

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Case No. 2017-001311

N. Bobby Knight and Construction Group, LLC, Appellants,

v.

South Carolina Department of Labor, Licensing and Regulation,
South Carolina Contractor's Board, Respondent.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Do the South Carolina Rules of Civil Procedure govern administrative proceedings?**
- II. Were Appellants properly noticed for the hearings?**
- III. Did the Board properly have subject matter jurisdiction regarding Appellants' disciplinary proceedings?**

STATEMENT OF THE CASE

This appeal originates from a complaint filed with the South Carolina Department of Labor, Licensing and Regulation (“LLR”), South Carolina Contractor’s Licensing Board (“the Board”) against Construction Group, LLC (“Appellant Construction Group”) and N. Bobby Knight (“Appellant Knight”) (collectively “Appellants”).¹

The complaint alleged that Appellants failed to disclose a judgment on a license renewal application. (R. pp. 104–07, R. Supp. p. 9). Specifically, on or about January 10, 2012, a claim was filed against Appellant Construction Group in the United States District Court for the District of South Carolina, Charleston Division for breach of a federal contract of over \$25,000. (R. p. 105). On or about January 7, 2013, the District Court entered a judgment against Appellant Construction Group in the amount of \$51,808.000 plus prejudgment interest, in addition to costs of the action. (R. p. 1).

On or about July 18, 2014, Appellants submitted their license renewal application for the 2014–2016 renewal period and failed to disclose the aforementioned judgment. (R. pp. 110–15).

An evidentiary hearing before a hearing officer appointed by the Board took place on September 9, 2016. (R. pp. 11–41). Appellants did not appear at this hearing despite being properly noticed. (R. pp. 17, 34–37). At the hearing, LLR Investigator Maurice Smith testified that Appellants failed to disclose the aforementioned judgment on the renewal application when

¹ As provided for in S.C. Code Ann. § 40-11-20(12) (1976, as amended), the Board licenses entities. (“‘Licensee’ means an entity which has been issued either a general or mechanical contractor’s license by the department.”) “Entity” is defined as a “a sole proprietorship, partnership, limited liability partnership, *limited liability company*, association, joint venture, cooperative, corporation, or other legal entity authorized by law and approved by the [B]oard.” S.C. Code Ann. § 40-11-20(7) (1976, as amended) (emphasis added). In order for the entity to be issued a contractor’s license, the entity must be qualified for the license. An entity becomes qualified for each license classification by having a qualifying party associated with it. A qualifying party is the individual that qualifies the licensee to engage in contracting work. See S.C. Code Ann. § 40-11-20(20) (1976, as amended) (“‘Qualifying party’ means an individual who has been issued a certificate to qualify an entity for a license by way of examination in a license classification or subclassification.”) A licensee must have a credentialed qualifying party to sustain its license; the licensee cannot stand alone. Here, Appellant Construction Group is the licensed entity and Appellant Knight is Appellant Construction Group’s qualifying party.

it should have been disclosed. (R. pp. 22–23, 112). In response to a notice of complaint that was mailed to 3940 Hottinger Avenue, Charleston, SC 29405, the address on file for Appellants, Investigator Smith testified that Appellant Knight submitted a statement providing that he realized that he should have checked “yes” on the application’s question regarding judgments, and that he did not intend to be deceitful. (R. pp. 10, 19–21, 108–09). Importantly, Appellant Knight’s statement identified his address as 3940 Hottinger Avenue, the same address to which the notice of the evidentiary hearing was mailed. (R. pp. 108–09). Additionally, Ms. O’Linda Mack, Administrative Assistant for LLR’s disciplinary counsel, testified that she also mailed the notice of hearing, both certified and regular, to 3940 Hottinger Avenue, Charleston, SC, 29405 — the address of record for Appellants. (R. pp. 34–36).

After reviewing the evidence presented, the hearing officer found that the State had met its burden in proving that Appellants, in not disclosing the aforementioned judgment on the 2014–2016 license renewal application, had violated S.C. Code Ann. § 40-11-110(A)(1), 40-11-110(A)(4), and 40-1-110(1)(f) (1976, as amended). (R. pp. 38–39). In light of these violations, the hearing officer recommended sanctions, including but not limited to Appellants being publicly reprimanded, being fined, and being required to appear before the Board for a renewal application hearing to determine the status of the judgment. (*Id.*)

The Hearing Officer’s Recommendation was issued on September 9, 2016. (R. pp. 51–54). On September 14, 2016, the Hearing Officer’s Recommendation and Notice of Final Order Hearing were mailed to Appellants at both the Hottinger Avenue address as well as an additional Wilson Street address. (R. pp. 101–02).

A final order hearing to review the Hearing Officer’s Recommendation took place before a quorum of the Board on October 20, 2016. (R. pp. 43–50). Despite being properly noticed, Appellants again failed to appear before the Board. (R. p. 46). The Board adopted the Hearing

Officer's Recommendation in its entirety and issued its Final Order on November 4, 2016. (R. pp. 2, 51–54). The Board's Final Order was mailed to Appellants at both the Hottinger Avenue address as well as the Wilson Street address. (R. Supp. p. 10).

Appellants filed an appeal of the Board's decision with the Administrative Law Court ("ALC") on or about December 8, 2016, which was later perfected.² On January 4, 2017, the ALC mailed a letter to Appellant Knight that provided that "it has come to the Court's attention that Construction Group, LLC, is not represented by an attorney in this matter," and pursuant to SCALC Rule 8(A), an attorney admitted to practice in South Carolina must represent an entity party, like Appellant Construction Group before the ALC. (R. p. 100).

On or about January 16, 2017, Appellants filed a Notice and Motion to Correct or Amend Case Caption.³ (R. p. 99). In response, Respondent submitted a Motion to Deny Appellants' Motion to Correct or Amend Caption on January 27, 2017. (R. pp. 95–98). Appellants then submitted two replies, one original reply and one amended reply, to Respondent's Motion. (R. pp. 85–94).

On February 6, 2017, the ALC issued an Order regarding the aforementioned motions. (R. pp. 3–8). In its Order, the ALC denied Appellants' Motion to Correct or Amend Caption, finding that the current appeal pertains to not only sanctions against the qualified party certificate issued to Appellant Knight and fines imposed against him, "but also to the sanctions imposed against the license issued to Construction Group, LLC and the fines imposed upon it. Therefore, this appeal must proceed with the current licensee, the LLC, as an appellant, not just Mr. Knight." (R. p. 5).

² Appellants first filed a premature appeal with this Court and then improperly filed a request for a contested case hearing with the ALC before filing their ALC appeal.

³ Appellants also filed a motion for automatic stay with the ALC at the same time.

Appellants' Brief with the ALC was then filed pro se on March 24, 2017, in direct violation of the Court's February 6, 2017 Order. (R. pp. 55–84). Respondent filed a Motion to Dismiss on April 18, 2017. (R. Supp. p. 1–8). On April 27, 2017, Appellant Knight filed a response to Respondent's Motion to Dismiss. (R. pp. 125–36).

On May 4, 2017, the ALC issued its Order of Dismissal, dismissing Appellants' appeal with prejudice. In doing so, the ALC found that, in addition to Appellants' continuing violation of SCALC Rule 8(A), Appellants failed to appear at either the hearing before the hearing officer or at the Final Order Hearing, despite being properly notified of both hearings. (R. pp. 117–22). Thus, all of the arguments Appellants attempted to make were being raised for the first time on appeal and could not be considered by the ALC. (R. p. 120).

On or about June 8, 2017, Appellants filed an appeal with this Court. Appellants' counsel filed his initial brief and designation of matter with this Court on September 25, 2017.

This brief follows.

ARGUMENTS

I. The South Carolina Administrative Procedures Act governs proceedings before an administrative agency.

Appellants argue that this Court should reverse the ALC's Order of Dismissal and remand the matter to the Board for a new trial de novo after "proper notice" is provided to Appellants. (Appellants' Br. p. 4). In arguing that the ALC decision must be reversed and the case remanded to the Board, Appellants argue that the Board did not follow various rules of the South Carolina Rules of Civil Procedure ("SCRCP") and in doing so, failed to provide proper notice of the hearings. (Id. at 3). A review of the SCRCP and the South Carolina Administrative Procedures Act ("APA") reveal that not only are the SCRCP inapplicable in the present case, but that Appellants were properly noticed for both hearings before the Board, but chose to not attend. By refusing to appear for the hearings despite being properly noticed, Appellants cannot now seek this Court's assistance in reversing the ALC's decision.

"In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). "When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning." *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004).

Rule 1, SCRCP, defines the scope of the SCRCP and specifically provides, in pertinent part, that "[t]hese rules govern the procedure in all South Carolina courts in all *suits* of a *civil nature* whether cognizable at law or in equity. . ." (emphasis added). Next, Rule 81, SCRCP, explains the applicability of the SCRCP and provides that "[t]hese rules, or any of them, shall apply to every trial court of *civil jurisdiction* within this state, within the limits of the jurisdiction

and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable.” (emphasis added).

The plain language of Rules 1 and 81, SCRCF, specifically designate that the SCRCF apply to *suits of a civil nature* and trial courts of *civil jurisdiction*. The present appeal does not arise from a civil suit and the Board is not a trial court of civil jurisdiction. Rather, the hearings that took place before the Board were contested case hearings before an administrative agency. As such, any notice and service issues with respect to the underlying case are addressed by the APA and the statutes governing the Board — not the SCRCF. Accordingly, this Court should not hold Respondent to a service standard that is not applicable to the present proceedings.

By arguing that Respondent has violated these applicable rules of civil procedure, Appellants’ counsel has overlooked the fact that the underlying case stems from action taken from an administrative agency. In the same way the SCRCF provide the procedural framework for civil lawsuits, the APA provides the rules of procedure before administrative agencies. *See Al-Shabazz v. State*, 338 S.C. 354, 374, 527 S.E.2d 742, 752 (2000) (“The APA outlines a variety of rights and procedures available to the parties in a contested case decided by an administrative agency.”); *Stono River Envtl. Prot. Ass’n v. S.C. Dep’t of Health & Envtl. Control*, 305 S.C. 90, 93–94, 406 S.E.2d 340, 342 (1991) (“Administrative agencies are required to meet minimum standards of due process. ‘Due process is flexible and calls for such procedural protections as the particular situation demands.’”) (internal citations omitted); *see also* S.C. Const. art. I, § 22 (“No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial review.”)

In the present case, the Board falls squarely within the APA’s definition of “agency,” as it is the state board authorized by law to determine contested cases involving contractors in this

state. *See* S.C. Code Ann. § 1-23-310(2). Likewise, the disciplinary action taken by the Board falls squarely within the APA's definition of a "contested case," as it is a licensing proceeding in which the "legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." S.C. Code Ann. § 1-23-310(3); *see also* S.C. Code Ann. §§ 40-1-90 and 40-11-90 (providing that investigation results and any subsequent disciplinary hearing must be presented to the Board.)

Importantly and most pertinent to the current appeal, the APA — not the SCRCF — details what type of notice must be afforded to parties in a contested case hearing before an administrative agency. Specifically, S.C. Code Ann. § 1-23-320(A) and (B) of the APA outline the specific notice requirements, including but not limited to at least thirty days' notice and a statement of the time, place, and nature of the hearing, that apply to contested case proceedings before an administrative agency.

As provided in Section II of this Brief, Respondent has satisfied the fundamental requirements of due process by providing proper notice in conformance with the APA at all stages. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (providing that those fundamental due process requirements include "notice, an opportunity to be heard in a meaningful way, and judicial review.")

II. Appellants were properly noticed for the underlying hearings before the Board, but chose not to appear.

Section 1-23-320 of the APA outlines the notice requirements that an administrative agency must provide a licensee for a contested case hearing. In addition to providing at least thirty days' notice before a hearing, the notice must include a statement of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; references to particular statutes and rules involved; and a short and plain statement of the matters

asserted in the case. S.C. Code Ann. §1-23-320. Unlike the SCRCPP, the APA's notice requirements do not differentiate between serving individuals and serving corporations or partnerships. Rather, all parties are provided notice in the same aforementioned manner. In addition to the notice provisions of the APA, the regulations governing contractors in South Carolina, specifically S.C. Code Ann. Regs. 29-9 (A) and (B) (1999), require that each licensee must maintain a current mailing address, among other contact information.

As detailed below and as found by the ALC in its Order of Dismissal, Appellants were properly noticed at all stages of the proceedings before the Board and failed to appear. (R. p. 120). Accordingly, Appellants cannot now cry foul and argue that the Board deprived them of their due process rights when they chose not to appear before the Board despite being properly noticed.

On July 28, 2016, Ms. O'Linda Mack, Administrative Assistant for LLR's disciplinary counsel, mailed Appellants the Notice of Hearing and Formal Complaint for the September 9, 2016 evidentiary hearing via both certified and regular mail. (R. Supp. p. 9). The Notice of Hearing and Formal Complaint were mailed to Appellants at 3940 Hottinger Avenue, Charleston, SC, 29405. (*Id.*) Ms. Mack testified to the same at the hearing and explained that she sent the notices to the address of record with the Board. (R. pp. 34–36). Appellants did not appear at the September 9, 2016 evidentiary hearing.

On September 14, 2016, the Hearing Officer's Recommendation and Notice of Final Order Hearing were mailed to Appellant Construction Group at the Hottinger Avenue address. Additionally, another copy of those same documents was mailed to Appellant Knight at 108 Wilson Street, Summerville, SC 29483. (R. pp. 101–02). The Notice of Final Order Hearing provided that the Final Order Hearing would take place on October 20, 2016. The Final Order Hearing occurred before the Board on October 20, 2016, and Appellants chose not to appear.

On November 4, 2016, the Board's Final Order was mailed to Appellant Construction Group at the Hottinger Avenue address and was mailed to Appellant Knight at the Wilson Street address. (R. Supp. p. 10).

As identified by the ALC in its Order of Dismissal, Appellant Knight argued in his filings with the ALC that he was never given notice of the hearings below because they were "mailed to 108 Wilson St., Summerville and this not the mailing address of Bobby Knight." (R. pp. 60, 120). While less than clear, it appears that Appellant Knight was arguing that he did not receive notice of the hearings because they were sent to the Wilson Street address, not the Hottinger Avenue address. However, as provided above, all notices but one (the first Notice of Hearing and Formal Complaint) were sent to both the Wilson Street and Hottinger Avenue addresses. The one notice that was not sent to the Wilson Street address was sent to the Hottinger Avenue address. This appears to be Appellants' current address and, based on the filings at the ALC, apparently their only address during the time the notices were sent out. In fact, Appellants have used the Hottinger Avenue address in nearly every correspondence with both the Board as well as the ALC with respect to this proceeding.⁴ Thus, Respondent properly served Appellants with the notices involved in the underlying case at the Hottinger Avenue address — the address on file with the Board. Following, this Court should find that Respondent did not deprive Appellants of their due process rights when Respondent complied with the APA's notice requirements and then sent additional notices to another address.

⁴ Appellants have themselves identified the Hottinger Avenue address as the correct address in the following documents provided to the Board and/or the ALC: Respondent's Exhibit 3, Letter to Investigator Smith from Appellants dated January 16, 2015 (R. pp. 108-09); Respondent's Exhibit 5, Appellants' Renewal Application dated July 18, 2014 (R. pp. 110-15); Appellants' Motion to Correct or Amend Case Caption dated January 16, 2017 (R. p. 99); Appellants' Reply Motions, both original and amended, dated February 2, 2017 and February 4, 2017 (R. pp. 85-94); Appellants' ALC Brief dated March 24, 2017 (R. pp. 56-83); and Appellants' Response to Respondent's Motion to Dismiss dated April 27, 2017 (R. pp. 125-36). If the Hottinger Avenue address was not the correct address, then Appellants had a duty to update their addresses with the Board, pursuant to S.C. Code Ann. Regs. 29-9 (A) and (B) (1999).

In sum, Appellants were properly noticed for the Board hearings and were not deprived of their due process rights at any stage of the proceedings. Appellants cannot now claim they were not properly noticed for the hearings when the evidence, including Appellants' own submissions to the Board and the ALC, proves otherwise.

III. The Board properly had subject matter jurisdiction for the underlying disciplinary proceeding against Appellants.

Finally, Appellants argue that “as the underlying service of process issues deprived at least one of the Appellants of procedural ‘due process’ and proper notice, the tribunals lacked subject matter, as well as personal jurisdiction over one or both parties.” (Appellants’ Br. p. 4). Having already addressed the issue of notice with respect to the contested case hearings in the prior sections of this Brief, Appellants’ final argument — that the Board lacked subject matter jurisdiction — is also without merit.

As this Court has recently explained in *Forman v. S.C. Dep't of Labor*, 419 S.C. 64, 74, 796 S.E.2d 138, 143 (Ct. App. 2016), *cert. denied* (Nov. 15, 2017), “[s]ubject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.” (quoting *Brown v. S.C. Dep't. of Health & Human Servs.*, 393 S.C. 11, 16, 709 S.E.2d 701, 704 (Ct. App. 2011)). This Court in *Forman* further explained that “[a] court’s subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question” and that “[t]his same principle applies to administrative agencies.” *Id.* (quoting *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011)).

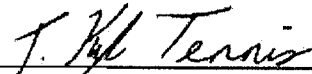
Here, the South Carolina Legislature created the Board to “protect the health, safety, and welfare of the public through the regulation of businesses and individuals who identify, assess, and provide contract work to individuals or other legal entities through the administration and enforcement” of S.C. Code Ann. §§ 40-1-5 *et seq.* and 40-11-5 *et seq.* S.C. Code Ann. § 40-11-

10(A). In so doing, the Legislature authorized the Board to investigate and discipline licensees licensed by the Board. S.C. Code Ann. §§ 40-11-80 to -210 (1976, as amended). Following, the Board is charged with the authority and responsibility to hear the disciplinary cases of licensees licensed by the Board, including Appellants. Even assuming, *arguendo*, that Appellants somehow were not properly noticed for the hearings, the Board still would retain subject matter jurisdiction over the disciplinary proceedings of its licensees.

CONCLUSION

Respondent properly complied with all notice requirements applicable to administrative agencies when it disciplined Appellants. Accordingly, this Court should find that Appellants due process rights were not violated and affirm the ALC's Order of Dismissal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served Respondent's Final Brief and Certificate of Counsel onto the Court and Counsel for Appellants, by hand delivery and by depositing same in an envelope, securely wrapped in the United States mail, respectively, to the following addresses:

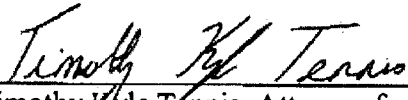
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