

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 Oct. 17, 2017)

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

v.

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

Court of Appeals Appellate Case No. 2017-002087

PETITION FOR A WRIT OF CERTIORARI

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SC Court of Appeals

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Pursuant to SCACR 242(a), Fred Gatewood (inmate) 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), inmate's undersigned counsel certifies that a petition for rehearing was made on October 27, 2017, and finally ruled on and denied by the Court of Appeals on November 8, 2017 (App. pp. 4, 40).

QUESTION PRESENTED

Did the Court of Appeals err in deciding the ALC's rulings at the September 7, 2017 status conference were not final decisions and thus not appealable?

STATEMENT OF THE CASE

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 When he worked, S.C. Code §24-3-430(D), the "prevailing wage" statute, had been replaced by budget provisos beginning in July 2001.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

On August 23, 2004, the Supreme Court held inmates could file prevailing wage grievances with SCDC and appeal to the Administrative Law Court (ALC) (Adkins, et al. v. SCDC 360 S.C. 413, 602 S.E. 2d 51 (S.C., 2004); Wicker v. SCDC 360 S.C. 421, 602 S.E. 2d 56 (S.C., 2004)). On September 27, 2004, inmate signed the September 14, 2004 fee contract with counsel (App. p. 80). In October 2004, inmate filed a wage grievance with SCDC. In 2007, SCDC denied the grievance for failure to timely file and on the merits.

Inmate appealed to the ALC in 2007. In 2012, the ALC ruled inmate's grievance was timely filed. In 2014, the ALC issued its decision denying the grievance.

ance on the merits.

Inmate appealed the adverse decision to the Court of Appeals. On March 9, 2016, the Court issued its decision 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., 406 S.C. 304.." (App. p. 6).

On June 30, 2017, inmate filed his petition for attorney fees, costs and pre and post-judgment interest in the ALC pursuant to S.C. Code §15-77-300, original 1985 version, and the 2004 fee contract. Inmate also filed a motion for appointment of a special referee to calculate back wages and other matters (App. p. 63).

On September 7, 2017, the ALC held a status conference and made certain rulings affecting these cases (App. p. 9). On October 5, 2017, inmate appealed the rulings to the Court of Appeals (App. p. 8). Before the parties filed the briefs or record, the Court on October 17, 2017 issued an order dismissing the appeal as interlocutory (App. p. 3). On October 27, 2017, inmate filed a petition for rehearing with the Court (App. p. 40). On November 8, 2017, the Court issued its order denying the petition (App. p. 4).

ARGUMENT

The Court of Appeals should have decided that the ALC rulings at the September 7, 2017 hearing were final decisions and thus appealable.

In its order dismissing the appeal, the Court of Appeals stated, in part, as follows (App. p. 3):

The notice of appeal filed in this case indicates the appeal is taken from statements made by the Administrative Law Judge during a status conference on this case. Because the decision of the Administrative Law Judge is not a **final** decision, this appeal is dismissed as interlocutory..

The notice of appeal stated it was appealing the rulings of the ALC during the September 7, 2017 hearing (App. p. 8). Moreover, the notice of appeal attached the hearing transcript containing these rulings (App. p. 9). Inmate contends the appeal of an ALC ruling necessarily encompasses the question of whether the ruling is a final order and thus appealable. Therefore, inmate contends the issue of appealability was raised in the Court of Appeals. The issue was also raised and discussed in the petition for rehearing (App. pp. 40-55).

Inmate contends the ALC rulings were final orders under Charlotte-Mecklenburg Hosp. Auth. v. DHEC 387 S.C. 265, 267, 692 S.E. 2d 894 (S.C., 2010), and cases relied on by the Court to explain the meaning of "finality": Mid-State Distributors, Inc. v. Century Importers, Inc. 310 S.C. 330, 426 S.E. 2d 777, 780-781 (S.C., 1993) (Regarding issue of appealability of denial of a motion to dismiss for lack of personal jurisdiction, the Court held there was no finality in the denial, and defendant could still show a lack of personal jurisdiction at trial); and Good v. Hartford Accident & Indem. Co. 201 S.C. 32, 21 S.E. 2d 209, 212 (S.C., 1942) (Regarding issue of appealability of trial

court's rulings, the Court approved principles that a final order or decree must dispose of the cause, or a distinct branch thereof, or operate to divest some right in such a manner as to put it out of court).

I. Rulings Affecting a Distinct Branch of the Case

The ALC believed it did not have to carry out the Court of Appeals' remand because the ALC only has appellate jurisdiction and the Court of Appeals' remand is dictum (App. pp. 15-17). Inmate contends the ALC has jurisdiction and is duty bound to carry out the Court of Appeals' remand order (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 the judgment, and is vested with jurisdiction to determine attorney fees); Prince v. Beaufort Mem. Hosp. 392 S.C. 599, 709 S.E. 2d 122, 125 (S.C. App., 2011) (Appellate court's mandate is "jurisdictional", and trial court has duty to follow appellate court's directions); SCDSS v. Basnight 346 S.C. 241, 250-251, 551 S.E. 2d 274, 279 (S.C. App., 2001); and Ackerman v. McMillan 324 S.C. 440, 443, 477 S.E. 2d 267, 268 (S.C. App., 1996)).

On June 13, 2017, the ALC remanded this case back to SCDC (App. p. 6). The ALC now believes it does not have jurisdiction to carry out the Court of Appeals' remand. Inmate submits the ALC ruling may cause inmate to lose the right to have the ALC consider the issue specified in the Court of Appeals' remand, which is a distinct branch of the case (Mid-State Distributors, Inc. v. Century Importers, Inc., 426 S.E. 2d at 780-781; Good v. Hartford Accident & Indem. Co., 21 S.E. 2d at 212). Thus, inmate submits the ALC ruling is "final" for purposes of appealability.

The ALC stated it did not have contested case, but only appellate jurisdiction (App. p. 18). Inmate contends the ALC has appellate and contested case jurisdiction (ALC Rule 2(E) ("Contested case" means a hearing required by due process or otherwise provided by law); J. Toal, Appellate Practice in South Carolina, 3d Ed., 2016, p. 74 (ALC can have both contested case and appellate jurisdiction). Here, Wicker, 602 S.E. 2d at 58 note 1 granted ALC appeal rights as a requirement of due process. In the instant matter, the ALC acquired jurisdiction to reconsider inmate's entitlement to attorney fees, etc. by the Court of Appeals' remand and remittitur to the ALC in 2016 and 2017. Thus, inmate contends the ALC has appellate and contested case jurisdiction pursuant to Rule 2(E), Wicker, and the Court of Appeals' remand and remittitur.

Inmate submits the ALC ruling may cause inmate to lose the right to have the ALC reconsider the issue specified in the Court of Appeals' remand, which is a distinct branch of this case (Mid-State Distributors, Inc., 426 S.E. 2d at 780-781; Good, 21 S.E. 2d at 212). Thus, inmate submits the ALC ruling is "final" for purposes of appealability.

The ALC stated it did not have jurisdiction because of the pending appeal to the Court of Appeals of the ALC's June 13, 2017 remand to SCDC (App. pp. 12, 15, 20, 32, 33). Inmate contends the ALC retains jurisdiction notwithstanding the appeal (Jackson v. Speed 326 S.C. 289, 486 S.E. 2d 750, 761 (S.C., 1997) (Notice of appeal divests lower court of jurisdiction only of the order being appealed); SCACR 205 (After notice of appeal, lower court retains jurisdiction over matters not affected by the appeal); Jackson, 486 S.E. 2d at 761 (Jurisdiction retained for attorney fees); Wayne Smith Const. Co., Inc. v. Wolman, Duberstein & Thompson 294 S.C. 140, 149, 363 S.E. 2d 115, 120 (S.C. App., 1987)

(Jurisdiction retained for attorney fees); Parker v. Shecut 340 S.C. 460, 492-493, 531 S.E. 2d 546 (S.C. App., 2000) (Jurisdiction retained for contract damages); Grosshuesch v. Cramer 377 S.C. 12, 659 S.E. 2d 112, 122 note 7 (S.C., 2008) (Different subject matters in lower court and on appeal).

Inmate submits the ALC ruling may cause inmate to lose the right to have the ALC consider the issue specified in the Court of Appeals' remand, which is a distinct branch of this case (Mid-State Distributors, Inc., 426 S.E. 2d at 780-781; Good, 21 S.E. 2d at 212). Thus, inmate submits the ALC ruling is "final" for purposes of appealability.

The ALC stated it would not at this point determine the motion for appointment of a special referee (App. p. 15). Inmate contends the ALC, or a special referee, should calculate back wages, interest, attorney fees (contingent), and other matters (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 attorney fee under §15-77-300, with the amount of such fee to be based in part on "the benefit obtained" and other factors to enhance the lodestar with a multiplier). See also, S.C. Code §14-11-60, SCRCP 53(b), and ALC Rule 68, which inmate contends allow for appointment of a special referee in this case. See motion at App. p. 63.

Inmate submits that he may lose the right to have the ALC consider the issue specified in the Court of Appeals' remand, which is a distinct branch of this case (Mid-State Distributors, Inc., 426 S.E. 2d at 780-781; Good, 21 S.E. 2d at 212). Thus, inmate submits the ALC ruling is "final" for purposes of appealability.

II. Rulings Affecting Vested Fee Contract Rights

The ALC stated counsel had a "vested contract" to a contingent fee (App. pp. 23-24). Inmate contends counsel and all inmates who signed the 2004 fee contract acquired vested contract rights, entitling them to the §15-77-300 (original 1985 version) fee, or the 40% contingent fee, whichever is greater (App. p. 78) (Sept. 14, 2004 fee contract, containing two methods of fee calculation, §15-77-300 and contingent fee; Vested contract rights: 16B Am Jur 2d (2009), Const. Law, §747; 16A C.J.S. (2015), Const. Law, §472; Black's Law Dict., Rev. Fourth Ed., p. 1735; United States Trust Co. of New York v. New Jersey 431 U.S. 1, 97 S. Ct. 1505, 1515 note 14, 1516 note 17; Catawba Indian Tribe of South Carolina v. South Carolina 372 S.C. 519, 642 S.E. 2d 751, 756 (S.C., 2007); Wilkinson ex rel Wilkinson v. Palmetto State Transp. Co. 638 S.E. 2d 109, 116 (S.C. App., 2006); First of America Bank v. Netsch 651 N.E. 2d 1105, 1113 (Ill., 1995); Entitlement to greater of §15-77-300 fee or contingent fee: Albunio, et al. v. City of New York, et al. 11 N.E. 3d 1104, 1108-1110 (Ct. of App. N.Y., 2014)).

Inmate submits the ALC ruling may effectively dispose of the attorney fee branch of the case and/or prejudice the right to pursue the attorney fee claim under §15-77-300 (Mid-State Distributors, Inc., 426 S.E. 2d at 780-781; Good, 21 S.E. 2d at 212). Thus, inmate submits the ALC ruling is "final" for purposes of appealability.

The ALC stated attorney fee petitions are remedial and §15-77-300, current version, can be applied retroactively (App. pp. 21, 23-24). Inmate contends the original 1985 version of §15-77-300 applies, and the current version does not apply and is not remedial. First, the current version 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)). It would also materially limit the vested contract rights under the 2004 fee contract (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, 651 N.E. 2d at 1113).

Moreover, the current version of §15-77-300 (2010 amendments) is not remedial because it creates no new remedy (Edwards v. SLED, 720 S.E. 2d at 466); and it creates a different fee liability for the agency than under original §15-77-300 (Carolina Chemicals, Inc. v. SCDHEC 351 S.E. 2d 575, 578-579 (S.C. App., 1986)).

The current version of §15-77-300 would also materially alter and divest vested fee contract rights, which are "property" under the Constitution, and thus violate due process (United States Trust Co. of New York, 97 S. Ct. at 1516 note 16; Coombes v. Getz 285 U.S. 434, 52 S. Ct. 435, 438 (1932); and Jefferson Disposal Co. v. Jefferson Parrish 603 F. Supp. 1125, 1136 (ED La., 1985)).

Further, the current version of §15-77-300 would substantially impair the fee contract by altering the reasonable expectations of the contract parties (Kirven, 760 S.E. 2d at 800), since the parties are presumed to have adopted the fee contract terms in reliance on the original version of §15-77-300 to govern a later fee petition (United States Trust Co. of New York, 97 S. Ct. at 1515 note 14, 1516 note 17).

In addition, the current version of §15-77-300 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); and the rights and obligations of the contract parties, and legal effect of the contract (Superior Motors, Inc. v. Winn-ebago Ind., Inc. 359 F. Supp. 773, 777 (D.S.C., 1973)).

Finally, application of the current version of §15-77-300 would breach a legislatively created contract in original §15-77-300 (United States Trust Co. of New York, 97 S. Ct. at 1515 note 14; Layman, et al. v. State of South Carolina, et al. 368 S.C. 631, 630 S.E. 2d 265, 268 (S.C., 2006)).

Inmate submits the ALC ruling would operate to nullify or substantially prejudice the vested fee contract rights to have the 1985 version of §15-77-300 apply (Mid-State Distributors, Inc., 426 S.E. 2d at 780-781; Good, 21 S.E. 2d at 212). Thus, inmate submits the ALC ruling is "final" for purposes of appealability.

The ALC stated, even if §15-77-300, 2010 version, is not retroactive, the ALC can still use it to "clarify" what §15-77-300 "originally intended", based on Duvall v. State Budget & Control Board 377 S.C. 36, 659 S.E. 2d 125, 130 (S.C., 2008) (App. pp. 28-29). Inmate contends that §15-77-300, original 1985 version, applies, and the 2010 amendments do not apply. See page(s) 7-9. Also, unlike the present case, in Duvall the amendment itself stated it was a clarification of, rather than a change to, existing law.

Inmate submits that he has vested fee contract rights that original §15-77-300 will apply, which rights would be lost if the 2010 amendments were used to "clarify" what the original statute intended (Mid-State Distributors, Inc., 426 S.E. 2d at 780-781; Good, 21 S.E. 2d at 212). Thus, inmate submits the ALC ruling is "final" for purposes of appealability.

The ALC stated, under the current version of §15-77-300, the ALC cannot grant attorney fees greater than the contingent fee (App. p. 21). Inmate contends §15-77-300, original 1985 version, applies and the 2010 amendments do not apply. See discussion, page(s) 7-9.

Inmate submits that he has vested fee contract rights that original §15-77-300 will apply, which rights would be lost if the current version of the statute were applied (Mid-State Distributors, Inc., 426 S.E. 2d at 780-781; Good, 21 S.E. 2d at 212). Thus, inmate submits the ALC ruling is "final" for purposes of appealability.

III. Ruling Affecting Due Process Rights

The ALC stated he did not think he could hear attorney's fees until there is a determination as to the "official results obtained" (App. p. 20). The ALC's June 13, 2017 Gatewood remand was for SCDC to determine the "beneficial results obtained" (App. p. 6). Presumably, this means back wage calculations. Inmate contends due process requires an impartial adjudicator to determine the "beneficial results obtained" (Due Process Clause of the South Carolina and United States Constitutions; Article I, Section 22 of the S.C. Constitution; Ross v. MUSC 492 S.E. 2d 62, 72 (S.C., 1997) (Due process in administrative matters requires impartial adjudicator); Al-Shabazz, 527 S.E. 2d at 753; J. Toal, Appellate Practice in South Carolina, 3d Ed., 2016, pp. 66-67).

Inmate further contends due process would exclude SCDC as a back wage adjudicator since it would be a conflict of interest for SCDC to determine its own damages. Moreover, SCDC's contesting liability for 13 years in these cases has demonstrated its "will to win" (Ross v. MUSC 492 S.E. 2d at 72 ("Will to win" demonstrates partiality by an administrative adjudicator)).

Inmate submits that the due process right to have an impartial adjudicator calculate back wages would be lost if SCDC performed that task (Good, 21 S.E. 2d at 212). Moreover, given SCDC's "will to win" and partiality, the ALC ruling and remand to SCDC may effectively dispose of the back wages calculations branch of the case, and eliminate or prejudice the claim for back wages (Id; Mid-State Distributors, Inc., 426 S.E. 2d at 780-781). Thus, inmate submits the ALC ruling is "final" for purposes of appealability.

IV. Rulings Affecting Attorney Fee Rights

The ALC stated the attorney fee is determined by considering the six (common law) factors, and then if necessary considering the lodestar. The ALC also stated the lodestar is the (fee) enhancement (App. pp. 24-26). Inmate contends that under Layman, 658 S.E. 2d at 332-335, the ALC was incorrect, as the lodestar is calculated first, and then the Court may enhance the lodestar with a multiplier based on one or more of the common law factors (Id).

Inmate submits the ALC ruling would result in miscalculation of attorney fees, and divest the right under Layman to claim attorney fees as calculated therein (Mid-State Distributors, Inc., 426 S.E. 2d at 780-781; Good, 21 S.E. 2d at 212). Thus, inmate submits the ALC ruling is "final" for purposes of appealability.

The ALC stated there is a question of law as to whether litigation in the ALC is a "civil action" under §15-77-300 (App. p. 34). Inmate contends ALC litigation for judicial review of SCDC wage denial is a "civil action" under the statute (McDowell v. SCDSS 304 S.C. 537, 543, 405 S.E. 2d 830, 833 (S.C., 1991) (Agency typically "presses its claim" in judicial review actions); Al-Shabazz, 527 S.E. 2d at 750 (Inmates may seek judicial review in the ALC of SCDC

final decisions); Wicker, 602 S.E. 2d at 58 (Due process requires judicial review in ALC of SCDC wage denial claims); and Ross v. MUSC 312 S.C. 532, 435 S.E. 2d 877, 878 note 2 (S.C. App., 1993) (Proceeding under APA is a civil action for purposes of attorney fee recovery).

Inmate submits the ALC ruling, if adverse to inmate, would prevent the attorney fee claim for ALC litigation on judicial review of these cases (Mid-State Distributors, Inc., 426 S.E. 2d at 780-781; Good, 21 S.E. 2d at 212). Thus, inmate submits, if the ALC rules adversely to inmate on this question, it would be a "final" ruling for purposes of appealability.

V. Considerations Governing Review

Inmate submits there are special and important reasons to grant the petition (SCACR 242(b)). First, the Court of Appeals dismissal raises novel questions of law (SCACR 242(b)(1)) about the effective finality of lower court rulings which dispose of or prejudice a distinct branch of the case, or take away vested contract rights, due process rights, and statutory attorney fee rights.

Second, inmate contends the dismissal conflicts with the meaning of "finality" in Charlotte-Mecklenburg Hosp.'s cited authorities, Mid-State Distributors, Inc. and Good, as explained herein (SCACR 242(b)(3)).

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, and Gatewood v. SCDC Appellate Case No. 2017-002119.

Respectfully submitted,

DH Westbrook
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Charleston, SC 29401
(843) 853-9600
Attorney for Petitioner

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 Oct. 17, 2017)

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

v.

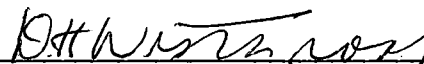
South Carolina Department of Corrections..... Respondent.

Court of Appeals Appellate Case No. 2017-002087

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 December 6, 2017, addressed to its attorney of record, Lake Summers, Esquire, of Malone, Thompson, Summers & Ott, LLC, 339 Heyward St., Suite 200, Columbia, SC 29201.

December 6, 2017.


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December 6, 2017

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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. 2017-002087


Dear Mr. Shearouse:

Pursuant to SCACR 242(a)(c), please find enclosed for filing with the Court the original and six 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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December 6, 2017

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DEC 08 2017

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. 2017-002087

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,



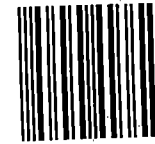
Douglas H. Westbrook

DHW/
Encl.

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



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