

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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PETITION FOR CERTIORARI TO COURT OF APPEALS

S.C. Supreme Court

2012-212952

Moshtaba Vedad

Petitioner,

v.

South Carolina Department of Transportation,

Respondent.

APPENDIX

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The South Carolina Court of Appeals

Moshtaba Vedad, Appellant,

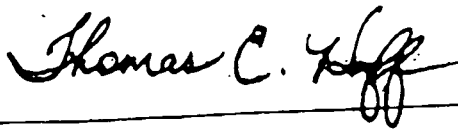
v.

South Carolina Department of Transportation,
Respondent.

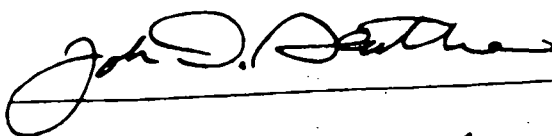
Appellate Case No. 2012-212952

ORDER

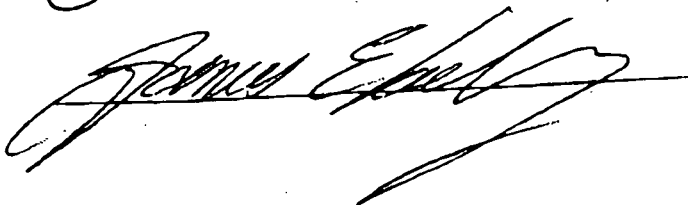
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Natalie Jean Moore, Esquire

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

2012-212952

Moshtaba Vedad

Appellant,

v.

South Carolina Department of Transportation,

Respondent.

APPELLANT'S PETITION FOR REHEARING

March 19, 2014

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The Appellant, Moshtaba Vedad, petitions this Court for rehearing.

Factual Summary

The following facts are set out by the Appellant's Brief at pp. 2-4:

Moshtaba Vedad, a civil engineer with a Bachelor of Science from The Citadel, was employed by the Department of Transportation for more than 27 years. Final Decision of State Employee Grievance Committee. R. 9. His employment was suspended and terminated. He was terminated effective June 2, 2010. *Id.* The basis for both his suspension and termination is the Agency's contention that he misused the Agency vehicle assigned to him and kept improper records of his vehicle use. *Id.* R. 12, 15. Appellant denied engaging in misconduct. *Id.* R. 12, 14. He timely invoked all his appellate rights, and after an appellate hearing on March 1, 2011, The State Employee Grievance Committee issued its March 21, 2011, decision affirming both his suspension and termination. A copy of this decision is made a part of the Record on Appeal. R. 9-15. A timely appeal was taken to the Administrative Law Court, and that Court affirmed the decision of the Employee Grievance Committee by Order of August 13, 2012. A copy of this Order is made a part of the Record on Appeal. R. 2-8. Notice of Appeal to this Court was filed and served on September 6, 2012. R. 16-17. Appellant contends that his termination violated due process of law because it is 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 arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion. This contention is based upon the procedure followed by the Department

in Transportation in effecting the Appellant's termination. The record is uncontroverted that the Appellant was suspended and terminated after a summary meeting with representatives of the Agency who accused him of misconduct. See, R. pp. 19-24. This was the type of pre-termination hearing anticipated by *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542-43, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). However, Mr. Vedad contends that lawful use of a summary pre-termination procedure requires the opportunity for a post-termination hearing with a full panoply of due process protections. *Loudermill* at 546-47; see, also, *Sutton v. Cleveland Bd. of Education*, 958 F.2d 1339, 1349-50 (6th Cir. 1992). "The severity of depriving a person of the means of livelihood requires that such 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." *Sutton*, 958 F.2d at 1549-50. Mr. Vedad's post-termination hearing gave him no such opportunity. No witnesses appeared. No testimony was taken. No opportunity for cross examination was provided. No oath was administered. See, R p. 25, l. 24 – p. 30, l. 2; p. 48, l. 12 to p. 51, l. 5; p. 52, l. 14 – p. 53, l. 20.

When this proceeding was described to counsel for the State Employee Grievance Committee, he guessed it to be a "mediation." R p. 49, ll. 12 – 16:

MR. GANJEHSANI: Wait a minute. Stop. Are we talking about a mediation?

MS. MOORE: No. We have a bifurcated proceeding like I think most state agencies –

MR. GANJEHSANI: Okay.

MS. MOORE: --where it's a non-confrontational ...

The Appellant raised the issue of the unconstitutionality of the Agency procedure but the State Employee Grievance Committee failed to cogently address it. The Committee's Decision evidences its misunderstanding of the relevant law. March 21, 2011, Final Decision, R. p. 15:

Appellant claimed his due process rights were violated by being deprived of an evidentiary hearing or similar opportunity to cross-examine the SCDOT

employees who participated in the decision to discipline him until after he appealed his suspension/termination to the Committee. However, it is well settled that "a full evidentiary hearing is not required prior to termination" of a public employee. *Ross v. Medical University of South Carolina*, 328 S.C. 51, 66, 492 S.E. 2d 62, 70 (1997). Accordingly, the Committee finds Appellant's argument on this issue unavailing.

The August 13, 2012, Order of the Honorable Shirley C. Robinson, Administrative Law Judge, affirms the decision of the State Employee Grievance Committee. Relying upon *Newton v. S.C. Dept. of Public Safety*, No. 6:10-01781, 2011 U.S. Dist. LEXIS 107828, *9 n.1, 2011 WL 4435761 (D.S.C. Sept. 23, 2011), Her Honor found that the South Carolina statutory procedure for appeals of state employee disciplinary actions does not establish a property right for state employees. Order of Administrative Law Court, R. pp. 5-6. Her Honor went on to hold that even if Mr. Vedad had a property interest in his continued employment, the appellate hearing before the State Employee Grievance Committee provided him with adequate due process. *Id.* pp. 6-7.

Reasons for Petition for Rehearing

The basis for this petition is as follows. The Appellant's appeal identified two issues for consideration by this Court:

- I. Did the South Carolina Employee Grievance Act Provide the Appellant with a Property Interest in Continued Employment?
- II. Did the Agency Terminate the Appellant's Employment in Violation of Due Process of Law by Failing to Provide Him with a Constitutionally Adequate Post-termination Hearing?

Statements of Issues on Appeal, Brief of Appellant, p. 1.

As to Statement of Issue I:

The March 5, 2014, decision of this Court¹ cites *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) for the inarguable proposition that "property interests" are not created by the Constitution, but from an "independent source such as state law . . ." This citation is provided as the sole basis for affirming the Administrative Law Court decision that the South Carolina State Employee Grievance Act does not create a property interest in continued state employment.

It is respectfully submitted that this Court failed to address or consider the authorities cited by the Appellant in support of his contention that the South Carolina State Employee Grievance Act and related state legislation are state laws sufficient to create a property interest in continued state employment. In particular, the following argument of the Appellant set out at pp. 5-10 of Appellant's Brief does not appear to have been considered and was not addressed:

The case of *Detweiller v. Virginia Dept. of Rehabilitative Services*, 705 F.2d 557 (4th Cir. 1983) (considering Virginia public employee grievance law) is on all fours with the case of Mr. Vedad. *Detweiller* explicates the particular aspects of a state employee grievance procedure which give rise to a property interest in an employee's continued employment. 705 F.2d at 560:

The statute's distinction between probationary employees and nonprobationary employees, its distinction between disciplinary discharges and discharges for reduction in work force, the Standards' specifications of the breaches of discipline for which an employee may be discharged, and the authority conferred on an impartial panel to reverse the agency's decision and to order reinstatement with back pay establish that a nonprobationary employee has a property interest in continued employment that is created by the state.

¹ Received by counsel for the Appellant on March 7, 2014.

There is no material difference between the Virginia statutory scheme and that which exists in South Carolina. In South Carolina, a "Covered Employee" must have completed the "probationary period" of employment. Section 8-17-320(7) S.C. Code of Laws (1976), as amended. In the case of Mr. Vedad, specific standards have been promulgated by the Agency specifying the breaches of discipline for which he might be subjected to disciplinary discharge. These are identified within the S.C. Department of Transportation's "Disciplinary Action Policy." State Employee Grievance Committee's Exhibit One, R. pp. 55-62. These standards were applied to him. R. pp. 19-27 and Final Decision of State Employee Grievance Committee, R. pp. 12, 15. The State Employee Grievance Committee is an impartial panel with authority to reverse the Agency's decision and to order reinstatement with back pay. Section 8-17-340(E) S.C. Code of Laws (1976), as amended. A failure of the Agency to comply with "its established personnel policies, procedures, and regulations" is a basis for reversing its decision. Section 8-17-340(E)(1)(b). There are differences between the standards applied to disciplinary discharges and discharges for reduction in work force. See, Section 8-17-330 S.C. Code of Laws (1976), as amended. "A reduction in force is an adverse employment action considered as a grievance only if the agency, or as an appeal if the State Human Resources Director, determines that there is a material issue of fact that the agency inconsistently or improperly applied its reduction in force policy or plan." The Administrative Law Court is specifically charged with review of the final decision of the Committee. The disciplinary standards are a product of Section 8-11-230(6) S.C. Code of Laws (1976), as amended, which requires the Budget and Control Board and the State Personnel Division to "[a]fter coordination with agencies served, develop policies and programs concerning leave with or without pay, hours of work, fringe benefits (except State retirement benefits), employee/management relations, performance appraisals, grievance

procedures, employee awards, dual employment, **disciplinary action, separations, reductions in force, and other conditions of employment as may be needed.**" (emphasis added). The statutory and regulatory scheme underlying Mr. Vedad's appeal is indistinguishable from that recognized as creating a property right in *Detweiller*.

Moreover, the standards for review of employee terminations by the State Employee Grievance Committee are only consistent with the existence of a property interest. If Mr. Vedad's employment is "at will," his termination could never be "arbitrary or capricious or characterized by an unwarranted exercise of discretion." 18-17-340(E)(2)(f). "At will" employment may be terminated with or without cause or reason, and with or without notice. Such a termination may be "arbitrary" and "irrational." *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 223-224, 337 S.E.2d 213, 215 (1985). By definition, such a termination could not be unlawfully "arbitrary" or "capricious" or be characterized by an "unwarranted exercise of discretion." Similarly, 18-17-340(E)(2)(e) allows reversal of the Committee's decision on a showing that it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." In the context of disciplinary terminations, these grounds for appeal can only mean that the Agency has to make some showing of good cause. This is all that is required to create a property interest.

Our 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. *Connor v. City of Forest Acres*, 348 S.C. 454, 560 S.E. 2d 606 (2002). In *Connor*, the employee claimed to rely upon disciplinary procedures in the employer's handbook. Despite an "at will" disclaimer, the Supreme Court found that whether a contract existed requiring cause for termination had to be submitted to the jury. 348 S.C. at 462-64, 560 S.E.2d at 610-11.

The footnote from *Newton v. S.C. Dept. of Public Safety, supra*, is the only authority cited by the Administrative Law Judge in support of the conclusion that the South Carolina Employee Grievance Act does not create a property interest in continued employment. That footnote is neither persuasive nor binding. In *Newton*, the plaintiff entered into a contract involving his resignation. He conceded his at-will status, 2011 U.S. Dist. LEXIS 107828 at *8. Consequently, any further discussion of this issue within *Newton* is *dicta*. However, in the cited footnote, *Newton* notes that the plaintiff might have filed a grievance under the State Employee Grievance Act, but then cites *Bunting v. City of Columbia*, 639 F.2d 1090 (4th Cir. 1981), for the proposition that "such grievance rights do not establish a property interest in employment." *Id.* at *9, n.1.

Newton misreads *Bunting*. Mr. Bunting was a City of Columbia police officer who served at the pleasure of the City. Consequently, he had no property interest in continued employment which required due process protection. *Bunting v. City of Columbia*, 639 F.2d 1090, 1094 (4th Cir. 1981).

As to Statement of Issue Two:

This Court's March 5, 2014, Order cites *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008), for the inarguable proposition that "Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest." It is respectfully submitted that the Court fails to consider or address the fact that *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), together with the other authorities cited by the appellant, specifically address the type of post-termination hearing required in the context of the termination of a public employee's property interest in public

employment. The Court's March 5, 2014, Order also cites *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 69, 663 S.E.2d 497, 504 (Ct. App. 2008), which this Court recites as having found "no violation of due process when post-termination hearing afforded notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Olson* addresses due process in relation to dock permits rather than in the context of the termination of a public employee's property interest in continued employment. Perhaps more importantly, *Olson* specifically holds that "'Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) *the right to confront and cross-examine witnesses.*' *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007)." (emphasis added). The Appellant's due process claim is based specifically on his being denied the right to confront and cross-examine witnesses.

It is respectfully submitted that the March 5, 2014, Order fails to consider or address the argument set out by Appellant's Brief at pp. 8-14 and Appellant's Reply Brief at pp. 5-7. These are set out below:

From Appellant's Brief:

II. The Administrative Law Court misapprehended the requirements of due process. Confrontation of witnesses and testimony under oath are required elements of post-termination hearings. The Constitution of the United States allows a public employer to terminate a public employee from his or her employment with less than a full-blown due process hearing provided minimal requirements of due process precede the termination. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542-43, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). However, in such a case, summary suspension or termination must be followed by a post-

termination or suspension hearing which comports with due process. The constitutionality of a bare-bones pre-termination hearing is dependent on the existence of a full-blown post-termination hearing. *Loudermill* at 546-47; see, also, *Sutton v. Cleveland Bd. of Education*, 958 F.2d 1339, 1349-50 (6th Cir. 1992). "The severity of depriving a person of the means of livelihood requires that such 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." *Sutton*, 958 F.2d at 1549-50.

In the case of Mr. Vedad, there was no full, post-termination hearing. Rather, there was a "conference." No evidence was presented on behalf of the Agency, no testimony was taken, no investigation was conducted, and no facts were found. No witnesses were sworn. Indeed, no witnesses appeared in the presence of Mr. Vedad. Needless to say, there was no opportunity for cross-examination or any record of a proceeding upon which a trier of fact might make findings of credibility and fact. Rather, the person designated as the Department's Representative at the conference simply followed the conference with a letter stating that "the Department acted within its policies and procedures for your client's termination." There was no explanation from the person designated to have the conference as to what, if anything, was to be addressed.

The subsequent hearing before the State Employee Grievance Committee was not an adequate post-*Loudermill* proceeding. The Employee Grievance Committee procedure is constrained by statute to review findings of fact under the equivalent of an "appellate" standard. In other words, the statutory scheme presupposes the correctness of the Agency's findings. This may not be permitted unless those findings meet both the pre- and post-termination due process requirements of *Loudermill*. *Sutton v. Cleveland Bd. of Education*, *supra*.

However, the Employee Grievance Committee could have provided relief to Mr. Vedad by reversing the decision of the Agency on account of: its violation of constitutional and statutory provisions; its actions in excess of the statutory authority of the agency; its findings made upon unlawful procedure; its failures to comply with the law; and on account of its arbitrariness and capriciousness. All of these stemmed from the Agency's failure to follow procedure and to provide Mr. Vedad with due process of law. All of these deficiencies were explicitly raised before the Employee Grievance Committee. See, for example, January 4, 2011, letter to State Employee Grievance Committee through Office of Human Resources from Allan R. Holmes.

The Committee's citation to *Ross v. Medical University of South Carolina*, 328 S.C. 51, 66, 492 S.E. 2d 62, 70 (1997), is ironic. Reading one page further in the *Ross* opinion one finds unequivocal support for Appellant Vedad's position --- a summary pre-termination hearing requires a post-termination hearing that affords the employee with "full and meaningful participation." *Ross v. Medical University of South Carolina*, 328 S.C. 51, 67, 492 S.E. 2d 62, 71 (1997):

Nonetheless, although the pretermination procedures afforded Dr. Ross did not comply with minimum due process requirements, the error was remedied by the subsequent Committee hearing. Dr. Ross received notice of a post-termination hearing, a written list of specific charges against him, and references to the sections in the faculty handbook and South Carolina Code his conduct was alleged to have violated. The hearing as originally scheduled was postponed at Dr. Ross' request. Thereafter, while represented by counsel, Dr. Ross fully participated in the seven-day hearing. He presented his own witnesses and evidence and cross-examined MUSC's witnesses. Any lack of opportunity to respond to charges in a pretermination hearing was clearly remedied by Dr. Ross' full and meaningful participation in the post-termination hearing. *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980)(any error in pretermination hearing cured by subsequent hearing); *Agarwal v. Regents of University of Minnesota*, 788 F.2d 504 (8th Cir. 1986)(even if employee did not receive all procedural safeguards during initial proceeding, his right to due process was not violated due to later hearing); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994)(state may cure

procedural deprivation of due process rights by providing later procedural remedy); *Jones v. Chatham County*, 223 Ga. App. 455, 477 S.E.2d 889 (1996)(available post-termination procedures cured employer's failure to have pretermination hearing).

Dr. Ross's rights of cross-examination and confrontation must be contrasted with the complete absence of any similar rights in the "bifurcated", "non-confrontational", dual venue "conference" provided Appellant Vedad.

The "full evidentiary" post-termination hearing required by *Loudermill* includes the right of the discharged employee to cross examine witnesses even where the facts giving rise to discharge are undisputed. *Garraghty v. Virginia, Dep't of Corrections*, 52 F.3d 1274, 1282-1283 (4th Cir. 1995). See, also, *Langley v. Adams Co., Colo.*, 987 F.2d 1473, 1480-1481 (10th Cir. 1993) (affirming denial of qualified immunity to officer who terminated plaintiff and officer who affirmed termination because no opportunity for post-termination hearing that included right to confront and examine witnesses). Consequently, there is no question but that the Agency's procedures do not comport with the requirements of *Loudermill*.

Essentially, the Administrative Law Court has ruled that the South Carolina legislature's provision of the State Employee Grievance Committee hearing satisfies the need for a full fledged post termination hearing. This ruling is incorrect. Insofar as the Administrative Law Court contends that the Agency procedure prior to the State Employee Grievance Committee was constitutionally adequate, the ruling is incorrect as shown by *Garraghty*. Also, insofar as the Administrative Law Court holds the "fact finding" standard utilized by the State Employee Grievance Committee is adequate --- an appellate standard --- that holding is erroneous. Even burden shifting has been found to violate due process in this context. A Missouri case addresses this very issue. *Cole v. Litz*, 562 S.W.2d 795 (Mo. App. 1978). In *Cole*, the public employee was dismissed by his agency and sought a hearing before the Civil Service Commission. The

Commission in *Cole* merely shifted the burden of proof, but the *Cole* opinion nonetheless found this to violate Due Process. 562 S.W.2d at 797-798:

Under the heading "Conclusions of Law and Decision", the commission noted that, according to its own rule, its policy is to support appointing authorities in requiring efficient service from merit system employees. The commission then stated:

"It is tempting for the Commission in a case of this character to substitute our judgment for that of the responsible party.

"Although we are sympathetic with Appellant we are compelled to conclude that the judgment of the Department must be upheld. To hold otherwise would be to substitute the judgment of the Commission for that of the appointing authority and we do not feel that we should do that in the absence of some compelling evidence that the judgment of the appointing authority was unsound or improperly motivated. There is no such evidence here."

Thus, by the terms of the commission's decision, Mrs. Cole could not have prevailed unless there appeared "compelling evidence that the judgment of the appointing authority was unsound or improperly motivated . . ." even though the commission found the independent exercise of judgment "tempting". The appointing authority was entitled to no such position of evidentiary advantage; evidence presented by the department did not, simply by virtue of its source, deserve more credit than that presented by the appellant.

A similar situation appeared in *Heidebur v. Parker*, 505 S.W.2d 440 (Mo. App. 1974) in which a police officer demanded a hearing before the board of police commissioners after the superintendent of police ordered his dismissal. Under a board rule, a dismissed officer was required to open and close the hearing. The officer argued that the rule unfairly shifted the burden of proof; and this court, speaking through Judge McMillian, agreed. The following appears at page 444:

"In the instant case the evidence is undisputed that plaintiff was discharged by the Superintendent based not upon a hearing, but only upon an Inspector's Report. His first evidentiary hearing, although styled an appeal, was before the Board. It was at this hearing that pursuant to the Board's procedure that defendant was required to put on his proof that he had not violated any of the department regulations contained in the Code of Discipline and Ethics. In other words, defendant had the burden of proving that his discharge was improper. Here what is styled by the Board as an appeal, is, in fact, even from a cursory reading of the transcript a de novo hearing of the entire controversy. Thus, since the Board hearing was the first evidentiary hearing of an adversary nature, we hold that the Superintendent has the burden of proof and should have been required to put on

his case first; . . . It is only fair since the Superintendent filed the charges that he be required to prove them before ordering plaintiff's discharge."

The court then concluded that the procedure dictated by the rule "failed to afford plaintiff due process."

In the instant case, it is clear that the department undertook the burden of proof by going forward with the evidence. The problem arises here in the commission's own concept of its function and its refusal to "substitute" its "judgment" for that of the appointing authority. The commission was the finder of fact and the arbiter of disciplinary measures to be imposed, if any. It could not abdicate that responsibility. By requiring appellant to come forward with compelling evidence of her innocence of the charges, it unfairly shifted the burden of proof, thus failing to afford appellant due process. *Heidebur, supra*.

In the instant case, the Administrative Law Court would go far beyond shifting the burden of proof at the post-termination hearing. That Court would require Mr. Vedad to show error under an appellate standard of review in order to avoid the Agency's pre-termination decision. No authority supports this position, and it is inconsistent with the very notion of the "full evidentiary hearing" required by *Loudermill*. Under the Administrative Law Court's scenario, the State Employee Grievance Committee wouldn't weigh the evidence and find the facts material to the Agency's decision to terminate Mr. Vedad. Rather, the Committee would determine whether the Agency's decision was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." The "Agency decision" --- reached without the full evidentiary hearing required by *Loudermill* --- would be deemed presumptively dispositive. Consequently, the ruling is constitutionally infirm.

The Agency has violated Appellant's Constitutional entitlement to the protection of due process of law. The Decision of the State Employee Grievance Committee should be reversed.

From Appellant's Reply Brief:

III. Appellate Review by the State Employee Grievance Committee Is Not Equivalent to the Post-Termination Hearing Required by Due Process. As Appellant has

explained, the "full evidentiary" post-termination hearing required by *Loudermill* includes the right of the discharged employee to cross examine witnesses even where the facts giving rise to discharge are undisputed. *Garraghty v. Virginia, Dep't of Corrections*, 52 F.3d 1274, 1282-1283 (4th Cir. 1995). See, also, *Langley v. Adams Co., Colo.*, 987 F.2d 1473, 1480-1481 (10th Cir. 1993) (affirming denial of qualified immunity to officer who terminated plaintiff and officer who affirmed termination because no opportunity for post-termination hearing that included right to confront and examine witnesses). Consequently, there is no question but that the Agency's procedures do not comport with the requirements of *Loudermill*. However, this is not to say that Appellant Vedad does not dispute the facts which are claimed to have justified the termination of his employment. As noted above, he provided testimony at every opportunity in which he denied violating the Agency policies upon which his termination was based.

In its brief, the Respondent attempts to argue that an employee's due process rights in defense of a property interest created by statute are limited to whatever limited procedural protections may be granted by the statutory scheme creating the property interest. Thus, Respondent argues, if the statutory scheme shifts the burden of proof to the employee and requires the employee to meet an appellate standard of review, this is within the prerogative of the State. This argument ignores the Constitutional underpinnings of the Due Process Clause, and it was expressly rejected by *Cleveland Bd. of Education v. Loudermill*, 740 U.S. 532, 541, 84 L. E.2d 494, 105 S. Ct. 1487 (1985):

In *Vitek v. Jones*, 445 U.S. 480, 491 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982), where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement.

In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Arnett v. Kennedy*, *supra*, at 167 (POWELL, J., concurring in part and concurring in result in part); *see id.*, at 185 (WHITE, J., concurring in part and dissenting in part).

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The answer to that question is not to be found in the Ohio statute.

It is in this context that *Garraghty*, *Langley*, and *Cole v. Litz*, 562 S.W.2d 795 (Mo. App. 1978), were decided. *Garraghty* holds that a public employee has a constitutional right to confront and examine witnesses at a post-termination hearing. 52 F.3d at 1283. *Garraghty* holds that this right is so firmly established as to deny the defendants' claim of qualified immunity. *Id.* It is in this context that the Mr. Vedad's appeal should be decided.

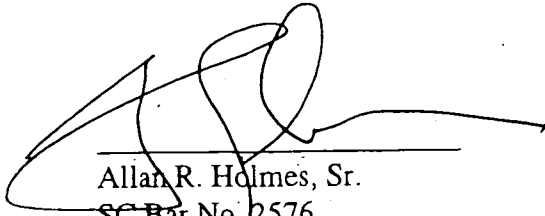
Substantial Evidence

The March 5, 2014, Order of this Court finds that there was evidence sufficient to allow reasonable minds to reach the conclusion the Agency reached. Appellant testified that he did not violate any policies of the Agency. As noted above, the Appellant's appeal is based upon the failure to be afforded due process of law in violation of the Constitution. "Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1001, 25 L.Ed.2d 287 (1970). Procedural due process often requires confrontation and cross-examination of one whose

word deprives a person of his or her livelihood. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963)." *Brown v. South Carolina State Board of Education*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990). It is respectfully submitted that the Court failed to consider these authorities.

All of which is respectfully submitted.

March 19, 2014



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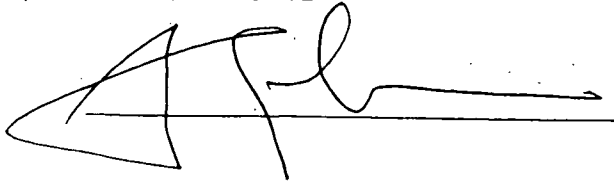
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I this day served the Record on Appeal in the matter of Mohammed Vedad, Appellant, v. South Carolina Department of Transportation, Respondent, S.C. Court of Appeals, No. 2012-212952, by sending a copy, FEDERAL EXPRESS OVERNIGHT, to the following:

Natalie J. Moore, Esq.
Office of General Counsel
955 Park Street, Suite 343
Columbia, South Carolina 29201

DONE this 19th day of March, 2014.

A handwritten signature in black ink, appearing to be 'N. Moore', written over a horizontal line.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Moshtaba Vedad, Appellant,

v.

South Carolina Department of Transportation,
Respondent.

Appellate Case No. 2012-212952

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Unpublished Opinion No. 2014-UP-087
Heard January 9, 2014 – Filed March 5, 2014

AFFIRMED

Allan R. Holmes of Gibbs & Holmes, of Charleston, for
Appellant.

Natalie Jean Moore, of Columbia, for Respondent.

PER CURIAM: In an appeal from the Administrative Law Court (ALC), Appellant Moshtaba Vedad (Vedad) seeks review of the ALC's order affirming the decision of the State Employee Grievance Committee to uphold Vedad's termination from his employment with Respondent South Carolina Department of

Transportation (SCDOT). Veadad contends that the ALC erred in finding that the procedures employed in his termination provided adequate due process. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the ALC erred in concluding the South Carolina State Employee Grievance Procedure Act does not create a property interest in continued state employment: S.C. Code Ann. §§ 8-17-320 to -340 (Supp. 2013) (providing a "covered [state] employee" with grievance rights and a procedure to appeal to the State Employee Grievance Committee for review of an agency's final decision regarding an adverse action against the employee; but not indicating a state employee has a "property interest" in continued employment); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (finding "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 . . .*" (emphasis added)) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).
2. As to whether the ALC erred in finding Veadad's post-termination hearing before the State Employee Grievance Committee afforded Veadad adequate due process in his termination proceedings: *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest."); *id.* at 172, 656 S.E.2d at 350 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *see Olson v. S.C. Dep't of Health & Env'tl. Control*, 379 S.C. 57, 69, 663 S.E.2d 497, 504 (Ct. App. 2008) (finding no violation of due process when post-termination hearing afforded notice and an opportunity to be heard at a meaningful time and in a meaningful manner).
3. As to whether the ALC's decision to affirm Veadad's termination was supported by substantial evidence: S.C. Code Ann. § 1-23-610(B)(e) (Supp. 2013) (providing, in pertinent part, that the court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact, but may reverse or modify the decision if the decision is clearly erroneous in view of the substantial evidence on the whole record); *Greeneagle, Inc. v. S.C. Dep't of Health & Env'tl. Control*, 399 S.C. 91, 95, 730 S.E.2d 869, 871 (Ct. App. 2012) ("Substantial

evidence' sufficient to support a finding of the ALC is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." (internal citation and quotation marks omitted)); *id.* ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (quoting *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011)). Based upon our review of the record, the ALC's order affirming the decision to terminate Vedad is supported by substantial evidence. Specifically, the ALC's decision is supported by the GPS reports indicating many of Vedad's trips appeared to be of a personal nature, a photograph of Vedad's assigned SCDOT vehicle parked near his home on a stop that was not logged-in on his mileage report, and other evidence indicating discrepancies in his time and mileage logs.

AFFIRMED.

HUFF, GEATHERS, and LOCKEMY, JJ., concur.

EXHIBIT D

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

2012-212952

Moshtaba Vedad

Appellant,

v.

South Carolina Department of Transportation,

Respondent.

BRIEF OF APPELLANT

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Statements of the Issues on Appeal.

I. Did the South Carolina Employee Grievance Act Provide the Appellant with a Property Interest in Continued Employment?

II. Did the Agency Terminate the Appellant's Employment in Violation of Due Process of Law by Failing to Provide Him with a Constitutionally Adequate Post-termination Hearing?

Statement of the Case

Moshtaba Vedad, a civil engineer with a Bachelor of Science from The Citadel, was employed by the Department of Transportation for more than 27 years. Final Decision of State Employee Grievance Committee. R. p. 9. His employment was suspended and terminated. He was terminated effective June 2, 2010. *Id.* The basis for both his suspension and termination is the Agency's contention that he misused the Agency vehicle assigned to him and kept improper records of his vehicle use. *Id.* R. pp. 12, 15. Appellant denied engaging in misconduct. *Id.* R. pp. 12, 14. He timely invoked all his appellate rights, and after an appellate hearing on March 1, 2011, The State Employee Grievance Committee issued its March 21, 2011, decision affirming both his suspension and termination. A copy of this decision is made a part of the Record on Appeal. R. pp. 9-15. A timely appeal was taken to the Administrative Law Court, and that Court affirmed the decision of the Employee Grievance Committee by Order of August 13, 2012. A copy of this Order is made a part of the Record on Appeal. R. pp. 2-8. Notice of Appeal to this Court was filed and served on September 6, 2012. R. pp. 16-17. Appellant contends that his termination violated due process of law because it is 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 arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion. This contention is based upon the procedure followed by the Department in Transportation in effecting the Appellant's termination. The record is uncontroverted that the Appellant was suspended and terminated after a summary meeting with representatives of the Agency who accused him of misconduct. See, R. pp. 19-24. This was the type of pre-termination hearing anticipated by *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542-43, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). However, Mr. Vedad contends that lawful use of a summary pre-termination procedure requires the opportunity for a post-termination hearing with a full panoply of due process protections. *Loudermill* at 546-47; see, also, *Sutton v. Cleveland Bd. of Education*, 958 F.2d 1339, 1349-50 (6th Cir. 1992). "The severity of depriving a person of the means of livelihood requires that such 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." *Sutton*, 958 F.2d at 1549-50. Mr. Vedad's post-termination hearing gave him no such opportunity. No witnesses appeared. No testimony was taken. No opportunity for cross examination was provided. No oath was administered. See, R p. 25, line 24 – p. 30, line 2; p. 48, line 12 to p. 51, line 5; p. 52, line 14 – p. 53, line 20.

When this proceeding was described to counsel for the State Employee Grievance Committee, he guessed it to be a "mediation." R p. 49, lines 12 – 16:

MR. GANJEHSANI: Wait a minute. Stop. Are we talking about a mediation?

MS. MOORE: No. We have a bifurcated proceeding like I think most state agencies –

MR. GANJEHSANI: Okay.

MS. MOORE: --where it's a non-confrontational . . .

The Appellant raised the issue of the unconstitutionality of the Agency procedure but the State Employee Grievance Committee failed to cogently address it. The Committee's Decision evidences its misunderstanding of the relevant law. March 21, 2011, Final Decision, R. p. 15:

Appellant claimed his due process rights were violated by being deprived of an evidentiary hearing or similar opportunity to cross-examine the SCDOT employees who participated in the decision to discipline him until after he appealed his suspension/termination to the Committee. However, it is well settled that "a full evidentiary hearing is not required prior to termination" of a public employee. *Ross v. Medical University of South Carolina*, 328 S.C. 51, 66, 492 S.E. 2d 62, 70 (1997). Accordingly, the Committee finds Appellant's argument on this issue unavailing.

The August 13, 2012, Order of the Honorable Shirley C. Robinson, Administrative Law Judge, affirms the decision of the State Employee Grievance Committee. Relying upon *Newton v. S.C. Dept. of Public Safety*, No. 6:10-01781, 2011 U.S. Dist. LEXIS 107828, *9 n.1, 2011 WL 4435761 (D.S.C. Sept. 23, 2011), Her Honor found that the South Carolina statutory procedure for appeals of state employee disciplinary actions does not establish a property right for state employees. Order of Administrative Law Court, R. pp. 5-6. Her Honor went on to hold that even if Mr. Vedad had a property interest in his continued employment, the appellate hearing before the State Employee Grievance Committee provided him with adequate due process. *Id.* R. pp. 6-7.

Argument

I. **The State Employee Grievance Act creates a property interest on the part of covered South Carolina public employees, including Mr. Vedad.** The case of *Detweiller v. Virginia Dept. of Rehabilitative Services*, 705 F.2d 557 (4th Cir. 1983) (considering Virginia public employee grievance law) is on all fours with the case of Mr. Vedad. *Detweiller* explicates the particular aspects of a state employee grievance procedure which give rise to a property interest in an employee's continued employment. 705 F.2d at 560:

The statute's distinction between probationary employees and nonprobationary employees, its distinction between disciplinary discharges and discharges for reduction in work force, the Standards' specifications of the breaches of discipline for which an employee may be discharged, and the authority conferred on an impartial panel to reverse the agency's decision and to order reinstatement with back pay establish that a nonprobationary employee has a property interest in continued employment that is created by the state.

There is no material difference between the Virginia statutory scheme and that which exists in South Carolina. In South Carolina, a "Covered Employee" must have completed the "probationary period" of employment. Section 8-17-320(7) S.C. Code of Laws (1976), as amended. In the case of Mr. Vedad, specific standards have been promulgated by the Agency specifying the breaches of discipline for which he might be subjected to disciplinary discharge. These are identified within the S.C. Department of Transportation's "Disciplinary Action Policy." State Employee Grievance Committee's Exhibit One, R. pp. 55-62. These standards were applied to him. R. pp. 19-27 and Final Decision of State Employee Grievance Committee, R. pp. 12, 15. The State Employee Grievance Committee is an impartial panel with authority to reverse the Agency's decision and to order reinstatement with back pay. Section 8-17-340(E) S.C. Code of

Laws (1976), as amended. A failure of the Agency to comply with "its established personnel policies, procedures, and regulations" is a basis for reversing its decision. Section 8-17-340(E)(1)(b). There are differences between the standards applied to disciplinary discharges and discharges for reduction in work force. See, Section 8-17-330 S.C. Code of Laws (1976), as amended. "A reduction in force is an adverse employment action considered as a grievance only if the agency, or as an appeal if the State Human Resources Director, determines that there is a material issue of fact that the agency inconsistently or improperly applied its reduction in force policy or plan." The Administrative Law Court is specifically charged with review of the final decision of the Committee. The disciplinary standards are a product of Section 8-11-230(6) S.C. Code of Laws (1976), as amended, which requires the Budget and Control Board and the State Personnel Division to "[a]fter coordination with agencies served, develop policies and programs concerning leave with or without pay, hours of work, fringe benefits (except State retirement benefits), employee/management relations, performance appraisals, grievance procedures, employee awards, dual employment, **disciplinary action, separations, reductions in force, and other conditions of employment as may be needed.**" (emphasis added). The statutory and regulatory scheme underlying Mr. Vedad's appeal is indistinguishable from that recognized as creating a property right in *Detweiller*.

Moreover, the standards for review of employee terminations by the State Employee Grievance Committee are only consistent with the existence of a property interest. If Mr. Vedad's employment is "at will," his termination could never be "arbitrary or capricious or characterized by an unwarranted exercise of discretion." 18-17-340(E)(2)(f). "At will" employment may be terminated with or without cause or

reason, and with or without notice. Such a termination may be “arbitrary” and “irrational.” *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 223-224, 337 S.E.2d 213, 215 (1985). By definition, such a termination could not be unlawfully “arbitrary” or “capricious” or be characterized by an “unwarranted exercise of discretion.” Similarly, 18-17-340(E)(2)(e) allows reversal of the Committee’s decision on a showing that it is “clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” In the context of disciplinary terminations, these grounds for appeal can only mean that the Agency has to make some showing of good cause. This is all that is required to create a property interest.

Our 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. *Connor v. City of Forest Acres*, 348 S.C. 454, 560 S.E. 2d 606 (2002). In *Connor*, the employee claimed to rely upon disciplinary procedures in the employer’s handbook. Despite an “at will” disclaimer, the Supreme Court found that whether a contract existed requiring cause for termination had to be submitted to the jury. 348 S.C. at 462-64, 560 S.E.2d at 610-11.

The footnote from *Newton v. S.C. Dept. of Public Safety*, *supra*, is the only authority cited by the Administrative Law Judge in support of the conclusion that the South Carolina Employee Grievance Act does not create a property interest in continued employment. That footnote is neither persuasive nor binding. In *Newton*, the plaintiff entered into a contract involving his resignation. He conceded his at-will status, 2011 U.S. Dist. LEXIS 107828 at *8. Consequently, any further discussion of this issue within *Newton* is *dicta*. However, in the cited footnote, *Newton* notes that the plaintiff might

have filed a grievance under the State Employee Grievance Act, but then cites *Bunting v. City of Columbia*, 639 F.2d 1090 (4th Cir. 1981), for the proposition that "such grievance rights do not establish a property interest in employment." *Id.* at *9, n.1.

Newton misreads *Bunting*. Mr. Bunting was a City of Columbia police officer who served at the pleasure of the City. Consequently, he had no property interest in continued employment which required due process protection. *Bunting v. City of Columbia*, 639 F.2d 1090, 1094 (4th Cir. 1981).

For the foregoing reasons, the Administrative Law Court erred in holding that the South Carolina State Employee Grievance Act does not create a property interest in continued employment.

II. The Administrative Law Court misapprehended the requirements of due process. Confrontation of witnesses and testimony under oath are required elements of post-termination hearings. The Constitution of the United States allows a public employer to terminate a public employee from his or her employment with less than a full-blown due process hearing provided minimal requirements of due process precede the termination. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542-43, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). However, in such a case, summary suspension or termination must be followed by a post-termination or suspension hearing which comports with due process. The constitutionality of a bare-bones pre-termination hearing is dependent on the existence of a full-blown post-termination hearing. *Loudermill* at 546-47; see, also, *Sutton v. Cleveland Bd. of Education*, 958 F.2d 1339, 1349-50 (6th Cir. 1992). "The severity of depriving a person of the means of livelihood requires that such 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." *Sutton*, 958 F.2d at 1549-50.

In the case of Mr. Vedad, there was no full, post-termination hearing. Rather, there was a "conference." No evidence was presented on behalf of the Agency, no testimony was taken, no investigation was conducted, and no facts were found. No witnesses were sworn. Indeed, no witnesses appeared in the presence of Mr. Vedad. Needless to say, there was no opportunity for cross-examination or any record of a proceeding upon which a trier of fact might make findings of credibility and fact. Rather, the person designated as the Department's Representative at the conference simply followed the conference with a letter stating that "the Department acted within its policies and procedures for your client's termination." There was no explanation from the person designated to have the conference as to what, if anything, was to be addressed.

The subsequent hearing before the State Employee Grievance Committee was not an adequate post-*Loudermill* proceeding. The Employee Grievance Committee procedure is constrained by statute to review findings of fact under the equivalent of an "appellate" standard. In other words, the statutory scheme presupposes the correctness of the Agency's findings. This may not be permitted unless those findings meet both the pre- and post-termination due process requirements of *Loudermill*. *Sutton v. Cleveland Bd. of Education, supra*.

However, the Employee Grievance Committee could have provided relief to Mr. Vedad by reversing the decision of the Agency on account of: its violation of constitutional and statutory provisions; its actions in excess of the statutory authority of the agency; its findings made upon unlawful procedure; its failures to comply with the

law; and on account of its arbitrariness and capriciousness. All of these stemmed from the Agency's failure to follow procedure and to provide Mr. Vedad with due process of law. All of these deficiencies were explicitly raised before the Employee Grievance Committee. See, for example, January 4, 2011, letter to State Employee Grievance Committee through Office of Human Resources from Allan R. Holmes.

The Committee's citation to *Ross v. Medical University of South Carolina*, 328 S.C. 51, 66, 492 S.E. 2d 62, 70 (1997), is ironic. Reading one page further in the *Ross* opinion one finds unequivocal support for Appellant Vedad's position --- a summary pre-termination hearing requires a post-termination hearing that affords the employee with "full and meaningful participation." *Ross v. Medical University of South Carolina*, 328 S.C. 51, 67, 492 S.E. 2d 62, 71 (1997):

Nonetheless, although the pretermination procedures afforded Dr. Ross did not comply with minimum due process requirements, the error was remedied by the subsequent Committee hearing. Dr. Ross received notice of a post-termination hearing, a written list of specific charges against him, and references to the sections in the faculty handbook and South Carolina Code his conduct was alleged to have violated. The hearing as originally scheduled was postponed at Dr. Ross' request. Thereafter, while represented by counsel, Dr. Ross fully participated in the seven-day hearing. He presented his own witnesses and evidence and cross-examined MUSC's witnesses. Any lack of opportunity to respond to charges in a pretermination hearing was clearly remedied by Dr. Ross' full and meaningful participation in the post-termination hearing. *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980)(any error in pretermination hearing cured by subsequent hearing); *Agarwal v. Regents of University of Minnesota*, 788 F.2d 504 (8th Cir. 1986)(even if employee did not receive all procedural safeguards during initial proceeding, his right to due process was not violated due to later hearing); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994)(state may cure procedural deprivation of due process rights by providing later procedural remedy); *Jones v. Chatham County*, 223 Ga. App. 455, 477 S.E.2d 889 (1996)(available post-termination procedures cured employer's failure to have pretermination hearing).

Dr. Ross's rights of cross-examination and confrontation must be contrasted with the complete absence of any similar rights in the "bifurcated", "non-confrontational", dual venue "conference" provided Appellant Vedad.

The "full evidentiary" post-termination hearing required by *Loudermill* includes the right of the discharged employee to cross examine witnesses even where the facts giving rise to discharge are undisputed. *Garraghty v. Virginia, Dep't of Corrections*, 52 F.3d 1274, 1282-1283 (4th Cir. 1995). See, also, *Langley v. Adams Co., Colo.*, 987 F.2d 1473, 1480-1481 (10th Cir. 1993) (affirming denial of qualified immunity to officer who terminated plaintiff and officer who affirmed termination because no opportunity for post-termination hearing that included right to confront and examine witnesses). Consequently, there is no question but that the Agency's procedures do not comport with the requirements of *Loudermill*.

Essentially, the Administrative Law Court has ruled that the South Carolina legislature's provision of the State Employee Grievance Committee hearing satisfies the need for a full fledged post termination hearing. This ruling is incorrect. Insofar as the Administrative Law Court contends that the Agency procedure prior to the State Employee Grievance Committee was constitutionally adequate, the ruling is incorrect as shown by *Garraghty*. Also, insofar as the Administrative Law Court holds the "fact finding" standard utilized by the State Employee Grievance Committee is adequate --- an appellate standard --- that holding is erroneous. Even burden shifting has been found to violate due process in this context. A Missouri case addresses this very issue. *Cole v. Litz*, 562 S.W.2d 795 (Mo. App. 1978). In *Cole*, the public employee was dismissed by his agency and sought a hearing before the Civil Service Commission. The Commission

in *Cole* merely shifted the burden of proof, but the *Cole* opinion nonetheless found this to violate Due Process. 562 S.W.2d at 797-798:

Under the heading "Conclusions of Law and Decision", the commission noted that, according to its own rule, its policy is to support appointing authorities in requiring efficient service from merit system employees. The commission then stated:

"It is tempting for the Commission in a case of this character to substitute our judgment for that of the responsible party.

"Although we are sympathetic with Appellant we are compelled to conclude that the judgment of the Department must be upheld. To hold otherwise would be to substitute the judgment of the Commission for that of the appointing authority and we do not feel that we should do that in the absence of some compelling evidence that the judgment of the appointing authority was unsound or improperly motivated. There is no such evidence here."

Thus, by the terms of the commission's decision, Mrs. Cole could not have prevailed unless there appeared "compelling evidence that the judgment of the appointing authority was unsound or improperly motivated . . ." even though the commission found the independent exercise of judgment "tempting". The appointing authority was entitled to no such position of evidentiary advantage; evidence presented by the department did not, simply by virtue of its source, deserve more credit than that presented by the appellant.

A similar situation appeared in *Heidebur v. Parker*, 505 S.W.2d 440 (Mo. App. 1974) in which a police officer demanded a hearing before the board of police commissioners after the superintendent of police ordered his dismissal. Under a board rule, a dismissed officer was required to open and close the hearing. The officer argued that the rule unfairly shifted the burden of proof; and this court, speaking through Judge McMillian, agreed. The following appears at page 444:

"In the instant case the evidence is undisputed that plaintiff was discharged by the Superintendent based not upon a hearing, but only upon an Inspector's Report. His first evidentiary hearing, although styled an appeal, was before the Board. It was at this hearing that pursuant to the Board's procedure that defendant was required to put on his proof that he had not violated any of the department regulations contained in the Code of Discipline and Ethics. In other words, defendant had the burden of proving that his discharge was improper. Here what is styled by the Board

as an appeal, is, in fact, even from a cursory reading of the transcript a de novo hearing of the entire controversy. Thus, since the Board hearing was the first evidentiary hearing of an adversary nature, we hold that the Superintendent has the burden of proof and should have been required to put on his case first; . . . It is only fair since the Superintendent filed the charges that he be required to prove them before ordering plaintiff's discharge."

The court then concluded that the procedure dictated by the rule "failed to afford plaintiff due process."

In the instant case, it is clear that the department undertook the burden of proof by going forward with the evidence. The problem arises here in the commission's own concept of its function and its refusal to "substitute" its "judgment" for that of the appointing authority. The commission was the finder of fact and the arbiter of disciplinary measures to be imposed, if any. It could not abdicate that responsibility. By requiring appellant to come forward with compelling evidence of her innocence of the charges, it unfairly shifted the burden of proof, thus failing to afford appellant due process. *Heidebur, supra*.

In the instant case, the Administrative Law Court would go far beyond shifting the burden of proof at the post-termination hearing. That Court would require Mr. Vedad to show error under an appellate standard of review in order to avoid the Agency's pre-termination decision. No authority supports this position, and it is inconsistent with the very notion of the "full evidentiary hearing" required by *Loudermill*. Under the Administrative Law Court's scenario, the State Employee Grievance Committee wouldn't weigh the evidence and find the facts material to the Agency's decision to terminate Mr. Vedad. Rather, the Committee would determine whether the Agency's decision was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." The "Agency decision" --- reached without the full evidentiary hearing required by *Loudermill* --- would be deemed presumptively dispositive. Consequently, the ruling is constitutionally infirm.

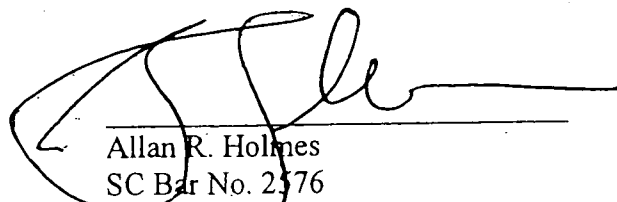
The Agency has violated Appellant's Constitutional entitlement to the protection of due process of law. The Decision of the State Employee Grievance Committee should be reversed.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Decision of the State Employee Grievance Committee should be reversed and the Appellant reinstated in his position of employment with back pay.

All of which is respectfully submitted.

GIBBS & HOLMES

A handwritten signature in black ink, appearing to read 'Allan R. Holmes', is written over a horizontal line.

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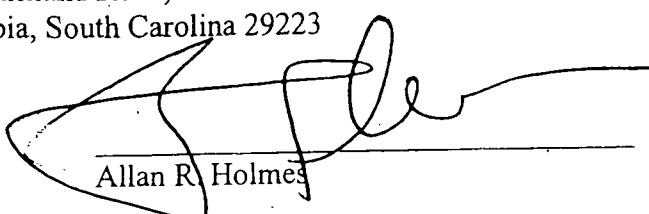
CERTIFICATE OF SERVICE

I hereby certify that I this day served the foregoing Final Brief by sending a copy, first class mail, to the following:

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DONE this 24th day of April, 2013.



Allan R. Holmes

EXHIBIT E

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. 2014-212952

Moshtaba Vedad

Appellant

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.

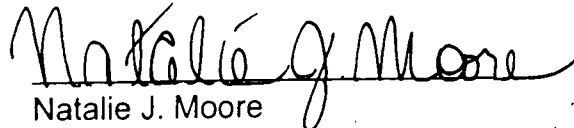
Appellant has failed to demonstrate any of the above elements or a substantial prejudice to his rights. Further, even if he had, it is important to note he is urging a remedy to which he is not entitled upon this Court. This taken with his untenable position, that is, an entitlement to present and cross-examine 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

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

2012-212952

Moshtaba Vedad

Appellant,

v.

South Carolina Department of Transportation,

Respondent.

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ARGUMENT

I. The Authorities Cited by the Agency are Inapposite. Respondent continues to argue that South Carolina employees, unlike employees of the State of Virginia, have no property interest in continued employment. This argument relies upon *Bunting v. City of Columbia*, 639 F.2d 1090 (4th Cir. 1090 (1981), *Beckham v. Brown*, 756 F.2d 1032 (4th Cir. 1985), *Bradley v. S. C. Dept. of Corrections*, No. 3:08-2510, 2010 U.S. Dist. LEXIS 19903 (D.S.C. Mar. 5, 2010); *Newton v. S.C. Dept. of Public Safety*, No. 6:10-01781, 2011 U.S. Dist. LEXIS 107828 (D.S.C. Sept. 23, 2011); *Reed v. S.C. State Univ.*, No. 5:08-3022, 2010 U.S. Dist. LEXIS 98820 (D.S.C. Sept. 20, 2010).

First, and most importantly, neither *Bunting* nor *Beckham* involves a State employee or the South Carolina State Employee Grievance Act. Mr. Beckham was a police officer who served "at the pleasure of" the Horry County Police Commission. This signifier of the "at will" nature of his employment was specifically set out in the Act creating the Commission, and in the personnel manual that Beckham claimed created a contract. *Beckham*, 756 F.2d at 1036-1037. In addition, *Beckham* failed to request a hearing in accordance with the terms of the personnel manual. *Id.* The *Beckham* opinion relies upon the holding in *Bunting*, and on another case in which the employment relationship was explicitly "at will." *Beckham*, 756 F.2d at 1037 n. 9, citing *Rhodes v. Smith*, 273 S.C. 13, 15, 254 S.E.2d 49, 50 (1979).

Mr. Bunting was a City of Columbia police officer who served at the pleasure of the City. Consequently, he had no property interest in continued employment which required due process protection. *Bunting v. City of Columbia*, 639 F.2d 1090, 1094 (4th Cir. 1981).

In *Bradley*, the District Court simply adopted the Magistrate's Report finding that the *pro se* plaintiff was an at-will employee. 2010 U.S. Dist. LEXIS 19903 at *16. The Report of the Magistrate states only the following with regard to the issue: "Bradley has not shown that he had a protected property interest in his employment with SCDC because he fails to show that his employment was not at-will. He argues that he was not an at-will employee because he believed that he could only be terminated for cause. Bradley has submitted nothing to support his assertion other than his own unsigned, unnotarized statement in which he states that he thought he was not an at-will employee. . . . Further, he has not presented anything to show that defendants contractually altered the at-will relationship." *Bradley v. S.C. Dept. of Corrections*, No. 3:08-2510, slip op. at 19-20 (D.S.C. Jan. 15, 2010). *Bradley* does not place the S.C. State Employee Grievance Act at issue.

In *Newton*, the plaintiff entered into a contract involving his resignation. He conceded his at-will status, 2011 U.S. Dist. LEXIS 107828 at *8. In a footnote, the *Newton* opinion notes that the plaintiff might have filed a grievance under the State Employee Grievance Act but, relying upon *Bunting v. City of Columbia*, *supra*, states that "such grievance rights do not establish a property interest in employment." *Id.* at *9, n.1. However, as shown above, *Bunting* does not support such a holding.

Reed involves the denial of a promotion, and the Court found that the plaintiff was unable to show that the job at issue even existed. 2010 U.S. Dist. LEXIS 98820 at *19-20. *Reed* also notes that assuming there was such a job, and that the plaintiff had a property interest in it, that interest was waived by the plaintiff's failure to pursue the defendant's internal grievance procedure. *Id.* at *21.

In summary, four of the five cases cited by the Respondent do not address the question of whether the S.C. State Employee Grievance Act creates a property interest in employment. In the fifth case, the plaintiff did not even argue against at-will status, and in support of the Court's assumption that such an argument would have been futile, the Court footnotes one of the four other cases cited by the Respondent – a case that does not address the question of whether the S.C. State Employee Grievance Act creates a property interest in employment.

Appellant Vedad's case squarely raises the question of whether the South Carolina State Employee Grievance Act creates a property interest on the part of covered South Carolina public employees. As shown by Appellant's initial brief, the South Carolina State Employee grievance Act contains all of the elements noted in *Detweiller v. Virginia Dept. of Rehabilitative Services*, 705 F.2d 557, 560 (4th Cir. 1983) (considering Virginia public employee grievance law), and this is sufficient to show a property interest in continued employment.

Respondent misapprehends the Appellant's reliance on *Connor v. City of Forest Acres*, 438 S.C. 454, 560 S.E. 2d 606 (2002). In *Connor*, the employee claimed to rely upon disciplinary procedures in the employer's handbook. Despite an "at will" disclaimer, this Court found that whether a contract existed requiring cause for termination had to be submitted to the jury. 438 S.C. at 462-64, 560 S.E.2d at 610-11. The point of the *Connor* case is that, in it, this Court recognizes that a South Carolina public employee may legitimately claim a property interest in continued employment when that employment is not "at will." This distinguishes *Connor* and the case of Mr. Vedad from every case cited by the Respondent.

Importantly, the State Employee Grievance Committee decision does not reject the appellant's claim that he was entitled to due process of law. Rather, it denies that the due process provided him was insufficient. The only inference to be drawn from the review by the Committee of the disciplinary standards and the evidence of record is that the Committee did not believe Mr. Vedad to be an at will employee.

II. Appellant Expressly Contended that His Termination Was without any Factual Basis. Indeed, the State Employee Grievance Committee explicitly noted that Mr. Vedad:

[S]tates that he did not violate any SCDOT policies. . . . Appellant contends that there is no evidence indicating that he improperly completed the mileage log and time sheets. In addition, Appellant stated that he properly completed the mileage log and time sheets. Further, he states that the charges of "Destruction, Alteration or Falsification of Records" and "Unauthorized Use of State Equipment or Property for Personal Gain" are inaccurate and unfounded. . . .

March 21, 2011, Final Decision, R. p.12. See, also, R.pp. 30-47 (testimony of Appellant).

Contrary to the contention of the Respondent, Appellant does contend that the factual basis for his termination was erroneous. Consequently, this appeal goes to the merits of the Agency decision.

III. Appellate Review by the State Employee Grievance Committee Is Not Equivalent to the Post-Termination Hearing Required by Due Process. As Appellant has explained, the "full evidentiary" post-termination hearing required by *Loudermill* includes the right of the discharged employee to cross examine witnesses even where the facts giving rise to discharge are undisputed. *Garraghty v. Virginia, Dep't of Corrections*, 52 F.3d 1274, 1282-1283 (4th Cir. 1995). See, also, *Langley v.*

Adams Co., Colo., 987 F.2d 1473, 1480-1481 (10th Cir. 1993) (affirming denial of qualified immunity to officer who terminated plaintiff and officer who affirmed termination because no opportunity for post-termination hearing that included right to confront and examine witnesses). Consequently, there is no question but that the Agency's procedures do not comport with the requirements of *Loudermill*. However, this is not to say that Appellant Vedad does not dispute the facts which are claimed to have justified the termination of his employment. As noted above, he provided testimony at every opportunity in which he denied violating the Agency policies upon which his termination was based.

In its brief, the Respondent attempts to argue that an employee's due process rights in defense of a property interest created by statute are limited to whatever limited procedural protections may be granted by the statutory scheme creating the property interest. Thus, Respondent argues, if the statutory scheme shifts the burden of proof to the employee and requires the employee to meet an appellate standard of review, this is within the prerogative of the State. This argument ignores the Constitutional underpinnings of the Due Process Clause, and it was expressly rejected by *Cleveland Bd. of Education v. Loudermill*, 740 U.S. 532, 541, 84 L. E.2d 494, 105 S. Ct. 1487 (1985):

In *Vitek v. Jones*, 445 U.S. 480, 491 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982), where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement.

X

In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Arnett v. Kennedy*, *supra*, at 167 (POWELL, J., concurring in part and concurring in result in part); *see id.*, at 185 (WHITE, J., concurring in part and dissenting in part).

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The answer to that question is not to be found in the Ohio statute.

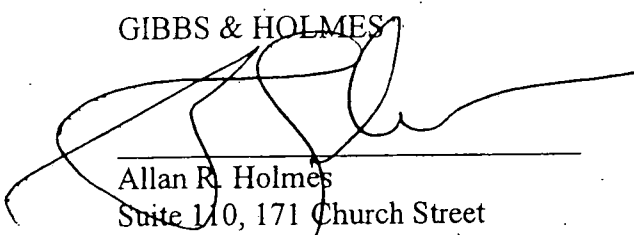
It is in this context that *Garraghty*, *Langley*, and *Cole v. Litz*, 562 S.W.2d 795 (Mo. App. 1978), were decided. *Garraghty* holds that a public employee has a constitutional right to confront and examine witnesses at a post-termination hearing. 52 F.3d at 1283. *Garraghty* holds that this right is so firmly established as to deny the defendants' claim of qualified immunity. *Id.* It is in this context that the Mr. Vedad's appeal should be decided.

IV. A Simple Remand Would Be Inappropriate. Because of the Agency's violation of his due process rights, Mr. Vedad was terminated from his employment unconstitutionally. The findings of fact in his case were contested, and they are infirm. Also, he has been required to incur attorneys' fees in order to appeal and correct the Agency's misconduct. If the matter is to be remanded, it should be remanded while providing Mr. Vedad appropriate relief. It has been recognized that the termination of a

public employee in violation of the due process requirements of *Loudermill* requires the employee's reinstatement and backpay for the period from the date of the employee's termination until the date of the provision of a constitutionally adequate hearing. *Irizarry v. Cleveland Public Library*, 727 F. Supp. 357, 363-366 (N.D. Ohio 1989). See, also, *Lightfoot v. District of Columbia*, 355 F. Supp. 2d 414, 439-440 (D.D.C. 2005). Mr. Vedad should be awarded back pay and attorneys' fees, and he should be granted reinstatement pending a hearing. Without such a remedy, there is no real incentive for the Agency to render its procedures constitutional.

All of which is respectfully submitted.

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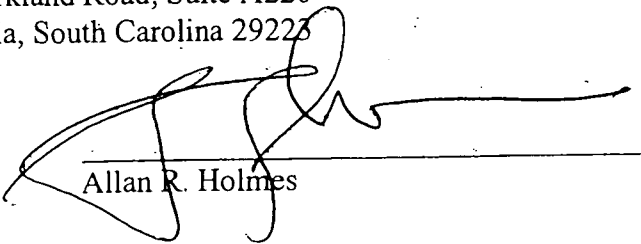
CERTIFICATE OF SERVICE

I hereby certify that I this day served the foregoing reply brief by mailing a copy, postage prepaid to:

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DONE this 24th day of April, 2013.



Allan R. Holmes

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

2012-212952

Moshtaba Vedad

Appellant,

v.

South Carolina Department of Transportation,

Respondent.

RECORD ON APPEAL

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AUG 13 2012

SC ADMIN. LAW COURT

Docket No. 11-ALJ-30-0210-AP

ORDER

South Carolina Department of Transportation,

Respondent.

The above-captioned matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to S.C. Code Ann. § 1-23-600(D) (Supp. 2011) for an administrative appeal. On April 19, 2011, Moshtaba VEDAD (Appellant) filed a notice of appeal regarding a decision by the State Employee Grievance Committee (Committee) upholding the Respondent South Carolina Department of Transportation's (Department) decision to terminate him from his employment. Based upon the record and the parties' briefs, and upon applicable law, Respondent's decision in this matter is affirmed.

Appellant was employed with the Department as an Engineer. Appellant was suspended pending an investigation by the Department, effective May 7, 2010. Upon the conclusion of the investigation, the Department terminated Appellant effective June 2, 2010, for violating the Department's Disciplinary Action Policy. Specifically, Appellant was terminated for "Destruction, Alteration or Falsification of Records" and "Unauthorized Use of State Equipment or Property for Personal Gain." Appellant filed an initial grievance with the Department on June 1, 2010, concerning his suspension. Appellant subsequently filed a grievance with the Department on June 9, 2010, regarding his termination. On August 31, 2010, the Department issued its final agency decision and sustained the decision to terminate Appellant based upon violation of the Department's Disciplinary Action Policy.

Thereafter, Appellant sought review of the Department's final agency decision with the

State Human Resources Director. Pursuant to the provisions of S.C. Code Ann. § 8-17-330, the matter was forwarded to the Committee for a hearing. On March 1, 2011, the Department and Appellant participated in a hearing before the Committee. Based upon the documentation and testimony presented at the hearing, the Committee issued a decision on March 21, 2011, upholding the Department's decision to terminate Appellant. On April 19, 2011, Appellant timely filed his Notice of Appeal with this Court.

ISSUE

Did the grievance procedure employed by the Department and the Committee violate Appellant's right to due process?

STANDARD OF REVIEW

Title 8, Article 5, entitled "State Employee Grievance Procedure" (the "Act"), contains definitional provisions and procedures for covered employees which are intended to assist them in resolving appeals of adverse employment actions. See generally S.C. Code Ann. §§ 8-17-320 and 8-17-370. Covered employees must first seek resolution of the matter through agency grievance procedures, established by each agency, subject to approval by the South Carolina Budget and Control Board, Office of Human Resources. If an employee receives a final adverse decision from an agency, the employee may appeal that decision to the Director by filing a written appeal within ten (10) calendar days from receipt of the adverse decision or within fifty-five (55) calendar days after the employee files the grievance with the agency. S.C. Code Ann. § 8-17-330. The Director forwards all appeals which meet jurisdictional requirements to either the Committee or to mediation/arbitration, depending upon the subject matter of the appeal.

Appeals forwarded by the Director to the Committee are those which relate to the following adverse employment actions: terminations, salary decreases based on performance, demotions, suspension for more than ten days, and reductions in force when the Director determines that there is a material issue of fact regarding inconsistent or improper application of the agency's reduction in force plan or policy. S.C. Code Ann. § 8-17-340 (emphasis added). The Committee chairman presides over any subsequent hearing, during which the employee and the agency are permitted to have a representative, including legal counsel. Within twenty calendar days of the conclusion of the hearing, the Committee must render its decision. Either party may request reconsideration of the Committee's final decision within thirty days of its receipt. S.C. Code Ann. § 8-17-340. Thereafter, an adverse final agency decision may be

appealed to the ALC pursuant to its appellate jurisdiction. S.C. Code Ann. § 1-23-600(D).

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 (Supp. 2011). This statute provides that the ALC "may not substitute its judgment for the judgment of the [Respondent] as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5). However, pursuant to Section 1-23-380(5), this Court:

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.; see also Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) (stating "[s]ubstantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Id. at 135, 276 S.E.2d at 306. Accordingly, "[t]he 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (citing Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm., 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

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 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.")).

DISCUSSION

Appellant does not challenge the merits of the Department's decision regarding the termination of his employment. Rather, Appellant argues that his due process rights were violated because he was not given the opportunity to present and cross-examine witnesses before the Department at "an agency-level proceeding." Based upon this alleged due process violation, Appellant asserts that he should be reinstated to his former position with the Department.

Appellant argues that the Act creates a property interest on the part of covered South Carolina public employees, and thus, Appellant was entitled to a full termination hearing before the Department. Appellant relies upon Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985) and Detweiler v. Virginia Dep't. of Rehabilitative Services, 705 F.2d 557 (4th Cir. 1983) to support his position. 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 in that case 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 services, and who could not be dismissed except for misfeasance, malfeasance or nonfeasance in office. Loudermill further held that where there is such a property right, employees were entitled to both a pre-termination opportunity to respond, coupled with post-termination administrative procedures. The Court stated in Loudermill that "[p]roperty 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. . .'" Clearly, the Court's ruling in Loudermill is specifically based upon the language contained in an Ohio statute. However, there is no South Carolina statute with comparable language to support Appellant's claim of a protected property right to continued employment. Likewise, Detweiler is also an interpretation of employees' rights under the laws of Virginia, and not those of South Carolina.

In South Carolina, the statutory procedure established for appeals of State employee disciplinary actions is proscribed under the Act, and it does not establish a property right for state

employees.¹ Although S.C. Code Ann. § 8-17-330 provides that the Administrative Procedures Act ("APA") applies to proceedings before the Committee, the APA does not apply at other levels of the grievance process, including the employing agency level.² Further it is under the APA that the right exists to present evidence and to conduct cross-examination of witnesses. S.C. Code Ann. §§ 1-23-320(e) and 1-23-330(3).

Nevertheless, even if Appellant had a property right in his continued employment with the Department, he was not denied due process as he was afforded all due process protections at his hearing before the Committee. More specifically, I do not find that the procedures utilized by the Committee and the Department violated Appellant's right to the process due under S.C. Code Ann. § 8-17-380(b). The requirements of procedural due process which apply in a hearing affecting an individual's property or liberty interest generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful manner, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to judicial review. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 636 S.E.2d 598 (2006). See also Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires adequate notice; adequate opportunity for a hearing; the right to introduce evidence; and the right to confront and cross-examine witnesses). "Even if a party is not given the opportunity to confront witnesses, due process is not violated if there has been a meaningful opportunity to be heard." S.C. Dep't of Social Services v. Holden, 319 S.C. 72, 459 S.E.2d 846, 849-50 (1995). Further, while the State Constitution requires that an administrative agency provide notice and an opportunity to be heard, it "does not require notice and an opportunity to be heard at each level of the administrative process." Ross v. Medical University of South Carolina, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997); S.C. Const. art. I, § 22. Due process is flexible and calls for such procedural protections as the particular situation demands. Id.

Having reviewed the record, the Court finds that Appellant was not denied due process.

¹ See e.g., Newton v. S.C. Dep't of Pub. Safety, 2011 WL 4435761, n.1 (D.S.C. 2011). In Newton, the Court stated that "[a]lthough Plaintiff may have been entitled to challenge his termination through the State Employee Grievance Procedure Act, see S.C. Code Ann. § 8-17-310 (2010), such grievance rights do not establish a property interest in employment. See Bunting v. City of Columbia, 639 F.2d 1090, 1093-95 (4th Cir. 1981)."

² The provisions of the State Administrative Procedures Act apply in proceedings before the State Employee Grievance Committee. At other levels the State Administrative Procedures Act does not apply.... (emphasis added).

The evidence in the Record evinces that Appellant was provided with advance notice of the charges made against him and of the hearing, and he was advised of his right to be represented by counsel at the hearing. Appellant retained counsel to represent him in the proceedings and his counsel participated fully in the Committee hearing and advised Appellant during the hearing. Furthermore, Appellant was given the opportunity to present evidence, to cross-examine witnesses, and respond to all issues raised during the hearing. Appellant received the Committee's written order outlining its decision and reasoning; and, he availed himself of the appeals procedure before this Court. In sum, Appellant fully participated at all stages of the hearing process and vigorously advocated his position, and accordingly, Appellant's due process rights were not violated.

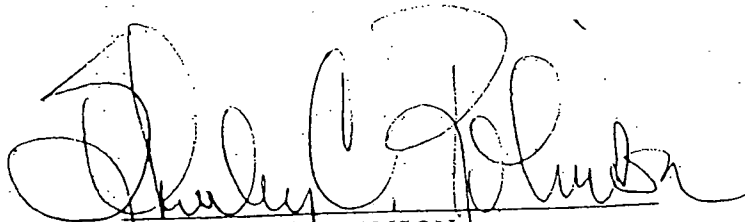
Appellant next argues that the hearing before the Committee was not an adequate post-termination hearing because the "Committee is constrained by statute to review findings of fact under the equivalent of an 'appellate standard'" and that "the statutory scheme presupposes the correctness of the Agency's findings." South Carolina's Constitution, its statutes and case law do not require that the post-termination hearing must be conducted pursuant to a de novo standard of review. Furthermore, the Act specifically provides that the Committee is the "finder of fact" in grievance hearings: "[w]ithin twenty calendar days of the conclusion of the hearing, the committee shall render its decision on the appeal. The decision shall include the committee's findings of fact, statements of policy and conclusions of law." S.C. Code Ann. § 8-17-340(D) (emphasis added). Moreover, the Committee chairman or its agent is "authorized to administer oaths; to issue subpoenas for files, records, and papers; to call additional witnesses; and to subpoena witnesses. S.C. Code Ann. § 8-17-340(C). Accordingly, Appellant's contention is without merit.

ORDER

For all the foregoing reasons, the decision of the Respondent to terminate Appellant's employment is **AFFIRMED**.³

³ In Appellant's reply brief to the Court, Appellant states that he is appealing the Committee's error "in its review of the constitutionality of the Agency procedure." To the extent Appellant challenges the constitutionality of the grievance procedures as applied to his termination, as noted above, the Court determined that Appellant's due process rights were not violated in this matter. However, to the extent Appellant challenges the constitutionality of the Act, an administrative law judge does not have the authority to declare a statute(s) unconstitutional. Vide Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000) ("ALJs are an agency of the executive branch of government and must follow the law as written until its constitutionally is

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

August 13th, 2012
Columbia, South Carolina

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 emergency Mail Service addressed to the party(ies) or their attorney(s).

This 13 day of August 2012
By: Jeckel Henderson
Judicial Law Clerk

State Employee Grievance Committee

Final Decision

APPELLANT'S NAME: Moshtaba Vedad
JOB CLASSIFICATION: Engineer/Associate Engineer II
AGENCY: South Carolina Department of Transportation
DATE OF HEARING: March 1, 2011
NATURE OF CASE: Suspension and Termination

Based on documentary evidence and testimony presented at the hearing of Moshtaba Vedad v. South Carolina Department of Transportation (SCDOT) held in Columbia, South Carolina, on March 1, 2011, the State Employee Grievance Committee (Committee) finds:

FINDINGS OF FACT

1. Mr. Moshtaba Vedad (Appellant) began employment with SCDOT as an Engineering Assistant on May 12, 1983. On July 29, 1984, Appellant became a Civil Engineering Associate I. He was most recently employed as an Engineer/Associate Engineer II in SCDOT's Engineering Division for District Six. (Committee Exhibit #1, p. 10.)
2. This appeal involves both Appellant's suspension and subsequent termination from SCDOT. Appellant was "Suspended Pending Investigation" effective May 7, 2010, in accordance with SCDOT's Disciplinary Action Policy. (Committee Exhibit #1, pp. 25-30.) Upon concluding the investigation, SCDOT terminated Appellant effective June 2, 2010, for violating SCDOT's Disciplinary Action Policy. Specifically, Appellant was terminated for "Destruction, Alteration or Falsification of Records" and "Unauthorized Use of State Equipment or Property for Personal Gain." (Committee Exhibit #1, pp. 33-34.)
3. On February 1, 2007, Appellant's supervisor, Resident Construction Engineer Rickie Green (Mr. Green), District Construction Engineer Timothy Henderson (Mr. Henderson), and District Six Engineer Administrator Robert Clark (Mr. Clark) met with Appellant regarding his having taken an SCDOT vehicle away from the office on the weekend of January 27-28, 2007. During the meeting, Appellant admitted to taking the SCDOT vehicle without authorization and using it for personal use. In addition, Appellant stated he had reported incorrect information concerning mileage on the SCDOT vehicle. (Committee Exhibit #1, p. 46.)
4. In November 2009, Mr. Green, Mr. Henderson, and Mr. Clark met to discuss concerns regarding Appellant's performance. During this meeting, Mr.

Green indicated that he was also concerned about Appellant's use of a SCDOT vehicle to pick up Appellant's child from school. In addition, Mr. Green expressed concern over his inability to contact Appellant when Appellant was supposed to be at assigned job sites. When Mr. Green asked workers and contractors at the assigned job sites about Appellant, they replied that they were not aware that Appellant had been on the job site. (Committee Exhibit #1, p. 85.)

5. According to statements by Mr. Green and Mr. Henderson, Appellant had been counseled several times in the past on such issues as his failure to attend scheduled meetings, personal use of the SCDOT vehicle, and his use of the SCDOT vehicle to go get lunch. Mr. Green stated that Appellant previously admitted to Mr. Clark, in 2007, that he used the SCDOT vehicle on a weekend for personal use without authorization and reported incorrect mileage. Mr. Green stated that he believed Appellant was again using the SCDOT vehicle for personal use. As a result, Mr. Green asked Mr. Henderson about tracking the SCDOT vehicle to monitor Appellant's whereabouts. Mr. Henderson made arrangements with Mr. Clark to have a GPS tracking device (GPS) installed to track the locations of the SCDOT vehicle used by Appellant. (Committee Exhibit #1, pp. 85-89.)
6. Mr. Clark stated that on or about November 16, 2009, he authorized SCDOT Mechanical Engineer Michael Simpson (Mr. Simpson) to install the GPS on the SCDOT vehicle used by Appellant. The software provided by the manufacturer of the GPS generates a written report of vehicle usage which can be reviewed on a computerized map or on a Google Earth screen. The GPS was retrieved from the SCDOT vehicle during the second week of January 2010. Upon reviewing the GPS tracking reports Mr. Clark found that many of Appellant's trips appeared to be of a personal nature and included stops to shopping centers, Wal-Mart, Appellant's residence, and bank trips. Mr. Clark requested that Mr. Green correlate the information obtained from the GPS with Appellant's timesheets and trip logs. (Committee Exhibit #1, pp. 85-92.)
7. Following the removal of the GPS in January 2010, Mr. Green continued to suspect misuse of the SCDOT vehicle by Appellant. On March 29, 2010, Mr. Clark again had the GPS installed on the vehicle used by Appellant to see if a pattern of misuse could be determined. This installation was done because Mr. Green had learned that Appellant's son had been transferred to another school and he suspected that Appellant was using the SCDOT vehicle to pick up his son from school. The GPS was subsequently retrieved and the tracking report indicated that Appellant had made trips in the SCDOT vehicle to shopping centers, his home, and to an area near Ft. Dorchester High School. Trips that were indicated on previous GPS tracking reports to the James Island High School area, where Appellant's son was enrolled at the time, did not appear in this latest report. The findings were reported to the

Human Resources Office at SCDOT headquarters in Columbia, South Carolina. (Committee Exhibit #1, pp.85-89 and 100-189.)

8. On May 5, 2010, a meeting was held in Charleston, South Carolina with Mr. Clark, Mr. Henderson, Mr. Green, District Six Human Resources Manager Margaret Rivers (Ms. Rivers), and SCDOT Employee Relations Manager Glenda Gilliard (Ms. Gilliard) to discuss Appellant's performance evaluation, the results of the GPS tracking report, discrepancies in Appellant's mileage report, his time sheet, and his use of the SCDOT vehicle. Later that day, Ms. Gilliard, Ms. Rivers, and Mr. Clark met with Appellant and presented him with the allegations and certain evidence to substantiate their concerns surrounding the GPS results, his mileage sheets, and his time sheets. Appellant denied using the SCDOT vehicle for personal gain or falsifying mileage sheets or time sheets. He was then asked to provide a written statement denying the allegations, which he did. (Committee Exhibit #1, pp. 30-31.)
9. According to Mr. Clark's statement, Appellant stated at the May 5, 2010 meeting, that he understood the SCDOT policy on vehicle use. Appellant denied using SCDOT vehicles for personal use and taking the SCDOT vehicle to his home. He also denied driving his children in the vehicle or going to their schools. He further acknowledged his understanding of the importance of properly reporting mileage and his awareness of the need to be accurate. Appellant, however, later identified in a photograph his assigned SCDOT vehicle, which he said was parked approximately 50-60 feet from his home on a stop that was not logged-in on his mileage report. Also, Appellant stated that he did not log his mileage on a daily basis, but that he estimated the information at the end of the week or month. (Committee Exhibit #1, pp. 85-88.)
10. On May 7, 2010, Mr. Green, Mr. Clark, and Mr. Henderson met with Appellant to inform him that they had reviewed the information presented to him and his written statement. Appellant was informed that SCDOT was continuing its investigation, that severe disciplinary action may be warranted, and that he was being suspended pending the completion of the investigation. (Committee Exhibit #1, p. 88.)
11. Appellant received an SCDOT Disciplinary Transaction form (approved on May 20, 2010) via facsimile on May 21, 2010, and via certified mail on May 22, 2010, informing him that he was "Suspended Pending Investigation" effective May 7, 2010. Appellant subsequently received an SCDOT Disciplinary Transaction form (approved on May 28, 2010) notifying him that he was terminated effective June 2, 2010. (Committee Exhibit #1, pp. 25-26 and 33.)

12. Appellant initially filed a grievance with SCDOT regarding his suspension by letter dated June 1, 2010, and he subsequently filed a grievance regarding his termination by letter dated June 9, 2010. (Committee Exhibit #1, pp. 252-253 and 254-258.) According to SCDOT, the grievance regarding the suspension was combined with the grievance regarding his termination. A final agency decision was made by letter dated August 31, 2010. (Committee Exhibit #1, p. 285.)
13. Appellant states that he did not violate any SCDOT policies. He contends that if he had taken the SCDOT vehicle near his home, it was only because he needed to pick up items needed for his disability or something he might have forgotten that was necessary for work.
14. Appellant contends there is no evidence indicating that he improperly used the SCDOT vehicle. In addition, Appellant stated that he properly completed the mileage log and time sheets. Further, he states that the charges of "Destruction, Alteration or Falsification of Records" and "Unauthorized Use of State Equipment or Property for Personal Gain" are inaccurate and unfounded. While Appellant contends that he did nothing wrong, he testified that he asked his supervisors if he could be suspended in lieu of termination.
15. Appellant contends that SCDOT did not follow its policies and procedures when he was suspended and ultimately terminated. Appellant states that he was initially told at the May 7, 2010 meeting with Mr. Green, Mr. Clark and Mr. Henderson that he was terminated even before an investigation began. (Committee Exhibit #1, p. 252.) In addition, Appellant contends that he was not provided with written notice of his suspension prior to receiving the SCDOT Disciplinary Transaction form via facsimile on May 21, 2010. Appellant also contends that the final agency decision was made by a single person rather than a committee of three individuals. Further, Appellant contends that his termination is discriminatorily motivated and based upon his national origin and his disability. (Committee Exhibit #1, p. 232.)
16. In accordance with SCDOT Disciplinary Action Policy, the recommended sanction for a first occurrence of "Unauthorized Use of State Equipment or Property for Personal Gain" ranges from a 5-day suspension to termination; a first occurrence of "Destruction, Alteration, or Falsification of Records" ranges from an oral reprimand to termination. (Committee Exhibit #1, pp. 15-22.)

STATEMENTS OF POLICY AND CONCLUSIONS OF LAW

The State Employee Grievance Procedure Act (Grievance Act) creates the Grievance Committee as a quasi-judicial review body that conducts hearings of certain specified state employee grievance appeals. S.C. CODE ANN. § 8-17-340 (1976). In addition, the Grievance Act provides:

(E) The committee may sustain, reject, or modify a grievance hearing decision of an agency as follows:

- (1) In cases involving actual or threatened abuse, neglect, or exploitation, to include those terms as they may be defined in § 43-35-10 or 20-7-490, 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.
- (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.

S.C. CODE ANN. § 8-17-340(E).

This appeal is governed by § 8-17-340(E)(2), which establishes that Appellant has the burden of proof to demonstrate that the decision to discipline him was wrong for the reasons articulated.

Based on the documents and testimony presented at the hearing, the Committee found substantial evidence to support SCDOT's decision to terminate Appellant. "'Substantial evidence' is something less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds, to reach the conclusion that the administrative agency reached in order to justify its action." *Todd's Ice Cream, Inc. v. South Carolina Employment Security Commission*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984).

According to Appellant, he did not violate any SCDOT policies concerning the use of an agency vehicle or the completion of his mileage logs and time sheets. In addition, Appellant contends there is no evidence which supports SCDOT's decision to suspend or terminate him and that the discipline imposed by SCDOT was discriminatorily motivated. Moreover, Appellant states that the process SCDOT used in suspending and terminating him was not in accordance with its policies and procedures. Specifically, Appellant contends he was initially told he was terminated before an investigation into the allegations raised by SCDOT had commenced. In addition, Appellant contends he was not provided with written documentation regarding his suspension until approximately two weeks later.

SCDOT provided detailed documentation to support its decision to discipline Appellant. Specifically, SCDOT provided GPS tracking reports that indicated Appellant was in his SCDOT vehicle in areas that were not his assigned job sites. Also, SCDOT provided a comparison of the GPS tracking documents with Appellant's time sheets and mileage logs. From this information, SCDOT concluded that Appellant was using the SCDOT vehicle for personal use and falsifying his time sheets and mileage logs. Appellant admitted that he stopped by his house on at least one occasion and did not log-in the mileage. He further admitted that he did not log-in his mileage on a daily basis, but he instead estimated the mileage at the end of the week or month even though he was instructed on the importance of keeping accurate mileage logs.

Based on the record and testimony presented at the hearing, the Committee finds that Appellant used his agency vehicle for personal use despite his continued denials when asked about the issue. Appellant was previously counseled regarding appropriate agency vehicle use and acknowledged a "clear" understanding of SCDOT policy in this regard. In addition, Appellant received counseling and training on the requirement to maintain accurate time sheets and mileage records associated with job assignments. The Committee finds that Appellant failed to maintain accurate time sheets and mileage records because doing so would have alerted management to his unauthorized use of the SCDOT vehicle. It appears that Appellant understood the possible consequences of continuing the aforementioned behavior as he had received counseling for a similar incident in 2007. The Committee finds that SCDOT officials made diligent efforts to determine Appellant's vehicle use on several occasions before pursuing disciplinary action. The Committee notes that, at the time Appellant was provided documentation by SCDOT, he requested that he be suspended in lieu of termination. The Committee finds it curious that Appellant would request that another discipline be imposed if he did not in

fact violate any policies. Finally, while Appellant contends he did not violate any SCDOT policies with regard to the vehicle, the Committee did not find his testimony to be credible in light of the documentation and testimony provided by SCDOT. Given the concerns regarding Appellant's credibility and the issues described above, the Committee finds that SCDOT had substantial evidence to determine that Appellant misused the SCDOT vehicle and falsified documentation.

Appellant claimed his due process rights were violated by being deprived of an evidentiary hearing or similar opportunity to cross-examine the SCDOT employees who participated in the decision to discipline him until after he appealed his suspension/termination to the Committee. However, it is well settled that "a full evidentiary hearing is not required prior to termination" of a public employee. Ross v. Medical University of South Carolina, 328 S.C. 51, 66, 492 S.E.2d 62, 70 (1997). Accordingly, the Committee finds Appellant's argument on this issue unavailing.

SCDOT's Disciplinary Action Policy provides a range of discipline from a 5-day suspension to termination for a first occurrence of "Unauthorized Use of State Equipment or Property for Personal Gain" and discipline ranging from an oral reprimand to termination for a first occurrence of "Destruction, Alteration, or Falsification of Records." Given Appellant's misuse of the SCDOT vehicle and the falsification of documentation by Appellant, the Committee concludes that SCDOT's decision to suspend and terminate Appellant was supported by the evidence presented and within the guidelines of its Disciplinary Action Policy.

DECISION

The Committee finds Appellant failed to establish that SCDOT's decision prejudiced his substantial rights and met one or more of the elements contained in S.C. CODE ANN. § 8-17-340(E)(2). Therefore, the Committee upholds the decision of SCDOT to suspend and terminate Appellant and denies the relief sought.

For the Committee:

Lynn Hatto
imb

Date:

21 March 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 11-ALJ-30-0210-AP

Moshtaba Vedad,

Appellant,

v.

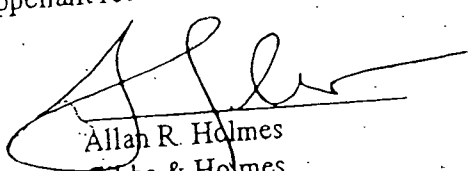
South Carolina Department of
Transportation,

Respondent.

NOTICE OF APPEAL

Moshtaba Vedad appeals the Order of the Honorable Shirley C. Robinson, Administrative Law Judge, dated August 13, 2012. Appellant received written notice of entry of this Order on August 15, 2012.

September 6, 2012


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 11-ALJ-30-0210-AP

Moshtaba Vedad,

Appellant,

v.

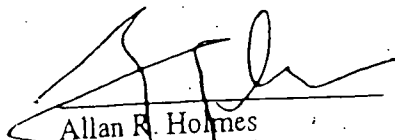
South Carolina Department of
Transportation,

Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the Notice of Appeal on the South Carolina Department of Transportation; the South Carolina Budget and Control Board; and the Administrative Law Court by depositing a copy of it in the United States Mail, postage prepaid, on September 6, 2012, addressed to the attorneys of record, who are, respectively, Natalie J. Moore, Esq., S.C. Department of Transportation, Office of General Counsel, 955 Park Street, Suite 343, Columbia, South Carolina 29201, and Derrick K. McFarland, Esq., South Carolina Budget and Control Board, 8301 Parkland Road, Suite A220 Columbia, South Carolina 29223; and to the Honorable Jana E. Shealy, Clerk, South Carolina Administrative Law Court, 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201.

September 6, 2012



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Attorney for Appellant

1 witness, if you like.

2 MR. HOLMES: That would be Mr. Vedad.

3 MR. VEDAD: (Inaudible).

4 MS. HUTTO: Mr. Vedad, if you would, take this
5 seat here please.

6 If you would, for the record, Mr. Vedad, state your
7 full name.

8 MR. VEDAD: My name is Mustaba Vedad, V-E-D-A-D.

9 MS. HUTTO: Okay. And I'm going to ask you, if
10 you would, please speak up. You can have a seat. If you
11 would, speak up so that the mics can pick up, because we're
12 recording the hearing.

13 MR. VEDAD: I understand.

14 MS. HUTTO: You'll have in front of you a binder
15 of the record, so if you like, that's the same record that
16 we have. So if you would like to refer to any of the
17 documents, please feel free to use that reference.

18 MR. VEDAD: Okay. I would like to start with a
19 little bit -- back a little bit in order to reach, because
20 it's like a chain. All this stuff happens together. And
21 they're all related. In 2005 when Mr. Rowe, who was my
22 resident engineer, he retired, I got an interim job. And I
23 actually was sent to Resident Construction Engineer Academy
24 for five different courses in USC. And for the whole year I
25 did act as a, and perform as a Resident Construction

1 tell me let's go to check the road. He would go tell
2 somebody else's that he wants me to go with him. Everything
3 become indirect.

4 Q All right. Let's move forward then, if we might. Move
5 forward again to May, 2010. Tell us about your first
6 information about the matter that gets us here before this
7 committee today.

8 A The meeting, my understanding was it was about my
9 rating. I had a neat rating (ph). And one of the
10 characteristic he rated me below, which was two and half
11 percent, if I remember correctly, of the whole things. And
12 on that one says that I'm not bringing like fun and
13 enthusiasm into office. Knowing that I was the only one ice
14 breaker in the office in any meeting that we have. I joke
15 around. I talk to people. I'm not shy about saying jokes
16 and stuff.

17 And I was not satisfied with my rating, even
18 though it was me -- one tenth of a percent less than being
19 exceed, it was 2.3. 2.4 is exceed. So I wrote it down that
20 I am not satisfied with this rating. And I'd like to speak
21 with someone in Human Resources in Columbia. When they
22 called me -- Ms. Linda, she told me that this is the --

23 Q Now, Ms. Linda -- I'm sorry -- but that's Ms. Gaillard?

24 A Gaillard, right. She started that it is about, it is
25 about my rating. After no more than one question and less

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1 than a minute everything got changed to, am I using my
2 vehicle for personal use. Is very important, personal use.
3 And I said, no. Then they wanted to know if I'm, if I know
4 how to do my time sheet. Yes, I do. If I know how to do
5 log sheet. Yes, I do. And they proceeded, they preceded to
6 start. And that meeting took about -- at least about an
7 hour and half to two hours.

8 Q All right. Now, who was at the meeting?

9 A The meeting was Mr. Clark, Mr. Henderson, and Ms.
10 Margaret Rivers, and Ms. Gaillard.

11 Q Mr. Green was not at that meeting?

12 A No.

13 Q All right. So then what happened? Tell us --

14 A Then after all the questioning about -- they showed me
15 a picture of a truck similar to my truck that is parked on
16 the edge of, edge of the pavement. And my residence is
17 here. The truck was parked here. And Mr. Clark asked me if
18 this is my truck. The picture was taken so far you could
19 not recognize any number on it. And the picture was taken
20 on a sideways. And I said, this is -- looks like my truck.
21 And yes, this is my residence.

22 Again, they showed me another picture, which was
23 very blurry. It was in a moving direction with more vehicle
24 in, in that picture. And they said, this is your truck. I
25 said, how could you say this is my truck? It's number one,

1 there is no number. Number two, it's blurry. Number three,
2 it's in a moving truck. I don't even recognize that street.
3 Then -- and on the top of it the date was written by hand on
4 those pictures.

5 And that's the only two things they asked me about
6 me using my state vehicle for personal use, again. And I'm
7 going to explain why use is so important in this. And they
8 wanted me to write a statement. And I wrote a statement
9 that I have completed my time sheet, my state vehicle log
10 sheet properly and accurately to the best of my knowledge.
11 And I have not used my state vehicle for personal use.

12 Q That was -- did you examine any of these people? What
13 I mean by that, did you ask them questions?

14 A They were really -- they were going at me. And I'll be
15 honest with you, they were not near to be nice or they
16 wanted -- they were trying to dig something that, oh, I got
17 you. And keep repeating, This is your truck, isn't it? You
18 sure this is your truck? You sure this is your residence?

19 Q All right. So now, and that meeting concluded. What
20 did they tell you at the end of it?

21 A At the end of it, which I really didn't felt
22 comfortable about it was like in a threaten way. Mr. Vedad,
23 Don't think this is over. This is just the -- this is just
24 the beginning of an investigation, and we're going to let
25 you know.

1 Q Now -- go ahead. I'm sorry.

2 A And like I said, it was not in any kind of a nice way
3 to say it. It was -- the tone was totally different.

4 Q Now, they showed you the picture of the truck, correct?

5 A Right.

6 Q And it had a date written on it?

7 A By hand.

8 Q All right. And anything else?

9 A That's it.

10 Q Now, when did you next meet with anybody about this
11 situation?

12 A Well, somebody in the office came to me and says, Be
13 careful. They put a GPS on your truck. I said, Well, they
14 have done it before, which it was in 2006. And I have it
15 right here in that bag. And nothing came out. Nobody did
16 anything about it. And that means I was not doing anything
17 wrong.

18 And the next time it was on May 7th that this -- I
19 was in the office, in my office. Mr. Green came to my
20 office. And he says, Come on to my office. And that was
21 it. I went to the office and that was Mr. Clark, Mr.
22 Henderson, and Mr. Green.

23 Q All right. What happened at that meeting?

24 A Only Mr. Clark talked. And he said based on our
25 investigation we decided to let you go. I said several

1 times, This is a big mistake. I said, After 25 and a half
2 years, 26 years, just like that. And that's what he said.

3 He said, Well, this is based on our investigation.
4 Our investigation showed and he talked -- and we talked to
5 Columbia. And we came up, we came up with the decision to
6 let you go. I said, How about suspension? He said, No.
7 Unfortunately, the decision was to let you go. I said, I'll
8 take suspensions. This is the first offense if everything
9 that what y'all saying is true, first offense. And I was
10 terminated.

11 And on that time Mr. Green told me to go get my
12 belonging. When a person, employee is suspended -- because
13 it happened before in our office. We get state property
14 from the person, like their keys to the building, keys to
15 the truck, anything, telephone, cell phone, whatever you
16 have. Mr. Green stayed until 12:30, until I cleaned totally
17 everything out of my office, everything out of my office. I
18 did not have one single paper left in any of the drawers.
19 That was the indication that from the beginning that this is
20 not just a suspension.

21 And I said, What about a retirement? I said, I
22 have enough years to get retired. They said, Well, you have
23 to go talk to Ms. Rivers. I said, Right now it's about
24 quarter to 12:00 or 11:30 or so, by the time that I get
25 there maybe she is gone to lunch. Is there any way you

1 could find out if she's going to be there or not. So Mr.
2 Clark called, and she said she will be there. So about 12
3 -- about the time I got there about 12:30, and right after
4 that Ms. Rivers says, They fired you, didn't they? I told
5 you.

6 And one things that I forgot to say, what during
7 that meeting Mr. Clark and Mr. Henderson and Ms. Gaillard,
8 they left the meeting and Ms. Rivers stayed with me. And
9 she said --

10 MS. MOORE: I'll object to him telling this
11 committee what Ms. Rivers said. He could have called her as
12 a witness. This is just outright hearsay.

13 MR. HOLMES: It's 801-D3. It's admission of a
14 party opponent. She's an agent in her capacity with the
15 agency making a statement.

16 MS. MOORE: We don't know what it is he's getting
17 ready to say, but he could have called her as a witness. He
18 doesn't have any witnesses but himself, so I object, for the
19 record, to him --

20 MR. GANJEHSANI: I'm going to sustain that. I
21 think your client, Mr. Holmes, has been offering a narrative
22 for quite a while. And I think if you want to continue down
23 this path you're going to have to be the one initiating the
24 questions, and perhaps there's a way to devine the same
25 response without resurrecting that objection, because I'm

1 letter.

2 MS. MOORE: The letter's in evidence.

3 MR. HOLMES: I know. I mean, I could just publish
4 portions of it.

5 MS. MOORE: It's already in evidence.

6 MR. HOLMES: It doesn't matter. You can still
7 publish the letter. I mean, you're entitled to publish a
8 document.

9 MR. GANJEHSANI: I understand the base of your
10 objection Ms. Moore. I mean, Mr. Holmes is free to touch on
11 the high points of this letter. It's in evidence. I mean,
12 he's not -- if he were, for instance to be embellishing the
13 contents of the letter, that'd be one thing, but I think Mr.
14 Holmes is within the bounds.

15 Q Now, did we ever receive, Mr. Vedad, to your
16 recollection, any explanation from the department of how
17 these things occurred that we've just gone through?

18 A No. By the way, on that letter it states that Mr.
19 Green was present in that meeting, which was a false
20 statement.

21 SPEAKER: I was wrong about that.

22 A Okay. But it was not -- Mr. Green was not in that
23 meeting.

24 Q Okay. Now, after this letter there was at some point a
25 meeting in Columbia, correct?

1 A Correct.

2 Q All right. Who was in attendance at that meeting?

3 A That was, that was me and Ms. Gaillard and Director of
4 Traffic Engineer in Columbia. I don't recall his name.

5 Q You don't remember his name? All right. Tell us what
6 happened at that meeting.

7 A He stated that this is a very, very informal meeting,
8 and not to afraid, bring any subject or anything at all.
9 And he asked me questions about, again personal use of the
10 truck. And I brought all kind of evidence about my diabetes
11 situation. And the -- what is my responsibility as an
12 Assistant Resident Construction Engineer on a daily basis,
13 what is my requirement, what I need to do as far as
14 inspection of roads, what roads I have to go to. And I
15 said, We have -- I brought all evidence and the roads in all
16 counties in our district, which is Dorchester, Berkeley,
17 Colleton, Charleston County and -- all the counties.

18 Q You have those materials with you today --

19 A Right.

20 Q -- for the most part, correct?

21 A Right.

22 Q We'll come back to those. Let me ask you this, did
23 anyone from the Department of Transportation at this meeting
24 offer any testimony? Did anyone from the Department of
25 Transportation place anything in evidence?

1 A No.

2 Q Was anybody --

3 MS. MOORE: I think he's asking questions that
4 call for a legal conclusion. Mr. Vedad is not an attorney.
5 I don't know if he even knows what these things mean, offer
6 evidence, give testimony. I don't think he's properly
7 qualified to be giving responses like that.

8 MR. GANJEHSANI: Mr. Holmes?

9 MR. HOLMES: Well, testimony I think is a common
10 word meaning somebody has to speak under oath, generally
11 when you think of testimony. I can break it down:

12 MR. GANJEHSANI: I'm going to sustain the
13 objection. If you could just be more precise.

14 Q Who appeared at the hearing -- we'll call it a hearing
15 now -- other than this fellow who was -- this traffic
16 engineer? He was supposed to be the finder of fact; is that
17 your understanding?

18 A That was -- that was my understanding that I'm going
19 and is going to be a minimum three member of department.
20 They going to take --

21 Q Okay. Well, please --

22 A Right.

23 Q If you'll answer my questions. Was he supposed to be a
24 person who was going to make the findings at the hearing?

25 MS. MOORE: I would object again. I think that

1 would call for a legal conclusion asking him if somebody's
2 going to make a finding of fact. That sounds like --

3 MR. GANJEHSANI: I'm going to sustain that.

4 Q What was your understanding of what the hearing was
5 supposed to be?

6 A That I present my case and they going to tell me either
7 way what was done wrong. And the procedure that they
8 followed was totally wrong. And he's going to make a
9 decision.

10 Q That guy was going to make a decision?

11 A Make a decision.

12 Q All right. Who was -- did Ms. -- you said Ms. Gaillard
13 was there?

14 A Yes.

15 Q Did she testify?

16 A No.

17 MR. HOLMES: Is testify okay?

18 Q Did she speak that you recall?

19 A She spoke very general stuff about why we're here, why
20 we were on that meeting. And that was it.

21 Q Did she say anything about what was supposed to be your
22 misconduct?

23 A She did state that what I have been --

24 Q Accused of?

25 A -- accused of. And that's why we there. And the

1 gentleman is going to make a final decision of what
2 Department of Transportation is going to, is going to come
3 up with.

4 Q Did they present any GPS records at that hearing?

5 A Nothing at all.

6 Q Did anybody explain how there was a GPS used?

7 A No.

8 Q To the best of your knowledge, did anyone say anything
9 about substantive -- you know what I mean when I say
10 substantive?

11 A Right.

12 Q About what you were supposed -- what you had done?

13 A No. They ---

14 Q All right. And was Mr. Green there?

15 A No.

16 Q Was anybody there other than the Traffic Engineer, Ms.
17 Gaillard?

18 A No.

19 Q Now, after that hearing what happened?

20 A That we received a letter from department that he
21 basically made his hundred percent decision that he's going
22 to go with the decision that the state have already made.

23 The conclusion was termination.

24 Q Now, sole to that has anybody been -- in any preceding
25 that you've been engaged in has anybody been administered an

1 oath prior to that? To the best of your knowledge, has
2 anybody answered questions to say what you did wrong? Okay.
3 Now, tell us, if you would, and I'm resistant to open it to
4 a narrative, tell me about how it is that you use -- let me
5 try to make it even more narrow, if I might.

6 MR. HOLMES: I'm sensitive to your concerns about

7 --

8 MR. GANJEHSANI: I'm not trying to play God, Mr.
9 Holmes.

10 Q You have a truck assigned to you?

11 A Right.

12 Q You did when you were working, correct?

13 A Right.

14 Q Okay. What were the restrictions on use of that truck,
15 as best you understood them?

16 A The restriction is we cannot use the truck for
17 personal, personal gain or personal use. There are two
18 different things. But there is some rights that is involved
19 with whoever is the truth is assigned to. For instance, if
20 I'm on it -- if I'm going on a job site and I'm staying on a
21 job site, and becomes the lunch time, I could drive the
22 truck, go eat lunch, and go back again to the job. If I'm
23 coming back from the job, job site to the office, I'm not
24 allowed to, or no one is allowed to use the truck to go eat
25 lunch at any restaurant, even if it is on their way or not.

1 It's the same thing, you cannot just go for the
2 purpose of eating lunch, say, well, I'm going to go check on
3 a job. And for that purpose use the truck to go eat lunch.
4 Lunch is somewhere between 11:00 o'clock to 2:00 o'clock for
5 one hour from the time that you leave wherever you are to go
6 eat lunch to come back. It allows you for one hour lunch.
7 And any time that I get, eat lunch I'm going on a job site,
8 from one job site, I'll go to another job site to another
9 job site. And on the top of it, I'm a diabetic. I cannot
10 eat the way I would like to. I have to go practically based
11 on my blood sugar.

12 Q All right. Well, did you ever stop the truck for some
13 brief periods of time?

14 A Yes.

15 Q Why?

16 A Just like this morning when I'm coming here I stop two
17 times to check my blood. I stop three times to get snack.
18 My diabetes is strictly based on a diet and pills. I'm not
19 on insulin. When I go high on a sugar I get sleepy, drowsy.
20 When I go low on a sugar, I get jittery, like you know,
21 shaking. And I have to stop. I have to stop, either check
22 my blood sugar. Many time I do it while driving, or move
23 somewhere, go somewhere, get some kind of a snack and check
24 the blood again, and get on back.

25 Q All right. Now, to the best of your knowledge, did you

1 ever purposely use your truck in violation of what you
2 understood to be the regulations?

3 A No.

4 Q What about taking your children to school? Did you do
5 that?

6 A No. Absolutely not. My children, they go -- I take
7 them to school myself. They go by bus home. One of them is
8 not -- he was in trouble with law and we came up with the
9 conclusion between a solicitor and our attorney that he need
10 to move out of the Charleston County system school. And he
11 was going for a while to Timberland. Not even, not even in
12 Charleston. And I was not even allowed to go pick him up or
13 take him, because he was going to the resident that they
14 were supervising.

15 Q How about the completion of your mileage logs? Tell us
16 about that. How did you do that?

17 A Mileage log, I have a evidence in there, in my stuff
18 that I brought in.

19 Q Well, you can use that if you like.

20 A Okay.

21 MR. GANJEHSANI: Mr. Holmes, is this
22 demonstrative, or are you going to attempt to offer this
23 into evidence?

24 MR. HOLMES: I think it's demonstrative at this
25 point.

1 MR. GANJEHSANI: Okay.

2 MS. MOORE: What -- excuse me. I'm sorry.

3 MR. GANJEHSANI: Well, I just want him to -- Ms.
4 Moore seen this before?

5 MS. MOORE: Yeah. I don't -- I mean, I've never
6 seen this.

7 MR. HOLMES: Well, we presented it at the hearing
8 in Columbia.

9 MS. MOORE: Is this in the record, all of it?

10 A Yes. All of it are in the record, every part.

11 MS. MOORE: Let me just look at it before you
12 publish it.

13 A Right.

14 MS. MOORE: What page is that one down there --

15 A This one?

16 MS. MOORE: Is that --

17 A I believe it's on page 135. It's on page 135.

18 MS. MOORE: Okay.

19 MR. HOLMES: While we're talking about this, this
20 was presented by him at the conference in Columbia. So if
21 it's not a part of the record, it's simply the failure of
22 the agency to include. It was there. It was used. I was
23 there. I'm a witness to it.

24 MS. MOORE: If you're -- you're not a witness, but
25 if you presented it and then you didn't make it part of the

1 record then --

2 MR. GANJEHSANI: All right. Let me --

3 MS. MOORE: I just hadn't seen it. I just wanted
4 to --

5 MR. GANJEHSANI: Let me stop everyone right here.
6 And I know that this is -- I have to sort of give my own
7 narrative because there's no camera here. The witness has
8 produced a folding cardboard exhibit containing documents,
9 some of which are, I understand have previously been made a
10 part of Committee Exhibit One, but based on comments I heard
11 from the agency's representatives, one or more of them may
12 have not been -- this is how I'm -- this is how I'm
13 tentatively ruling, to the extent there is any information
14 on this -- and I'll address you, Mr. Holmes, rather than
15 your client. To the extent there's any document, there are
16 any documents contained on this which are already part of
17 the record, I would ask that your client keep this board
18 next to him.

19 He can then look at the documents. Perhaps we can then
20 go to whichever page in the record that document appears.
21 He can then instruct us based on his highlights, if that's
22 what he wants to do, which portion of, which portion of the
23 document we need to refer to. If there are any documents on
24 that board which have not previously been made part of
25 Committee Exhibit One, you can attempt to introduce them.

1 If you want them received into evidence, obviously subject
2 to any objections that the agency may have.

3 But as a practical matter, I'm not going to allow that
4 document in total to be published without knowing -- the
5 fact that there are multiple documents on one board doesn't
6 change the fact that it's multiple proffers as to what each
7 of those documents purport to be so --

8 MR. HOLMES: I would then ask if I might
9 supplement my question in just a moment and then maybe make
10 an offer of proof.

11 Q Mr. Vedad, did you carry this very board with those
12 exhibits to Columbia for what was the, quote, hearing that
13 you had?

14 A Yes.

15 Q All right. Did you place those documents in front of
16 the person that we understood, the traffic engineer, to be
17 the trier of fact?

18 A Yes.

19 Q Did you reference each one of those documents when you
20 did that?

21 A Yes.

22 Q And did you show him what these documents were?

23 A Yes.

24 MR. HOLMES: Then again, I understand the ruling,
25 and I of course, comply with it. But I make the offer of

1 proof that we're not in any position to create -- we don't
2 even get a copy of it -- to create this document that is the
3 agency's record of this appeal.

4 MS. MOORE: This is not something we created.

5 MR. GANJEHSANI: Let me just clarify. This is a
6 compendium of documents that are exchanged between the
7 parties. From what I understand, I believe I may have
8 misstated earlier, this is something that is provided to the
9 parties; I believe prior to or at the ADR that may or may
10 not have occurred. And I can't talk about that any more
11 than I already have. To the extent that that may not have
12 happened, obviously parties are on notice of what Committee
13 Exhibit One is.

14 In the APA letter that OHR sends it says that these
15 materials will be provided to the panel members
16 approximately one week before the hearing. So to the extent
17 that these documents, or that this board, or these documents
18 were presented by the appellant to an agency prior to this
19 hearing, unless there's some acknowledgement of transmittal
20 of those documents or there's some recognition that the
21 documents that were presented were already documents that
22 the agency was on notice of.

23 I still don't see how -- I don't see how your proffer
24 changes my ruling in terms of the fact that if you're going
25 to seek to introduce these into evidence in this proceeding,

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1 you have to still go through, still go through the motions
2 unless they're documents that are already in the record.

3 MR. HOLMES: I understand. And I was just simply
4 say -- because I am trying to make a record --

5 MR. GANJEHSANI: I understand.

6 MR. HOLMES: -- as to how the process went. And
7 in so far as we're here in an appellant capacity, you're
8 here as an appellant group for purposes of the statute, then
9 it seems to me that certainly the evidentiary submissions
10 that we've made at the lower level of the proceedings should
11 be part of this record. But I understand your ruling and
12 I'll comply with it. I just wanted to make sure I'm clear.

13 Q Mr. Vedad, if you could turn this document toward you.
14 Okay. It probably would be just as well if you put it out
15 there facing you.

16 MR. GANJEHSANI: You can push that podium out if
17 you need to keep it back where you are.

18 Q All right. Or put it out a little further and let her
19 -- your opposing counsel can see it at the same time, but
20 however you want to do it. Just, if you would, first let's
21 start, and can you identify, for my purposes, the documents
22 that are in this record that you haven't seen before?
23 Probably not. What's the document on the far left?
24 Describe it in terms of it's title.

25 A Among all these papers in here, two papers not in the

1 record.

2 Q Okay.

3 A One of them is Disciplinary Action Procedures. And the
4 other one is annual leave and sick leave that state provides
5 for all employees.

6 Q All right. So the one you're, the first one you're
7 referencing on the far left -- excuse me. Don't say
8 anything about it until I ask you a question. That is the
9 agency's publication as to what penalties it has for it's
10 offenses?

11 A Right.

12 MR. HOLMES: We'd ask the committee to take --

13 MS. MOORE: That's on page 20. It's in the
14 record, in the record. Yeah, you submitted that.

15 Q And how about the far right?

16 A The far right is, like I said, it's just a balance of
17 all the employee in my office of what kind of a sick leave,
18 how many days or hours of sick leave or annual leave they
19 have.

20 Q Well, that's not necessary. All right. Why don't you
21 rip that one off and hand it to me? And your testimony is
22 everything else is in the record?

23 A Yes.

24 Q I'd like you to give counsel, opposing counsel, an
25 opportunity to confirm that.

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1 MS. MOORE: Well, just tell me what pages it is so
2 we --

3 MR. HOLMES: You'll have to look through the
4 record. We don't have a copy of what number --

5 MS. MOORE: You should have been sent a disk like
6 I was or -- I think this second one is what you just pointed
7 out, Allan, is 235. Do you remember -- didn't you point
8 that out as 235?

9 MR. GANJEHSANI: Let's do this, let's take a
10 break. I don't want to interrupt anyone's rhythm, but under
11 the circumstances I don't see a more practical means of
12 dealing with this.

13 MS. MOORE: Can I write the page numbers on this?

14 MR. HOLMES: I do have a --

15 MS. MOORE: It's 238. I think a break would be --
16 I'll second that, especially if I get to participate in it.

17 MR. HOLMES: I'm embarrassed to say I do have a
18 CD-ROM. It came in November of last year, but I apologize.

19 MS. HUTTO: Let's take about a ten minute break.
20 And I think that'll give the counsel a chance to look at
21 those documents and everybody else a chance to kind of
22 refresh themselves.

23 MR. HOLMES: Thank you.

24 MS. HUTTO: Are we ready to go back on the record?

25 MS. MOORE: We are.

1 MS. HUTTO: Okay. We're back on the record. Ms.
2 Moore, were you able to get the documents identified that
3 you needed?

4 MS. MOORE: I don't think we have any -- we think
5 everything's (inaudible). Anyway, I think it's all in here.
6 And I think we have page numbers on most of them.

7 MR. GANJEHSANI: Thank you for everyone's
8 cooperation in that respect.

9 MS. HUTTO: And we'll proceed.

10 Q Mr. Vedad, if you would, let's go first to the
11 documents in the center there. What are those?

12 A I had a chance to put a page number on it. One of them
13 is page 33 and then 35 and then 37. The one that I'm
14 referring to is on page 33, 35, and 37.

15 Q Okay. Again, trying to avoid putting words in your
16 mouth, but at the same time moving things along. If we look
17 at the document on page 35, the -- what is the date of that
18 document?

19 A The date of the document -- the only date that I could
20 see is in here is the date that I worked for the DOT. And
21 then on the bottom, date of 5-12-10.

22 Q That's the certification date?

23 A Right.

24 Q Of 5-12?

25 A Five -- right.

1 Q All right. And what is it -- if we look up under
2 section 04, that's discharge?

3 A That's the discharge.

4 Q And what does it say?

5 A Discharge, that means whenever --

6 Q No, no. I'm sorry. What is the check mark?

7 A The check mark is on violation of company rules or
8 policies?

9 Q And so this document, and it says last day worked, May
10 7th, correct?

11 A Correct.

12 Q So this document was created, apparently on May 12th
13 and has you terminated as of that date?

14 A That's what appears to, unless they did it early on May
15 12th and put the date of May 12th on there, but yes.

16 Q Now, your understanding was you were under
17 investigation? I'm sorry. The May 22nd suspension letter
18 says you're being suspended on May 22nd, correct?

19 A Right.

20 Q This document says you've been terminated as of May
21 12th?

22 A Right.

23 Q All right. Now, let's move to --

24 A One more thing, if you look at item number 90,
25 miscellaneous.

1 Q Yes.

2 A Very simply, they could have put down in there
3 disciplinary suspension.

4 Q That's available there under miscellaneous?

5 A Yes.

6 Q That's not checked?

7 A That's not checked. They just put -- they put down his
8 charge. That means it proves and supports the --

9 Q Well, the committee will have to figure out what it
10 supports.

11 A Right.

12 Q Let's go down to document 37.

13 A 37, I have a received date of June, '08 that I been
14 discharged. And based on that rules and regulation and DOT,
15 or department has 14 days after the suspension date to tell
16 the employee either his suspension is over, he could go back
17 to work, or he is terminated. Well, this is 32 days after
18 that.

19 Q Okay. All right. Hand me those. And let's go back
20 now and talk a little bit about the documents that relate to
21 your use of the truck, if you could. When I say use of the
22 truck, I mean the claim is you've misused the truck. And
23 what documents there relate to your not misusing or properly
24 keeping time records?

25 A I had a chance to look over a lot of it carefully. And

1 many of them it shows ten second stop, 50 second stop.

2 Q Now, hold on. When you say many of them, for
3 clarification you're talking about the written GPS records
4 that we were able to obtain from them?

5 A Yes. The daily driving report, which came from GPS.

6 Q All right. So again, for the benefit of the committee,
7 and not to testify, and with the indulgence of counsel just
8 to clarify, there was a GPS done apparently. And then there
9 were written documents that showed portions or maybe all of
10 the GPS, things that they thought were important, correct?

11 A Correct.

12 Q And those would show the interval at which you were
13 stopped and where you were stopped?

14 A Right.

15 Q Okay. Tell me about that, now that you've got these
16 documents.

17 A Well, many of them shows one minute stop, 35 second
18 stop, nine second stop. And these are traffic lights that
19 I'm going through street and you stop and you go. You stop
20 and you go. That's many of them. And some of them is being
21 written down after 5:00 o'clock. I do not work after 5:00
22 o'clock. One of them shows the truck went to Orangeburg for
23 69 miles. I didn't go to Orangeburg after 5:00 o'clock.
24 And that brings the log mileage.

25 If I don't know who is using my truck, there is no

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1 way for me to find out what the mileage should put down in
2 there and after what code should go in there, especially,
3 especially audit project, which they audited. And come to
4 find out, everybody were doing it wrong. All the time
5 sheets, they had to be checked and re-checked. And I was
6 the only one, only one, I had my time sheet and my log sheet
7 correct, because I separate every code that I was on that
8 project for any project. This is also a part of it.

9 Q What page is that?

10 A I have to find it.

11 MS. HUTTO: Mr. Vedad, what is the name of the
12 document?

13 A This is a Vehicle Daily Trip Log.

14 SPEAKER: 135, page 135.

15 MS. MOORE: I think that's not the one he's got
16 though.

17 A I saw it somewhere.

18 MS. MOORE: Oh, it is. I think it is 135.

19 A Right. In here shows, are showed, for instance, if I
20 -- on the far end on the remark, I put down exactly how much
21 mileage I put down on that charge code exactly how much I
22 put down on the different charge code. Because like I said,
23 when I go, I just don't go inspect one road to see what's
24 going on. I go at least two, three project. It depends how
25 many active project we have at that time. For instance, on

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1 1-11, the same thing. I had three of them and ---

2 Q All right. Now, anything else on this that deals with
3 your use of the truck that you think is assistance to you,
4 on this page?

5 A No. That would be it.

6 Q Okay. Now, with the truck, you looked through
7 materials that you were provided, correct?

8 A Correct.

9 Q All right. And that's what you made reference to with
10 these many stops, in fact they were short, brief stops?

11 A Right.

12 Q Okay. Now, is it the case that -- just again, this may
13 be repetitive, but I want to make sure we get this point.
14 Were there times that you did eat lunch when you were
15 outside of your office?

16 A Right.

17 Q And what would the time period generally be for that?

18 A Like I said, because I'm diabetic I have to check my
19 sugar to see if I can eat or not, whether I'm hungry or not.
20 If my blood sugar is good, I have to go get something, but
21 unfortunately, not -- I'm not normal person when you
22 diabetic. You cannot go sit down in a fast food restaurant
23 or anything else. You just have to pick and choose your
24 diet. I go to Wal-mart. I pick up salad, or I go to TJ
25 Maxx. I pick up some fish or whatever and -- or just a

1 snack. And basically, that's what it is.

2 Q Let me ask you, Mr. Vedad, if you could identify this
3 item.

4 A That was in -- our office, the whole office was under
5 investigation of using or abusing gas and using truck card,
6 vehicle card for different trucks.

7 Q When was that?

8 A That was in 2000 -- part of it 2006 and seven, ongoing
9 thing. And when I was parked at Taco Bell I was -- I went
10 and ate. And when I was coming back to my car, that was in
11 downtown. We had a job in downtown, resurfacing job. I saw
12 this hanging off back of my truck. And come to find out
13 that they put a GPS on my car.

14 Q That's a GPS?

15 A Based on what they told me. And that one was on it, on
16 my truck for at least six to eight months, which they found
17 nothing I did wrong.

18 Q And at the same time this was in 2006, correct?

19 A Right.

20 Q And so you were aware then that the Department of
21 Transportation had at least once used a GPS --

22 A Yes.

23 Q -- to track you in your truck?

24 A Only -- yes.

25 Q Okay. Did you ever discuss that with them?

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1 A No, no. They didn't even come and asked, you know,
2 what happened to it or -- but I guess technology went a lot
3 higher in two years that, you know, they put it somewhere
4 else that it was -- it didn't fall off, but ---

5 Q Okay. Now --

6 MS. MOORE: Could we see that?

7 MR. HOLMES: Sure.

8 Q And the document that's over there on attachment, that
9 down there, is that -- no, the one underneath it. Did you
10 find that? Is that in the record?

11 A It is in the record, yes.

12 Q What is that?

13 A This is one of the notes that Mr. Green was wrote -- it
14 is attachment E.

15 Q Do you know what page it is? Hold on. Let me see it
16 for --

17 MS. MOORE: That's page 72.

18 MR. HOLMES: 72, okay.

19 Q Tell us about what that document shows.

20 A That was one of my statement that I asked in one of the
21 meeting that I had with Mr. Green and Mr. Henderson. And he
22 practically told me just because he's a supervisor he is not
23 obligated to tell anybody where he's going and what he's
24 doing, which I was reference to -- I said, As your assistant
25 -- I said, This is not 70's or 80's or even 90's. As an

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1 an opposite direction of where a project was?

2 A Well, that's what confounded me, is if he were going to
3 a project or places he were stopping were at projects it
4 would be one thing. But in fact, if you're going to James
5 Island and there are no projects there, and you're making
6 two or three stops, there's really no reason to be there to
7 begin with.

8 Q That's all the questions I have. Please answer any
9 questions of the committee or Mr. Holmes.

10 MR. HOLMES: (Inaudible).

11 EXAMINATION BY MR. HOLMES:

12 Q Mr. Clark?

13 A Yes. Correct.

14 Q Is this the first time we've met?

15 A Yes.

16 Q So you didn't appear at any hearing prior to this in
17 this case?

18 A I -- the hearing that was held with the department with
19 Mr. Shepherd, I was there for that.

20 Q Did you testify?

21 A Yes, sir.

22 Q In front of me?

23 A No, sir.

24 Q When you say the hearing that was held in the
25 department --

1 A That's correct.

2 Q I was at a hearing that was held.

3 A I was, too.

4 Q And you testified?

5 A Yes, sir.

6 Q With me there?

7 A No.

8 Q Why was that?

9 A Because they had myself, and Mr. Green, and Mr.

10 Henderson in a separate session from you, I believe.

11 Q All right. So there was no opportunity --

12 MR. GANJEHSANI: Wait a minute. Stop. Are we

13 talking about a mediation?

14 MS. MOORE: No. We have a bifurcated proceeding,

15 like I think most state agencies --

16 MR. GANJEHSANI: Okay.

17 MS. MOORE: -- where it's a non-confrontational

18 where there's --

19 MR. GANJEHSANI: That's fine. I just want to get

20 that clear. I didn't mean to interrupt, Mr. Holmes.

21 Q You testified under oath?

22 A No, sir.

23 Q All right. Was Mr. Shepherd there when you testified?

24 A Yes, sir.

25 Q All right. Did anyone cross -- did I have an

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1 opportunity to cross examine you?

2 A No, sir.

3 Q No one did?

4 A Well, I guess it depends on how you say that. Mr.
5 Shepherd asked many questions, yes.

6 Q Okay. Now, as far as the documentation, did you
7 presented to Mr. Shepherd?

8 A Yes, sir.

9 Q This same documentation?

10 A Yes. It was not all of this, because there's a lot of
11 evaluations and things like that that we did not have to
12 bring, but the information that we've provided, yes, sir.
13 We had all of it.

14 Q All right. Now, but that was not in our session of the
15 hearing, that wasn't presented, was it?

16 A I have no idea.

17 Q Okay. You weren't there?

18 A No, sir.

19 Q All right. Who else testified at that -- on that day?

20 A Mr. Green and Mr. Henderson were there. And they may
21 have answered questions. I don't recall.

22 Q You don't know?

23 A I don't recall.

24 Q I mean, were you there in the room with them?

25 A I sure was. Yes, sir.

1 Q All right. But you don't recall whether there was any
2 testimony?

3 A Well, I -- again, there were a number of questions.
4 They may have answered some, but I can't recall whether they
5 did or not.

6 Q Okay. Ask you to turn to page 90 of the materials.
7 And I'm looking for the 2111 Easy Street address; do you see
8 that?

9 A Yes, sir.

10 Q All right. And you have -- you're the one that put
11 next to that, "Jiffy Lube"?

12 A Yes, sir.

13 Q Now, in fact, that address on Easy Street is, according
14 to Mapquest, underneath a tree --

15 MS. MOORE: Now, I'm going to object to him
16 because he's doing the same thing that he said I couldn't
17 do, which is site to something that's not in evidence.

18 MR. HOLMES: He was allowed to testify how he went
19 through --

20 MS. MOORE: He was around --

21 MR. GANJEHSANI: Woah, woah. One at a time. Mr.
22 Holmes?

23 MR. HOLMES: He was allowed to testify that he,
24 went to Mapquest, that you can go, you know, expand the map,
25 you can look and see where the spot is. He showed some

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1 suspension and was forwarded on up. The determination by me
2 to make a recommendation was -- for termination came later
3 that next week, at which time paperwork was developed. And
4 it got to me. And I signed it on May 25th.

5 Q All right.

6 A And then it went to headquarters and was signed by Mr.
7 Watson on May 28th.

8 Q So your testimony is that the suspension paperwork was
9 done on May 7th, or May 12th?

10 A It was somewhere between that Friday and the following
11 Monday.

12 Q All right. So if that's wrong, you are?

13 A Don't ask -- I don't understand that question.

14 Q That's all right. Okay. Now, as far as the -- as far
15 as the hearing that we had in Columbia, if I understand it
16 correctly, no one cross examined you? Mr. Vedad did not get
17 to confront you at the hearing? And your testimony was made
18 out of his presence in front of somebody else and it was
19 unsworn, correct?

20 A I was called to our hearing in Columbia with Mr.
21 Shepherd. Mr. Shepherd asked me several questions. And
22 after that, I'm not sure what the process is, because I'm
23 not part of that process.

24 Q Well, let me go back through the question I just asked
25 you.

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- 1 A Okay.
- 2 Q You were not sworn?
- 3 A No, sir. I was not.
- 4 Q Mr. Vedad did not confront you during your examination?
- 5 A No, sir. He did not.
- 6 Q You were not cross examined?
- 7 A Well, again, cross examined by you?
- 8 Q That's right.
- 9 A No, sir. I was not.
- 10 Q A representative of the employee?
- 11 A That's -- yes. I was not.
- 12 Q And you were, in fact in another room, and as far as I
- 13 know your presence was not disclosed to us at any time?
- 14 A I don't know.
- 15 Q Do you know when you were there, what time of day it
- 16 was?
- 17 A I don't recall the time. No, sir. It was in the
- 18 morning.
- 19 Q And do you know what time we were supposed to be there?
- 20 A No, sir. I don't.
- 21 MR. HOLMES: Give us one second.
- 22 Q Exactly how many days did -- if you would, tell me when
- 23 you started with the GPS? Was it November, what?
- 24 A November 15th or 16th. I'm not sure (inaudible). The
- 25 16th of November.

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COMMITTEE'S EXHIBIT

1

STATE EMPLOYEE GRIEVANCE PROCEDURE
STATE APPEAL FORM

TO APPEAL THE DECISION OF THE AGENCY CONCERNING A GRIEVANCE UNDER THE STATE EMPLOYEE GRIEVANCE PROCEDURE ACT TO THE STATE HUMAN RESOURCES DIRECTOR, THE EMPLOYEE AND/OR REPRESENTATIVE INITIATING THE APPEAL MUST COMPLETE THIS FORM AND RETURN IT TO THE STATE OFFICE OF HUMAN RESOURCES.

EMPLOYEE'S NAME: MOJTABA VEDADJOB CLASSIFICATION: Civil Eng. IIAGENCY: SCDOTHOME ADDRESS: 2073 Edisto Ave. CHS SC 29412
Street City State Zip CodeTELEPHONE: 843-724-9323 cell: 843-478-6006
Home Office

1. Has the employee completed twelve (12) months of satisfactory service with the state? YES
2. What disciplinary action taken against the employee is being appealed? 44A First occurrence
41A
3. Has the employee received a final decision from the agency? yes
4. What date did the employee receive the final decision? August 31st 2010
5. If the employee has not received a final decision from the agency, what date did the employee initiate the grievance within the agency's internal grievance procedure?

APPEAL

Please specify why the employee contends that the agency's decision concerning the grievance is unfair and state relevant facts and issues to support that position (continue on additional pages if necessary):

The charges are not accurate or founded; the Agency failed to follow its written procedures in both effecting the termination and processing the grievance; e.g., the decision was made by a single person rather than a committee of 3. The termination was effected before investigation, the penalty is excessive.

Please specify the relief that the employee is seeking by this appeal (continue on additional pages if necessary):

Reinstatement back pay, a letter of apology, clean personnel file, attorney's fees.

Signature: [Signature] Date: 09/11/2010
Employee or Representative

White Copy - Return to: State Human Resources Director
Office of Human Resources
8301 Parklane Road, Suite A220
Columbia, South Carolina 29223

Yellow Copy - Keep for your file

State Human Resources Regulations

SCDOT DISCIPLINARY ACTION POLICY

THE LANGUAGE USED IN THIS DOCUMENT DOES NOT CREATE AN EMPLOYMENT CONTRACT BETWEEN THE EMPLOYEE AND THE AGENCY. THIS DOCUMENT DOES NOT CREATE ANY CONTRACTUAL RIGHTS OR ENTITLEMENTS. THE AGENCY RESERVES THE RIGHT TO REVISE THE CONTENT OF THIS DOCUMENT, IN WHOLE OR IN PART. NO PROMISES OR ASSURANCES, WHETHER WRITTEN OR ORAL, WHICH ARE CONTRARY TO OR INCONSISTENT WITH THE TERMS OF THIS PARAGRAPH CREATE ANY CONTRACT OF EMPLOYMENT.

SCOPE AND PURPOSE

This sets forth the rules, procedures and responsibilities of the Department of Transportation for disciplinary actions.

STATEMENTS OF POLICY

- A. Standard ranges of penalties and uniform administration of remedial action have been established for various types of unacceptable and undesirable conduct. To ensure that disciplinary actions taken against employees in similar situations are consistent, each supervisor and employee shall be made aware of the disciplinary action policy. It is most difficult to be all-inclusive or to assign a degree of severity to the various offenses. In such cases, the supervisor(s) must rely on judgment to arrive at the proper disciplinary action. (This policy does not apply to probationary employees who may be disciplined at the Agency's discretion.)

Disciplinary Action with the exception of termination and actions taken under the Department's Alcohol and Controlled Substance Policy will remain in effect and count as an accumulative offense in accordance with the following:

1. Oral and written reprimand - 12 months.
2. Suspension, Reassignment and Demotion - 24 months.

- B. Line of Authority for Administering Disciplinary Actions:

Oral and written reprimands may be administered by the immediate supervisor. The immediate supervisor is to submit all recommendations for reassignment, demotion, suspension and termination through channels to the Director or his/her designee for approval.

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C: Disciplinary Fact Finding Committee:

Each division head will have the option of appointing a Disciplinary Fact Finding Committee for the purpose of reviewing all facts surrounding the offense in order to make a recommendation to the division head. A Disciplinary Fact Finding Committee should only be appointed when the disciplinary action being recommended by the employee's supervisor(s) is demotion, reassignment, suspension or termination. The Committee in its review and investigation, may schedule informal interviews with the employee or witnesses, but is not authorized to conduct formal hearings.

PROCEDURE FOR ADMINISTERING DISCIPLINARY ACTION:

A. Oral Reprimands:

Many disciplinary problems of minor nature can be resolved by means of an oral reprimand. When disciplinary action requiring an oral reprimand is necessary, the supervisor shall discuss the problem with the employee and do the following:

1. Complete in detail a HR-3, Disciplinary Transaction Form.
2. Present and discuss the HR-3 with the employee.
3. Allow the employee to give the reasons for his/her action.
4. Explain to the employee why his/her behavior has not been acceptable.
5. Make suggestions for corrections or improvement.
6. Advise employee what more stringent disciplinary action will be taken if correction or improvement is not made.
7. Retain a copy of the HR-3 and forward the original containing the signature of the supervisor and the signature of the employee, if obtained, through channels to the Human Resources Office to be included in the employee's permanent personnel file.

B. Written Reprimands:

When disciplinary action requiring a written reprimand is necessary, the supervisor shall do the following:

1. Complete in detail a HR-3, Disciplinary Transaction Form, to include all pertinent information.
2. Review the written reprimand with the next level of supervision to determine if he/she concurs with the contents of the written reprimand and the action being taken. If the next higher level supervisor disagrees, they should jointly determine what appropriate action should be taken.

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3. Present and discuss the written reprimand with the employee. Tell the employee exactly why he/she is being disciplined and what action he/she can take to improve or correct his/her behavior.
4. Advise the employee that if further disciplinary action becomes necessary, it may lead to a more severe disciplinary action up to and including termination.
5. Retain a copy of the HR-3 and forward the original containing the signature of the supervisor and the signature of the employee, if obtained, through channels to the Human Resources Office to be included in the employee's permanent personnel file.

C. Suspension, Reassignment and Demotion:

Much thought and consideration should be given and all circumstances should be weighed carefully before suspending, reassigning or demoting an employee. If an employee is suspended and later proved not at fault, he/she shall be reinstated to a comparable position, and receive his/her regular rate of pay for time lost.

When disciplinary action requiring suspension, reassignment and/or demotion is necessary, the supervisor shall do the following:

1. Prepare the HR-3, Disciplinary Transaction Form, reflecting suspension, reassignment, and/or demotion and outline in detail the reasons for the disciplinary action, and in the case of suspension, the exact dates and time of suspension.
2. Review the HR-3 with the next level of supervision to determine if he/she concurs with the disciplinary action being taken. If the next higher level supervisor disagrees, they should jointly determine what appropriate action should be taken.
3. Attach to the HR-3 any additional documentation deemed necessary and forward the original through channels to the Human Resources Office. This paperwork must be submitted at least seven work days prior to the effective date of the recommended action in order to give sufficient time for approval by the Director or his/her designee.
4. After receipt of the approved HR-3 and Personnel Advice, present and discuss the written notice of suspension, reassignment and/or demotion in detail with the employee. Tell the employee exactly why the disciplinary action was taken and what action he/she can take to improve or correct his/her behavior.
5. Advise the employee that if further disciplinary action becomes necessary, it may lead to termination.

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6. Retain a copy of the HR-3 and immediately forward the original containing the signature of the employee, if obtained, through channels to the Human Resources Office to be included in the employee's permanent personnel file.

Exception: When a violation is of a severe nature and it would be in the best interest of everyone to remove the employee from the premises, and the offense calls for suspension, the supervisor may suspend an employee immediately with the understanding that final approval must be given by the Director or his/her designee.

D. Termination:

When disciplinary action requiring termination is necessary, the supervisor shall do the following:

1. Prepare a HR-3, Disciplinary Transaction Form, that outlines the reasons for termination.
2. Present the HR-3 to the next level of supervision for his/her concurrence. If the next level of supervision disagrees, they should jointly determine what appropriate action should be taken.
3. Attach to the HR-3 any additional documentation deemed necessary and forward the original through channels to the Human Resources Office. This paperwork must be submitted at least seven work days prior to the effective date of the recommended action in order to give sufficient time for approval by the Director or his/her designee.
4. After receipt of the approved HR-3 and Personnel Advice, present and discuss the termination with the employee. (NOTE: If an employee has been suspended pending approval of termination, a copy of the approved HR-3 and Personnel Advice shall be mailed certified to the employee.)
5. Retain a copy of the HR-3 and immediately forward the original containing the signature of the employee, if obtained, through channels to the Human Resources Office to be included in the employee's permanent personnel file.

Exception: When a violation is of a severe nature and the offense calls for termination, the supervisor may suspend an employee immediately and advise him/her that termination will be recommended and is pending approval of the proper authority.

DISCIPLINARY ACTION GUIDELINES

It is not possible to list all acts and omissions which may result in disciplinary action. The disciplinary action that is appropriate for any particular misconduct depends upon a number of factors including but not limited to the length of the employee's service, the quality of that

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service, the employee's prior disciplinary record, the seriousness of the misconduct, and the impact of the misconduct on others. The following list is merely a guideline of some of the more obvious types of misconduct and the probable disciplinary action which may result from them.

HOWEVER, the disciplinary action that is administered for any particular act or acts of misconduct rests in the sole discretion of the Director or his/her designee. Suspensions, terminations, demotions and involuntary reassignments are subject to review under the State Employee Grievance Procedure Act in accordance with the provisions of that Act and the Department's internal grievance procedure.

*** All performance related problems should be addressed by the guidelines established in the Employee Performance Management System.***

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-20-

OFFENSE	FIRST OCCURRENCE	SECOND OCCURRENCE	THIRD OCCURRENCE	FOURTH OCCURRENCE
Any Accumulation Within a 12-month Period of 3 Different Offenses Where the 1st Occurrence Calls for an Oral to Written Reprimand	5 Day Suspension	Termination		
Any Accumulation Within a 24-month Period of 3 Different Offenses Where the Occurrence Calls for Suspension, Reassignment, or Demotion	Termination			
Arrested or Indicted for Alleged Violation of Federal or State Criminal Laws	When an employee is arrested for any offense other than a minor traffic offense, the supervisor should immediately conduct an investigation. Depending on the severity of the offense, the supervisor may recommend from an oral reprimand to termination. Should the supervisor deem it necessary, the employee may be suspended immediately pending further investigation. An employee who is placed on leave of absence due to arrest or who is suspended as a result of the filing of an indictment or information may be terminated before disposition of the charge(s) against him/her and notwithstanding that (1) the charge(s) is ultimately dismissed or dropped, or (2) the employee is acquitted if the Director or his/her designee, after investigation, determines that the charge(s) is true.			
Conviction of Violation of Federal or State Criminal Laws	Oral Reprimand to Termination	Written Reprimand to Termination	5 Day Suspension to Termination	Termination
Destruction, Alteration, or Falsification of Records	Oral Reprimand to Termination	5 Day Suspension to Termination	Termination	
Engaging in Unlawful Work Stoppages, Slowdowns or Strikes	Written Reprimand to Termination	5 Day Suspension to Termination	Termination	
Excessive Excused Absenteeism	Oral Reprimand	Written Reprimand	5 Day Suspension	Termination
	(Action must be taken in accordance with the Americans With Disabilities Act and the Family Medical Leave Act. Please consult the Human Resources Office prior to taking any action.)			
Excessive or Abusive Use of Sick Leave	Oral Reprimand	Written Reprimand	5 Day Suspension	Termination
	(Action must be taken in accordance with the Americans With Disabilities Act and the Family Medical Leave Act. Please consult the Human Resources Office prior to taking any action.)			
Excessive Use of Telephone for Personal Matters	Oral Reprimand	Written Reprimand	5 Day Suspension	Termination
Failure to Report for Work and Not Notifying Supervisor for One (1) Day	5 Day Suspension	Termination		
Failure to Report for Work and Not Notifying Supervisor for Two Days or More	Termination			

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State Human Resources Regulations

OFFENSE	FIRST OCCURRENCE	SECOND OCCURRENCE	THIRD OCCURRENCE	FOURTH OCCURRENCE
Fighting, other than Reasonable Defense to an Unprovoked Attack	5 Day Suspension	Termination		
Gambling During Work Hours	Written Reprimand	5 Day Suspension	Termination	
Habitual Tardiness or Failure to Observe Assigned Work Hours	Oral Reprimand	Written Reprimand	5 Day Suspension	Termination
Horseplay	Oral Reprimand	Written Reprimand	5 Day Suspension	Termination
Improper Conduct	Oral Reprimand to Termination	Written Reprimand to Termination	5 Day Suspension to Termination	Termination
Insubordination	Written Reprimand to 5 Day Suspension	5 Day Suspension to Termination	Termination	
Interference with Other Employee's Work	Oral Reprimand	Written Reprimand	5 Day Suspension	Termination
Leaving Work Station Without Authorization	Written Reprimand	5 Day Suspension	Termination	
Loafing	Oral Reprimand	Written Reprimand	5 Day Suspension	Termination
Malicious Use of Profane/Abusive Language to Others	Oral Reprimand to 5 Day Suspension	Written Reprimand to Termination	5 Day Suspension to Termination	Termination
Mishandling of Department Funds or Documents	Written Reprimand to Termination	5 Day Suspension to Termination	Termination	
Negligence in Following Rules, Regulations, or Policies	Oral Reprimand to Written Reprimand	Written Reprimand to 5 Day Suspension	5 Day Suspension to Termination	Termination
*Negligent Authorized Operation of a State Vehicle Resulting in an Accident or Personal Injury	Oral Reprimand to 5 Day Suspension	Written Reprimand to Termination	5 Day Suspension to Termination	Termination
Negligent or Willful Destruction of or Damage to State Property or Equipment	Written Reprimand to 5 Day Suspension	5 Day Suspension to Termination	Termination	
Operation of a State Vehicle or Equipment without required Valid License	30 Day Suspension to Termination	Termination		
Refusal to Cooperate with Administrative Investigation or to Answer a Work-Related Question or Inquiry	5 Day Suspension to Termination	Termination		
Reporting to Work Under the Influence of or Using Alcoholic Beverages or Illegal Drugs on the Job	Refer to SCDOT Alcohol and Controlled Substances Policy. (Action must be in accordance with the Act on Alcoholism and/or the Drug Free Workplace Act. Employee should be advised of available help sources.)			
Sexual Harassment	Written Reprimand to Termination	5 Day Suspension to Termination	Termination	(REFER TO DEPARTMENT'S SEXUAL HARASSMENT POLICY)
Sleeping or Appearing to be Sleeping While on Duty	Written Reprimand to 5 Day Suspension	5 Day Suspension to Termination	Termination	

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State Human Resources Regulations

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OFFENSE	FIRST OCCURRENCE	SECOND OCCURRENCE	THIRD OCCURRENCE	FOURTH OCCURRENCE
Stealing State Property or While on State Property	Termination			
Suspended Pending Investigation	Where there is reason to believe that an employee may be guilty of an act of a severe nature, including by not limited to theft or mishandling of Department funds, and it is determined by the supervisor that it would be in the best interest of all concerned to remove the employee from the premises, the employee may be suspended immediately pending the outcome of an internal investigation. On suspensions of this nature, a decision as to intermediate or final action as a result of the internal investigation shall be made within fourteen (14) calendar days of the date of suspension.			
Unauthorized Distribution of Written or Printed Material of Any Kind	Written Reprimand	5 Day Suspension	Termination	
Unauthorized Leave	5 Day Suspension	Termination		
Unauthorized Possession of Firearms on the Job	Termination			
Unauthorized Release of Confidential Information	Written Reprimand to Termination	5 Day Suspension to Termination	Termination	
Unauthorized Solicitation or Sales on State Premises	Written Reprimand	5 Day Suspension	Termination	
Unauthorized Use of State Equipment or Property	Written Reprimand	5 Day Suspension	Termination	
Unauthorized Use of State Equipment or Property for Personal Gain	5 Day Suspension to Termination	Termination		
*Violation of Traffic Laws in a State Vehicle	Oral Reprimand to Termination	Written Reprimand to Termination	5 Day Suspension to Termination	Termination
Willful Violation of Rules, Regulations, or Policies	5 Day Suspension to Termination	Termination		
Working on Personal Jobs During Work Hours	Written Reprimand	5 Day Suspension	Termination	

*Violation of these offenses could also affect an employee's privilege to drive a State Vehicle under the Department's Fleet Safety Program.

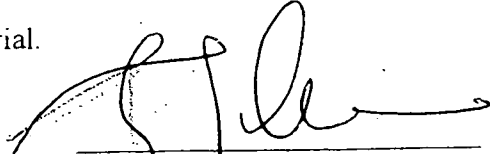
THE DIRECTOR OR HIS/HER DESIGNEE MAY TAKE LESS SEVERE OR MORE SEVERE DISCIPLINARY ACTION THAN THAT INDICATED ABOVE, INCLUDING TERMINATION, IF, IN HIS/HER SOLE JUDGMENT, HE/SHE DEEMS A DIFFERENT DISCIPLINARY ACTION APPROPRIATE.

July 1, 2001

CERTIFICATE OF COUNSEL

I herby certify that the foregoing Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

April 17, 2013



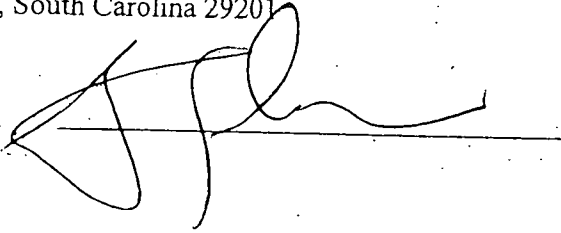
Allan R. Holmes
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I this day served the Record on Appeal in the matter of Mohammed Vedad, Appellant, v. South Carolina Department of Transportation, Respondent, S.C. Court of Appeals, No. 2012-212952, by sending a copy, first class mail, to the following:

Natalie J. Moore, Esq.
Office of General Counsel
955 Park Street, Suite 343
Columbia, South Carolina 29201

DONE this 17th day of April, 2013.

A handwritten signature in black ink, appearing to be "N. Moore", is written over a horizontal line.