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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2019-001282

Richard J. Hook,

Respondent,

vs.

South Carolina Department of Health and Environmental Control
And Phillip Patterson,

Of Which South Carolina Department of Health and Environmental Control is the Appellant and Phillip Patterson is the Respondent.

Appellant South Carolina Department of Health And Environmental Control's *Final Reply Brief of Appellant*

Bradley D. Churdar, SC Bar # 12829
Associate General Counsel
SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL
1362 McMillan Ave., Ste. 400
Charleston, SC 29405
Tel: (843) 953-0213
Fax: (843) 953-0201
Email: churdabd@dhec.sc.gov

Attorney for Respondent South Carolina Department of Health and Environmental Control

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ARGUMENT

The Department stands by the arguments made in its opening brief. Additionally, the Department offers the following reply to Hook's Respondent's Brief.

I. No Evidence in the Record Supports a Finding of Contempt.

The ALC order must be reversed because there is no evidence in the record to support a finding of contempt. Respondent Hook's Brief points to no evidence in the record of willful disobedience of the 2005 Consent Order. In fact, the Administrative Law Court (ALC) drew the opposite conclusion on the record at the December 6, 2017 Motion Hearing. Specifically, Judge Lenski stated that

> *"the Department made an error by providing the wrong information to Mr. Patterson, who then acted on that.* And then all information that went subsequent to that was wrong because it didn't -- it wasn't in accordance with the [2005] consent order, which was -- which created this 500-foot-long dock. So everything's wrong. It's all -- *it starts off on the whole wrong foot and that's because an error, sadly and unfortunately, not -- nobody necessarily intended to do. But just a mistake was made at the Department,* and everything that went forward from there was based on this error." (R. p. 501 - Transcript Page 50:8 to 50:21, December 6, 2017 Motion Hearing). (Emphasis added).

The ALC reiterated his opinion a second time on the record that the Department made a *mistake* (i.e., not willful disobedience) by stating that "Mr. Hook has no reason to know that because the [Department's] original [permitting] *mistake* is so significant. But *it's a mistake.*" (R. p. 502 - Transcript Page 51:2 to 51:4, December 6, 2017 Motion Hearing). (Emphasis added). Hook skips over these judicial determinations and concludes, without evidence, that the Department's permitting action can only be willful disobedience of the 2005 Consent Order.

However, when Hook filed the *Motion to Enforce Consent Order* and accompanying Affidavit on October 20, 2017, he did not allege willfulness that would support a contempt finding. Rather, Hook stated on page 10 of his Motion that "[t]he financial responsibility for tearing down

and replacing the dock at Lot 9 may rest with the Department since *the Department was negligent* in executing its duty to Respondent." (R. p. 170). (Emphasis added). It is error for both the ALC to find and Hook to assert that the Department's mistake in processing the permit amendment was *ipso facto* contemptuous conduct simply because the Department's error occurred. The Department has conceded that its mistake in processing this permit amendment application was a human error; nothing more. There is no evidence in the record that the Department's permitting decision was a willful act of defiance toward the 2005 Order.

A focus of the July 2, 2019 Amended Order refers to "three (3) instances where a violation of a court order does not rise to the level of 'willful disobedience.'"[1] The ALC then leaps to the erroneous conclusion that the Department willfully disobeyed the 2005 Consent Order because "there is no evidence of any legitimate effort by the Department to comply with the Consent Order, and no justifiable explanation for its inability to comply after its issuance in 2005." (R. p. 81, Amended Order, p. 20). Hook urges this Court to accept that conclusion without a factual basis. The facts in this case are few because there was never a hearing regarding willfulness or contempt. However, the conclusion of willfulness is not supported by any facts.

After the February 9, 2005 Consent Order was issued, no Lot 9 owner built a dock until 2014. During this time, there was no known event that would have caused the Department to act on the

[1] Specifically, the Amended Order states that "[f]irst, '[w]here a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt.' Smith-Cooper v. Cooper, 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct. App. 2001) (citations omitted). Second, where there is '[a] good faith attempt to comply with the court's order, even if unsuccessful,' a finding of contempt is not warranted. Ex parte Lipscomb, 398 S.C. 463, 470, 730 S.E.2d 320, 324 (Ct. App. 2012) (citation omitted). Finally, one may not be held in contempt 'for violating a court order which fails to tell him in definite terms what he must do. *See* State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) (citation omitted)." (R. p. 80 - Amended Order, p. 19).

permit. Finally, on August 29, 2014, Mr. Patterson submitted a dock permit amendment application and then began construction of his dock in November 2014. (R. p. 307).

The Department's October 3, 2014 permitting mistake was *not* willful disobedience of the 2005 Consent Order, nor was it part of a *pattern* of willful disobedience for over a decade as the ALC seems to imply. Rather, without minimizing the Department's error, this was the only time a permit amendment was issued for Lot 9 ever since the Consent Order was issued on February 9, 2005. Thereafter, the issue before the ALC (i.e., location of the Patterson dock) only came to the Department's attention when Mr. Hook contacted the Department in 2017.

Hook's argument rests on the assertion that the Department "possessed the unfettered power to comply with the Consent Order." (Respondent's Initial Brief, p. 16). Specifically, the Department pointed out one reason compliance was <u>not</u> "unfettered" after Hook's Request for Contested Case was because of the statutorily-imposed automatic stay on the Department's permitting of Mr. Phillip Patterson's dock. Regarding the issue of willfulness, Hook's Counsel challenges the Department's argument as to the applicability of the automatic stay provision per S.C. Code Ann § 1-23-600(H)(2). Counsel for Hook asserts that Hook's Request for Contested Case was not actually a Request for Contested Case. (Respondent's Initial Brief, p. 21). This argument is without merit. Mr. Hook filed a Request for Contested Case on March 30, 2017. (R. pp. 171-172). The ALC accepted jurisdiction over this Request for Contested Case. Hook's Counsel endorsed the *pro se* Request for Contested Case (R. p. 470, Transcript Page 19:18 to 19:20, December 6, 2017 Motion Hearing). The ALC recognized the matter was "before the South Carolina Administrative Law Court (ALC or court) *pursuant to a request for a contested case hearing* filed by Richard J. Hook (Petitioner) on February 7, 2017." (R. p. 62, Amended Order, p. 1). Counsel for Hook never withdrew the Request for Contested Case.

Hook attempts to justify the ALC's erroneous finding of willful disobedience by asserting that "[t]he ALC's finding of contempt is justified in this case because the well-settled definition of *willfulness encompasses more than just a voluntary and intentional act with specific intent*. The definition also identifies willful acts as 'those done with the specific intent to fail to do something the law requires to be done; *that is to say with bad purpose either to disobey or disregard the law.*'" (Respondent Hook's Initial Brief, p. 14-15). (Emphasis added by Appellant). This very quote, from the Supreme Court's Opinion in Spartanburg County Dep't of Social Services v. Padgett, 296 S.C. 79, 370 S.E.2d 872 (1988)[2] supports the conclusion that the Department was NOT in contempt of court. There is not a scintilla of evidence in the record of any specific intent by the Department to violate the 2005 Consent Order. Nor does the record contain even a scintilla of evidence of any bad purpose to either disobey or disregard the law.

The Supreme Court requires the ALC to identify "clear and specific" acts or conduct that amount to willful disobedience of the 2005 Consent Order. Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982). Hook acknowledges this requirement for a contempt finding. But Hook wrongly asserts that at pages 14-19 of the ALC's Order Granting Petitioner's Motion to Enforce the Consent Order and Denying Respondent DHEC'S 60(b)(5), SCRCP Motion (issued May 3, 2019), Judge Lenski "thoroughly discuss the clear and specific acts undertaken by the Department to avoid compliance with the Consent Order and to attempt justification of that choice." (Respondent Hook's Initial Brief, p. 16-17). Neither the ALC's original May 3, 2019 Order nor the July 2, 2019 Amended Order cites to any "clear and specific acts." It is error for both the ALC to find and Hook to assert that the Department's mistake in processing the permit amendment was *ipso facto* contemptuous conduct simply because the Department's error occurred.

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[2] The Supreme Court derives this definition from Black's Law Dictionary 1434 (5th Ed. 1979).

II. Hook Erroneously Addresses the Department's Due Process Argument.

The Department was denied due process because there was no evidentiary hearing. The only hearing in this case was the December 6, 2017 Motion Hearing. Furthermore, the Department had no notice of contempt until a conference call initiated by the ALC more than eight months[3] after the December 6, 2017 Motion Hearing and there was never a hearing on the merits. The ALC's error and fundamental unfairness in awarding compensatory contempt damages is that neither Hook nor Patterson *ever* requested such damages and the Department first became aware that the ALC might award such contempt damages several months after the December 6, 2017 Motion Hearing.

Hook's Counsel asserts that the Department "indisputably understood it could have used the opportunity to submit evidence in support of its entire position." (Respondent's Initial Brief, p. 21). However, this assertion is contrary to the parties' agreement with the ALC that the December 6, 2017 Motion Hearing was limited to the filed Motions and that this hearing was not a trial on the merits.[4] The ALC's first words from the Bench affirming this agreement of the limited scope of this hearing were as follows:

> "Good morning, everyone. I am Phil Lenski, the administrative law judge assigned to this matter, and this is the Richard Hook, petitioner, versus South Carolina

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[3] The conference call was initiated by Judge Lenski and occurred on August 22, 2018.

[4] On November 14, 2017, the Department's Counsel sent an email to Judge Lenski's Law Clerk (Edye Moran) and opposing counsel stating the following:

> "[e]ven though the trial date is less than 30 days from now, I would nonetheless like for the Court to consider the merits of my *Rule 60(b)(5) Motion.* From my perspective, the most efficient path forward would be to make December 6th a *Motion Hearing only*. This change would solve the '30 day problem' under Rule 19 and would also allow the parties the benefit of the Court *clarifying some issues before trial*. Given the short amount of time before trial, I would like to resolve this as quickly and efficiently as possible." (Emphasis added). (R. pp. 578-579).

On November 17, 2017, Hook's counsel agreed via email to the Department's ALC request to limit the scope of the December 6, 2017 hearing to just a Motion Hearing. Plainly, the parties did not intend for this to be an evidentiary hearing.

> Department of Health and Environmental Control and Phillip Patterson, respondents, Docket Number 17-ALJ-07-0085-CC. It is the 6th of December. We are here on a -- *I think this is just a motions hearing today, we've decided.*" (R. p. 455, Transcript Page 4:2 to 4:10, December 6, 2017 Motion Hearing). (Emphasis added).

The ALC again affirmed the parties' agreement regarding the limited scope of the hearing by stating that *"[w]e're just here on the motion."* (R. p. 456, Transcript Page 5:7, December 6, 2017 Motion Hearing). (Emphasis added).

Hook's Counsel also affirmed that the December 6, 2017 hearing was just a Motion Hearing and not a trial when she stated her understanding that "I have to address the issue -- and I assume I'm gonna get a chance to on reply." (R. p. 488, Transcript Page 37:7 to 37:9, December 6, 2017 Motion Hearing).

Hook attempts to make up for the lack of evidence by guessing as to the reasons underlying the Department's permitting error.[5] The cause of this factual paucity is plainly because the ALC conducted a Motion Hearing only on December 6, 2017 and did not conduct an evidentiary hearing.

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[5] The following examples from Hook's Brief illustrate this point:
(1) Hook asserts that "DHEC unquestionably possessed the unfettered power to comply with the Consent Order but, *apparently*, simply made no legitimate effort to do so…" (Respondent Hook's Initial Brief, p. 16). (Emphasis added);
(2) Hook again asserts that "[t]here was just no attempt by DHEC to comply with the Order at all, *apparently* at the time the Consent Order was entered - either by ensuring that the Consent Order was appended to the Permit or that the Permit was revised - or at the time of submission of the Patterson Amendment - by thoroughly reviewing the Permit history while reviewing Patterson's application." (Respondent Hook's Initial Brief, p. 17). (Emphasis added);
(3) Hook again asserts that "[w]hile DHEC would like to place all blame on a single Project Manager, it ignores the fact that policies and procedures outlining appropriate file maintenance were *apparently* lacking on an agency level." (Respondent Hook's Initial Brief, p. 17). (Emphasis added);
(4) Hook again asserts that "DHEC *appears to be claiming* it was blindsided by the hearing conducted by the lower court, that it was provided no notice that the lower court might *allow evidence* to be introduced," (Respondent Hook's Initial Brief, p. 12). (Emphasis added).

Hook's Counsel argues that the competing interests of the property owners on the opposite side of Parrot Creek that were Petitioners in the prior case were adequately protected by the proceedings that resulted in the 2005 Consent Order. Specifically, Hook argues that "[i]t was a fair and balanced resolution of the matter" and that the three property owners (prior litigants) from the opposite side of Parrot Creek who submitted comment letters objecting to changing the alignment and length of the Lot 9 (Patterson) dock "never attempted intervention when Ford filed its contested case related to the dock at Lot 9." (Respondent Hook's Initial Brief, p. 24). An evidentiary hearing before the ALC would have allowed a determination regarding the interests of the property owners on the opposite side of Parrot Creek.

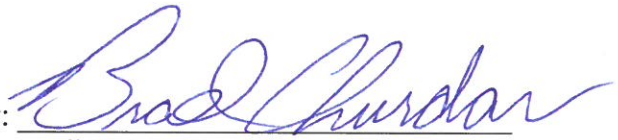
CONCLUSION

The Department acknowledges that it made mistakes in administering the Permit for Lot 9. Nonetheless, the ALC erred in finding DHEC in contempt and erred in awarding contempt damages of attorney's fees to Mr. Hook and Mr. Patterson and also erred in awarding $46,936.00 to Mr. Patterson for tort damages. Additionally, the ALC erred in not holding a full evidentiary hearing.

The Department respectfully requests that the Court of Appeals reverse the ALC Order.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

By: 

Bradley D. Churdar, SC Bar# 12829
Associate General Counsel
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
Attorney for Appellant SCDHEC

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