

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2012-212952

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SC Court of Appeals

Moshtaba VedadAppellant

v.

South Carolina Department of Transportation.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Were Appellant's due process rights violated because he was not allowed to cross-examine and present witnesses at a hearing before his employer?
- II. Did the hearing before the State Employee Grievance Committee afford Appellant the due process rights to which he was entitled?
- III. If this Court were to find Appellant's due process rights were violated, would the appropriate remedy be reinstatement to his former position, as he asserts, or would it be to remand the matter for further proceedings?

STATEMENT OF THE CASE

The date of the commencement of this action is June 2, 2010. The nature of the action is an employee grievance appeal of Appellant's termination for "Destruction, Alteration, or Falsification of Records" and "Unauthorized Use of State Equipment or Property for Personal Gain." The nature of the defense is that Appellant is not entitled to be reinstated just because he was not permitted to present and cross-examine witnesses at the internal grievance stage before the employer. The date and nature of the order appealed from is the August 13, 2012 Order of Administrative Law Judge Shirley C. Robinson affirming the State Employee Grievance Committee's upholding of Appellant's termination. Date of service of Notice of Appeal was September 6, 2012. The agency action appealed from is the March 21, 2011 Final Decision of the State Employee Grievance Committee upholding the termination of Appellant's employment by

Respondent South Carolina Department of Transportation (SCDOT) pursuant to a hearing held on March 1, 2011.

ARGUMENT

I. **Appellant's due process rights were not violated on the ground that he was not allowed to cross-examine and present witnesses at a hearing before his employer.**

Appellant raises only one issue in this appeal. It is one of procedure, not substance. His only argument is that he should be reinstated to his former position on the ground that he was not given the opportunity to present and cross-examine witnesses at a hearing *before his employer* after he was terminated. He raises no challenge to the merits of the State Employee Grievance Committee's findings that he used his Agency vehicle for personal use.

Appellant relies on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L. Ed.2d 494, 105 S. Ct. 1487 (1985), to support his argument that he should be reinstated to his former position because he was denied due process by not being allowed to present and cross-examine witnesses before SCDOT. In *Loudermill*, the Supreme Court held that if an employee had a property right in his continued employment, he was entitled to certain due process rights in the termination of such employment. The property right that was recognized there arose from an Ohio statute that classified the employees as civil service employees, who were entitled to retain their positions during good behavior and efficient service, and who could not be dismissed except for misfeasance, malfeasance or nonfeasance in office. *Id.* at 538. *Loudermill* held that where

there is such a property right, employees were entitled to both a pretermination opportunity to respond, coupled with post-termination administrative procedures. *Id.* at 547-548. *Loudermill* states that “property interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Id.* at 538. There is no comparable language in the South Carolina statutes to that of Ohio, upon which *Loudermill* relied, which would give rise to a protectible property right.

Appellant also relies on *Detweiler v. Virginia Dept. of Rehabilitative Services*, 705 F.2d 557 (4th Cir. 1983), which predates *Loudermill*, to support his argument that the “South Carolina State Employee Grievance Act creates a property interest on the part of covered South Carolina public employee.” Brief of Appellant at 5. However, *Detweiler* is an interpretation of an employee’s rights under the laws of the State of Virginia, not those of South Carolina.

Appellant argues that the Virginia and South Carolina statutes are not materially different and give rise to a property right to his employment. However, he fails to consider the totality of the statutes and he cites to no supporting legal authority. As pointed out in the Administrative Law Judge’s Order, S.C. Code Ann. §8-17-330 provides that the Administrative Procedures Act (APA) applies to proceedings before the State Employee Grievance Committee, but not at other levels of the grievance process, which includes the employing agency level. Order at 5. And as the Order notes, it is the APA which gives rise to the right to present evidence (S.C. Code Ann. §1-23-320[e]) and to cross-examine the

witnesses (S.C. Code Ann. §1-23-330[3]). Hence, the statutory procedure established for appeals of State employee disciplinary actions does not support Appellant's position that he has a property right in his continued employment. Appellant's whole case rests on his argument that he should have been allowed to present and cross-examine witnesses at the agency (SCDOT) level. However, the statutory procedure created by the State Legislature does not require that he be allowed to do so.

Detweiler refers to the power of the State to define what is and what is not property. *Id.* at 558. As demonstrated, the statutes in South Carolina do not confer a property right in continued employment and the courts that have looked at this issue in the context of South Carolina law have consistently held that there is no property interest in the continued employment of a South Carolina State or public employee for purposes of the Due Process Clause. In *Bradley v. South Carolina Department of Corrections*, 2010 WL 883729 (D.S.C. 2010), Federal District Court Judge Joseph F. Anderson held that a State employee did not have a protected property interest in his employment. *Id.* at p. 15. Also in *Newton v. South Carolina Department of Public Safety*, 2011 WL 4435761 (D.S.C. 2011), Federal District Court Judge Michelle Childs found a State Highway Patrol Trooper's "employment was not a property interest for purposes of the Due Process Clause." *Id.* (p. 3). Further, in *Reed v. South Carolina State University*, 2010 WL 3730907 (D.S.C. 2010), District Court Judge Margaret Seymour found an employee of South Carolina State University failed to produce evidence that would support a finding that he was deprived of a protectible liberty or property

interest. *Id.* (p. 6). This issue has also been ruled upon with respect to other public employees in South Carolina, with the same conclusion having been reached. See, *Bunting v. City of Columbia*, 639 F.2d 1090 (4th Cir. 1981); *Beckham v. Harris*, 756 F.2d 1032 (4th Cir. 1985).

Citing *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002), Appellant states “(o)ur Supreme Court has held that a public employer’s regulatory scheme may create a property right on the part of a public employee to continued employment.” Brief of Appellant at 7. This is not a correct statement of the holding in *Conner*. That case concerned the issue of whether the existence of an employee handbook gave rise to a contract of employment. *Id.* at 610. *Conner* did not address the existence of a property right on the part of a public employee in the absence of such a contract.

Appellant also argues that the Administrative Law Judge’s citation of *Newton v. S.C. Dept. of Pub. Safety*, 2011 WL 4435761 (D.S.C. 2011), for the proposition that there is no property right in employment on the part of a public employee is not persuasive or binding since the employee in that case was a contractual employee. Brief of Appellant at 7. Appellant further challenges the reliance on *Newton* on the ground that it cites *Bunting v. City of Columbia*, 639 F.2d 1090 (4th Cir. 1981), which Appellant claims was misread by the *Newton* court since *Bunting* was an at will employee with no property interest. Brief of Appellant, p. 8. Appellant is unable to cite any opinions that do state that under the law in South Carolina a property right exists in continued employment.

- II. **Even if Appellant did have a property right in his continued employment, he was not denied due process since he was afforded an opportunity to present and cross-examine witnesses at his hearing before the State Employee Grievance Committee.**

The Administrative Law Judge found that even if Appellant did have such a property right in his continued employment, he was not denied due process. Order at 5. The case of *Sutton v. Cleveland Bd. of Education*, 958 F.2d 1339, (6th Cir. 1992), cited by Appellant in his Brief, pp. 8 and 9, is instructive on the issue of what process is due in the event the Court finds there is a property interest in the continued employment. Quoting *Loudermill*, the *Sutton* court states: "Once it is determined that the due process clause applies, we are then faced with the question of what process is due." *Id.* at 1349. *Sutton* states: due process requires, at a minimum, "that the discharged employee be permitted to attend the (post-termination) hearing, to have the assistance of counsel, to call witnesses and produce evidence on his own behalf, and to know and have an opportunity to challenge the evidence against him." *Id.* at 1350. The Court goes on to state the requirement that the "person have at least one opportunity for such a full hearing, so that he may challenge the factual basis for the state's action and may provide reasons why that action should not be taken." *Id.* Since Appellant was afforded all the opportunities set forth in *Sutton* at his hearing before the State Employee Grievance Committee, it is clear that such hearing comports with all legal requirements, thus providing him due process.

Appellant argues that the hearing before the "Committee was not an adequate post-*Loudermill* proceeding" because the "Committee procedure is

constrained by statute to review findings of fact under the equivalent of an 'appellate' standard" and that "the statutory scheme presupposes the correctness of the Agency's findings." Brief of Appellant, p. 9. However, Appellant fails to cite any authority requiring that the post-termination hearing must be *de novo*.

As Appellant points out on p. 9 of his Brief, the State Grievance Committee could have provided him relief by reversing the decision of the Agency. However, he failed to establish that the agency's decision was in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §8-17-340(E)(2). Mr. Vedad has not demonstrated that he was prejudiced by the fact that his due process hearing was held in accordance with State law by the impartial partial State Grievance Committee panel, as opposed to before SCDOT.

Appellant characterizes the Administrative Law Judge's reliance on *Ross v. Medical University of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997), as "ironic" because he states that it contains unequivocal support for his position, that being his entitlement to rights of cross-examination and confrontation which he states was completely absent. Brief of Appellant, p. 10. This statement is inconsistent with his full participation in the hearing that was conducted before the State Employee Grievance Committee in which he exercised his statutory rights to present evidence and to conduct cross-examination of witnesses in

accordance with the State Grievance Procedure and State Administrative Procedures Acts. S.C. Code Ann. §8-17-310, *et seq.*, and S.C. Code Ann. S.C. Code Ann. §1-23-310, *et seq.*, respectively.

Appellant cites *Garraghty v. Virginia Dept. of Corrections*, 52 F.3d 1274 (4th Cir. 1995) to support his argument that due process entitles him to a hearing before the Respondent, not before the State Employee Grievance Committee, as provided for under S.C. Code Ann. §8-17-310, *et seq.* However, *Garraghty*, which involved an employee of the Commonwealth of Virginia, a state where the Courts have ruled there *is* a protected property right in employment, does not support Appellant's position. *Garraghty*, a warden with the Virginia Corrections Department, appealed his discharge for sexual harassment and, unlike Mr. Vedad, was *never* given an opportunity at any stage to confront and cross-examine any witnesses. Mr. Vedad was given that opportunity before the State Grievance Committee. Also unlike Mr. Vedad, who is arguing in favor of a full due process hearing before *his employing agency*, which is not provided for in the statutory scheme, Mr. *Garraghty* argued that he was entitled to a hearing before *the impartial grievance panel* set up under Virginia law. That aspect of Virginia law is in concert with the appeal procedure of the South Carolina State Employee Grievance Procedure Act, S.C. Code Ann. §8-17-310, *et seq.*

Appellant also cites *Langley v. Adams Co. Colo.*, 987 F.2d 1473 (10th Cir. 1993), a decision under Colorado law, also a jurisdiction which has ruled there is a property right in continued employment. *Langley* emphasizes the requirement of a hearing before an impartial tribunal, *id.* at 1480, which is provided for under

the South Carolina State Grievance Procedure Act, which Appellant argues against.

Lastly Appellant quotes a lengthy excerpt from a Missouri state court, *Cole v. Litz*, 562 S.W.2d 795 (Mo. App. 1978), a decision predating *Loudermill*, that found in favor of a discharged employee on the ground that she should not have had the burden of proof under Missouri law. As previously stated, it was Mr. Vedad's burden under South Carolina law to establish that the agency's decision was in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §8-17-340(E)(2). Appellant did not carry this burden.

III. If there had been a violation of Appellant's due process rights, reinstating him to his former position would not be the proper remedy where there is no challenge to the correctness of the State Employee Grievance Committee's Decision.

Appellant submits that this Court should reverse the Final Decision of the State Employee Grievance Committee and reinstate him to his former position of employment with backpay. Brief of Appellant, p. 14, "Conclusion." However, there has been no basis advanced upon which he should be reinstated and this remedy is clearly not in accordance with *Loudermill*. After finding that the due process rights of the employees were violated in *Loudermill*, the Supreme Court did not order reinstatement to employment, rather the case was remanded for further proceedings consistent with the opinion.

In order to prevail before the State Employee Grievance Committee, Appellant is required to show under S.C. Code Ann. §8-17-340(E)(2) that he suffered substantial prejudice to his rights and that the Agency's decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

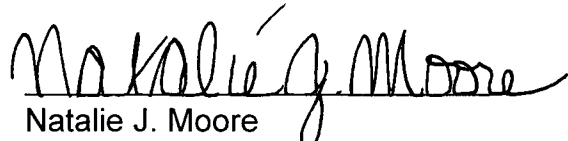
Appellant has failed to demonstrate any of the above elements or a substantial prejudice to his rights. Further, even if he had, it is important to note he is urging a remedy to which he is not entitled upon this Court. This taken with his untenable position, that is, an entitlement to present and cross-examine witnesses before his employing agency, SCDOT, underscores the lack of merit to Appellant's case. Since Appellant did not make any challenge to the substantive findings of the State Employee Grievance Committee which would require a reversal, the remedy sought by Appellant is inappropriate. There has been no argument advanced upon which this Court could find the State Employee Grievance Committee's Final Decision was improper on the merits, nor any basis upon which to order Appellant was wrongfully discharged, nor upon which to reinstate him to his former position of employment. The only challenge that was

made was to the procedure before the employing agency, which is not supported by the case law in South Carolina. Even if there were some basis upon which to find substantial prejudice to the due process rights of Appellant, co-existing with one of the other requirements enumerated in S.C. Code Ann. §8-17-340(e)(2), then the appropriate remedy would be a remand for further proceedings, not reinstatement into his former position, as there has been no challenge the correctness of the State Employee Committee's ruling, only to an issue of procedure.

CONCLUSION

For the reasons stated, this Court should uphold the Order of the Administrative Law Court affirming the Final Decision of the State Employee Grievance Committee.

Respectfully submitted,



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May 21, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Shirley C. Robinson, Administrative Law Judge

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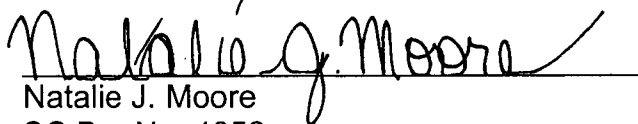
Moshtaba VedadAppellant

v.

South Carolina Department of Transportation.....Respondent.

CERTIFICATE OF COUNSEL

I, Natalie J. Moore, Attorney for Respondent South Carolina Department of Transportation, hereby certify that this final brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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May 2, 2013

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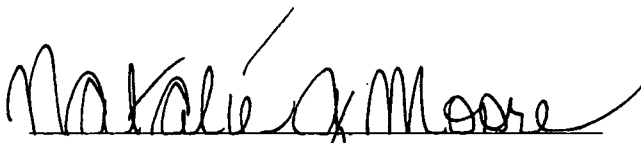
v.

South Carolina Department of Transportation.....Respondent.

CERTIFICATE OF SERVICE

I, Natalie J. Moore, Attorney for Respondent South Carolina Department of Transportation, hereby certify that I served a copy of the Brief of Respondent in this matter on counsel for the Appellant at the following address by deposit in the first class mail this 20 day of May, 2013:

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