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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Samuel L. Johnson, Administrative Law Court Judge

Appellate Case No. 2025-002574
Case No. 24-ALJ-04-0156-AP

Luther B. Marcus, #218408,

Respondent,

v.

South Carolina Department of Corrections,.....

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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S.C. Code Ann. § 24-3-390.

S.C. Code Ann. § 24-3-430(D).

ARGUMENTS

I. The Respondent improperly raises multiple issues and arguments for the first time on appeal which should not be relied upon even if the Court treats them as additional sustaining grounds.

The Respondent Luther Marcus has filed a Respondent's Brief that presents a number of preservation issues and issues of fundamental fairness. While Marcus was unrepresented before the Administrative Law Court ("ALC"), he certainly was not precluded from retaining counsel and being represented in the proceedings before that Court. However, the appearance of counsel for the first time in the appeals process does not authorize nor justify a total revamping of Marcus' position and arguments. Litigation does not begin anew at the appellate level.

It should not be lost on this Court that, in response to an exhaustion of administrative remedies argument, Marcus' counsel has filed a 41-page brief seeking to litigate numerous issues never raised in the ALC nor decided by Administrative Law Judge Samuel L. Johnson. Notably, these arguments have not been presented as "additional sustaining grounds," nor can they be where the evidentiary record is closed and this Court cannot make factual determinations that were not made below.

Nonetheless, even if they had been presented by Marcus as additional sustaining grounds, this Court should refuse to consider them. In *I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court ruled that "a respondent -- the 'winner' in the lower court -- may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. The Supreme Court further explained that "[t]he appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so,

rely on them or any other reason appearing in the record to affirm the lower court's judgment.” *Id.* Ultimately, however, “[i]t is within the appellate court's discretion whether to address any additional sustaining grounds.” *Id.* Importantly, this Court further cautioned that it is unlikely that an additional sustaining ground which was not raised in the court below would be the basis for the resolution of the case. This Court explained:

While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.

526 S.E.2d at 724.

Marcus’ approach to this appeal only further highlights the fundamental unfairness of a process already marked by the ALC repeatedly raising and addressing arguments that were never raised by Marcus. Indeed, now on appeal, Marcus, through his counsel, places great weight on the two so-called Rule to Show Cause Order that were issued by the ALC to *sua sponte* raise new issues, but what should be clear is that a rule to show cause is not even a proper mechanism for a court to *sua sponte* raise new issues or arguments not actually asserted by the parties. Under South Carolina law, a rule to show cause is a judicial mechanism for bringing a party before the court to ascertain whether that party is subject to contempt or other sanction. There is not a single appellate case in this state allowing a judge to issue a rule to show cause to *sua sponte* raise a defense or legal argument that a litigant himself has not asserted.

The proper adjudication of this appeal should focus on the issues and arguments actually made by the parties before the ALC and should *not* be adjudged based on the ALC’s *sua sponte*

arguments and certainly *not* on new issues and arguments made for the first time on appeal. It bears repeat that our appellate courts have cautioned that “[i]s an error of law for a court to decide a case on a ground not before it.” *City of North Myrtle v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462, 464 (Ct. App. 2004). *See also, Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010) (same).

II. The Administrative Law Court erred in rejecting the Appellant’s exhaustion of administrative remedies defense based on the provisions of Section 12.1 of SCDC Policy ADM-15.13 titled “Inmate Pay” both on the merits and by asserting *sua sponte* arguments not asserted by the Respondent.

Throughout his brief, with his fairly convoluted analyses, Marcus mischaracterizes, confuses, and deflects from the straightforward issue actually raised and litigated in the ALC and on appeal – whether Marcus’ failure to comply with Section 12.1 of SCDC Policy ADM-15.13 titled “Inmate Pay” gives rise to an exhaustion of administrative remedies defense. Of note, Marcus never argues that he complied with Section 12.1. It is undisputed he did not – not once during his entire prison industries employment from 2011 to 2021. Instead, Marcus now argues for the first time on appeal that he was not required to do so because Section 12.1 does not apply to inmates working in the prison industry programs, that Section 12.1 does not apply to a request for back pay, and that Section 12.1 provides no remedy nor an appeals process. He is mistaken as to each point.

As mentioned, Section 12.1 is part of SCDC Policy ADM-15.13 titled “Inmate Pay.” As Marcus points out, that policy covers a myriad of issues related to pay received by inmates for employment within the corrections system. Marcus, however, now contends that SCDC Policy ADM-15.13 has no application to the prison industries programs. To make that argument,

Marcus notes that the statutory basis for the policy is identified as Sections 24-3-40 and 24-1-295, and he describes those statutes as not implicating the prison industries programs. That is not correct. A reading of both statutes reflects references to the prison industries programs.¹ However, more compelling are the multiple references to the prison industries programs throughout SCDC Policy ADM-15.13. It is simply wrong to suggest the “Inmate Pay” policy has no application to Marcus or inmates working in the prison industry programs. Moreover, there is no language in Section 12.1 exempting prison industries workers from the provisions of that section. There is likewise no language in Section 12.1 or elsewhere in the policy which would even imply (as opposed to state directly) that Section 12.1 has no application to prison industries workers. The ALC actually agrees with SCDC on this issue. The ALC wrote that “ADM-15.13 appears to apply to the correction of individualized pay errors for ongoing inmate employment (including payroll errors related to Prison Industries work).” (Order, p. 12). Marcus did not challenge that ruling by way of cross-appeal, and it constitutes the law of the case.

Next, Marcus argues that Section 12.1 does not apply to a request for back pay. In taking that position, Marcus does not point to any argument that he made in the ALC. Instead, he resorts to the ALC’s restrictive definition of the term “payroll error,” which was an argument raised *sua sponte* by the ALC and was not even included in one of the Rule to Show Cause Orders to even give SCDC a chance to address it prior to adjudication. Marcus now claims that argument as his own, which it was not. At any rate, SCDC has already refuted that argument in its opening brief. In a nutshell, the ALC’s definition of “payroll error” (and that of Marcus now

¹ Section 24-3-40 is cross-referenced and adopted in Section 23-3-430(H) and is also cited by the appellate courts in such notable prison industries cases as *Adkins v. South Carolina Dept. of Corrections*, 360 S.C. 413, 602 S.E.2d 51 (2004), and *Torrence v. South Carolina Dept. of Corrections*, 433 S.C. 633, 861 S.E.2d 36 (Ct. App. 2021).

on appeal) is not inclusive of an error in the “pay rate.” However, as SCDC argues in its opening brief, Section 12.1, by its literal terms, covers “adjustments of the pay rate.” Indeed, the use of the term “pay rate” and the indication that the “pay rate will be adjusted to the proper rate amount” clearly demonstrate that Section 12.1 is intended to address precisely the subject matter of Marcus’ claim for back wages. Marcus specifically alleges that he was denied the “proper rate,” that being a “prevailing wage” as required by statute.

Further, Marcus argues that Section 12.1 provides no remedy nor an appeals process, and hence, it cannot be the basis for an administrative remedies defense. That is also incorrect. Marcus argues that the remedy he seeks -- his back pay at a prevailing rate for work allegedly performed from September 16, 2011 to February 14, 2012, and from March 18, 2019 to July 21, 2021 – is not recoverable under the provisions of Section 12.1. However, it is well settled under South Carolina law that the exhaustion of administrative remedies is not excused if the remedy sought is unavailable. In the leading case of *Allen v. South Carolina Alcoholic Beverage Control Commission*, 321 S.C. 188, 467 S.E.2d 450 (Ct. App. 1996), the plaintiff argued that “the difference in the types of relief available under the State Employee Grievance Act and the Whistleblower Act is sufficient to excuse his failure to exhaust his administrative remedies.” 467 S.E.2d at 454. He claimed compensation for his damages which is the remedy available under the Whistleblower Act but not available under the State Employee Grievance Act. This Court rejected that argument and held that “[t]he difference in remedies under the State Employee Grievance Act and the Whistleblower Act does not eliminate the exhaustion requirement.” *Id.* Ultimately, this Court ruled that the plaintiff “was required to exhaust his administrative remedies before the State Employee Grievance Committee prior to seeking additional remedies under the Whistleblower Act.” *Id.*

Allen is controlling on this issue. Section 12.1 does provide a remedy for “back pay” or “additional pay” for two pay periods,² and if the pay rate was in error, then “[t]he pay rate will be adjusted to the proper rate amount for future payrolls.” (Policy). Thus, if Marcus had exhausted his administrative remedies under Section 12.1 at any time from September 16, 2011 to February 14, 2012, or from March 18, 2019 to July 21, 2021, he could have obtained, most importantly, a prospective change in his pay rate to the proper amount (i.e., a prevailing wage as determined to be owed in *Torrence*) and two pay periods of back pay. There is no reason that Marcus could not have challenged his pay rate as far back as 2011, by making the same arguments on which the inmate in *Torrence* later prevailed. Unquestionably, Marcus had remedies available to him under Section 12.1. He simply never took advantage of them nor sought them. And to the extent those remedies did to fully compensate him, they still were remedies he needed to pursue before attempting another avenue for relief, just as this Court in *Allen* makes very clear.

Marcus also suggests that the process under Section 12.1 and a decision by an inmate pay designee would not have been subject to an appeals process. That is also not true. A decision by the inmate pay designee was subject even as far back as 2011 to being the subject of a grievance, and through the SCDC grievance process, Marcus could pursue his grievance rights. Ultimately, if aggrieved by a final agency decision, Marcus could have appealed to the ALC and then on to the appellate courts as necessary.

In sum, Section 12.1 does provide an administrative process whereby Marcus could have received a remedy as far back as 2011, when he began his employment in the prison industries programs. That remedy included prospective relief of making an adjustment in the pay rate as well as a limited amount of back pay. It is undisputed, however, that Marcus did not take

² Note that Section 12.1 uses the terms “back pay” and “additional pay” interchangeably.

advantage of his administrative remedies under Section 12.1, and because of that failure to exhaust administrative remedies, SCDC is correct in concluding that his claim for any additional remedies, specifically back pay, is barred.

As one of many issues raised for the first time on appeal, Marcus attempts to assert a futility exception to the requirement that he exhaust his administrative remedies under Section 12.1. That was not raised in the ALC nor even addressed *sua sponte* by the ALC. It is well settled, nonetheless, that a plaintiff – in this case Marcus -- has the “burden to show the futility exception applied.” *Cox v. South Carolina Education Lottery Commission*, 441 S.C. 209, 893 S.E.2d 342, 348 (Ct. App. 2023). In his attempt to show futility, Marcus first argues that the remedy of full back pay for work performed from September 16, 2011 to February 14, 2012, or from March 18, 2019 to July 21, 2021, was unavailable under Section 12.1. While that may be true depending on when the administrative remedy was first sought, that does not establish any futility as *Allen* shows.³ Marcus also attempts to show futility by suggesting without any evidence that an inmate pay designee cannot make an adjustment of the pay rate to meet the prevailing wage. That is pure supposition and inconsistent with the language in Section 12.1 which allows “an adjust[ment] to the proper rate” to be made. Marcus points to the Automated Request to Staff Member (ARTSM) which he submitted on August 24, 2023. In that ARTSM, Marcus did not explicitly raise any payroll error nor make challenge to his pay rate. In fact, he was not working at that time. Instead, he referenced this Court’s decision in *Torrence* and made a general inquiry about back wages for prior prison industries work that he performed in the past. Consequently, in response to the ARTSM, he was told: “Financial Accounting does not make

³ To reiterate, if Marcus had sought the available administrative remedies under Section 12.1 when first employed in September 2011, by making the arguments on which the inmate in *Torrence* ultimately prevailed, he would have been made whole and never needed any additional process by which to seek further back pay.

this determination. You must submit a grievance for your claim to be researched.” (R. ____). To reiterate, Marcus was not working at that time, and as a result, there was no *current* issue for an inmate pay designee or Financial Accounting to address or correct. That does not make the administrative process and remedies available under Section 12.1 futile or excusable. Those remedies were available to Marcus when he was working, and as indicated, if raised in 2011 or even at any point of his employment through 2021, the administrative process could have provided him a remedy. He never took advantage of that process, as he was required to do.

Nonetheless, it is also important to recognize that futility was never raised by Marcus in the ALC as an exception to the Section 12.1 exhaustion requirement. That was his burden to raise *and prove*. Not surprisingly, Marcus attempts to shift the burden to SCDC, but that should be soundly rejected. In his brief, Marcus writes: “Across two Returns to Show Cause, a brief below, and its brief in this Court, the Department has never identified a single occurrence on which an inmate pay designee determined a prevailing wage or adjusted a rate to meet one, for Marcus or for anyone.” *See*, Respondent’s Brief, p. 22. That is a disingenuous argument. SCDC was never asked to address futility because Marcus never asserted the futility exception, nor did the ALC do his bidding on that issue by raising it *sua sponte*. So, of course, there is no evidence in the ALC record to address a futility exception, and of course, the ALC never addressed a futility exception in its order. That issue cannot now be raised for the first time on appeal.

Finally, Marcus takes the untenable position that administrative remedies may not be subject to time limitations. Although it is undisputed that Marcus never pursued his administrative remedies under Section 12.1 at any time from 2011 to 2021 (the dates of his employment), Marcus contends that administrative remedies under Section 12.1 may not be

subject to time limitations because this Court ruled in *Torrence, supra*, that a fifteen-day filing rule pertaining to grievances per the requirements of Paragraph 13.1 of the SCDC Grievance Policy does not apply to a grievance making a back pay claim. However, it is not only common but it is generally necessary to place time limitations on administrative remedies. As discussed, this Court in *Allen, supra*, found that the plaintiff was required to exhaust his administrative remedies under the State Employee Grievance Act before he could pursue a claim for damages under the Whistleblower Act. Yet, not surprisingly, the State Employee Grievance Act places a fourteen-calendar-day deadline on an employee exercising his/her grievance rights. *See*, S.C. Code Ann. § 8-17-330. There are many other examples in South Carolina statutory law where time limitations are placed on the exercise of administrative remedies. However, missing a deadline or even inaction is not an excuse for failing to exhaust administrative remedies. Therefore, contrary to Marcus' argument, it is not unlawful (or even unusual) that Section 12.1 includes a deadline of fifteen days of the payroll date error to submit a ARTSM challenging the pay issue, including seeking an adjustment to the proper pay rate. Neither this Court nor the Supreme Court have ever addressed whether the fifteen-day deadline to challenge a pay issue in Section 12.1 is enforceable. This is no cogent reason to suggest it is not.

Finally, it appears that Marcus is even challenging SCDC's authority to enact Section 12.1. Section 24-3-390 provides: "The State Department of Corrections shall have power and authority to prepare and promulgate rules and regulations which are necessary to give effect to the provisions of this article with respect to matters of administration and procedure respecting it." S.C. Code Ann. § 24-3-390. Hence, the General Assembly has specifically directed and authorized SCDC to promulgate not only "regulations" but also "rules" governing the administrative process for the governance of the prison industries programs. Marcus, however,

makes a rather non-sensical argument that SCDC did not “promulgate” SCDC Policy ADM-15.13 because it is a *policy* and *not a regulation* promulgated under the Administrative Procedures Act (APA). However, as SCDC explains in its opening brief, in *Adkins, supra* and in *Wicker v. South Carolina Dept. of Corrections*, 360 S.C. 421, 602 S.E.2d 56 (2004), the Supreme Court concluded that the SCDC Grievance Policy, which itself is a *policy* and *not a regulation* promulgated under the APA, provides the *very procedural framework* that allows the prison industries inmates, including Marcus, to pursue a claim for back pay. There is no reasonable argument that has been made or can be made that an SCDC policy provides the framework for the claim, as acknowledged by the Supreme Court, but that an SCDC policy cannot or does not establish the procedural parameters or requirements for such a claim. Consequently, applying the literal language of Section 24-3-390, this Court is respectfully urged to find that the “rules,” which SCDC is authorized to promulgate, include such policies as SCDC Policy ADM-15.13, which is intended to issues related to inmate pay. SCDC Policy ADM-15.13 includes rules, specifically Section 12.1, for reporting and challenging payment errors including errors in the “pay rate,” which is at issue here. Clearly, Section 12.1 was authorized by the General Assembly, and most importantly, that provision is not in contradiction to any statutory provision including Sections 24-3-315 and 24-3-430(D). It presents a binding policy or “rule” which, as authorized by Section 24-3-390, is controlling with respect to the governance of the prison industries programs.

Nonetheless, Marcus further argues that the Section 12.1 is contrary to the foregoing statutes because it causes a “forfeiture” of his back pay claim, which violates his “statutory rights.” That is not the case at all. Section 12.1 provides an administrative process and administrative remedies – including prospective pay rate adjustments and two pay periods of

back pay -- that Marcus was required to seek and exhaust, and he did not do so at any time. It is that failure to exhaust administrative remedies that has resulted in his so-called “forfeiture” of his back pay claim. That, quite simply, is how an exhaustion of administrative remedies defense works, and the consequence that results when the administrative process is not exhausted.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Corrections respectfully renews its request that the Court reverse the Order of the Administrative Law Court rejecting SCDC’s exhaustion of administrative remedies defense based on the provisions of Section 12.1 of SCDC Policy ADM-15.13 titled “Inmate Pay,” and reinstate the final agency decision.

Respectfully submitted,

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