

FILED

AUG 28 2013

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

South Carolina Department of Corrections,)
)
Appellant,)
v.)
)
Johnnie L. Bryant,)
)
Respondent.)
_____)

Docket No. 12-ALJ-30-0014-AP

ORDER

GENERAL COUNSEL

STATEMENT OF THE CASE

This matter is an appeal by Appellant South Carolina Department of Corrections (“Department”) from a Final Decision of the South Carolina State Employee Grievance Committee (“Committee”) dated September 12, 2011. The Committee’s decision was issued following an administrative hearing held on August 23, 2011. Upon careful review of the matter, the Committee’s decision is affirmed.

BACKGROUND

Respondent Johnnie L. Bryant (“Respondent”) was employed with the Department from October 11, 1999, until March 20, 2011, most recently as a Correctional Officer II. Respondent was notified by letter dated March 31, 2011, that his employment had been terminated effective March 30, 2011, for violation of Department Policy ADM-11.04, Employee Corrective Action: Item 250, Use of Unnecessary and/or Excessive Use of Force; Item 260, Making False Statements During the Course of an Official Investigation; and Item 180, Falsification of Official Documents.¹ The events that led to Respondent’s termination occurred on August 17, 2008.

On August 17, 2008, an inmate assaulted Correctional Officer Kenneth Cobb while he was working at Ridgeland Correctional Institution (“RCI”). Respondent, along with Officer John Middleton, arrived in response to the incident. Respondent and Officer Middleton first attempted to gain control over the inmate through the use of chemical munitions. After a brief struggle with the

¹ Department Policy ADM-11.04, Employee Correction Action, indicates the recommended sanction for a first offense of Use of Unnecessary and/or Excessive Use of Force is a 1 to 10-day suspension up to termination. The recommended sanction for a first offense of Making False Statements During the Course of an Official Investigation is a written warning up to termination. The recommended sanction for a first offense of Falsification of Official Documents is also a written warning up to termination.

inmate, Respondent and Officer Middleton restrained and handcuffed the inmate. At some point after the inmate was handcuffed, he sustained an injury to his head requiring eight internal sutures and 37 external staples. The inmate was admitted to the hospital and remained hospitalized overnight. Three Correctional Officers – Respondent, Officer Middleton, and Sergeant Wiggins – all had contact with the inmate from the time he was restrained until he arrived in Medical for treatment of his injuries. Following the inmate’s arrival at Medical, Respondent submitted an incident report regarding the events of August 17, 2008. This incident report covered the period of time from Respondent’s arrival at RCI’s Beaufort Wing – the location of the incident – until the inmate was placed in handcuffs.

On August 17, 2008, Department Investigators also began an investigation of the incident. After reviewing the original statements provided by Respondent and Officer Middleton, the Investigator requested that both officers complete another incident report. The same day, Respondent signed another incident report that provided an expanded explanation of the incident. On August 20, 2008, Respondent provided a voluntary statement to the Department’s Division of Investigation where he expanded further on the statements he previously provided.

On August 25, 2008, Appellant was placed on administrative suspension without pay pending an investigation into the allegations that he used excessive force toward the inmate on August 17, 2008. Further, on September 24, 2008, warrants were issued for the arrests of Respondent and Officer Middleton for Assault and Battery with Intent to Kill and Misconduct in Office based on their alleged assault of the inmate. However on May 14, 2009, the 14th Circuit Solicitor’s Office entered a *Nolle Prose* of all criminal charges against Respondent.

On March 6, 2011, Respondent filed a civil lawsuit against the Department for wrongful discharge and gross negligence.² On March 21, 2011, the Department’s Division of Investigations Director prepared an investigative memorandum summarizing the investigation into the circumstances surrounding the August 17, 2008 incident. According to the memorandum, the inmate provided a statement to the Department Investigators on August 20, 2008, and he stated that Officer

² The lawsuit was dismissed on June 9, 2011; however, Respondent was granted the right to re-file after he had exhausted his administrative remedies through the State Grievance Procedure. Respondent filed another civil suit on January 30, 2012. At the request of the Department, this case was removed to Federal District Court on March 6, 2012. On May 28, 2012, the parties agreed to dismiss the Federal lawsuit without prejudice with the right to re-file pending the outcome of this appeal before the ALC.

Middleton “bulldogged his head into the side of the Unit.” The memorandum also stated that several inmates were interviewed as part of the investigation and provided various accounts of the events surrounding the inmate’s injury.

On March 23, 2011, the Department notified Respondent, via certified letter, that an Employee Corrective Action meeting was scheduled for 8:30 a.m. on March 30, 2011. Respondent and his attorney appeared at the meeting on March 30, 2011. However, per Department Policy, Respondent was not allowed to be represented by counsel at the Corrective Action meeting. Respondent and his attorney subsequently left without attending the meeting, and it was held in Respondent’s absence. Following the meeting, the Warden of RCI recommended that Respondent be terminated based upon the investigation conducted by the Department’s Division of Investigations. As of March 30, 2011, Respondent had been on administrative suspension without pay for 947 days.

On April 15, 2011, Respondent filed a grievance with the Department, and an investigative review hearing was held on May 12, 2011, at the Department’s offices in Columbia, South Carolina. Respondent subsequently filed a grievance report with the Human Resources Division of the South Carolina Budget and Control Board on June 8, 2011. Mediation was held at the Human Resources Division’s offices on August 16, 2011; however, the parties were unable to reach an agreement. Subsequently, a hearing on the merits of this matter was held on August 23, 2011, at the offices of the State Employee Grievance Committee of the South Carolina Budget and Control Board. The Committee issued its Final Decision on September 12, 2011, and it found that the Department had acted wrongfully in its termination of Respondent.

The Department filed an Amended Motion for Reconsideration, and the Committee Attorney denied this motion by a decision dated December 22, 2011.³ The Department then filed this appeal with the ALC on January 17, 2012.

STANDARD OF REVIEW

The ALC’s appellate review of final decisions in state employee grievance proceedings is governed by the standards provided in S.C. Code Ann. § 1-23-380. This statute provides that the ALC “may not substitute its judgment for the judgment of the agency as to the weight of the

³ The decision is dated December 12, 2012; however, this appears to be a scrivener’s error.

evidence on questions of fact.”⁴ § 1-23-380(5). However, the ALC, pursuant to § 1-23-380(5),

may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the [Board];
- (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.

Id.

A decision is supported by “substantial evidence” when the Record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best W. Royal Motor Lodge, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). A decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307. The fact that the Record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing Kearse v. State Health and Human Servs. Fin. Comm’n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). The party challenging an agency action has the burden of proving convincingly that the agency’s decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917.

An abuse of discretion occurs when an administrative agency’s ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible

⁴ Pursuant to S.C. Code Ann. § 1-23-10(1), the Commission is considered an “agency.”

decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) (application of standard to circuit court) (citing Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); see also Converse Power Corp., 350 S.C. 39, 47 564 S.E.2d 341, 345 (Ct. App. 2002) (quoting Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) (“A decision is arbitrary if it is without a rational basis, is based alone on one’s will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.”)).

ISSUES ON APPEAL

1. Did the Committee err by applying an incorrect standard of review and by declining to apply the correct standard in response to the Department’s Motion for Reconsideration?
2. Did the Committee err in its finding that the Department did not provide sufficient evidence to support the charges that Respondent made false statements during the course of an official investigation and falsified official documents?
3. Did the Committee err by finding a causal connection between the filing of Respondent’s civil lawsuit and the Department’s decision to terminate Respondent’s employment?

DISCUSSION

Standard of Review

The Department argues that, in overturning its decision to terminate Respondent’s employment, the Committee applied an incorrect standard of review and afforded the agency less deference than mandated by statute. The Department asserts that the appropriate standard of review for this matter is provided under S.C. Code Ann. § 8-17-340(E)(1). Additionally, the Department further argues that the Committee erred by finding the Department’s objection to the standard of review was not timely made. As noted by the Committee Attorney in his decision on the Department’s Motion for Reconsideration, State employee grievance appeals are “contested cases” under the Administrative Procedures Act (“APA”). When the APA or applicable regulations do not address a specific issue before the Committee, the Committee looks to the ALC Rules of Procedure for guidance. See 2009 Revised Notes to ALC Rule 1 (providing that the ALC Rules “are applicable

to all matters within the jurisdiction of the court,” including “contested cases under the [APA]”). ALC Rule 29 provides that “[a]ll objections to procedure, admission of evidence, or any other matter shall be timely made and stated on the record.” ALC Rule 29(A)(6). This requirement is also applicable to the instructions given to the Committee by the Committee Attorney.

To be preserved for appellate review, an issue must have been raised to and ruled upon by the trial judge. Wilder Corp. v. Klaus Wilke, et al., 330 S.C. 71, 497 S.E.2d 731 (1998). A contemporaneous objection is required to preserve issues for direct appellate review. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997). A party cannot use a motion for reconsideration to present to the court an issue the party could have raised prior to the final decision but did not. Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995).

The Department and Respondent were asked at the hearing if there were “any additional instructions requested or objections to the ones [that were] given” after the Committee’s attorney had instructed the Committee to decide this appeal pursuant to the standard of review contained in § 8-17-340(E)(2). Neither the Department nor Respondent objected to the instruction concerning the standard of review. The Department did not object until approximately three weeks after receiving the Committee’s Final Decision. Because the Department did not contemporaneously object to the use of § 8-17-340(E)(2) as the governing standard of review in this matter, the instruction become the law of the case and cannot be altered through a motion for reconsideration. See Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 172, 714 S.E.2d 869, 878 (2011) (noting “an unchallenged ruling, right or wrong, becomes the law of the case”).

Although the Department argues that the Committee Attorney “had ample opportunity to apply the correct standard of review in its original decision,” the Department was required to timely object to the instruction. It did not. The Department cannot attempt to challenge the issue on appeal when it was required to object at the time the parties were asked if they had any objection to the standard of review to be used by the Committee.⁵ Accordingly, the Committee did not err in

⁵ Moreover, even if the ALC Rules were not applicable to this matter, applying the South Carolina Rules of Civil Procedure would compel the same result. See ALC Rule 68 (providing that the South Carolina Rules of Civil Procedure “may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed” by the ALC Rules). While jury instructions are not specifically used in matters before the Committee, the rules pertaining to jury instructions are sufficiently analogous as to be applied in the instant case. See Rule 51, SCRPC (declaring that “[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.”); see also Hope Ferry Motors of Columbia, Inc. v. Hyatt, 310 S.C. 171, 175 n.3, 425 S.E.2d

determining this matter pursuant to the standard of review provided under § 8-17-340(E)(2).

Substantial Evidence

The Department next argues that, contrary to the Committee's ruling, the Department introduced sufficient evidence to support the charges that Respondent made false statements during the course of an official investigation and falsified official documents.⁶ The Court disagrees. The Committee was presented with three statements made by Respondent. Each subsequent report by Respondent contained more detailed information than the statement previously provided. While the statements vary in detail, there is nothing inconsistent or contradictory contained within any of those three statements. The Committee found the testimony of the Department's Investigator to be credible, and neither he nor any other Department witness could produce any evidence to suggest that Respondent was responsible for the injuries sustained by the inmate on August 17, 2008. In fact, the inmate provided a statement during the investigation and stated that Officer Middleton – and not Respondent – “bulldogged his head into the side of the unit.” Finally, the Committee noted that the Solicitor's Office had dropped the charges against Respondent while Officer Middleton's charges were still pending as of the date of the Committee's hearing.

Accordingly, there is substantial evidence in the Record to support the Committee's decision that the Department failed to provide any evidence that Respondent made false statements or misled the Department in its investigation of the August 27, 2008 incident. Based on the testimony and the evidence presented during the hearing, reasonable minds could reach the conclusion the Committee reached in this matter. The Committee observed the witnesses and is in the best position to judge their demeanor and veracity and to evaluate the credibility of each witness' testimony. See Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Brown v. Allstate Insurance Company, 337 S.C. 499, 23 S.E.2d 807 (Ct. App. 1999) (quoting Cherry v. Thompson, 276 S.C. 524, 280 S.E.2d 541 (1981) and Morehead v. Doe, 324 S.C. 559, 479 S.E.2d 817 (Ct. App. 1996).

786, 789 n.3 (Ct. App. 1992) (recognizing that failure to timely object to jury charge renders such charge “the law of the case”).

⁶ The Department also determined that Respondent violated its Employee Corrective Action policy for the offense of “Use of Unnecessary and/or Excessive Use of Force,” and the Committee found insufficient evidence to support the Department's decision. Notably, the Department does not challenge the Committee's determination regarding this specific charge.

Civil Lawsuit

The Department next argues that the Committee erred in its implication that Respondent's termination by the Department was due, at least in part, to a civil lawsuit filed by the Respondent. As noted above, the findings of the Committee may be reversed if they are clearly erroneous in view of the substantial evidence on the whole record. § 1-23-380(5)(e). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See S.C. Dep't of Mental Health v. Moore, 295 S.C. 42, 45, 367 S.E.2d 27, 28 (1988).

Respondent presented evidence that, after being suspended without pay for over 900 days, the Department instituted termination procedures less than two weeks after Respondent filed a civil lawsuit. More specifically, Respondent filed the civil lawsuit against the Department on March 6, 2011, and the Department made its decision to terminate Respondent effective March 30, 2011. The Department had represented to Respondent that he would be kept on unpaid suspension pending a decision by the Solicitor's Office on the criminal charges against Officer Middleton. As of the date of the Committee hearing, Officer Middleton's criminal charges were still pending, and the Department was unable to explain why it did not wait for the charges against Officer Middleton to be resolved. Moreover, no Department witness could provide the Committee with any evidence, circumstantial or direct, to refute the inference that the Respondent's firing was motivated by the filing of his civil lawsuit against the Department.

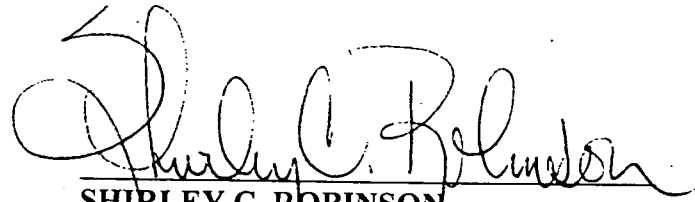
Most notably, the Record reflects that Respondent was first charged with the violations underlying his eventual termination on March 23, 2011 – the same day the Department represented that it was served with Respondent's lawsuit. In the decision, the Committee noted that "additional circumstances" factored into the decision regarding the timing of Respondent's lawsuit and his eventual termination by the Department. There is nothing contained within the Record that suggest the Committee abused its discretion or erred in its determination regarding the timing of the lawsuit and Respondent's termination. Accordingly, in reviewing the Record the Committee's Decision is supported by the substantial evidence on the whole Record.

ORDER

IT IS HEREBY ORDERED that the State Employee Grievance Committee's Final Decision to reverse Respondent's termination with the Department is **AFFIRMED**.

AND IT IS SO ORDERED.

August 28th, 2013
Columbia, South Carolina


SHIRLEY C. ROBINSON
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 28 day of August, 2013

By: Tebe A. Hemmerson
Judicial Law Clerk