

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

Opinion No. 5020 (S.C. Ct. App. filed Aug. 8, 2012)

Ricky Rhame, Petitioner,

v.

Charleston County School District, Respondent.

REPLY IN SUPPORT OF CERTIORARI

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S.C. Supreme Court

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ARGUMENTS

Administrative agencies have the power to entertain petitions for rehearing. This Court has already said so, and the Administrative Procedures Act says so. Even if these authorities were not there, common sense would counsel against the position taken by the School District and the Court of Appeals. The power to make a decision necessarily includes the power to reconsider that decision.

According to the School District and the Court of Appeals, a party may not petition an agency for rehearing unless there is a specific statute allowing it to do so. This view is contrary to the law and to logic, but setting the merits to the side, the fact that there are at least *some* authorities to support both sides of the argument should counsel in favor of granting certiorari. If *In re Crawford* and *McCummings v. South Carolina Department of Corrections* are wrong, this Court should grant certiorari and overrule them. If those cases are *not* wrong, this Court should grant certiorari and overrule *Nettles v. Spartanburg School District #7* as well as the relevant portions of the two cases that have cited it.

It is time for this case to come into contact with meaningful scrutiny. When Ricky Rhame reported his work-related injuries to the School District, the district said his injuries were his problem. When he sued, the commission found that he had been injured in 1994 and that his claim was barred by a statute that applies to injuries that occur on or after July 1, 2007. When Mr. Rhame tried to point the commission to the errors in its decision, the commission dismissed the request. When he appealed, the Court of Appeals dismissed the appeal; reasoning that although the APA ties the appeal deadline to the denial of a rehearing request, that statute supposedly does apply. This is all wrong, and it is time for it to stop.

I. The Holding of the Court of Appeals Conflicts with the Text of the Administrative Procedures Act and with this Court's Decision in *McCummings*.

The text of the APA contemplates a party asking for rehearing *after* an agency's final decision. The APA instructs that the losing party in a contested case must initiate an appeal "within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision is rendered." S.C. Code Ann. § 1-23-380(1) (Supp. 2012).

The School District says that review by the commission's "appellate panel" is the same thing as rehearing, but the textual problem with that argument is that the individual hearing commissioner is not the fact-finder — the full commission is. An early recognition of this principle appears in *Riddle v. Fairforest Finishing Co.*, 198 S.C. 419, 18 S.E.2d 341 (1942), and this Court has repeated it on other occasions. See, e.g., *Jordan v. Kelly Co., Inc.*, 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009). If the law were as the School District would like it to be, there would be no reference to rehearing in the APA. The statute would simply say "a party may appeal within 30 days of the agency's decision."

Under the School District's construction, a hypothetical party could receive an adverse decision from the hearing commissioner, decide not to seek commission review (because that review is supposedly just rehearing), and then seek judicial review of the decision. This Court's *Riddle* decision rejected such an attempt and observed "[i]t seems clear to us that the award of a Single Commissioner, or that of a deputy appointed by the Commission, is not a final adjudication of a claim" 198 S.C. at 424, 18 S.E.2d at 343.

It does not matter that the Workers' Compensation Act does not contain a specific statute discussing petitions for rehearing. The necessary implication of including the word

“rehearing” in the Administrative Procedures Act is that such petitions are appropriate. Saying that there must be a specific statute for each agency undermines the fact that the APA contemplates uniform procedures for administrative agencies. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). Where there are exceptions, the APA creates them. Otherwise, each agency is to process contested cases in relatively similar fashion.

This same reasoning shows why *McCummings* cannot be meaningfully distinguished. The APA was designed to create uniform procedures for state agencies, but the supposed basis for the Court of Appeals to distinguish *McCummings* was that the State Employee Grievance Committee is a different agency than the Workers’ Compensation Commission. See (App.p.4, n.1). Nothing could be more subversive to the purpose of a statute designed to implement uniform procedures than a decision that says each agency is a law unto itself.

Beyond having to overcome this shortcoming, any attempt to distinguish *McCummings* must still overcome the fact that the State Employee Grievance Committee was no different than the Workers’ Compensation Commission is here — neither agency possessed a statute or regulation dealing with petitions for rehearing. See (Petition, p.6) (citing the grievance committee’s regulations). Distinguishing *McCummings* also requires one to forget that the decision begins with the words “[t]his case concerns the time limits for filing petitions for rehearing of administrative agency decisions . . . [.]” and that the holding of the case is “in the absence of an agency rule specifying a time limit, parties have thirty days after a final agency decision to petition the agency for rehearing or appeal the decision.” 319 S.C. 440, 441, 462 S.E.2d 271, 272 (1995). If the law was as the Court of Appeals believed it to be, the APA and *McCummings* would be written differently.

II. The Reasoning the Court of Appeals Expressed in *Nettles* Conflicts with this Court's Decision in *In re Crawford*.

It is not possible to deny that there is a conflict in authority on the question presented. In *Nettles v. Spartanburg School District #7*, the Court of Appeals wrote "an aggrieved party may not challenge the commission's decision with a motion, but only with an appeal to the circuit court." 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000). In contrast, Justice Stukes' concurring opinion in *In re Crawford* holds that the power to authorize rehearing *after* the full commission has made a decision is necessary to give effect to the purpose of the Workers' Compensation Act. 205 S.C. 72, 93-94, 30 S.E.2d 841, 849-50 (1944). These decisions cannot both be right. Either *Nettles* is right and the party who loses a workers' compensation case has no recourse other than to apply for judicial review, or *Crawford* is right and until someone files an "appeal," an agency necessarily possesses all powers incident to its jurisdiction including the power to rehear a decision.

The School District says that the holding of *Crawford* is not clear, but under that interpretation, the Chief Justice's concurring opinion in *State v. Torrence* did not abolish *in favorem vitae* review for death penalty cases in this State. See 305 S.C. 45, 406 S.E.2d 315 (1991). *Torrence* accomplished that very thing, and in the same fashion, Justice Stukes' opinion in *Crawford* garnered the votes of a majority of this Court. *Crawford* has never been limited or overruled, and the Court of Appeals was therefore bound to apply it. S.C. Const. Art. V, § 9. In the Federal system, the Supreme Court has instructed that if one of its precedents has direct application but appears to rest on reasons that have been rejected in another line of decisions, "the Court of Appeals should follow the case which directly

controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). South Carolina has never expressly recognized this principle, but the structure of our appellate system and the limits the Constitution imposes on the Court of Appeals describe a similar hierarchy.

The School District’s return incorrectly recites that Mr. Rhame did not advise the Court of Appeals of the *Crawford* decision until his petition for rehearing. In fact, Mr. Rhame first advised the court of *Crawford* pursuant to the rule concerning the subsequent discovery of significant and pertinent authority. See Rule 208(b)(7), SCACR. This occurred nearly three months before the Court of Appeals conducted oral argument.

That said, it is unclear why this timing should matter. Error preservation principles prevent parties from raising an issue on appeal that was not raised below, but Mr. Rhame is unaware of and was unable to discover any authority supporting the proposition that error preservation principles apply to case citations.

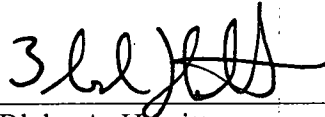
The School District and the Court of Appeals would grant the Workers’ Compensation Commission a unique status among quasi-judicial entities in that the moment the commission makes a decision, they see the commission as being irreversibly bound to it. There is no logical reason for such a rule. As a practical matter, the commission can do whatever it wants with the petitions for rehearing — it can summarily deny them (as it did in this case), it can order briefing, or it can have a hearing. The critical fact is that the law gives the losing party the right to make the request. The text of the APA contemplates an aggrieved party having the right to ask an agency to change its mind, and this Court has already recognized that this right exists. The decision to the contrary is wrong.

CONCLUSION

The Court of Appeals held that the Workers' Compensation Act controls the process of "appealing" the Workers' Compensation Commission's decision to the judicial system. This holding conflicts with the Administrative Procedures Act and this Court's previous decisions construing that act. This reasoning of this Court's decision in *In re Crawford* conflicts with a statement that first appeared in *Nettles v. Spartanburg School District #7* and was repeated in *Pikaart v. A & A Taxi* and *Stone v. Roadway Express*; in short, there are conflicts in authorities that are ripe for resolution. The appropriate result in this case could not be plainer: the APA says that Ricky Rhame's deadline for seeking review of the denial of his claim was "thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision is rendered." Mr. Rhame followed this statute, and the Court of Appeals erred when it dismissed his appeal. This Court should grant certiorari, reverse the Court of Appeals, and hear the merits of this dispute.

April 18, 2013

Respectfully submitted,



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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Reply in Support of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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