

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Appellate Case No. 2023-001204

Francis Ackerman, #266928, *et al.* Appellants,

v.

South Carolina Department of Corrections Respondent.

**MEMORANDUM BY THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
ADDRESSING THE ISSUE OF APPEALABILITY**

In satisfaction of the August 15, 2023 letter issued by the Clerk, the South Carolina Department of Corrections [SCDC], the Respondent in the above-captioned matter, respectfully submits its memorandum addressing the issue of appealability.

SCDC respectfully asserts the Appellants failed to present any appealable issues in their July 25, 2023 notice of appeal, and it respectfully urges the Court to dismiss their appeal.

I. BACKGROUND

On August 15, 2023, the Clerk issued a letter in which she stated that the Court had received the Appellants’ notice of appeal, which the Appellants’ counsel dated July 25, 2023, and that “[a] preliminary review of the order(s) challenged on appeal indicates it might not be appealable.”

The opening passages of the Appellants’ notice of appeal read as follows (July 25, 2023 Notice of Appeal, pp 3 – 4):

Francis Ackerman, et al. appeal the back wage calculation decisions of [SCDC] dated October 31, 2019. Undersigned appellants' attorney also received the decisions in this matter on October 31, 2019.

In the footnote associated with this passage, the Appellants acknowledge the following (July 25, 2023 Notice of Appeal, p. 4):

This case is currently on remand in SCDC, following [this Court's] remand to the [South Carolina Administrative Law Court (ALC)] in 2016 ([*Ackerman, et al., v. S.C. Dep't. Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016), *cert. denied* (May 30, 2017)]), and [the ALC's remand] to SCDC in 2017.¹ [emphasis supplied].

The Appellants' counsel did not include copies of the "back wage calculation decisions of SCDC dated October 31, 2019" with his notice of appeal, and nowhere in their notice of appeal do the Appellants assert that the "back wage calculation decisions of SCDC dated October 31, 2019" constitute final decisions by SCDC or, for that matter, final decisions by the South Carolina Administrative Law Court [ALC].

In fact, as discussed below, the Appellants concede later in their notice of appeal both that SCDC's October 31, 2019 "back wage calculation decisions" are incomplete and that they do not constitute a final decision. (July 25, 2023 Notice of Appeal, pp. 5 and 6).

In his single page cover letter to the Clerk dated July 25, 2023, the Appellants' counsel itemized three (3) additional items he enclosed with the notice of appeal:

- (1) Proof of Service of the notice of appeal on [SCDC], The Honorable Ralph K. Anderson, III, and [SCDC's undersigned counsel].
- (2) A copy of the decisions which are to be challenged on appeal.
- (3) A filing fee of \$250.

Judge Anderson serves as the ALC's Chief Administrative Law Judge [ALJ], and while he served a copy of it upon Chief ALJ Anderson, the Appellants' counsel did not include with

¹ As discussed below, Chief Administrative Law Judge [ALJ] Anderson of the ALC issued his order of remand in this matter on June 13, 2017.

the Appellant’s July 25, 2023 notice of appeal copies of any decisions issued by Chief ALJ Judge Anderson or any other ALJ.

The Appellants’ counsel could not have included such a copy or copies for a straightforward reason, namely such a decision does not exist. Thus, the Appellants’ counsel included no materials with the Appellants’ July 25, 2023 notice of appeal which constitute a “final decision” or any other kind of decision by Chief Judge Anderson, any other ALJ, or, for that matter, SCDC to be challenged on appeal.

The Clerk recognized as much in her July 31, 2023 deficiency letter to the Appellants’ counsel in which she directed the Appellants’ counsel to “provide a copy of the [ALC] order on appeal.” In response to the Clerk’s deficiency letter, the Appellants’ counsel, in a letter also dated July 31, 2023, advised as follows:

Pursuant to your July 31, 2023 deficiency letter, and our conversation today, this will confirm that **there is no ALC order for this phase of the case**, the matter is on direct appeal from SCDC to the Court of Appeals under §1-23-380 and several provisions of the South Carolina and United States Constitutions, and the deficiency letter requiring correction within 10 days may be disregarded. [emphasis supplied].

II. EXAMINATION OF THE APPELLANTS’ JULY 25, 2023 NOTICE OF APPEAL

In their notice of appeal, the Appellants represent as follows (July 25, 2023 Notice of Appeal, pp. 4 – 5):

This appeal is filed pursuant to S.C. Code §1-23-380 (“[...] judicial review available under other means of review [...] provided by law”), and the following:

(1) S.C. Constitution, Article I, Sections 22, 23.

...

(2) S.C. Constitution, Article I, Sections 22, 23, and S.C. Constitution, Article I, Section 3, and U.S. Constitution, Amendment 14, Section 1.

...

(3) S.C. Constitution, Article I, Section 3 due process and U.S. Constitution, Amendment 14, Section 1 due process.

Thus, the Appellants are seeking to invoke the Court’s jurisdiction under the above-listed authorities to provide them some kind of unstated and unknown relief regarding SCDC’s October 31, 2019 “back wage calculation decisions.”

However, as discussed above in Section I, the Appellants, in articulating the first ground for their appeal, first concede in their notice of appeal that SCDC’s October 31, 2019 “back wage calculation decisions” are incomplete. (July 25, 2023 Notice of Appeal, p. 5). The Appellants further acknowledge the following regarding SCDC’s calculations (Id.):

[SCDC’s October 31, 2019 “back wage calculation decisions”] were done for an inmate work program which ran from about 1998 to 2013. However, the calculations computed back wages only up to July 2007. Many appellants worked during the period July 2007-2013. Also, no calculation was done for appellant Vondell Sanders. Appellants submit the calculations are facially incomplete, and they were not required to appeal until a more complete decision is issued, which has not occurred (SCACR 203(b)(6) (If a decision indicates that a more full and complete decision is to follow, a party **need not** appeal until receipt of the more complete decision)). [emphasis in original].

The Appellants next explicitly concede, in articulating the second ground for their appeal, that SCDC’s October 31, 2019 “back wage calculation decisions” do not constitute final decisions, and they further acknowledge the following about them (July 25, 2023 Notice of Appeal, pp. 5 – 6):

In addition to their incompleteness, the calculations do not determine liability and computations for statutory interest, S.C. Code §§11-9-360, 34-31-20(A), or for overtime pay and back wages and interest for Appendix 2 additional work periods. **The cover sheet for the calculations states they are for “settlement and mediation purposes only.”**² SCDC has also indicated it would revise the calculations, which never occurred. Further, SCDC has indicated it would issue final decision and continue litigation if the parties could not settle. [emphasis supplied].

² As discussed below, the parties have retained a mediator who has, starting in late 2021, conducted two (2) in-person sessions.

Given such realities, the Appellants assert “they did not have to appeal within 30 days of October 31, 2019.” (Id., p. 6).

As the third ground for their appeal, the Appellants “contend their January 3, 2020 Motion for SCDC to Amend Back Pay Analysis Spreadsheets was a petition for rehearing under §1-23-380(1),” which purportedly “stayed the time to appeal until receipt of SCDC's decision on that motion, which did not occur as SCDC filed no response to the motion.” (Id.).

For clarity’s sake, the Appellants did not submit a copy of their January 3, 2020 motion with their July 25, 2023 notice of appeal.

As the fourth ground for their appeal, the Appellants assert as follows (Id., pp. 6 – 7):

[...], to the extent a stay resulted from the January 3, 2020 motion, or this appeal is precluded by any state statute or court rule, appellants contend the stay or state provision is (a) superseded by the constitutional due process provisions in S.C. Constitution, Article I, Sections 3, 22, 23, and U.S. Constitution, Amendment 14, Section 1 (See (1)-(3) above); and (b) preempted by U.S. Constitution, Amendment 14 due process and federal constitutional right to appeal stemming therefrom (U.S. Constitution, Article VI, Clause 2, Supremacy Clause; [*Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020)] (Pursuant to the Supremacy Clause, if a federal law confers rights and state law imposes restrictions conflicting with federal law, state law is preempted)).

As their fifth and final ground for their appeal, the Appellants assert that “to the extent there is a conflict between §1-23-380(1) and any general state provision, the former prevails. [citation omitted].” (July 25, 2023 Notice of Appeal, p. 7).

III. CHIEF ALJ ANDERSON’S JUNE 13, 2017 ORDER OF REMAND AND SUBSEQUENT ACTIVITY

As mentioned above, Chief ALJ Anderson issued his order of remand in the instant matter on June 13, 2017 in which he stated as follows:

This matter is before the [ALC] on remand from the South Carolina Court of Appeals (Court of Appeals). The case originally came before the [ALC] on an appeal filed by multiple inmates (Appellants) concerning the Prevailing Wage Statute. The Court denied the appeal, stating that

Appellants failed to timely file their grievances. The Court of Appeals subsequently reversed and remanded the cases for processing of the grievances. *See [Ackerman]*. Accordingly,

IT IS THEREFORE ORDERED that these cases are remanded to [SCDC] for consideration of Appellants' grievances on the merits in keeping with the Court of Appeals decisions in *Ackerman* and [*Gatewood v. S.C. Dep't of Corr.*, 785 S.E. 2d 60 (S.C. Ct. App. 2016)].

Progress on remand was quickly derailed when the Appellants challenged Chief ALJ Anderson's order of remand.

A. THE APPELLANTS' PETITION FOR WRIT OF MANDAMUS IN RESPONSE TO CHIEF ALJ ANDERSON'S JUNE 13, 2017 ORDER OF REMAND

By materials dated July 13, 2017, the Appellants filed with this Court a petition for writ of mandamus, a memorandum in support of their petition for writ of mandamus, and other supporting items in response to Chief ALJ Anderson's order of remand.

Regarding the Appellants' July 13, 2017 petition for writ of mandamus, the Clerk, by letter dated July 17, 2017, advised the Appellants' counsel that since the remittitur had been filed June 2, 2017 in *Ackerman*, this Court no longer had jurisdiction over the case. *See Ackerman*, Court of Appeals Appellate Case No. 2012-210588.

B. THE APPELLANTS' APPEAL OF CHIEF ALJ ANDERSON'S JUNE 13, 2017 ORDER OF REMAND AND THEIR PETITION FOR WRIT OF CERTIORARI TO OUR SUPREME COURT UPON THIS COURT'S DISMISSAL OF THEIR APPEAL

By materials dated July 14, 2017, the Appellants also filed with this Court a notice of appeal in response to Chief ALJ Anderson's June 13, 2017 order of remand, and by an order dated July 20, 2017, this Court ruled as follows:

This appeal arises out of an order from the [ALC] remanding the case to [SCDC]. **Because the order of the [ALC] is not a final order, we dismiss this appeal as interlocutory.** *See [Charlotte-Mecklenburg Hasp. Auth. v. S.C. Dep't of Health & Env'tl. Control]*, 692 S.E.2d 894, 895 (S.C.

2010)] (“**If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory.**”). The remittitur will be sent pursuant to Rule 221(b) of the South Carolina Appellate Court Rules. [emphasis supplied].

See Ackerman, Court of Appeals Appellate Case No. 2017-001560.

The Appellants petitioned this Court to rehear its above-quoted July 20, 2017 order dismissing their appeal of Chief ALJ Anderson’s June 13, 2017 order of remand, and this Court dismissed the Appellants’ petition by an order filed September 14, 2017. *See Ackerman*, Court of Appeals Appellate Case No. 2017-001560.

By materials dated September 28, 2017, the Appellants petitioned our Supreme Court to issue a writ of certiorari by which to review this Court’s dismissal of their appeal of Chief ALJ Anderson’s June 14, 2017 order of remand, and by an order issued March 7, 2018, the Clerk of our Supreme Court advised the parties that the Appellants’ petition for a writ of certiorari had been denied. *See Ackerman*, Supreme Court Appellate Case No. 2017-002010.

C. THE APPELLANTS’ APPEAL OF CHIEF ALJ ANDERSON’S SEPTEMBER 7, 2017 STATUS CONFERENCE AND THEIR PETITION FOR WRIT OF CERTIORARI TO OUR SUPREME COURT UPON THIS COURT’S DISMISSAL OF THEIR APPEAL

On September 7, 2017, approximately 90 days after he issued his June 13, 2017 order of remand, Chief ALJ Anderson conducted a status conference concerning this matter, and remarkably, the Appellants, by a notice of appeal dated October 7, 2017, challenged “rulings” Chief ALJ Anderson purportedly rendered during the status conference.

Unlike their instant notice of appeal, the Appellants included with their October 7, 2017 notice of appeal a copy of the transcript from the September 7, 2017 status conference conducted by Chief ALJ Anderson.³

³ As neither SCDC nor, for that matter, Chief ALJ Anderson have conducted any hearings concerning this matter, the Appellants did not – and could not – submit any transcripts in support of their July 25, 2023 notice of appeal.

This Court, by an order dated October 17, 2017, ruled as follows on the Appellants' notice of appeal:

The notice of appeal filed in this case indicates the appeal is taken from statements made by [Chief ALJ Anderson] during a [September 7, 2017] status conference on this case. Because the decision of the [ALJ] is not a final decision, this appeal is dismissed as interlocutory. *See* S.C. Code Ann. § 14-3-330 (2016) (setting forth the categories of judgments from which an appeal may be taken); S.C. Code Ann. § 14-8-200(a) (2016) (defining the appellate jurisdiction of the Court of Appeals to include final decisions of an administrative law judge with the same scope of review as the Supreme Court would apply in a similar case). The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

See Ackerman, Court of Appeals Appellate Case No. 2017-002086.

The Appellants petitioned this Court to rehear its above-quoted October 17, 2017 order dismissing their appeal from Chief ALJ Anderson's September 7, 2017 status conference, and this Court dismissed the Appellants' petition by an order filed November 8, 2017. *See Ackerman*, Court of Appeals Appellate Case No. 2017-002086.

By materials dated December 6, 2017, the Appellants petitioned our Supreme Court to issue a writ of certiorari by which to review this Court's dismissal of their appeal from Chief ALJ Anderson's September 7, 2017 status conference, and by an order issued March 28, 2018, the Clerk of our Supreme Court advised the parties that the Appellants' petition for a writ of certiorari had been denied. *See Ackerman*, Supreme Court Appellate Case No. 2017-002503.

D. THE APPELLANTS' PETITION FOR WRIT OF CERTIORARI TO OUR SUPREME COURT IN WHICH THEY NAMED BOTH CHIEF ALJ ANDERSON AND SCDC AS RESPONDENTS

By materials dated February 27, 2018, the Appellants filed with our Supreme Court a petition for writ of certiorari by which they named both Chief Judge Anderson and SCDC as respondents and in which they sought the following relief:

Pursuant to S.C. Constitution Art. V, §5, S.C. Code §14-3-310, and SCACR 240, 245, Francis Ackerman, et al. (inmates) request the Court to exercise its original jurisdiction and issue a Writ of Mandamus compelling [Chief ALJ Anderson] to consider [their] grievances on the merits, as required by the Court of Appeals’ judgment of February 10, 2016, the Supreme Court’s denial of certiorari of May 30, 2017, and the Court of Appeals’ remittitur of June 2, 2017, as more particularly described in the attached memorandum, and related materials.

By an order issued April 19, 2018, the Clerk of our Supreme Court advised the parties that the Appellants’ petition for a writ of certiorari in which he named as respondents both Chief ALJ Anderson and SCDC had been denied. *See Ackerman*, Supreme Court Appellate Case No. 2018-00353.

E. THE PARTIES’ EFFORTS TO MEDIATE ALL MATTERS INCLUDED IN *Ackerman*

As stated in the Appellants’ instant notice of appeal, SCDC provided the Appellants with “back wage calculation decisions” in late October 2019, which the Appellants accurately described as being for “settlement and mediation purposes” only. (July 25, 2023 Notice of Appeal, pp. 5 – 6).

The Appellants, however, omitted any mention of the parties’ efforts to mediate all the matters which fall under the umbrella of *Ackerman*, which included retaining a certified mediator who convened two (2) in-person mediation sessions, the first in December 2021 and the second in January 2023.

IV. TO THE EXTENT THEY EVEN GENERALLY IDENTIFY THE RELIEF THEY SEEK, THE APPELLANTS HAVE PRESENTED NO FINAL ORDERS, DECISIONS, OR VIABLE GROUNDS FOR REVIEW IN THEIR JULY 25, 2023 NOTICE OF APPEAL

The Appellants do not discuss, reference, or even mention in their July 25, 2023 notice of appeal any of the litigation chronicled immediately above in Section III.

The Appellants likewise do not discuss, reference, or even mention in their July 25, 2023 notice of appeal why they failed to first seek any relief, to the extent any relief exists for them, from the ALC and, specifically, Chief ALJ Anderson.

Perhaps most glaringly, the Appellants do not identify in their July 25, 2023 notice of appeal the precise relief or even the general relief they seek.

As discussed above in both Sections I and II, the Appellants concede in their notice of appeal both that SCDC's October 31, 2019 "back wage calculation decisions" are incomplete and that they do not constitute a final decision. (July 25, 2023 Notice of Appeal, pp. 5 and 6).

Thus, per its July 20, 2017 ruling in an earlier iteration of this matter, this Court should dismiss the Appellants' July 25, 2023 appeal, because they are not appealing from any decision or order, final or otherwise, issued by SCDC or the ALC, including Chief ALJ Anderson. *See Charlotte-Mecklenburg Hesp. Auth. v. S.C. Dep't of Health & Env'tl. Control*, 692 S.E.2d 894, 895 (S.C. 2010) ("If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory."). *See also Torrence v. S.C. Dep't of Corr.*, 857 S.E.2d 549, 550 (S.C. 2021). ("Importantly, the question of appealability often presents a critical timing quandary for litigants and the practicing bar. If a party believes that an order from the ALC that includes a remand may be a final judgment, is the aggrieved party required to test the appellate waters by filing an appeal lest it risk losing the right to challenge the decision of the ALC? The answer is no. Where a remand to the agency is ordered, yet it is believed the order of the ALC finally determines the rights of the parties and constitutes a final judgment, the aggrieved party may allow the remand to conclude without forfeiting its right to appeal. Take this case as an example: if the ALC-mandated award was entered on

remand for Respondent, SCDC would have retained its right to challenge that award on appeal.”).

Likewise, per its October 17, 2017 ruling in an yet another earlier iteration of this matter, this Court should dismiss the Appellants’ July 25, 2023 appeal, because no judgment or final decision of an ALJ exists from which they may appeal under either S.C. Code Ann. § 14-3-330 (2016) (setting forth the categories of judgments from which an appeal may be taken) or S.C. Code Ann. § 14-8-200(a) (2016) (defining the appellate jurisdiction of the Court of Appeals to include final decisions of an administrative law judge with the same scope of review as the Supreme Court would apply in a similar case). *See Ackerman*, Court of Appeals Appellate Case No. 2017-002086.

V. CONCLUSION

For the above-stated reasons, SCDC respectfully asserts the Appellants have presented no appealable issues in their July 25, 2023 notice of appeal, and it respectfully urges this Court to dismiss the Appellants’ appeal.

RESPECTFULLY SUBMITTED:

s/Lake E. Summers

Lake E. Summers

S.C. Bar #0064146

Malone, Thompson, Summers & Ott LLC

339 Heyward Street

Columbia, South Carolina 29201

(803) 254-3300 – Office

(803) 254-0309 – Fax

summers@mtsolfirm.com

Counsel for the South Carolina

Department of Corrections

Columbia, South Carolina

September 1, 2023

Counsel for the Appellants:

Douglas H. Westbrook, Esquire

Attorney at Law

3 Gamecock Avenue, Suite 304-B

Charleston, South Carolina 29407

douglas.h.westbrook@gmail.com

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ADDRESSING THE ISSUE OF APPEALABILITY**

PROOF OF SERVICE

I certify that I have served the **MEMORANDUM BY THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ADDRESSING THE ISSUE OF APPEALABILITY** on the above-named Appellants by transmitting a PDF copy of the same via electronic mail to their counsel and by mailing a hard copy to their counsel, first class postage pre-paid, at the following address:

Douglas H. Westbrook, Esquire
Attorney at Law
3 Gamecock Avenue, Suite 304-B
Charleston, SC 29407
douglas.h.westbrook@gmail.com

September 1, 2023

s/Lake E. Summers
Lake E. Summers

Counsel for the South Carolina
Department of Corrections