STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
DECISION OF NEWBERRY COUNTY COUNCIL
Appellate Case Number 2016-000305

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SC Court of Appeals

Arthur L. Jayroe Jr.,

Appellant,

Vs.

Newberry County,

Respondent.

FINAL REPLY BRIEF

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Scope of Review

The County asserts that S.C. Code Ann. Section 1972(B) of the Magistrate's Pay Act requires that this Court apply the "substantial evidence" scope of review from the Administrative Procedures Act (APA). Section 1-23-380. However, that the statute provides that an appeal from the decision of County Council is "subject to judicial review as provided in Section 1-23-380."

While the APA appeal statute is cited in the Magistrate's Pay Act, the County seems to suggest that the scope of review provided by Section 1-23-380 is so narrow that this Court need not look closely at the factual and legal issues raised by Jayroe on appeal. Applying a minimal review of factual issues (under a "substantial evidence" standard) as adjudicated by County Council would violate the constitutional separation-of-powers doctrine.

It is respectfully asserted that the reference to the APA appeal provisions in the Magistrate's Pay Act provides for procedural matters only, and does not prescribe the appellate scope of review in this appeal (or any appeal from a county governing body). In analyzing the appellate provisions of the APA, the Supreme Court said that separation of powers doctrine permitted the appellate courts only a limited review of agency decisions. *Guerard v. Whitner,* 276 S.C. 521, 280 S.E.2d 539 (1981). Elaborating on the Supreme Court's decision, this Court specifically noted that the limited scope of APA review applies only to review of agencies, and specifically did not include decisions of legislative bodies. *Kores Nordic (USA) Corp. v. Sinker, Gibbs & Simons*, 284 S.C. 513, 327 S.E.2d 365 (Ct. App. 1985). This Court's further discussion in *Kores Nordic* was mandated by the statutory language of the APA, which specifically defines "agency" for purposes of the APA as "boards, commissions... other than the legislature or the courts... authorized by law to... determine contested cases." Section 1-23-10(1).

A county is a "body politic." S.C. Code Ann. Section 4-1-10. County Council is a legislative body like the General Assembly, taking legislative action via ordinance adoption. S.C. Code Ann. Section 4-9-30(14) ("to enact ordinances...") and Section 4-9-120 ("The council shall take legislative action by ordinance..."). Newberry County is not an agency, and appeals of decisions from its governing body are not restricted by the "substantial evidence" standard of the APA.

The structuring and governance of counties underwent an evolution in the early 1970s. The General Assembly submitted to the electorate a proposed constitutional amendment regarding local government. 1972 by Act No. 57 (in this case, Section 3184). Once passed by the electorate, the constitutional amendments were ratified by 1973 Act No. 58.

The General Assembly subsequently enacted the Home Rule Act, (codified at S.C. Code Section 4-9-10[1] *et seq.* and Section 5-5-10 *et seq.* by 1975 Act No. 59, Section 692), which enabled the provisions of Article VIII, Section 1 to be satisfied. ("... changed in a matter provided by law.") The Home Rule Act specifically allocated the powers which a county government can have:

1. To sue and be sued;
2. To purchase and hold, for the use of the county, lands. . .
3. To make all contracts; and
4. To do all acts in relation to the property and concerns of the county necessary thereto.

S.C. Code Ann. Section 41-1-10.

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[1] In enacting the Home Rule Act, the General Assembly provided that the counties have a referendum for the determination by the electorate of the form of government each county would have. In the event of no action by a particular county, the General Assembly dictated that the form of government existing at the time of the adoption of the Home Rule Act would remain in effect. S.C. Code Ann. Section 4-9-10 (as enacted by 1975 Act No. 59, Section 692. Newberry County's form of government was determined to be the "council-administrator form of government." *Id.* at (b).

The Home Rule Act also provided for cities and towns to create municipal courts. *See* Sections 5-7-90 and 5-7-230. It did not, however, provide for the governing body[2] of the county to have any adjudicative authority. To the extent that the County is attempting to argue that this Court's scope of review is limited by the APA, such a construction would be wrong. As noted by this Court, both appellate courts have construed the appellate provisions of the APA as applicable to "many entities of state government [but] they have all been agencies of the executive branch." *Kores Nordic*, 284 S.C. at 515.

The only way to read the reference in Section 22-4-50 is to construe it to prescribe procedural matters for appeals from a decision of a county council under the Magistrate's Pay Act. If read any other way, the attempt by the General Assembly to impose a limited scope of review on appeals from county governing bodies as to the Magistrate's Pay Act is ineffective, in that it could not extend the authority of a county governing body other than by amending provisions of the Home Rule Act.

The proceeding which occurred before County Council in the instant matter could only have been preliminary or advisory. The judicial power in the state is vested in a unified judicial system, of which the legislature is not a part. S.C. Const, Article 5, Section 1. While it is likely not a violation of the separation of powers doctrine to permit limited adjudicatory authority to be vested in agencies under the executive branch, *see City of Rock Hill v. South Carolina Department of Health and Environmental Control*, 302 S.C. 161, 394 S.E.2d 327 (1990), a county governing

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[2] County governing bodies are expressly granted certain powers as it relates to courts, but those powers are administrative only. SC Code Ann. Sections 4-1-20 (conducting referendum if the public wishes to move the courthouse); 4-1-80 and 90 (furnishing facilities for the holding of court); 4-1-150 (establish certain fees for services). The general duties of a county governing body are also prescribed based on the form of government selected by that County. See Section 4-9-30.

body does not have any statutorily-prescribed authority to adjudicate disputes involving private parties.

Indeed, permitting a governing body of a county to adjudicate private rights among itself and third parties (such as Jayroe) would be a violation of Article I, Section 22 of the South Carolina Constitution, which states "No person shall be... subject to the same person for both prosecution and adjudication... and in all case he shall have the right to judicial review."

Here, County Council addressed whether the conduct of its own employees, acting for Council itself, violated Jayroe's rights. This is the fox guarding the henhouse, against basic structures designed and implemented to prevent such circumstances. The County was being asked to reverse its own actions; therefore, the suggestion that Jayroe received an unbiased and balanced hearing before County Council is pure fiction. Jayroe's petition to County Council was doomed from the start. The hearing was perfunctory; Council was never going to reverse itself or the actions of its own agents. County Council had a financial interest in the outcome of the issues presented. The evidence was gathered before Council solely for purposes of consideration by this Court on appeal. The issues were tried before County Council only because the statutory procedure set forth in the Magistrate's Pay Act required it be done. S.C. Code Ann. Section 22-8-50(B).

Thus, the appellate court must review factual decisions of County Council *de novo*, with no particular deference to the supposed factual "findings" of Council. This is the first court to address the factual and legal issues presented and therefore the first impartial examination of the issues presented. Thus, the appellate court should examine the facts and make its own factual determinations in accordance with its own view of the evidence. *See Martin v. Skinner*, 286 S.C.

252, 335 S.E.2d 527 (Ct.App. 1985); *See also Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011)(discussing the *de novo* scope of review).

This Court's review of legal issues, of course, does not require any deference to County Council's decision. *Berry v. S.C. Dep't of Health & Envtl. Control* (S.C., 2013). "This [appellate] Court is free to decide questions of law with no particular deference to the lower court." *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006).

Limiting the scope of review available in this Court, under these circumstances, would constitute a violation of Jayroe's substantive and procedural due process rights. As noted above, the hearing he received before County Council was not an unbiased hearing; it was instead a hearing by a body whose own employees' actions, as well as those of the Council itself, were being challenged. County Council had a financial interest in the outcome. Council had ostensibly been involved in the decision to reduce Jayroe's pay; certainly it had been involved in approving the annual budget which allocated salary to Jayroe which included the $4,500.00 salary supplement.

"Meaningful judicial review" is constitutionally required. *Rowe v. City of West Columbia*, 334 S.C. 400, 407, 513 S.E.2d 379 (Ct.App. 1999), citing South Carolina Constitution Article I, Section 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor s hall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly and he shall have in all such instances the right to judicial review.") (emphasis added). Where, as here, the governing body was reviewing its own conduct and that of its employees and had a financial stake in the outcome, meaningful judicial review requires this Court's implementation of *de novo* review of the factual issues presented.

"Procedural due process requirements are not technical; no particular form of procedure is necessary.... . Due process is flexible and calls for such procedural protections as the particular situation demands." *Sloan v. S.C. Bd. of Physical Examiners*, 370 S.C. 452, 636 S.E.2d 590, 615 (2006) (citations omitted). "The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur." *Id.*

With respect to Jayroe's procedural due process rights, the County has shown its hand by arguing that the appellate court employ a hands-off, "substantial evidence" standard to prop up and allow factual determinations from a biased and self-interested governing body to be upheld without adequate judicial review. Adequate review, however, requires *de novo* review of the facts presented in this case.

Jayroe's substantive due process rights would also be violated by applying the APA standard of review to a decision by County Council under these facts. "The Constitution's provisions that 'no state shall... deprive any person of life, liberty or property without due process of law,' U.S. Constitution Amendment XIV, Section 1, guarantees more than just fair process; it 'covers a substantive sphere as well barring certain actions regardless of the fairness of the procedures used to implement them.'" *State v. Dykes*, 398 S.C. 351, 728 S.E.2 445 (2012) (citations omitted). The core of the Due Process Clause, therefore, is the protection against arbitrary government action. *Id.* (emphasis added).

As discussed in the arguments raised by Jayroe in his appellant's brief, the County wants to accept the work he provided, which it acknowledges was provided, and from which it benefitted (by complying with the Chief Justice's requirement for warrant, bond, and other duties), but without compensating Jayroe *at all* for the on-call hours he provided. "Substantive due process in particular protects against the arbitrary infringement of 'fundamental rights that are so implicit in

the concept of ordered liberty' that 'neither nor justice would exist if they were sacrificed.'" *Id.* (citations omitted).

The County's position therefore, that it should not have to pay Jayroe at all for the on call time he provided for the county's benefit, is so fundamentally arbitrary that the appellate court must provide a *de novo* review of the issues presented. To do otherwise would deprive Jayroe of his substantive due process rights. "In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Sloan, supra at* 614.

For the reasons set forth above, Jayroe submits that the County is completely wrong in suggesting that this appellate court must defer to the findings of County Council in any way. This Court is the first impartial body or Court with an opportunity, and as set forth above obligation, to provide an unbiased and fair hearing to the issues presented.

Issue One[3]

As discussed above, this is the first adjudicatory (and first impartial) body to address the facts and legal issues presented. As a result, a *de novo* review of the evidence presented is required. Jayroe has been denied an unbiased hearing, and this Court is his first opportunity to have an adjudication of the facts presented.

The County's Respondent's brief did not directly respond to the arguments made by Jayroe in his Appellant's brief. Instead, it restated the questions and addressed them without responding directly to the separate issues argued by Jayroe. This Court may conclude that the County's failure

[3] Jayroe's Reply Brief addresses the issues as argued by the County, which does not match the arguments initially set forth by Jayroe in his appellants' brief.

to respond specifically to the issues raised by Jayroe constitute a failure to respond to the brief in total. *See R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct.App.2000) (holding that an issue is abandoned if the appellant's brief treats it in a conclusory manner); *see also State v. Colf,* 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct.App.1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned).

Jayroe's Issue One specifically challenges the facts determined by the County that Jayroe's compensation was not reduced during his tenure, since he County has essentially admitted that Jayroe's compensation was reduced. However, instead it plays word games by suggesting that a "change" in method of compensation (from flat salary supplement to mandatory hourly time sheets) did not effect a "reduction in compensation." As described in detail in his appellant's brief, Jayroe's salary supplement of $4,500.00 for weeknight on call work was included in the annual budget of the county as additional salary to him specifically by name. (R. p. 197). Changing the method during the term of the budget year had to be a reduction in salary (as well as a violation of the approved annual budget). It could be nothing else.

"In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Sloan, supra.* at 605. "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this State and the Court's sense of law, justice and right." *Id.* (citations omitted).

Issue Two

Tellingly, the County argues that Section 22-8-40(F) cannot possibly mean what it says. The County does not dispute that the statute requires that part time magistrates are required to be paid for "time scheduled to be spent on call." However, after making its argument, it cites directly to *Ramsey v. County of McCormick*, 306 S.C. 393, 412 S.E.2d 408 (1991), which says exactly what the statute says.

Moreover, the County does not dispute that Jayroe provided the hundreds and hundreds of on-call hours each year, as required by the Chief Justice. The County is happy to take Jayroe's service which cannot be obscured, it simply refuses to pay him for it as required. Had Jayroe not complied with the County's 1995 directive that the Chief Magistrate provide all week-day on-call hours, it would have had to pay other magistrates to provide the coverage, another direct benefit realized.

In an earlier decision in the circuit court, the County stipulated that "had [former magistrate] been officially appointed a part-time magistrate, Plaintiff would have been entitled to call pay for time spent on call." *Abraham v. County of Newberry*, Case No. 2011-CP-36-464 (Newberry County Court of Common Pleas), Order filed July 7, 2014, page 10, Section II (R. p. 12¶ II).

This is a legal issue that requires the appellate court to "choose ye this day whom ye will serve" and "in the duty of this decision, the court has the right to determine which doctrine best appeals to its sense of law, justice, and right." *Sloan*, *supra* at 606.

This Court can easily see that the County's argument, *i.e.,* 'we can require him to work but we don't have to pay him', is wholly unsupported by legal authority and is thus pure folly.

Issue Three

The County continues to assert that it is Jayroe's fault that he voluntarily complied with its 1995 directive, and the order of the Chief Justice, to ensure on-call coverage was provided for magistrate's courts on week-day on call hours. The County's argument is illogical and flawed.

The County accepted Jayroe's service. Because he was scheduled to be on call for so many hours per week, the only logical conclusion is to pay him for the full 40 hours that a full-time magistrate would have received because of the statutory definition of "part-time magistrate" requires less than 40 hours per week worked. Section 22-8-10(3).

The County attempts to distinguish *Ramsey* by suggesting that the reason she was entitled to be compensated as a full-time magistrate is because she was performing "judicial administrative functions." (Respondent's Brief, p. 16). The time Jayroe spent on call was all judicial in nature. Section 22-8-20 ("Magistrates are judicial officers, and the hours they spend in the performance of their official duties are hours spent in the exercise of their judicial function."). Regardless, the Magistrate's Pay Act makes no distinction between "judicial" functions and "administrative" functions, thereby eviscerating the County's argument. Id. ("Time spent in the performance of judicial functions also includes time spent performing ministerial duties necessary for the exercise of the magistrates' judicial powers, as well as necessary travel and training time.").

The County acknowledges Jayroe provided on-call service. It simply refuses to pay for it.

Issue Four

The County asserts that the $4,500 was not part of Jayroe's salary, so Jayroe was not making a salary "greater than that provided for his position." Section 22-8-40(j). Yet it makes no response to the citation of evidence that clearly demonstrated that it budgeted the $4,500.00 as

salary for Jayroe, and that it took tax deductions applicable for salary payments related to those expenditures.

The IRS defines a "stipend" as "a fixed sum of money periodically for services or to defray expenses. The fact that remuneration is termed a "fee" or "stipend rather than salary or wages is immaterial. Wages are generally subject to employment taxes and should be reported on Form W-2." Wage and Tax Statement, Circular E, Employer's Tax Guide, www.irs.gov. As Jayroe's exhibits reflect, the $4,500.00 was included as Jayroe's salary and reported on his W-2. (R. pp. 238-247). Of course it was part of his salary.

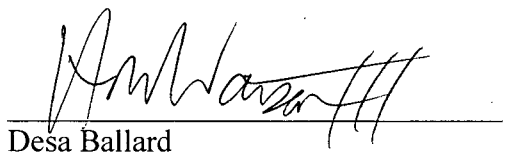
The remaining evidence and documents which reflect these undisputed facts are set forth in detail in Jayroe's appellant's brief and will not be repeated here.

CONCLUSION

Jayroe requests that, in determining the appropriate scope of review for this matter, this Court not fall prey to the County's assertion that it take the easy way out. This appeal presents significant legal issues that go to the very core of the operation of the state's judicial system, requiring meaningful review under a more expansive de novo review standard.

The decision of County Council is arbitrary, capricious, and wrong on virtually every front. The decision of County Council should be reversed. Jayroe would request that, after reversing the legal and factual errors in the decision of County Council, that the matter be sent to the circuit court to enter judgment in favor of Jayroe, and to address his petition for attorney fees.

All of which is respectfully submitted.



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CERTIFICATE OF COUNSEL

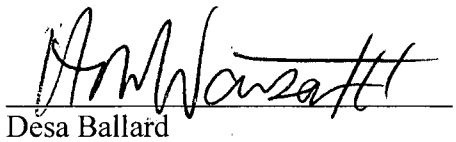
A typographical error on the Table of Contents was corrected, as was a citation to a statutory code section.[1] Replacement of the word "county" with "cities and towns" was made at the top of page 3 to be consistent with the argument intended and otherwise advanced in that portion of the brief.

No other changes were made, and thus the undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

[Signature page follows]

[1] The initial draft mistakenly referenced S.C. Code § 5-10-70, which is non-existent. It has been corrected to refer to S.C. Code § 5-7-90.

Respectfully submitted,



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