

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Austin Bischoff,

Appellant,

v.

South Carolina Department of Education,

Respondent.

Docket No. 24-ALJ-30-0362-AP

**ORDER DENYING PETITION
FOR REHEARING**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (“Court”) pursuant to an appeal filed by Austin Bischoff (“Appellant”) on October 3, 2024.¹ Appellant challenges a decision issued on September 3, 2024 by the South Carolina Department of Education’s State Board of Education (“Department” or “Respondent”) suspending his educator certificate.

This matter was assigned to the undersigned on October 7, 2024. On October 11, 2024, the Department filed the Record on Appeal. On November 7, 2024, Appellant requested an extension of time to file his brief, which was initially due on or before November 11, 2024. The Department did not oppose the request and, on November 7, 2024, the Court granted a 30-day extension.² On December 9, 2024, Appellant filed his initial brief and a Motion to Supplement the Record on Appeal. The Court received no response to the motion from the Department. However, the Department did file its brief on January 3, 2025. Appellant filed his reply brief on January 13, 2025. On January 21, 2025, the Court granted Appellant’s motion and offered the Department an opportunity to amend its brief. The Department filed a letter on January 29, 2025 informing the Court it elected to not submit an amended brief.

The Court issued an Order affirming the decision of the South Carolina State Board of Education on March 6, 2025. On March 17, 2025, Appellant filed a Motion for a Rehearing. As of the date of this Order, the Department has not responded to the motion.

¹ The Court has jurisdiction in this matter under S.C. Code Ann. §§ 1-23-380, -600(D)&(E)(Supp. 2024) and 59-25-260(2020).

² The thirtieth day fell on Saturday, December 7, 2024 and the deadline was automatically extended to Monday, December 9, 2024 pursuant to SCALC Rule 3(A).



BACKGROUND

The factual background of this matter is fully recited in the Court's March 6, 2025 Order and is therefore not repeated herein.

STANDARD OF DECISION

A motion for rehearing is authorized by SCALC Rule 40(B). This rule is based on its counterpart in the South Carolina Appellate Court Rules. The appellate court rules in turn provide that a motion or petition for rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. Accordingly, to prevail on a petition for rehearing, an appellant must demonstrate the Court overlooked or misapprehended their argument. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). The Court should therefore not consider new evidence or arguments when deciding whether to grant the petition for rehearing. *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322.

DISCUSSION

Appellant's petition for rehearing raises seven general arguments, and, within each argument articulates several individual points or issues. The seven general arguments are titled:

1. Misapplication of *Jones v. Flowers*, 547 U.S. 220 (2006) and the inadequacy of subsequent notice attempts;
2. Erroneous application of S.C. Rule of Civil Procedure 5(b) to override Due Process;
3. Acceptance of fact findings wholly unsupported in the record;
4. The Department's violation of procedural obligations;
5. Constraints of S.C. Code Ann. § 59-25-260 do not preclude review of due process violations when evidence is undermined;
6. ALC's preservation issue.
7. Arbitrary and capricious action/abuse of discretion.

The Court will address these arguments below.

I. Misapplication of *Jones v. Flowers*

Within this heading, Appellant enumerates five arguments. These arguments are: (1) a failure to properly apply the “additional reasonable steps” requirement; (2) misinterpretation of the “reasonably calculated” standard; (3) inadequate follow up measures by the Department; (4) improper reliance on inapplicable legal standards; (5) overlooking evidence supporting due process violations.

Appellant argues that the Court failed to properly apply the “additional reasonable steps” requirement established in *Jones v. Flowers*. In *Jones*, the United States Supreme Court held that when a mailed notice of a tax sale is returned unclaimed, a state, as a matter of due process, must, if practicable, take additional reasonable steps to attempt to provide notice to the property owner before conducting a tax sale. *Jones*, 547 U.S. 220, 226-27 (2006). Appellant contends that while the Court recognized that misdelivery of the certified letter triggered the additional steps requirement, the Court failed to enforce this requirement.

The Court does not agree with Appellant. Its prior Order does not contain a discussion of or endorse the “additional reasonable steps” requirement established in *Jones*. The absence of a discussion of this requirement in the Court’s prior Order stems from the fact that the Court did not conclude that the Department’s efforts to provide notice to Appellant using a certified letter comported with due process in this case. The Court’s ruling instead was that the Department’s additional attempt to provide notice by simultaneously sending another copy of its letter to Appellant in the regular mail satisfied due process. There was no evidence that the copy of the letter sent by regular mail was returned unclaimed, and, as a result, the “additional reasonable steps” requirement was not triggered.

Appellant also contends that the Court misinterpreted the “reasonably calculated” standard. He argues that merely resending notices via regular mail without any effort to confirm receipt or explore alternative methods does not satisfy the requirement that the means of communication must be reasonably calculated to provide notice. Again, the Court disagrees with Appellant. The Court did not conclude that the Department satisfied due process by “resending” notices by regular mail. Had the Department actually resent a notice, then it would have taken an additional reasonable step to notify Appellant, something Appellant specifically contends was not done. The Department instead sent both a certified letter and a letter via regular mail at the same time. To the extent that Appellant attempts to argue more generally that sending a letter by regular mail is

not a method reasonably calculated to give notice, the Court notes that precedent weighs uniformly against this argument. *E.g., Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988) (“[w]e have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice”); *see also Taylor v. Taylor*, 672 A.2d 44, 50 (Del. 1996) (notice of a modification petition, sent by *regular* mail to a non-resident obligor's last known address, is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection”)(quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)) (emphasis in original); *First Resol. Inv. Corp. v. Seker*, 795 A.2d 868, 874 (N.J. 2002) (due process is satisfied when a defendant is served by ordinary mail at his or her last known address).

Appellant next argues that the Department’s actions fell far short of the *Jones* requirement to undertake reasonable follow-up measures after its certified letter was returned. According to Appellant, the notices subsequently sent by the Department on November 29, 2023 and July 31, 2024 via regular mail were insufficient follow-up measures. The November 29, 2023 letter sent by regular mail was, however, not a follow-up letter. It was an additional copy of the letter sent by certified mail and was sent at the same time as was the certified letter. In any event, this argument is largely a duplicate of Appellant’s earlier argument regarding the requirement to take additional reasonable steps and fails for the reasons discussed above.

Another argument raised by Appellant is that the Court improperly relied upon inapplicable legal standards. Specifically, Appellant contends that: (1) the Court erred in relying upon the cases cited above for the proposition that service by regular mail is reasonably calculated to give notice and therefore satisfies due process because these cases did not involve situations in which mail was returned, thereby triggering the requirement that additional steps be taken to provide notice; and (2) the Court misconstrued S.C. Code Section 59-25-260, which indicates that the Board’s findings should be “final and conclusive.” The Court does not agree with Appellant’s assertion that it misconstrued the cited cases. Appellant is correct that these cases do not involve a situation in which mail was returned unclaimed, but Appellant’s argument once again fails to acknowledge that the Department sent *two* original notices – one by certified mail and one by regular mail. It is this additional letter sent by regular mail which the Court has concluded provided constitutionally

adequate notice. There is no evidence that the letter sent simultaneously by regular mail was returned, making the Court's citation to the above authorities proper.

The Court also disagrees with Appellant's contention that it misapplied S.C. Code section 59-25-260, which provides that:

The findings of fact by the State Board of Education are final and conclusive. A person aggrieved by the order of the State Board of Education, within thirty days, may appeal to the Administrative Law Court as provided in Sections 1-23-380(B) and 1-23-600(D), to review errors of law only, by filing with the Administrative Law Court and the State Board of Education notice of appeal. The State Board of Education shall file a certified copy of the record with the Administrative Law Court in accordance with its rules of procedure. An appeal from the order of the Administrative Law Court must be taken in the manner provided by the South Carolina Appellate Court Rules.

S.C. Code Ann. § 59-25-260 (2020) (emphasis added). Appellant argues that deference to the Board's factual findings under section 59-25-260 does not extend to findings unsupported by any evidence or to legal conclusions based upon those flawed findings.

Appellant cites no authority for this proposition, but, in any event, the Court agrees generally with Appellant that deference does not extend to factual findings unsupported by any evidence. As the Court stated in its original order, it construed this standard to mean that factual findings will not be disturbed if there is any evidence in the record which would support those findings, or, stated differently, cannot be disturbed unless there is no evidence reasonably supporting such findings. The flaw in Appellant's argument here is again that he fails to recognize that the Department initially attempted to notify him in two ways: (1) a certified letter; and (2) a letter sent by regular mail. Had the Department only attempted to notify Appellant by certified letter, the Court would have reversed the determination of the Board and remanded for additional proceedings. The Court, however, concluded that the alternate method of notice met the minimum requirements for due process.

Appellant's final point in his initial argument is that the Court overlooked evidence that his due process rights were violated because he did not receive adequate notice. He asserts that the Department failed to explore alternate methods of service after "the initial attempts failed due to their errors in notifying Mr. Bischoff." This argument ignores the fact that the notice sent by regular mail was not returned and no error in service is associated with this initial notification.

II. Erroneous Application of S.C. Rule of Civil Procedure 59(b) to Override Due Process.

Appellant makes several arguments challenging the Court's strict enforcement of Rule 5(b), SCRCP. The Court dispenses with these arguments quickly because it did not rely upon or enforce Rule 5(b), SCRCP. The only references to Rule 5(b) in the Court's prior Order were contained in quotes from prior statements of the parties.³

III. Acceptance of Fact Findings Wholly Unsupported by the Board

Appellant asserts that the Court has incorrectly given the findings made by the Board deference because it overlooked evidentiary deficiencies. Many of these arguments have already been addressed.⁴ Appellant does make one new argument in this portion of his motion. He asserts that there is a complete lack of evidentiary support for the Board's finding that it actually mailed the July 31, 2024 letter to him.⁵ However, Appellant made no assignment of error with respect to the July 31, 2024 letter in his brief and cannot raise any issues relating to this letter in a petition for rehearing.

IV. The Department's Alleged Violation of Procedural Obligations

Once again, Appellant argues that the Department failed to fulfill its obligations to provide him with notice when it knew that its certified letter had been misdelivered and thereby violated standards of due process. These criticisms have already been addressed herein and the Court incorporates its prior discussion by reference.⁶

Appellant does make two additional arguments in this section of his motion that the Court will address. First, Appellant contends that the Court's refusal to accept the Department's finding that the certified letter was properly delivered is inconsistent with the Court's ultimate conclusion that there was no due process violation. Second, Appellant argues that the Department disregarded

³ Appellant also argues in this section of his motion that additional attempts at notice were required in light of the failure of the Department's initial attempts. This argument has already been addressed.

⁴ In particular, Appellant argues that the Court has misapplied S.C. Code Section 59-25-260, that the Court should not have accepted findings without evidentiary support, the Court failed to consider that the Department actually knew that its certified letter was returned and made no subsequent attempts to remedy the error, and that the Court rigidly applied Rule 5(b), SCRCP. These contentions have been addressed *infra*.

⁵ The July 31, 2024 letter informed Appellant that he had *previously* defaulted and that the Board would consider the matter without input from him in August of 2024.

⁶ Appellant also contends that it sanctioned making findings of fact based upon speculation. Appellant does not identify the findings of fact he contends were made upon speculation rather than evidence, with the result that Appellant has not identified with particularity a point that the Court has overlooked or misapprehended. Assuming for the purposes of argument that his challenge is based upon the July 2024 letter, that argument is addressed above.

certain procedural safeguards which are designed to protect individuals in administrative proceedings.

The Court disagrees with Appellant's first argument that the Court's refusal to accept the Department's findings regarding the certified letter are inconsistent with its ultimate ruling. Again, the Court did not conclude that the Department's efforts to notify Appellant using a certified letter comported with due process. The Court instead ruled that the Department's mailing of a second letter by regular mail at the same time it sent the certified letter satisfied due process. Accordingly, there is no inconsistency.

Appellant next contends that certain procedural safeguards were disregarded. According to Appellant, these safeguards are found in S.C. Code sections 59-25-170, 59-25-200, State Board of Education Rule BCAF, and particularly section 4(C) of this rule, and the Administrative Procedures Act. The Court cannot take action upon this argument for two reasons: (1) it does not discuss which provisions of these rules Appellant claims to have been violated and the manner in which they were violated, with the result that Appellant fails to identify with particularity any points overlooked or misapprehended by the Court;⁷ and (2) Appellant did not make these arguments in his brief on appeal, and, as a result, they cannot be raised in a petition for rehearing.⁸

V. Constraints of S.C. Code Section 59-25-260.

Appellant again takes issue with the Court's construction of S.C. Code Section 59-25-260. He argues that the Court was not required to defer to any of the Board's findings below. The Court did eschew some of the Board's findings but concluded that there was *some* evidence in support of the remaining findings and, as a result, deference was required. Appellant's argument has been otherwise addressed above.

⁷ An argument exists that the notice sent by regular mail was improper because registered or certified mail is required by statute. The Court does not address whether that argument would have been successful. However, this argument was not made below until Appellant filed his reply brief and it would have been improper for the Court to inject into the appeal a non-jurisdictional argument which had not been raised by the parties. The due process implications of the notice sent by regular mail were all that the Court considered in its initial ruling. As the Court noted in its initial order, the outcome of this case is harsh for Appellant, and, were the Court free to make its own findings of fact, it may have decided the matter differently. Unfortunately, the matter is before the Court in the posture of an appeal and as a result, the Court is required to accept certain findings made by the Board and is limited to addressing the specific arguments made by the parties.

⁸ Appellant did previously generically assert that he was entitled to notice pursuant to S.C. Code Section 59-25-170. The Court does not disagree with the conclusion. However, the Court has ruled that the letter mailed by regular mail satisfied due process and due process concerns were the only concerns properly addressed to the Court in this appeal.

VI. ALC Preservation Issues

Appellant contends generally that the Court's conclusion that arguments made on appeal were not preserved constitutes an error of law. Appellant does not identify the specific arguments which he contends were erroneously not considered. In its prior Order, the Court concluded it could not entertain the following: (1) all issues raised in Appellant's brief other than due process; and (2) an argument that all notices sent by the Board were required to be sent by registered or certified mail. Appellant asserts that the Court's conclusion on these matters deprived him of an opportunity to present arguments, were based on incorrect interpretations of legal precedent, and should not have been made given the exceptional circumstances present here.

As to issues raised by Appellant in his statement of issues on appeal other than due process, those issues all related to defenses which would ordinarily have been considered by the Board below. The Court did not refuse to consider these issues based on ordinary preservation of error rules. The Court ruled that these arguments could not be raised as a result of Appellant's procedural default – his failure to request a hearing. State Board of Education Rule BCAF(4)(D) provides that “[i]f the educator fails to make a written request for a hearing within 15 days, the educator will have waived the right to a hearing, and the Board may make a determination based solely on information presented by the SCDE.”

As to the argument that the notice sent by regular mail was invalid because such a notice must be sent by registered or certified mail, this argument too was not excluded based upon error preservation principles. Appellant was precluded from asserting this argument because it was raised for the first time in a reply brief.

The Court does not believe it has misapprehended or overlooked any point regarding these matters.

VII. Arbitrary and Capricious Actions/Abuse of Discretion

Appellant argues that the Department's decision to suspend his teaching certificate is arbitrary, capricious and constitutes an abuse of discretion because: (1) it utilized a flawed notification process; (2) it violates legal precedent; (3) the Department's decision is not supported by substantial evidence; (4) the Administrative Law Court erred in accepting findings of fact made by the Board; and (5) there is no rational basis for the Department's decision to suspend the certificate. The Court will briefly address these arguments below.

Appellant identifies three alleged flaws in the notification process. First, he complains that the initial certified mail notice was known to be misdelivered. Second, he contends that there is no proof of delivery for the regular mail notice dated November of 2023. Third, he contends that there is no proof of delivery for the July 31, 2024 letter. The first and third of these arguments have previously been addressed above, and, the second argument is flawed. As the United States Supreme Court stated in *Jones*:

Due process does not require that a property owner receive actual notice before the government may take his property. *Dusenbery, supra*, at 170, 122 S.Ct. 694. Rather, we have stated that due process requires the government to provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”

Jones, 547 U.S. at 226. Because actual notice is not required to satisfy due process, proof of delivery is also not required where, as here, only due process is challenged.

Appellant next argues that the Department’s actions contravene *Meier v. Sunz Ins. Co.*, 2023 WL 123456 (S.C. 2023). The Westlaw citation to case number “123456” is highly suspicious. The Court’s own independent research revealed no case involving the parties named in the case citation, and it appears that this case is fictitious.

The Court therefore rejects Appellant’s argument in this regard. It is likely that Appellant employed argument generated by an artificial intelligence (AI) program which contained the fictitious case citation and cautions Appellant that many harms flow from the use of non-existent case citations and fake legal authority generated by AI programs, including but not limited to the waste of judicial resources and time and waste of resources and time of the opposing party. Were courts to unknowingly rely upon fictitious citations, citizens and future litigants might question the validity of court decisions and the reputation of judges. If, alternatively, Appellant’s use of a fictitious case was not the result of using an AI program, but was instead a conscious act of the Appellant, Appellant’s action could be deemed a fraud on the Court. **Appellant is hereby expressly warned that submission of fictitious case authorities may subject Appellant to sanctions under the S.C. Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10(Supp. 2024).**

Appellant’s next argument is that the Department’s decision is not supported by substantial evidence. Appellant relies upon a finding by this Court that there is no evidence which reasonably supports the Board’s finding that the certified letter was addressed to Appellant at his Georgia

address. This argument is misconceived. The Court cannot reverse or modify a factual finding made by the Board unless there is no evidence supporting that finding. This standard is in fact more rigorous than a substantial evidence standard of review. In this case, the Court is required to accept factual findings of the Board which are not supported by substantial evidence as long as there is at least *some* evidence supporting the finding. The absence of substantial evidence in support of a particular factual finding is therefore not necessarily a ground for reversal. While the Court has rejected some of the findings made by the Board, it was required to accept others which were outcome determinative.

Appellant again argues that the Court erred in accepting the Board's findings regarding the July 13, 2024 letter. To the extent that Appellant argues that the Court's rejection of the Board's conclusion that the certified letter was mailed to his Georgia address undermines the reliability of the Board's conclusions regarding other mailings, the Court agrees. However, the applicable standard of review does not permit the Court to substitute its judgment for that of the Board with respect to other dispositive conclusions it reached.

Appellant's final argument is that the Board's decision is irrational, arbitrary and capricious, and an abuse of discretion because the Board failed to adhere to proper notification procedures, relied upon unsubstantiated claims, and disregarded Appellant's due process rights. These arguments have been fully addressed herein and in the Court's original Order. The Court perceives nothing that it overlooked or misapprehended.

ORDER

IT IS THEREFORE ORDERED that the Appellant's petition for rehearing is **DENIED.**

AND IT IS SO ORDERED.

The Honorable Robert L. Reibold
Administrative Law Judge

April 10, 2025
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Jared Thompson, hereby certify that I have on this date served this order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Jared Thompson
Judicial Law Clerk

April 10, 2025
Columbia, South Carolina