THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Doyet A. Early, III, Circuit Court Judge

Opinion No. 6055
Appellate Case No. 2019-000599
Lower Court Case No. 2013-CP-06-0059

Lorenda Robinson, Elaine Nix, Archie Patterson,
And Tami Bollerman, ... Plaintiffs,

Of Whom, Archie Patterson and Tami Bollerman are..... Respondents,

v.

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

RESPONDENT'S REPLY TO APPELLANT'S RESPONSE TO PETITION FOR REHEARING

Without first promulgating regulations as statutorily required, DEW implemented an online work search requirement for claimants seeking unemployment benefits. The online work search was to be conducted through South Carolina Works Online System (SCWOS). When the system detected non-compliance, it automatically stopped payment of benefits without first issuing any determination regarding whether benefits were due in violation of South Carolina Code Ann. Section 41-35-670 (1976, as amended) [1] Then, it automatically sent a notice to the

[1] S.C. Code Ann. 41-35-670. Provides: Notwithstanding another provision contained in this article, benefits must be paid pursuant to a determination, redetermination, or the decision of an appeal tribunal, the department, or a reviewing court upon the issuance of that determination, redetermination, or decision, regardless of the pendency of the period to apply for reconsideration, file an appeal, or petition for judicial review provided with respect to it or the pendency of such an application, filing, or petition,

claimant telling them why they did not receive benefits and if they wanted to receive future benefits to report to DEW. The letter did not tell them the true purpose of reporting to DEW was to conduct a hearing to issue a determination regarding whether the claimant had conducted an online work search in an apparent attempt to comply with S.C. Code Ann. 41-35-670.

In determining whether a statute creates an administrative remedy which must be exhausted before an action may be filed, legislative intent prevails. *Ward v. State,* 343 S.C. 14, 538 S.E.2d 245 (2000), *Charleston Trident Homebuilders, Inc v. Town Council of Summerville*, 389 S.C. 498, 632 S.E.2d 864 (2006) The doctrine of exhaustion of administrative remedies only applies when a litigant invokes the original jurisdiction of the circuit court to adjudicate a claim based upon a statutory violation for which the legislature has provided an administrative remedy. *Stinney v. Sumter School Dist. 17*, 391 S.C. 547, 707 S.E.2d 397, (2011), Footnote 1, citing *Thomas Sand Inc, v, Colonial Pipeline Co*., 349 S.C. 402, 563 S.E. 2d 109 (Ct. App. 2002)

Our Supreme Court has held:

> The purpose of the ESC [now DEW] hearings is to quickly provide benefits to persons becoming unemployed through no fault of their own. S.C. Code Ann. § 41-27-20 **(1986)** The legislature intended to minimize procedural hurdles before the ESC so as to enable unemployed claimants to obtain prompt decisions regarding entitlement to unemployment benefits from the ESC....Further, the narrow issue the ESC decides is simply whether the claimant is qualified to receive employment benefits. *See* S.C. Code Ann. § 41–35–120. Thus, the jurisdiction of the ESC is limited. By focusing on a narrow issue, the ESC is able to expeditiously determine whether an employee is entitled to unemployment benefits. *Shelton v. Oscar Meyer Food Corporation*, 325 S.C. 248, 252, 481 S.E. 706, 708 (1997)

While the issue in this case affects claimant's entitlement to benefits, it goes to much more than a factual inquiry of whether claimants were able to work, available to work, and

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until the determination, redetermination, or decision has been modified or reversed by a subsequent redetermination or decision, in which event benefits must be paid or denied for weeks of unemployment afterward pursuant to the modifying or reversing redetermination or decision.

actively seeking work as contemplated by S.C. Code Ann. Section 41-35-110, or whether he is ineligible for benefits under Section 41-35-120. In this case, DEW, without first promulgating regulations, changed the rules to determine whether a person was actively seeking work and claimants challenge its authority to do so. The circuit court was correct in determining this action was not an appeal from a determination, but a declaratory judgment action designed to resolve whether the new requirement constituted an illegal regulation. R. p. 43.

DEW expeditiously issued 61,900 determinations between August 2012 and February 2013 denying claims for failing to conduct an online work search. This averages 2,280 determinations a week concerning this issue and would be in addition to any other determinations it issued. This quick and prompt - albeit illegal since proper notice was not given - process would not have been equipped for hearing questions regarding whether DEW was required to promulgate regulations. In fact, Romi Robinson, the chief judge of the appellate tribunal appellate panel in charge of hearing appeals from those determinations, would not have considered the issue of whether DEW was required to promulgate regulations. R. p. 42. As noted in *Shelton,* employees are often unrepresented at hearings and likely would not know to raise this issue, much less how to raise it. (DEW had Robinson testify about the various reasons a determination denying benefits for failing to comply with the online work search requirement was reversed. None of those issues involved whether the online requirement was implemented through an illegal regulation. ROA 917, l.14 to ROA 925) Moreover, if the issue was raised before the appellant tribunal or appellant panel, who would represent the interest of DEW in defending its policy? And, would the decision have a preclusive effect in all other determinations/hearings where failure to conduct the online search was the reason for denying the claim? *Shelton* suggests it would not.

In enforcing this illegal policy mandating the online search, DEW acted outside its authority. DEW is statutorily required to promulgate regulations to carry out the provisions of the unemployment law found in Chapters 27 through 41 of Title 41 of the South Carolina Code. See S.C. Code Ann. Sections 41-27-510, 41-29-110, and 41-35-610. Failure to promulgate regulations when mandated to do so renders the actions of an agency invalid, since the agency is acting outside its authority. *Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13 (1992). See also *Responsible Economic Development v. South Carolina Dept. of Health and Environmental Control,* 371 S.C. 547, 641 S.E.2d 425 (2007) (Actions outside of the agency's authority are null and void.)

This Court found the Supreme Court has yet to rule on whether an exhaustion of remedies is excused when an agency acts outside its authority. This Court in making that conclusion overlooked the apparent consequences of the agency's conduct, which is that its illegal actions are invalid, null and void and of no effect. It also overlooked *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (2010) which in addition to futility also found exhaustion was not required when an agency acted outside its authority. The only purpose of this finding was to support the court's conclusion that administrative remedies were not required.

The effect of an agency acting outside of its authority is broad. It applies to all types of agencies, including school boards (*Brown v. James*, supra.), zoning appeal boards (*Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals,* 342 S.C, 480, 536 S.E.2d 892 (2000), local public service authorities, (*Murphee v. Mottel,* 267 S.C. 80, 226 S.E.2d 30 (1986)) and state agencies such as DEW. (*Captain Quarter's Motor Inn; Responsible Economic Development,*supra.) It applies in all types of situations, such as the authority to enter into a lease/contract (*Charleston Television Inc. v. South Carolina Budget and Control Bd* 301 S.C

468, 392 S.E.2d. 671 (1990)) employment matters (*Brown*, supra), the authority to conduct an election (Murphee, supra), storm water drainage (*Responsible Economic Development*, supra,) zoning appeals (*Vulcan Materials*, supra), and licensing and permitting (*Captain's Quarters Motor Inn*, supra.). The issue of whether DEW was required to promulgate regulations to implement the online work search requirement is one of law and is beyond the normal function of DEW in issuing determinations. There is no reason to pursue administrative remedies when the agency is acting outside its bounds. Whether regulations should have been promulgated is an issue for the court. The court must insist on "...strict compliance with the APA, including submission of administrative policies having the force and effect of law to the legislature for review." *Joseph v. South Carolina Dept. of Labor Licensing and Regulation*, 417, S.C. 436, 465, 790 S.E.2d 763, 778 (2016)

Further, Appellant's arguments against the Circuit Court's finding of futility challenge findings of fact made by that Court and supported by competent evidence. Appellant first argues that, because approximately 16% of those who appealed a disqualification related to the online work search requirement were successful in getting their disqualification reversed, DEW was not blindly enforcing the online work search requirement and exhaustion of administrative remedies would not have been futile. App. Rtn. p. 10. However, this evidence was presented to the Circuit Court which found it unpersuasive. Instead, the Circuit Court relied on the testimony of Appellant's Chief Administrative Hearing Officer to find that DEW's Appellate Panel "would not resolve issues of law pertaining to the authority of SCDEW to implement the online work search requirement without first promulgating regulations." R. p. 42. Appellant has mischaracterized the issue in this case as whether a one-time decision by DEW to disqualify an individual for benefits based on alleged failure to comply with the online work search requirement was proper. But the

claim Respondents present is that DEW was without authority to implement the online work search requirement at all without promulgating regulations. The distinction between these questions is one with a real practical difference. Those 16% of appellants who were "successful" on appeal to DEW were "successful" only in the sense that the disqualification they appealed from was reversed. They were still subject to the online work search requirement that DEW implemented unlawfully and still at risk of being disqualified unlawfully for future benefits along with ever other person who may have been eligible for unemployment benefits. The Circuit Court relied on competent evidence to conclude that DEW's administrative process would not have addressed Respondents' claim and, as a result, any attempt to exhaust that process would have been futile. R. pp. 41-42. That decision should stand because it was supported by competent evidence. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Appellant next argues that the testimony of its Chief Administrative Hearing Officer "simply cannot bear the weight Respondents place upon it." But to be clear, it is not only Respondents who relied on that testimony to support their futility argument, but the Circuit Court which relied upon that testimony to support its factual conclusion that exhaustion of administrative remedies would have been futile. R. pp. 41-42. The Circuit Court's factual conclusion should only be disturbed now if it was without evidentiary support. *Clark*, 339 S.C. at 389, 529 S.E.2d at 539. Respondents do not argue that the Circuit Court's conclusion was without evidentiary support. Instead, they fall back on the argument that this testimony could not "contravene DEW's authority under state law." App. Rtn. p. 11. Appellant cites *Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 688 S.E.2d 844 (2010), for this proposition. However, *Spectre* does not go so far. Rather, the question presented in *Spectre* was whether an

agency had certain authority, not whether administrative remedies were futile because the agency would not use that authority. *Spectre* stands only for the proposition that statements by agency employees "may not abrogate authority granted by statute." 386 S.C. at 368, 688 S.E.2d at 850. In making this argument, Appellant attempts to evade the abuse of discretion standard of review applicable here. Whether DEW could have taken up the question of its authority to implement the online work search requirement without promulgating regulations may be a legal question. But it is not the question presented and the answer is of little import if DEW would not have done so. The latter is a question of fact which the Circuit Court, relying upon competent evidence, resolved in Respondents' favor. The DEW Appellate Panel "would not resolve issues pertaining to the authority of SCDEW to implement the online work search requirement without first promulgating regulations." R. p. 42 (emphasis added). For this reason, the Circuit Court found that exhaustion of administrative remedies as to the issue presented in this case would have been futile. That finding should stand because Appellant has failed to show that it was without evidentiary support.

In addition, Appellant's argument that exhaustion of administrative remedies could only be futile if Respondents were raising a constitutional challenge misconstrues the holding in *Ward v. State*. Appellant argues that the only conceivable reason that DEW and the ALC could not have resolved the issue Respondents present here is if Respondents had challenged the constitutionality of a statute or regulation. App. Rtn., p. 7. Appellants cite *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000), for this proposition. However, that is not what *Ward* holds. Rather, *Ward* identified only one of the possible ways in which exhaustion of administrative remedies would be futile holding that "[r]equiring a party to go before an agency or ALJ who cannot rule on the constitutionality of a statute would be a futile act." 343 S.C. at 19, 538 S.E.2d at 247.

Ward does not hold, and it does not follow, that this was the only situation in which exhaustion of administrative remedies would be futile. Instead, South Carolina precedent makes clear that there are several ways to demonstrate that exhaustion of administrative remedies would be futile. One is where a showing is made "comparable to the administrative body taking a hard and fast position that makes and adverse ruling a certainty." *See e.g.* *Brown v. James*, 389 S.C. 41, 54, 697 S.E. 604, 611 (Ct. App. 2010). The Circuit Court, relying upon the testimony of Appellant's own Chief Administrative Hearing Officer, held that Respondents had established futility in this way. R. pp. 41-42. Another is where an agency is acting outside of its authority. *See e.g.* *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 641 S.E.2d 425 (2007). Again, the Circuit Court found that Respondents had established futility in this way. R. pp. 42. Thus, while futility can be established where the agency or ALJ cannot rule upon the issue presented, Appellants argument that this is the only way in which DEW or the ALC could not have resolved the issue presented here is misguided.

Conclusion

For the reasons set forth in the Petition and Memorandum and this reply, respondents pray for a rehearing and that this court reconsider its ruling that failing to exhaust administrative remedies bars respondents from bringing this action. In addition, to resolve the exhaustion issue it is necessary for this court to rule on the whether DEW was without authority to implement its online work search Requirement without first promulgating regulations, since much of respondent's argument hinges on whether DEW acted outside its authority. Finally, the Respondents request this court affirm the Circuit Court's ruling in this case, including its ruling certifying the class.

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