

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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

South Carolina Department of
Corrections,

Appellant,

v.

Johnnie L. Bryant,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE ADMINISTRATIVE LAW COURT ERR BY UPHOLDING THE COMMITTEE USE OF AN INCORRECT STANDARD OF REVIEW?
2. DID THE ADMINISTRATIVE LAW COURT ERR IN RULING APPELLANT'S STATEMENTS WERE NOT INCONSISTENT OR CONTRADICTORY?
3. 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 THE CASE

Mr. Johnnie L. Bryant, hereby submits this Appellate Brief in response to the Department of Correction's Appeal to the South Carolina Court of Appeals. The decision made by the Administrative Law Court on August 28, 2013 affirmed the decision made by the Employee Grievance Committee of the South Carolina Budget and Control Board on September 12, 2011 at a full trial on the merits.

The basis for the South Carolina Department of Correction's ("SCDOC") motion are: (i) that the Committee failed to apply the correct legal standard, (ii) that the Committee failed to consider evidence of a false statement, and (iii) that the Committee's finding of a causal connection between Mr. Bryant's firing and Mr. Bryant's filing of an employment based lawsuit was unwarranted. This is a "second appeal" as the Administrative Law Court has already heard these issues on appeal and found them meritless. This current appeal is an appeal of the Administrative Law Court's Order. It is the Respondent's position that this appeal is meritless as all grounds fail as a matter of law.

FACTS

On August 25, 2008, Mr. Bryant was suspended from his job as a corrections officer and was placed on “suspension without pay pending investigation” pursuant to SCDC Employee Policy ADM-11.04. (R. p. 295; p. 306). The events that led to the Plaintiff being accused of this misconduct occurred on or about August 17, 2008. (R. p. 306).

Prior to his suspension, Mr. Bryant held the title of Corrections Officer (Sergeant II) and earned a salary of \$33,255.00 per year. (R. p. 381; p. 366). Mr. Bryant has worked at the Ridgeland Correctional Institution since 1999 and was named “Correctional Officer of the Year” in 2002. (R. p. 109, lines 16-18; p. 110, lines 3-9).

Mr. Bryant remained on suspension without pay from August 17, 2008 until he filed a civil lawsuit in the Jasper County Court of Common Pleas on March 9, 2011. (R. p. 124, line 4- p. 130, line 7; p. 276-286; p. 295). On March 23, 2011 the Ridgeland Correctional Institute sent out an “Official Notification of an Employee Corrective Action.” (R. p. 318). On March 30, 2011 a hearing was held without the Plaintiff’s presence and the Plaintiff’s employment was terminated.¹ (R. p. 320-321).

Mr. Bryant filed a timely Verified Grievance with the SCDOC on April 14, 2011. (R. p. 352-386). An investigative review hearing was held on May 5, 2011 at the SCDOC’s offices in Columbia. (R. p. 388). Mr. Bryant filed his Grievance Report with the Human Resources Division of the SC Budget and Control Board on June 8, 2011. (R. p. 268-293).

¹ Plaintiff attempted to attend but was barred from attending with his counsel pursuant to a constitutionally suspect SCDOC policy forbidding employees from being represented by legal counsel at their corrective action meetings. (R. p. 320).

Mr. Bryant's civil lawsuit was dismissed on June 9, 2011 pursuant to a hearing that occurred on the same day in the Jasper County Courthouse; however, Mr. Bryant was granted the right to re-file after he had exhausted his administrative remedies through the State Grievance Procedure.

An unsuccessful mediation was held at the Human Resources Division's offices on August 16, 2011. The SCDOC has not made any objection to the timeliness of any filing or action taken by Mr. Bryant.

A full hearing on the merits of this case was held on August 23, 2011 at the offices of the SC Budget and Control Board in Columbia in front of the State Employee Grievance Committee ("Committee"). (R. p. 47). At the conclusion of this hearing, the Committee found that the SCDOC had acted wrongfully in their termination of Mr. Bryant. (R. p. 47-54). The Committee set forth a written Final Decision on September 12, 2011. (R. p. 47-54).

The SCDOC's Amended Motion for Reconsideration was filed on or before October 11, 2011, and the Committee denied this motion on November 18, 2011. (R. p. 63-73; p. 43-46).

Mr. Bryant again attempted to have his day in civil court and filed another Summons and Complaint in Jasper County on January 30, 2012. This case was removed to Federal District Court on March 6, 2012 by the SCDOC. In January 2012, the SCDOC decided to appeal the Grievance Committee and filed their appeal with the Administrative Law Court. (R. p. 24-25).

After another failed mediation that occurred on February 2, 2012, the parties agreed on May 28, 2012 to dismiss the Federal lawsuit without prejudice with the right to re-file pending the finality of this current appeal.

On August 28, 2013 the Administrative Law Court denied SCDOC's appeal and affirmed the ruling by the Committee. (R. p. 1-9).

On September 27, 2013, SCDOC filed their Notice of Appeal.

Status of Mr. Bryant's Relief

Mr. Bryant prevailed at his Grievance hearing via written decision dated September 12, 2011 in which the SCDOC was ordered to re-instate Mr. Bryant effective March 30, 2011. (R. p. 47-54). Mr. Bryant was not reinstated until October 17, 2013; however, he has not received any financial compensation from the SCDOC for his time out of work (from August 17, 2008 to October 17, 2013). The committee also ordered "all relief permitted by the Grievance Act," which should include back pay for this time out of work. (R. p. 54). Mr. Bryant was suspended without pay for 1887 days.

ARGUMENTS

I. THE COMMITTEE APPLIED THE CORRECT STANDARD, THE FAILURE TO APPLY THE CORRECT STANDARD WOULD BE HARMLESS ERROR, AND THE SCDOC DID NOT PRESERVE THIS ISSUE FOR APPEAL

The SCDOC asserts that the Committee used the wrong standard of review. The Committee's decision should stand for the following reasons: (A) the SCDOC did not preserve this issue for appeal, (B) The SCDOC does not appeal the issue that could have made the difference in standards of review relevant, and (C) the Committee's decision stands under either standard.

For background, the Committee used S.C. Code Ann. § 8-17-340(E)(2) (i.e. a standard for "other cases") for its ruling, where the SCDOC asserts that the Committee should have used S.C. Code Ann. § 8-17-340(E)(1) (i.e. a standard for "abuse" cases).

A. The SCDOC did not preserve this issue for appeal.

The SCDOC's appeal on this issue focuses on failing to apply the correct instruction as to the standard of review. 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 Rule 59(e) motion to present to the court an issue the party could have raised prior to the judgment but did not. Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995).

Both parties were asked at the time of the hearing if there were any objections to this case being decided under S.C. Code Ann. § 8-17-340(E)(2). The SCDOC did not object. (R. p. 255, lines 18- p. 259, line 7). The first objection to the standard of review was made in a Rule 59 motion for reconsideration.

By black letter South Carolina law the SCDOC failed to preserve this issue for appeal. This should be dispositive on the issue, as there is no legal theory presented in which would support this issue being preserved for appeal. It does not appear that there is any case law to support the contention that this rule does not apply to proceedings before the Employee Grievance Committee of the South Carolina Budget and Control Board (as SCDOC argues).

B. For the purposes of this Appeal, the SCDOC only appeals the finding that there was a false statement, and the proper standard was used for this alleged infraction.

The SCDOC only appeals the factual findings related to Mr. Bryant's alleged false statements, not the findings related to Mr. Bryant's alleged use of force. The SCDOC alleges that S.C. Code Ann. § 8-17-340(E)(1) applies to situations where there is "abuse" involved, whereas S.C. Code Ann. § 8-17-340(E)(2) applies to situations "all other cases" not involving abuse.

The SCDOC does not appeal the factual findings related "abuse", or more specifically to Mr. Bryant's not causing Inmate Doughty's injuries. The SCDOC was well served in not appealing the abuse findings as Mr. Bryant was not involved in causing Mr. Doughty's injuries (and clearly demonstrated as such at the Committee's trial).

The factual issues that the SCDOC appeals have to do with Mr. Bryant allegedly making a false statement, which in no way involved "abuse" as required by S.C. Code Ann. § 8-17-340(E)(1). As such, the SCDOC's appeal regarding the proper standard is pointless and doesn't address substantive issues.

C. The Committee's factual findings regarding Mr. Bryant's lack of wrongdoing in this case are proper regardless of the standard used.

No matter what standard is used, the Committee's ruling is supported by law. Applying an incorrect standard of law is harmless error where the evidence supports a finding under the proper standard. Gray v. Club Group LTD, 339 S.C. 173 at 183-184, 528 S.E.2d 435 at 440-441 (Ct. App. 2000) (finding that "The Circuit Court's application of the substantial evidence standard of review to this issue was clearly error. The Circuit Court should have taken its own view of the preponderance of the evidence to review the jurisdictional question in this case. However, this error is harmless.") Id.

The Grievance Committee's written Final Decision concludes that there was no evidence presented to indicate Mr. Bryant was responsible for Inmate Doughty's injuries and there was no credible evidence that Mr. Bryant made any false statement. (R. p. 53-54). In reviewing the evidence in the record, this is not a case where there is a "close call". The facts strongly support the Committee's decision.

The finding of facts made by and the conclusion set forth by the Committee satisfies either standard of review that the SCDOC cites. The section the SCDOC asserts should be used states that an agency's decision should not be overturned unless it is, among other things, "arbitrary and capricious." S.C. Code Ann. § 8-17-340(E)(1)(c). The section that the Committee used stated that an agency should not be overturned unless it is, among other things, "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 8-17-340(E)(2)(f).

The two standards are so similar that it takes multiple readings to notice the difference between the two. Counsel for the SCDOC argues that one standard is stricter than the other; however, no case law on the subject can be found to support that proposition and they appear strikingly similar.

When applying the facts of this case to the standard the SCDOC asserts should have been used, the result of this trial cannot be any different.

II. THE COMMITTEE CORRECTLY FOUND THAT MR. BRYANT DID NOT MAKE ANY FALSE STATEMENTS

A. **The Committee correctly found that Mr. Bryant did not make any false statements.**

The Committee, the entity which heard the testimony in this case, correctly found that Mr. Bryant did not make a false statement, and as such their factual findings on the issue should stand. An Appellate Court is not required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony; furthermore, an appellate court will not disturb the trial judge's findings of fact that depend on the credibility of witnesses. Brown v. Allstate Insurance Company, 337 S.C. 499, 23 S.E.2d 807 (S.C.App. 1999), *quoting* Cherry v. Thomasson, 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). The Committee was presented with three statements that were purportedly made by Mr. Bryant, Exhibit 1, Exhibit 2 and Exhibit 3. (R. p. 398-399; p. 400; p. 401, respectively). The SCDOC is mistaken in asserting that these documents present evidence of any false statements.

Exhibit 1 was a typed written statement signed by Mr. Bryant which was not typed by Mr. Bryant. (R. p. 398-399). This exhibit gave the general facts of the incident involving Inmate

Doughty, but did not mention any injuries to Mr. Doughty. (R. p. 398-399). Exhibit 1 was dated August 17, 2008, the date of the occurrence. (R. p. 398-399).

Exhibit 3 was also dated on August 17, 2008, was not in Mr. Bryant's handwriting, but also gave a general description of the incident. (R. p. 401). It was not signed by Mr. Bryant. (R. p. 401). However, as the Committee notes, it is not inconsistent with Exhibit 1. (R. p. 54).

Exhibit 2 was a hand written statement given on August 20, 2011 by Mr. Bryant (it was typed out due to Mr. Bryant's penmanship and presented as Exhibit 4). (R. p. 400; p. 402) This document was in Mr. Bryant's handwriting and signed by Mr. Bryant. (R. p. 400). This statement, given three days after the incident, includes a mention of Mr. Bryant, Officer Middleton, and Inmate Doughty falling as they left the facility. (R. p. 400; p. 402). However, there is nothing in Exhibit 2 that is inconsistent with any other statements.

SCDOC's position that the failure to mention falling on the first reports constitutes an omission that is so egregious that it should be considered a false statement is meritless. The Committee has already had the opportunity to fully examine the issue, and the Committee found that "[a] review of the incident reports indicate that while each subsequent report contained more detailed information than those previously, the information contained in the reports was not contradictory or inconsistent." (R. p. 54). The SCDOC does not attempt to address the logic or reason behind this finding of fact, and merely attempts to re-argue the position they have advanced prior (this is the *fourth* time that the SCDOC has asserted this exact argument). The Committee has ruled on this matter and the SCDOC does not advance any argument or attempt to present any evidence in their appeal that has not already been presented.

Simply put, Officer Hamer was asked on the stand to identify any time when Mr. Bryant made a false statement, and he could not. (R. p. 193, line 16- p. 196, line 19). Furthermore, no other SCDOC representatives could point out where Mr. Bryant made a false statement. This complete failure to offer evidence should be dispositive on the matter.

However, the “omission” argument advanced in this current motion is even more disingenuous when it is considered that the witnesses called by the SCDOC, especially Officer Hamer, testified that the basis of Mr. Bryant being accused of giving a false statement was that they were unsatisfied with the statements that Mr. Bryant consistently made. (R. p. 193, line 16- p. 196, line 19). No SCDOC witness testified that the August 20, 2008 statement (Exhibit 2 (R. p. 400)) contained such ground breaking new information that it rendered the two August 17, 2008 statements (Exhibit 1 (R. p. 398-399) and Exhibit 3 (R. p. 401)) a false statement. However, numerous SCDOC witnesses testified that they felt they were being misled, and that this feeling of being misled was the motivating factor in charging Mr. Bryant with giving a false statement. (R. p. 193, line 16- p. 196, line 19; p. 211, line 16- p. 212, line 6). Of course, there was no evidence presented to substantiate that Mr. Bryant actually misled the SCDOC, and the Committee correctly found the SCDOC was unable to present any evidence to substantiate this claim. (R. p. 47-54).

The Committee has considered this “false statement” issue at a fully noticed hearing, heard multiple witnesses testify on the matter, considered documentary evidence, and heard arguments of counsel concerning this issue. The SCDOC has argued that Mr. Bryant made a false statement at trial before the Committee, then on their motion for reconsideration before the Committee, then on appeal before the Administrative Law Court: all prior courts have found this argument meritless. Their appeals on the matter do not argue any error of law, only their interpretation of the facts, and

their prior arguments for their position have been identical to the ones they advance in this appeal.

This argument is meritless and should be dismissed as such.

B. Even if the SCDOC was justified in disciplining Mr. Bryant for making a false statement, the SCDOC acted arbitrarily and capriciously in their disciplining of Mr. Bryant.

Even if Mr. Bryant's multiple reports can be considered "false statements," that these false statements come close to justifying the punishment that Mr. Bryant received is absolutely absurd. Mr. Bryant was basically given the "death penalty" of punishments: suspension without pay for over 1800 days. The evidence shows that the SCDOC knowingly destroyed Mr. Bryant's ability to make living in his chosen occupation and actively prevented him from finding other employment (despite not paying him). In the highly unlikely scenario that the SCDOC had the legal authority to impose such a lengthy suspension without pay, this punishment should be reserved for only the most egregious of violations. Mr. Bryant's alleged violations, in a light most favorable to the SCDOC, are minor and clerical in nature. There is no escaping that the SCDOC acted wrongfully, arbitrarily and capriciously in its actions in this regard.

This whole argument is especially absurd considering that the SCDOC disciplined Mr. Bryant for an alleged "use of force" issue and any "false statement" issue was merely an afterthought. Considering that Mr. Bryant was demonstrably not responsible for Inmate Doughty's injuries and hence there was no "use of force" issue, this is a naked attempt to shoe-horn a weak "false statement" argument to justify what they did to Mr. Bryant. The true issue of this case was whether Mr. Bryant used excessive force on Inmate Doughty. The SCDOC is not even attempting to appeal the Commission's conclusion that there was no evidence of Mr. Bryant using excessive force on Inmate Doughty. Again, the SCDOC is attempting to shoe-horn a weak "false statement" argument

to justify what they did to Mr. Bryant, and this Honorable Court should see this argument for what is it.

III. THE COMMITTEE CORRECTLY IDENTIFIED THAT THE TIMING OF MR. BRYANT'S FIRING CONCERNED HIS FILING OF A CIVIL LAWSUIT

The Committee correctly determined that the trigger for Mr. Bryant's termination was the filing of a civil suit. (R. p. 54). Furthermore, this factual finding does not affect the SCDOC's liability to pay Mr. Bryant the money they owe him, but rather appears to concern liability in other legal venues (Mr. Bryant has unsuccessfully attempted to get this case to civil court twice during this action). An Appellate Court is not required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony; furthermore, an appellate court will not disturb the trial judge's findings of fact that depend on the credibility of witnesses. Brown v. Allstate Insurance Company, 337 S.C. 499, 23 S.E.2d 807 (S.C.App. 1999), *quoting* Cherry v. Thomasson, 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).

The Committee was correct in finding that the Department of Corrections could not produce evidence to refute the inference that Mr. Bryant was terminated for filing a lawsuit. Ms. Gracien testified that the Plaintiff would be kept on unpaid suspension until the criminal charges regarding Officer Middleton were resolved. (R. p. 226, line 23- p. 219, line 21). She further testified that charges have not yet been resolved. On cross-examination, Ms. Gracien was unable to explain why the Department of Correction did not wait to terminate Mr. Bryant until after Officer Middleton's criminal charges were resolved. (R. p. 230, line 17- p. 235, line 18).

Mr. Bryant presented evidence that, after being suspended without pay for over 1800 days, the SCDOC instituted termination procedures less than two weeks after Mr. Bryant filed a civil

lawsuit. (R. p. 128, line 20- p. 130, line 6; p. 266-303). This is compelling circumstantial evidence that the SCDOC fired Mr. Bryant for filing his civil lawsuit.

Ms. Gracien could not give the Committee any evidence, circumstantial or direct, to refute the inference that Mr. Bryant's firing was motivated by filing a civil lawsuit. Considering there was no reason whatsoever given for the timing of Mr. Bryant's firing, the Commission was free to rest their finding on the circumstantial evidence presented.

The Committee was correct to be concerned about the suspect timing of the Corrective Action Meeting in relation to the date Mr. Bryant filed his lawsuit against the Department of Corrections as there could be civil remedies available to Mr. Bryant. However, this issue is both irrelevant to the remedies sought in this case by Mr. Bryant and correctly decided by the Commission.

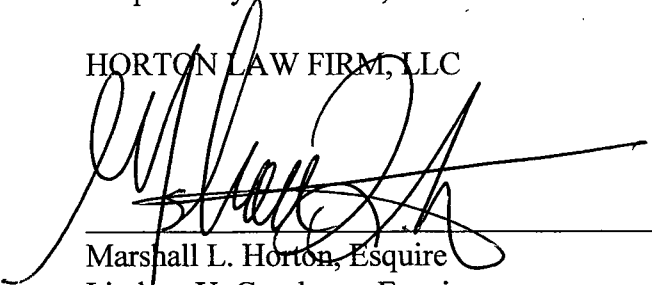
CONCLUSION

For the reasons stated above, the SCDOC's appeal should be dismissed.

February 13th, 2014

Respectfully submitted,

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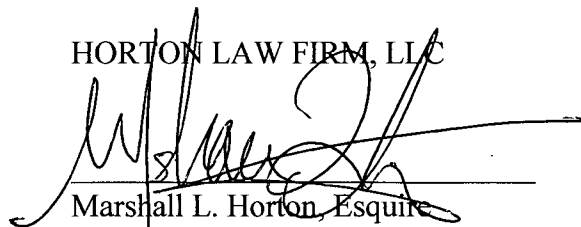
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

February 17, 2014

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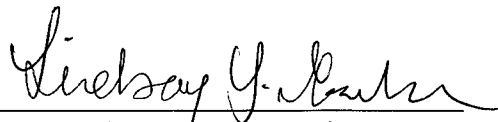
Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on the South Carolina Department of Corrections, by depositing a copy of it in the United States Mail, postage prepaid, on February 17, 2014, addressed to their attorney of record, Christopher D. Florian, Esquire, P.O. Box 21787 Columbia, South Carolina, 29221 on February 17, 2014.

February 17, 2014

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