THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Court Judge

Appellate Case No. 2020-001689
Case No. 2020ALJ300064AP

South Carolina Technical College System, ... Appellant,

v.

Carla Jackson and South Carolina
Department of Administration, ... Respondents,

Of whom, Carla Jackson is the ..... Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

I. The Administrative Law Court erred in finding that the Respondent's appeal of her termination was covered by the State Employee Grievance Procedure Act, and in finding as a result that the State Employee Grievance Committee and the Court had subject matter jurisdiction over the Respondent's grievance appeal.

The Appellant South Carolina Technical College System ("SCTCS") contends that the State Employee Grievance Committee and the Administrative Law Court ("ALC") lacked subject matter jurisdiction because the Respondent Carla Jackson did not file her appeal under a full-time equivalent ("FTE") position that was covered by the State Employee Grievance Procedure Act and, therefore, had no right to a grievance hearing under the Act. SCTCS contends that the ALC erred in its remand to the State Employee Grievance Committee for additional fact-finding on a jurisdictional issue and in then applying the substantial evidence standard of review. SCTCS further argues that the preponderance of the evidence supports a finding that Jackson was functioning in the position of Interim Dean of Business, Computers and Related Technologies at the time of her termination, a fact that Jackson herself admitted in the State Employee Grievance Procedure State Appeal Form that she submitted.

In response, Jackson makes a weak attempt to distinguish compelling authorities in support of SCTCS's position by "distinguishing" the cases because they were appealed from the Workers' Compensation Commission rather than another state administrative agency. Jackson's position demonstrates nothing more than a distinction without a difference. For instance, SCTCS cites to *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993), for the holding that "[i]f the facts which give rise to a jurisdiction issue are in dispute, the court, not the jury, must find the facts." 431 S.E.2d at 631. Additionally, SCTCS cites to

Hernandez-Zuniga v. Tickle, 374 S.C. 235, 647 S.E.2d 691 (Ct. App. 2007), for the proposition that the proper standard of review for jurisdictional issues is preponderance of the evidence and not the substantial evidence standard. Jackson responds by simply stating that "[t]his is not a workers' compensation case, and the law of workers' compensation does not apply here." *See*, Respondent's Brief, p. 13. There are many types of administrative appeals that fall under the Administrative Procedures Act ("APA"), with workers' compensation claims likely being the most prevalent. However, it is not the law of workers' compensation that determines or governs rules regarding jurisdictional fact-finding or the appropriate standard of review. Those issues are controlled by the APA and the rules governing appellate procedures generally. There is nothing unique to workers' compensation law that controlled the decisions in *Chew* and *Hernandez-Zuniga*, and the suggestion that the principles of law enunciated in those decisions are not applicable here is incorrect. The remand for jurisdictional fact-finding was in error, as was the subsequent "review" of the Committee's finding under a substantial evidence standard after remand.

As to the merits of the jurisdictional fact-finding, Jackson argues on appeal that she was classified as an Administrative Coordinator at the time of her termination and that designation is determinative regardless of the preponderance of the evidence and *her own admission* that she was functioning in the position of an Interim Dean. That is elevating form over substance. That is also focusing on a label with no consideration of function. Indeed, the remand order issued by the ALC required the Committee "to determine whether Jackson was an Interim Dean at the time of her termination (uncovered employee) or whether Jackson was also functioning in a covered FTE position." (Remand Order, p. 6). Thus, the Committee was charged on remand with determining whether Jackson was functioning as an Interim Dean or as an Administrative

Coordinator. The preponderance of the evidence, as discussed in SCTCS's opening brief, overwhelmingly points to the former.

In addition, the record before the Committee also reflects that the Remand Order required the Committee to determine in which position Jackson was *functioning* at the time of her termination. In fact, in her pre-hearing order, the Committee Attorney ruled that the Committee was tasked on remand with "mak[ing] the factual finding about which position Appellant was functioning in." (R. 177). Additionally, the Committee Attorney ruled that the Proposed Instructions for the State Employee Grievance Committee submitted by SCTCS were appropriate and would govern the proceedings. (R. 226-227).[1] Those instructions include the following:

> The Committee's only authority on remand is to determine whether at the time of Appellant's termination she was *functioning* as an Interim Dean or as an Administrative Coordinator and issue a decision reporting this finding of fact to the Administrative Law Court.

(R. 220). (Emphasis added). This instruction by the Committee Attorney was never challenged at the Committee hearing or on appeal and, therefore, represents the law of the case. *See*, *First Union National Bank v. Soden*, 333 S.C. 554, 511 S.E.2d 372, 378 (Ct. App. 1998) ("an unchallenged ruling, right or wrong, is the law of the case"). Moreover, statutory law provides that the parties are *bound by the legal rulings by the Committee Attorney*. S.C. Code Ann. § 8-17-340(C) provides in pertinent part:

> The committee attorney shall determine the order and relevance of the testimony and the appearance of witnesses, and shall rule on all motions, and all legal issues. The parties are bound by the decisions of the committee chairman or a designee or the committee attorney insofar as these hearings are concerned.

[1] After SCTCS submitted proposed instructions, Jackson was asked to provide any objections to the proposed instructions, and no response was received from Jackson. (R. 226).

S.C. Code Ann. § 8-17-340(C).

In the 2020 appeal, the ALC attempted to backtrack from its use of the term "functioning" in the Remand Order. The ALC called its use of the term as "perhaps inartful" and suggested that SCTCS was interpreting that term "too narrowly." (Order, p. 10). Nonetheless, the record reflects that such was the fact-finding that the Committee was tasked to accomplish, even if the ALC after-the-fact maintained that was not its intention. The Committee's decision on remand, nonetheless, focused on Jackson's state job classification of "Administrative Coordinator I" -- which is suggestive of a position that Jackson admittedly was not performing at the time of her termination. In addition to being contrary to the law of the case, as established by the legal rulings of the Committee Attorney, that decision improperly focused on the "label" given Jackson's employment rather than the function that she was fulfilling.

South Carolina law has always focused on substance over labels, and in particular a job function rather than a job title. For instance, in assessing whether a judge is entitled to judicial immunity, the South Carolina Supreme Court has ruled: "In determining whether an act serves a judicial function, the Court must look to the nature and function of the act as opposed to the title of the person committing the act." *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188, 193 (2007), *citing Forrester v. White*, 484 U.S. 219 (1988). Similarly, in assessing the appealability of an order, the Supreme Court has focused on the substance of the order to be appealed rather than a label given that order. *See, Spalt v. South Carolina Dept. of Motor Vehicles*, 423 S.C. 576, 816 S.E.2d 579, 584 (2018) ("[t]he label given to the order is not determinative of its immediate appealability"). Likewise, in the insurance context, the Supreme Court instructs that the substance of an allegation rather than the label attached to it is determinative of insurance coverage. *See, Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 379 S.C. 573, 666

S.E.2d 897, 900 (2008) ("we must look beyond the label of negligence to determine … duty to defend").[2]

Thus, labels or titles are not determinative when assessing what job function is actually being undertaken. That is likewise the case with a state job classification. In the case at bar, it is well established by the evidentiary record that Jackson was functioning as the Interim Dean of Business, Computers and Related Technologies at the time of her termination. She no longer held the position of Administrative Coordinator and had not performed those job functions or worked in the President's office as of October 1, 2015, except for a brief period of three months or less immediately thereafter to assist the person who "fill[ed]" her "old position" with the transition into it. (R. 115). Jackson was in the Administrative Coordinator position until October 1, 2015, when she became Interim Dean of Transitional Studies and Distance Education. (R. 113). Additionally, after Jackson became the Interim Dean, the Administrative Coordinator position was filled full time by another employee, Gwendolyn Bamberg. (R. 100-101, 105). That is undisputed. Nonetheless, the Committee, as also adopted as "fact" by the ALC, concluded in error that Jackson was functioning as an Administrator Coordinator at the time of her termination.

Moreover, in her State Employee Grievance Procedure State Appeal Form, which was completed and signed by her legal counsel, Carla Jackson identified her job on the document's first page only as an "Interim Dean of Business, Computers and Rel[ated Technologies]." (R.

[2] *See also, Greater Johnstown Area Voc.-Tech. Sch. v. Johnstown Area Voc.-Tech. Educational Association*, 426 A.2d 1203, 1205 (Pa. Cmwlth. Ct. 1981) (holding that teachers who had grievance rights as "professional employees" could not pursue grievances when their contracts affording them duties as Student Congress Advisors were not renewed, insofar as they were "not included within the category of 'professional employees'" when they were "acting in th[e] capacity" of advisors).

599). Her narrative statement on the Appeal Form confirmed the fact that she held the position of Interim Dean at the time of her termination. (R. 600-601). Specifically, she maintained that she was "an Interim Dean of Business, Computers and Related Technologies at Denmark Technical College," that she had been a "Dean of the College" whose "entire job entail[ed] 'college operations,'" and that she had served as "an Interim Dean of the College since October 2015." (R. 600). Jackson included no mention of holding the position of Administrative Coordinator at the time of her termination. In fact, she stated that she served "previously as Administrative Coordinator." (R. 600).

In her response brief, Jackson does not dispute the contents or meaning attributed to the information contained in her Appeal Form. Instead, she disputes whether the Appeal Form should be treated as a pleading to which she is bound by the factual allegations made therein. Jackson cites no case law to support her position. In fact, Jackson points out in her brief that the binding nature of the Appeal Form was actually part of the instructions approved and given by the Committee Attorney, which further shows that that legal ruling represents the law of the case which cannot be simply disregarded by the ALC or Jackson. (R. 223).

Jackson attempts to also argue that SCTCS should be similarly bound by representations contained in a "position statement" provided by the SCTCS to the Division of State Human Resources Alternative Dispute Resolution Program dated July 25, 2017. (R. 605-608). Jackson points to the following language: "Through our review it was determined that Ms. Jackson's state classification title is Administrative Coordinator I." (R. 606). She suggests that SCTCS should be bound by that representation. There are several significant flaws with that argument. First, the agency's assertion does not address the position in which Jackson was "functioning" at the time of her termination. In fact, the "position statement" clearly states that she held an

Interim Dean position. Second, there is no law that supports the argument that a "position statement" submitted as part of an ADR program is binding on a party or may be introduced into evidence. In fact, the State Employee Grievance Procedure Act provides that "[a]ll records, reports, documents, discussions, and other information received by the mediator while serving in that capacity are confidential." S.C. Code Ann. § 8-17-360. To the extent that the "position statement" nevertheless appears in the record on appeal, it reflects SCTCS's arguments in support of termination but does not constitute admissible evidence of the position in which Jackson was functioning or whether she was functioning in a position covered under the State Employee Grievance Procedure Act. Third, Jackson argues that the "position statement" is evidence SCTCS "repeatedly admit[ted] that [Jackson] is a covered employee." *See*, Respondent's Brief, p. 25. No such meaning, however, should be ascribed to SCTCS's statement in light of the instruction to the Committee that "references in documents from [DTC] and [SCTCS] about [Jackson's] ability to file a grievance or appeal of her suspension and termination are not to be considered as evidence of the position she was functioning in at the time of her termination." (R. 222, 226-227). That instruction is unchallenged on appeal and remains the law of the case.

In sum, the ALC and Jackson treat SCTCS's position statement to the Division of State Human Resources as a type of responsive pleading although there is no legal basis for doing so. Jackson argues that SCTCS should be "strictly bound to [its] response to the Grievance Appeal Form." *See*, Respondent's Brief, p. 25. However, unlike the case cited in the Committee instructions where the Workers' Compensation Commission treated a Form 50 as a "pleading" under *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322 (Ct. App. 1992),[3] there is no

[3] *See, Piers v. Rock Hill School District*, 2017 WL 5255904, *6 (S.C. Workers' Comp. Comm. 2017) (citing *Postal* and *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410 (1964) in

administrative or judicial decision equating a position statement to the Division of State Human Resources as a "responsive pleading." (R. 223, n.11). Moreover, while an employee has to submit a State Appeal Form to the State Human Resources Director to appeal a disciplinary action, there is no requirement for a state agency to submit a "position statement" in response thereto. *See*, S.C. Code Regs. Ann. 19-718.05(D)(1)-(2) (providing that the State Human Resources Director "shall . . . require that the covered employee submit a standard appeal application form," whereas state agencies are only "request[ed]" to "furnish the State Human Resources Director a copy of all records, reports, and documentation of the earlier proceedings on the grievance").

Finally, it is also important to recognize that there has been no assertion by Jackson, the Committee, or the ALC that "Interim Dean" is a covered FTE position with grievance rights. In its November 25, 2019 order, the Committee Attorney ruled that the "ALC determined that 'Interim Dean' was not a covered position under the State Employee Grievance Procedure Act" (R. 177), and this was never appealed nor otherwise challenged by the parties. Because Jackson is bound by her pleadings and she filed a grievance identifying herself in a position that is not a covered FTE based on a ruling that is now the law of the case, the ALC erred in failing to dismiss Jackson's appeal on jurisdictional grounds or otherwise ruling that the Committee ignored the instructions it was given in reaching its remand decision.

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finding that a workers' compensation claimant was judicially bound by statements made in her Form 50).

II. The Administrative Law Court erred in refusing to hear the merits of the Appellant's appeal that Denmark Technical College had valid reasons to terminate the Respondent and there was substantial evidence in the record to support that termination decision.

Assuming that the State Employee Grievance Committee and the ALC had subject matter jurisdiction, SCTCS has also argued on appeal that the ALC erred in refusing to hear the merits of its appeal that Denmark Technical College had valid reasons to terminate Carla Jackson and there was substantial evidence in the record to support that termination decision. To recap, the ALC determined that there were two separate appeals filed which the ALC referred to as the "2018 appeal" and the current appeal filed in March 2020. The ALC ruled that the 2018 appeal ended with the Remand Order issued on June 25, 2019, and that the appeal after the State Employee Grievance Committee issued its decision on remand was a new and separate appeal.

SCTCS has relied on this Court's decision in *Bobo v. Marshane Corp.*, 302 S.C. 86, 394 S.E.2d 2 (Ct. App. 1990), in which this Court held that an appeal from an administrative agency remains pending in the court sitting in an appellate capacity while that court awaits agency compliance with a remand order. Jackson, like the ALC, attempts to distinguish *Bobo* by arguing that it is a workers' compensation case, which presents only a meaningless distinction. The rule of law applied in *Bobo* should apply to any court sitting in an appellate capacity where a remand to *any* agency is deemed necessary for the appellate court to address the appeal pending before it. This is not unique to workers' compensation law, as Jackson and the ALC state. It applies to all appeals under the APA.

Jackson also strangely argues that a circuit court loses jurisdiction after ten days absent a "reservation" of jurisdiction. That argument is misguided in several respects. Most importantly, a circuit court cannot "reserve" subject matter jurisdiction beyond the ten days after a final,

written order is issued and judgment is entered.[4] Second, that rule of law applies to a circuit court sitting as a trial court and *not in an appellate capacity*. Here, as in *Bobo*, the court is sitting in an appellate capacity and there is no limitation on jurisdiction created by any "ten day" rule.

Further, Jackson suggests that SCTCS was not prejudiced by the ALC's denial of the motion to submit a supplemental brief that accompanied the Notice of Appeal in the 2020 appeal. However, Jackson -- and the ALC -- ignore that the request to submit a supplemental brief was in the 2018 appeal which was referred to as the "preexisting appeal." (Notice of Appeal, p. 2). That reflects that SCTCS placed both the ALC and Carla Jackson on proper notice that it intended to continue its pursuit of all pre-remand issues on appeal. There is no other explanation for the references to "pre-existing appeal" and the request to "consolidate" the appeals or otherwise allow for a supplemental record and briefing in the pre-existing appeal. As SCTCS has pointed out, if its language in the Notice of Appeal was inartful in any respect, that constitutes, at worst, a clerical error and should not preclude SCTCS's ability to proceed with the issues raised in the 2018 appeal.

Moreover, Jackson's suggestion that SCTCS is seeking "an eighth bite at the apple" is unnecessary hyperbole. *See*, Respondent's Brief, p. 26. SCTCS is seeking to pursue its appeal rights on the issues raised before and after the ALC remand. Critical errors were made touching on jurisdictional issues and the merits, and SCTCS is entitled to pursue those issues on appeal from the Committee and from the ALC.

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[4] *See, Rutland v. Holler, Dennis, Corbett, Ormond, & Garner*, 371 S.C. 91, 637 S.E.2d 316, 319 (Ct. App. 2006) ("because a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment"); *Overland, Inc. v. Nance*, 423 S.C. 253, 815 S.E.2d 431, 433 (2018) (ten-day deadline for filing post-trial motions is an "absolute deadline" and is not subject to extension by the trial court).

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Technical College System respectfully renews its request that the Court reverse the orders of the Administrative Law Court and remand with directions that the Respondent's grievance be dismissed for lack of jurisdiction. In the alternative, the Appellant seeks a remand for consideration of the merits of its appeal that Denmark Technical College had valid reasons to terminate the Respondent and there was substantial evidence in the record to support that termination decision.

Respectfully submitted,

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May 24, 2021

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Court Court Judge

Appellate Case No. 2020-001689
Case No. 2020ALJ300064AP

South Carolina Technical College System, ... Appellant,

v.

Carla Jackson and South Carolina
Department of Administration, ... Respondents,

Of Whom, Carla Jackson is the..... Respondent.

CERTIFICATE OF SERVICE

Pursuant to Section (g)(3) of the Supreme Court's Order Re: Operation of the Trial Courts During the Coronavirus Emergency (as amended May 29, 2020), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant, does hereby certify that service of the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** was made upon all counsel of record by email only this the 24th day of May 2021:

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May 24, 2021

Via Email Only
The Honorable Jenny Abbott Kitchings
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RE: South Carolina Technical College System v. Carla Jackson
Appellate Case Number: 2020-001689
ALC Number: 20-ALJ-30-0064-AP
Our File Number: 79.20391

Dear Ms. Kitchings:

In accordance with Section (c)(5) of the Supreme Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), please find enclosed for filing the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. In accordance with Section (g)(3) of this same order, I am hereby serving copies on all counsel of record by email only. If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Shannon M. Polvi, Esquire *(w/ Enclosures, Via Email Only)*
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