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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Robert L. Reibold, Administrative Law Judge

Docket No. 22-ALJ-07-0082-CC
Appellate Case No. 2022-001402

Coastal Conservation League, ...Appellant,

vs.

South Carolina Department of Health and Environmental Control, Price and Carolyn Sloan, Mark and Anne Tiberio, Michael and Laura Schulte, and Northwest Properties of Hickory, LLC, …….Respondents.

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

In their Initial Brief, Respondents Price and Carol Sloan, Mark and Anne Tiberio, Michael and Laura Schulte, and Northwest Properties of Hickory, LLC (hereinafter "Property Owners") attempt to deflect the Court's attention from them to Dr. Gayes as the interested and affected party in this case, despite these undisputed facts:

1. the Property Owners constructed the sandbag seawall illegally and without any DHEC authorization;
2. the Property Owners then, in an effort create justification for their illegal actions, initiated contact with Dr. Gayes and asked him to submit a research proposal to DHEC (Prop. Own. Initial Brief p. 8);
3. the subject of the research proposal was the sandbags illegally placed by the Property Owners (R.p. 214);
4. once DHEC determined that the proposal did not comply with the statute or regulations, Dr. Gayes stood by and took no action to initiate an administrative appeal pursuant to S.C. Code Ann. § 44-1-60 on his own or any others' behalf. (R.p. 223; R.p. 622 l. 7-17));
5. the Property Owners are the party that filed a Request for Final Review Conference before the DHEC Board (R.p. 223).

Property Owners discount the facts triggering Dr. Gayes' research request as irrelevant. (Prop. Own. Initial Brief p. 1) They claim "this is *not* an appeal from an enforcement proceeding" and downplay the facts and circumstances surrounding the research proposal idea concocted by the Property Owners. *Id*. To the contrary this case has never been about enforcement. Appellant is not seeking an order that the ALC issue a fine or otherwise take enforcement action; in fact, Appellant could only bring enforcement proceedings as a third party in Circuit Court pursuant to

S.C. Code Ann. §48-39-160. Despite this mischaracterization, it is telling that Dr. Gayes' request followed a protracted enforcement proceeding involving only the Property Owners. (R.p. 226, R.p. 214, R.p. 170) Indeed, Dr. Gayes had no involvement in the placement of the sandbags or even became involved with the disputed sandbags until almost a year after their installation. The record is also clear that the Property Owners were intimately involved from the get-go in seeking Respondent DHEC's blessing to eliminate the threat of fines and further enforcement proceedings. It was the Property Owners who were invested enough in keeping the sandbags in place to retain attorneys and file a Request for Final Review before the DHEC Board, not Professor Paul Gayes. (R.p. 223).

Property Owners' arguments that Dr. Gayes should have been named a party before the ALC are belied by their own failure to name Dr. Gayes in the proceedings before the DHEC Board.

ARGUMENT

I. Reversal is warranted for errors of law, not lack of substantial evidence.

Property Owners point to an incorrect standard by asserting "[s]ubstantial evidence supports the ALC's findings that Dr. Gayes was a party to the final agency decision." (Initial Brief p. 11) Given this is an appeal of a decision on a motion to dismiss, the Court reviews this case de novo and must "correct the decision of the ALC it is affected by an error of law." *S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483(2012) (reh'g denied May 4, 2012).

"The decision of the [ALC] should not be overturned unless it is supported 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) (emphasis added). The ALC's order is replete with legal errors that warrant reversal.

II. Under the controlling law, Dr. Gayes was not properly considered to be a party such that the contested case should have been dismissed.

a. Gayes was not an applicant or licensee; Gayes failed to seek review before the DHEC Board; and Gayes never sought to be admitted as a party.

Property Owners assert that because Gayes submitted the research exemption request and was identified in the Final Agency Decision as the "applicant," he should be considered an applicant or licensee in the contested case, citing SCALC Rule 2(H).[1] (Prop. Own. Initial Br., pp. 13-14). Rule 2(H) states that a: "[p]arty means each person or agency named or admitted as a party or **properly seeking and entitled** to be admitted as a party, including a license or permit applicant." (emphasis added). Subsequent to stating that a **license or permit applicant** is entitled to seek admission as a party, Rule 2(H) provides that such applicants "whose **application or license** is the subject of a request for a contested case hearing shall be deemed a party and shall be served with copies of all papers." *Id*. (emphasis added). However, the DHEC Board's Final Agency Decision recognizes that the Property Owners, **not Dr. Gayes**, challenged the Department staff's decision pursuant to § 44-1-60 for an exemption for research purposes under § 48-39-130, not a permit under § 48-39-150. (R.p. 3) Under § 48-39-130(D), permit applications are not necessary for "research activities of state agencies and educational institutions…."[2] Moreover, under the statute

[1] Property Owners make these assertions in the Initial Brief without providing any citations to the documents designated to be included in the Record on Appeal (Prop. Own. Initial Brief p. 13-14). Despite the failure to identify with any specificity the documents being cited and despite the disadvantage it places Appellant in responding to the Property Owners' allegations, Appellants submit that they were not required to name Dr. Gayes as party under Rule 2(H).

[2] The Property Owners' suggestion that if no permit is required then DHEC would be unable to initiate enforcement proceedings is absurd and legally unsupported. (Resp. Brief p. 16). The Department's enforcement authority, while discretionary, is not dependent on whether or not it issued a permit, but whether or not an individual violated statutory or regulatory provisions. S.C.

that controls the Department's review, an applicant is defined as "any person who files an application for a permit under the provisions of this chapter." § 48-39-10(A). The Department staff views Dr. Gayes' proposal consistently with the statutory language. Matt Slagel, Manager of the Beachfront Management Section, agreed that the proposal sought by Dr. Gayes was under an exception from the normal permitting requirements and that Dr. Gayes' submittal was not considered an application. (R.p. 620 l.20-R.p. 621 l.9)

Property Owners argue Appellant "failed to name and timely serve the one and only person who requested permission to conduct the Research Proposal, and the one and only person who, in fact, received or could receive authorization from the Department to conduct it." (Prop. Own. Brief p. 10) Property Owners also perpetuate the ALC's error stating "that Dr. Gayes was *the* proper party to the DHEC Board's approval of the Research Proposal," despite the fact that Dr. Gayes was not a party before the DHEC Board at all. Aside from the fact that the Property Owners themselves failed to name Dr. Gayes as a party in their own appeal, the notion that Dr. Gayes is the only person would could receive authorization is patently incorrect. DHEC's Final Agency Decision issues the approval **to the Property Owners, as Requestors, and recognizes them as the only parties requesting final review**. Dr. Gayes, therefore, is not the only party who received authorization and arguably he did not even receive it from the Board, given his failure to appeal the staff denial under § 44-1-60.

Following Property Owners' arguments, Dr. Gayes similarly could not be bound by the decision of the DHEC Board to which he was not a party. Thus, his failure to appeal the staff denial

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Code Ann. § 48-39-160. If a research individual or entity undertook a project that violated the provisions of § 48-39-10, *et seq*., it would be subject to enforcement just like anyone else.

of his research proposal should mean that the DHEC Board's FAD was merely an "advisory opinion," according to the Property Owners' line of argument (Resp. Brief p. 17, fn. 15). At best, it is the Property Owners who received a decision from the DHEC Board, not Dr. Gayes, and thus the Property Owners are the proper party. Indeed, how can the FAD "impose obligations" on Dr. Gayes when he was not even a party before the DHEC Board proceeding? (See Resp. Brief p. 29, citing R.p. 49).

Just as the Property Owners assert that the League's relief is against Dr. Gayes, not the Property Owners, so goes the Property Owners' relief before the DHEC Board. Can the Property Owners even stand in the shoes of Dr. Gayes and ask for relief on his behalf, for an activity that they assert only he has the authority to undertake? (Resp. Brief p. 30). To the extent that only Dr. Gayes is able to seek relief, and the DHEC Board can only bind parties before it, the Property Owners' request for DHEC Board review, and the FAD itself, are invalid.

Simply because a permit is not required in this instance because it is subject to a permit exemption under S.C. Code Ann. 48-39-130(D)(2), does not also mean that an agency decision does not give rise to a contested case under S.C. Code Ann. 1-23-310(3). A contested case is defined as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." S.C. Code Ann. 1-23-310(3). Unlike a critical area permit application, a research exemption requires no formal application, no public notice and no opportunity for public comment or hearing. Indeed, citizens and groups like the League are entirely excluded from that process. And unlike a critical area permit, DHEC does not place decisions regarding research exemptions on public notice.

Even if Dr. Gayes is considered an applicant, despite not applying for a permit or license, he did not seek to institute an appeal under § 44-1-60, much less seek to be admitted as a party during the DHEC administrative proceedings, and therefore may not be admitted as a party now. *Home Health Services, Inc. v. South Carolina Dep't of Health and Environmental Control*, 298 S.C. 258 (1989). In *Home Health* the South Carolina Appellate Court affirmed the trial court's decision that Home Health was not a party to the lawsuit because they did not seek to be admitted as a party in the DHEC administrative proceedings, noting that the issue "is not whether Home Health Services had standing before the administrative agency. Instead, the question is whether it has standing **now** to seek judicial review of the agency's decision." *Id* at 261. (emphasis added). Dr. Gayes was not the one to submit the RFR – rather, it was the Property Owners, who had the vested interest in finding a way out of their enforcement woes. Dr. Gayes did not seek to be admitted in the Agency Proceedings with DHEC and is not entitled to become a party now.

b. Dismissal is not the appropriate remedy.

Property Owners claim that failure to serve Dr. Gayes requires dismissal of the case and cites to the procedural requirements of the APA and Rule 2(H), RPALC, with cites to *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 207, 207 (1985) and *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). (Prop. Own. Initial Br., pp. 29-30)

Despite the Property Owners' position, *Mears v. Mears* is inapplicable to this case. The Supreme Court in *Mears* reviewed the applicability of its rules following the Legislature's repeal of S.C. Code Ann. §18-9-60, which was a part of Title 18 of the South Carolina Code, specifically applying to appeals to the Supreme Court and Court of Appeals. The Supreme Court concluded that its rules required that service of the notice of appeal is required in order to perfect an appeal to the Supreme Court. The statutory and administrative structure that brings rise to this appeal is

distinct from a notice of appeal to an appellate court in the judicial setting. Appellant did in fact file and serve the Notice of Request for Contested Case hearing on the agency, who is a necessary party under the Administrative Procedures Act and on the Property Owners, who initiated the proceedings before the DHEC Board pursuant to § 44-1-60. This case is also distinguishable from *Elam v. S.C. Dept. of Transportation,* 361 S.C. 9, 602 S.E.2d 772 (2004); there, service of the notice of appeal was not made because the Appellant sought reconsideration instead and assumed this would toll the time for service, which the Court determined was error.

In both *Mears* and *Elam*, the notices of appeal were not timely served at all within the prescribed time frame and there was no question before the Court as to whether an individual or entity should have been made a party to the proceedings as the case before this Court.

The ALC invoked the "statute of creation" doctrine and cited to cases that are not controlling or relevant in an administrative contested case proceeding. Property Owners argue, "even if the requirement to name and timely serve Dr. Gayes was not a purely jurisdictional requirement, it was nevertheless a condition precedent necessary to properly maintain the action." Prop. Own. Brief p. 20. The case law cited in the Amended Order relating to a "statute of creation" relates to commencing an action. *See Knight Publ'g. Co. v. Univ. of S.C.*, 295 S.C. 31, 33, 367 S.E.2d 20, 22 (1988) (holding that a failure to commence a legal action pursuant to the Freedom of Information Act within the prescribed time frames precludes the action). If naming Dr. Gayes were some sort of condition precedent to initiating an action, the Property Owners themselves are at fault for failing to name Dr. Gayes in their Request for Final Review Conference before the DHEC Board.

III. Contrary to the conclusion of the ALC, it has jurisdiction over this matter as a contested case.

Property Owners inaccurately submit that "[i]f the Department was not required to give approval or permission to Dr. Gayes … then the underlying contested case was not appropriate because a determination by the Department or ALC was not required by law, as required by S.C. Code Ann. § 1-23-505(3)." (Prop. Own. Brief at 30)

a. The Administrative Law Court has jurisdiction to hear the case because the Property Owners have legal rights, duties and privileges.

Property Owners' suggestion that "the only party whose rights and duties in the Final Agency Decision that could be affected by a decision of the ALC with respect to the Research Proposal, which was the only issue before the Department, is plainly Dr. Gayes" ignores reality (Resp. Brief, p. 30). Obviously, the Property Owners filed a Request for Final Review before the DHEC Board for a reason – they wanted to be able to keep their sandbag seawall under the auspices of a research project. Under the APA's definition of a contested case as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing," S.C. Code Ann. § 1-23-310(3), and clearly the Property Owners are receiving the "privilege" of having these illegal sandbag walls remain in place through their appeal of the staff denial. The ALC admitted as much in its Amended Order ("Property Owners have private rights that might be impacted by the proposed research study such as ownership and use of private property"). (R.p. 54)

Property Owners claim that Dr. Gayes is the only correct party to the case because he proposed and is responsible for the research proposal, and reversal of the Final Agency Decision would result in the denial of Dr. Gayes' request to conduct the research. (Respondent's Initial Br., pp. 29-30). However, this argument fails to acknowledge the extensive evidence supporting the Property Owners' significant investment and interest in having this research proposal approved.

Property Owners even conceded that they have an interest in the research proposal and "stand to benefit" from the research (Respondent's Initial Br., pp. 29), yet attempt to obfuscate that they are the real parties. The research project was *requested by the Property Owners* to conduct research on the impact of *actions of the Property Owners*, resulting in the elimination of the need to spend the money to remove the enormous sandbags they have on their properties.

b. The Department has rights and duties relating to alterations and activities on the public beach and within its statutory jurisdiction.

Furthermore, Property Owners assert that under "if there is 'no legal duty owed by DHEC to issue a staff decision in this matter, which is the trigger giving rise to a contested case [per S.C. Code Ann. § 1-23-505(3)], there [is] no corresponding obligation that [a petitioner] be afforded a contested case hearing before the ALC.'" (Respondent's Br., pp. 30-31). (quoting *Amisub of South Carolina, Inc. v. South Carolina Department of Health & Environmental Control*, 403 S.C. 576, 596, 743 S.E.2d 786, 797 (2013)). In other words, if Dr. Gayes is not a permit or license applicant, then the Department has no legal duty to issue a staff decision.

Property Owners confuse Appellant's assertion that the Department has a "clear legal duty" to make determinations regarding the two exemptions with Appellant's position that an exemption does not require a license. Section 48-39-130(D)(2) states that a permit shall not be necessary for "research activities of state agencies and educational institutions… *provided that such activities cause no material harm* to the flora, fauna, physical or aesthetic resources to the area." S.C. Code Ann. § 48-39-130(D). (emphasis added). This bestows the Department with the authority and duty to make the determination regarding whether the sandbag activity may cause harm to the surrounding environment, physical, or aesthetic resources. Despite a permit not being required,

more broadly, DHEC must administer and enforce the provisions and polices of the Coastal Zone Management Act, S.C. Code Ann. § 48-39-10 et. seq., the regulations promulgated thereunder and the Coastal Management Program. *See* S.C. Code Ann. §48-39-50 (DHEC has the power to "to administer the provisions of this chapter and all rules, regulations and orders promulgated under it" and "to exercise all incidental powers necessary to carry out the provisions of this chapter") *See also* § 48-39-260 (As a matter of policy, DHEC must "protect, preserve, restore, and enhance the beach/dune system" and "severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the department which will provide for the protection of the shoreline without long-term adverse effects").

Respondent DHEC makes the argument that while they have not challenged the ALC's dismissal of Appellant's contested case, "the Department is nonetheless concerned that the Amended Order Granting Property Owners' Motion to Dismiss may have the future effect of limiting the Department's authority over pilot projects and research activities of state educational institutions (collectively referred to as 'pilot projects') to merely taking enforcement action after a structure has been placed in a critical area without Department knowledge or input." (DHEC Initial Brief p. 5). Appellant objects to Respondent DHEC lumping research activities and pilot projects, which are provided for in separate statutory sections. See S.C. Code Ann. § 48-39-130(D) (research activities of state agencies); § 48-39-320(C). However, Appellant is in agreement with DHEC's authority to review exemption requests and also that DHEC has a duty to administer the provisions of the Coastal Zone Management Act. Such powers and duties should not be curtailed by the ALC.

CONCLUSION

WHEREFORE, Appellant Coastal Conservation League respectfully requests that this Court reverse the Administrative Law Court's Order.

Respectfully submitted,

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