

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Thomas J. Torrence, #094651,

Docket No. 12-ALJ-04-00143-AP

Grievance No. ECI 0980-10

Appellant,

vs.

South Carolina Department of Corrections,

FEB 17 2016

FEB - 3 2014

Respondent.

SC Court of Appeals

GENERAL COUNCIL

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal of Thomas J. Torrence (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (DOC or Department). Appellant filed a grievance with the Department objecting to the Department's alleged failure to pay the prevailing wage for Appellant's work while participating in the prison industry program. Appellant also asserted that the Department removed portions of his private sector prison industry wages without statutory authority. Appellant received the Department's final decision on or about February 15, 2012. On March 7, 2012, the Appellant filed this appeal with the Court.

BACKGROUND

The Appellant participated in the Private Sector Prison Industry Program (Program), in which Insilco Global Technologies/ESCOD (ESCOD) participated as the private industry sponsor at Evans Correctional Institute from June 1997 until November 2004. During the first 320 hours of his employment, Appellant was paid a "training wage" of \$0.25-\$0.75 per hour. Upon completion of the 320 "training hours," Appellant was paid \$5.25 per hour. Throughout Appellant's participation in the Program, ESCOD remitted Appellant's wages to the Department pursuant to S.C. Code Ann. § 24-3-40. The Department distributed Appellant's wages to his Prison Industry Account.

In 2001, Appellant and two other inmates filed a class action law suit in the Richland County Court of Common Pleas. Appellant alleged, among other things, that the Department violated S.C. Code Ann. §§ 24-3-310 through -430 (2007) in failing to pay inmates a prevailing wage for work

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performed.¹ The class action also alleged that the Department improperly diverted a portion of the inmates' wages to the Department Surplus Fund. The Department filed a motion to dismiss pursuant to Rule 12, SCRCF in November 2002, however, that motion was denied. In 2004, the South Carolina Supreme Court issued its opinions in two cases dealing with similar issues of inmate wages, Adkins v. S.C. Dept. of Corrections, 360 S.C. 413, 602 S.E.2d 51 (2004) and Wicker v. S.C. Dept. of Corrections, 360 S.C. 421, 602 S.E.2d 56 (2004). The Department renewed its motion for summary judgment based upon those decisions. The motion was granted, and the Appellant appealed. The South Carolina Supreme Court heard the appeal.

In Torrence v. South Carolina Department of Corrections, 373 S.C. 586, 646 S.E.2d 866 (2007), the South Carolina Supreme Court held that the plaintiffs did not hold a private right of action against the Department. However, the court held that all members of the class action could file an internal grievance with the Department to seek any monies owed. Upon the issuance of the Supreme Court decision, Appellant filed a Step 1 grievance with the Department on May 21, 2007. The Department notified Appellant that his Step 1 grievance would not be answered until the Supreme Court decided on the Department's petition for rehearing. In December 2011, the petition for rehearing was denied by the court. At that time, the Department answered Appellant's Step 1 grievance, indicating the Step 1 grievance was denied because the grievance was untimely filed with the Department. Appellant filed his Step 2 grievance on December 5, 2011, appealing the denial of his Step 1 grievance. The Department denied the Step 2 grievance and this appeal followed.²

ISSUES ON APPEAL

1. Did the South Carolina Supreme Court decisions in the Adkins and Wicker cases create new substantive or grievance rights?
2. Did Appellant timely file his Step 1 grievance alleging a prevailing wage issue with the Department?

¹ In the class action, Appellant and the other Plaintiff were representatives of all prisoners who participated in the Program at Evans Correctional Institute. The suit also included a "Victim Beneficiary Subclass" which represented all crime victims awarded funds from the South Carolina Victims Compensation Fund and all victims receiving restitution paid by prisoners working in the Program. The suit included a "Dependent Beneficiary Subclass" which represented all dependents of prisoners entitled to support payments from funds received through the Program.

² In his appeal to this Court, the Appellant 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 Appellant's Step 1 grievance.

3. Was the time to file an inmate grievance with the Department equitably tolled when the Appellant filed a claim in the Richland County Court of Common Pleas?

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). The Administrative Law Court's jurisdiction in inmate appeals is limited to state created liberty interests typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his/her sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. *Id.* When reviewing the Department's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Id.* at 756. Consequently, the review in these inmate grievance cases is limited to the record presented. An Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2013). Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence on the whole record, arbitrary or affected by an error of law. See S.C. Code Ann. § 1-23-380(A)(6); See also Marietta Garage, Inc. v. South Carolina Dept. of Public Safety, 337 S.C. 133, 522 S.E.2d 605 (1999); South Carolina Dept. of Labor, Licensing and Regulation v. Girgis, 332 S.C. 162, 503 S.E.2d 490 (1998).

DISCUSSION

Creation of Substantive Rights or Remedies by Adkins and Wicker

The Appellant contends that the Supreme Court's decisions in Adkins and Wicker created new substantive and grievance rights for inmates alleging the Department failed to pay a prevailing wage. Specifically, Appellant asserts that "a remedy for prevailing wage claims was not solidified until August 23, 2004 in Wicker." The Department argues, however, that the Supreme Court did not create a new substantive right, but simply clarified that inmates had a pre-existing right to pursue prevailing wage claims through the inmate grievance system.

A substantive right can be created by statute or by judicial decision. See, e.g., Lawson v. S.C. Dept. of Corrections, 340 S.C. 346, 350, 532 S.E.2d 259, 261 (2000) (holding that the whistleblower

statute created new substantive rights); McCaskey v. Shaw, 295 S.C. 372, 375, 368 S.E.2d 672, 673 (Ct. App. 1988) (holding that a prior Supreme Court decision “created a new substantive right”). A statute presumptively creates substantive rights. A court creates a new substantive right when it recognizes a new cause of action that did not previously exist. Toth v. Square D Co., 377 S.E.2d 584 (S.C. 1989).

In Adkins, our Supreme Court held that Section 24-3-430 and accompanying prison industries statutes did not provide inmates with the right to bring a private cause of action against DOC. Adkins, 360 S.C. at 419, 602 S.E.2d at 55. More relevant to the case at hand, the court further held that:

[N]otwithstanding our holding that Inmates have no private civil cause of action, they are not without remedy. In accordance with the companion case of Wicker v. South Carolina Dept. of Corrections, 360 S.C. 421, 602 S.E.2d 56, 2004 WL 1877947 (2004), we hold Inmates may file an inmate grievance to protest DOC’s failure to pay wages in accordance with the mandatory statutory provisions.

Id.

In Wicker, the Supreme Court fleshed out this latter holding. It explained that “where, as here, the state has created a statutory right to the payment of a prevailing wage, it cannot thereafter deny that right without affording due process of law.” Wicker, 360 S.C. at 424, 602 S.E.2d at 57. The court thus held that inmates’ prevailing wage claims were grievable through DOC’s internal grievance processes and that DOC’s denial of those claims could be appealed to the ALC. *Id.* at 25, 602 S.E.2d at 57-58.

Adkins and Wicker did not create new substantive rights. The substantive right at issue in Adkins and Wicker – i.e., the right to a prevailing wage – was granted to inmates in 1995 pursuant to S.C. Code Ann. § 24-3-430(D). Adkins and Wicker simply addressed the appropriate procedure for seeking redress for a denial of that existing right. More precisely, these decisions acknowledged Policy Number GA-01.12 as the proper procedural mechanism by which inmates may challenge the rate at which the Department paid for labor provided.

Adkins and Wicker also did not create new grievance rights. Paragraph 7 of DOC Policy Number GA-01.12, which has existed in some form since May 1, 1996, sets forth the issues that are

considered grievable by the Department.³ Among other grievable issues, it includes the following: "Department policies/procedures, directives, or conditions which directly affect an inmate." DOC Policy Number GA-01.12, ¶ 7.1. Unquestionably, inmates are "directly affect[ed]" by DOC policies that cause them to be paid less than required by law. Thus, this provision, which is very broad in scope, encompasses prevailing wage claims.

The ALC reached that same conclusion in a 2001 decision that gave rise to, and was ultimately affirmed by, the Supreme Court's opinion in Wicker. See Wicker v. S.C. Dept. of Corrections, 00-ALJ-04-00781-AP, 2001 WL 1005574 (S.C. Admin. Law Ct. Aug. 13, 2001). In the case before the ALC, the Department contended that prevailing wage claims were "non-grievable." See *id.* at *1. Upon reviewing the Department's grievance policies, the ALC disagreed, holding:

Wicker's wage dispute falls under the listed issues considered "grievable" under DOC policy at GA-01.12(OP), Specific Procedures, paragraph 7; the first issue listed is "Department policies/procedures, directives, or conditions which directly affect an inmate." Wicker is directly affected by DOC's arrangement with private industry to pay inmates less than the "prevailing wage for work of similar nature in the private sector" for the first 320 hours of work. Therefore, Wicker's wage dispute is grievable under the agency's grievance system.

Id. at *1.

Furthermore, in affirming the ALC's decision in Wicker, the Supreme Court did not suggest that it was granting inmates' new grievance rights. There was no indication by the court that the Department's grievance procedures were inadequate or that they should be enlarged. The court ruled that "[t]here are numerous issues relating to inmates which, although not giving rise to private, civil cause of action, are nonetheless grievable through DOC's internal grievance processes." Wicker, 360 S.C. at 423-24, 602 S.E.2d at 57.

Accordingly, I conclude that Adkins and Wicker did not create new substantive or grievance rights, but merely confirmed that prevailing wage claims were grievable under the Department's existing policies.

³ The existence of the Department's grievances policies was specifically recognized by the Supreme Court in its 2000 decision Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), where the court held that the Department's grievance procedures were consistent with the standard delineated by the U.S. Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). See Al-Shabazz, 338 S.C. at 371-373, 527 S.E.2d 751-52.

Timeliness of Filing Grievance

The Department denied Appellant's grievance as untimely because it was not brought within 15 days of the date the Department began paying Appellant for his labor. The Department argues that the Inmate Grievance policy has been the proper procedure for filing an internal grievance regarding a prevailing wage since its inception in May 1996, predating the decision issued by the Supreme Court in Wicker. The Department alleges that since the Appellant had a "pre-existing constitutionally protected property interest" in his prison industry pay, policy guidelines required that Appellant file a grievance within 15 days of the date the Department began paying Appellant for his labor.

Appellant points out that prior to the Wicker decision no such grievance was recognized by the Department, so any attempt to file an internal grievance would have been futile. Appellant also argues that, at that time, he had no judicially recognized constitutional right to file a grievance, so he "logically elected" to file a claim in Circuit Court. Appellant states that he timely filed his grievance with the Department within 15 days after the Supreme Court issued a final ruling which stated: "[c]learly, [Appellant] can present this claim via the inmate grievance procedure." Torrence v. S.C. Dept. of Corrections, 373 S.C. 586, 595, 646 S.E.2d 866, 870 (2007).

Paragraph 13.1 of GA-01.12 generally requires that Step 1 grievances be filed "within 15 days of the alleged incident." DOC Policy Number GA-01.12, ¶ 13.1. However, Paragraph 13.9 of GA-01.12 provides that "[e]xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures." DOC Policy Number GA-01.12, ¶ 13.9. In the present case, Appellant contends that his grievance concerns "policies/procedures" and, therefore the 15 day time limit requirement does not apply to the filing of his grievance. I agree.

The courts have long held that "[w]hen interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand [its] operation." Murphy v. S.C. Dept. of Health and Env'tl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). While the policy at issue is not a regulation, the Court finds the rules of statutory and regulatory interpretation instructive. The Inmate Grievance System Policy fails to define either "incident" or "policies/procedures." The dictionary defines "Incident" as "an occurrence of an action or situation that is a separate unit of experience;" "policy" is defined as "a

definite course of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.” Meriam-Webster Dictionary, available at <http://www.meriam-webster.com>. Based on the “plain and ordinary meaning” of both of these words, it is clear that an incident would be a one-time, specific event, and a policy would be continuous course of action. In the present case, it was not a one-time event, in which Appellant 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.

In the absence of an express time limit for grievance of a policy or procedure this Court must determine a reasonable time limitation that gives effect to the statutory or regulatory scheme. McCummings v. S.C. Dept. of Corrections, 319 S.C. 440, 462 S.E.2d 271 (1995). The fact that other grievances must be filed within 15 days indicates a policy requiring the utmost promptness in raising a grievance. In the case of a challenge to the agency’s policies and practices, such as the one raised here, it seems reasonable to require the grievance be raised within 15 days of the time some action has been taken under the policy relevant to the grievance.

Prior to the Wicker opinion issued by the Supreme Court, the Department maintained that wage issues were not grievable under the internal grievance system. In its brief in the current matter the Department acknowledges that in its appeal of Wicker before the ALC, the Department argued that “Wicker’s complaint is non-grievable.” In its decision, the ALC disagreed with the Department and found that Wicker’s prison industries pay claim was grievable under ¶ 7 because Wicker’s pay represented “conditions which directly affect an inmate.” Wicker, 2001 WL 1005574, *1. Clearly, the Department did not recognize a wage claim as grievable until the Supreme Court upheld the ALC’s decision in August 2004. Thus, any attempt by Appellant to file a grievance prior to August 22, 2004 would have been futile. By that time, Appellant’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. Appellant filed his grievance within fifteen days of the date the Supreme Court issued its decision in his case stating, “[c]learly, [Appellant] can present this claim via the inmate grievance procedure.” Torrence v. S.C. Dept. of Corrections, 373 S.C. 586, 595, 646 S.E.2d 866, 870 (2007).

Equitable Tolling

Appellant maintains that by filing his class action lawsuit in the Court of Common Pleas, he effectively tolled the filing requirement of his internal grievance. Appellant argues that a defective action, filed within the statute of limitations, maintained in a court of competent jurisdiction tolled the time to file an agency grievance. The Department maintains that the Appellant did not toll the time to file a grievance by filing a claim in the Court of Common Pleas.

Where a statute sets forth a limitation period for commencement of an action, courts have invoked the doctrine of equitable tolling to suspend the statutory period “to ensure fundamental practicality and fairness.” Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting Rodriguez v. Superior Court, 98 Cal. Rptr. 3d 728, 736 (Cal. Ct. App. 2009)). Equitable tolling is a judicially created doctrine, and it stems from the judiciary’s inherent power to formulate rules of procedure “where justice demands it.” Hooper, 386 S.C. at 115, 687 S.E.2d at 32. The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. *Id.*

Equitable tolling is reserved for extraordinary circumstances, and it is rarely applied in South Carolina. American Legion Post 15 v. Horry County, 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009). The threshold necessary to trigger equitable tolling is very high, lest the exception swallow the rule. Ex parte Ward, 47 So. 3d 888, 897 (Ala. 2007). The S.C. Court of Appeals has explained:

[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation.

Pelzer v. State, 378 S.C. 516, 522, 662 S.E.2d 618, 621 (Ct. App. 2008) (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)).

Typically, equitable tolling applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control. Hooper, 386 S.C. at 116, 687 S.E.2d at 32; see also 54 C.J.S. Limitations of Actions § 133 (2013). However, as the South Carolina Supreme Court has noted, courts have flexibility in applying equitable remedies such as tolling:

The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.

Hooper, 386 S.C. at 116-17, 687 S.E.2d at 33 (citations omitted).

“Under the doctrine of equitable tolling, when a party has more than one legal remedy available, the statute of limitations is tolled while the party pursues one of the possible remedies.” Abbott v. State, 979 P.2d 994, 998 (Alaska 1999).

In this case, Appellant did not have more than one legal remedy available, but no statute, regulation, or precedent established the proper procedure for bringing his claim. Because the Department refused to consider the issue under the grievance procedures, Appellant was effectively prevented from utilizing the procedure that the Supreme Court ultimately determined to be the appropriate method to raise prison industry pay claims. Appellant’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 Wicker and Adkins decisions were issued. This case presents the type of extraordinary circumstances in which fairness demands that the doctrine of equitable tolling be applied. Appellant’s existing lawsuit, filed prior to the time the Department 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.

Given all of the above factors, the Appellant’s grievance was timely filed.

Motions to Expand Record/Provide Full Record

On May 1, 2012, Appellant filed a Motion for an Order to Provide a Full Record and a Motion to Expand Record (Record Motions). In light of the decision in this order, it is appropriate to address those motions. Respondent has not filed a response related to the merits of the Record Motions, seeking instead to defer the issue until the timeliness of the grievance could be addressed.

Therefore, Respondent shall have thirty days to file any response to the Record Motions. Appellant shall then have thirty days to reply.

ORDER

IT IS THEREFORE ORDERED that in light of the determination, above, that Appellant's grievance was timely filed, this Court will address the merits of the issues presented in this appeal.


IT IS ALSO ORDERED that the Department of Corrections may file a response to the Record Motions by March 31, 2014. If such a response is filed, Appellant may file a reply, if any, by April 30, 2014.

IT IS FURTHER ORDERED that if no opposition to the Record Motions is filed, the Department of Corrections shall file an addendum to the Record on Appeal, including the items requested in the Record Motions and all relevant matter in the record not previously presented in the Abbreviated Record filed May 7, 2012. The Addendum to the Record on Appeal shall be filed with the Court by March 31, 2014, if no opposition to the Record Motions is timely filed.

IT IS FURTHER ORDERED that Appellant's brief shall be filed within sixty days of the date the Record is filed.

IT IS FURTHER ORDERED that the Respondent shall have sixty days from the date Appellant's Brief is filed to submit a brief. Any reply brief must be filed within twenty days from the date Respondent's brief is filed.

AND IT IS SO ORDERED.


Deborah Brooks Durden, Judge
Administrative Law Court

January 30, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s).
This 30th day of January, 2014
By: R. E. C.
Judicial Law Clerk