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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Clifton B. Newman, Circuit Court Judge

Lower Case No. 2013-CP-06-0059
Appellate Case No. 2019-000599

Lorenda Robinson, Elaine Nix, Archie Patterson
and Tami Bollerman, ...Plaintiffs,
Of Whom, Archie Patterson and Tami Bollerman are Respondents/Appellants,

v.

South Carolina Department of Employment and
Workforce,.....Appellant/Respondent.

JOINT AMICI CURIAE BRIEF OF PRESIDENT OF THE SOUTH CAROLINA SENATE AND SPEAKER OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES

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INTEREST OF AMICI CURIAE

Thomas Alexander, in his official capacity as President of the South Carolina Senate, and G. Murrell Smith, in his official capacity as Speaker of the South Carolina House of Representatives, submit this *amicus curiae* brief to address only one issue on appeal before this court: whether the Department of Employment and Workforce was authorized to execute a particular budget proviso without first promulgating regulations.

The annual appropriations act is arguably the most important legislation enacted by the General Assembly because it provides funding to meet the ordinary expenses of state government and regulates the expenditure of appropriated funds. The circuit court's holding that the Department of Employment and Workforce was required to promulgate regulations prior to implementing the proviso at issue in this case directly impacts the General Assembly's ability to regulate the expenditure of appropriated funds. The elected leaders of the Senate and the House of Representatives, respectively, *amici*, have an interest in preserving the legislature's plenary legislative authority to direct the manner in which the state government spends appropriated funds.

BACKGROUND AND PROCEDURAL HISTORY

The circuit court erred when it found that the Department of Employment and Workforce ("Department") was required to promulgate regulations before it could execute the budget proviso at issue in this case. This error demonstrates the circuit court's fundamental misunderstanding of the purpose and function of the appropriations act, provisos, and how regulations are promulgated.

The annual appropriations act is divided into three parts: "Part IA," in which recurring funds are appropriated to government agencies; "Part IB," in which provisos prescribe how government agencies shall spend appropriated funds [1]; and "End of Part IB," which suspends laws or portions of laws that are in conflict with the act, provides a severability clause, and sets an effective date. Much like an act with a sunset provision, the End of Part IB states that the annual appropriations act is effective on July 1st of the year in which it was passed and ends on June 30th of the following year. Like statutes containing different sections, Part IA, IB, and End of Part IB must be read and interpreted together and comprise one law; therefore, each section of the act must be given full effect.

Plainly stated, a proviso is a law enacted by the General Assembly and is subject to the same constitutional constraints as any other act of the General Assembly. Provisos must be executed by the executive branch and interpreted by courts using the same rules of construction as other laws. The only difference between provisos and statutes is that provisos are not printed in the South Carolina Code of Laws, 1976 because they are in effect for a limited duration of time.

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[1]The circuit court's misunderstanding of the mechanics of the budget is further evidenced by its finding that the Proviso was a "funding mechanism." The "funding mechanism" for the activities required in the Proviso was in Part IA of the appropriations acts that contain the Proviso with all of the other recurring funding. The proper way to read the lead-in to first sentence of the Proviso is: Thirty percent of the funds appropriated [in Part IA of the appropriations act] …"

As provided by law, promulgating regulations is time-intensive. Promulgating authorities must meet certain deadlines and submit proposed regulations to the General Assembly for review. (see S.C. Code Ann. §1-23-10, *et. seq.*, the South Carolina Administrative Procedures Act). The legislature may choose to actively approve or reject the regulation or to passively allow the regulation to go into effect after the requisite amount of time. Legislative action on a proposed regulation must take place during the legislature's regular annual session, which runs from mid-January to mid-May.

Beginning in Fiscal Year 2012-2013 and ending in Fiscal Year 2015-2016, the General Assembly included within the annual appropriations act a proviso ("Proviso") that provided:

> Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code, via Eligibility Reviews, Random Verification of Job Contacts and Wage Cross Matches during those weeks covered by the South Carolina State Unemployment Tax Authority (SUTA), and to ensure seated meetings with Unemployment Insurance claimants and requiring that one of the four job search contact required per week be conducted through SC Works Online System (SCWOS) so that it can be electronically verified. The agency must also inform claimants in advance that Eligibility Reviews and Random Verification of Job Contacts will be used by the Department to verify compliance with the laws administered by the agency.

Act No. 288, 2012 S.C. Acts 2408, 2854 § 67.7 (*see also* Act No. 101, 2013 S.C. Acts 1041, 1515 § 83.6; Act No. 286, 2014 S.C. Acts 2635, 3137 § 83.6; and Act No. 91, 2015 S.C. Acts 429, 912-913 § 83.5). The Proviso coincided with the Department's March 12, 2012, revision of its job search policy to require claimants to use the South Carolina Works Online System ("SCWOS"). The policy revision also coincided with the Legislative Audit Council's March 2012 report to the

General Assembly and the Department's response[2]. After the Proviso was signed into law, the Department began enforcing the new policy in August 2012.[3]

In response to the Department's enforcement of the Proviso, Respondents filed a class action seeking a declaratory judgement that the Department lacked the authority to implement the Proviso because the Department did not first promulgate regulations facilitating the Proviso's implementation. The circuit court ultimately found that the Proviso "is a funding mechanism and no intent is expressed in the Proviso to suspend any statutes governing SCDEW." (*See* Order, *Archie Patterson and Tammie Bollerman v. South Carolina Department of Employment and Workforce*, No. 2013-CP-06-00059, 13 (Barnwell Cty. Comm. Pls. February 15, 2019)). Based

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[2] Section 112 of the Act 146 of 2010 required the Legislative Audit Council ("LAC") to perform three audits of the Department at set intervals. Act No. 146, 2010 Acts ____. The Legislative Audi Council's March 2012 Report found the Department could not verify job searches for unemployment compensation benefits. Legislative Audit Council, "A Management Review of the Department of Employment and Workforce" (March 2012). The Report also noted the Department ceased verifying work search forms by contacting employers due to employers' complaints. Legislative Audit Council Report (March 2012), p. 35. In March 2012, during meetings of the Senate Labor Commerce and Industry subcommittee Legislative Audit Council presented its findings in its first audit of the Department. Legislative Audit Council presentation to Senate Labor, Commerce and Industry Subcommittee (March 21, 2012) (www.scstatehouse.gov/VideoArchives). The LAC Report recommended the Department "should establish a mechanism for tracking how often claimants' benefits are stopped for failure to meet job contact requirements." Legislative Audit Council Report, p. 37. The Department identified its new programming would verify if contact was made and would track how often benefits are stopped to claimants who have failed to comply with that requirement." SCDEW Responses to LAC Audit Recommendations, Letter to Perry Simpson from General Abraham Turner, March 6, 2012, p. 5. During the Department's presentation on March 28, 2012, General Abraham Turner, then acting Executive Director of the Department, addressed the subcommittee. S.C. Department of Employment and Workforce presentation to the Senate Labor, Commerce and Industry Subcommittee (March 28, 2012)(www.scstatehouse.gov/VideoArchives). Included in General Turner's remarks to the subcommittee, he shared the Department was implementing an adjustment to the work search ("job contacts") policy and commented that it was suggested at a prior subcommittee meeting that job contacts be made online. *Id.*

[3] While the proviso was included in the appropriation act for four fiscal years, the Governor vetoed the proviso in the FY 2016-2017 budget. The Department stopped enforcing one weekly search on SCWOS on July 1, 2016, the first day of the new fiscal year. *See* Public Hearing Report of the Administrative Law Judge for Regulation 47-104. Work Search, 2016 WL 7477324 (December 15, 2016). The Department filed notice of a proposed regulation in August 2016. *State Register*, Vol.40, Issue 8, August 26, 2016. The proposed regulation to require two work searches on SCWOS was published in the *State Register* in October 2016. *State Register*, Vol.40, Issue 10, October 28, 2016. A public hearing in the Administrative Law Court was held in November 2016. In the Public Hearing Report, the Administrative Law Judge found the regulation was reasonable and necessary. He noted the "...Department must be allowed to verify whether the eligibility requirements, including active work searches, are conducted by would be recipients of unemployment benefits...." *Id.* at p. 4. Without the proviso to provide authorization for the Department, the Department **then** needed a regulation in order to continue enforcing the online work searches. The General Assembly reviewed the proposed regulation during the 2017 session. The final regulation was published in May 2017. *State Register*, Vol.41, Issue 5, May 26, 2017.

upon that fundamental misunderstanding, the circuit court further found that the Proviso did "not absolve SCDEW of the requirements to promulgate regulations." *Id.*, 15.

The facts and record regarding this case are well-developed, and the procedural history is well-documented by the parties of record in their briefs. The amici have nothing further to add on those matters and defer to parties of record.

Argument

While the Petitioners raised three issues on appeal, amici have an inherent interest in only one of those issues: whether the Department was authorized to execute the Proviso without first promulgating regulations.

The circuit court's ruling on this matter is erroneous. The Department's authority to implement the Proviso arises when the General Assembly's Proviso is enacted and becomes law; implementing regulations is not a prerequisite to that authority. Not only did the Department act fully within and pursuant to its authority to implement the Proviso each year that it was enacted without first having to promulgate regulations, the Department was obligated to enforce the Proviso as written. Consequently, this court should reverse the circuit court on this issue.

I. Circuit Court's Findings Frustrate the Intent of the General Assembly and Lead to an Absurd Result

The circuit court found that the Department was statutorily required to promulgate regulations in order to implement the Proviso. This court should strike down the circuit court's finding because it frustrates the General Assembly's intent and leads to an absurd result. In effect, the court's finding gives the Department a *de facto* veto over the Proviso, which violates the separation of powers and, simultaneously, encroaches upon the Governor's constitutional veto authority.

A. The General Assembly Intended for the Department to Execute the Proviso without First Promulgating Regulations

The General Assembly clearly and unambiguously told the Department what to do and when to do it in the text of the Proviso.

The General Assembly has "the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent." *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 630 (2002) (quoting *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 313-314, 295 S.E. 2d 633, 637 (1982). Every year, the General Assembly exercises its duty and authority to appropriate money in the annual appropriations act. The appropriations act has the same force and effect as a statute. *Amisub of South Carolina, Inc. v. South Carolina Dept. of Health and Environmental Control*, 407 S.C. 583, 597, 757 S.E.2d 408, 415 (2014). If the "General Assembly directs that appropriated funds be treated in a particular manner, executive agencies must comply with those directions." *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 263 (2013).

The General Assembly, in the Proviso, directs the Department to treat the funds in a particular manner by citing the statutes necessary for the Department to understand how to enforce the work search. The General Assembly sets forth the eligibility requirements for a claimant's unemployment compensation benefits in S.C. Code § 41-35-110. S.C. Code Ann. § 41-35-110 (2021). Under S.C. Code Ann. § 41-35-120(5), failure to apply for available, suitable work constitutes grounds for disqualification. A claimant's award total, however, is not deducted by a week for failure to meet other eligibility criteria. S.C. Code Ann. § 41-35-120 (2021). A claimant is deemed ineligible only for the week that the claimant fails to conduct the requisite work search; therefore, the Department's only reasonable interpretation of the Proviso is that the law requires a claimant to conduct one online work search per week through SCWOS in order to be eligible for

a weekly benefit. Failure to meet this eligibility requirement results in a disqualification under 41-35-120(5), and the claimant being ineligible for a weekly unemployment compensation benefit until the claimant meets the eligibility criteria. Despite the clear language in the Proviso, and despite the fact that the Department "must comply" with that language, the circuit court undertook a statutory construction analysis resulting in an error that should be reversed.

In *Creswick v. University of South Carolina*, 434 S.C. 77, 81-82, 862 S.E.2d 706, 709 (2021), the Supreme Court succinctly recited the test for interpreting a proviso:

> The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. (citations omitted). The first question to be asked when interpreting a statute is whether the statute's meaning is clear on its face. (citation omitted). If a statute's language is plain, unambiguous, and conveys a clear and definite meaning, there is no need to employ the rules of statutory interpretation, and this Court must apply the statute according to its literal meaning. (citation omitted) Under the plain meaning rule, this Court has no right to search for or impose another meaning or resort to subtle or forced construction to change the scope of a clear and unambiguous statute. (citations omitted). Only where the language of an act gives rise to doubt or uncertainty as to legislative intent may this Court search for that intent beyond the borders of the act itself. (citation omitted). The best evidence of legislative intent is the text of the statute. (citation omitted).

Petitioner avers the construction of the Proviso is clear on its face because the General Assembly's directions to the Department are "plain, unambiguous, and convey[] a clear and definite meaning."[4] The General Assembly, in the clear language of the Proviso, provides the Department

[4] Previously, the General Assembly passed Section 41-35-420, which provides for an indefinite disqualification for extended benefits under a federal extended unemployment compensation program when the claimant does not provide evidence of actively "engaging in a systematic and sustained effort to find work." Crum v DEW, 2012 WL 7187642 (SC ALC 2012). As the Proviso specified there must be enforcement via Section 41-35-120(5) and did not call for an indefinite disqualification, it was reasonable for the Department to find the claimant ineligible for benefits for any week the claimant failed to perform one online work search in SCWOS. Further, the U.S. Department of Labor issued its Unemployment Insurance Procedure Letter No. 05-13 to update states on "actively seeking work" under an updated federal law in 2013. "Work Search and Overpayment Offset Provisions Added to Permanent Federal Unemployment Compensation Law by Title II, Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2012," Unemployment Insurance Program Letter No. 05-13, January 10, 2013. The UIPL specified the Social Security Act required an applicant to "actively seek work as a condition of eligible for UC **for any week**". (UIPL No. 05-13, p.2)(emphasis added) The UIPL noted the requirements found regarding a claimant being able and available to work and actively seeking work in the update to the Social Security Act were consistent with the existing U.S. Department of Labor regulations. States that were in conformity with 20 C.F.R. 604 were in conformity with the new federal law.

with all necessary information to execute its provisions without any "doubt or uncertainty." The Proviso uses terms of art well known to the Department; that is demonstrated by the fact that the Department understood exactly what the Proviso was directing it to do and already had regulations in place, where necessary, to provide the framework for its actions in enforcing the Proviso. The operation of the Proviso, when read in conjunction with existing statutes and regulations, was complete in itself and no further instructions were needed to enforce it. The Department's implementation of the Proviso without first promulgating regulations was in accord with the legislature's intent and fulfilled its obligation to comply with the General Assembly's directives.

Further, the General Assembly did not intend for the Proviso to be contingent upon the Department promulgating regulations. "The best evidence of legislative intent is the text of the statute." *Creswick v. University of South Carolina*, 434 S.C. 77, 82, 862 S.E.2d 706, 708 (2021). The Proviso does not contain any language that establishes a contingency, nor is there any other provision in the appropriations act that makes the Proviso contingent. The circuit court's interpretation that regulations must be promulgated prior to executing the Proviso is in clear contravention of the General Assembly's intent. Rather, the General Assembly intended that the Proviso go into effect on the first day of the fiscal year and remain in effect until the last day of the fiscal year.

In addition to the clear, plain meaning of the words in the Proviso, the General Assembly clearly states in the appropriations act that its intent to vest the Department with the authority to execute the Proviso on July 1st of each year that the Proviso was enacted. The General Assembly unambiguously stated the specific time when the Proviso vested the Department with the authority

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(*Id.*). The UIPL further stated, "Any requirements established by states on the type or number of work search contacts must be closely tied to an expectation that the claimant will be quickly reemployed." (UIPL 05-13, p. 3). Access to SCWOS provided claimants with online job searches intended to be a more efficient way for claimants to search for work.

to execute the Proviso: "Except as otherwise specifically provided, this act takes effect July 1, 2012." Act No. 288, 2012 S.C. Acts 2408, 2968[5]. The effect of the circuit court's decision, despite clear legislative intent to the contrary, is to prohibit the Department from implementing the Proviso until some uncertain, future date in the succeeding calendar year when the legislature reconvened for its annual legislative session. Furthermore, by including "[e]xcept as otherwise specifically provided," the legislature acknowledged that there are some circumstances in which a delayed implementation may be warranted, but if the General Assembly wanted to delay the effectiveness of a provision in the budget it had to be "specifically stated." The Proviso contains no specific language suspending its effective date, nor is there any other provision in the appropriations act that is remotely close to requiring a delay in the Proviso's implementation. The circuit court's construction is at odds with the clear intent of the General Assembly, as expressed in the legislation: the Department was authorized to enforce the Proviso's mandates on the first day of the fiscal year until the final day of the fiscal year.

B. The Circuit Court's Construction of the Proviso Leads to Absurd Results

"In construing a statute, this court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." *Lancaster County Bar Ass'n. v. South Carolina Comm'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008). The circuit court's interpretation of the Proviso resulted in a finding that the Department first had to promulgate regulations pursuant to S.C. Code Ann. §§ 41-29-110, 41-27-510, and 41-35-610.[6] (Order, 15). Aside from frustrating the legislature's intent, the circuit court's

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[5] For the effective date in each of the other appropriations acts in which the Proviso was included, please see Act No. 101, 2013 S.C. Acts 1041, 11640; Act No. 286, 2014 S.C. Acts 2635, 3277; and Act No. 91, 2015 S.C. Acts 429, 1053.

[6] In Section B of this amicus we explain why those code sections do not obligate the Department to promulgate regulations in this instance. However, at this point, we confine our argument to the absurd results that flow from the circuit court's findings.

interpretation gives the Department a *de facto* veto over an enacted provision of law. If the Department has the discretion to decide to promulgate regulations to carry out the Proviso, then the Department is left with a choice, which amounts to an ability to override the legislature. In effect, this would give the Department the ability to step into the legislature's shoes to set state policy, a clear separation of powers violation.

A *de facto* veto violates the separation of powers. The constitutional division of powers is the process by which "[t]he legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws." *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979). In *Hampton v. Haley*, 403 S.C. 395, 743 S.E.2d 258 (2013), the Supreme Court held that the South Carolina Public Benefit Authority's Board violated the separation of powers when it substituted its policy choices for those enacted by the General Assembly. In spite of the Supreme Court's holding in *Hampton v. Haley*, the circuit court's decision in the instant case leads to the exact result that the Supreme Court has held violates the separation of powers: allowing the Department to substitute its policy choices for those the General Assembly made in enacting the Proviso.

If the Department did not like what the Proviso required or did not want to take the actions the Proviso mandated, and refused to promulgate regulations, then the Department would be "substituting its policy decisions for those enacted by the General Assembly" in violation of the separation of powers. Further, the General Assembly could have changed the Proviso in subsequent appropriations acts from the original Proviso 67.7 if the Department was not operating as the General Assembly intended.

Additionally, allowing a *de facto* veto encroaches on the Governor's sole constitutional prerogative to reject legislation passed by the General Assembly. (S.C. Const. art. 4, § 21). Only

the Governor is vested with the authority to reject or nullify a legislative enactment. The Governor must exercise this authority *before* a bill passed by the legislature becomes law. The circuit court's interpretation of the Proviso would allow an executive *agency* to reject a legislative act *after* it becomes law. The circuit court's decision gives the agency a veto without any standard recourse for override by the General Assembly.

The circuit court's order sets the stage for a cascade of absurd results that would fundamentally rewrite the relationship between the legislative and executive branches. Furthermore, the circuit court's order would have a wide-ranging negative effect on the General Assembly's ability to annually fund the necessary expenses of state government. For those reasons the court should reverse the circuit court on this issue.

II. The Statutes Cited by the Circuit Court Were Suspended by the Appropriations Act

Even if this court finds that the statutory provisions regarding promulgating regulations are applicable to the Proviso, this court should reverse the circuit court because the appropriations acts in which the Proviso was included suspended those provisions. Additionally, the Proviso should control regardless because it is well settled that when there is a conflict between statutory provisions, the later enacted legislation controls, and here, that would be the Proviso.

The circuit court found that the Proviso "did not suspend the operation of these statutes and does not absolve [the Department] of the requirement to promulgate regulations." It is myopic analysis in light of *Amisub of South Carolina v. South Carolina Department of Health and Environmental Control* 407 S.C. 583, 757 S.E.2d 408 (2014) and led to an erroneous conclusion. In *Amisub*, the Supreme Court ruled on the interplay between a proviso in an appropriations act and general laws. The Court noted that "[t]here is no question that the General Assembly has the power, where there is no constitutional prohibition, to temporarily suspend a statute's operation."

Id at 597, 417 (citations omitted). The Court further noted that "this Court will not construe a statute by concentrating on an isolated phrase." *Id* at597, 416 (citations omitted). Finally, the Court focused on what must occur in the appropriations act for a permanent law to be suspended, which is an irreconcilable conflict between the appropriations act and the permanent statute[7]. *Id* at 598, 414 (citations omitted).

Even if the Proviso had not suspended the operation of the statutes, case law in South Carolina is clear that when a conflict exists between statutory provisions, the later enacted legislation controls. "Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, *being the latest expression of the legislative will*, will, although it contains no repealing clause, govern, control, or prevail, so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy." *City of Newberry v. Public Service Com'n of South Carolina*, 287 S.C. 404, 407 (1986) (quoting 82 C.J.S. *Statutes* § 291 (1953)(emphasis added).

The circuit court incorrectly concluded that there was no clear intent to suspend the regulation statutes. In reaching its conclusion, the circuit court did exactly what the Supreme Court said not to do in *Amisub*: it construed the Proviso in isolation, detached from the rest of the appropriations act. A full reading of the appropriations act reveals that the General Assembly clearly stated its intention to suspend S.C. Code Ann. §§ 41-29-110, 41-27-510, and 41-35-610 with the inclusion of the End of Part IB. The End of Part IB in each of the appropriations acts that included the Proviso explicitly states:

> All acts or parts of acts inconsistent with any of the provisions of Parts IA or IB of this act are suspended for [the applicable Fiscal Year].

[7] The circuit court's analysis assumes that an irreconcilable conflict exists between the Proviso and the three cited statutes. There would be no reason to undergo further analysis if the irreconcilable threshold prong was not satisfied.

When read with the entirety of the appropriations acts, the General Assembly pronounced its policy goal in the Proviso and clearly expressed its intent to suspend any statute that would prevent or otherwise hinder the implementation of that policy on the first day of the Fiscal Year. Consequently, the Department's promulgation of regulations was not a prerequisite to implementing the Proviso.

III. The Department Was Not Statutorily Obligated to Promulgate Regulations to Implement the Proviso

Even if this court finds that the statutory provisions are applicable and not suspended, this court should reverse the circuit court because nothing requires the Department to promulgate regulations prior to implementing the Proviso. Sections 41-29-110 and 41-27-510 vest administrative discretion to promulgate regulations in the Department. The Department's decision not to promulgate regulations was not arbitrary or capricious; therefore, this issue is beyond review by the circuit court. The third statute cited by the circuit court, S.C. Code Ann. § 41-35-610, does not apply to the policy enacted in the Proviso.

A. The General Assembly Explicitly Provides in Statute for Discretion to Promulgate Regulations

S.C. Code Ann. § 41-29-110 provides that:

> The department must **promulgate regulations necessary** to carry out the provisions of Chapters 27 through 41 of this title, employ personnel, make expenditures, require reports not otherwise provided for in these chapters, conduct investigations or take other action as it considers necessary or suitable to administer its duties and exercise its powers pursuant to the title. (emphasis added)

S.C. Code Ann. § 41-27-510 provides that:

> The department must promulgate regulations applicable to unemployed individuals, making distinctions in the procedures regarding total unemployment, part-total unemployment, partial unemployment of the individuals attached to their regular jobs and other forms of short-time work **as the department considers necessary**. (emphasis added)

It is plain from the text of these two statutes that the General Assembly vested the Department with administrative discretion to promulgate certain regulations necessary to administer the agency.[8]

The General Assembly "may vest in administrative officers, agencies of government, commissions, and bodies a large measure of discretionary authority in matters relating to the administration and execution of statutes." *Clark v. South Carolina Public Service Authority*, 177 S.C. 427, 181 S.E. 481, 488 (1935). While the courts may not substitute judicial discretion for administrative discretion, and, as a general rule, will not attempt to interfere with the exercise of discretionary power by a governmental agency, capricious or arbitrary exercise of administrative discretion is subject to judicial review. *Cole v. Manning*, 240 SC 260, 267, 125 SE2d 621, 625 (1962). "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Converse Power Corp. v. South Carolina Dept. of Health and Environmental Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 345 (Ct. App. 2002) (DHEC's denial of an aquaculture permit was not arbitrary or capricious because the denial was based upon its own reasonable interpretation of the applicable regulations.) Failing to promulgate regulations to enforce the Proviso was not an arbitrary or capricious action.

The legislature enacted the Proviso to ensure "enforcement of Section 41-35-110(3) and Section 41-35-120(5)." Act No. 288, 2012 S.C. Acts 2408, 2854 § 67.7 (*see also* Act No. 101, 2013 S.C. Acts 1041, 1515 § 83.6; Act No. 286, 2014 S.C. Acts 2635, 3137 § 83.6; and Act No. 91, 2015 S.C. Acts 429, 912-913 § 83.5). To achieve that policy goal, the Proviso directed the Department to conduct eligibility reviews, engage in random verification of job contacts, conduct

[8] The Department did not need a regulation until the Proviso was no longer in effect at which time there was "no online work-search requirement". "Public Hearing Report", December 15, 2016.

wage cross matches, provide seated meetings with Unemployment Insurance claimants, and require that one of four job searches be conducted using the SC Works Online System. *Id.* The Proviso included terms of art well known and understood by the Department. The Department had existing regulations in place, where necessary, to provide the framework for its actions in furtherance of the Proviso. The operation of the Proviso, when read in conjunction with existing statutes and regulations, was complete and no further instructions were needed for enforcement. Therefore, there was a rational basis for not promulgating regulations pursuant to the Proviso and the Department's inaction was not an arbitrary or capricious exercise of its administrative discretion.

B. Section 41-530-610 is not Applicable to the Proviso

The circuit court's reliance on S.C. Code Ann. § 41-35-610 completely misses the mark. Unlike the other two code sections cited by the circuit court, S.C. Code Ann. § 41-35-610 mandates that regulations be promulgated under five discreet circumstances[9]. None of those circumstances are contained within the Proviso[10] and therefore do not apply.

Conclusion

For the reasons stated above, the court should reverse the circuit court on the question of whether the Department of Employment and Workforce had the authority to implement a proviso without first promulgating regulations contained in four successive appropriations acts.

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[9] Regulations are required pursuant to S.C. Code Ann. § 41-35-610 for: (1) a request for determination of insured status, (2) a request for initiation of a claim series in a benefit year, (3) a notice of unemployment, (4) a certification for waiting-week credit, and (5) a claim for benefits.

[10] The Proviso relates to: (1) eligibility reviews; (2) random verification of job contacts; (3) wage cross matches; (4) ensuring seated meeting with UI claimants; and (5) requiring one of four job searches be conducted through SCWOS.

Respectfully Submitted,

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Columbia, South Carolina
May 17, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Clifton B. Newman, Circuit Court Judge
Case No. 2013-CP-06-0059
Appellate Case No. 2019-000599

Lorenda Robinson, Elaine Nix, Archie Patterson
and Tami Bollerman, ...Plaintiffs,
Of Whom, Archie Patterson and Tami Bollerman are Respondents/Appellants,

v.

South Carolina Department of Employment and
Workforce,.....Appellant/Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief complies with Rule 211(b), SCACR and the Supreme Court's April 15, 2014 Order on Personal Identifying Information.

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