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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Lower Court Case No. 23-ALJ-30-0335-CC

South Carolina Department of Consumer Affairs, Respondent,

v.

Lavisha Green, Appellant.

Appellate Case No. 2024-001652

FINAL BRIEF OF APPELLANT

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Whether the fine imposed by the Department of Consumer Affairs was unconstitutionally excessive in violation of the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution?

STATEMENT OF THE CASE

This is an appeal from an order by the ALJ concluding that it lacked the authority to reduce a fine imposed against Lavisha Green[1] by the Department of Consumer Affairs.

The Department imposed a $9,000 fine against Fab Seven, LLC for failure to timely submit its mortgage log for the 2022 calendar year. On August 8, 2023, Lavisha Green, the sole member of Fab Seven, requested a contested case hearing in the ALC. A hearing was held on November 14, 2023, before the Honorable S. Phillip Lenski. R. 1. The Department was represented by Zachary Passmore and James Copeland. Ms. Green represented herself. R. 1.

After the hearing the ALJ took the matter under advisement and ultimately upheld the Department's decision to impose the $9,000 fine.

[1] The fine imposed by the Department in this case was not against Lavisha Green personally but rather Fab Seven, LLC her mortgage broker business which is a registered LLC in South Carolina. However, the case was captioned in the ALC as "South Carolina Department of Consumer Affairs, Petitioner, v. Lavisha Green, Respondent" and thus proceeded as if the fine were imposed against her personally.

STANDARD OF REVIEW

Section 1-23-610 (B) of the South Carolina Code provides the standard of review in appeals from the Administrative Law Court:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals 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.

STATEMENT OF FACTS

Lavisha Green's company, Fab Seven, LLC, obtained its mortgage broker license in South Carolina on July 1, 2021, and has continuously been licensed since then. R. 14, ll. 7 – 14.

Kerri Hawley testified on behalf of the Department. Hawley is a licensing attorney for all the Department's regulated industries. R. 13, ll. 2 – 18. Mortgage brokers are one of those regulated industries and part of Hawley's job is to assist mortgage brokers in complying with their regulations. R. 13, l. 19 – 14, l. 2.

Hawley gave a basic overview of the mortgage broker licensing process in her testimony. She explained that mortgage broker licensing is done through a national system called NMLS (Nationwide Multistate Licensing System). R. 14, ll. 15 – 22. Applicants who wish to obtain a license must first apply to NMLS and the Department reviews the applications from there. Hawley testified that "all communication typically regarding a license are through NMLS." R. 14, l. 23 – 15, l. 4.

Licensees must submit two annual reports, one of which is a "mortgage log." R. 15, ll. 5 – 11. Hawley testified that the Department's website provides licensees with information and instructions about how to file their mortgage log, along with the deadlines and penalties associated with late or incomplete submissions. R. 16, l. 17 – 17, l. 9; R. 49 – 53. Licensees also must complete training prior to obtaining a license which includes information about the requirement to submit the mortgage log. R. 19, l. 21 – 23, l. 1; R. 53 – 61. Ms. Green completed the training requirements prior to obtaining her license in 2021. R. 25, ll. 14 – 18.

Hawley also testified that the Department sends out "reminder emails" to all licensed mortgage brokers in South Carolina beginning in January of each year. One email is sent in January, February, and March reminding licensees of the deadline. Then a fourth email is sent the

first week of April to any licensee who has missed the deadline. R. 27, ll. 17 – 23. Hawley said that she obtains the email addresses of licensees through the NMLS service and the email addresses on file with the NMLS are submitted by the licensees themselves. R. 36, ll. 1 – 13.

The Department sent its three reminder emails to "realtorlavishagreen@gmail.com" in an attempt to notify Ms. Green of her obligation to file a mortgage log no later than March 31, 2023. These emails were sent on January 23, February 15, and March 14 of 2023. R. 62 – 69. The email on March 14 also included a notice that the failure to submit the mortgage log would result in a fine of $100 per day that it was late. R. 68 – 69. On April 6, 2023, the Department sent an email to "realtorlavishagreen@gmail.com" advising that it had not received Fab Seven's mortgage log and that the fine for failing to timely file was $100 per day. R. 70 – 71. On June 30, 2023, the Department sent an email to this same email address stating that it had imposed a $9,000 fine against Fab Seven for its failure to file its mortgage log. R. 2. Hawley testified that she never received any notification that the emails were undeliverable. R. 31, ll. 20 – 24. Ms. Green did submit her mortgage logs on time in 2022 for the reporting year of 2021, which was the first year she was required to report. R. 31, l. 25 – 32, l. 2.

Ms. Green testified at the hearing that the continuing education information provided was confusing. R. 38, ll. 12 – 14. She further testified that she had two points of contact with the Department, and she would normally respond immediately when she received information from one of them regarding her license. R. 38, ll. 15 – 23. Ms. Green testified that her email address had changed and that she did not receive the notifications regarding the mortgage log until the Department had already assessed the $9,000 fine. R. 41, l. 2 – 42, l. 24. When Ms. Green saw the email regarding the $9,000 fine, she immediately reached out to the Department to see if it could be reduced because it was unreasonable and unfair. R. 39, ll. 3 – 25; R. 72 – 76.

Ms. Green argued to the ALJ that the fine imposed was unreasonable and requested the fine to be reduced. R. 45, l. 16 – 46, l. 8. The ALJ asked the Department if it believed that the Court had the authority to reduce the fine. R. 46, l. 10 – 47, l. 5. The Department responded that it did not believe the statute "gives us the discretion to lower [the] fine without a higher authority." R. 47, ll. 6 – 14. The ALJ took the matter under advisement.

In its final order the ALJ upheld the Department's decision to impose a $9,000 fine against Fab Seven, LLC for failure to timely submit its mortgage log. The ALJ pointed out that the statute which provides for the $100 per day fine for late mortgage log submissions states that licensees "shall pay a fine of one hundred dollars a day for late or incomplete data submissions." R. 4.

The ALJ thus concluded: "Though the court is inclined to agree that the monetary penalty imposed in this case for a new licensee with no prior disciplinary infractions seems disproportionate to [Ms. Green's] conduct in this case . . . the court regrettably finds that it lacks discretion to reduce the penalty." R. 4. The ALJ further concluded that "it is clear that [Ms. Green's] omission in this case was due in large part to her inexperience, the court is without discretion to reduce or alter the penalty in any way given the statute's mandatory language." R. 5. The ALJ explicitly rejected the Department's argument that it was unable to reduce the fine based on the statute's mandatory language:

> The Department took the position that it was just enforcing the statute as written and had no authority to deviate from the one hundred dollar ($100) per day penalty imposed by the statute. While the court's ability to offer leniency in this case is foreclosed by the mandatory statutory language regarding the penalty, the court rejects the idea that the Department—as the licensing authority in this matter—could not stipulate to a reduced number of days as part of settlement negotiations with [Ms. Green], suspend some portion of the penalty, or offer a long-term payment option to her. Given the facts of this case, [Ms. Green's] neophyte status and her otherwise clean record, the court encourages the Department to work with [Ms.

> Green] so as not to create an unsurmountable financial barrier to her returning to practice as a mortgage broker.

R. 5 fn. 2.

ARGUMENT

1.

The ALJ erred in concluding that it lacked the authority to reduce the fine imposed by the Department of Consumer Affairs because South Carolina law explicitly authorizes ALJs to find a statute unconstitutional as applied to the parties before it.

Section 40-58-65(A) of the South Carolina Code requires licensed mortgage brokers in South Carolina to submit a mortgage log by March 31st of each year. The statute further provides that the "licensee shall pay a fine of one hundred dollars a day for late or incomplete data submissions." S.C. Code § 40-58-65(A).

In its final order upholding the $9,000 fine imposed against Ms. Green by the Department, the ALJ concluded that because the statute includes the word "shall," the ALJ "is without authority to alter the mandatory statutory penalty of one hundred dollars ($100) a day for late submissions." The ALJ noted that its conclusion was "regrettabl[e]" because it was "inclined to agree that the monetary penalty imposed in this case for a new licensee with no prior disciplinary infractions seems disproportionate to [Ms. Green's] conduct in this case." R. 4.

The ALJ erred in concluding that it did not have the authority to reduce the fine. The argument made by Ms. Green throughout this case was that the fine was excessive in comparison to her conduct. The ALJ appears to have agreed with Ms. Green on that point but nonetheless concluded that it lacked the authority to reduce the fine because of the statute's mandatory language. The ALJ did have the authority to reduce the fine and therefore its decision was "affected by [an] error of law." *See* S.C. Code § 1-23-610(B)(d) (allowing this Court to reverse the ALJ when its decision is based on an error of law).

While Ms. Green never uttered the phrase "unconstitutional as applied," that is the unmistakable import of her arguments to the ALJ. Ms. Green did not ask the ALJ to strike down the entire statute as unconstitutional, but rather asked the ALJ to find that the fine imposed against her was excessive, i.e., that it violated her right to be free from excessive fines under the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution. *See State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010) ("Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review"); *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (even though the defendant did not use the phrase "corpus delicti" in his request for a directed verdict, the issue was preserved because it was clear from the record that the motion was made on that ground).

"While it is true that ALJs cannot rule on a facial challenge to the constitutionality of a regulation or statute, ALJs can rule on whether a law as applied violates constitutional rights." *Dorman v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002). The difference between a facial constitutional challenge and an as-applied constitutional challenge is significant. In a facial constitutional challenge, the challenger asserts that there is no set of circumstances in which the statute is constitutional. In other words, a facial challenge is one that claims the statute violates the constitution in all its conceivable applications and must be struck down in its entirety. An as-applied constitutional challenge on the other hand does not challenge the constitutional validity of the statue itself, but instead involves a claim that when the statute is applied to a particular set of facts, it results in a violation of that person's constitutional rights. *See Doe v. State*, 421 S.C. 490, 502-03, 808 S.E.2d 807, 813 (2017) (explaining the difference between facial and as-applied constitutional challenges to statutes).

In *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), our Supreme Court clarified the power of an ALJ to adjudicate claims regarding the constitutionality of a statute. Because the ALC is part of the executive branch of government, the Court noted that ALJs do not have the power to determine the *facial* constitutional validity of a statute. However, the Court in *Travelscape* held that "ALCs are empowered to hear as applied challenges to statutes and regulations." *Id*. at 109, 705 S.E.2d at 39. The Court explained: "ALCs are better suited for making the factual determinations necessary for an as applied challenge, and finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision." *Id*.

Ms. Green asked the ALJ to show her leniency in the substantial fine assessed against her by the Department, arguing that the fine was excessive and unreasonable as compared to her conduct. R. 45, l. 16 – 46, l. 8. A clear request to the ALJ that the statute was unconstitutional as applied to her. The ALJ agreed with Ms. Green that the fine was excessive in light of all the circumstances presented to it and should have found that the statute was unconstitutional as applied to her. Instead, the ALJ erred in holding that it lacked the authority to hold that a statute is unconstitutional as applied to a particular party before it. Notwithstanding the mandatory language of section 40-58-65(A), an ALJ always has the power to conclude that a particular statute as applied violates a party's constitutional rights. *See Travelscape*, 391 S.C. 89, 705 S.E.2d 28.

The ALJ erred in concluding it lacked authority to rule on Ms. Green's as-applied constitutional challenge and this error resulted in Ms. Green's substantive constitutional rights being prejudiced by imposition of the excessive fine. This Court should reverse the ALJ's final order under section 1-23-610(B)(d) because the ALJ's final order was affected by an error of law.

2.

The fine imposed by the Department of Consumer Affairs was unconstitutionally excessive in violation of the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution.

The United States Constitution and the South Carolina Constitution both protect people from the imposition of "excessive fines." U.S. Const. amend. XVIII ("Excessive bail shall not be required, nor excessive fines imposed"); S.C. Const. art. I, § 15 ("Excessive bail shall not be required, nor shall excessive fines be imposed"). The Excessive Fines Clause of the U.S. Constitution was incorporated against the States in *Timbs v. Indiana*, 586 U.S. 146, 149 (2019). Additionally, the Excessive Fines Clause applies to civil fines—at least when the fine is imposed as punishment. *See Hudson v. United States*, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines, including forfeitures").

In *United States v. Bajakajian*, 524 U.S. 321, 324 (1998), the Supreme Court of the United States held that the forfeiture of $357,144 violated the Excessive Fines Clause of the Eighth Amendment because it was "grossly disproportional to the gravity of [the] offense" involved in that case: failing to report the transporting of greater than $10,000 outside of the United States.[2] In *Bajakajian*, the defendant was at the Los Angeles Airport waiting to board a flight to Italy. He was approached by a customs inspector who advised him that he was required to report all money in excess of $10,000. Bajakajian told the inspector that he had only $8,000 and his wife had $7,000. However, upon a search of his bags, the inspectors found $357,144. *Id*.

[2] Congress later amended the statute at issue in *Bajakajian* in an attempt to supersede the Court's decision by making the act of smuggling cash a crime instead of the failure to report the cash. *See United States v. Jose*, 499 F.3d 105 (1st Cir. 2007) (detailing the legislative history subsequent to *Bajakajian*). The amendment had no bearing on the Court's central holding that fines are unconstitutionally excessive if they are grossly disproportionate to the offense conduct.

Bajakajian pleaded guilty to failing to report the money but challenged the forfeiture of the full amount. *Id*. at 325. The District Court found that the entire amount was subject to forfeiture. However, the Court only ordered Bajakajian to forfeit $15,000 because the forfeiture of the full amount would have been "extraordinarily harsh" and "grossly disproportionate to the offense in question." *Id*. at 325-26.

The Supreme Court in *Bajakajian* noted that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id*. at 334. The Court then adopted the following standard for determining whether a fine violates the Excessive Fines Clause of the Eighth Amendment: "If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Id.* at 336. Applying this standard to Bajakajian's conduct the Court found that the forfeiture of the full $357,144 was unconstitutionally excessive because the conduct at issue involved a reporting offense which was unrelated to any other illegal activity, and the harm caused by the failure to report was minimal. *Id*. at 336-37.

In *State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharm.*, 414 S.C. 33, 777 S.E.2d 176 (2015), our Supreme Court considered whether a $327 million civil penalty imposed against a pharmaceutical company for violating the South Carolina Unfair Trade Practices Act was unconstitutionally excessive. The Court adopted the standard articulated in *Bajakajian* noting that it would only find a violation of the Excessive Fines Clause if the penalty was "grossly disproportional to the gravity of a defendant's offense." *Ortho-Mcneil-Janssen Pharm.*, 414 S.C. at 88, 777 S.E.2d at 205. Because the Court had already ruled that the $327 million penalty be remitted to $124 million, it analyzed the constitutional question based on the reduced fine. The

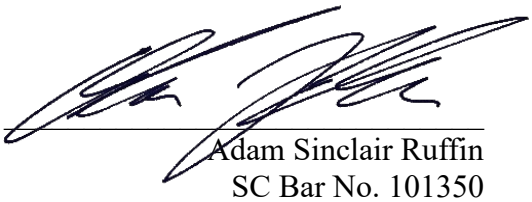
Court concluded that the reduced amount was not unconstitutionally excessive because it "[bore] a rational relationship to the gravity of Janssen's conduct in perpetuating a marketing scheme in South Carolina designed to be unfair and deceptive under our law." *Id*.

The ALJ acknowledged that the penalty imposed by the Department was disproportionate to Ms. Green's conduct. The ALJ stated in its final order that it was "inclined to agree that the monetary penalty imposed in this case for a new licensee with no prior disciplinary infractions seems disproportionate to [Ms. Green's] conduct in this case." R. 4. Ms. Green was only in her second year in the mortgage broker business and had no prior violations. While she submitted her mortgage log on time the previous year, she was in regular contact with the Department because she was receiving their reminder emails regarding the mortgage log deadline. Having changed her email address, she did not receive the Department's emails regarding the 2022 mortgage log deadline until the Department had already imposed a $9,000 fine against her for being 90 days late.

Respectfully, $9,000 is a grossly disproportionate penalty for not updating an email address. It is also unclear from the record in this case what the rational relationship is between the failure to timely file a mortgage log and the fine imposed. And it's unclear from the record what harm, if any, befell the Department as a result of Ms. Green's late filing of her mortgage log. Under these circumstances, this Court should hold the $9,000 fine imposed against Ms. Green was grossly disproportionate to her conduct and therefore unconstitutionally excessive in violation of both the Eighth Amendment to the U.S. Constitution and Article I, Section 15 of the South Carolina Constitution. This matter should be remanded to the ALJ to consider in the first instance what the penalty should be reduced to.

CONCLUSION

By reason of the foregoing arguments this Court should reverse the ALJ's finding that it lacked the authority to consider an as-applied constitutional challenge to the $9,000 fine imposed on Ms. Green, hold that the fine was unconstitutionally excessive because it was grossly disproportionate to Ms. Green's conduct, and remand this case to the ALJ for a determination as to how much the fine should be reduced.



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This 18th day of April 2025.