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May 06 2024

SC Court of Appeals

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.

PETITION FOR REHEARING

The Respondents petition the South Carolina Court of Appeals for a rehearing of the Court’s Opinion dated April 3, 2024, reversing the Circuit Court Order in this case.

The grounds for the Respondents’ petition for rehearing and the specific relief requested are addressed in the supporting memorandum filed herewith and incorporated herein, and is also based on all matters of record and the matters on file in this Court Rule 221(a), SCACR, Rule 240, SCACR, and other rules of court.

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Introduction

The Respondents Archie Patterson and Tami Bollerman petition this court for a rehearing and submit this memorandum in support of their petition.

The ever increasing reach of the so-called Fourth Branch of government presents a threat to our civil society, especially the principle of separation of powers. If the executive branch, through unelected bureaucrats and seemingly countless administrative agencies, is going to set policies having the force of law, **the judicial branch must insist on clear delegation from the legislative branch and 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) (emphasis added)

Without first promulgating regulations as mandated by S.C. Code Ann. Sections 41-27-510, 41-29-110, and 41-35-610, DEW implemented changes to its work search verification procedure to require one job search/contact to be made online via South Carolina Works Online (SCWOS). This requirement is set forth in Procedural Transmittal letter 1267-3. The letter states “Warnings are NOT acceptable for SCWOS work searches.... There may be a few extraordinary circumstances, such as a court order prohibiting a claimant from using the internet, or for a claimant whose first language is not English... where a claimant may be justified failing to make job searches through SCWOS....”

This Court did not address DEW’s failure to comply with the APA because it concluded Respondents were required to exhaust administrative remedies. In reaching its decision, the Court overlooked or misapprehended that DEW’s administrative process was not designed to redress this issue involving DEW’s authority. Exhaustion is not required since DEW acted outside its authority making the online work search policy null and void and of no effect. Submitting to the administrative process would be futile. These matters are discussed herein.

1. **The Court’s failed to consider the circuit Court’s ruling that this declaratory judgment action was not an appeal from a determination or redetermination of claimant’s benefits and therefore not subject to DEW’s administrative procedures.**

This Court found Respondents were required to exhaust administrative remedies by appealing a determination of DEW. The Court pointed to S.C. Code Ann. Section 41-35-690, which provides the procedure provided in this chapter for appeals from a determination or redetermination to the appellate tribunal, then to the appellate panel, and afterwards the administrative law court is the sole and exclusive appeal procedure. However, as noted by the circuit court, this is not an appeal of a determination or redetermination. It is a declaratory

judgment action seeking a judgment that DEW was required to promulgate regulations before implementing the online work search requirement.

Moreover, a party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body. Charleston Trident Homebuilders v. Town Council of Summerville, 369 S.C. 498, 632 S.E. 2d 864 (2006) In *Charleston Trident*, the court found the appellant challenging the town ordinance impact fee was not required to exhaust administrative remedies when the administrative relief provided for in the ordinance did not extend to the right to challenge the ordinance itself. Respondents challenge more than whether they were entitled to benefits because they were able, available, and actively seeking work. They seek determination that DEW changed the rules of receiving benefits without going through the process of establishing a regulation. Further, the notice telling Claimants why their benefits were stopped and requiring them to appear at DEW did not tell them it was to issue a determination regarding whether they had complied with the online work search requirement in violation of S.C. Const. Art. I, Section 22.

“The basic purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reasons for [denial of benefits], would not assist the court in this instance. The alleged wrong is not one which the administrative process was designed to redress.” Thomas Sand Company v. Colonial Pipeline Company. 349 S.C. 402, 413, 563 S.E.2d 109, 115 (2002) Nothing in DEW’s administrative process is designed to redress this wrong. On the issue presented in this case – whether DEW had the authority to implement the online work search requirement without first promulgating regulations – there simply was no administrative remedy to exhaust. Even if there was, there would be no purpose in asking DEW to confirm through the administrative process what it had already decided incorrectly – that it had the

authority to implement the online search requirement without promulgating regulations. This question is a question of law for the court to decide.

This action challenges more than what is contained in DEW's determination. It challenges the authority and structural process of DEW's implementation of the online work search requirement. Respondents seek a declaration that the online work search constitutes a binding norm and is therefore invalid. This issue is beyond the normal purview of the appellate tribunal and appellate panel. The issue is one of law, and the administrative process is not needed to determine facts. See *Ex. parte Allstate*, infra. Romi Robinson, the chief judge of the appellate tribunal testified the tribunal would not have considered the issue. SROA 86-87. Therefore, this was not an appeal from a determination triggering DEW's administrative procedures.

2. The Court failed to consider the effect of DEW acting out of its authority, which nullifies the online work search policy.

The circuit court found DEW was required by statute to promulgate regulations to implement the online work search requirement, and that its policy was a binding norm. Citing *Responsible Economic Development*, infra, *Brown*, infra. and *Ex parte Allstate*, infra., the circuit court also found DEW was without authority to implement the online work search requirement and its action was null and void.

In *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 641 S.E.2s 425 (2007), the Supreme Court upheld an order of DHEC finding an applicant for a storm water permit pursuant to the regulations pertaining to the Stormwater Management Act did not also have to comply with the regulations pertaining to the Pollution Control Act. The court noted that the two regulations had different

enabling acts which did not reference each other, and that DHEC in issuing a Stormwater Permit would not have the authority to require compliance with the Pollution Control Act. Citing similar language as Captain's Quarters Motor Inn, Inc v. South Carolina Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 12,13 (1991), the court stated: “[a]s creatures of statute, regulatory bodies, like DHEC have only the authority granted them by the legislature (internal citations omitted) Any action taken outside that statutory and regulatory authority is **null and void**”. Responsible Economic Development. at 371 S.C. 553, 614 S.E.2d 428. (emphasis added)

In Brown v. James, 389 S.C.41, 697 S.E.604 (Ct. App. 2010) the court found that Brown did not have to exhaust administrative remedies. Brown involved a teacher whose contract with her employer was not renewed. She timely asked for administrative review. (However, before the time for review had expired, the board terminated her contract.) The district asked to extend the time for a review hearing and Brown agreed. Then, the district attempted to schedule her deposition before holding a hearing. When Brown refused to be deposed, the board took the position that Brown was refusing to cooperate, and her noncooperation amounted to a voluntary withdrawal of her request for a hearing. Brown filed suit. The circuit court dismissed the case for failing to exhaust administrative remedies. The Court of Appeals reversed. It found that Brown did attempt to seek administrative relief but was thwarted by the school board's unauthorized dismissal of Brown's request for hearing and the fact that it dismissed the case before the time to request a hearing expired. It then found, even if Brown failed to exhaust administrative remedies, exhaustion was not required. The court noted two exceptions to exhaustion, futility and the agency acting outside its authority. “Another exception to the exhaustion requirement is recognized when an agency has acted outside of its authority” id. at 389 S.C. 55, 697 S.E.2d 612. As to futility, the court found Brown was not required to

participate in the administrative hearing process when the district had already terminated her. It then found that Section 59-25-520 of the Employment and Dismissal Act **does not vest the Board with authority** to dismiss Brown's request for a hearing based on her nonparticipation in a deposition.” The wrongful dismissal supports *Brown's* conclusion that administrative remedies were not required to be exhausted, and it provided an additional basis to excuse exhaustion.

In Ex parte Allstate, 248 S.C. 550, 151 S.E.2d 550 (1966), the Supreme Court found the South Carolina Insurance Commissioner improperly commenced an investigation into Allstate and other insurance companies for running newspaper ads opposing legislation pending in the General Assembly. The Insurance Commissioner argued the case was not properly before the courts because Allstate had not exhausted administrative remedies. The Commissioner asserted that Allstate could have let the investigation run its course and then exercised its statutorily created rights of appeal from the conclusion of the investigation. *Id* at 248 S.C. 566, 151 S.E.2d 854. The court concluded exhaustion was not required, since the issue of whether the Commissioner had the authority to conduct the investigation was one of law. The Court ultimately concluded that the Commissioner **did not have the authority to commence** the investigation. *Id.* at 248 S.C. 567, 151 S.E.2d 855.

In *Charleston Television Inc. v. South Carolina Budget and Control Board, et.al.*, 301 S.C. 468, 392 S.E.2d 671 (1990) the Supreme Court declared **null and void** a lease which had been awarded pursuant to a regulation that did not comport with the statute mandating it. (The underlying statute required the regulation to have a provision for competitive bidding.)

In *Captain's Quarters Motor Inn, Inc v. South Carolina Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 12,13 (1991), the Supreme Court found the Coastal Council's damage assessment test to be invalid since it was not promulgated by regulation as required by statute.

The damage assessment test was created by the Coastal Council in response to S.C. Code Ann, 48-39-290 (C) which limited a property owner's ability to rebuild a sea wall damaged by a natural disaster only if it suffered less than 50 % damage. The court noted, "[a]s a creature of statutes, a regulatory body is possessed only of those powers expressly conferred or necessarily implied for it to effectively fulfill the duties for which it is charged." *Id.* at 306 S.C. 490, 413 S.E.2d 13. The damage assessment test was found to be **invalid**, and the property owners were entitled to rebuild.

In *Joseph v. South Carolina Dept. of Labor, Licensing and Regulation*, S.C., S.E.2d (2016) the Supreme Court found a position statement regarding the ability of physical therapist to refer patients to other physical therapist within his/her practice constituted a binding norm. Since the policy set forth in the statement was not promulgated by regulation, the policy was declared **invalid**.

In other cases, the Supreme Court has held actions of an agency outside of its authority to be invalid, null and void, or a nullity. In *Vulcan Materials Co. v. Greenville County Bd. Of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (2000) the court found an order signed by a board chairman and secretary, but not voted on by the board to be a **nullity**, since authority to act had been given to the board as a whole and not to its individual members. In *Hardy v. Francis*, 273 S.C. 677, 259 S.E.115 (1979) the court found the placement of the office of county supervisor on the ballot after the county had adopted the council-administrator form of government was not authorized by law, and the election of a county supervisor was therefore a **nullity**. In *Murphee v. Mottel*, 267 S.C. 80, 226 S.E.2d 36 (1986), the court found the right to hold an election must be based on authority conferred by law and therefore an election called for by a county public service authority to be a **nullity** since it was not the governing body of the county. In *Bazzle v.*

Huff (In re John W. Heaton, Inc.), 319 S.C. 443 462 S.E.2d 273 (1995) the court held since the Workers' Compensation Commission (WCC) lacked the authority to require the submission and approval of attorney's fees before related regulations were promulgated, that action was **null & void**.

In all these cases the court treated the unauthorized administrative acts as if they did not happen. Actions outside the agency's authority are null and void, invalid, and of no effect. In this case, the circuit court found that DEW did not have authority to implement its online work search requirement without first promulgating a regulation. This means the procedures set forth in Procedural Transmittal Letter 1267-3 are null and void and of no effect. DEW did not have authority to stop payment or to require claimants to report to DEW for a hearing. Any determination issued denying benefits for failing to conduct an online work search are null and void and of no effect.

Section 41-35-690 is inapplicable since there is no valid determination from which to appeal, Further, Respondents are not appealing a determination or redetermination of benefits eligibility. Rather, they are challenging DEW's authority to implement the online work search requirement without first promulgating regulations. Their remedy is to seek declaration from the court that DEW was required to promulgate regulations actions were without authority and invalid.

As noted by this Court, Respondents have not challenged the constitutionality of a statute or regulation. However, as found by the circuit court, DEW's failure to promulgate regulations, coupled with its inadequate notice requiring claimants to appear if they wanted to receive future benefits, raises significant constitutional concerns. As noted in *Joseph*, supra, "... [i]f the executive branch, through unelected bureaucrats and seemingly countless administrative

agencies, is going to set policies having the force of law, the judicial branch must insist on clear delegation from the legislative branch and strict compliance with the APA, including submission of administrative policies having the force and effect of law to the legislature for review.” The issue of whether the agency acted outside its authority in creating law without legislative approval is inherently an issue for the courts to resolve-not the agency.

3. This Court did not give proper weight to the Circuit Court’s factual conclusions and misapprehended the futility exception to exhaustion of remedies.

The Circuit Court found that any effort by Respondents to exhaust administrative remedies concerning whether they were required to complete an online job search would have been futile and, as a result, exhaustion was not required. R. p. 86. This Court held that the Circuit Court abused its discretion in reaching that conclusion. Order, p. 13. That holding was in error for two reasons.

First, whether Respondents were required to exhaust administrative remedies was a matter within the discretion of the Circuit Court and that conclusion should only have been reversed upon a finding of abuse of discretion. *Cox v. S.C. Educ. Lottery Comm'n*, 441 S.C. 209, 217, 893 S.E.2d 342, 346 (Ct. App. 2023). An abuse of discretion occurs if the trial court’s ruling is based upon an error of law or when factual conclusions are **without evidentiary support**. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (emphasis added). Here, the Circuit Court found that “any appeal concerning whether [Respondents] were required to complete an online job search would be futile, since by [DEW’s] own admission the hearing officer could not rule on this issue.” R. p. 86. *See also* R. p. 41-42. The Circuit Court based its finding on the testimony of Romi Robinson, the Chief Judge of DEW’s appellate tribunal, that the appellate tribunal would not have considered the issue of whether DEW should have promulgated the online work search requirement by regulation. *Id.* In holding that the Circuit

Court erred in finding futility, this Court looked to different evidence and reached a different factual conclusion. Specifically, this Court looked to statistical data provided by DEW's witness Kevin Cummings concerning the number of administrative appeals which resulted in a benefits disqualification being reversed. This court opined that while the percentage of reversals was not high, it was not so low to support a finding that DEW took a hard and fast position that made an adverse ruling a certainty. April 3, 2024 Order, p. 13-14. In doing so, this Court failed to give appropriate deference to the Circuit Court's fact finding. This Court should only have reversed the Circuit Court if its finding was without evidentiary support. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). Here, that was not the case and the Circuit Court's finding that Respondents were not required to exhaust administrative remedies should stand.

Second, the evidence that this Court considered in determining that exhaustion would not have been futile is not relevant to the question presented here. This Court cited the affidavit of Kevin Cummings who testified that, of the appeals related to the online job search requirement taken between August 2012 and early February 2013, approximately 16% were successful. This Court then held that Respondents were required to exhaust administrative remedies because "DEW might have excused their failures to comply with the requirements and issued their benefits for the applicable week, which would have dispensed with their claims and would not have required a resolution of the question of DEW's authority." Order, p. 13-14. Whether an individual could be excused from the online job search requirement is not the issue presented in this case. Rather, Respondents challenge DEW's authority to implement the online job search requirement at all without first promulgating regulations. Mr. Cummings' testimony is not relevant to determining whether Respondents were required to exhaust administrative remedies with respect to that question because it does not establish that that question was ever raised or

passed upon in DEW's administrative process. By contrast, the evidence that the Circuit Court relied upon, the testimony of Romi Robertson, does tend to establish that DEW would not have considered the question that Respondents present here. Thus, this Court erred both by substituting its view of the evidence for that of the Circuit Court, and by relying upon evidence which is not relevant to the issue presented here.

The distinction between the issue Respondents present (whether DEW had the authority to implement the online job search without promulgating regulations) and the issue Mr. Cummings' testimony relates to (whether DEW might have excused an individual's failure to conduct an online work search) is not merely semantic. The 16% of claimants who were successful in administrative appeals related to the online work search requirement may have received benefits for the weeks they were disqualified, but they remained subject to the online job search requirement that Respondents contend, and the Circuit Court found, is unlawful. Nothing prevented DEW from disqualifying them again for the same reason. This Court's holding would leave no path to challenge unlawful agency action when there is the slightest possibility that the agency would reverse course in an individual case even while it continued with its unlawful action.

Conclusion

For the reasons set forth in the Petition and Memorandum, 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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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing and Memorandum In Support of
Petition for Rehearing on the following counsel of record by email, a copy of which is attached,
on May 6, 2024.

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May 6, 2024



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Lorenda Robinson, et al. vs. South Carolina Department of Employment and Workforce; Appellate Case No. 2019-000599

1 message

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Mon, May 6, 2024 at 1:18 PM

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All:

Pursuant to In Re Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024, App. No. 2020-000447, dated April 24, 2024), attached for service upon you via email is the Petition for Rehearing and the Memorandum in Support of Petition for Rehearing, as well as a Proof of Service, being filed in the Court of Appeals this afternoon.

Should you have any questions or concerns, please do not hesitate to contact me. Thanks and have a great afternoon.

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646K

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May 06 2024

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May 6, 2024

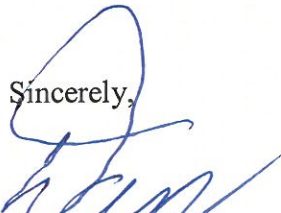
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Re: Lorenda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman vs. SC Department
of Employment and Workforce
Civil Action Number: 2013-CP-06-0059
Appellate Case No.: 2019-000599

Dear Ms. Kitchings:

In connection with the above entitled action, you will find attached the Petition for Rehearing along with a Memorandum in Support of Petition for Rehearing and the Proof of Service.

By copy of this letter, I will be sending the required filing fee of \$50.00 to your office. Please let me know if it is not timely received.

Sincerely,

Daniel W. Williams

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Enc.

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The Hon. Jenny Abbott Kitchings

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