

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Administrative Law Court

Deborah B. Durden, Administrative Law Judge

ALC Case No.: 19-ALJ-30-0036-AP
Appellate Case No.: 2019-000947

Richland County School District One Board of Commissioners.....Appellant,

v.

The Charter Institute at Erskine and Clear Dot Charter School Columbia.....Respondents.

INITIAL BRIEF

July 8, 2019

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STATEMENTS OF ISSUES ON APPEAL

- I. WHETHER THE ALJ'S DECISION TO DISMISS APPELLANT'S APPEAL AS UNTIMELY IS AFFECTED BY ERROR OF LAW AND CLEARLY ERRONEOUS AS THE ONLY WRITTEN NOTICE OF RESPONDENT ERSKINE'S ISSUANCE OF FINAL APPROVAL TO CLEAR DOT IS ITS DECEMBER 11, 2019 MEETING MINUTES WHICH WERE NOT AVAILABLE TO APPELLANT UNTIL JANUARY 16, 2019.

- II. WHETHER THE ALJ'S DECISION TO DISMISS APPELLANT'S APPEAL AS UNTIMELY PREJUDICES APPELLANT'S SUBSTANTIVE RIGHTS TO DETERMINE IF THE OPENING OF RESPONDENT CLEAR DOT WOULD HAVE AN ADVERSE IMPACT ON STUDENTS REMAINING IN APPELLANT'S DISTRICT.

STATEMENT OF THE CASE

The issuance of a charter to open a charter school in South Carolina is governed by the South Carolina Charter Schools Act of 1996 (“Charter Schools Act”) codified in Title 59, Chapter 40 of the Code of Laws of South Carolina, 1976, as amended. S.C. Code Ann. § 59-40-10 et. seq. A charter school applicant may apply to a local school district, the South Carolina Public Charter School District (“SCPCSD”), or an independent institution of higher learning. S.C. Code Ann. § 59-40-70(A)(2).

In this case, Respondent Clear Dot of Columbia (“Respondent Clear Dot” or “Clear Dot”) applied to the Charter Institute at Erskine (“Respondent Erskine” or “Erskine”) as an independent institution of higher learning. The entity to whom the application is designated as the sponsor. Id. When the sponsor is either the SCPCSD or an independent institution of higher learning, notice of the application must be given to the local school district in which the school is proposed to be located. S.C. Code Ann. § 59-40-70(A)(1). A sponsor may conditionally approve a charter school to secure space, equipment, facilities, and personnel if such authority is necessary for it to meet the requirements of the Charter Schools Act. S.C. Code Ann. § 59-40-80. Once an application is given final approval, then the local school district is provided the right to determine if the approved application “adversely affects the other students in its district, as defined by regulation, or that the approval of the application fails to meet the spirit and intent of th[e] [Charter Schools Act].” S.C. Code Ann. § 59-40-70(G).

In February of 2018, Respondent Clear Dot submitted a charter application seeking sponsorship by Respondent Erskine to open a charter school within the bounds of Richland County School District One (“Appellant’s District” or “District”). Erskine’s Board of Director’s (“Erskine Board”) issued conditional approval to Clear Dot during its April 20, 2018 meeting

requiring that Clear Dot meet several conditions, to include: (1) executing the preopening conditions and reporting the status of those conditions to the Erskine Board; (2) reporting student enrollment projections to the Erskine Board, and (3) reporting the finalizing of a facility to the Erskine Board. The Erskine Board subsequently issued final approval orally during its December 11, 2018 meeting. Erskine did not issue a final written order or any other written notice, and when a written order was requested by Richland County School District One's Board of Commissioners ("Appellant"), Erskine informed Appellant that its meeting minutes reflecting the decision would be publicly available online upon the approval of the Erskine Board during their January 16, 2019 meeting. Erskine further agreed to provide Appellant with those minutes but never did. The December 11, 2019 meeting minutes, to which Appellant did not have access until January 16, 2019, are the only written notice of the full approval of the charter.

Nonetheless, Appellant served its Notice of Appeal on the Respondents and filed the Notice in the Administrative Law Court ("ALC") on February 15, 2019, contending that: (1) Erskine's failure to issue a written notice memorializing the final approval of Clear Dot's charter application deprived the Appellant of its substantive statutory right to determine whether the opening of Clear Dot would have an adverse impact on the students remaining in the District; (2) because Clear Dot's charter application lacked a secure facility and/or a description of facility needs at the time of approval, the approval is in contravention of the requirements enunciated in S.C. Code Ann. Regs. 43-601 (2015).; and, (3) the approval of Clear Dot's charter application failed to meet the spirit and intent of the South Carolina Charter Schools Act ("Charter Schools Act").

On March 28, 2019, the Respondents filed an Amended Joint Motion to Dismiss the District's appeal on the grounds that: (1) the appeal was untimely; and, (2) Appellant failed to

exhaust its administrative remedies by addressing its concerns to Erskine's Board. Appellant submitted its Response to Respondents' Amended Joint Motion to Dismiss on April 10, 2019, contending that: (1) Appellant timely filed and served the Notice of Appeal by doing so on February 15, 2019, within 30 days of the Erskine Board's approval and publication of the December 11, 2018 meeting minutes; and, (2) Appellant did not have a statutory duty to address its concerns to the Erskine Board prior to instituting its appeal to the ALC.

On May 7, 2019, the Administrative Law Judge ("ALJ"), the Honorable Deborah Brooks Durden, issued an order dismissing Appellant's appeal as untimely ("Order"). The Order relies on the following findings of fact to support its decision: (1) Erskine's December 11, 2018 meeting was properly noticed and conducted with adequate access given to the public pursuant to the South Carolina Freedom of Information Act; (2) there was a presentation by representatives of Respondents Clear Dot and Erskine followed by questions by the Erskine Board; and (3) the Erskine Board publicly and unanimously voted to grant full approval to Respondent Clear Dot.

Relying on the above stated facts and Brown v. James, 389 S.C. 41, 51, 697 S.E.2d 604 (Ct. App. 2010), the ALJ held that the Erskine Board's "on-the-record, publicly announced, ruling constituted [Respondent Erskine's] final decision with respect to Clear Dot's charter application" which was sufficient to trigger Appellant's 30 day window to appeal. The Order made no finding on Respondent's contention that Appellant had a duty to exhaust its administrative remedies by presenting its concerns to Respondent Erskine's Board prior to appealing to the ALC.

Appellant timely filed and served the instant Notice of Appeal on June 6, 2019.

STANDARD OF REVIEW

In accordance with the Administrative Procedures Act (“APA”), an aggrieved party may appeal an order of the ALJ to the South Carolina Court of Appeals. S.C. Code Ann. § 1-23-600(E). The Court of Appeals must confine its review of the ALJ’s order to the record below. S.C. Code Ann. § 1-23-610(B). The Court of Appeals cannot substitute its judgment for that of the ALJ as to the weight of evidence on questions of fact. *Id.* However, if a decision of the ALJ prejudiced the substantive rights of a party because the decision is affected by error of law and/or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, the Court of Appeals may reverse. S.C. Code Ann. § 1-23-610.

ARGUMENT

- I. THIS COURT SHOULD REVERSE THE ALJ’S DECISION TO DISMISS APPELLANT’S APPEAL AS UNTIMELY BECAUSE THE DECISION IS AFFECTED BY ERROR OF LAW AND CLEARLY ERRONEOUS AS THE ONLY WRITTEN NOTICE OF RESPONDENT ERSKINE’S ISSUANCE OF FINAL APPROVAL TO CLEAR DOT IS ITS DECEMBER 11, 2019 MEETING MINUTES WHICH WERE NOT MADE AVAILABLE TO APPELLANT UNTIL JANUARY 16, 2019.**

In reviewing a decision of the ALC, the Court of Appeals may reverse a decision if the substantive rights of the petitioner have been prejudiced because the decision is: (1) affected by error of law and/or (2) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-610(B). In this case, the ALJ erred in holding Appellant’s appeal untimely because Erskine did not meet the requirements of providing a written notice in approving Clear Dot’s charter.

The Administrative Procedures Act provides that “proceedings for review are instituted by serving and filing a notice of appeal as provided in the South Carolina Appellate Court Rules (“SCACR”) within thirty days after the final decision” of the agency is rendered. S.C. Code Ann.

§ 1-23-380(1). However, the Supreme Court of South Carolina has held that a party has 30 days after receiving **written notice** of the decision to appeal an agency decision pursuant to § 1-23-380. Hamm v. South Carolina Public Service Com., 287 S.C. 180, 182 (S.C. 1985). The Supreme Court concluded that,

[w]hile a literal reading of Section 1-23-380(b) suggests the thirty days to appeal runs from the time the decision is made, [the court] believe[s] the statute must be read to allow a party thirty days after *notice* of a decision to bring an appeal.

Id. at 181-82. The Supreme Court reasoned that without such a liberal interpretation of § 1-23-380(b), “an agency could preclude judicial review in all cases simply by concealing its decision until the thirty days had run.” Id. at 182.

Moreover, SCACR Rule 203(b) sets forth the procedures for appealing a decision and states that, “a notice of appeal shall be served on all respondents within thirty (30) days of receipt of **written notice** of entry of the order or judgment.” Rule 203(b), SCACR (**emphasis added**). The Supreme Court has stated that, “when determining whether the service of the notice of appeal is timely, [courts] look to the date the parties received written notice of entry of an order or judgment.” Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC, 422 S.C. 211, 215-216 (S.C. 2018) (finding that an e-mail to the parties containing a signed order and Form four was sufficient to trigger the time to appeal); see also Cox v. Cnty. of Florence, 337 S.C. 340, 344 (S.C. 1999) (finding a letter addressed to appellants informing them of the agency’s decision triggered their time to appeal pursuant to § 1-23-380).

In the instant action, Respondent Erskine announced its decision approving Respondent Clear Dot’s charter application on December 11, 2018. However, Respondent Erskine did not provide written notice of its decision to Appellant. Rather, upon Appellant’s request for a written final decision, Respondent Erskine informed Petitioner by e-mail that Erskine would approve its

December 11, 2018 meeting minutes, which included written memorialization of the decision, at its regularly scheduled meeting on January 16, 2019. While this e-mail correspondence did not state whether the Board approved Clear Dot's application, Erskine assured Appellant that once approved, Respondent Erskine would forward the minutes reflecting the decision to Appellant. Upchurch v. Upchurch, 367 S.C. 16 2006 (finding that notice of future entry of an order was not sufficient to trigger the appellant's time to appeal as it was not notice of entry of judgment). Respondent Erskine never forwarded the minutes to Appellant and thus, Appellant was never provided written notice of the decision. Appellant's actual first notice of the minutes was when the minutes were posted to Erskine's website several days after January 16, 2019, but Appellant used January 16, 2019, as the trigger date because Appellant could have attended the meetings to obtain a written copy of the minutes.

Nonetheless, the ALJ determined that Erskine's December 11, 2018, oral decision was sufficient to trigger Appellant's thirty-day appeal window. By this logic, Appellant had until January 10, 2019, to appeal the decision. However, the Erskine Board did not approve the meeting minutes memorializing the decision until January 16, 2019, six (6) days after Appellant's alleged window would have expired. Accordingly, the ALJ's determination that the oral decision on December 11, 2018, triggered Appellant's appeal rights is in contravention with Hamm as Respondent Erskine was able to preclude judicial review by concealing its approval of Clear Dot's application until after Appellant's window to appeal had expired. Hamm, 287 S.C. at 182.

Additionally, Erskine's decision, as reflected in the December 11, 2018 meeting minutes, is largely insufficient to satisfy the APA. The meeting minutes provide only the following, in pertinent part,

a) Clear Dot Charter School Charter Application Status

Mr. Rudrapati reported that Clear Dot Charter School has requested full approval of their charter application. The recommendation from the Institute team is for full approval of the Clear Dot Charter School Application. Dr. Ott and Kendall Artusi answered questions.

A motion was made by Mr. Rodman to fully approve the charter application for Clear Dot Charter School. Dr. Hellams seconded the motion which carried unanimously.

However, S.C. Code Ann. § 1-23-350 requires an agency's decision to state findings of fact and conclusions of law. Despite these deficiencies and, although the meeting minutes were never provided to Appellant, Appellant identified January 16, 2019, as the trigger date to serve and file its Notice of Appeal with the ALC as that was the earliest date on which the Appellant could have received written notice of the final decision.¹ As such, Appellant served and filed its Notice of Appeal on February 15, 2019, with the ALC, within the thirty-day time period contemplated by the applicable rules and supported by case law.

Lastly, while the ALJ relied on Brown v. James, 389 S.C. 41 (Ct. App. 2010) to conclude that an on the record vote can constitute final action, the case is inapposite as the issue before the ALC was not whether Erskine's decision on December 11, 2018, constituted a final action. 389 S.C. 41 (Ct. App. 2010). Rather, Erskine's failure to provide written notice of the decision delayed the triggering of Appellant's thirty-day window to appeal. Furthermore, the court in Brown interpreted statutes relating to the termination of a contract teacher rather than the APA. While there is no written notice requirement in the teacher termination provisions, it is clear that in cases governed by the APA, written notice of the decision is required.

¹ Courts have held that all administrative agencies, pursuant to the Administrative Procedure Act, "must make findings which are sufficiently detailed" to enable the reviewing court to determine whether the decision is supported by the record. See Porter v. South Carolina Pub. Serv. Comm'n, 333 S.C. 12 (1998); Lee County Sch. Dist. Bd. of Tr. v. MLD Charter Sch. Acad. Planning Comm., 371 S.C. 561 (2007).

Thus, this Court should reverse the ALJ's decision that Appellant's appeal was untimely as the decision is in error of law and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

II. THIS COURT SHOULD REVERSE THE ALJ'S DECISION TO DISMISS APPELLANT'S APPEAL AS UNTIMELY BECAUSE THE DECISION PREJUDICES APPELLANT'S SUBSTANTIVE RIGHTS TO DETERMINE IF THE OPENING OF RESPONDENT CLEAR DOT WOULD HAVE AN ADVERSE IMPACT ON STUDENTS REMAINING IN APPELLANT'S DISTRICT.

Pursuant to South Carolina law, Appellant had substantive rights to assess whether the opening of Respondent Clear Dot's charter school would have an adverse impact on students remaining in the District and whether the approval of Clear Dot's charter application met the spirit and intent of Charter Schools Act.

Section 59-40-70(G) of the Charter Schools Act empowers a local school board of trustees, such as Appellant, to appeal the granting of a charter to the ALC upon information that an approved application by an independent institution of higher learning sponsor, such as Respondent Erskine, adversely affects the other students in its district or that the approval fails to meet the spirit and intent of the Charter Schools Act. Id. The ALC has the authority to review the final decision of an independent institution of higher learning sponsor pursuant to the provisions of the APA. A charter school applicant and a charter school sponsor are both on notice that an appeal is governed by the APA, thus, there is an inherent obligation to provide written notice required by the act.

In contravention of the above provisions, the ALJ's decision to dismiss Appellant's timely appeal deprives Appellant of a meaningful opportunity to exercise its substantive rights.

- a. **Due to deficiencies contained in Respondent Clear Dot's application upon approval, Appellant is unable to determine whether the opening of Respondent Clear Dot would have an adverse impact on students remaining in Appellant's District.**

The ALJ's dismissal of Appellant's timely appeal results in an affirmance of Erskine's approval of Clear Dot's application which was so deficient as to deprive Appellant of its substantive right to meaningfully assess whether the opening of the charter school would have an adverse impact on students remaining in its District.

The Charter Schools Act dictates that the approved charter application constitutes an agreement between the charter school and the sponsor. S.C. Code Ann. § 59-40-60(A). The resulting contract between a charter school applicant and its sponsor must reflect all the provisions outlined in the application. S.C. Code Ann. § 59-40-60(B). Accordingly, each charter school application must contain several provisions to include the following: (1) evidence that an adequate number of parents or guardians of students eligible to attend support the school to justify the projected per pupil allocation in the application budget and (2) a description of the building, facilities, and equipment and how they shall be obtained. S.C. Code Ann. § 59-40-60(F).

Furthermore, the South Carolina Department of Education promulgated the regulation, "Procedures and Standards for Review [of] Charter School Applications" ("Reg. 43-601"), which elaborates on the required provisions of charter applications. S.C. Code Ann. § 59-40-180. Reg. 43-601 provides that if a charter school has not identified a suitable facility, the application must describe its facility and equipment needs, state whether a facility will be built or remodeled, and have schedule for attaining the facility and raising funds. S.C. Code Ann. Regs. 43-601(L)(2) (2015).

At the time of approval, Clear Dot had not secured a permanent facility. Instead, Clear Dot would be operating out of an unidentified temporary site during its first year. Clear Dot's application does not contemplate a temporary site nor specify the location of the temporary site or indicate whether the site would need to be remodeled. Instead, the application contemplates a permanent site which is subject to various cleanup initiatives prior to being fit for operation as an elementary school. Additionally, Clear Dot had not actually obtained the temporary site at the time of approval. Because of this, the Clear Dot administration was unable to specify the number of students to be served in its first year in operation. Because Clear Dot's application does not, and at the time of approval could not, articulate these critical factors with some sense of certainty, Appellant was unable to determine whether the opening of Clear Dot would have an adverse impact on students remaining in the District.

To adequately assess the impact of an opening charter school, a school district reasonably relies on the charter application, which, by law, reflects the material provisions of school's charter, the written conditional approval, and the written final approval. Together, these documents inform a school district which of its schools and programs will be impacted by the opening of the charter school. School districts consider the charter school's size, location, target population, and proposed curriculum as described in these documents. Because, at the time of approval, Clear Dot had not identified the school's location and specified the school's target population, the District has been unable to assess what impact the opening will have on its students. The ALJ's decision affirms the deprivation of Appellant's substantive right to do so and further deprives Appellant's of its only remedy in these circumstances.

Therefore, this Court should reverse the ALJ's dismissal of Appellant's timely appeal as such has prejudiced Appellant's substantive rights.

b. Respondent Erskine's approval of Respondent Clear Dot's charter application fails to meet the spirit and intent of the Charter Schools Act.

On the date of approval, Respondent Clear Dot's application (1) was so deficient as to deprive Appellant of its statutory right to determine whether its opening would have an adverse impact on students remaining in the District; (2) was in contravention with regulatory and statutory requirements; and (3) failed to meet the terms of its conditional approval.

The Charter Schools Act gives a local school board the authority to assess whether the opening of a charter school would have an adverse impact on students remaining in the District. S.C. Code Ann. § 59-40-70(G). The Charter Schools Act and accompanying regulations further requires each application to address certain subjects which are material to the operation of the school and will be reflected in the contract between the charter school and its sponsor. S.C. Code Ann. § 59-40-60; S.C. Code Ann. Regs. 43-601 (2015). As discussed more fully above, due to Clear Dot's failure to submit a complete application which meets the requirements of § 59-40-60, Appellant was unable to exercise its statutory rights under § 59-40-70(G).

Furthermore, Erskine issued a conditional approval to Clear Dot to: (1) execute the preopening conditions and report the status of such to the Erskine Board; (2) report student enrollment projections to the Erskine Board, and (3) report the finalizing of a facility to the Erskine Board. At the time of approval, Erskine acknowledged that Clear Dot had not met all of the preopening conditions of the conditional approval. Specifically, Clear Dot was unable to report on its enrollment projections even during its presentation to the Erskine Board as its enrollment was dependent upon the occupancy of its temporary site which had not yet been acquired. Erskine considered whether these circumstances could lead to an issue of economic viability. Even in the face of Clear Dot's failure to meet the terms required by Erskine's own conditional approval, Erskine issued final approval to Clear Dot. Erskine's approval of Clear

Dot's application fails to meet the spirit and intent of the Charter Schools Act as the application is in contravention of the applicable law, regulations, as well as Erskine's conditional approval.

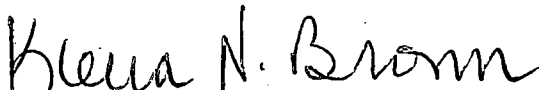
The process used by Erskine deprived the public of a meaningful examination before the school opens, thereby placing parents at risk of selecting an inadequate choice for their children, as the approval by Erskine theoretically validates the legitimacy of Clear Dot. As such, this Court should reverse the ALJ's dismissal of Appellant's timely appeal as such has prejudiced Appellant's substantive right to appeal Erskine's approval as it fails to meet the spirit and intent of the Charter Schools Act.

CONCLUSION

This Court should reverse and remand this case for a decision on the merits as the ALJ's decision prejudiced Appellant substantive rights and is affected by error of law and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, namely the absence of written notice of Erskine's decision with the requisite findings of fact and conclusions of law.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Administrative Law Court

Deborah B. Durden, Administrative Law Judge

ALC Case No.: 19-ALJ-30-0036-AP
Appellate Case No.: 2019-000947

Richland County School District One Board of Commissioners.....Appellant,

v.

The Charter Institute at Erskine and Clear Dot Charter School Columbia.....Respondents.

PROOF OF SERVICE

The undersigned of Boykin & Davis, L.L.C., hereby certifies that he has served the following counsel of record with the foregoing **INTIAL BRIEF**, by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 8th day of July 2019.

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Re: Richland County School District One Board of Commissioners v. Clear Dot
Charter School and Charter Institute at Erskine
Appellate Case No.: 2019-000947


Dear Ms. Kitchings:

Enclosed please find for filing the original and six (6) copies of Richland County School District One Board of Commissioners' Initial Brief and Designation of Matter to be included in the Record on Appeal in the above-referenced case. Please return the time-stamped copies to our courier.

By copy of this letter, we are today serving a copy of same to all parties of record.

Thank you for your assistance with this matter.

Sincerely yours,


Kierra N. Brown

/tjb

Enclosure

cc: The Administrative Law Court (w/encl.)
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