

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Shirley C. Robinson

Case No.: 12-ALJ-30-0014-AP

South Carolina Department of Corrections,.....Appellant,

v.

Johnnie L. Bryant,.....Respondent.

FINAL BRIEF OF APPELLANT

January 31, 2014

South Carolina Department of Corrections

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S.C. Dept. of Corrections
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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ERR BY UPHOLDING THE COMMITTEE USE OF AN INCORRECT STANDARD OF REVIEW?
- II. DID THE ADMINISTRATIVE LAW COURT ERR IN RULING APPELLANT'S STATEMENTS WERE NOT INCONSISTENT OR CONTRADICTORY?
- III. DID THE ADMINISTRATIVE LAW COURT ERR IN AFFIRMING THE FINDING OF A CAUSAL CONNECTION BETWEEN THE FILING OF RESPONDENT'S LAWSUIT AND THE DEPARTMENT OF CORRECTIONS' DECISION TO TAKE CORRECTIVE ACTION?

STATEMENT OF CASE

This matter comes before the Court pursuant to an appeal by the Department of Corrections (SCDC) challenging the decision of the Administrative Law Court (ALC) which resulted in the reversal of corrective action SCDC took against its employee, Mr. Johnnie L. Bryant (respondent).

Respondent was employed by SCDC as a sergeant at Ridgeland Correctional Institution. On August 17, 2008 in a dorm at Ridgeland Correctional Institution, inmate Thomas Doughty assaulted Correctional Officer Kenneth Cobb, striking him in the back of the head with a lock tied to a string. Respondent, along with Officer John Middleton, arrived in response to the incident. Respondent and Middleton first attempted to gain control over inmate Doughty through the use of chemical munitions. When that failed, the two of them physically took inmate Doughty to the floor. They then handcuffed inmate Doughty before escorting him outside. (R.p.324-25).

At the heart of this case are the events which transpired while they were escorting inmate Doughty. By the time Middleton and respondent had transferred custody to Lieutenant John Wiggins outside the dorm, inmate Doughty's head had been split and he was bleeding profusely. (R.p.156, lines 19-21; p.398).

Respondent's initial handwritten report, which purported to have been written August 17, 2008, the day of the incident, indicated no significant events related to the escorting of inmate Doughty at all:

I, Sgt. Johnnie Bryant respond to Beaufort-B wing an observe Ofc. Kenneth Cobb bleeding from the rear of his head. I told Officer Cobb to exit the Beaufort-B wing and go to medical. I then observe Inmate Thomas Doughty # 238012 W/M with a sock swinging it (with a lock

inside). I gave Inmate Doughty several directive to drop the sock (with the lock inside) and turn to be cuff. Inmate refuse and began to approach me (Sgt. Bryant). I pulled my Top Cop # 813 and administered one burst to the Facial Area. Inmate Doughty continued his actions and refused. Inmate Doughty appeared to be on some type of narcotic. Inmate Doughty look wild. I Sgt. Bryant and Ofc. Middleton place Inmate Doughty on the floor. **I cuff Inmate Doughty and escort the Inmate Doughty out the unit.**

(R.p.401) (emphasis added).

A typewritten report also dated August 17, 2008 by respondent similarly described an uneventful escort of inmate Doughty:

I, Sgt. J. Bryant responded to the Beaufort "B" wing as a first responder and observed Ofc. K. Cobb bleeding from the back of his head. I told Ofc. K. Cobb to report to medical. I then observed Inmate Doughty, Thomas W/M #238012 swinging a string with a pad lock tied to one end. I gave Inmate Doughty several directives to drop the weapon. Inmate Doughty refused all directives and continued to swing the weapon while aggressively approaching me and yelling, "Y'all caused this shit!" I then administered one short burst of Top Cop chemical munitions from canister #813 to the facial area of Inmate Doughty. Inmate Doughty still continued with his aggressive behavior. Ofc. J. Middleton then administered a short burst of Top Cop chemical munition to Inmate Doughty's facial area. Inmate Doughty still did not cease his actions. At that time, I and Ofc. J. Middleton knew the chemical munitions were ineffective against Inmate Doughty. I then maintained eye contact with Inmate Doughty to give Ofc. J. Middleton the opportunity to go around to the right side of Inmate Doughty, while I remained on the left side of Inmate Doughty. Inmate Doughty kept his eyes on me while still swinging the weapon and did not see Ofc. J. Middleton approaching him from the right side. During the takedown procedure, Ofc. J. Middleton approached Inmate Doughty from the right rear and I approached Inmate Doughty from the left side. After Ofc. J. Middleton got control of Inmate Doughty's right arm, I gained control of the left arm and we simultaneously place Inmate Doughty to the floor. I, Sgt. J. Bryant, then placed the handcuffs on Inmate Doughty. **We then escorted Inmate Doughty to the outside of the unit where Sgt. J. Wiggins assumed control of the inmate.** Inmate Doughty was escorted to medical for treatment of injuries sustained during the takedown. Beginning weight of chemical munitions canister #813 was 142 grams, ending weighty was 118 grams, total chemical munitions used was 24 grams.

(R.p.398) (emphasis added).

However, a voluntary statement given by respondent to investigators on August 20, 2008 described the escorting of inmate Doughty out of the dorm differently:

On August 17, 2008 at Ridgeland Coorectional Institution at approximately 4:30 pm. Sgt. Johnnie Bryant responded to the Beaufort "B" Wing as a First Responder and observed OFC Kenneth Cobb bleeding from the back the head. I told OFC K. Cobb to report to medical. I then observed Inmate Thomas Doughty W/M swinging a string with a Padlock tied to one end. I gave Inmate Doughty several directives to drop the weapon. Inmate Doughty refused all directives and continued to swing the weapon while aggressively approaching me and yelling, "Y'all caused this shit!" I then administered a short burst of Top Cop chemical munitions from canister #813 to the facial area of Inmate Doughty. Inmate Doughty still continued with his aggressive behavior. OFC John Middleton then administered a short burst of Top Cop chemical munition to Inmate Doughty's facial area. Inmate Doughty did not cease his actions. I and OFC J. Middleton then lowered Inmate Doughty to the floor to restrain him. Inmate Doughty resisted being placed in restraints. After a brief struggle, Inmate Doughty was successfully restrained. **I and OFC Middleton while escorting Inmate Doughty outside, Fell while coming out of (along with Inmate Doughty) the exit door, because Inmate Doughty still was resisting. We pick Inmate Doughty up Sgt John Wiggins assumed control of Inmate Doughty. When Inmate Doughty lowered his head, I Sgt Bryant notice one or two drops of blood.** I Sgt Bryant ran into the Unit to rinse my Facial Area and to finish unlocking the unit.

(R.pp.400, 402) (emphasis added).

Due to the injuries to inmate Doughty's head, he was transported by ambulance to a local hospital, where he received thirty-seven staples to the outside of the head and eight stitches to the inside of the head. (R.pp.324, 326). Investigators discovered a blood stain approximately five feet above the ground on a wall outside the dorm, and DNA testing confirmed the blood was inmate Doughty's. (R.p.326). Respondent was placed on administrative suspension, and he was indicted for misconduct in public office and assault and battery with intent to kill. (R.p.142, lines 6-18, p.300).

Respondent remained on administrative suspension until his employment was terminated, effective March 30, 2011. Respondent was terminated based on violations of SCDC policy in connection with the events of August 17, 2008: the use of unnecessary or excessive force; making false statements during the course of an official investigation; and falsification of official documents. (R.p.327).

Respondent challenged the termination through the State Employee Grievance process. See S.C. Code Ann. §§ 8-17-310 to -380. At the grievance hearing, respondent described the escorting of inmate Doughty as being a continuing physical conflict:

When we got him down, finally got him down, I cuffed him up. . . . We trying to struggle. He's steady fighting us back, fighting us back.

We trying to get him to the door. Now mind you I'm blind. I'm really blind from the Top Cop. Officer Middleton blind from the Top Cop. We don't have any gas masks on. . . .

So we struggling and struggling. He's fighting and he's fighting because he don't want to go out. So when we got to the door, we pushing, pushing, we push him out the door. When we push him out the door, all three of us fell coming out the door – I mean, you know, at the door we fell.

Push him out the door, Officer Middleton fall, I fell because we had him on both sides. So when I pick – when we picked him up, like I said, I hardly couldn't see, but it looke like I seen like one or two drip of blood, which that's what I stated on my report, on the report when I wrote – when I came off of vacation and talked with Mr. Hamer when I did remember that we did fell coming out the door.

Anyway, and so when I picked him up, I'm trying to blink, blink, trying to see, so it looked like I seen Sergeant Wiggins come across the yard. . . . I asked Officer Middleton, you got him, because a lot of the inmates. . . . They trying come out though because they gagging. . . .

So I asked – like I said I asked Officer Middleton. He said, yeah. I snatched his keys and then I took my keys and I locked the front door.

(R.p.116, line 14 – p.118, line 8).

Investigator Fred Hamer testified at the hearing. Investigator Hamer explained “Well, you know, you’ve got a – we have a serious – seriously injured individual, and you know, you’re the supervisor in that particular area, and you are right on the scene, and there’s nothing indicated in your first report about what happened to that individual?” (R.p.196, lines 5-10). Investigator Hamer further elaborated that profound things had been left out of the incident reports, and those omissions reflected an effort to mislead. (R.p.200, lines 2-7; p.201, lines 13-18).

At the conclusion of the hearing the State Employee Grievance Committee (the Committee) overturned SCDC’s decision to terminate respondent’s employment. Although the Committee found Investigator Hamer’s testimony to be credible, it nevertheless ruled SCDC lacked sufficient evidence to support the charges of use of unnecessary or excessive force, making false statements during the course of an official investigation, and falsification of official documents. In doing so, the Committee applied the standard of review provided in S.C. Code Ann. § 8-17-340(E)(2), failing to apply to the more deferential standard of review for cases involving abuse of an inmate from S.C. Code Ann. § 8-17-340(E)(1). (R.pp.53-54).

SCDC filed a timely motion for reconsideration, arguing: (1) the Committee applied an incorrect standard of review; (2) the committee erred by finding SCDC lacked sufficient evidence to support the charges of making false statements during the course of an official investigation and falsification of official documents; and (3) the Committee erred in implying a causal connection between a lawsuit respondent filed and respondent’s termination. (R.pp.63-72).

The Committee denied SCDC's motion for reconsideration. As to the erroneous standard of review, the Committee attorney declined to allow the Committee to consider the case using the correct standard, finding no objection had been timely made to the incorrect standard of review. As to the sufficiency of the evidence, the Committee upheld its original decision. The Committee also stood by its conclusion respondent's lawsuit was connected to the termination of his employment. (R.pp.27-30).

On appeal, the ALC upheld the Committee's decision. The ALC found the standard of review applied by the Committee had become the law of the case and therefore, declined to address the issue on appeal. The ALC also upheld the Committee's determination SCDC provided insufficient evidence to support the charge of making false statements. In addition, the ALC affirmed the Committee's finding that respondent's termination was motivated, at least in part, by a civil lawsuit filed by respondent. (R.pp.5-8).

SCDC now appeals the ALC's decision to this Court. For the reasons that follow, SCDC respectfully requests the ALC's decision be reversed.

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT ERRED BY UPHOLDING THE COMMITTEE'S USE OF AN INCORRECT STANDARD OF REVIEW.

The ALC's decision erred by upholding the Committee's reliance on the incorrect standard of review. Specifically, the Committee's decision afforded the agency less deference than mandated by statute, and the Committee erred by finding SCDC's objection to the standard of review was not timely made.

A. *The appropriate standard of review is provided by S.C. Code Ann. § 8-17-340(E)(1).*

In overturning SCDC's decision to terminate respondent's employment, the Committee applied an incorrect standard of review and afforded the agency less deference than mandated by statute.

S.C. Code Ann. § 8-17-340(E)(1) provides:

In cases involving actual or threatened abuse, neglect, or exploitation, to include those terms as they may be defined in Section 43-35-10 or 63-7-20, of a patient, client, or inmate by an employee, the agency's decision must be given greater deference and may not be altered or overruled by the committee, unless the covered employee establishes that:

- (a) The agency's finding that the covered employee abused, neglected, or exploited or threatened to abuse, neglect, or exploit a patient, client, or inmate is clearly erroneous in view of reliable, probative, and substantial evidence;
- (b) The agency's disciplinary action was not within its established personnel policies, procedures, and regulations; or
- (c) The agency's action was arbitrary and capricious.

The term "abuse" is defined as, "physical abuse or psychological abuse." S.C. Code Ann. § 43-35-10(1). Physical abuse is further defined by statute:

“Physical abuse” means intentionally inflicting or allowing to be inflicted physical injury on a vulnerable adult by an act or failure to act. Physical abuse includes, but is not limited to, slapping, hitting, kicking, biting, choking, pinching, burning, actual or attempted sexual battery as defined in Section 16-3-651, use of medication outside the standards of reasonable medical practice for the purpose of controlling behavior, and unreasonable confinement. Physical abuse also includes the use of a restrictive or physically intrusive procedure to control behavior for the purpose of punishment except that a therapeutic procedure prescribed by a licensed physician or other qualified professional or that is part of a written plan of care by a licensed physician or other qualified professional is not considered physical abuse. Physical abuse does not include altercations or acts of assault between vulnerable adults.

S.C. Code Ann. § 43-35-10(8).

Instead of applying the deferential standard of review mandated by S.C. Code Ann. § 8-17-340(E)(1), the Committee’s decision relied upon the more stringent standard of review found in § 8-17-340(E)(2).¹ (R.p.53). In doing so, the Committee erred by not affording the agency the level of deference appropriate in this type of case.

¹ S.C. Code Ann. 8-17-340(E)(2) provides:

(2) In all other cases, the committee may not alter or overrule an agency's decision, unless the covered employee establishes that the agency's decision is one or more of the following and prejudices substantial rights of the covered employee:

- (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.

SCDC terminated respondent in connection with a use of force against inmate Doughty. Specifically, respondent was charged with use of unnecessary and/or excessive force, falsification of official documents, and making false statements during the course of an official investigation. These charges clearly fall within the scope of “cases involving actual or threatened abuse” of an inmate pursuant to S.C. Code Ann. § 8-17-340(E)(1). Therefore, the Committee was required to afford the agency’s decision greater deference than reflected in the Committee’s decision.

B. SCDC’s motion for reconsideration was sufficient to preserve the error for review given the special context of a State Employee Grievance hearing.

In upholding the Committee’s decision, the ALC found SCDC failed to timely object to the standard of review used by the Committee. However, the ALC’s decision failed to adequately take into account the unique procedures used by the Committee. Because the Committee had a full opportunity to apply the correct standard of review, the Committee erred by not doing so.

In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court. Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Co., 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006). Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments. Id. The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. Id. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide a platform for meaningful appellate review. Id.

In its motion for reconsideration, SCDC called the Committee's attention to the inappropriate standard that had been applied in the Committee's decision and asked that the Committee consider the case using the correct standard of review. (R.p.65). The Committee reconvened to consider SCDC's request for reconsideration. (R.p.87). However, despite having the opportunity to apply the correct standard of review while reviewing the request for reconsideration, the Committee, through its attorney, declined to do so, finding that SCDC's objection had not been timely made during instructions given to the Committee. (R.pp.27-28).

The ALC upheld the Committee's decision, finding that the issue was not properly preserved due to SCDC's failure to object at the moment the erroneous instruction was given. (R.p.6).

The ALC's decision related to this issue was incorrect for two reasons. First, the Committee had ample opportunity to apply the correct standard of review in its original decision. Issue preservation rules for jury instructions have no application in State Employee Grievance Hearings because the Committee's process is simply not analogous to a jury trial. The role of the Committee Attorney in State Employee Grievance Hearings differs significantly from the role of a judge during jury deliberations. Before beginning deliberations, the Committee Chairperson explained that the Committee Attorney would remain present during deliberations: "**The Committee Attorney will remain to provide legal advice**, but all other parties are asked to leave the hearing room." (R.p.259, lines 21-24) (emphasis added). Consequently, ex parte contacts between the Committee Attorney and the Committee during deliberations are not only

permitted, they are expressly contemplated. See S.C. Code Ann. § 8-17-340(D) (“The committee attorney may be present during the committee's deliberations on its decision only upon the request of the presiding officer.”); S.C. Code Regs. 19-718.07(F)(1) (“The designated Committee panel shall retire into a separate executive session, **without the parties present, to receive legal advice** from the Committee Attorney and consider the evidence.”) (emphasis added). This starkly contrasts with the contact a judge may have with a jury during deliberations. See, e.g., Snyder v. Lehigh Valley Railroad Co., 245 F.2d 112, 116 (3d Cir. 1957) (“We are of the opinion that the communication between the trial judge and the jury in the instant case cannot be said to have been harmless or merely collateral. Irrespective of the factual accuracy of the reply to the jury’s inquiry or the failure of a positive affirmative showing of substantial prejudice, the circumstances surrounding the communication require that a new trial be granted.”); State v. Keaton, 599 S.E.2d 799, 804 n.2 (W.Va. 2004) (“A trial judge acts at his or her peril when he or she conducts ex parte communications with a deliberating jury.”) (internal quotation marks omitted); Hernandez v. Virgin, 505 So.2d 1369, 1370 (Fla. Ct. App. 1987) (“Specific prejudice will be presumed as a matter of law where a trial judge, without permission of the parties, enters a room with a deliberating jury for an ex parte ‘off-the-record’ communication even if the purpose of the communication is purportedly, as it was here, unrelated to the issues in the case.”).

It is clear from the Committee Attorney’s continuing presence during deliberations that the Committee receives legal advice outside the presence of the parties. Moreover, the law which the Committee ultimately deems relevant to its decision is

reflected in the written decision of the Committee. (R.pp.47-54). In the case at hand, the Committee's written decision clearly reflects it was aware of the correct standard – the decision specifically recites S.C. Code Ann. § 8-17-340(E)(1). The Committee simply erred in concluding, despite being aware of subsection (E)(1), that the correct standard of review in this case was provided by subsection (E)(2).

Second, the Committee also had a full opportunity to rule using the correct standard following the motion for rehearing. Although typically a motion for reconsideration would not properly preserve the issue in a trial, the unique procedure followed by the Committee dictates a different result in the case at hand. In response to SCDC's motion for reconsideration, the Committee reconvened to deliberate and reconsider its decision. (R.pp.87-89). The Committee conducted additional deliberation to review the evidence, again in the presence of the Committee Attorney, and had a full opportunity to apply the correct standard of review at the time. (R.p.43). Consequently, as mandated by issue preservation rules, the correct standard of review was raised to the Committee, and the Committee had ample opportunity to issue its ruling applying the correct standard of review. See Pye v. Estate of Fox, 369 S.C. 555, 565-66, 633 S.E.2d 505, 510 (2006) (explaining that if an issue is properly raised in a motion for reconsideration but not ruled upon, it is preserved for appellate review; Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Co., 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006) (“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.”)).

Because the Committee erred by applying a less deferential standard of review than mandated and because the Committee Attorney incorrectly found SCDC did not properly raise the error, SCDC respectfully submits the ALC's decision should be reversed.

II. THE ADMINISTRATIVE LAW COURT ERRED IN RULING APPELLANT'S STATEMENTS WERE NOT INCONSISTENT OR CONTRADICTORY.

Contrary to the ALC's ruling, SCDC introduced sufficient evidence to support the charges that respondent made false statements during the course of an official investigation and falsified official documents.

In reviewing SCDC's decision to terminate respondent's employment, the Committee cannot reverse the Department's evidentiary findings unless those findings are clearly erroneous in view of reliable, probative, and substantial evidence. S.C. Code Ann. § 8-17-340(E)(1)(a) and (E)(2)(e). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Holmes v. Nat'l Service Industries, Inc., 395 S.C. 305, 308, 717 S.E.2d 751, 752 (Ct. App. 2011). An appellate court generally defers to the trial court's findings as to the credibility of witnesses. Gowdy v. Gibson, 381 S.C. 225, 233, 672 S.E.2d 794, 798 (Ct. App. 2008).

In the case at hand, Investigator Hamer testified as to the statements provided by respondent regarding the events of August 17, 2008. He explained that he first was given a handwritten report written by respondent. (R.p.167, line 6 - p.168, line 12.). The report described an altercation with inmate Doughty, which ultimately culminated in inmate

Doughty being taken to the floor and escorted outside. In this report, respondent appeared to indicate the escorting of inmate Doughty outside was entirely uneventful:

I Sgt. Bryant and Ofc. Middleton place Inmate Doughty on the floor. **I cuff Inmate Doughty and escort the Inmate Doughty out the unit.**

(R.p.401) (emphasis added).

Investigator Hamer explained to respondent that he needed to know "everything that happened from the time they arrived on the scene until that inmate was turned over to the yard officer." (R.p.167, lines 22-25). In response, respondent provided a longer, typewritten incident report. This report still described the escort as uneventful:

After Ofc. J. Middleton got control of Inmate Doughty's right arm, I gained control of the left arm and we simultaneously place Inmate Doughty to the floor. I, Sgt. J. Bryant, then placed the handcuffs on Inmate Doughty. **We then escorted Inmate Doughty to the outside of the unit where Sgt. J. Wiggins assumed control of the inmate.**

(R.p.398) (emphasis added).

However, when Investigator Hamer again met with respondent, respondent gave a much different account of the escort in a voluntary statement:

I and OFC J. Middleton then lowered Inmate Doughty to the floor to restrain him. Inmate Doughty resisted being placed in restraints. After a brief struggle, Inmate Doughty was successfully restrained. **I and OFC Middleton while escorting Inmate Doughty outside, Fell while coming out of (along with Inmate Doughty) the exit door, because Inmate Doughty still was resisting. We pick Inmate Doughty up Sgt John Wiggins assumed control of Inmate Doughty. When Inmate Doughty lowered his head, I Sgt Bryant notice one or two drops of blood.** I Sgt Bryant ran into the Unit to rinse my Facial Area and to finish unlocking the unit.

(R.pp.400, 402) (emphasis added). In this statement, instead of describing inmate

Doughty being uneventfully escorted from the dorm, respondent claimed inmate Doughty

continued to resist while being escorted. Respondent said inmate Doughty fell as they were coming out of the exit door. Also, respondent mentioned for the first time seeing blood.

At the hearing of respondent's employee grievance, respondent's description departed even further from his initial incident report. He testified:

When we got him down, finally got him down, I cuffed him up. . . . We trying to struggle. He's steady fighting us back, fighting us back.

We trying to get him to the door. Now mind you I'm blind. I'm really blind from the Top Cop. Officer Middleton blind from the Top Cop. We don't have any gas masks on. . . .

So we struggling and struggling. He's fighting and he's fighting because he don't want to go out. So when we got to the door, we pushing, pushing, we push him out the door. When we push him out the door, all three of us fell coming out the door – I mean, you know, at the door we fell.

Push him out the door, Officer Middleton fall, I fell because we had him on both sides. So when I pick – when we picked him up, like I said, I hardly couldn't see, but it looke like I seen like one or two drip of blood, which that's what I stated on my report, on the report when I wrote – when I came off of vacation and talked with Mr. Hamer when I did remember that we did fell coming out the door.

Anyway, and so when I picked him up, I'm trying to blink, blink, trying to see, so it looked like I seen Sergeant Wiggins come across the yard. . . . I asked Officer Middleton, you got him, because a lot of the inmates. . . . They trying come out though because they gagging. . . .

So I asked – like I said I asked Officer Middleton. He said, yeah. I snatched his keys and then I took my keys and I locked the front door.

(R.p.116, line 14 – p.118, line 8). Notably, among other differences in the account respondent gave at the hearing, he stated for the first time that he left Doughty alone in the custody of Officer Middleton, instead of the two of them transferring custody to Sergeant Wiggins.

At the hearing, Investigator Hamer explained “Well, you know, you’ve got a – we have a serious – seriously injured individual, and you know, you’re the supervisor in that particular area, and you are right on the scene, and there’s nothing indicated in your first report about what happened to that individual?” (R.p.196, lines 5-10). Investigator Hamer further elaborated that profound things had been left out of the incident reports, and those omissions reflected an effort to mislead. (R.p.200, lines 2-7; p.201, lines 13-18).

Although the Committee expressly found Investigator Hamer’s testimony to be credible, it nonetheless also ruled SCDC lacked sufficient evidence to determine respondent made false statements during the course of an investigation and falsified official documents. The Committee’s decision stated the Committee found the additional information respondent provided was not contradictory or inconsistent. (R.pp.39-40).

The ALC affirmed the Committee’s decision, concluding that based on the testimony and evidence presented during the hearing, reasonable minds could reach the conclusion the Committee reached in this matter. The ALC specifically noted the Committee observed the witnesses and was in the best position to judge their demeanor and veracity. (R.p.7).

Contrary to the ALC’s decision, when the evidence is reviewed in light of the Committee’s credibility findings, SCDC provided ample evidence respondent falsified both his reports and his statements to investigators. Specifically, the Committee found Investigator Hamer’s testimony to be credible. Investigator Hamer explained at the hearing that profound aspects of the incident had been omitted from respondent’s reports.

He also stated respondent's omissions had been done in an effort to mislead investigators. (R.pp.196, 200-01). Because the Committee found Investigator Hamer's testimony credible and because his testimony provided substantial evidence for SCDC's decision to terminate respondent's employment, the ALC and the Committee were incorrect in finding SCDC provided insufficient evidence to support its decision.

It appears the Committee erroneously believed respondent's omissions of events from his reports could not amount to a false statement. However, in the context of an affirmative directive to describe all events, respondent's failure to provide any mention at all of events he testified occurred constituted a false statement. Even after Investigator Hamer directly informed respondent that his report needed to contain everything that happened until they transferred custody of inmate Doughty to Sergeant Wiggins, respondent's incident report made no mention of the inmate falling through the door, no mention of seeing any blood, and no mention of leaving inmate Doughty in Officer Middleton's custody alone. (R.p.398-99). Moreover, all of respondent's statements are inconsistent with inmate Doughty's injuries and Investigator Hamer's discovery of a blood stain originating from inmate Doughty found on a wall approximately five feet above the ground. (R.p.181, line 12-p.182, line 21).

Given the context of his affirmative duty to disclose information and the Committee's credibility determinations, respondent's omissions supported the charges of making false statements during the course of an official investigation and falsifying official documents. Therefore, SCDC respectfully submits the decision of the ALC should be reversed.

III. THE ADMINISTRATIVE LAW COURT ERRED IN AFFIRMING THE FINDING OF A CAUSAL CONNECTION BETWEEN THE FILING OF RESPONDENT'S LAWSUIT AND THE DEPARTMENT OF CORRECTIONS' DECISION TO TAKE CORRECTIVE ACTION

Factual findings may be reversed if they are clearly erroneous in view of the substantial evidence on the whole record. See S.C. Code Ann. § 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).

On March 6, 2011, respondent filed a lawsuit against the Department of Corrections and Ridgeland Correctional Institution, alleging wrongful discharge and gross negligence. (R.pp.279-86). At the Committee hearing, Robin Gracien, employee relations branch chief, testified that the corrective action process was already in motion before the lawsuit was received. Specifically, she explained communications were received from the South Carolina Law Enforcement Division in late 2010. She stated that at the beginning of March 2011, SCDC's Division of Investigation began preparing the documentation to provide to the reprimanding authority, which eventually led to the production of an Investigative Memorandum, dated March 21, 2011. Ms. Gracien testified all of these events occurred before SCDC received notice of respondent's lawsuit on March 23, 2011. (R.p.229, lines 3-18).

In its final decision, the Committee indicated it was troubled by circumstances surrounding respondent's termination, implying respondent's lawsuit caused SCDC to proceed with corrective action against respondent. (R.p.54). In denying SCDC's motion

for rehearing, the Committee also relied on the fact that respondent was first officially charged with the violations the same day SCDC was served with the lawsuit. (R.p.45).

The ALC affirmed the Committee's decision, finding 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. (R.p.8).

The ALC's decision overlooked the testimony of Ms. Gracien. Ms. Gracien specifically testified as to the actions of SCDC to complete respondent's termination, all of which happened before SCDC had notice of the lawsuit. There was no evidence SCDC was aware of the lawsuit prior to the date of service on March 23, 2011. The lawsuit was served after communications about the corrective action had occurred and after the investigative memorandum was drafted to provide to the reprimanding authority with necessary supporting documentation. (R.p.229, lines 3-18). More to the point, Ms. Gracien directly refuted the contention that respondent's termination was motivated by the fact respondent filed a civil lawsuit. (R.p.229, lines 19-22).

In short, there could not have been a connection between the decision to issue corrective action and respondent's lawsuit because respondent did not serve his lawsuit until after the corrective action process was underway. Instead, as explained by Ms. Gracien's testimony, the corrective action was prompted by the ongoing failure of the solicitor's office to bring Officer Middleton's related case to a disposition. (R.p.237, line 20-p.238, line 3). Ms. Gracien testified internal discussions about ending Mr. Bryant's administrative suspension and proceeding with corrective action had been ongoing since

late 2010. (R.p.238, lines 10-19).

Consequently, the ALC erred by finding the Department had not provided evidence refuting that respondent's termination was motivated by the fact respondent filed a civil lawsuit. Therefore, SCDC respectfully submits the ALC's decision should be reversed as it unsupported by substantial evidence.

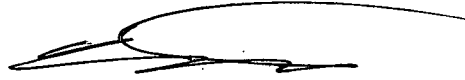
CONCLUSION

WHEREFORE, for all the reasons stated above, this Court should reverse the decision of the Administrative Law Court, and uphold SCDC's decision to terminate respondent's employment as a result of the charges of making false statements during an official investigation and falsification of official documents.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS

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Columbia, SC
January 31, 2014

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR and the Supreme Court's order of August 13, 2007.



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Administrative Law Court

Administrative Law Judge Shirley C. Robinson

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

South Carolina Department of Corrections.....Appellant,

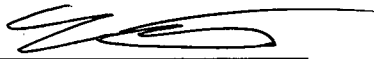
v.

Johnnie L. Bryant,.....Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served Respondent a copy of this Final Brief by depositing a copy of same in the United States Mail, postage prepaid, January 31, 2014 addressed to the Respondent as follows:

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SC Court of Appeals