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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III Administrative Law Court Judge

Appellate Case No. 2020-001689
Case No. 2020ALJ300064AP

South Carolina Technical College System .....Appellant,

v.

Carla Jackson and South Carolina Department of Administration……..……Respondents,

Of whom, Carla Jackson is the .....Respondent.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

CROMER BABB & PORTER, LLC

s/Shannon Polvi
Shannon Polvi, Esquire (#101837)
1418 Laurel Street
Post Office Box 11675
Columbia, South Carolina 29201
Phone: (803) 799-9530
Fax: (803) 799-9533
Attorney for Respondent Carla Jackson

June 24, 2024
Columbia, South Carolina

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STATEMENT OF THE CASE

South Carolina Technical College System (SCTCS) petitions for rehearing of this Court's order on May 29, 2024, wherein this Court affirmed the administrative law court's (the ALC) order, which upheld the State Employee Grievance Committee's (the Committee) determination that Carla Jackson (Jackson) was a full time equivalent (FTE) employee, covered under the State Employee Grievance Procedure Act (the Act), and was terminated without cause.[1]

ARGUMENT

The Court did not overlook any arguments raised by SCTCS and correctly applied the law to this case.

1. This Court correctly found that the ALC could remand the case to the Committee to make factual findings.

The ALC did not err in remanding to the Committee because the ALC is permitted to remand to the Committee to make factual findings. SCTCS argues that this Court erred by not adopting its arguments that findings of fact are incidental to the jurisdictional issues. Yet, the General Assembly contemplated that very possibility by writing such authority into law. See S.C. Code Ann. § 1-23-380(5) (Supp. 2023) ("The court may affirm the decision of the agency or remand the case for further proceedings."). Further, the case relied upon by SCTCS, *Chew v. Newsome Chevrolet, Inc.* S.C. 315 102, 431 S.E.2d 631 (Ct. App. 1993), is inapplicable to this case.

The substantial evidence standard was appropriately applied by the ALC to this case. Furthermore, this Court also correctly found that SCTCS's argument for a *de novo* review

[1] Jackson craves reference to the Findings of Fact in the Final Decisions of the State Employee Grievance Committee issued on March 22, 2018 and February 3, 2020. (R. pp. 88-96); (R. pp. 120-124); (See also R. pp. 100-109).

unpersuasive. This Court found the analysis in *State v. Oxner*, 391 S.C. 132, 705 S.E.2d 51 (2011) dispositive here. "[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court." *State v. Oxner*, 391 S.C. at 134, 705 S.E.2d at 52 (quoting *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939)). "An argument that is not raised to an intermediate appellate court is not preserved for review by this Court." *State v. Oxner*, 391 S.C. at 134, 705 S.E.2d at 52 (citing *United Dom. Realty Trust v. Wal–Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct.App.1992)). "Even though subject matter jurisdiction may be raised at anytime, there is no error preservation exception allowing a party to bypass calling an erroneous ruling to the attention of the tribunal making it before appealing that ruling to a higher court." *State v. Oxner*, 391 S.C. at 134, 705 S.E.2d at 52 (internal citations omitted). The ALC's remand to the Committee was within its statutory authority and none of SCTCS's arguments to the contrary are persuasive.

2. Substantial evidence supports this Court's holding that Jackson was an administrative coordinator and a covered employee under the State Employee Grievance Procedure Act at the time of her termination.

The basis for the Court's affirmance of the Administrative Law Court's decision upholding the State Employee Grievance Committee's decision in Jackson's favor is there is substantial evidence in the record that Jackson was an administrative coordinator and a covered employee under the State Employee Grievance Procedure Act ("the Act") at the time of her termination.

Even if the Court were to consider SCTCS's argument that the preponderance of the evidence standard applies to that issue, under either standard of review, the evidence shows Jackson was an employee covered by the Act. In its Order issued on May 29, 2024, this Court cited to evidentiary support within the record. The termination letter Jackson received acknowledged her role was that of "Administrative Coordinator I" and advised her of her grievance rights.

For every single grievance hearing,[2] the position was undisputed that Jackson satisfied the definition of 'employee' within the meaning of the State Employee Grievance Procedure Act. Such an interpretation is consistent with the statutory authority and reasonable interpretation S.C. Code Ann. 8-17-370. Furthermore, SCTCS cannot argue that Jackson was not entitled to grievance rights when its own legal counsel acknowledged that Jackson was an Administrative Coordinator at the administrative hearing. (R. p. 324). Appellant's legal counsel stated, "[i]n fact, the sole purpose that we are here today is the administrative coordinator's position is the only part that's covered." (Id.). Moreover, the Department of Administration informed Jackson that the "State Human Resources Director ha[d] determined that jurisdiction requirements ha[d] been met under the State Employee Grievance Procedure Act concerning" the appeal of the Committee's decision. In making a final decision on the grievance, the DSHR considered all facts, evidence, and testimonies and the Committee's Final Decision granting Jackson relief should be upheld.

In its Petition for Rehearing, SCTCS makes the same arguments raised previously that Jackson did not "function" as an administrative coordinator. This Court considered such arguments in its Order and found that this argument fails under the facts previously outlined because a reasonable mind could reach the same conclusion as the ALC with regard to Jackson's role at DTC.

This Court found that Jackson's employment status is a factual question that was answered by the Committee and the ALC and they found persuasive that Jackson was continuously keyed as an Administrative Coordinator (state title/classification) since hire in 2011. All other duties Jackson performed were supplemental, not a replacement position. The College's own letters and

[2] The suspension and termination grievance hearings before the College President, State Technical System President, and the State Employee Grievance Committee.

personnel actions forms support the factual finding of the State OHR[3] and the State Employee Grievance Committee. Jackson was never hired as a Dean and her state position/title never changed. The record is void of any College documents or HR forms that prove otherwise.

Moreover, upon suspension and termination, Dr. Hall, in his official capacity as the President of the College, issued Jackson two letters that unequivocally prove Jackson has State Employee Grievance rights. The first is on February 14, 2017, Jackson received a letter from Dr. Hall, the Interim President of the College, stating that the supplemental pay Jackson was receiving was suspended. (R. p. 916). Following the suspension of her supplemental pay, Jackson filed a complaint with the South Carolina Department of Labor, Licensing and Regulation on February 15, 2017. Later that day, Jackson was instructed to come to Dr. Hall's office where she was given a letter informing her that she was suspended without pay. (R. p. 748). Therefore, as of February 15, 2017 and continuing until her termination, Jackson was in no other role and serving in no interim capacities.

Upon the suspension of her supplemental pay on February 14, 2017, Jackson was to receive her annualized salary solely limited to her Administrative Coordinator position, her covered FTE position, in which she was classified throughout the entirety of her employment with the College. (R. p. 916). Dr. Hall specifically wrote, "…You will continue to receive your annualized base pay for the state position to which you were hired." (*Id*.). Jackson was suspended without pay from February 15, 2017 until her termination on May 11, 2017.

The second key piece of evidence is the termination letter dated May 11, 2017. (R. p. 703). The termination of employment uses the phrase "in your role as Administrative Coordinator I" in

[3] The procedural requirements have to be satisfied before the State OHR even refers the appeal to the State Employee Grievance Committee.

the second paragraph of the termination notice and it expressly informs Jackson of her grievance rights to appeal. (*Id*.).

In addition, when following through the grievance process, repetitively over the next several months, every official document issued by Respondent's officials reiterated Jackson's grievance appeal rights and steps to take to appeal under the Act. Many of these letters were generated by the State Tech System President, Dr. Tim Hardee, as well as the Vice President of HR, Kandy Peacock, and Charles Boykin, Respondent's legal counsel. (See, for example, R. pp. 706, 709, 710, and 715). There can be no justification to change the fact that every executive official at the highest level of both the College and SCTCS affirmed that Jackson was an administrative coordinator and an FTE employee with grievance rights under the Act.

3. The ALC was correct in finding that Respondent was not limited by the representations in her Grievance Appeal Form.

Appellant argues that Respondent was bound by her identification as an "Interim Dean" on her Grievance Appeal Form. In its Petition for Rehearing, SCTCS argues that the case of *Fisher v. South Carolina Department of Health and Environmental Control*, 309 S.C. 10, 419 S.E.2d 794 (Ct. App. 1992), is particularly instructive and was not addressed by this Court. In *Fisher*, "[t]he sole question for our determination is whether Fisher is entitled to an employee grievance hearing under the South Carolina Employee Grievance Procedure Act." *Fisher*, 309 S.C. at 12, 419 S.E.2d at 795. The facts of *Fisher* are not analogous to the case at hand. *Id*. In *Fisher*, the employee at issue admitted that she had probationary status when she filed for a grievance hearing. *Id.* The only dispositive issue before the *Fisher* Court was whether a probationary employee was entitled to a grievance hearing. *Id.* There is no such debate in this case. The record on appeal reflects that all parties agreed that if Jackson was an administrative coordinator at the time her termination, she was entitled to a grievance hearing.

Appellant also cites to *Towles v. United Healthcare Corp.* in support of its position. Again, the facts of *Towles* are not analogous. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). In *Towles*, the plaintiff attempted to contradict a fact alleged in his complaint related to who his employer was, with an after-the-fact affidavit. The *Towles* court dealt with this issue in the first footnote. The dispositive issue in *Towles* was whether the plaintiff was compelled to arbitrate by way of an employee handbook.

Even if Jackson was bound to her Grievance Appeal Form, such a situation would not resolve this case in SCTCS's favor. Performing *Interim* Dean duties is a factual allegation of Jackson's prior day-to-day work, not a legal conclusion as to whether she was a covered employee under the Act. The facts of this case overwhelmingly demonstrate that SCTCS itself acknowledged the fact that Jackson's placement into the Interim Dean position was temporary. SCTCS has repeatedly acknowledged, through its management and counsel, that Jackson continued to be classified as an Administrative Coordinator, a position entitled to grievance rights under the Act. Thus, the ALC committed no reversible error.

4. Appellant did not properly preserve the issues raised in its 2018 Appeal.

SCTCS argues the ALC erred by refusing to hear the merits of its appeal. SCTCS avers it had a valid reason to terminate Jackson and substantial evidence in the record supported its decision. It contends it did not waive its arguments because the notice of appeal incorporated the prior 2018 appeal and the ALC disregarded precedent in *Bobo v. Marshane Corporation*, 302 S.C. 86, 394 S.E.2d 2 (Ct. App. 1990). This Court analyzed these arguments and disagreed with SCTCS.

It is the practice of this jurisdiction that a Court does not retain jurisdiction after a remand unless jurisdiction is specifically reserved. *See, Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494,

530 S.E.2d 127, 128 (2000) ("Under Rule 59(e), SCRCP, the trial judge has only ten days from entry of judgment to alter or amend an earlier order on his own initiative absent a 'reservation' of jurisdiction in the form order."). No such reservation took place in this case.

The SCTCS mistakenly cites to *Bobo v. Marshane Corp.* 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990). *Bobo* is not persuasive in this case. *Id.* As the ALC identified, and this Court agreed, *Bobo* was a factually distinct case dealing with the application of workers' compensation law and is not applicable precedent for this case.

SCTCS claims to have made a motion to consolidate the two appeals. As the ALC points out, however, "[Appellant] never made a formal motion to consolidate the case." SCTCS points to one sentence in its notice of appeal as evidence of a motion to consolidate. One sentence in a document, which was not a motion, cannot constitute a motion upon which the ALC may rule. SCTCS did not timely follow up on its one-sentence request. SCTCS claims that it did not know whether to raise the issues from the 2018 appeal in this case. As the ALC notes:

> If [Appellant] was not sure what issues it needed to raise again, if any, it would seem prudent to have raised any and all possible issues, or filed a formal motion, rather than to have relied on a one-sentence request in a Notice of Appeal. To the extent [Appellant] was prejudiced, the prejudice resulted from its own actions, or rather, inactions.

(R. p. 21).

SCTCS also points to the fact that, in the alternative to a motion to consolidate, it requested (again with only one sentence) to treat the appeals as already consolidated, and to file a supplemental brief. The ALC identifies,

> Regardless, in SCTCS's Notice of Appeal, as part of its explanation of its Motion, SCTCS asked that it be allowed to submit a supplemental brief "on the issues identified herein." The issues SCTCS identified were the issues it wanted to raise with regard to the Committee's decision on Remand, which it then proceeded to raise in its Appellant's Brief filed on July 27, 2020. Therefore, SCTCS was not

> prejudiced by this Court's failure to rule on its Motion because SCTCS raised the issues it sought permission to raise in a supplemental brief in its Appellant's Brief and those issues were thoroughly considered by this Court and ruled upon in its September 2020 order.

(R. p. 22). Here, no specific limiting instructions were included in the ALC's order of remand that could imply the ALC sought to retain jurisdiction. Thus, SCTCS failed to preserve the additional issues raised in its 2018 appeal to the ALC.

SCTCS also makes several arguments regarding the merits of its appeal. Because the underlying merits of SCTCS's appeal are unpreserved and the ALC refused to address these arguments, this Court appropriately found SCTCS's arguments are not properly before this Court for review. See *Brown v. S.C. Dep't of Health & Env't Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the AL[C] are not preserved for appellate consideration."). Assuming, without conceding, that SCTCS may properly argue the merits of the Committee's underlying determination the Jackson was wrongfully terminated, the Committee's decision is supported by substantial evidence in the record. The evidence has continuously shown that Jackson was a state employee with grievance rights and SCTCS prejudiced Jackson's substantial rights and that she met one or more of the required elements for the reversal of the termination of her employment. The Committee's decision passes all permissible scrutiny under S.C. Code Ann. § 1-23-380(5).

CONCLUSION

For all these reasons, and those previously briefed before the Court, Appellant's Petition for Rehearing should be denied, and the decision of the South Carolina Court of Appeals should stand as issued.

Respectfully Submitted,

CROMER BABB & PORTER, LLC

BY: s/Shannon M. Polvi

Shannon M. Polvi (#101837)
1418 Laurel Street, Suite A (29201)
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Facsimile 803-799-9533
Attorney for Respondent Carla Jackson

Columbia, South Carolina
June 24, 2024

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CB&P CROMER BABB & PORTER

Fearless Advocates. Fierce Challengers.

June 24, 2024

VIA EMAIL ONLY

The Honorable Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201
ctappfilings@sccourts.org

Re: South Carolina Technical College System v. Carla Jackson
Appellate Case No.: 2020-001689

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as Amended April 24, 2024), please find enclosed for filing Respondent's Return to Appellant's Petition for Rehearing the above referenced matter. In accordance with Section (d)(1) of this same Order, I am hereby serving copies on all counsel of record.

Sincerely,

Shannon Polvi
Counsel for Respondent Carla Jackson

cc: Andrew F. Lindemann, Esq. (via email only)
Warren V. Ganjehsani, Esq. (via email only)

MAILING ADDRESS PO BOX 11675, COLUMBIA, SC 29211
TELEPHONE 803.799.9530 FAX 803.799.9533
OFFICES IN COLUMBIA AND ROCK HILL