversed and remanded this case for a new trial based on the trial judge's decision to admit a temporary injunction order into evidence. However, relying on *Futch, supra,* the Court of Appeals declined to address Defendants' claims that the trial judge erred in denying their motions for directed verdict and JNOV. Defendants argue the Court of Appeals' disposition of the new trial issue was not dispositive of their directed verdict and JNOV arguments, and therefore, the Court of Appeals should have addressed the arguments before remanding for a new trial.

We find the Court of Appeals should have addressed whether the trial judge erred in denying Defendants' directed verdict and JNOV motions. The Court of Appeals' decision to reverse and remand for a new trial based on the admission of the temporary injunction order did not dispose of any parties or causes of action that could have been eliminated by a decision on the trial judge's denial of Defendants' motions. Therefore, *Futch, supra*, did not apply because the Court of Appeals' disposition of the new trial issues did not dispose of the directed verdict and JNOV issues.

Accordingly, this matter is hereby

REMANDED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Ray Tant, Respondent,

v.

South Carolina Department of Corrections, Petitioner.

Appellate Case No. 2012-206988

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 27392
Heard November 20, 2013 – Filed May 28, 2014

AFFIRMED AS MODIFIED

Deputy General Counsel Christopher D. Florian, of Columbia, for Petitioner.

Desa A. Ballard and Harvey M. Watson, both of Ballard Watson Weissenstein, of West Columbia, and Douglas Jennings, Jr., of Douglas Jennings Law Firm, LLC, of Bennettsville, all for Respondent.

JUSTICE HEARN: This case calls upon us to consider the authority of the Department of Corrections to alter its initial determination as to the length of an inmate's sentence. Following his conviction for one count of assault and battery of a high and aggravated nature (ABHAN), one count of possession of a dangerous animal, and multiple counts of animal fighting, David Tant was remanded to the Department of Corrections. Upon receipt of his sentencing sheets, the Department recorded his sentence as fifteen years' imprisonment. However, the Department later determined the judge intended to sentence Tant to forty years' imprisonment and changed its records without notifying Tant.

We hold that when the Department decides its original recordation of a sentence was erroneous, it must afford the inmate formal notice of the amended sentence and advise him of his opportunity to be heard through the grievance procedure. Furthermore, the Department is generally confined to the face of the sentencing sheets in determining the length of a sentence, but may refer to the sentencing transcript if there is an ambiguity in the sentencing sheets. Because we find both the sentencing sheets and the transcript in this case are ambiguous, we hold Tant's sentences run concurrently for a total of fifteen years' imprisonment. Accordingly, we affirm the court of appeals' opinion as modified.

FACTUAL/PROCEDURAL BACKGROUND

Land surveyor Steven Baker was injured on Tant's property when he set off a booby-trap that fired shotgun pellets at him. After law enforcement arrived to investigate the incident, the officers discovered several pit bulls and called Animal Control to process and seize the animals. The deputy in charge of processing the animals observed scars and other injuries on the dogs consistent with fighting, including puncture wounds. During further investigation, the police also discovered treadmills, cattle prods, chains, and breaking sticks.[1]

Tant pled guilty before the Honorable Wyatt T. Saunders, Jr. on November 22, 2004, to one count of ABHAN, one count of possession of a dangerous animal, and forty-one counts of animal fighting. Initially, the judge orally sentenced him to serve ten years' imprisonment for the ABHAN and "five years consecutive to [the ABHAN sentence]" on six of the animal fighting counts with the condition that if restitution were paid on two of those convictions, those sentences would be

[1]These are apparently typical accoutrements of dogfighting.

null and void. Tant was also sentenced to five years' imprisonment, suspended, on the remaining animal fighting charges and three years' imprisonment, suspended, for possession of a dangerous animal. When Judge Saunders asked if there were any questions, the solicitor requested clarification as to the first part of the sentence. Judge Saunders responded the first "four indictments for which [Tant] has been convicted of animal fighting, are consecutive to each other and consecutive to [the ABHAN sentence]." He asked if that was clear, and there was no objection. The judge then stated the two additional animal fighting sentences were for five years consecutive to the ABHAN sentence, but would be null and void upon payment of restitution. Again, there was no objection. Tant did not file a direct appeal.

The sentencing sheets for all six of the animal fighting charges at issue here—which were signed by the judge, the solicitor, and Tant's attorney—indicate each sentence is consecutive to the ABHAN sentence, but fail to reference the other charges. Tant began serving his sentence in November of 2004, and the Department read the sheets as indicating the animal fighting charges were to be served consecutive to the ABHAN charge, but concurrent to each other, for a total of fifteen years' imprisonment. This initial interpretation was documented in the Department's records and was used by the Department of Parole, Pardon, and Probation to determine his parole eligibility date.

In January of 2006, a Department employee spoke with one of the attorneys who prosecuted Tant, about the calculation of Tant's sentence. That attorney informed the employee that he would draft an order for Judge Saunders clarifying that Tant's sentence was forty years instead of fifteen years. On July 5, 2007, the Department's general counsel, David Tatarsky, e-mailed the employee inquiring whether he received the order from Judge Saunders referenced in the employee's notes. Apparently, Judge Saunders sent the Department a letter on June 8, 2007, stating it was his intention that Tant's sentences all run consecutively for a total of forty years' imprisonment, with a ten year reduction upon payment of restitution. The Department thereafter updated Tant's sentence from fifteen to forty years on June 13, 2007, and Tant was informed of this change on July 12, 2007.

The following day Tant filed a Step 1 inmate grievance requesting his sentence be returned to fifteen years, which was denied based on Judge Saunders' letter. Tant then filed a Step 2 grievance claiming Judge Saunders' letter was not a court order and the animal fighting charges were to be served concurrently. This

was reviewed by Tatarsky and denied on the grounds that the transcript of the guilty plea is also part of the sentencing record and it clearly demonstrates the judge's intention to impose a forty year sentence. This denial also referenced Judge Saunders' letter and stated judges "frequently clarify their sentencing intentions in letters to [the Department]."

Tant appealed to the Administrative Law Court (ALC) again challenging the Department's use of Judge Saunders' letter in calculating his sentence and also arguing Tatarsky was not authorized to rule on his grievance. The ALC held it was improper to consider the letter because Judge Saunders no longer had jurisdiction over the case. It further found the Department failed to address Tant's challenge as to whether Tatarsky was authorized to rule on the grievance, and thus deemed that issue conceded by the Department. The ALC also noted the Department should consider the transcript of the sentence in addition to the sentencing sheets and remanded the case "to have an appropriate person review the grievance based upon the entire record to determine the calculation of [Tant's] sentence."

On remand, the Department again calculated Tant's sentence as forty years, this time quoting the transcript: "those additional four indictments, for which he has been convicted of animal fighting, are consecutive to each other and consecutive to [the ABHAN sentence]. Is that clear?"

Tant again appealed to the ALC, challenging the legality of relying on the transcript. The ALC affirmed, holding consideration of the transcript was appropriate to determine the intention of the sentencing judge even though the sentencing sheets themselves were unambiguous. The ALC further noted that in federal courts and a number of other jurisdictions, the oral pronouncement of a sentence controls over a written judgment.

The court of appeals reversed, holding the sentencing sheets controlled and because they are unambiguous, the ALC and the Department erred in considering the transcript as well. *Tant*, 395 S.C. at 449, 718 S.E.2d at 755. Accordingly, the court of appeals determined Tant's sentence to be fifteen years and reversed. *Id.*

ISSUE PRESENTED

What process must the Department engage in to determine an inmate's sentence as intended by the sentencing judge?

LAW/ANALYSIS

I. DUE PROCESS

We first address the troubling manner by which the Department altered Tant's sentence without his involvement and conclude it constituted a denial of due process.

Under both our state and federal due process clauses, no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *State v. Binnarr*, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012). Determining whether an individual has been denied due process requires an inquiry into whether the interest involved can be defined as liberty or property within the meaning of the Due Process Clause, and if so, what process is due under those circumstances. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571–73 (1972).

There can be no doubt the length of an inmate's incarceration implicates a constitutional liberty interest. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part) ("Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). Accordingly, we need only determine what process is required.

We fully appreciate the Department's duty to correct mistakes that may occur in recording an inmate's sentence and are cognizant of the fact that in some instances the Department's correction will resolve nothing more than a clear clerical error. However, we cannot ignore the reality that an individual's freedom is implicated in these determinations. As this case makes plain, at times inputting an inmate's sentence in its records requires more from the Department than the ministerial act of looking to the face of the sentencing sheet.[2] We therefore hold

[2] Contrary to the suggestion made in the concurring opinion, the Department performs an administrative function in recording an inmate's sentence and in interpreting an unclear judicial pronouncement of a sentence when necessary. The

whenever the Department alters an inmate's sentence in its records, it must give the inmate formal notice of the change and advise him of his right to file a grievance and obtain a hearing.[3]

II. SENTENCE DURATION

Turning now to the merits of the case, the Department contends it should be allowed to consider the sentencing transcript and any communication with the sentencing judge in its determination of whether Tant's sentences run concurrently or consecutively. We disagree and hold the Department is confined to the face of the sentencing sheets absent ambiguity. Because here we find the sheets ambiguous, we must interpret them along with the transcript, which we also find ambiguous, and hold Tant's sentences run concurrently.

"The rule of law is well settled that two or more sentences of a defendant to the same place of confinement run concurrently, in the absence of specific

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Department has no independent sentencing authority and nothing in our opinion indicates otherwise. In carrying out the executive function of incarcerating inmates, the Department must review the sentencing sheets provided by the judiciary to ascertain the sentence imposed by the court. Based on this review, the Department inputs that sentence into its records and retains the prisoner in its custody until that sentence has been served. During this process, the Department may run across judicial pronouncements of a sentence that are not clear from the face of the sentencing sheet alone. As discussed in more detail, *infra*, in those instances the Department can consider the court's transcript to determine what sentence the judiciary intended to impose. In doing so, the Department performs the administrative task of implementing the law as set forth by the judiciary and is in no way imposing a sentence or resentencing an inmate.

[3] The concurrence would have us require the Department to bring a declaratory judgment action in the circuit court in instances where the inmate disagrees with a reinterpretation of his sentence. The concurrence sets forth no basis in law for imposing this procedure upon the Department. The relevant legal doctrine at issue here is that of due process, and as applied in our opinion, due process requires notice and an opportunity to be heard, both of which are afforded by the procedure outlined above. The inmate who is allegedly aggrieved by an ambiguous sentence can, if he chooses, seek judicial review through the grievance process and thus, "the interpretation of the unclear sentence" would be "made by a judicial officer."

provisions in the judgment to the contrary . . . ." *Finley v. State*, 219 S.C. 278, 282, 64 S.E.2d 881, 882 (1951). Although the intent of the judge is controlling in determining whether sentences run concurrently or consecutively, "[a]mbiguity or doubts relative to a sentence should be resolved in favor of the accused." *State v. DeAngelis*, 257 S.C. 44, 50, 183 S.E.2d 906, 909 (1971).

The Department initially contends it should be allowed to consider the judge's letter in determining the length of Tant's sentence. Although we respect the Department's responsibility to administer a sentence as intended by the judge, we cannot countenance this practice. The judge sent the letter two-and-a-half years after sentencing and at that point no longer had jurisdiction over the case. *State v. Campbell*, 376 S.C. 212, 215, 656 S.E.2d 371, 373 (2008) (noting the "long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered expires," except for post-trial motions filed within ten days pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure). Therefore, Judge Saunders was without jurisdiction to make any subsequent pronouncement concerning Tant's sentence. Such correspondence may not be considered in determining the length of an inmate's sentence, even if both the sentencing sheets and the transcript are vague or unclear.

We also reject the Department's claim that the court of appeals erred in holding it can only consider a sentencing transcript if the sentencing sheets are ambiguous. The Department asserts this pronouncement runs contrary to our holding in *Boan v. State*, 388 S.C. 272, 695 S.E.2d 850 (2010). We disagree with the Department's expansive reading of *Boan*.

In *Boan*, we were faced with the issue of whether an unambiguous oral pronouncement controls over an unambiguous sentencing sheet. *Id*. at 274, 695 S.E.2d at 851. Upon conviction, the trial judge orally sentenced Boan to a total of twenty years' imprisonment. *Id.* at 274–75, 695 S.E.2d at 852. However, the sentencing sheet later signed by the judge indicated Boan was to serve a total of thirty years' imprisonment. *Id*. at 275, 695 S.E.2d at 852. Boan filed an application for Post-Conviction Relief (PCR), arguing his counsel provided ineffective assistance in failing to object to or file a motion regarding the discrepancy between the oral and written sentences. *Id.* at 275, 695 S.E.2d at 851–52. The PCR court dismissed his application, but on certiorari the Court reversed. *Id.* at 278, 695 S.E.2d at 853. We recognized in our analysis that, "Although this

Court has not previously spoken on the issue of whether an oral pronouncement of a sentence controls over a conflicting written sentencing order, the majority of jurisdictions that have considered this point hold the oral pronouncement controls." *Id.* at 276, 695 S.E.2d at 852. Despite this acknowledgement, we nevertheless declined to adopt a bright-line rule and held simply that "a trial's fairness is compromised when a trial judge *increases* a defendant's sentence outside his presence" and therefore, "in a situation such as the one on appeal, due process requires the judge's oral pronouncement control over a conflicting written sentencing order." *Id.* at 277, 695 S.E.2d at 852 (emphasis added). Our reasoning was fundamentally rooted in the defendant's constitutional right to be present at all stages of the trial, including sentencing. *Id*.

The Department contends our *Boan* decision adopted the majority rule that an oral pronouncement controls. We disagree. *Boan*'s holding was plainly limited to its facts. In explicating the rationale for our decision, we specifically relied on the defendant's constitutional right to be present at every stage of trial instead of adopting a bright-line rule. Here, Tant does not allege his sentence was increased in the sentencing sheets; rather, the sheets arguably indicate a reduction of his sentence. Therefore, the constitutional concerns presented in *Boan* are not implicated here. Instead, Tant's case involves the routine practice undertaken by the Department in discerning an inmate's sentence and how it addresses situations where it subsequently discovers the original interpretation may be erroneous.

In this context, we find the court of appeals' ruling both sound and practical. Although the Department expresses concern about its ability to follow the intent of the trial judge if its ability to reference other evidence is constrained, the sentencing sheets were signed by the judge and both attorneys without objection and are assumed to memorialize the judge's intention no less than what was pronounced from the bench. *See Finley*, 219 S.C. at 284, 64 S.E.2d at 883 ("A sentence should be so complete as to need no construction of a court to ascertain its import."). We see no reason why the Department should not be able to rely on unambiguous sentencing sheets as indicative of the intended sentence.

Applying this reasoning to the case before us, we find the written sentencing sheets are ambiguous as to whether the animal fighting sentences run concurrently or consecutively to one another. Turning to the oral pronouncement, we find that it

too is ambiguous. We therefore hold Tant's sentences must be construed to run concurrently.[4]

The Department argues that the written sentences are ambiguous because two of the animal fighting convictions can be nullified by payment of restitution. Therefore to construe them as running concurrently with the other animal fighting convictions—as the sheets indicate—would render the payment of restitution a futile act as it would have no practical effect on the length of this sentence. Tant argues there are other reasons to pay restitution than simply to reduce a sentence, such as removing a potential aggravating factor for any future conviction or allowing mitigation during his parole review. We find that argument unpersuasive, especially for a defendant who was convicted of forty-one counts of animal fighting. Nullifying two of those counts would not appear to remove much in terms of aggravating factors if he were ever convicted again. However, applying this reasoning also renders Judge Saunders' oral pronouncement ambiguous. Accordingly, we find both ambiguous.

During sentencing, Judge Saunders initially stated the six animal fighting convictions at issue were to be served "consecutive to [the ABHAN sentence]." However, upon request for clarification by the solicitor, Judge Saunders stated that four animal fighting indictments would be "consecutive to each other and consecutive to [the ABHAN sentence]." He then addressed the remaining two animal fighting convictions and stated they should be served "consecutive to [the ABHAN sentence] as to both. However . . . these two sentences shall be null and void upon payment of restitution . . . ." The judge thereafter executed the sentencing sheets, which indicate all six animal fighting convictions are to be served consecutive to the ABHAN but are silent as to whether they are to be served

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[4] The Department claims the court of appeals' decision produces uncertainty as to when a sentence is ambiguous and how this determination should be made. Ambiguity in a sentence is established the same way as it is established for contract terms or statutes, essentially where the language, and therefore the intent, is in some way unclear. *E.g. S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."); *State v. Hudson*, 336 S.C. 237, 247, 519 S.E.2d 577, 582 (Ct. App. 1999) (noting the court must construe terms that "give[] rise to doubt or uncertainty as to legislative intent").

consecutive to one another. Additionally, two of the sentences can be nullified by paying restitution—basically mirroring his initial oral pronouncement.

Accordingly, Judge Saunders' first oral pronouncement could either indicate a total sentence of fifteen years or twenty-five years, with each animal fighting conviction served consecutive only to the ABHAN conviction or with the two convictions allowing for restitution served consecutive to the other charges. However, in Judge Saunders' subsequent oral clarification he states four of the animal fighting convictions are consecutive to each other, but does not say the same about the two subject to restitution. Therefore, this second statement could either be read as thirty years—four of the animal fighting convictions served in succession after the ABHAN and the other two served concurrently—or forty years if we assume the requirement of paying restitution indicated the judge intended those sentences to be served consecutively as well.

Because both of the trial court's pronouncements, oral and written, are susceptible to multiple interpretations, they are ambiguous. Accordingly, the sentences must be construed in the defendant's favor to run concurrently. *Finley*, 219 S.C. at 283, 64 S.E.2d at 883 ("The importance of accuracy in the statement of the terms of the sentence is a right which is accorded every defendant. . . . If it is vague and indefinite, the terms will run concurrently." (alteration in original)). We therefore hold Tant's sentence is for fifteen years.

CONCLUSION

Based on the foregoing, we hold the Department must provide an inmate with timely, formal notice when it seeks to recalculate its initial determination of his sentence and advise him of his right to file a grievance and obtain a hearing. Additionally, we hold the Department is confined to an unambiguous sentencing sheet in determining an inmate's sentence, but may consider the sentencing transcript if the sheet is ambiguous. Furthermore, we find in this case that both the sentencing sheets and the transcript are ambiguous, and therefore, Tant's sentences must be construed to run concurrently.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the result but would adopt the following procedure should this circumstance arise again.

This case requires us to determine the appropriate procedure when the Department of Corrections seeks to increase an inmate's sentence based upon the Department's determination that it has misinterpreted that sentence. In my opinion, the onus for upward recalculations of sentences must be placed on the Department and not on the inmate, and the interpretation of the unclear sentence must be made by a judicial officer and not by an executive agency.[5] I would therefore hold that when the Department proposes to reinterpret a sentence in a manner that would increase the time an inmate must serve, the Department must notify the inmate of the proposed change and of his right to judicial interpretation of the sentence. If the inmate does not agree to the Department's proposed reinterpretation, then I would require the Department to bring a declaratory judgment action in the Court of General Sessions. *See* S.C. Code Ann. § 15-53-20 (2005); *compare In re Shaquille O'Neal B.*, 385 S.C. 243, 684 S.E.2d 549 (2005).

Further, this record reflects the increase in respondent's sentence was initiated by an *ex parte* communication between a Department employee and a solicitor which led to *ex parte* communications with respondent's sentencing judge. Moreover, based upon the Department's general counsel's letter, this case does not appear to represent an isolated instance of such contacts. I believe we must clearly and unequivocally end this practice which serves to undermine confidence in the fairness of our system.

[5] The exercise of sentencing authority by the Department would violate the separation of powers doctrine. *State v. Archie*, 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996).

The Supreme Court of South Carolina

In the Matter of Joenathan Shelly Chaplin, Respondent.

Appellate Case No. 2014-001090
Appellate Case No. 2014-001091

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Peyre T. Lumpkin, pursuant to Rule 31, RLDE. Respondent consents to being placed on interim suspension and to the appointment of the Receiver.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Mr. Lumpkin is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

May 23, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Be Mi, Inc. d/b/a St. Clements Beach Bar & Grill,
Respondent,

v.

South Carolina Department of Revenue,

and St. Clements Homeowners Association, Intervenor,

Of whom St. Clements Homeowners Association is the Appellant,

and South Carolina Department of Revenue is the Respondent.

Appellate Case No. 2012-212861

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 5233
Heard April 9, 2014 – Filed May 28, 2014

AFFIRMED

James J. Corbett, of Holler, Garner, Corbett, Ormond, Plante & Dunn, of Columbia, for Appellant.

Clifford Leon Welsh, of Welsh & Hughes, of North Myrtle Beach, for Respondent Be Mi, Inc.

Kathryn Ray Brown, Sean Gordon Ryan, Harry T. Cooper, Jr., and Milton Gary Kimpson, all of Columbia, for Respondent South Carolina Department of Revenue.

KONDUROS, J.: St. Clements Homeowners Association (the Homeowners Association) appeals the administrative law court's (ALC) decision that Be Mi, Inc. met the requirements for a restaurant liquor by the drink license. It contends Be Mi does not meet the seating requirements because some of the seats counted are in common areas and other seats are bar stools at a rail. It also asserts Be Mi does not have control over the deck, where many of its seats are located, and does not have a lease for the deck space. We affirm.

FACTS

In 1988, Be Mi purchased a snack and pool bar, known as St. Clements Beach Bar & Grill, located in the St. Clements condominium/hotel complex in Myrtle Beach. Raymond Luke Goude is the sole owner and officer of Be Mi. Be Mi has had a beer and wine license as well as a restaurant liquor by the drink license since 1991.[1] At that time, the developer of the complex was the president of the Homeowners Association. The developer and another board member allowed Be Mi to expand by adding a covered wooden deck on top of two parking spaces. There is no seating available inside the bar.

On March 6, 2007, the Homeowners Association filed for an injunction to have Be Mi remove the deck it built. On December 20, 2010, the Master-in-Equity denied the Association's claim for an injunction and ordered that Be Mi had the right to retain and maintain the side deck. The Association appealed that decision to this court.

On May 19, 2011, Be Mi applied to the South Carolina Department of Revenue (the DOR) for the renewal of its beer and wine permit and its restaurant liquor by the drink license. On May 24, 2011, DOR denied the application due to a valid public protest by the Homeowners Association. Be Mi protested the denial. South

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[1] Prior to that, the licenses had been in the Homeowners Association's name since the bar opened for business.

Carolina Law Enforcement Division (SLED) reviewed and investigated Be Mi's application. On September 30, 2011, the DOR confirmed the denial because of the valid public protest and because Be Mi failed to be engaged primarily and substantially in the preparation and service of meals. However, the DOR gave Be Mi the opportunity to correct the deficiencies. On October 27, 2011, Be Mi filed a request for a contested case hearing with the ALC. Following a second visit, SLED determined Be Mi met the requirements for a restaurant liquor by the drink license. The DOR withdrew the portion of its denial relating to Be Mi not meeting the requirements but determined the license still had to be denied due to the valid public protest.

The Homeowners Association filed a motion to intervene in the contested case, which the ALC granted. The ALC held a hearing on January 4, 2012, and the Homeowners Association agreed that it was not protesting the beer and wine permit. Goude testified Be Mi provided seating for forty people simultaneously at tables: twenty chairs at tables on the deck, eighteen chairs at tables on the roof, and bar stool space for four to six customers at a wide rail on the deck. Goude stated that Be Mi had purchased forty chairs for its use and the Association had twenty chairs to be used by guests poolside. He provided Be Mi owned the rooftop area as a limited common area. He indicated two stools in a picture provided by the Homeowners Association were located off of the deck but could be moved to the other side of the rail and be on the deck and would not affect his use.

Barbara Brown, an owner of one of the units at St. Clements and former board member of the Homeowners Association, testified that currently eighteen chairs were on the roof but there had previously only been twelve chairs. She did not believe more than twelve people could sit there comfortably. She also testified that typically sixteen tables were on the deck and it was not reasonable to seat twenty people there. She contended the Homeowners Association was protesting the license because people had complained of Goode asking them if they had brought their own food and drinks while sitting on the deck or around the pool. She stated "they didn't think they should be asked or didn't like being asked." She testified the Homeowners Association was protesting the license because Goude was "patrolling the area and making it like these was [sic] the premise[s] -- the whole area was the premise[s] of his business."

The DOR appeared at the hearing and represented that Be Mi met all of the statutory requirements for the restaurant liquor by the drink license. Be Mi had

"sufficient space under [its] control to provide seating for 'forty persons simultaneously at tables for the service of meals.'" This appeal followed.

On December 18, 2013, this court affirmed the master's decision denying the injunction to remove the deck, finding: "B[e Mi] has constructed, maintained, and improved the side deck at B[e Mi]'s own expense. The side deck constitutes a substantial part of B[e Mi]'s business and relieves congestion by the pool and pool bar, allows patrons a place to sit and eat, and provides shade." *St. Clements Homeowners Ass'n v. BE-MI, Inc.*, 2013-UP-466 (S.C. Ct. App. Filed Dec. 18, 2013).

STANDARD OF REVIEW

> The review of the [ALC's] order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALC] 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;
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> (b) in excess of the statutory authority of the agency;
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> (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. 2013).

LAW/ANALYSIS

I. Common Area Seating

The Homeowners Association argues the ALC erred by ignoring or overriding the Master Deed to find that common area seating meets Be Mi's simultaneous seating requirement as a matter of law. We disagree.

> The State, through the [DOR], is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors, is authorized to establish conditions or restrictions which the department considers necessary before issuing or renewing a license or permit, and occupies the entire field of beer, wine, and liquor regulation except as it relates to hours of operation more restrictive than those set forth in this title.

S.C. Code Ann. § 61-2-80 (2009).

> "[I]t is lawful to sell and consume alcoholic liquors sold by the drink in a business establishment . . . if the establishment . . . [is a] business . . . bona fide engaged primarily and substantially in the preparation and serving of meals or furnishing of lodging . . . ."

S.C. Code Ann. § 61-6-1610(A)(1) (2009). "'Bona fide engaged primarily and substantially in the preparation and serving of meals' means a business that provides facilities for seating not fewer than forty persons simultaneously at tables for the service of meals . . . ." S.C. Code Ann. § 61-6-20(2) (Supp. 2013).

"Absent an allegation of fraud or a statu[t]e or a court rule requiring a higher standard, the standard of proof in administrative hearings is generally a preponderance of the evidence." *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (internal quotation marks omitted). "In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the de novo contested case proceeding." *S.C. Dep't of Revenue v. Sandalwood Soc. Club*, 399 S.C. 267, 279, 731 S.E.2d 330, 337 (Ct.

App. 2012) (italics omitted). "The Rules of Procedure for the Administrative Law Judge Division require that the AL[C] make independent findings of fact in contested case hearings, and the Administrative Procedures Act clearly contemplates that the AL[C] will make [its] own findings of fact in a contested case hearing." *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997) (citation omitted). When the evidence conflicts on an issue, the court's substantial evidence standard of review defers to the findings of the fact-finder. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 435 (2011).

"The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). A reviewing court may reverse or modify an administrative decision if substantial evidence does not support the findings of fact. *Risher*, 393 S.C. at 210, 712 S.E.2d at 434. Substantial evidence is evidence that allows reasonable minds considering the record as a whole to reach the conclusion the administrative agency reached. *Id.* "Substantial evidence . . . is more than a mere scintilla of evidence." *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 605, 670 S.E.2d at 676. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Risher*, 393 S.C. at 210, 712 S.E.2d at 434 (alteration by court) (internal quotation marks omitted).

The record contains Goude's testimony that Be Mi has seating at tables for at least forty people. SLED's final report also indicated Be Mi met the seating requirements. The ALC, as the sole fact finder, found Be Mi had seating at tables for at least forty people. The record includes substantial evidence to support the ALC's finding. Accordingly, the ALC did not err in finding Be Mi met the seating requirements.

II. Seating at Bar Stools

The Homeowners Association argues the ALC erred in finding bar stool space at a rail is table space.[2] We disagree.

"'Bona fide engaged primarily and substantially in the preparation and serving of meals' means a business that provides facilities for seating not fewer than forty persons simultaneously at tables for the service of meals . . . ." § 61-6-20(2).

"Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). "[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (alteration by court) (internal quotation marks omitted). "While the [c]ourt typically defers to the Board's construction of its own regulation, where . . . the plain language of the regulation is contrary to the Board's interpretation, the [c]ourt will reject its interpretation." *Id.* at 515, 560 S.E.2d at 415.

Table is not defined in the Code. *Webster's Dictionary* defines table as "a flat slab" or "a piece of furniture consisting of a smooth flat slab fixed on legs or other support and variously used (as for eating)." *Webster's Third New International Dictionary: Unabridged* 2324 (1986). The wide rail described in the record meets this definition. The DOR determined Be Mi met the seating requirements. When testifying that Be Mi had at least forty seats at a table, Goude included the stools at the wide rail. The ALC determined Be Mi met the seating requirements, and substantial evidence supports that decision. Accordingly, the ALC did not err in finding Be Mi met the seating requirements.

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[2] The ALC did not specifically find the bar stool space at the rail constituted seating at a table. It simply found Be Mi had sufficient space to provide seating for forty people simultaneously at tables, as specified by statute.

III. Commercial Rights

The Homeowners Association argues the ALC erred by giving commercial rights to Be Mi reserved to the Homeowners Association members under the Master Deed through use of common space. We disagree.

> Each co-owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the master deed or lease or in the deed or lease to his apartment. Failure to comply with any of the same shall be grounds for a civil action to recover sums due for damages or injunctive relief, or both, maintainable by the administrator or the board of administration, or other form of administration specified in the bylaws, on behalf of the council of co-owners, or in a proper case, by an aggrieved co-owner.

S.C. Code Ann. § 27-31-170 (2007).

The ALC cannot resolve this issue in a contested liquor license case. As section 27-31-170 provides, noncompliance with the master deed is to be resolved by filing a suit with the circuit court. The Homeowners Association previously filed an action for an injunction with the circuit court. That action was then referred to the master, which found Be Mi had a right to use the deck space built over the parking spaces. The Homeowners Association did not appeal this court's affirmance of that decision. The ALC made its decision properly relying on how Be Mi was operating presently and the master-in-equity's denial of the Homeowners Association request to tear down the deck Goude built. The proper court for the Homeowners Association to litigate whether Be Mi has a right to use the deck for the seating of its restaurant is in the circuit court.[3]

[3] This court does not take a position on whether the Homeowners Association is barred from initiating a suit against Be Mi based on the previous suit.

IV. Written Contract

The Homeowners Association argues the ALC erred by ignoring the requirements of Regulation 7-202.1 of the South Carolina Code (Supp. 2013) by finding Be Mi had a contract to use the premises without evidence of a required written contract or lease. We disagree.

> A. Unless otherwise limited by statute or regulation, as used in Title 61, "premises" means all of the buildings and grounds that are both (1) subject to the direct control of the license holder and (2) used by the license holder to conduct its business.
>
> B. For purposes of establishing the premises:
>
> (1) The license holder's direct control of buildings and grounds may be shown by any of the following: (a) a deed or lease conveying to the license holder an appropriate interest that includes the premises; (b) a writing from a local governmental jurisdiction giving the license holder the right to use and the duty to maintain an area owned or controlled by the local governmental jurisdiction; (c) an enforceable written contract granting the license holder a right to use the premises.

Regs. 7-202.1.

"The construction of a regulation is a question of law to be determined by the court." *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) (internal quotation marks omitted). "We will correct the decision of the ALC if it is affected by an error of law, and questions of law are reviewed de novo." *Id.* (citations omitted). "Although our review of these questions is de novo, we will generally give deference to an agency's interpretation of its own regulation." *Id.* at 260-61, 725 S.E.2d at 483. "Nevertheless, we will reject the agency's interpretation if it is contrary to the regulation's plain language." *Id.*

Regulations are construed using the same ruless of construction as statutes. *See S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010). "Accordingly, [t]he words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation." *Blue Moon of Newberry*, 397 S.C. at 261, 725 S.E.2d at 483 (alteration by court) (internal quotation marks omitted). Further, the regulation must be construed as a whole rather than reading its component parts in isolation. *Id.*

Regulation 7-202.1 provides that a lease is one way a license holder may show control of the premises, not the only way. Be Mi showed control by building and use of the deck for over twenty years and the master's decision that the deck should not be torn down. The record contains substantial evidence to support the ALC's finding Be Mi had sufficient space under its control to seat forty persons. Accordingly, we affirm the ALC's decision.[4]

CONCLUSION

The ALC's decision to issue the restaurant liquor by the drink license is

AFFIRMED.

WILLIAMS and LOCKEMY, J., concur.

[4] The Homeowners Association also argued the ALC erred in granting a license to an applicant that did not meet the requirements. We did not separately address this argument because it is the underlying argument in each of its issues on appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kevin Tyrone Bennett, Appellant.

Appellate Case No. 2012-207559

Appeal From Spartanburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5234
Heard December 12, 2013 – Filed May 28, 2014

REVERSED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

HUFF, J.: Kevin Tyrone Bennett was convicted of burglary in the second degree, petty larceny, and malicious injury to real property. Bennett appeals, arguing the trial court erred in denying his motion for directed verdict based upon the insufficiency of the evidence. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Around 3:30 a.m. on November 17, 2010, an alarm activated at the C.C. Woodson Community Center (the Center) in the City of Spartanburg. Upon their arrival, police discovered a broken door adjacent to a smashed window in the area referred to as the "community room." Officer Osrechek dusted the doors, as well as the televisions, for fingerprints in this room. He was able to lift one usable print from a wall-mounted television located in the community room. Officer Osrechek focused on this particular television in the room because it appeared to him that someone had tampered with it. He testified he found the television in an unnatural position, pointing down at a sharper angle than it should have been in order to project across the large room. Though he did not recall seeing any damage to the television, it appeared to him to have been manipulated, as if someone were trying to remove it from the wall. Officer Osrechek also went to the computer room, where he took photographs. In particular, he photographed holes in a wall and mounting brackets on the floor where a television once sat, and noted it was obvious an item had been removed from the wall. He did not locate any fingerprints or other forensic evidence in the computer room. A fingerprint examination expert later testified that, after comparing the latent print lifted from the community room by Officer Osrechek with Bennett's prints, the latent print belonged to Bennett.

Officer McClure also responded to the scene, where he processed the computer room. He testified it appeared that one of the computers was missing. He observed two misplaced chairs, which had apparently been moved from underneath the computer desk and were found directly below brackets on the wall where a television was missing. The chairs were pushed against a wall "as if somebody would use them as leverage." Also discovered next to one of the chairs was a tire iron. Officer McClure was unable to lift any fingerprints from the computer room, and did not discover any blood or other forensic evidence in there. He collected the tire iron to be processed by their forensic team, but no prints were ultimately recovered from this item either.

Olivia Sartor, the director of the Center, testified she arrived at the Center between 3:30 and 4:00 a.m. on November 17, 2010, and was asked by officers to walk through the building to see if anything was missing. She observed glass broken in the community room. Nothing was missing from that room, but Sartor did observe abrasions on the wall, as if something had been used to try to pry the televisions

from the wall. In the computer room, she found a television, computer, monitor and keyboard were missing. Sartor explained the community room was not simply open for the public to enter, but that it was scheduled for events. However, the doors were not always locked to that room and Sartor agreed the scheduling of events did not control who was able to access the community room. Sartor stated she had seen Bennett in the Center several times prior to the break-in, characterizing him as a frequent visitor who mainly participated in their computer lab in the computer room. During the hours of the day she saw Bennett at the Center, there were usually after school programs meeting in the community room, as well as adult groups such as senior citizen craft classes or bridge groups, both of which met earlier in the day. Sartor did not remember Bennett being in the community room and did not recall seeing him in that room as part of these groups. Sartor also stated she would monitor Bennett when he was in the facility. She testified the Center was open from 6:00 a.m. to 9:00 p.m., and she was typically present at the facility from 6:00 a.m. until 7:00 or 8:00 p.m. She acknowledged, though, that she was unable to monitor Bennett during the times she was not at the Center. She further agreed that grief support groups and addiction support groups also used the community room in the evening.

Officer Banks, who was assigned to Spartanburg Public Safety Department's burglary task force, testified he arrived at the Center at approximately 9:30 in the morning on November 17, 2010. He checked to see if there was any other evidence, such as blood or fingerprints, the other officers may have missed. He noted that brackets to one of the televisions in the community room appeared to have been dislocated from the wall on one side, leaving the television hanging lower than normal. In the computer room, Officer Banks discovered two small droplets of blood approximately two inches below what would have been the bottom of the missing television. The blood droplets were also about one and a half to two feet above the chair. The officer collected swabs of the blood found in the computer room. A later DNA analysis of the blood swabs showed it matched the DNA profile of Bennett.

After the State rested, Bennett moved for a directed verdict on all charges arguing, though there was evidence of the presence of his fingerprint and blood in the Center, it was a public building and the evidence showed he often visited the building. The State countered, viewing the evidence in a light most favorable to the State, based on the presence of the fingerprint near the television with the damaged brackets as well as the blood spot near the missing television, the jury

could infer Bennett was the burglar. The trial court recognized this was a circumstantial evidence case, but denied Bennett's motion finding there was substantial circumstantial evidence from which the jury could conclude Bennett was the perpetrator of the crime.

STANDARD OF REVIEW

In an appeal from the denial of a motion for directed verdict, this court must view the evidence in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the case was properly submitted to the jury. *State v. Cope*, 405 S.C. 317, 348, 748 S.E.2d 194, 210 (2013). When a case is built wholly on circumstantial evidence, if the State fails to produce substantial circumstantial evidence the defendant committed a particular crime, he is entitled to a directed verdict. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes." *State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Arnold*, 361 S.C. 386, 389, 605 S.E.2d 529, 531 (2004). However, the trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. *Id.* at 390, 605 S.E.2d at 531. *See also State v. Hernandez*, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009) (holding mere suspicion is insufficient to support a verdict). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). The trial court is not, however, required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis. *Id.*

LAW/ANALYSIS

On appeal, Bennett contends the trial court erred in denying his motion for directed verdict, because the evidence against him was solely circumstantial, and the circumstantial evidence was not substantial. We agree.

The State's case consisted solely of circumstantial evidence. It relied primarily upon the following: (1) that Bennett's fingerprint was found on a community room television set that may have been manipulated by the burglar in an attempt to

remove the television, and (2) that two small droplets of blood matching Bennett's DNA were found below the space where a stolen television once sat in the computer room. However, it is uncontroverted that Bennett was a frequent visitor to the Center prior to the crime, spending much of his time in the computer room. Additionally, while the director of the Center testified she was in the habit of monitoring Bennett when he was at the Center, she acknowledged that she typically left the Center at least one hour before it closed at night and she was not able to monitor Bennett when she was not at the Center. Further, though she directed Bennett to the computer room and did not see him participating in the group activities such as the afterschool programs and Senior Citizen programs held in the community room earlier in the day, she agreed there were other groups which met in the room at night and she was not typically at the Center the last hour it was open. The director also acknowledged the community room door was not always locked, and the scheduling of activities in the community room would not control who had access to the room. Thus, we cannot say it would be unexpected to find Bennett's DNA in the computer room and his fingerprint in the community room. Though the exact locations of the DNA and fingerprint evidence do raise a suspicion of his guilt, the evidence simply does not rise above suspicion. The evidence undoubtedly placed Bennett at the *location where a crime ultimately occurred*; however, it is undisputed that Bennett was a frequent visitor to the location prior to the crime, and we disagree with the State's assertion that the evidence placed Bennett *at the scene of the crime*. Viewing the evidence in a light most favorable to the State, we find the State did not present substantial circumstantial evidence to reasonably prove Bennett's guilt, but at most, the evidence presented merely raised a suspicion that Bennett committed the crimes. *See State v. Bostick*, 392 S.C. 134, 141-42, 708 S.E.2d 774, 778 (2011) (considering the circumstantial evidence relied upon by the State and finding, viewing the evidence in the light most favorable to the State, the State's evidence raised only a suspicion of guilt such that the trial court erred in failing to direct a verdict in favor of Bostick).

CONCLUSION

Based on the foregoing, we find the trial court erred in refusing to grant Bennett's motion for directed verdict. Accordingly, Bennett's convictions are

REVERSED.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kimberly M. Morrow, Respondent,

v.

South Carolina Department of Employment and Workforce and A Wing and A Prayer, Inc., Defendants,

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

and A Wing and A Prayer, Inc. is also the Respondent.

Appellate Case No. 2012-207406

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 5235
Heard February 4, 2014 – Filed May 28, 2014

AFFIRMED

Eugene Belton McLeod, III, and Debra Sherman Tedeschi, of South Carolina Departement of Employment and Workforce, both of Columbia, for Appellant.

Kimberly M. Morrow, pro se, of Spartanburg.

KONDUROS, J.: The South Carolina Department of Employment and Workforce (SCDEW) appeals the Administrative Law Court's (ALC) reversal of

the SCDEW Appellate Panel's (Panel) finding that Kimberly Morrow was ineligible for unemployment benefits. The SCDEW argues the ALC exceeded its scope of review when substantial evidence supported the Panel's decision to deny Morrow unemployment benefits and the ALC erred in failing to consider Morrow's controlling interest in her employer as a relevant factor in creating her own unemployment. We affirm.

FACTS/PROCEDURAL HISTORY

A Wing and a Prayer, Inc. (Employer) was incorporated in 2005. Employer issued 10,000 shares of stock with Raymond Hicks owning 6,500 shares and Christopher Morrow, Morrow's husband, owning the remaining 3,500 shares. Employer operated under the trade name "Blue Star BBQ" as a restaurant and catering business in Spartanburg, South Carolina. Morrow testified she worked as the manager of Blue Star BBQ and "basically ran the restaurant." Blue Star BBQ closed on January 23, 2011. In the year and a half before the closing of the restaurant, the business lost $113,000.

As a result of the closing, Morrow applied for unemployment benefits on January 30, 2011. On her application for unemployment benefits, Morrow listed her position as Vice President and she stated she owned one-third of the business. On the application, Morrow wrote that the President, Vice President, Secretary, and Treasurer made the decision to close the business due to slow business and a lack of revenue. Regarding the future of the business, Morrow stated the business planned to reopen as soon as possible but no reopening date was set. She also provided she was involved in efforts to reopen the business, and she was looking for smaller locations to open a new restaurant. She estimated she spent twenty hours each week looking for a new location. In response to the question, "How much time (per week) will you contribute to the operation of the business during your period of unemployment?" Morrow answered, "None[.] Business is closed." In response to the question, "Do you expect to be reemployed with the business?" Morrow answered, "Yes" and stated her anticipated date of reemployment was "ASAP" as the Vice President.

On March 11, 2011, Morrow was notified that a claims adjustor with the SCDEW determined she was ineligible for unemployment benefits because:

> As an officer of a corporation, [Morrow] had control over [her] employment insurance benefits. Since unemployment insurance benefits are meant for those

> who are unemployed through no fault of their own, [Morrow is] ineligible for benefits under the South Carolina Code. [Morrow is] ineligible for benefits beginning 01/30/11.

Morrow appealed to the SCDEW Appeal Tribunal (Tribunal), and a hearing was held on April 13, 2011. During the hearing, Morrow testified she had no controlling interest in Employer and Employer was no longer in business and had no plans to reopen. Morrow stated she spent approximately twenty hours per week in an effort to find a location to open a new restaurant. She also testified she attended classes for sixteen hours each week to earn her GED; however, she would be willing to stop going to school if she found full-time employment.

Christopher Morrow appeared at the hearing as an Employer witness. He testified Morrow was not an owner of Employer. He stated he owned one-third of Employer and Hicks owned two-thirds of Employer, while his wife was "only the operating manager and at the time [the restaurant was closed she] was on paper as the vice president just for paperwork." He stated Hicks, as the controlling partner, made the decision to close the restaurant and Morrow "really [had] no say so in that decision."

The Tribunal found Morrow did not have unrestricted exposure to the labor market and was ineligible for unemployment benefits based on her time spent seeking to open a new business and her enrollment in school. Morrow appealed the decision to the Panel, which affirmed the Tribunal's ruling. The Panel held Morrow's intention to open a new business in conjunction with her school attendance restricted her exposure and attachment to the labor market.

Morrow appealed the Panel's decision to the ALC. The ALC found no evidence in the record supported the conclusion that Morrow's GED classes made her unavailable for work. The ALC also stated Morrow had no corporate position within Employer and there was no effort to continue operating the business. Accordingly, the ALC reversed the Panel's decision and found Morrow met the availability requirements to receive unemployment benefits. This appeal followed.

STANDARD OF REVIEW

"A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." S.C. Code Ann. § 1-23-380

(Supp. 2013). "The review must be conducted by the court and must be confined to the record." § 1-23-380(4). "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." § 1-23-380(5). "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 . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . ." S.C. Code Ann. § 1-23-610(B) (Supp. 2013).

LAW/ANALYSIS

I. Substantial Evidence

The SCDEW argues the ALC exceeded its scope of review by substituting its judgment for that of the Panel in determining that Morrow was eligible for unemployment benefits. We disagree.

The Administrative Procedures Act (APA) provides a party who has exhausted all administrative remedies available within an agency is entitled to judicial review. S.C. Code Ann. § 1-23-380 (Supp. 2013). The APA defines an agency as "each state board, commission, department, or officer, other than the legislature, the courts, or the Administrative Law Court, authorized by law to determine contested cases." S.C. Code Ann. § 1-23-310 (Supp. 2013). Under this definition, the SCDEW is an agency. *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding the Employment Security Commission, the predecessor to the SCDEW, was an agency within the APA, based upon its authority to make rules, as well as its ability to hear and decide contested matters).

To receive benefits, an unemployed worker must demonstrate, among other things, the claimant is able to work, available to work, and unemployed through no fault of their own. S.C. Code Ann. § 41-35-110 (Supp. 2013). "The burden is on a claimant to show compliance with benefit eligibility requirements. This includes a duty to show availability for work and a reasonable effort to obtain employment." *Wellington v. S.C. Emp't Sec. Comm'n*, 281 S.C. 115, 117, 314 S.E.2d 37, 38 (Ct. App. 1984). "[A]vailability implies an applicant's 'unrestricted exposure' to the labor market." *Id*. The Panel determines whether a claimant has an unrestricted exposure to the labor market by looking at the facts and circumstances of each case. *Id.* The ALC "may not substitute its judgment for the judgment of the [Panel] as to the weight of the evidence on questions of fact." § 1-23-380(5). "Whether a claimant is available for work is a question of fact for the [Panel]."

Murphy v. S.C. Emp't Sec. Comm'n, 328 S.C. 542, 544, 492 S.E.2d 625, 627 (Ct. App. 1997).

"Review of an administrative agency's factual findings is governed by the 'substantial evidence' test of the [APA]." *Id.* "Substantial evidence under § 1-23-380 . . . is neither a mere scintilla of evidence nor evidence viewed blindly from one side of a case, but rather is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." *Carroll v. Gaddy*, 295 S.C. 426, 428, 368 S.E.2d 909, 911 (1988). "The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment. A judgment upon which reasonable men might differ will not be set aside." *Todd's Ice Cream, Inc. v. S.C. Emp't Sec. Comm'n*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984).

We find the ALC correctly reversed the Panel because the record lacked substantial evidence Morrow was unavailable to work. The fact that Morrow was a student does not automatically make her ineligible to receive unemployment benefits. She was in school to obtain her GED, which is an admirable pursuit in the event of unemployment, but also a pursuit that can be deferred if full-time employment becomes available. She testified she always had her phone with her in class in case prospective employers called. She also stated she would leave school if she were offered full-time employment. We find these facts to be substantial evidence she was available for employment.

Regarding the twenty hours each week she spent looking for a location to open a restaurant, this search exhibited optimism on her part the business could be reopened and did not require specific hours each week. We agree with the ALC her search for a new location and her availability to work under the statute do not conflict. During her hearing, Morrow was not asked when or under what circumstances she searched for a new location. She testified she was submitting employment applications and searched for new restaurant locations in her "free time." Subsequently, we do not find the record contained substantial evidence to support the Panel's decision. Therefore, the ALC did not err in reversing the Panel's ruling.

II. Controlling Interest

The SCDEW argues the ALC erred in failing to consider Morrow's controlling interest in Employer. We disagree.

The ALC determined that "[a]ccording to the Stock certificates placed in evidence at the hearing, Mr. Morrow owns 3500 shares in [Employer], and 6500 shares are owned by Raymond D. Hicks." In a footnote, the ALC found "[Morrow] does not own *any* interest in Employer." Based on these findings, we believe the ALC considered Morrow's interest in Employer. Accordingly, the SCDEW's contention the ALC failed to consider Morrow's controlling interest in Employer is without merit.

CONCLUSION

Based on the foregoing, the ALC's decision is

AFFIRMED.

LOCKEMY, J., concurs.

WILLIAMS, J., dissenting.

I respectfully dissent. In my view, the ALC impermissibly substituted its judgment for that of the Panel's in determining there was no substantial evidence that Morrow was restricted from the general labor market. *See* S.C. Code Ann. § 1-23-380(5) (Supp. 2013) ("The court may not substitute its judgment for the judgment of the [Panel] as to the weight of the evidence on questions of fact."); *see also Murphy v. S.C. Emp't Sec. Comm'n*, 328 S.C. 542, 544, 492 S.E.2d 625, 627 (Ct. App. 1997) ("Whether a claimant is available for work is a question of fact for the [Panel]."). In determining that Morrow was ineligible for unemployment benefits, the Panel reviewed the evidence and found the sixteen hours per week Morrow spent in school and the twenty hours per week she spent looking to open a new restaurant restricted her access to the general labor market. The ALC independently weighed the same evidence and found Morrow had unrestricted access to the general labor market. I believe the ALC impermissibly weighed the evidence and substituted its judgment for that of the Panel's in making this determination. *See Todd's Ice Cream, Inc. v. S.C. Emp't Sec. Comm'n*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984) ("The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment. A judgment upon which reasonable men might differ will not be set aside."). Accordingly, I would reverse the ALC's decision awarding Morrow unemployment benefits and reinstate the decision of the Panel to deny Morrow unemployment benefits.