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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Administrative Law Court Docket No. 12-ALJ-04-00143-AP
Appellate Case No. 2014-000409

Thomas J. Torrence, #094651 Respondent,

v.

South Carolina Department of Corrections, Appellant.

**APPELLANT’S RETURN TO THE RESPONDENT’S
MOTION TO DISMISS THE INSTANT APPEAL**

By his submission dated March 10, 2013, the Respondent moved to dismiss the instant appeal filed by the Appellant, the South Carolina Department of Corrections, in the above-captioned matter.

For the reasons stated below; the Appellant, by and through its undersigned counsel, respectfully urges this Court to deny the Respondent’s motion.

I. BACKGROUND

A. OVERVIEW OF RESPONDENT’S ARGUMENT IN FAVOR OF DISMISSAL

The Respondent asserted the following argument in his motion:¹

The January 30, 2014 of [the Administrative Law Court] is neither a final order on the merits, nor an order immediately appealable at this time. Thus, Appellant’s appeal lacks appealability of a matter and must be dismissed. [The Administrative Law Court’s] Order is quite clear that [its]

¹ See the Respondent’s Motion, p. 2.

intent is to address the merits of the issues presented in Respondent's March 2, 2012 appeal.

The Respondent further argued as follows:²

South Carolina Code Ann. § 1-23-610(A)(1) (Supp. 2009) provides that judicial review may only be sought from a *final* decision of the ALC. Therefore, although § 14-3-330 permits appeals from interlocutory orders which involve the merits, that section is inapplicable in cases where a party seeks review of a decision of the ALC because the more specific statute, § 1-23-610, limits review to final decisions of the ALC. [emphasis supplied by Respondent].

B. THE ALC'S JANUARY 30, 2014 ORDER

Within its January 30, 2014 order, the Administrative Law Court ["ALC"] considered three (3) issues associated with the Respondent's appeal of the final agency decision rendered by the Appellant concerning an administrative grievance filed by the Respondent under the provisions of the Appellant's Inmate Grievance System Policy, designated as Policy Number GA-01.12.

By his appeal of the Appellant's denial of his administrative grievance to the ALC, the Respondent challenged the Appellant's denial of the claims he raised concerning the wages paid to him by the Appellant for labor he voluntarily provided to a prison industries project operated by the Appellant at Evans Correction Institution. The Respondent, by his appeal to this ALC, also challenged the Appellant's determination that he did not timely file his administrative grievance under the provisions of Policy Number GA-01.12.

As stated in its January 30, 2014 order,³ the ALC considered the following issues:

1. Did the South Carolina Supreme Court decisions in the [*Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004)] and [*Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (S.C. 2004)] cases create new substantive or grievance rights?

² *Id.*, p. 3.

³ See the ALC's January 30, 2014 Order, pp. 2 – 3.

2. Did [the Respondent] timely file his Step 1 grievance alleging a prevailing wage issue with the [Appellant]?
3. Was the time to file an inmate grievance with the [Appellant] equitably tolled when the [Respondent] filed a claim in the Richland County Court of Common Pleas?

By its January 30, 2104 order, the ALC first ruled that neither *Adkins* nor *Wicker* created “new substantive or grievance rights, but merely confirmed that prevailing wage claims were grievable under the [Appellant’s] existing policies.”⁴

However, the ALC next ruled that the Respondent had timely filed his Step 1 administrative grievance.⁵ It also ruled that, under the doctrine of equitable estoppel, the Respondent had timely filed his Step 1 administrative grievance.⁶

II. ARGUMENT IN OPPOSITION TO THE RESPONDENT’S MOTION

A. UNDER THE APPLICABLE ALC RULES OF PROCEDURE, THE ALC’S JANUARY 30, 2014 WRITTEN ORDER CONSTITUTES “A FINAL DECISION” REGARDING THE TIMELINESS OF THE RESPONDENT’S STEP 1 ADMINISTRATIVE GRIEVANCE

In its denials of both the Respondent’s Step 1 and Step 2 administrative grievances, the Appellant determined that the Respondent did not timely file his Step 1 administrative grievance. Thus, the final two (2) rulings from the ALC’s January 30, 2014 order, by which the ALC reversed the Appellant’s determinations that the Respondent did not timely file his Step 1 administrative grievance, constitute the ALC’s final decision concerning the merits of the Appellant’s determinations that the Respondent did not timely file his Step 1 administrative grievance.

⁴ *Id.*, p. 5.

⁵ *Id.*, p. 7.

⁶ *Id.*, p. 9.

Section V of the ALC's Rules of Procedure is entitled "Special Appeals," and the first rule which appears in Section V is ALC Rule of Procedure 51. Rule 51, which is entitled "Applicability," reads as follows:

The Rules in this section shall apply exclusively in matters heard on appeal from final decisions pursuant to Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

As our Supreme Court anchored its decision in *Wicker*, 602 S.E.2d at 57 – 58, in large part upon its earlier decision in *Al-Shabazz*, the Respondent's appeal of the Appellant's denial of his administrative grievances to the ALC animates the application of Section V of the ALC's Rules of Procedure as contemplated under Rule 51.

Section V also includes ALC Rule of Procedure 65, and, in its entirety, Rule 65 provides as follows:

The Administrative Law Judge shall render a decision in a written order which shall be served on all parties and filed with the clerk of the Court. The Administrative Law Judge may affirm any ruling, order or judgment upon any ground(s) appearing in the Record and need not address a point which is manifestly without merit. **The decision of the Administrative Law Judge is a final decision and motions for reconsideration will not be considered.** Judicial review of any decision of the Court shall be as provided in S.C. Code Ann. § 1-23-610 (2005) (as amended). [emphasis supplied].

In its January 30, 2014 decision, the ALC recognized the following:⁷

In his appeal to this Court, the [Respondent] raised multiple issues related to the payment of wages. However, by an order dated June 7, 2012, the only issue addressed in this order is the timeliness of [Respondent's] Step 1 grievance.

Thus, as defined under Rule 65, the January 30, 2014 decision issued by the ALC clearly constituted "a written order" which the ALC "served on all parties and filed with the Clerk of Court." Most importantly, the ALC's January 30, 2014 written order constituted, as clearly

⁷ *Id.*, p. 2, n. 2.

defined under Rule 65, “a final decision” concerning the timeliness of the Respondent’s Step 1 administrative grievance for which “motions for reconsideration will not be considered.”

B. THE FINAL DECISION REPRESENTED BY THE ALC’S JANUARY 30, 2014 WRITTEN ORDER CONSTITUTES “THE LAW OF THE CASE” AS TO WHETHER THE RESPONDENT TIMELY FILED HIS STEP 1 GRIEVANCE, AND, AS SUCH, IT PREVENTS THE APPELLANT FROM RAISING TIMELINESS AS A DEFENSE IN ANY FURTHER PROCEEDINGS ASSOCIATED WITH THE RESPONDENT’S APPEAL BEFORE THE ALC

The Respondent argued in his motion to dismiss the instant appeal that that ALC’s January 30, 2014 written order did not constitute “an ultimate decision on the merits under South Carolina Code § 1-23-390.⁸” The Respondent also argued that the ALC’s January 30, 2014 written order “was interlocutory and was not a final decision which is not immediately appealable under § 1-23-610.⁹”

As demonstrated in the section of the Appellant’s instant argument immediately above, the Respondent clearly failed to consider the provisions of Section V of the ALC Rules of Procedure in his analysis. By his analysis and argument, the Respondent likened the ALC’s January 30, 2014 written order to a denial of a motion for summary judgment.

In *Ballenger v. Bowen*, 443 S.E.2d 379 (S.C. 1994), our Supreme Court considered an appeal taken from a circuit court’s order denying a party’s motion summary judgment. In its initial assessment of the case, our Supreme Court, 443 S.E.2d at 379 – 80, observed as follows:

This is an appeal of an order denying summary judgment. Respondent moves to dismiss the appeal, arguing the order is not appealable. Appellants, relying on the second footnote in *Ex parte South Carolina Farm Bureau Mutual Insurance Co.*, 314 S.C. 487, 431 S.E.2d 252 (1993), assert the order is immediately appealable because statements made in the order have the effect of striking their defense of *res judicata* /collateral estoppel.

⁸ See the Respondent’s Motion, p. 3.

⁹ *Id.*

In its analysis, the *Ballenger* Court, 443 S.E.2d at 380, reasoned as follows:

A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial. *Parker Oil Co. v. Smith*, 34 N.C.App. 324, 237 S.E.2d 882 (1977); cf. *Geiger v. Carolina Pool Equipment Distributors, Inc.*, *supra*. The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict. *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993) (motion to reconsider); *Weil v. Weil*, 299 S.C. 84, 382 S.E.2d 471 (Ct.App.1989) (statement made while denying summary judgment is not the law of the case); *PPG Industries v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct.App.1988) (motion to reconsider);¹⁰ 21 C.J.S. *Courts*, § 149, p. 183 (1990).

In short, the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable. *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942) (an order which has not resulted in any binding adjudication of the rights of the parties is not appealable).

However, contrary to the dynamic that unfolded in *Ballenger*, the ALC's January 30, 2014 written order determined with finality that the Appellant's defense of timeliness, which it invoked when it denied the Respondent's Step 1 and Step 2 administrative grievances, was not applicable. Under ALC Rule of Procedure 65, the ALC's January 30, 2014 written order clearly constitutes the "final decision" concerning the Appellant's timeliness defense, and the Appellant simply will not be able to raise the defense again as the ALC considers the various other grounds associated with the Respondent's appeal.

¹⁰ In *PPG Industries*, this Court considered whether a trial court could entertain motions for reconsideration after an initial denial of summary judgment. In *PPG Industries*, this Court, 375 S.E.2d at 335, declared as follows: "We have no authority in this state regarding this exact issue; however, it is the rule in our neighboring state of Georgia that it is within the discretion of the trial judge to consider a renewed motion for summary judgment. (citation omitted). The federal rule is that reconsideration of a motion for summary judgment is a matter for the trial court's discretion. (citations omitted)." However, as illustrated above, the ALC, under ALC Rule of Procedure 65, could not have and would not have entertained a motion for reconsideration filed by the Appellant concerning its January 30, 2014 written order.

Thus, the Respondent's entire analysis and argument are fundamentally defective, and this Court should deny his motion to dismiss the instant appeal filed by the Appellants.

C. THIS COURT IS CURRENTLY CONSIDERING ANOTHER APPEAL IN WHICH THE IDENTICAL OR NEARLY IDENTICAL ISSUES CONCERNING TIMELINESS ARE IN CONTROVERSY

The Appellant also respectfully urges this Court to deny the Respondent's motion to dismiss in light of the reality that another decision issued by the ALC involving identical or nearly identical issues, i.e. *Ackerman, #266928, et al., v. S.C. Dep't of Corr.*, Docket Nos. 07-ALJ-04-00444-AP, *et seq.*, is currently under review by this Court.¹¹

As in the instant matter, the issue of whether the Respondent timely filed his Step 1 administrative grievance is identical to the issue currently under review in *Ackerman*. In *Ackerman*, the ALC considered a myriad of arguments articulated by counsel for nearly 200 current and former inmates concerning whether they had timely filed Step 1 administrative grievances in which they presented claims concerning the rate at which the Appellant paid them for the labor they voluntarily provided to the prison industries project operated by the Appellant at Lieber Correctional Institution.

Critically, as reflected by the table attached as the sole exhibit to the Appellant's instant return, the issues concerning timeliness considered by the ALC in its January 30, 2014 written order in the instant matter were identical or nearly identical to some of the issues concerning timeliness considered by the ALC in its July 26, 2012 written order in *Ackerman*.¹²

¹¹ The appeal in *Ackerman* is designated by the Court of Appeals as appellate case number 2012-210588.

¹² The Appellant respectfully submits that the ruling(s) rendered by this Court in *Ackerman* will undoubtedly impact the rulings rendered by the ALC in the January 20, 2014 final decision in the instant matter.

However, the ALC, by the 29-page order it issued July 26, 2012, ruled in the Appellant's favor on the timeliness issue in *Ackerman*, and, accordingly, it affirmed the Appellant's determination that all but one (1) of the 200 current and former inmates had not timely filed their Step 1 administrative grievances.

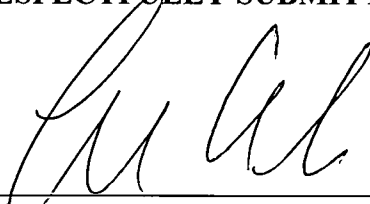
Like the ALC's January 30, 2014 written order in the instant matter, the ALC's January 26, 2012 written order in *Ackerman* constituted, under ALC Rule of Procedure 65, the "final decision" regarding the timeliness issue. As Rule 65 prohibited the Appellant from filing a motion for reconsideration with the ALC concerning the ALC's January 30, 2014 final decision regarding timeliness in the instant matter, Rule 65 also prohibited counsel for the current and former inmates in *Ackerman* from filing a motion for reconsideration with the ALC's July 26, 2012 final decision regarding timeliness in that case.

Accordingly, counsel for the current and former inmates in *Ackerman* properly appealed the ALC's July 26, 2012 final decision concerning timeliness in *Ackerman* to this Court, and, as their appeal is still under review, this Court accepted jurisdiction over the appeal filed by the current and former inmates in that case. Likewise, the Appellant's undersigned counsel properly appealed the ALC's January 30, 2014 final decision concerning timeliness in the instant matter to this Court, and this Court should deny the Respondent's motion to dismiss.

III. CONCLUSION

For the foregoing reasons, the Appellant respectfully urges this Court to deny the Respondent's motion to dismiss its instant appeal of the ALC's January 30, 2014 final decision.

RESPECTFULLY SUBMITTED:



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April 4, 2014

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<p>Issue considered by the ALC in its January 30, 2014 Final Decision</p> <p><u>Issue # 1</u></p> <p>“Did the South Carolina Supreme Court decisions in <u>Adkins</u> and <u>Wicker</u> cases create new substantive or grievance rights? (<u>p. 2</u>).</p>	<p>Ruling by the ALC in its January 30, 2014 Final Decision</p> <p>“Accordingly, I conclude that <u>Adkins</u> and <u>Wicker</u> did not create new substantive or grievance rights, but merely confirmed that prevailing wage claims were grievable under the [Appellant’s] existing policies.” (<u>p. 5</u>).</p>	<p>Issue considered by the ALC in its July 26, 2012 Final Decision in <u>Ackerman</u></p> <p>“Pursuant to an April 14, 2010 order, this court, in the interests of judicial economy, instructed the parties that it would consider the issues relevant to the Appellants’ appeals in three levels. In the first level of review, which was set for in an order dated March 10, 2011, the court addressed the following two issues (1) did [<u>Adkins</u>] and [<u>Wicker</u>] create new substantive rights and/or new remedies? and (2) do <u>Adkins</u> and <u>Wicker</u> apply prospectively or retrospectively?” (<u>pp. 2 – 3</u>).</p>	<p>Ruling by the ALC in its July 26, 2012 Final Decision in <u>Ackerman</u></p> <p>“As discussed in the March 10, 2011 order, the court found that <u>Adkins</u> and <u>Wicker</u> created neither new substantive rights nor new remedies and that both decisions applied retrospectively.” (<u>p. 3</u>).</p>
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<p>Issue considered by the ALC in its January 30, 2014 Final Decision</p>	<p>Ruling by the ALC in its January 30, 2014 Final Decision</p>	<p>Issue considered by the ALC in its July 26, 2012 Final Decision in <i>Ackerman</i></p>	<p>Ruling by the ALC in its July 26, 2012 Final Decision in <i>Ackerman</i></p>
<p><u>Issue # 2</u> “Did [the Respondent] timely file his Step 1 grievance alleging a prevailing wage issue with the [Appellant]?” <u>(p. 2)</u>.</p>	<p>“In the present case, it was not a one-time event, in which [the Respondent] was not paid a prevailing wage. The Department continuously failed to pay Appellant a prevailing wage. Therefore, the grievance involved is related to a policy or procedure.” <u>(p. 7)</u>.</p>	<p>“The court now turns to the second level of review, which involves the timeliness of the filing of the Appellants’ grievances under GA-01.12. The Appellants make the following arguments: (1) the Appellants’ grievances are not time-barred under the fifteen-day limit for filing grievances set forth in Paragraph 13.1 of GA-01.12 because they concern policies/procedures and thus fall under Paragraph 13.9. . . .” (p. 2).</p>	<p>“For the foregoing reasons, I conclude that prevailing wage claims do not constitute grievances concerning “policies/procedures” under Paragraph 13.9 of GA-01.12. Rather, I find that prevailing wage claims are “incident” grievances and thus must be filed within the fifteen day timeframe set forth in Paragraph 13.1.” <u>(p. 10)</u>.</p>

<p>Issue considered by the ALC in its January 30, 2014 Final Decision</p>	<p>Ruling by the ALC in its January 30, 2014 Final Decision</p> <p>“Clearly, the [Appellant] did not recognize a wage claim as grievable until the Supreme Court upheld the ALC’s decision [in <u>Wicker</u>] in August 2004. Thus, any attempt by [Respondent] to file a grievance prior to August 22, 2004 would have been futile. By that time, [Respondent’s] lawsuit initiated as a class action in Circuit Court was pending before the courts, representing ongoing litigation between these same parties over the same issue. [Respondent] filed his grievance within fifteen days of the date the Supreme Court issue its decision in his case, [c]learly, [Appellant] can present this claim via the inmate grievance procedure.’ <u>Torrence v. S.C. Dept. of Corrections</u>, 373 S.C. 586, 595, 646 S.E.2d 866, 870 (2007).” (p. 7).</p>	<p>Issue considered by the ALC in its July 26, 2012 Final Decision in <u>Ackerman</u></p> <p>“The Appellants next argue that, if this court determines that their Step 1 grievances constituted ‘incident’ grievances and, therefore, were subject to Paragraph 13.1’s fifteen-day filing deadline, they had ‘reasonable cause’ under Paragraph 13.9 not to file their Step 1s before the South Carolina Supreme Court issued its opinions in <u>Adkins</u> and <u>Wicker</u>. Specifically, the Appellants contend that the Department’s ‘practice of denying grievability’ for prevailing wage claims, as well as the ALC’s en bane order in <u>McNeil v. South Carolina Department of Corrections</u>, 00-ALJ-04-00336-AP (S.C. Admin. Law Ct. Sept. 5, 2001), ‘effectively barred’ them from exercising their grievance and appeal rights prior to the issuance of <u>Adkins</u> and <u>Wicker</u>. I disagree.” (pp. 10 – 11).</p>	<p>Ruling by the ALC in its July 26, 2012 Final Decision in <u>Ackerman</u></p>
<p><u>Issue # 2 (continued)</u></p> <p>“Did [the Respondent] timely file his Step 1 grievance alleging a prevailing wage issue with the [Appellant]?” (p. 2).</p>	<p>“For these reasons, I find that the Appellants’ contention that they were ‘effectively barred’ from filing their Step 1s before the issuance of <u>Adkins</u> and <u>Wicker</u> is without merit.” (p. 12).</p>		

<p>Issue considered by the ALC in its January 30, 2014 Final Decision</p>	<p>Ruling by the ALC in its January 30, 2014 Final Decision</p>	<p>Issue considered by the ALC in its July 26, 2012 Final Decision in <i>Ackerman</i></p>	<p>Ruling by the ALC in its July 26, 2012 Final Decision in <i>Ackerman</i></p>
<p>Issue #3</p> <p>“Was the time to file an inmate grievance with the [Appellant] equitably tolled when the [Respondent] filed a claim in the Richland County Court of Common Pleas?” (p. 3).</p>	<p>“[Respondent’s] case, originally filed as a class action in the Court of Common Pleas, was pending before the courts on August 23, 2004 when the <u>Wicker</u> and <u>Adkins</u> decisions were issued. This case presents the type of extraordinary circumstances in which fairness demands that the doctrine of equitable tolling be applied. [Respondent’s] existing lawsuit, filed prior to the time the [Appellant] recognized grievances regarding pay claims, equitably tolled the time for filing a grievance during the period that lawsuit was pending. Appellant filed his Step 1 grievance within days of receiving the Supreme Court’s final order and decision in that matter holding that he could present his claim via the inmate grievance procedure.” (p. 10).</p>	<p>“Next, the Appellants argue that the fifteen-day filing deadline in Paragraph 13.1 was tolled when they filed their class action in Williams on January 29, 2002. I disagree.” (p. 23).</p>	<p>“The record shows that numerous Appellants began participating in the prison industries project at Lieber several months, and in some cases years, before the class action was filed. As discussed in more detail below, under Paragraph 13.1, these Appellants were required to file a grievance within fifteen days after being informed of the Department’s decision to pay them less than the prevailing wage. Thus, by the time the 2002 class action was filed, Paragraph 13.1’s fifteen-day filing deadline had already passed with regard to their prevailing wage claims. Accordingly, even if the running of the fifteen-day filing deadline were suspended by the filing of the class action, these Appellants still failed to timely file their grievances.” (p. 24).</p>

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APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Administrative Law Court Docket No. 12-ALJ-04-00143-AP
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Thomas J. Torrence, #094651 Respondent,

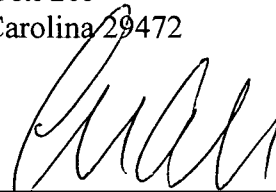
v.

South Carolina Department of Corrections, Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Return to the Respondent's Motion to Dismiss the Instant Appeal upon the above-named *pro se* Respondent by depositing a copy of it in the United States Mail, First Class Postage Pre-Paid, to the Respondent addressed as follows:

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