STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge S. Phillip Lenski

ALC Case No. 16-ALJ-04-0317-AP
Appellate Case No. 2024-000130

NICHOLAS BOAN, # 302151,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Christina Catoe Bigelow
Deputy General Counsel
Office of General Counsel
South Carolina Dept. of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-8508

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT OF ISSUE ON APPEAL

THE LOWER COURT PROPERLY DISMISSED THE APPEAL BECAUSE APPELLANT'S GRIEVANCE DID NOT IMPLICATE A STATE-CREATED LIBERTY OR PROPERTY INTEREST WHERE APPELLANT WORKED IN A PRISON INDUSTRIES SERVICE PROJECT AND NOT A PRISON INDUSTRIES ENHANCEMENT PROGRAM, AND WORK FOR A PRISON INDUSTRIES SERVICE PROEJCT IS NOT SUBJECT TO THE PREVAILING WAGE STATUTE.

STATEMENT OF THE CASE

This matter comes before the Court pursuant to the appeal of Nicholas Boan ("Appellant"), an inmate in the South Carolina Department of Corrections ("SCDC"). On November 3, 2008, Appellant filed a Step One grievance seeking to be paid pursuant to the prevailing wage statute. This grievance was investigated and denied. Appellant then filed a Step Two grievance, which was also investigated and denied. Appellant submitted a Notice of Appeal to the Administrative Law Court on April 14, 2016. On December 4, 2023, the Administrative Law Court issued an Order of Dismissal. In that Order, Judge S. Phillip Lenski found that Appellant's grievance did not implicate a state-created liberty or property interest because the work Appellant performed was service work not subject to the prevailing wage statute. This appeal follows.

STANDARD OF REVIEW

S.C. Code Ann. § 1-23-610(B) provides the applicable standard of review:

> The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5).

In an appeal of a final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-610(B). "Substantial evidence" is evidence which, considering the record as a whole, would allow a reasonable mind to reach the same conclusion that administrative agency reached. Hendley v. S.C. State Budget & Control Bd., 325 S.C. 413, 481 S.E.2d 159 (Ct. App. 1996). A reviewing court shall not substitute its own judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions that are controlled by errors of law or that are clearly erroneous in view of the substantial evidence on the record as a whole. Id.

ARGUMENT

THE LOWER COURT PROPERLY DISMISSED THE APPEAL BECAUSE APPELLANT'S GRIEVANCE DID NOT IMPLICATE A STATE-CREATED LIBERTY OR PROPERTY INTEREST WHERE APPELLANT WORKED IN A PRISON INDUSTRIES SERVICE PROJECT AND NOT A PRISON INDUSTRIES ENHANCEMENT PROGRAM, AND WORK FOR A PRISON INDUSTRIES SERVICE PROEJCT IS NOT SUBJECT TO THE PREVAILING WAGE STATUTE.

Deference should be given to an agency's interpretation of statutes it is charged with administering. See, e.g., Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, 411 S.C. 16, 34, 766 S.E.2d 707, 716 (2014) ("As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations "'unless there is a compelling reason to differ.'"); Barton v. S.C. Dep't of Prob., Parole & Pardon Servs., 404 S.C. 395, 415, 745 S.E.2d 110, 121 (2013) (an agency's interpretation "will not be overruled absent compelling reasons"). The deference doctrine provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. See Brown v. Bi–Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). Courts defer to an agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844.

In this case, SCDC's interpretation of the statutes involved is both reasonable and consistent with statutory authority. The ALC agreed with SCDC's interpretation. Accordingly, SCDC's interpretation should be given deference, and as discussed below, should be affirmed.

Appellant argues that he was entitled to the prevailing wage under S.C. Code 24-3-430 (D) for work he performed at Lee Correctional from September 2005 through January 2007. However, because the work Appellant performed was service work, it was not subject to the prevailing wage statute. Accordingly, the Administrative Law Court properly dismissed the appeal as not implicating a state-created liberty or property interest.

There are three types of prison industries programs in the South Carolina Department of Corrections: (1) Prison Industries Enhancement Programs (commonly referred to as "PIE" programs); (2) Prison Industries Service Projects ("PISP" programs); and (3) traditional prison industries. Traditional prison industries programs do not work with private industries sponsors and are not subject to the prevailing wage statute. Both PIE programs and PISP programs work with private industry sponsors. However, only PIE programs are subject to S.C. Code Ann. § 24-3-315 and § 24-3-430(D), i.e., the prevailing wage, because PISP programs are governed by separate authority.

S.C Code 24-3-430, the statute governing PIE programs, states that the Department of Corrections "may establish a program involving the use of inmate labor by a nonprofit organization or in private industry for the manufacturing and processing of goods, wares, or merchandise or the provision of services or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina." S.C. Code 24-3-430(A). Section (D) of the statute states that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code 24-3-430(D).

On the other hand, PISP programs, also called service projects, were governed by budget provisos during the time period in question. In Ackermann v. South Carolina Department of

Corrections, 415 S.C. 412, 782 S.E.2d 757 (Ct. App. 2016), this Court articulated the authority governing PISP programs as:

> The legislature enacted the first of a series of yearly budget provisos, effective for the fiscal year beginning July 1, 2001, permitting SCDC to pay participating inmates less than the prevailing wage for "service work:"
>
> > The Director of [SCDC] may enter into contracts with private sector entities that would allow for inmate labor to be provided for prison industry service work. The use of such inmate labor may not result in the displacement of employed workers within the local region in which work is being performed. Service work is defined as any work such as repair, replacement of original manufactured items, **packaging**, sorting, labeling, or similar work **that is not original equipment manufacturing**. The department may negotiate the wage to be paid for inmate labor provided under prison industry service work contracts, **and such wages may be less than the prevailing wage for work of a similar nature in the private sector**.
>
> H. 3687, Appropriation Bill 2001–2002, Part IB § 37.31 (Act No. 66, 2001 S.C. Acts 738) (emphasis added). The legislature enacted identical, or nearly identical, provisos for each following fiscal year until the 2007–2008 fiscal year. On August 1, 2007, section 24–1–295 of the South Carolina Code, which codified the language in the provisos, became effective.

Ackermann v. South Carolina Department of Corrections, 415 S.C. 412, 415, 782 S.E.2d 757, 758-59 (Ct. App. 2016) (emphasis added).[1]

The U.S. Textiles project operated at Lee Correctional Institution was a PISP program governed by the budget provisos discussed in Ackermann. The contracts governing this program stated that the inmates were to provide service work wherein they packaged hosiery according to engineering design and manufacturing specifications. See 2005 Textiles Contract at p. 13 and 2006

[1] The only time frame where no authorization existed to allow SCDC to pay inmates wages less than the prevailing wage when working with a private industry service work was form July 1, 2007, to August 1, 2007. This time frame is not relevant to this appeal because Appellant participated in the program from September 2005 until January 2007.

Textiles Contract . Inmates in this program did not manufacture anything; instead, they provided packaging services for what was expressly called a "service project." Textiles Contract Addendum, p. 32. Furthermore, the contract did not contemplate invoicing the contractor at an hourly rate, but rather at a rate per package processed by inmates. See 2005 Textiles Contract p. 6 ("SCDC will charge contractor $0.10 per package processed by inmates.") and 2006 Textiles Contract p. 6. Accordingly, this textiles project was a service project (PISP) created pursuant to the budget provisos discussed in Ackermann, and inmates who worked in this service program were not entitled to the prevailing wage set forth in S.C. Code 24-3-430 (D).[2] (See Final Order, p. 3).

Therefore, because Appellant's work for a PISP program does not fall under the prevailing wage statute, the decision of the Administrative Law Court should be affirmed.

[2] Significantly, Appellant has no PI Private Sector Account, which is indictive of the fact that Appellant never worked for a PIE program. See Appellant's Account Summary Screen. All inmates who work for PIE programs have a PI Private Sector Account.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that this Court affirm the determination of the Administrative Law Court.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

BY: _____

CHRISTINA CATOE BIGELOW
Deputy General Counsel
Office of General Counsel
S. C. Department of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-8508

June 5, 2024