

THE STATE OF SOUTH CAROLINA
In The Supreme Court
APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge
Dock. No. 07-ALJ-04-00517-AP
Order (S.C. Ct. App. filed July 20, 2017)

RECEIVED
OCT 16 2017
SC Court of Appeals

Fred Gatewood, #289775..... Petitioner,

v.

South Carolina Department of Corrections..... Respondent.

Court of Appeals Appellate Case No. 2017-001552

PETITION FOR A WRIT OF CERTIORARI

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Pursuant to SCACR 242(a), Fred Gatewood petitions the Court for a writ of certiorari to review the final decision of the Court of Appeals in this case.

CERTIFICATION OF COUNSEL

Pursuant to SCACR 242(d)(1), Gatewood's undersigned counsel certifies that a petition for rehearing was made on July 31, 2017, and finally ruled on and denied by the Court of Appeals on September 14, 2017 (App. pp. 4, 11).

QUESTION PRESENTED

Did the Court of Appeals err in deciding the ALC's remand order was not appealable under the rule in Charlotte-Mecklenburg Hosp. Auth. v. DHEC?

STATEMENT OF THE CASE

This appeal involves Fred Gatewood's grievance for past due wages under South Carolina law. Gatewood worked in the Lieber/Williams Technologies (WTI) work program between 2004 and 2009. When Gatewood worked, S.C. Code §24-3-430(D), the "prevailing wage" statute, had been replaced by budget provisos beginning in July 2001. In 2007, §24-1-295 codified the provisos.

On August 23, 2004, the Supreme Court issued decisions in Adkins, et al. v. SCDC 360 S.C. 413, 602 S.E. 2d 51 (S.C., 2004) and Wicker v. SCDC 360 S.C. 421, 602 S.E. 2d 56 (S.C., 2004). These decisions held inmates could file prevailing wage grievances with SCDC and appeal to the Administrative Law Court (ALC).

In October 2004, Gatewood filed a wage grievance with SCDC. The grievance was fully processed and denied by SCDC in 2007 (App. pp. 41-45), and Gatewood appealed to the ALC.

The ALC directed the parties to brief the appeal in three levels. Level

One (2010-2011) involved two legal issues. Level Two (2011-2012) involved the timeliness of grievances under SCDC grievance policy. In 2012, the ALC ruled Gatewood's grievance was timely filed. In 2014, the ALC issued its decision denying Gatewood's grievance on the merits. Gatewood appealed to the Court of Appeals the adverse decision.

On March 9, 2016, the Court of Appeals issued its opinion affirming in part and reversing in part the ALC's decision. The Court remanded "...the issue of Inmate's entitlement to costs, attorney's fees, pre-judgment interest, and post-judgment interest to the ALC for reconsideration in light of this opinion" (Gatewood v. SCDC 416 S.C. 304, 785 S.E. 2d 600, 613 (S.C. App., 2016)).

On May 30, 2017, the Supreme Court denied the petitions for certiorari (App. p. 2). On June 2, 2017, the Court of Appeals issued the remittitur to the ALC (App. p. 5).

On June 13, 2017, the ALC remanded the case "...to the South Carolina Department of Corrections for processing as set forth in Gatewood v. S.C. Dep't of Corr., 416 S.C. 304.." (App. p. 6).

On June 30, 2017, Gatewood filed his petition for attorney fees, costs, and pre and post-judgment interest pursuant to §15-77-300, 1985 version, and the 2004 contingent fee contract with counsel.

On July 14, 2017, Gatewood filed notice of appeal in the Court of Appeals of the ALC's order of remand (App. p. 8). Before the parties filed briefs and the record, the Court of Appeals on July 20, 2017 issued an order dismissing the appeal as interlocutory (App. p. 3). On July 31, 2017, Gatewood filed a petition for rehearing (App. p. 11). On September 14, 2017, the Court of Ap-

peals issued an order denying the petition (App. p. 4).

ARGUMENT

The Court of Appeals should have decided that Charlotte-Mecklenburg Hosp. Auth. v. DHEC is distinguishable, and the ALC's remand order was appealable.

In its order dismissing the appeal, the Court of Appeals stated as follows

(App. p. 3):

Because the order of the ALC is not a final order, we dismiss this appeal as interlocutory. See Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env'tl Control, 387 S.C. 265, 267, 692 S.E. 2d 894, 895 (2010) ("If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory.")..

In Gatewood's notice of appeal footnote, he stated in part concerning the Charlotte-Mecklenburg Hosp. v. DHEC case (App. p. 9):

..Thus, it is possible the Court may distinguish Charlotte-Mecklenburg Hosp. based on other circumstances here which were not addressed in that case. Therefore, Gatewood attempts to appeal the remand order to preserve his rights should the Court consider the remand a final order.

Based on the above, Gatewood contends he raised in the Court of Appeals the issue that Charlotte-Mecklenburg Hosp. may be distinguishable, and the remand order was appealable. Gatewood further contends this issue includes every subsidiary question fairly comprised therein, including the various circumstances distinguishing this case from Charlotte-Mecklenburg Hosp. (SCACR 242 (d)(2)).

I. Mode of Trial

Gatewood contends the initial distinguishing circumstance is the ALC's remand to SCDC would deprive him of the mode of trial to which he is entitled,

and that is immediately **appealable** (J. Toal, Appellate Practice in South Carolina, 3d Ed., 2016, p. 155, citing Williford v. Downs 265 S.C. 319, 218 S.E. 2d 242, 243 (1975) (Ordinarily, granting or refusal of order of reference is not appealable unless granting the reference deprives a party of a mode of trial to which he is entitled). See also, Lester v. Dawson 327 S.C. 263, 491 S.E. 2d 240, 241 (S.C., 1997); Foggie v. CSX Transp. Corp. 313 S.C. 98, 431 S.E. 2d 587, 590 (1993); and Creed v. Stokes 285 S.C. 542, 331 S.E. 2d 351, 352 (1985).

Here, Gatewood has not had ALC reconsideration of his entitlement to attorney fees. Gatewood's entitlement to ALC reconsideration stems from two sources. His immediate entitlement stems from the Court of Appeals' remand to the ALC to reconsider his entitlement to attorney fees, costs and pre and post-judgment interest (Gatewood v. SCDC, 785 S.E. 2d at 613). The ALC's remand to SCDC for processing would deprive Gatewood of the mode of trial to which he is entitled.

Moreover, Gatewood's entitlement to ALC reconsideration of attorney fees is required by statute. On June 30, 2017, Gatewood filed his petition for attorney fees, costs and interest in the ALC pursuant to §15-77-300, 1985 version, and the contingent fee contract with counsel (App. pp. 6, 20-21, 39). Under §15-77-300, it is clearly "the court" which adjudicates entitlement to attorney fees, not the defendant agency.

In sum, Gatewood submits he would be denied the mode of trial to which he is entitled, ALC reconsideration of his attorney fee petition, if the ALC's remand to SCDC is enforced. For this reason, the Court of Appeals' dismissal was appealable.

II. Inconsistent ALC Remand and Effects

Another circumstance distinguishing Charlotte-Mecklenburg Hosp. is the inconsistency between the Court of Appeals' March 9, 2016 opinion remand of ".the issue of Inmate's entitlement to costs, attorney's fees, pre-judgment interest, and post-judgment interest to the ALC for reconsideration in light of this opinion" (Gatewood v. SCDC 785 S.E. 2d at 613); and the ALC's June 13, 2017 remand ".to the South Carolina Department of Corrections for processing as set forth in Gatewood v. S.C. Dep't of Corr., 416 S.C. 304.." (App. p. 6). Charlotte-Mecklenburg Hosp., 387 S.C. at 267, involved an ALC remand to DHEC for determination of a "certificate of need". It did not involve an ALC remand to an agency that was inconsistent with a previous Court of Appeals' remand order to the ALC. The remands also differ in the duties to be performed.

Moreover, the subsidiary effects of the inconsistent ALC remand are substantial. First, the ALC remand does not enforce the Court of Appeals' opinion remand and June 2, 2017 remittitur for the ALC to reconsider Gatewood's entitlement to attorney fees, etc. (Muller v. Myrtle Beach Golf & Yacht Club 313 S.C. 412, 414-415, 438 S.E. 2d 248 (S.C., 1993) (Once remittitur is sent down from Supreme Court, Circuit Court acquires jurisdiction to enforce judgment and take any action consistent with Supreme Court's ruling); Ackerman v. McMillan 324 S.C. 440, 477 S.E. 2d 267, 268 (S.C. App., 1996); and Am Jur 2d (2007), App. Rev., §§734-737, 740, 744).

Gatewood further contends the ALC's remand was outside its jurisdiction, and is another circumstance distinguishing Charlotte-Mecklenburg Hosp. from this case (Prince v. Beaufort Mem. Hosp. 392 S.C. 599, 709 S.E. 2d 122, 125-

126 (S.C. App., 2011) (Mandate of appellate court is jurisdictional, and trial court has no authority to exceed mandate on remand, but has duty to follow appellate court's directions). See also, SCDSS v. Basnight 346 S.C. 241, 551 S.E. 2d 274 (S.C. App., 2001); and Ackerman v. McMillan 324 S.C. 440, 477 S.E. 2d 267, 268 (S.C. App., 1996).

Finally, because the ALC's remand was outside its jurisdiction to issue, Gatewood contends it was null and void, and the proceeding is as if the remand had not occurred (Am Jur 2d (2007), App. Rev., §740; 20 Am Jur 2d (2015), Courts, §63).

Gatewood submits the ALC remand was inconsistent with and did not enforce the Court of Appeals' remand to the ALC, and the ALC remand was outside the ALC's jurisdiction and thus null and void.

III. Due Process

Gatewood contends there is a third circumstance distinguishing Charlotte-Mecklenburg Hosp. from this case. Here, a remand to SCDC would result in a conflict of interest and violation of due process. See discussion below at page(s) 8-9.

IV. Considerations Governing Review

A. SCACR 242(b)(1)(3)(4)

Gatewood contends there are special and important reasons to grant the petition (SCACR 242(b)). First, the Court of Appeals' dismissal of the appeal may conflict with Williford v. Downs and other cases holding a mode of trial denial is immediately appealable (SCACR 242(b)(3)).

Second, the appealability of an ALC remand which conflicts with a previous

Court of Appeals remand to the ALC may present a novel question of law (SCACR 242(b)(1)).

Third, the Court of Appeals' decision may conflict with S.C. Constitution, Article I, Section 22, and Wicker's and Ross v. MUSC's guarantee of due process in administrative adjudications (SCACR 242(b)(3)(4)). See discussion below at page(s) 8-9.

B. Delay and Denial of Justice

Further, Gatewood contends the Court should grant the petition to prevent unnecessary delay and a denial of justice. First, there is no need to remand for SCDC to "process" Gatewood's grievance again. SCDC fully processed and denied Gatewood's grievance on the merits by 2007 (App. pp. 41-45), which Gatewood appealed to the ALC. A remand to SCDC for "processing" would be a waste of time and unnecessarily delay ALC reconsideration of Gatewood's entitlement to attorney fees, costs and interest.

In response to Gatewood's ALC petition for attorney fees, SCDC indicated that, on remand, it would process Gatewood's grievance "anew" and adjudicate the merits of his claim; its "grievance proceedings" would determine inmates' "beneficial results obtained", apparently meaning back wage calculations; and SCDC had previously issued final merits decisions for Gatewood's and the Ackerman inmates' claims (App. pp. 25, 31, 35). Finally, SCDC stated Gatewood could appeal SCDC's "final decision" to the ALC (App. p. 35).

Thus, from SCDC's perspective its processing "anew" would allow SCDC a second "bite at the apple" to again merits consider Gatewood's grievance, again issue a final decision, and again start an appeals process which alone has las-

ted 10 years thus far. This would be a needless use of judicial resources.

Assuming for argument purposes that the ALC remand is legal, at the very most it allows SCDC to determine Gatewood's "beneficial results obtained", or back wages (App. p. 6). The remand says nothing about considering the merits of Gatewood's grievance or issuing a new final decision. SCDC has seized upon the word "processing" in the remand to justify starting the process all over again for a second "bite at the apple". Gatewood contends this would be highly unreasonable and ought not to be allowed.

More to the point, there is nothing in the Court of Appeals' March 9, 2016 remand allowing or requiring SCDC to do anything. On the contrary, that remand, in no uncertain terms, required the ALC to reconsider Gatewood's entitlement to attorney fees, cost and interest. Gatewood submits that the remand to SCDC in these circumstances would be unnecessary, unreasonable, and a denial of justice.

C. Back Wage Calculations

Finally, Gatewood contends there are substantial legal problems with SCDC calculating back wages for any inmate. First, it would be an obvious conflict of interest for SCDC to calculate its own damages.

More importantly, it would violate due process. In Wicker, 602 S.E. 2d at 58, this Court found that §24-3-430(D), the prevailing wage statute, creates an interest encompassed by the Fourteenth Amendment which cannot be denied without due process. In Ross v. MUSC 492 S.E. 2d 62, 72 (S.C., 1997), the Court stated the purpose of S.C. Constitution Article I, Section 22 (concerning due process in administrative adjudications) is to ensure that adjudications are conducted

by **impartial** administrative bodies; due process requires an impartial decision-maker; and partiality exists when the adjudicator has developed a "will to win". Gatewood submits, after 13 years of contesting liability, it appears SCDC has developed a "will to win" in these cases.

In his June 30, 2017 petition to the ALC for attorney fees, Gatewood relied on §15-77-300 (1985 version) as the statutory basis for fees. Under that statute, it is clearly "the court" which adjudicates fee requirements, not the defendant agency. However, the ALC remand to SCDC invoked the "beneficial results obtained" factor in §15-77-300(B) (2016), as justification for the remand (App. p. 6). SCDC cited this remand provision as authorization to calculate Gatewood's and inmates' back wages (App. pp. 25, 35).

The "beneficial results obtained" factor was part of the amendments to §15-77-300 which became effective on February 24, 2010. Following a statement of this and four other factors, the amendment states, "(T)he judge must make specific written findings regarding each factor listed above in making the award of attorney's fees". Thus, Gatewood contends SCDC cannot legally make back wage calculations under the 1985 or amended version of the statute.

Gatewood contends it is the ALC's responsibility, or a Special Referee appointed by the ALC, to determine back wages (Layman, et al. v. State of South Carolina, et al. 376 S.C. 434, 658 S.E. 2d 320, 324, 333-335 (S.C., 2008) (Supreme Court remanded attorney fees request to the Circuit Court to determine entitlement to fees under §15-77-300, with the amount of such fees to be based in part on "the benefit obtained" and other factors to enhance the lodestar with a multiplier). See also §14-11-60, SCRCP 53(b), and ALC Rule 68.

Aside from the above considerations, Gatewood contends the "beneficial results obtained" factor in §15-77-300, 2010 version, does not apply here. First, it would violate the presumption against retroactive application of statutes (Kirven v. Central States Health & Life 409 S.C. 30, 760 S.E. 2d 794, 799 (S.C., 2014)).

The "beneficial results obtained" factor would also materially limit Gatewood's vested contract rights under his and inmates' 2004 fee contract with counsel (App. p. 39). See Edwards v. SLED 395 S.C. 571, 720 S.E. 2d 462, 466-467 (S.C., 2011); Fernandez-Vargas v. Gonzales 548 U.S. 30, 126 S.Ct. 2422, 2428 (2006); and First of America Bank v. Netsch 651 N.E. 2d 1105, 1113 (Ill., 1995). The contract expressly states counsel may seek attorney fees under §15-77-300. In 2004, this was the original 1985 version of §15-77-300 which contained no factors to determine the hourly rate.

Gatewood further contends the "beneficial results obtained" factor would violate due process. It materially alters his vested fee contract rights by taking away his right to an attorney fee not determined by that factor, and making the factor a requirement for the Court's consideration. Such application would divest Gatewood of his vested contract rights, which are "property" under the Constitution, and violate due process (United States Trust Co. of New York v. New Jersey 431 U.S. 1, 97 S.Ct. 1505, 1516 n. 16 (1977); Coombes v. Getz 285 U.S. 434, 52 S.Ct. 435, 438 (1932); Jefferson Disposal Co., Inc. v. Jefferson Parrish 603 F. Supp. 1125, 1136 (ED La, 1985)).

Thus, Gatewood contends that due process would prohibit application of the "beneficial results obtained" factor before and after February 24, 2010.

Finally, Gatewood contends the "beneficial results obtained" factor would substantially impair the fee contract by altering the reasonable expectations of the contract parties (Kirven, 760 S.E. 2d at 800). The parties are presumed to have adopted the fee contract terms in reliance on original §15-77-300 to govern a subsequent fee petition (United States Trust Co. of New York, 97 S.Ct. at 1515 n. 14, 1516 n. 17). Original §15-77-300 only required that fees be reasonable, not that any factors be used to determine the fee rate. The amendment would require the Court to consider the "beneficial results obtained" and other factors to determine the rate. Thus, the provisions in original §15-77-300 would not apply and the presumed expectations of the parties would be altered.

For the same reason, this factor would materially alter the fee contract terms (Harleysville Mut. Ins. Co. v. South Carolina 401 S.C. 15, 736 S.E. 2d 651, 658 (S.C., 2012)). It would also alter the rights and obligations of the contract parties, and legal effect of the contract (Superior Motors, Inc. v. Winnebago Ind., Inc. 359 F. Supp. 773, 777 (D.S.C., 1973)).

For these reasons, Gatewood contends impairment of contract would prohibit application of the "beneficial results obtained" factor before and after February 24, 2010.

As a final consideration governing review, if the Court finds the ALC remand order was not appealable, Gatewood requests the Court to consider this petition as an application for mandamus to the ALC to reconsider Gatewood's entitlement to attorney fees, costs and interest, thus rendering this Court's review of the Court of Appeals' decision appropriate (J. Toal, Appellate Prac-

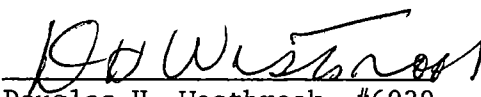
tice in South Carolina, 3d Ed., 2016, page 165).

Gatewood submits the above considerations are special and important reasons to grant his petition for certiorari under SCACR 242(b).

CONCLUSION

For the reasons stated herein, petitioner requests the Court to grant the Petition for a Writ of Certiorari. If the Court grants the petition, the Court may consider consolidating this case with Ackerman, et al. v. SCDC Appellate Case No. 2017-002010 pursuant to SCACR 214, 242(h).

Respectfully submitted,


Douglas H. Westbrook, #6039
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(843) 853-9600
Attorney for Fred Gatewood

THE STATE OF SOUTH CAROLINA
In The Supreme Court
APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge
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South Carolina Department of Corrections.....

Respondent.

Court of Appeals Appellate Case No. 2017-001552

PROOF OF SERVICE

I certify that I have served petitioner's Petition for a Writ of Certiorari and Appendix on the S.C. Department of Corrections by depositing copies of them in the U.S. Mail, postage prepaid, on October 13, 2017, addressed to its attorney of record, Lake Summers, Esquire, of Malone, Thompson, Summers & Ott, LLC, 339 Heyward St., Suite 200, Columbia, SC 29201.

October 13, 2017.


Douglas H. Westbrook, #6039

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October 13, 2017

RECEIVED
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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Fred Gatewood v. SCDC
Court of Appeals Appellate Case No. 2017-001552

Dear Ms. Kitchings:

Pursuant to SCACR 242(c), please find enclosed for filing with the Court a copy of Petitioner Fred Gatewood's Petition for Writ of Certiorari and Proof of Service, which have been filed by mail this date in the Supreme Court.

Thank you for your assistance in this matter.

Sincerely,



Douglas H. Westbrook

DHW/
Encl.

cc: The Honorable Daniel E. Shearouse
Lake E. Summers, Esquire

DOUGLAS H. WESTBROOK
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October 13, 2017

RECEIVED
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SC Court of Appeals

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Fred Gatewood v. SCDC
Court of Appeals Appellate Case No. 2017-001552

Dear Mr. Shearouse:

Pursuant to SCACR 242(a)(c), please find enclosed for filing with the Court the original signature copy and six additional copies of Petitioner Fred Gatewood's Petition for Writ of Certiorari and Proof of Service. I also enclose two copies of the Appendix, one copy unbound, pursuant to SCACR 242(e). Finally, I enclose a check for the \$100 filing fee.

I have this date filed by mail a copy of the Petition and Proof of Service with the Clerk of the Court of Appeals. By copy of this letter, I also served by mail a copy of the Petition, Appendix, and Proof of Service on counsel for the Department of Corrections.

Thank you for your assistance in this matter.

Sincerely,



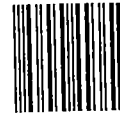
Douglas H. Westbrook

DHW/
Encl.

cc: The Honorable Jenny Abbott Kitchings
Lake E. Summers, Esquire



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