THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2020-000448

RECEIVED
Apr 14 2020
S.C. SUPREME COURT

Pickens County, ...Respondent,

v.

South Carolina Department of Health
and Environmental Control and MRR Pickens, LLC ..... Petitioners.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIORNMENTAL CONTROL'S PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for South Carolina Department of Health and Environmental Control ("Petitioner") hereby certifies that a timely Petition for Rehearing was made to the Court of Appeals on January 23, 2020, which the Court of Appeals ruled upon and denied on February 14, 2020.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err as a matter of law and in contravention of the doctrine of exhaustion of remedies in reversing and concluding the County's request for review was timely under S.C. Code Ann. § 44-1-60(E)(2) when the County indisputably filed its request months after it received actual notice of the modification?

II. Did the Court of Appeals exceed the scope of its review and invade the province of the fact finder by making *de novo* findings of fact and conclusions of law on issues upon which the ALC did not receive evidence or argument and did not rule because the case was correctly dismissed on procedural grounds?

III. If the factual and legal questions the Court of Appeals reached were properly within the scope of its review, did the Court of Appeals fail to give deference to DHEC's interpretation of its regulations absent compelling reasons not to do so?

STATEMENT OF THE CASE

Before the Court is a dismissal of a contested case by the Administrative Law Court ("ALC") based on the procedural ground of timeliness and the Court of Appeals' error by reaching issues not heard or ruled upon by the ALC and failing to defer to Petitioner's interpretation of its regulations absent compelling reasons not to do so.

On November 3, 2008, Petitioner South Carolina Department of Health and Environmental Control ("DHEC") issued Permit LF2-00003 to Petitioner MRR Pickens, LLC ("MRR") (collectively, "Petitioners") for the construction of a Class 2 landfill. **(R. pp. 381-86)** On August 10, 2015, DHEC staff issued a modification of the permit. **(R. pp. 32-38)** On March 23, 2016, Respondent Pickens County ("County") filed its request for review of the modification with the DHEC Board. **(R. pp. 162-73)** The DHEC Board denied the request for review as untimely on April 21, 2016. **(R. pp. 160-61)**

The County filed its Request for Contested Case Hearing before the ALC on May 19, 2016. **(R. p. 159)** MRR and DHEC filed motions to dismiss the Contested Case on July 28 and July 29, 2016, respectively. **(R. pp. 174-91, 447-598)** The ALC held a hearing on these motions on December 2, 2016. **(R. pp. 47-158)** By written order dated December 12, 2016, the ALC granted Petitioners' motions and held the County failed to timely fulfill the procedural requirements for bringing a contested case before the ALC. **(R. pp. 1-5)**

On January 11, 2017, the County filed a Notice of Appeal with the Court of Appeals. The Court of Appeals held oral argument on May 6, 2019 and reversed the ALC by published opinion

on January 8, 2020. Petitioners filed a timely Petition for Rehearing on January 23, 2020, which the Court of Appeals denied on February 14, 2020. This Petition for Writ of Certiorari follows.[1]

STATEMENT OF FACTS

I. The issuance of the permit and modification for the Highway 93 Landfill.

On November 3, 2008, DHEC issued a permit to MRR for the construction and operation of a Class 2 landfill at 2180 Greenville Highway, Liberty, South Carolina, in Pickens County (the "Highway 93 Landfill"). **(R. pp. 381-86)** Prior to issuing the permit, DHEC publicly noticed the agency decision and sent written notice to neighboring landowners and the County. **(R. pp. 653-67)** The County did not object or otherwise contest the permit and did not request to be notified of any further decisions with respect to the permit. **(R. pp. 472-73, 501 ¶ 4)**

On March 30, 2015, MRR applied for a modification to the permit for the option to install a liner and associated leachate collection system. **(R. pp. 32-38, 465)** These modifications do not, in and of themselves, allow the landfill to accept additional categories of waste or an increased volume of waste. **(R. p. 696, line 21-p. 697, line 18)** It is undisputed that accepting new categories of waste, such as coal ash, would require separate permissions, modifications, and approvals from DHEC. **(R. p. 698, line 25-p. 699, line 6)** On August 10, 2015, DHEC staff issued the requested modification and mailed it to MRR the same day. **(R. pp. 32-38)** Prior to issuing the modification, DHEC did not publicly notice or provide a comment period because it determined based on its regulations that MRR's requested modification qualified as minor. **(R. p. 472).** Because the County had not requested notification of any actions pertaining to the permit after its initial

[1] In Order No. 2020-03-20-01, this Court suspended the normal procedure for compiling and filing an Appendix under Rule 242, SCACR. In referencing a document that would ordinarily be included in the Appendix, Petitioner will cite the name of the document and specific page number(s) for reference.

issuance, DHEC did not mail a copy of the modification to the County when the modification decision was issued**.**

II. The County's actual knowledge of the modification and failure to exhaust administrative remedies before commencing an untimely and improper contested case proceeding.

It is undisputed the County obtained various forms of actual notice and knowledge of the modification as follows:

- On December 15, 2015, DHEC staff met with representatives from the County and discussed the modification "at length" **(R. pp. 501-02 ¶ 5; p. 505 ¶ 6)**;
- On January 11, 2016, DHEC sent the County a copy of the modification to the County **(R. p. 509)**;
- On January 11, 2016, the County issued a Land Use Approval Termination Letter to MRR confirming its knowledge and receipt of the modification **(R. pp. 511-12)**;
- On February 17, 2016, Gerald Wilson, an employee of the County, signed an affidavit attesting he was aware of the modification **(R. pp. 504-07)**; and
- On February 18, 2016, the County attached a copy of the modification as an exhibit to a brief submitted to the circuit court in related litigation between the MRR and the County stemming from the County's Land Use Approval Terminal Letter **(R. p. 525)**.

Despite having this actual notice and knowledge, the County did not file its request for review with the DHEC Board until March 23, 2016. **(R. pp. 162-73)** This was 226 days after DHEC staff issued the modification, 99 days after the County received actual notice of it, 72 days after it received a copy of it, 72 days after it issued a Land Use Approval Termination letter to MRR in part based upon it, 35 days after an employee of the County signed an affidavit admitting the County's knowledge of the modification, and 34 days after the County submitted the modification in other court proceedings.

DHEC staff submitted a recommendation to its Board requesting denial of the request for review as untimely because the County did not file the request within the 15-day window required by S.C. Code Ann. § 44-1-60(E)(2). **(R. pp. 472-502)** The DHEC Board denied the County's

request for review on April 21, 2016. **(R. pp. 160-61**) The County filed its Request for Contested Case Hearing before the ALC on May 19, 2016**. (R. p. 159)** DHEC and MRR each moved to dismiss the County's Request for a Contested Case Proceeding on the narrow ground that the County's request for review was untimely, as the County failed to exhaust its administrative remedies and the ALC was deprived of jurisdiction to hear the matter. **(R. pp. 174-91, pp. 447-598)**

Following a motions hearing, the ALC granted Petitioners' motions and dismissed the case on procedural grounds. The ALC's order was appropriately limited to the jurisdictional issue of timeliness and failure to exhaust administrative remedies. In pertinent part, the ALC held as follows:

- S.C. Code Ann. § 44-1-60 is the exclusive process for appeals of DHEC permitting decisions and is the statutory equivalent of the judicial doctrine of exhaustion of administrative remedies. **(R. p. 3)**

- "[The County] was given various forms of notice over a period of months. However, [the County] still waited months before filing a request for review." **(R. p. 3)**

- "In part, the County argues that it did not have the opportunity to take action because DHEC improperly classified the matter as a minor permit modification, which exempted the Department from the public notice and comment procedure followed for major modifications and new constructions. Whether the Department improperly classified the modification, and whether it should have granted the modification, is a matter that can only be decided in a hearing on the merits of this case. However, the matter currently before the Court is [Petitioners'] motions to dismiss this case on procedural grounds." **(R. pp. 3-4)**

- "[The County] also argues that DHEC's failure to comply with the notice requirements in the regulation is the reason it filed the request for review months late. However, this argument is foreclosed by the fact that Petitioner received actual notice on multiple occasions and still failed to take prompt action." **(R. p. 4)**

- "Using the last possible date of notice still renders [the County's] request untimely." **(R. p. 4)**

- Equitable tolling is inapplicable because "the County had actual notice of the decision made by DHEC, but failed to pursue the available administrative remedies in a timely fashion, and has not stated a legally valid or compelling reason for its failure." **(R. p. 4)**

III. The Court of Appeals' *de novo* findings of fact and improper reversal of the Administrative Law Court ("ALC").

The County appealed the ALC's dismissal to the Court of Appeals. The Court of Appeals reversed the ALC, primarily based on its conclusion that the time to file a request for review does not begin "upon a party's simply learning of a permit action," but instead "begins to run only after DHEC issues a staff decision in compliance with applicable statutory and regulatory notice safeguards." Opinion No. 5707, filed January 8, 2020, (hereinafter "Opinion") at 13. The Court of Appeals looked to whether MRR sought a minor or a major modification of the permit in determining whether DHEC complied with statutory notice requirements—a question the ALC specifically did not answer because the ALC **correctly** found the classification of the permit to be irrelevant. *Id.* at 13.

The Court of Appeals made several *de novo* findings of fact which led to its erroneous conclusion that "DHEC failed to comply with the notice procedures applicable to its decision to, in essence, permit a Class III landfill" and its incorrect ruling that the contested case was timely regardless of County's receipt of actual notice well before March 23, 2016. *Id.* at 14. Further, the Court of Appeals also held the ALC "improperly accepted evidence from outside of the pleadings" and improperly converted the Petitioners' motions to dismiss to motions for summary judgment, even though the Petitioners actually sought relief under Rule 12(b)(1), SCRCP, for a lack of subject matter jurisdiction. *See id.* at 14.

SUMMARY OF ARGUMENT

In this case, the Court of Appeals disregarded undisputed facts of a party's actual notice of an agency decision and documented failure to comply with and avail itself of known administrative remedies. Therefore, its Opinion represents an extraordinary departure from established precedent for a court sitting in appellate review of a final agency decision.

The issue of timeliness under S.C. Code Ann. § 44-1-60(E)(2) was the sole question presented to the ALC, the sole question for which the ALC received and accepted evidence and argument, and the sole question upon which the ALC ruled. The Court of Appeals greatly exceeded its powers under the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310 *et seq*. ("APA") and ruled on issues that were not preserved, failed to adhere to this Court's and the Court of Appeals' precedents, and set the stage for certain DHEC determinations to be challenged in the future despite a challenger's actual notice of a decision and failure to timely act upon such notice. This judicially-created, open-ended window to challenge DHEC permits could wreak havoc on the system, as neither DHEC nor the permittee can be certain a non-publicly noticed decision is final and free from challenge. This Court should grant certiorari to review, and reverse, the decision of the Court of Appeals.

ARGUMENT

I. The Court of Appeals erred in looking beyond the County's undisputed actual knowledge and failure to timely exhaust administrative remedies.

Based upon the undisputed facts before the ALC, the County's action is untimely even when using the last possible date upon which the County received actual notice of the modification. As the ALC correctly determined, the County's failure to timely exhaust its administrative remedies under S.C. Code Ann. § 44-1-60 is dispositive in this case.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). If the language is plain, unambiguous, and conveys a clear and definite meaning, courts have no right to go beyond the text and import a different meaning. *Id.* The court is "confined to what the statute says" and has "no right to modify a statute's application 'under the guise of judicial interpretation." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012) (quoting *Coker v. Nationwide Ins. Co.*, 251 S.C. 175, 182, 161 S.E.2d 175, 178 (1968)). It is "improvident to engraft extra requirements to legislation." *Id.* (quoting *Berkebile v. Outen*, 311 S.C. 50, 55-56, 426 S.E.2d 760, 763 (1993)).

Section 44-1-60(E) is plain, unambiguous, and controls this question. It first requires that "[n]otice of the department decision must be sent by certified mail, return receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified." S.C. Code Ann. § 44-1-60(E)(1). It is undisputed the County had previously failed to request to be notified of any action with respect to the permit. Therefore, DHEC fully complied with this statutory notice provision by mailing the staff decision to MRR on August 10, 2015. Furthermore, section 44-1-60(E) provides that "[t]he staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, or affected person." *Id.* at § 44-1-60(E)(2). No request for review was filed within fifteen days of the mailing on August 10, 2015. Thus, the decision became final. *See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 426, 702 S.E.2d 246, 250 (2010) ("The clear and unambiguous language in the statute provides that the staff decision

becomes final 'fifteen days after notice of the department *has been mailed* . . . .'")(emphasis in original).

Unlike the ALC, which found it unnecessary to address the County's argument for improper classification of the modification as irrelevant to the procedural grounds upon which the case should be disposed, the Court of Appeals evaluated the modification to determine whether the County should have received notice when the modification was issued. Even assuming the County was entitled to such notice, the case law is clear that the date upon which it received actual notice controls the timeliness inquiry. In cases where a challenger did not receive notice of a permit or other decision at the time it was issued, both this Court and the Court of Appeals have evaluated the timeliness of a request for review based upon the receipt of actual notice. *See id.* at 429, 702 S.E.2d at 252 ("[W]e hold that in situations where DHEC fails to simultaneously notify the applicant, permittee, and affected persons who asked to be notified, the latest date of mailing controls when the fifteen day period begins to run."); *Bursey v. S.C. Dep't of Health & Envtl. Control*, 369 S.C. 176, 188, 631 S.E.2d 899, 906 (2006) (holding the ALC properly found action to be timely where there was substantial evidence the challenger brought the action within the required period of time after receiving actual notice); *A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control*, 428 S.C. 189, 205, 833 S.E.2d 451, 460 (Ct. App. 2019) (affirming dismissal of contested case as untimely because the challenger failed to request final review within fifteen days of obtaining actual notice of the permit). The County's action is untimely under this actual notice test because the County obtained actual knowledge of the modification verbally on December 15, 2015 and was emailed a copy on January 11, 2016. These facts, found by the ALC, are undisputed and were not reversed on appeal. By waiting until March 23, 2016 to file its request for review, the County missed the 15-day window required by S.C. Code Ann. § 44-1-60(E). The County's

request for review was filed 99 and 72 days after it received verbal and electronic notice of the modification, respectively.

The Court of Appeals' failure to apply the actual notice rule conflicts with and overrules the decisions of this Court. The Court of Appeals held that actual notice is irrelevant and "the time period [to file a request for review] begins to run *only* after DHEC issues a staff decision in compliance with the applicable statutory and regulatory notice safeguards." (**Opinion at 13)**. If this inconsistent precedent set by the Court of Appeals' published decision in this matter is allowed to stand, the floodgates could open for delayed challenges to DHEC permits regardless of whether the challenger had actual notice of the decision, which will needlessly consume public resources and clog the ALC docket. This could not have been the intent of the General Assembly in enacting S.C. Code Ann. § 44-1-60 and the APA, and this new precedent does great harm to the established exhaustion of remedies doctrine. In addition to conflicting with a prior decision of this Court, the harmful effects of the Opinion constitute special and important reasons to grant certiorari. Therefore, certiorari should be granted to review the Court of Appeals' decision. *See* Rule 242(b), SCACR.

II. The Court of Appeals erred by exceeding its authority under the Administrative Procedures Act and crafting factual determinations *de novo* when the ALC correctly dismissed the case on procedural grounds.

The General Assembly intended the APA to "provide a uniform procedure for contested cases and appeals from administrative agencies." *S.C. Coastal Conservation League*, 390 S.C. at 429, 702 S.E.2d at 252 (quoting 2006 Act. No. 387 § 53). South Carolina Code Ann. § 1-23-610(B) details the narrow standard of review applicable to appeals taken from a contested case proceeding. In this case, the Court of Appeals went beyond the narrow standard of review and addressed issues for which the ALC did not receive evidence or argument or rule upon because

the case was correctly dismissed on procedural grounds. *See Timms v. Timms*, 286 S.C. 291, 293, 333 S.E.2d 74, 75 (Ct. App. 1985) (holding "[w]here a point has not been decided by the lower court, we will not consider the point on appeal.") The failure of the Court of Appeals to apply the correct standard of review is reversible error. *E.g.*, *State v. Moore*, 415 S.C. 245, 253, 781 S.E.2d 897, 901 (2016) (finding that, "while the court of appeals' panel majority properly set forth the standard of review, it failed to follow the standard of review," and holding that it constitutes reversible error under such circumstances if the Court of Appeals, for instance, "reweighed the facts and substituted its *de novo* judgment" as "[t]he question before the court of appeals was whether there was any evidence to support the trial court's finding of reasonable suspicion—not the court of appeals' independent view of the facts.").

The ALC's order was limited to the following: (1) the County had actual knowledge of the modification by no later than January 11, 2016; (2) the County did not file its request for review until March 23, 2016, beyond the deadline found in S.C. Code Ann. § 44-1-60(E)(2); and (3) there were no grounds to invoke equitable tolling of the deadline. The Court of Appeals should not have rendered *de novo* findings of fact on the issues pertaining to modification classification, disposal and special handling of coal ash, and incomplete deposition excerpts from another case, because these were all issues the ALC found unnecessary to rule upon given the dispositive nature of the timeliness issue. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] court usually should refrain from deciding unnecessary questions."). In this case, the narrow opinion of the ALC is correct on the law and is supported by substantial evidence in the record. Therefore, the Court of Appeals' reversal is an error of law that warrants this Court's review.

After exceeding its authority by making *de novo* findings of fact on issues not ruled upon by the ALC, the Court of Appeals also found reversible error in the ALC's alleged consideration of evidence from outside of the pleadings in granting the motion to dismiss. In contested cases before the ALC, "[t]he Request for Contested Case Hearing along with the Prehearing Statements establish a core statement of the facts and issues for determination that is comparable to the pleadings in a civil trial." *Preservation Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, No. 13-ALJ-0056-CC at 4, Order Denying Motion to Dismiss (Dec. 2, 2013) (Anderson, J.) (rev'd on other grounds, Op. No. 27949 (S.C. Sup. Ct. filed Feb. 19, 2020) (Shearouse Adv. Sh. No. 8 at 43) (extension on petition for rehearing pending). The ALC's review on a motion to dismiss is limited to the Request for Contested Case Hearing and Prehearing Statements." *Id.* The Court of Appeals' holding that the motions to dismiss were converted into motions for summary judgment by the ALC's consideration of Petitioners' respective prehearing statements and the undisputed facts regarding the timing of the County's filings constitutes an error of law.

III. If the ALC should have considered issues it did not reach, the Court of Appeals erred in not deferring to DHEC's interpretation of its regulations or remanding this matter to the ALC for the limited purpose of considering the modification classification.

The ALC only made findings of fact regarding notice and timeliness of the appeal and did not decide whether the permit modification was major or minor, because the last possible date of actual notice rendered the County's request untimely. To the extent the Court of Appeals addressed the classification of the modification, DHEC is entitled to deference with respect to its interpretation of its regulation.

If this Court finds the modification classification issue addressed by the Court of Appeals is relevant to the issue of timeliness, which is expressly denied, the matter should be resolved based on the agency's interpretation of its regulation or the case should be remanded to the ALC

for factual development and findings on that issue. *See Fox v. Newberry Cty. Mem'l Hosp.*, 319 S.C. 278, 282, 461 S.E.2d 392, 395 (1995) ("[T]he merits of this issue should have never been addressed by the Circuit Court or the Court of Appeals, but instead the case should have been remanded to the Commission for findings of fact."). The ALC is the "ultimate finder of fact" in contested cases. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011). In an action at law, an appellate court may not make its findings of fact and instead may only determine whether the ALC's findings lack evidentiary support. *See Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005); *see also* S.C. Code Ann. § 1-23-610(B)(e) (allowing an appellate court to reverse an ALC if the decision is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"); *Fox*, 319 S.C. at 280, 461 S.E.2d at 394 (holding an appellate court reviewing a decision of the Workers' Compensation Commission "may not make findings of fact as to basic issues of liability for compensation, where, to do so, would impose upon the court the function of determining such facts from conflicting evidence").

If the modification classification issue addressed by the Court of Appeals is relevant to the issue of timeliness, DHEC is entitled to deference with respect to its interpretation of its regulation. Courts are required to give deference to an agency when an agency interprets its own regulation, absent a compelling reason to do otherwise. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) (reemphasizing the deference doctrine in South Carolina provides that courts defer to an administrative agency's interpretations with respect to its own regulations "unless there is a compelling reason to differ") (quoting *S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486). Here, the Court of Appeals overreached regarding factual determinations and gave no deference to the Department's

interpretation of its regulation pertaining to the permit's modification classification. The Department's determination that the permit modification was minor can only be overturned by a court if the determination is arbitrary, capricious, or manifestly contrary to the statute and regulations. *Id.* at 34-35, 766 S.E.2d at 718 ("[W]here an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'"). Courts give such deference to administrative agencies "both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Id.* at 34, 766 S.E.2d at 718. To the extent this Court determines the modification classification issue is relevant to the issue of timeliness, which is expressly denied, the Court of Appeals' failure to give the required deference to DHEC's interpretation of its regulation absent compelling reasons not to do so is a fundamental error and should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court issue a writ of certiorari to review, and ultimately reverse, the decision of the Court of Appeals in this matter.

Respectfully submitted,

/s/ Etta R. Williams Linen

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