1978 S.C. Op. Atty. Gen. 63 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-38, 1978 WL 22521

Office of the Attorney General

State of South Carolina
Opinion No. 78-38
February 24, 1978

***1** TO: Jack S. Mullins
Director
Personnel Division
Budget & Control Board

QUESTION:

Is the ten day limit in which an appeal to the State Employee Grievance Committee must be filed after receipt of the final decision of an agency tolled by failure of the agency to notify an employee's attorney of record of that decision?

STATUTES AND CASES:

S.C. Code Ann. §§ 8–17–30, 8–17–40 (1976);

S.C. Code Ann. § 15–9–990 (1976);

Anderson v. Anderson, 198 S.C. 412, 18 S.E.2d 9 (1941);

Mountain States Telephone & Telegraph Company v. Department of Labor and Employment, 520 P.2d 586 (Colo. 1974);

2 Am.Jur.2d, Administrative Law § 323, 544 (1962).

DISCUSSION:

An employee of an agency was discharged and subsequently filed a grievance concerning the termination, utilizing the grievance procedure provided for within the agency. The employee retained an attorney, and the attorney, following the appeal steps permitted in the agency's grievance procedure, requested in writing a final review of an interim decision adverse to his client. There is no doubt that the agency understood that this attorney was representing this employee because the agency acknowledged this fact in subsequent correspondence.

The final decision of the agency head upheld the termination. The employee was notified in writing of this decision, but the employee's attorney was not given a copy of the notification, or given any other notification by the agency. The attorney subsequently stated he was not informed of the final decision of the agency until eighteen (18) days after the decision had been issued. Three days after the attorney was informed by his client of the final decision of the agency, the attorney requested State Personnel that the ten day statutory period set forth in S.C. Code Ann. § 8–17–40 (1976) be 'waived'. The State Employee Grievance Act, S.C. Code Ann. § 3–17–40 (1976), as amended, states in pertinent part:
A State employee who wishes to appeal the decision of the agency or department grievance procedure to the State Employee Grievance Committee shall file a request for such an appeal within ten days of receipt of the decision from the agency or department head. The request shall be filed directly with the State Personnel Director by the employee. (emphasis added)

  

As a general matter of law, it is stated that 'the time for taking an administrative appeal is generally prescribed by statute or regulation and timely application has been held necessary, delay beyond the statutory time being fatal'. See 2 Am.Jur.2d, Administrative Law § 544 (1962). Further, it is generally understood that 'an administrative agency may not enlarge its powers by waiving a time requirement which is jurisdictional or prerequisite to the action taken'. See 2 Am.Jur.2d, supra., § 323. Thus, although it is clear that the State Personnel Director cannot 'waive' that time period in which a request for an appeal must be filed, it also must be determined when the ten day statutory time period began to run.

***2** On its face, S.C. Code Ann. § 8–17–40 makes notice to the employee alone sufficient for the purpose of starting the running of the ten day period. It is our view, however, that the language in this statute should be construed in conjunction with the general principle recognized in this state embodied in S.C. Code Ann. § 15–9–990 (1976):
When a party shall have an attorney in the action the service of papers shall be made upon the attorney instead of the party.

Although we have not found a decision in this state which specifically speaks to the question of whether service of notice on the party, instead of his attorney or record, is sufficient, our Court has specifically stated that 'attorneys by virtue of the very name of their office stand for and in the place of their clients. An attorney is the alter ego of his client. . . .' Anderson v. Anderson, 198 S.C. 412, 18 S.E.2d 9, 19 (1941).

General due process standards also should be considered. In Mountain State Telephone & Telegraph Company v. Department of Labor and Employee, 520 P.2d 586 (Colo. 1974), the Colorado Supreme Court specifically considered this question of whether notice to a party, without notice to the party's attorney of record, was sufficient to start the running of an eleven day period for initiation of an administrative appeal. Under the governing statute, notice of the decision from which the appeal could be taken was required only to be given to the 'party'. The Colorado Court held that the time period for initiation of appeal did not commence to run until the attorney of record was notified of the decision, stating, '[p]rocedural due process cannot be satisfied when counsel, upon whom a client is entitled to rely, is not notified of decisions affecting his client's interests.' 520 P.2d at 589. Finding no merit in the argument that literal compliance with the statute regarding notice of the decision to the parties only was all that was necessary, the Court concluded that 'due process requirement qualify statutory enactments, which must be interpreted, if possible, so as to conform to constitutional standards'. 520 P.2d at 589.

Under these circumstances, it is our opinion that in an administrative grievance proceeding affecting the interests of the State employee, notice of agency proceedings forwarded to the employee alone is not sufficient to start jurisdictional time periods running when the agency is aware that the employee is represented by an attorney. The State Personnel Director pursuant to S.C. Code Ann. § 8–17–40 (1976), as amended, should determine when the employee's attorney of record received notice of the decision from the department head and should count the ten days within which an appeal must be filed from that date, rather than the date on which the employee received the notice.

CONCLUSION:

The ten day limit for appeal to the State Employee Grievance Committee does not begin to run until an employee's attorney of record is notified of the agency's final decision.

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