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I. COURT HOLDS ADMINISTRATIVE REMEDIES NOT EXHAUSTED UNTIL PERSON AGGRIEVED BY EXISTING REGULATION PETITIONS FOR PROMULGATION OF NEW REGULATION

In *Charleston Television, Inc. v. South Carolina Budget & Control Board*[1] the South Carolina Court of Appeals held that before an aggrieved person may be granted judicial relief from a challenged administrative regulation, the person first must petition the appropriate agency to promulgate an additional regulation that would resolve the petitioner's dissatisfaction with the one challenged.[2] This holding is inconsistent with the intent of the drafters of the Model State Administrative Procedure Act[3] and with decisions from courts in other jurisdictions that have addressed issues similar to the ones presented in this case.

The litigation arose between South Carolina Educational Television (ETV) and two Charleston area stations, WCSC (Tall Tower) and

1. 296 S.C. 444, 373 S.E.2d 892 (Ct. App. 1988).

2. *Id.* at 456, 373 S.E.2d at 899. The court also decided whether the promulgation of regulation 19-445.2120, which provides procedural guidelines for state lease of non-state-owned property, exceeded the authority of the Budget and Control Board. The court held the Board did not exceed its authority. *Id.* at 458-59, 373 S.E.2d at 900. Because of the far greater significance of the first holding, the second issue is addressed only when necessary to adequately discuss the court's holding on the interference with rights issue.

3. The South Carolina Administrative Procedure Act is based largely on the 1961 version of the Revised Model State Administrative Procedure Act. *Compare* S.C. CODE ANN. §§ 1-23-10 to -400 (Law. Co-op. 1986 & Supp. 1988) *with* MODEL STATE ADMIN. PROCEDURE ACT §§ 1-19, 14 U.L.A. 357 (1980).

WCBD (Charleston Television). Both Tall Tower and Charleston Television determined to build antenna towers, and each sought to lease space on its own tower to ETV. After considerable negotiation the lease was awarded to Tall Tower, even though the chosen time and payment plan was more costly than a similar plan submitted by Charleston Television.[4] The court noted there were allegedly "technical differences in the bids . . . and for this reason the higher bid of Tall Tower was accepted by ETV."[5] Apparently Charleston Television was not made aware of Tall Tower's technical superiority or afforded any opportunity to rebid under a regulation providing for competitive bidding.[6]

Charleston Television petitioned the South Carolina Budget and Control Board (Board) pursuant to South Carolina Code section 1-23-150(a)[7] for a declaratory ruling that the Board did not have authority to promulgate regulation 19-445.2120,[8] which permits state leases to be negotiated instead of offered for competitive bidding.[9] Charleston Television alleged that in accordance with South Carolina Code section 11-35-1590(3)(c),[10] the Board should have promulgated a regulation requiring competitive bidding when feasible.[11]

The Board ruled it had authority to promulgate regulation 19-445.2120, the regulation was applicable to its decision, and competitive bidding was not feasible.[12] Charleston Television then petitioned the circuit court for injunctive relief and a declaratory judgment that the Board did not have authority to enter into the lease. The circuit court

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4. *See Charleston Television*, 296 S.C. at 452, 372 S.E.2d at 897. The chosen Tall Tower plan was valued at $1,180,434.00, while the competitive Charleston Television plan was valued at $1,094,962.00. Values given are in 1986 equivalent dollars. *Id.*

5. *Id.*

6. *See id.*

7. S.C. CODE ANN. § 1-23-150(a) (Law. Co-op. 1986).

8. S.C. CODE REGS. 19-445.2120 (1976). This regulation sets forth procedures to be followed for the negotiation of all leases of non-state-owned property for state use. *See id.*

9. *Charleston Television*, 296 S.C. at 454, 373 S.E.2d at 898. Charleston Television also challenged the lease award itself in a separate action under provisions of the South Carolina Procurement Code. Both the Procurement Review Panel and the circuit court ordered that the lease be rebid, but the South Carolina Supreme Court reversed on the ground that Procurement Code sections did not govern evaluation criterion in that case. Section 11-35-1590 of the South Carolina Code was held to be solely governing over the lease. *See* Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987).

10. S.C. CODE ANN. § 11-35-1590(3)(c) (Law. Co-op. 1986). This section requires that the "Board shall promulgate regulations to implement the provisions of this section which shall include . . . [p]rocedures for competitive bidding where feasible." *Id.*

11. *Charleston Television*, 296 S.C. at 454, 373 S.E.2d at 898.

12. *Id.* at 453, 373 S.E.2d at 897.

held the lease was "null and void because the Board had not promulgated a regulation providing for procedures for competitive bidding where feasible as mandated by [section] 11-35-1590."[13] Tall Tower appealed the order of the circuit court and the court of appeals reversed.[14]

The court of appeals reasoned that section 1-23-150(b),[15] which permits petitions for judicial review, is limited to persons[16] "affected" by the challenged regulation. Based on this reasoning, the court held that because Charleston Television failed to petition the Board for the promulgation of a regulation providing for competitive bidding, it had not exhausted its administrative remedies and thus could not be heard concerning allegations of interference with its rights caused by the negotiation process.[17] For this failure to exhaust administrative remedies, the court of appeals reversed the circuit court, stating that Charleston Television could not "reasonably claim to be affected by [regulation] 19-445.2120."[18]

The court's reversal clearly was rooted in the doctrine of exhaustion as set forth in the United States Supreme Court case, *Myers v. Bethlehem Shipbuilding Corp.*[19] In *Myers* the Court held " 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' "[20] The court of appeals noted that the South Carolina Supreme Court in *Lominick v. City of Aiken*[21] endorsed the *Myers* rule.[22] The proper inquiry, however, is not whether the doctrine of exhaustion is valid, but

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13. *Id.* at 454, 373 S.E.2d at 898.

14. *Id.* at 454, 459, 373 S.E.2d at 898, 900.

15. S.C. CODE ANN. § 1-23-150(b) (Law. Co-op. 1986). This section provides in pertinent part:

> After compliance with the provisions of paragraph (a) of this section, any person affected by the provisions of any regulation of an agency may petition the Circuit Court for a declaratory judgment and/or injunctive relief if it is alleged that the regulation or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or that the regulation exceeds the regulatory authority of the agency. The agency shall be made a party to the action.

Id.

16. " 'Person' means any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character other than an agency . . . ." *Id.* § 1-23-10(3).

17. *Charleston Television*, 296 S.C. at 456, 373 S.E.2d at 899.

18. *Id.* at 455, 373 S.E.2d at 898.

19. 303 U.S. 41 (1938).

20. *Id.* at 50-51, *quoted in Charleston Television*, 296 S.C. at 455, 373 S.E.2d at 898.

21. 244 S.C. 32, 135 S.E.2d 305 (1964).

22. *See Charleston Television*, 296 S.C. at 455, 373 S.E.2d at 898-99.

whether its application is appropriate in this case.

The court of appeals was split in its decision. Indeed, only one judge believed it was necessary to petition the Board pursuant to section 1-23-126[23] before seeking judicial relief. Another judge concurred in the result, but wrote that because Charleston Television did not proceed under section 1-23-126, "it seem[ed] unnecessary to reach the issue at all."[24] The third judge on the panel dissented, stating that "the legislature did not intend that an aggrieved party must invoke the petition process prior to challenging the validity of a regulation under the provisions of Section 1-23-150."[25] Thus, the holding in *Charleston Television*, which requires a person aggrieved by an existing regulation to petition for the promulgation of a new rule before seeking judicial relief, was not reached through a consensus of the three-judge panel.

The opinion is contrary to the apparent intent of the drafters of the model section on which South Carolina Code section 1-23-126 is based. Although the legislature did not incorporate statements of purpose into the State Administrative Procedure Act,[26] the Act is based on the Model State Administrative Procedure Act[27] and thus the Model Act is a valuable source for ascertaining the intent of the drafters. Similarly, additional insight can be gained from courts in other jurisdictions that have interpreted statutes based on the Model Act.

South Carolina Code section 1-23-126 is patterned after section 6 of the 1961 version of the Revised Model Act.[28] The comments to section 6 are not helpful in resolving the exhaustion question presented in *Charleston Television*, but comments to the 1981 version are directly on point. Section 5-107 of the 1981 version of the Act generally permits

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23. S.C. CODE ANN. § 1-23-126 (Law. Co-op. 1986). This section provides: "An interested person may petition an agency in writing requesting the promulgation, amendment or repeal of a regulation. Within thirty days after submission of such petition, the agency shall either deny the petition in writing (stating its reasons for the denial) or shall initiate the action in such petition." *Id.*

24. *Charleston Television*, 296 S.C. at 460, 373 S.E.2d at 901 (Bell, J., concurring). Judge Bell's concurrence was based on his view that the respondent did not have standing. *Id.* at 460, 373 S.E.2d at 901. He noted the Budget and Control Board found that prior to the submission of lease proposals, the Division of General Services determined competitive bidding was not feasible. Judge Bell thus concluded that because the Board's finding was not disturbed at any stage of appeal, the case went to the court of appeals as one in which competitive bidding was not feasible. *Id.* at 459, 373 S.E.2d at 900-01. Consequently, whether or not there was a regulation providing procedures for competitive bidding did not affect Charleston Television to give it standing to challenge the regulation.

25. *Id.* at 462, 373 S.E.2d at 902 (Cureton, J., dissenting).

26. S.C. CODE ANN. §§ 1-23-10 to -400 (Law. Co-op. 1986 & Supp. 1988).

27. MODEL STATE ADMIN. PROCEDURE ACT §§ 1-19, 14 U.L.A. 357 (1980).

28. *Compare* S.C. CODE ANN. § 1-23-126 (Law. Co-op. 1986) *with* MODEL STATE ADMIN. PROCEDURE ACT § 6, 14 U.L.A. 357 (1980).

a person to seek judicial review only after exhausting all administrative remedies.[29] The section, however, provides a significant exception: "[A] petitioner for judicial review need not have participated in the rule-making proceeding upon which that rule is based, or have petitioned for its amendment or repeal."[30]

The comment following model section 5-107 clearly demonstrates that the intent behind the exception was also the intent behind the 1961 version of the provision. The comment reads, "Paragraph (1), *like the 1961 Revised Model Act*, imposes *no exhaustion requirement* on the petitioner for judicial review of a rule."[31] The impact of this comment should not be overlooked. Its weight as highly persuasive authority is increased by the fact that it is the official statement offered by the drafters after twenty years of research in administrative law.[32] Accordingly, the question of intent behind the petition provision of the 1961 Act was answered conclusively in the comments to the 1981 version.

Other jurisdictions have viewed statutes similar to South Carolina Code section 1-23-126 as nothing more than a means by which the public at large could participate in the rule-making process. The dissent cited an Iowa Supreme Court case, *Community Action Research Group v. Iowa State Commerce Commission*,[33] for this proposition.[34] In that case the Iowa court stated the purpose of the petition provision was to insure that the right to petition is available to any member of the public who is interested in changing the status quo.[35] The case did not suggest that the provision was intended as a remedy which must be exhausted prior to seeking judicial relief.

Similarly, the Hawaii Supreme Court interpreted its petition provision in *Costa v. Sunn*[36] as one allowing the public to participate in rule-making procedures, and not as a provision that must be exhausted before judicial relief is available.[37]

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29. *See* UNIF. LAW COMMISSIONERS' MODEL STATE ADMIN. PROCEDURE ACT (1981) § 5-107, 14 U.L.A. 69 (Supp. 1989) [hereinafter 1981 MODEL ACT].

30. *Id.* at 146. Judge Cureton also noted this exception in his dissent, but did not refer to the section's comment that indicates the exception was intended to apply to the 1961 version. *See Charleston Television*, 296 S.C. at 462 n.1, 373 S.E.2d at 902 n.1. (Cureton, J., dissenting).

31. 1981 MODEL ACT, *supra* note 29, § 5-107 comment, at 146 (emphasis added).

32. *See id.* at 68 prefatory note.

33. 275 N.W.2d 217 (Iowa 1979).

34. *Charleston Television*, 296 S.C. at 461, 373 S.E.2d at 902 (Cureton, J., dissenting).

35. *Community Action Research Group*, 275 N.W.2d at 220.

36. 64 Haw. 389, 642 P.2d 530 (1982).

37. *Id.* at 392, 642 P.2d at 533 (noting that the Hawaii Legislature expressly stated that an objective of this provision is " 'to provide for public participation in the rule-

In *Missourians for Separation of Church & State v. Robertson*[38] the Missouri Court of Appeals acknowledged the public interest purpose of the provision as well. That court stated the provision is a recognition of the public's interest in the rules promulgated by state agencies.[39]

Thus, courts that have interpreted the provision have recognized it as one that was not intended to be a mandatory individual remedy to be exhausted prior to seeking judicial relief. Instead, the provision has been viewed merely as a means of enhancing and ensuring the right of the general public to participate in the rule-making process.

The few courts that have directly addressed whether one is required to petition for a rule change prior to seeking judicial relief have held that no such requirement exists.[40] The North Carolina Court of Appeals left no question after *Porter v. North Carolina Department of Insurance*[41] that petitioning for a change in the rules is not a prerequisite to judicial relief in that state. The court in *Porter* found that the plaintiff could have pursued two avenues to obtain judicial relief from a challenged regulation. First, the plaintiff could have petitioned for a rule change under the North Carolina petition provision,[42] which is similar to South Carolina Code section 1-23-126. If unsuccessful, the petitioner would have been entitled to seek judicial review. Second, the plaintiff could have sought a declaratory ruling from the agency on the validity or application of a rule, which then would be subject to judicial review.[43]

The second approach recognized as proper in *Porter* was followed by Charleston Television, yet the approach was held unacceptable in

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making process, by allowing any interested person to petition for a change in the rules.' " (quoting Agular v. Hawaii Hous. Auth., 55 Haw. 478, 487, 522 P.2d 1255, 1261-62 (1974)).

38. 592 S.W.2d 825 (Mo. Ct. App. 1979).

39. *Id.* at 836.

40. The fact that there are so few cases deciding this question in itself indicates that courts, as a common practice, issue declaratory judgments on administrative rules without regarding provisions similar to section 1-23-126 as a bar to judicial relief. This practice prevails even in cases in which a dissent or concurrence may suggest that the petition provision should have been exhausted. *See, e.g.*, Citizens Ass'n v. Zoning Comm'n, 392 A.2d 1027 (D.C. Ct. App. 1978).

41. 40 N.C. App. 376, 253 S.E.2d 44, *cert. denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). Although the court in *Porter* found that the plaintiff had not exhausted administrative remedies, the finding was compelled because the plaintiff sought direct judicial relief. The plaintiff initially did not petition the agency for a declaratory ruling, as did the respondent in *Charleston Television*. Thus, because *Porter* is factually distinguishable, the holding in that case is not applicable to *Charleston Television*, but the reasoning is directly on point.

42. N.C. GEN. STAT. § 150B-16 (1987) (previously codified at N.C. GEN. STAT. § 150A-16).

43. *Porter*, 40 N.C. App. at 380, 253 S.E.2d at 46.

South Carolina. After *Charleston Television, Inc. v. South Carolina Budget & Control Board*, one seeking judicial review of administrative regulations in this state will not be able to choose one avenue or the other. Instead, one will be required to travel both roads through agency administration, which in almost all cases will lead to the same result. Such a requirement will produce rulings that are effectively redundant and ill serving to administrative economy.

Similar to *Charleston Television* is *Lundy v. Iowa Department of Human Services*.[44] The petitioner in *Lundy* "sought only to challenge the validity of the rules [at issue in that case] on procedural grounds."[45] The *Lundy* petitioner sought judicial relief alleging that the state agency had violated rule-making requirements of the Iowa Administrative Procedure Act. Like the respondent in *Charleston Television*, which alleged that the Budget and Control Board had violated the rule-making requirements of South Carolina Code section 11-35-1590(3)(c),[46] the petitioner in *Lundy* also failed to petition for a change in the rules. The Iowa Supreme Court found this fact of no consequence to the question of judicial review. The court stated:

> While a petition . . . might have been a way to present the issue to the department, . . . [the section allowing petitions for rule changes] is not designed as a means for challenging the validity of rules. . . . We find no legislative intention that a petition for rulemaking be brought as a condition precedent to a judicial review action challenging the validity of rules on procedural grounds.[47]

In *Rocky Mountain Oil & Gas Association v. State*[48] the appellant sought a declaratory judgment on the validity of certain pollution control regulations promulgated by the Wyoming Environmental Quality Council. Although Wyoming has a statute[49] similar to South Carolina Code section 1-23-126, the majority in *Rocky Mountain Oil* apparently believed the statute had no application to the issue of judicial review, since it made no reference to the statute whatsoever. The majority ignored the statute despite the dissent, which stated that because the appellant had not petitioned for rule changes it had not exhausted its administrative remedies.[50]

The Wyoming court stated that the proper focus when determining whether declaratory judgment is appropriate in matters of agency

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44. 376 N.W.2d 893 (Iowa 1985).
45. *Id.* at 896.
46. S.C. CODE ANN. § 11-35-1590(3)(c) (Law. Co-op. 1986).
47. *Lundy*, 376 N.W.2d at 896.
48. 645 P.2d 1163 (Wyo. 1982).
49. WYO. STAT. § 16-3-106 (1977).
50. *Rocky Mountain Oil*, 645 P.2d at 1175 (Thomas, J., dissenting).

regulation is on what the court is asked to do. If the court were asked to substitute a judicial decision for that of an agency, the majority stated that an action for declaratory judgment should not be entertained. When, however, the validity of a regulation is at issue, as was the case in *Rocky Mountain Oil* and *Charleston Television*, the court stated that an action for declaratory judgment is appropriate.[51] Thus, in light of the substantial weight of authority from other jurisdictions that have interpreted statutes similar to South Carolina Code section 1-23-126, the decision of the court in *Charleston Television* clearly represents a minority view.

Additionally, the reasons set forth in the dissent are persuasive on the issue of whether one must petition for rule changes under section 1-23-126 prior to seeking judicial review. The dissent provided several reasons why such a requirement was not the intent of the legislature, two of which are particularly worth noting since no other jurisdiction has made the observations.

First, the court's opinion does not address the fundamental rule that regulations, in contrast to orders in contested cases, are normally prospective in their operation.[52] Thus, under the facts of *Charleston Television*, in which the court required a petition, it is clear that even if Charleston Television had petitioned for rule changes, it would not have received the immediate benefit it needed because of the prospective nature of regulations. Second, section 1-23-126 must be read in conjunction with other provisions of the State Administrative Procedure Act. Consideration must be given not only to adjudicative provisions, but also to provisions requiring public notice, filing, public participation and legislative review.[53] This process would be too time consuming to resolve questions in cases like *Charleston Television* in which time is a crucial factor.

The rationale behind the doctrine of exhaustion is that when administrative remedies are available, they must be invoked before state courts will act. The doctrine is well established and provides a good rule of law that enhances the efficiency of judicial administration. The doctrine, however, should not be invoked to require exhaustion of statutory provisions not intended as a prerequisite to judicial relief. While the court of appeals required such exhaustion in *Charleston Television*, the requirement is inconsistent with the intent of the drafters of the Model State Administrative Procedure Act and with decisions of

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51. *Id.* at 1169.

52. *See Charleston Television*, 296 S.C. at 462-63, 373 S.E.2d at 902 (Cureton, J., dissenting).

53. *Id.* at 462, 373 S.E.2d at 902 (Cureton, J., dissenting). *See* S.C. CODE ANN. §§ 1-23-40, -110 to -120 (Law. Co-op. 1986 & Supp. 1988).

courts addressing the issue in other jurisdictions. Consistent or not, though, *Charleston Television* is now the law in this state. As long as it is, the prudent practitioner with a client unfavorably affected by a questionable regulation will avoid wasted time, effort and money by initially petitioning for the promulgation of a regulation that could resolve his client's problems with the challenged regulation.[54]

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54. It should be noted that while the court in *Charleston Television* discussed Charleston Television's failure to exhaust administrative remedies in terms of its not having sought promulgation of a new regulation, the court's holding requiring such action presumably also would be satisfied if, under appropriate facts, one challenging a regulation had petitioned for either its amendment or repeal prior to seeking judicial relief.