

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
83-CP-40-0191

IN THE MATTER OF)
Data-Tec Business Forms,)
Respondent, (Respondent))
-vs-)
South Carolina Department of)
Highways and Public Transpor-)
tation,)
Petitioner. (Appellant))

IN RE: PROTEST OF DATA-
TEC BUSINESS FORMS

ORDER REVERSING
S.C. PROCUREMENT
REVIEW PANEL

This is an appeal from the South Carolina Procurement Review Panel, hereinafter referred to as the Review Panel; which Panel is established by S.C. Code Ann. Section 11-35-4410 (1983 Cum. Supp.). It is noted from the outset that the Review Panel itself sat as an appellate panel in this matter in review of a decision by Richard J. Campbell, Acting Materials Manager Office who rendered a decision on October 25, 1982. The jurisdiction of the Review Panel, it is this court's conclusion, is not only appellate in nature but also de novo. See S.C. Code Ann. Section 11-34-4410 (5) (1983 Cum. Supp.) This review of the Circuit Court therefore, is from a final decision of the Procurement Review Panel in a contested case and is therefore pursuant to S.C. Code Ann. Section 1-23-380 (1983 Cum. Supp.)

Arguments came on to be heard in the Circuit Court before the undersigned sitting as Special Judge. Data Tec Business Forms (hereinafter referred to as Data Tec) is represented by John

Medlin and South Carolina Department of Highways and Public Transportation (hereinafter referred to as Highway Department) is represented by Assistant Chief Counsel to Petitioner, William L. Todd.

The scope of review in this case is clear. This Court "...shall not substitute its judgment for that of the agency as to weight of the evidence on questions of facts." S.C. Code Ann. Section 1-23-380 (g) (1983 Cum. Supp.). Nor may this Court substitute its judgment for that of the lower administrative tribunal "...upon a question as to which there is room for a difference of intelligent opinion..." Patton v. The South Carolina Public Service Commission, Sup. Ct. of S.C., Opinion Number 22033, filed January 19, 1984; Chemical Leaman Tank Lines, Inc. v. S.C. Public Service Commission, 258 S.C. 518, 189 SE 2d 298 (1972).

Applying the well accepted "substantial evidence" standard for judicial review of administrative agency decisions, the S.C. Supreme Court has stated:

'Substantial evidence' is not a mere scintilla of evidence nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, will allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 SE 2d 304, 306 (1981).

'Substantial evidence' is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative

gency's finding from being supported by substantial evidence. Ellis v. Spartan Mills, 276 S.C. 216, SE 2d 590 (1981), and a judgment upon which reasonable men might differ will not be set aside. Lark v. Bi-Lo, Inc., 276 SE 2d at 307.

I. The Jurisdictional Issue

At the conclusion of oral argument in this case, counsel for the Highway Department mentioned that he believed there was a jurisdictional problem in this case and requested leave of Court to submit a brief thereon. The Court granted this request and both parties have submitted Memoranda on the alleged jurisdiction questioned.

The Memorandum of the Highway Department argues that this court is without jurisdiction because the Review Panel was without jurisdiction inasmuch as Data-Tec did not timely file an appeal from the decision of the Acting Materials Management Officer, Richard J. Campbell, to the Review Panel. In support of this argument, the Memorandum of Law of the Highway Department attaches four (4) "Exhibits", to wit:

Exhibit #1. A letter dated October 25, 1982 from Richard J. Campbell, Acting Materials Management Officer, to Mr. B. Gerald Sease, Data-Tec Business Forms, which letter purported to enclose a copy of Mr. Campbell's decision in the case and advised that "...if you do not agree with my decision, you have the right to notify me in writing within ten (10) days from the receipt of this decision and request an appearance before the Procurement Review Panel..."

Exhibit #2. A letter under the signature B.G. Sease, on the letterhead of Data-Tec Business Forms, to Mr. Richard J. Campbell, S.C. Budget and Control Board, which advises that "...after reviewing your decision, I request an appearance before the Procurement Review Panel." This letter is dated November 8, 1982 and is stamped "Received November 10, 1982, Material MGMT. Office State Procurement"

Exhibit #3. A letter dated November 12, 1982 under the signature of Richard J. Campbell, Acting Materials Management Officer to Mrs. Judith A. Finuf, Attorney General's Office, which says, inter-alia, that "...this appeal has been made within the ten (10) day time period..." It also requests Mrs. Finuf to review the matter and advise Senator Hugh K. Leatherman, Chairman of the Procurement Review Panel, of the Appeal.

Exhibit #4. An Order of the Honorable Owens T. Cobb, Jr., dated May 4, 1983, in the case of S.C. Alcoholic Beverage Control Commissioner v. J.K. Surles, 83-CP-40-0411

These "Exhibits" do not appear in the record of this case as transmitted from the lower tribunal.

The State first argues that the Court lacks jurisdiction because more than ten (10) days elapsed between the date of the decision of the Acting Materials Management and the request of

Data-Tec for review and secondly, that the request was not received by Mr. Campbell's Office until seventeen (17) days after the decision. Although, the Highway Department cites and extensively argues from the unpublished opinion of Judge Cobb which dealt with a misdirected notice of appeal, this Court does not interpret an argument of the Highway Department to be that this case is jurisdictionally defective because the November 8, 1982, letter of Mr. Sease was directed to Richard J. Campbell, rather than specifically to the S.C. Procurement Review Panel. It is also to be noted that, although, the Highway Department argues that the appeal time between the Acting Materials Management Officer and the Review Panel is ten (10) days and not thirty (30) days as established by S.C. Code Ann. Section 1-23-380 (1983 Cum. Supp.) Data-Tec does not argue for a thirty (30) days standard, and it would therefore be unnecessary to consider this question in any event.

Data-Tec advances the proposition that the State is precluded by estoppel from raising a jurisdictional issue at this time during the proceedings.

The essential elements of equitable estoppel as related to the party estopped are: (1) conduct which amounts to false representation or concealment of material facts, or, at least, which is calculated to convey impression that facts are otherwise than, and inconsistent with, those which party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct be acted upon by other party; and (3) knowledge, actual or constructive, of real facts; essential elements of

equitable estoppel as related to party claiming estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of party estopped; and (3) action based thereon of such a character as to change his position prejudicially. Frady v. Smith, 247 S.C. 353, 147 SE 2d 412, 415 (1966).

The conduct of the Highway Department in this appeal does not come within the definition of estoppel and the appellant is therefore not estopped from asserting a jurisdictional issue at this state of the proceedings.

Moreover, the cases in our jurisdiction hold that the matter of jurisdiction can be raised at any time during the proceedings Bramlett v. Young, ___ S.C. ___ 293 SE 2d 873 (1956), even by the Court ex mero motu. Betterson v. Stewart, ___ S.C. ___ 121 SE 2d 102, 105 (1961). The jurisdictional issue however may be raised only once and after an adverse ruling, the matter is res judicata if the adverse ruling is not appealed. Hoffman-Hoffman v. S. & K. Systems and Just E. Cooper, S.C. Ct. App. Opinion No. 0151, April 13, 1984.

The State is thus not precluded from raising the jurisdictional issue for the first time during argument before the Circuit Court on an appeal.

Petitioner urges that a review of the "exhibits" in his Memorandum of Law leads to the conclusion that the appeal of Data-Tec from the decision of the Acting Materials Management Officer to the Review Panel was not timely, and therefore, that the Review Panel had no jurisdiction in this matter.

It is generally said that the statutory procedures for seeking administrative review are mandatory.

The procedure for taking an appeal to an appellate Administrative tribunal from the determination of an Administrative body generally depends on the statutory provisions; and statutory requirements must be complied with. A party seeking to appeal must file a notice of appeal within the time prescribed by statute....

73 C.J.S. Public Administrative Bodies and Procedures, §159, at 497, 498.

The right of appeal to a reviewing administrative agency is purely statutory and all applicable statutory requirements must be complied with to sustain such appeal.

1 Am. Jur. 2d Administrative Law §543 at 353.

The time for taking an administrative appeal is generally prescribed by statute or regulation and timely application has been held necessary, delay behind the statutory time being fatal.

Id. § 544 at 354.

In addition, the majority of the courts which have considered a litigant's failure to timely perfect an appeal to an administrative forum have concluded that the appellate forum lacks jurisdiction to consider the appeal. For example, the Ohio Supreme Court in Lee Jewelry Co. v. Bowers, 124 N.E. 2d 415 (1955) noted that "compliance with the specific mandatory provisions of statutes governing the filing of notice of appeal to the Board of Tax Appeals...is essential to confer jurisdiction on the Board." The Arizona Supreme Court in Campbell v. Chatwin, 428 P. 2d 108 (1967) similarly recognized the jurisdictional restraint in a case involving a highway department review proceeding:

Obviously the request for a hearing must be made prior to the running of the ten (10) day period of notice

prior to the effective date. Therefore, the failure to make a timely request for the administrative hearing on the suspension order waived for plaintiffs the right to any administrative review. Id. at 113.

In Campbell, the Court further noted that the time limit for filing the appeal was "jurisdictional".

The Georgia Appellate Court in Miller v. Georgia Real Estate Comm., 136 Ga. App. 718 222 SE 2d 183, (1975) held that "when an appeal of an adverse decision by an administrative agency is filed beyond the time allowed by law, the Superior Court has no jurisdiction to take any action other than to dismiss the case."

The South Carolina Supreme Court in an analogous situation appears to be in accord. Pursuant to the South Carolina Worker's Compensation Act, administrative review may be had when the decision of the single Commissioner is appealed to the Full Commission. This State's decisions dealing with the procedure suggest that it is mandatory to strictly and accurately follow the appellate procedures to vest the full Commission with authority to review, administratively, the decision of the single Commissioner. See, e.g. Wall v. C.Y. Thomason Co., 232 S.C. 153, 101 S.E. 2d 286 (1957). Burnett v. S.C. State Highway Dept., 252 S.C. 579, 167 S.E. 2d 572 (1969) held that the Court had no discretion or authority to extend the statutorily mandated time for taking an appeal because if the notice of appeal is not timely, the Court has no jurisdiction.

The above authority makes it clear that strict compliance with procedural requirements is mandated on appeals. The

record in this case however, may be distinguished from that in the Surles case cited by the State. The Order of Judge Cobb in that case stated at page 2 that "...the record as certified to this Court by the S.C. State Employee Grievance Committee evinces without doubt that Mr. Surles failed to file his request for appeal within ten (10) days of the Commission's final decision as required in Section 8-17-40 of the Code..."(emphasis added) In the instant case, the record on appeal does not contain the time frames in question. Accepting the premise that a party may assert the jurisdictional issue for the first time on appeal and further accepting the premise that the statutes setting the requirements for the appeal must be strictly followed, the record in this case is absolutely devoid of the facts as to the time limits in question. There is simply no record for the Court to determine this issue without a stipulation of the parties or an evidentiary hearing. The attachments to the Memorandum of the Highway Department are not a part of the record certified to this Court. It should also be noted at this juncture that even if one were to accept the "exhibits" presented by the State's attorney in its Memorandum, one important fact is omitted, and that is the date Mr. Sease received actual notice of the decision of the Acting Materials Management Officer. Were the issue of timeliness of the appeal squarely placed before the Court, there is ample authority in South Carolina to determine the question as to when the time for filing an appeal commences. See, for example, S.C. Department of Mental Health v. Glass, ___ S.C. ___ 236 S.E. 2d 412 (1977); Brewer v. S.C. State Highway Dept., ___ S.C. ___, 198 S.E. 2d 256 (1973); O'Rourke v. Atlantic,

____ S.C. _____, 74 S.E. 930(1912); O'Neal v. Atlas, ____ S.C. _____, 167 S.E. 227 (1933).

Having no certified record from which to base a decision on the alleged jurisdictional issue, this Court is compelled to conclude that the argument of the Highway Department on this issue cannot succeed.

II. The Substantive Issue on Appeal

In its Petition filed on January 14, 1983, the Highway Department argued that the decision of the Review Panel must be reversed on the following grounds:

(a) The decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

(b) The decision was arbitrary and capricious and was characterized by abusive discretion.

(c) The conclusions of law are not supported by the findings of fact.

Although, the Petition filed by the Highway Department is unfortunately not more specific than that which is set out above, the Court has undertaken to review the documents which were filed as a transcript of the proceedings in an effort to determine if this case was infected with any error as prohibited by S.C. Code Ann. §1-23-380 (g) (1983 Cum. Supp.).

From the outset it is concluded that although paragraph (c) above is not per se an error listed under the Administrative Procedures Act, this Court interprets paragraph (c) as being another way of stating paragraph (a).

The record under consideration provides no basis whatsoever for a finding that the decision of the Review Panel is

arbitrary or capricious or characterized by abusive discretion and therefore this ground of appeal is denied.

This leaves for consideration only paragraph (a) which is a determination of the issue of whether the decision was clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record.

The Review Panel in its findings of fact and conclusions of law found that witness, Ms. Nancy Temple, an employee of the S.C. Department of Highways and Public Transportation, was an agent with apparent authority to bind the department and that her signature on a document captioned "proof" without any "...notation or restriction as to type size or submission of a finished set with carbon..." was a waiver of those requirements in the contract specifications. (order of the Review Panel, page 3). This finding and conclusion of the Review Panel is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

The concept of apparent authority or agency by estoppel depends upon a manifestation by the alleged principal to a third party, coupled with a reasonable belief by the third party that the alleged agent is authorized to bind the principal. Beasley v. Kerr McGee Chemical Corp., Inc., 273 S.C. 523, 257 S.E. 2d 726, (1979). The general rule with respect to apparent authority to bind another requires 1) a representation by the principal, 2) a reliance upon it by a third party, and 3) a change of position by such a person in reliance upon the representation. All three elements must be present. ZIV Television Programs, Inc. v. Associated Grocers, Inc. of S.C., 236 S.C. 448, 114 S.E. 2d

826 (1960); See also Moore v. Pilot Life Insurance Company, 205 S.C. 474, 32 S.E. 2d 757 (1944); and Tobacco Redrying Corp. v. U.S. Fidelity and Guaranty Company, 185 S.C. 162, 193 S.E. 426 (1937).

One who alleges the existence of a principal agent relationship has the burden of proving that the alleged agent had real or apparent authority to act for the principal. Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 106 S.E. 2d 272 (1959) See also Esslinger's, Inc. v. Murray Bros., 195 S.C. 34, 11 S.E. 2d 381 (1940).

The critical document in this case is marked as Appellant's Exhibit A, is entitled "Quotation" and is dated May 31, 1982. It is signed by J.G. Freeman, Director of Purchasing of the S.C. Department of Highways and Public Transportation and B. Sease for Data Tec. The document, both parties acknowledge, bore the statement, "Before printing, contact D.R. Cherry of the Oversize Permit Office at 803-758-3310 to determine proper wording and spacing, submit finished set with carbons for proofreading, trial on typewriter and checking quality of carbon copies."

Witness Temple was identified by Mr. Sease as a Secretary who was employed by Mr. Cherry. Mr. Sease testified that he received a copy of the proof on August 10 and called Mr. Cherry who was out of town. He talked to Ms. Temple and asked her if she could approve the proof. He testified that she said "yes" and that he went to her office and went over the entire form and that is when she signed the proof (Trans. page 13). Mr. Sease also acknowledged at Trans. page 15 the essence of the statement

quoted above which appears on Appellant's Exhibit A. He also acknowledged that Ms. Temple told him that she believed the printing might be too small. (Trans. page 19). Mr. Sease also said that he asked Ms. Temple if she could approve the proof and she said "yes" (Trans. page 21).

Ms. Temple testified that Mr. Sease called and wanted to speak to Mr. Cherry and that she told him that Mr. Cherry was on vacation. She testified that Sease said that he wanted to know if someone could sign for the permits that he ordered "...and I hesitated but I told him I said I suppose I can do it." She further stated that she told him "...sure bring it on up (the proof) and I will look at it." (Trans. page 42). She said that as soon as she looked at the proof that she could tell that the type was small and that she told him that it was. She stated that her concern was that the "...customer that picks up the permit is not going to be able to read it..." (Trans. page 43) Her testimony was that when she signed the proof, she expected Mr. Sease to bring back a "...finished set." She also testified that she told Mr. Sease that Mr. Cherry needed to see the forms (Trans. page 45) and that she said that she could sign for it (the proof) if necessary (Trans. page 45). Ms. Temple stated further that the reason that she signed the form was that she thought she was approving the "spelling...the wording was o.k." She testified that she did not tell Mr. Sease that she had authority to sign the proof, but that "...I told him that I suppose that I could look at it." She signed the proof willingly "...because I looked at the proof and the spelling was o.k. and the

wording was o.k."...(Trans. page 53).

Appellant's Exhibit C has four boxes near to the top of the form relating to the production. These lines are as follows:

- Check this box 1 if production may continue exactly according to the attached. (the underlined word is in bold print on the exhibit)
- " " " 2 if production may continue according to the attached as corrected or changed.
- " " " 3 if a revised proof is desired before actual production.
- " " " 4 if revised pricing, if any, is desired prior to continuing production.

The fact that none of the above boxes are checked tends to support Ms. Temple's testimony that she signed the proof believing that she was only indicating that the spelling and wording were acceptable. The above choices on the proof all relate to the production of the item and instruct the printer as to the production. Absent a check mark in one of these boxes there is no instruction to the printer to commence production.

Of the three elements necessarily present before an apparent agency relationship is established, at best the record establishes a change in position by Data Tec. This change in position, however, was not brought about by any representation of the principal, the Highway Department, nor was there reliance based upon any such representation. Appellant's Exhibit A sets out clearly the requirements of the order. Even accepting the testimony of Mr. Sease this record does not provide the kind of factual support required by the cases in order to find an apparent agency relationship.

The finding and conclusion of the Review Panel as to Ms. Temple's apparent authority is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and therefore the Order of the Review Panel is hereby reversed.

AND IT IS SO ORDERED.

JCH

JAMES C. HARRISON, JR.

Columbia, S. C.

May 27, 1984.