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Feb 07 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge S. Phillip Lenski

ALC Case No. 22-ALJ-04-0039-AP
Appellate Case No. 2023-001814

WILLIAM ROBERT HORTON, # 109013,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

MOTION TO REMAND TO THE ADMINISTRATIVE LAW COURT

Comes now Respondent, through undersigned counsel, and requests that this Court remand this case to the Administrative Law Court for a proper ruling. The relevant facts supporting this request are as follows.

Appellant's Notice of Appeal refers to ALC case number 22-ALJ-04-0039-AP, which relates to an Order of Dismissal signed by Administrative Law Judge S. Phillip Lenski on October 25, 2023. The only issue addressed in that Order of Dismissal was that the issue on appeal was a duplicate issue of the issue ruled upon in ALC case number 22-ALJ-04-0048-AP. The Order dismissed the case "since this case is a duplicate of a final decision on which the court has issued an Order." For the Court's convenience,

both of the ALC orders are attached with this Motion. Appellant also filed both Orders with his Notice of Appeal.

ALC case number 22-ALJ-04-0039-AP dealt with inmate pay from Lee Correctional Institution from 2005-2008. On the other hand, ALC case number 22-ALJ-04-0048-AP dealt with inmate pay from Manning Correctional Institution from 1982-84 and 1992-94. Therefore, Respondent agrees with Appellant that 22-ALJ-04-0039-AP should not have been dismissed as duplicative. Accordingly, Respondent respectfully asks that this Court remand this case back to the Administrative Law Court so that Court can issue a proper ruling in the case. Respondent further requests that this Court hold the time period for any filings in abeyance pending resolution of this motion.

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

BY: 

CHRISTINA CATOE BIGELOW
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ATTORNEY FOR RESPONDENT

February 7, 2024

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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SC Court of Appeals

William Robert Horton, #109013,
Appellant,
v.
South Carolina Department of Corrections,
Respondent.

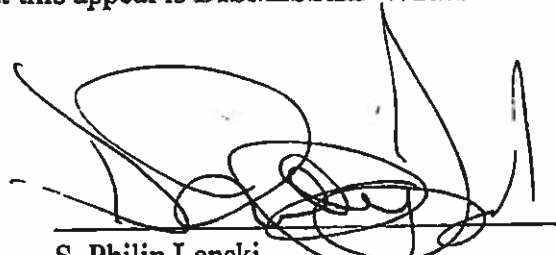
Docket No. 22-ALJ-04-0039-AP

ORDER OF DISMISSAL

This matter is before the South Carolina Administrative Law Court (ALC or court) pursuant to a Notice of Appeal filed on February 22, 2022 by William Robert Horton (Appellant) an inmate in the custody of the South Carolina Department of Corrections (Department or Respondent.) The Appellant is seeking to be paid the prevailing wages for the time he worked in Prison Industries at Lee Correctional Institution from 2005 – 2008.

On March 3, 2022, this appeal was assigned to the undersigned, however, this appeal is a duplicate of the final decision that is the subject of appeal in Docket Number 22-ALJ-04-0048-AP, initially assigned on March 3, 2022 to Judge Shirley Robinson and upon Judge Robinson's retirement, was reassigned to Judge Crystal Rookard and then to Judge Robert Reibold. On October 10, 2023, Judge Reibold issued an Order Granting Motion to Dismiss, dismissing the case with prejudice. Therefore, since this case is a duplicate of a final decision on which the court has issued an Order,

IT IS HEREBY ORDERED that this appeal is **DISMISSED WITH PREJUDICE.**
AND IT IS SO ORDERED.



S. Philip Lenski
Administrative Law Judge

October 25, 2023
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States Mail, postage paid, or in the interagency mail service addressed to the party(ies) or their attorney(s).

By [Signature] day of October 2023

Judicial Law Clerk

The State of South Carolina
FILED
OCT 25 2023
Administrative Law Court

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

RECEIVED
NOV 20 2023
SC Court of Appeals

William Robert Horton, #109013,)
)
Appellant,)
)
v.)
)
South Carolina Department of Corrections,)
)
Respondent.)

Docket No. 22-ALJ-04-0048-AP
ORDER GRANTING MOTION
TO DISMISS

STATEMENT OF THE CASE

This matter is pending before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to an appeal filed by William Robert Horton (Appellant), an inmate incarcerated by the South Carolina Department of Corrections (SCDC or the Department). See *Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 170, 886 S.E.2d 671, 674 (2023); *Slezak v. S.C. Dep't of Corr.*, 361 S.C. 327, 331 605 S.E.2d 506, 507 (2004); and *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000).

On October 11, 2021 at 22:10, Appellant submitted an inmate request (Ref. No. 21-02247923) concerning a financial concern and it provided in full:

Ms.Greer, Please forward this Request; To: Headquarters-Financial Accounting Office. To Whom it May Concern, I William Robert Horton#109013, Allendale Correctional Inst. F-3- B-50. I have tried several times to resolve this matter on several Request to Staff, To members of each Business Office to said, Institutions: Manning Correctional Inst. Worked: Central Laundry & Switchboard Operator..... Between: 1982 to 1984, and again in 1992 to 1994. Kirkland Correctional Inst. Worked: Upholstery & AT&T..... Between: 1984 to 1987. Allendale Correctional Inst. Worked: Penguin Book Company, Plus other jobs.....Between: 1996 to 2000. Lee Correctional Inst. Worked: West P.I., Ind.Group/Section Lead..... East P.I., Machine operator..... Between: 2005 to 2008. Between the years above and Institutions. I have worked at these Institutions P.I.'s, Plus the Big Central Laundry at Manning. And I was not payed prevailing wages. Your Staff at each of these Institutions was improper for failure to pay me prevailing wages. Each job was punched and entered in by a time card. If you would help me with this matter it would be most appreciated. Thank you. William Robert Horton#109013- F-3B-50, Allendale. Date 10-11-21.

On October 12, 2012 at 09:01, the Department responded, "After review, SCDC records show that you were paid prevailing wages during the time you were working."

On October 14, 2021, Appellant submitted a Step 1 grievance complaining that the Department failed to pay prevailing wages pursuant to S.C. Code § 24-3-430 (2007) for work performed in the "Big Central Laundry" and as "Switchboard Operator" from 1982 to 1984 and



1992 to 1994¹. By decision dated November 3, 2021, the warden denied the grievance because the warden asserted that “[Appellant’s] interpretation of the legal case that you cited in your grievance does not comply with our reading of the same. You have been provided with wages that have been approved by the governing authority of South Carolina.” Appellant received the Warden’s decision on November 17, 2021.

Appellant submitted a Step 2 grievance on November 20, 2021 and stated that his grievance was over non-payment of a prevailing wage, not that he was unpaid. The responsible official denied the Step 2 on January 20, 2022 with an explanation that the payments made during the claimed years conformed to the applicable federal and state statutory requirements. Appellant received the denial on January 31, 2022.

Appellant filed his notice of appeal on February 24, 2022. The matter was originally assigned to the Honorable Shirley Robinson. Appellant filed his brief on March 21, 2022. On April 29, 2022, the Department filed the record on appeal. The record consists of the October 11, 2021 inmate request (Ref. No. 21-02247923) and Step 1 and 2 grievances including Department responses. The Department filed a Motion to Dismiss or in the Alternative Hold in Abeyance on June 21, 2022. Judge Robinson did not expressly rule on the motion to dismiss and instead held the matter in abeyance beginning July 19, 2022. The matter was held in abeyance pending resolution of *Torrence v. S.C. Dep’t of Corr.*, 433 S.C. 633, 861 S.E.2d 36 (2021). This appeal was restored to the active docket on June 5, 2023.

Upon Judge Robinson’s retirement, the appeal was reassigned to the Honorable Crystal Rookard. The Department filed Respondent’s Brief and Motion to Dismiss, and a motion to supplement the record on August 4, 2023. Appellant did not file a specific response to the Department’s motions but did conclude his Reply Brief with a request for denial of the Department’s motions for the reasons set forth in the brief. On August 21, 2023, Appellant filed a Motion for Enlargement of Time in Which to File Reply Brief and his reply brief. The Department did not file a response directly to the Appellant’s motion.

This matter was re-assigned to the undersigned on September 21, 2023. The Court issued, on September 28, 2023, an order granting the Department’s August 4, 2023 motion to supplement the record and the Appellant’s August 21, 2023 motion for enlargement of time in which to file a

¹ Despite the breadth of employment described by Appellant in his October 11, 2021 request, the work and years raised in the subsequent Step 1 are more narrow and, thus, limit the scope of this appeal.

reply brief. The Department's motion to dismiss, contained in its brief, is presently before the Court.

DISCUSSION

In the Department's August 4, 2023 Motion to Dismiss, the Department asserts that Appellant's claim does not implicate a state-created liberty or property interest for which relief can be granted. Specifically, the Department highlights that section 24-3-430 was not enacted until July 1, 1995 and would not support Appellant's claims for prevailing wages from the periods of 1982-1984 and 1992-1994. Finally, the Department noted that the Appellant never worked for the specific program – "Prison Industries Enhancement Programs" – to which the prevailing wage statute² applies.

Treating the Appellant's Reply Brief as his response to the Department's motion, the Court is willing to consider and address Appellant's arguments. First, the Appellant asserts the Department is procedurally barred from claiming in the context of this appeal that the prevailing wage claim fails as a matter of law because the prevailing wage statute did not exist when the work was performed. He argues that the Department cannot raise an issue on appeal that was not ruled on below. *See, e.g., Carson v. S.C. Dept. of Natural Resources*, 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (court sitting in appellate capacity may not consider issues not raised to or ruled upon by an administrative agency). Appellant is certainly correct that the Department did not raise this argument below, but the doctrine of error preservation does not operate as Appellant suggests.

It is well-settled that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved for appellate review. *E.g., Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). Appellate review is the examination of a lower court's decision by a higher court, which can affirm,

² The "prevailing wage statute" is commonly used to describe section 24-3-430, as it is being used herein, although other statutory provisions may relate to wage payments for inmate. Section 24-3-430(D) applies to for profit partnerships with private industry. In contrast and for example, Section 24-3-315 was enacted to allow the State of South Carolina to participate in the federal Prison Industry Enhancement Certification Program (PIECP), a non-profit program allowing the federal government to purchase goods manufactured by federal inmates. This program was expanded by the Justice Assistance Act of 1984. The Justice Assistance Act allowed states to sell goods and materials made by state prison inmates to federal agencies as well as state agencies and others, provided that the director of prisons in a particular state made certain determinations to qualify for admission into the federal program. Section 24-3-315 is associated with programs administered under the Justice Assistance Act and a determination is required of the Department's Director to make the same determinations that the PIECP program requires for admission to the program.

reverse, modify, or vacate the decision. REVIEW, Black's Law Dictionary (11th ed. 2019). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Stated differently, error preservation requirements ensure that when an appellate court is asked to affirm, reverse, modify or vacate a decision below, there is in fact a decision from the lower court to evaluate.

Here, however, the Court is not being asked to affirm, reverse, modify or vacate the lower decision. The question before the Court in this instance is instead whether the appeal should be summarily dismissed because it does not involve a state created liberty or property interest.³ This issue was raised by motion. Indeed, it would have been impossible for the Department to raise this issue below. The argument that an appeal should be dismissed for lack of a state-created liberty or property interest below cannot, of course, exist *before* an inmate has appealed to the Administrative Law Court. The Court concludes that the Department is permitted to raise its argument in the context of a motion to dismiss.⁴

Next, Appellant invites the Court to view section 24-3-430 as remedial thus allowing retrospective application for work performed prior to its adoption in 1995. Such a position is in contrast with the Department's position that the statute clearly lacks a legislative mandate for retroactive application.

Unless section 24-3-430(D) operates retroactively, Appellant has no claim for additional wages for periods of time prior to July 1, 1995. "[A]bsent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature." *Edwards v. State L. Enforcement Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011). "A statute is remedial where it creates new remedies for

³ The Court is careful to distinguish between the Department's two arguments. In the motion to dismiss, the Department argues that the case should be summarily dismissed because Appellant possesses no state-created property interest in the prevailing wages claimed on appeal. In other words, there can be no state-created property right to prevailing wages before the state created the prevailing wage act. In the brief, the Department argues that its denial of additional wage relief to Appellant should be affirmed because Appellant lacks any entitlement to a prevailing wage for time periods prior to the enactment of the prevailing wage act. These two arguments are similar, but not identical.

⁴ Appellant's argument is better suited to precluding consideration of the Department's argument that its denial of additional wage relief to Appellant should be affirmed because Appellant lacks any entitlement to a prevailing wage for time periods prior to the enactment of the prevailing wage act. However, even there, Appellant's objection fails. The Department is the Respondent and is authorized by rule to raise arguments for affirmance which were not asserted below as long as the basis for the argument appears in the record. SCALC Rule 65.

existing rights or enlarges the rights of persons under disability." *State v. Hilton*, 406 S.C. 580, 585, 752 S.E.2d 549, 551-52 (Ct. App. 2013) (quoting *Edwards*, 395 S.C. at 579, 720 S.E.2d at 466). Where, however, "a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only." *Id.* (quoting *Edwards*, 395 S.C. at 579, 720 S.E.2d at 466); *see also* 82 C.J.S. *Statutes* § 568 (Oct. 2023 Update) ("In the absence of an express legislative statement or clear intent to the contrary, a statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage" (footnotes omitted)).

Application of these standards reveals that the prevailing wage statute, section 24-3-430, created a new obligation on the Department in subsection D and nothing in the statute evidences any intent that the statute applies retroactively. Therefore, there is no basis to conclude that section 24-3-430 was intended or should apply retroactively to provide the remedy sought by Appellant.

Having concluded that the Department's argument is one which the Court may properly consider, the Court next considers the merits of the Department's argument. Appellant's claim is expressly based on S.C. Code section 24-3-430. Appellant's Step 1 grievance complains that Department failed to pay prevailing wages pursuant to S.C. Code § 24-3-430 (2007) for work performed in the "Big Central Laundry" and as "Switchboard Operator" from 1982 to 1984 and 1992 to 1994. The relief Appellant requested was "[t]o be paid my prevailing wages for services rendered *per Sec 24-3-430 and 24-3-430(D)*." (Step 1 grievance) (emphasis added). In his Step 2 grievance, Appellant again requests that he be paid prevailing wages for services rendered in accordance with the legislative intent "behind the statute governing Prison Industries Services."⁵ Appellant's notice of appeal again expressly refers to Section 24-3-430(D). It states that "*Section 24-3-430(D)* provides 'No inmate participating in the (PI) Prison industries program may not earn less than the prevailing wage for work of a similar nature in the private sector.'⁶ (Notice of Appeal) (emphasis added). Finally, the only statute mentioned in Appellant's brief is section 24-3-430(D).⁷

⁵ The Court construes Appellant's reference to "the statute governing Prison Industries Services" as a reference to Section 24-3-430(D). The reference to a statute is in the singular, not the plural. It also comes immediately after the Step 1 grievance, which expressly refers to Section 24-3-430(D). Finally, Appellant's Step 2 grievance refers to "prevailing wages," a term taken from Section 24-3-430(D). That section provides that "[n]o inmate participating in the program may earn less *the prevailing wage* for work of similar nature in the private sector." S.C. Code Ann. § 24-3-430(D) (emphasis added). While other statutes, such as Section 24-3-315 existed prior to 1995 and contain a similar wage requirement, these statutes did not use the term "prevailing wage."

⁶ Appellant has not accurately transcribed section 24-3-430(D).

Section 24-3-430(D) was not enacted until July 1, 1995. Therefore, this section could not have conferred a state created property right to prevailing wages upon inmates prior to that date. Appellant's claim for prevailing wages is for the following years: (i) 1982 to 1984; and (ii) 1992 to 1994. (Step 1 grievance). These time periods predate July 1, 1995. The Department therefore correctly concludes that Appellant has no state created property right to prevailing wages under section 24-3-430(D).

For these reasons, the Court concludes that summary dismissal is appropriate, and GRANTS the Department's motion to dismiss.⁸

ORDER

IT IS THEREFORE ORDERED that the Department's motion to dismiss is **GRANTED WITH PREJUDICE**.

AND IT IS SO ORDERED.



The Honorable Robert L. Reibold
Administrative Law Judge

October 10, 2023
Columbia, South Carolina

⁷ The first mention of section 24-3-315 by Appellant comes in his reply brief. Appellant attempts to rebut the Department's argument that the prevailing wage statute did not exist prior to July 1, 1995. Even then, it is not clear that Appellant is relying on Section 24-3-315 as a source of his right to payment. Appellant seems to be arguing that Section 24-3-315 supports his argument that Section 24-3-430(D) is remedial in nature and should apply retroactively. Assuming, arguendo, that the discussion in Appellant's reply brief should be construed as arguing that the Section 24-3-315 was the source of Appellant's right to prevailing wages, it would be improper for the Court to consider this argument. *See ABB, Inc. v. Integrated Recycling Group of SC, LLC*, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (Ct.App. 2021) (a party cannot raise an issue for the first time in an appellate reply brief).

⁸ The Court need not address the Department's secondary basis for dismissal because the Court's analysis of the Department's primary basis is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CERTIFICATE OF SERVICE

I, Van Whitehead, hereby certify that I have this date served this order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

Van Whitehead

Van Whitehead
Judicial Law Clerk

October 10, 2023
Columbia, South Carolina

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Feb 07 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge S. Phillip Lenski

ALC Case No. 22-ALJ-04-0039-AP
Appellate Case No. 2023-001814

WILLIAM ROBERT HORTON, # 109013,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on today's date, she mailed a copy of the Respondent's **Motion to Remand to the Administrative Law Court** to Appellant via U.S. Mail addressed as follows:

**William Robert Horton, # 109013
Allendale Correctional Institution, F3 B50
1057 Revolutionary Trail
Fairfax, South Carolina 29827**



Christina Catoe Bigelow
Deputy General Counsel
S. C. Department of Corrections
Post Office Box 21787
Columbia, S. C. 29221

February 7, 2024



SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS
Division of Legal Counsel & Compliance

HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

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Feb 07 2024

SC Court of Appeals

February 7, 2024

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: William Robert Horton, # 109013, v. South Carolina Department of Corrections
Appellate Case No. 2023-001814

Dear Ms. Kitchings:

Enclosed please find the Respondent's **Motion to Remand to the Administrative Law Court** in the above captioned appeal, along with **Proof of Service**.

Thank you for your attention to this matter, and please do not hesitate to contact me should there be any questions or concerns.

Sincerely,

Christina Catoe Bigelow
Deputy General Counsel
South Carolina Department of Corrections
S.C. Bar No. 73562

cc: William Robert Horton, # 109013
Allendale Correctional Institution, F3 B50
1057 Revolutionary Trail
Fairfax, South Carolina 29827