

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Judge

Case No. 14-ALJ-30-0538-AP

William Henry Chapman, ... Appellant,

v.

South Carolina Department of Social Services, ... Respondent.

FINAL BRIEF OF RESPONDENT

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Statement of the Case

The Respondent adopts as its statement of the case, paragraphs 1-6 of the "Findings of Fact" set forth in the June 16, 2015 Final Order and Decision of the Administrative Law Court, the Honorable Carolyn C. Matthews, in No. 14-ALJ-30-0538-AP; the underlying case on appeal in this matter. (R. p. 1, lines 10-18, p.2, p. 3, and p. 4, lines 1-5) To the extent that Appellant's statement of the case is inconsistent with the findings set forth by the Administrative Law Court, Respondent contests any such inconsistent matter.

Argument

I. Appellant failed to exhaust administrative remedies with the Respondent in accordance with the requirements of the State Employee Grievance Act.

In his Initial Brief, Appellant argues that he has exhausted his administrative remedies as required under the State Employee Grievance Act and that he is in full compliance with the same. Appellant then asserts, in apparent reference to the Analysis provided by the State Human Resources Director in his Final Opinion (R. p. 12, lines 16-32), that the analysis "omits any mention of the critical events which occurred between the June 3, 2014, notification to Appellant that his employment had been terminated and the June 20, 2014, submission of the faxed DSS Form 1449." (Sic) (See Appellant's Brief at p. 6)

What Appellant conveniently omits from his argument is that the State Human Resources Director in the same Final Opinion, in his Statement of Events, found as follows:

2. by letter dated June 3, 2014, Ms. Kristen L. Johnson, M.A. HRM, Respondent's Employee Relations Specialist, advised Appellant that "[e]mployees must initiate a grievance within 14 calendar days of the effective day of the grievable action." [Emphasis in original.] **In addition, Ms. Johnson provided Appellant with DSS Form 1449, Employee Grievance and Appeal Form and a copy of Respondent's Human Resources Policy and Procedure Manual, Chapter 6, Procedure for Grievance and Appeal...** (R. p. 11, lines 15-20) (Emphasis supplied)

Accordingly, while Appellant expends extensive effort asserting that his Counsel's letter to the Clarendon County Interim Director dated June 12, 2014 should have been considered as having initiated his grievance, Appellant does not address the fact that he was in possession not only of the required DSS Form 1449 on June 3, 2014 but, as well, a copy of the DSS Human Resources Policy and Procedure Manual provisions that described specifically the time frame and other essential aspects of properly initiating a grievance. Appellant cannot rely upon his lack of diligence in accessing materials made

available to him at the time of his termination of employment to support a claim that a non-compliant and untimely effort by his counsel should override the clear requirements of the Respondent's policy.

Appellant also asserts that because the Division of State Human Resources (DSHR) revised its "model" policy effective April 8, 2013, this Court should now reevaluate whether the DSS internal policy should have been given effect at the time of his termination, which was effective after the date of the effective date of the model policy. (See Appellant's Brief at p. 9)

Appellant in his assertion neglects the fact that the DSHR provided more than one revised "model" policy in April 2013 (See <http://www.admin.sc.gov/humanresources/agency-information/policy-and-programs/model-policies#Grievance>, last accessed September 16, 2015) and that the documentation he references is exactly that, a "model policy," having no effect on the terms of the DSS policy.

Appellant further argues that "neither the enabling statute, the Model Policy nor the Respondent's Manual uses the mandatory term 'shall' with regard to use of DSS Form 1449 when filing an employee grievance; instead, all documents use the permissive term 'must' when referring to the subject provision." (See Appellant's Brief at p. 9) Appellant's understanding of mandatory, as opposed to precatory, language is misplaced, however. The word "must," notwithstanding Appellant's contrary understanding, is mandatory language, requiring specific conduct and is typically used interchangeably with the word "shall," although some legal writing scholars suggest eliminating the use of the word "shall" in favor of "must." (See <http://iln.isba.org/2009/11/25/must-vs-shall>, last accessed September 16, 2015)

Appellant further cites *Trowell v. South Carolina Department of Public Safety* (See Appellant's Brief at p. 11) as supportive of his failure to properly file notice of his internal grievance with DSS. Trowell, however, is inapposite to the issues currently before this Court. In that case, Trowell, a South Carolina State Trooper, filed an internal grievance against his employer, the South Carolina Department

of Public Safety ("Department"). Notice of the Department's decision regarding Trowell's Step II Grievance was initially sent to Trowell's attorney via facsimile on February 2, 2005, and the cover sheet contained a notation explaining the original letter would be sent subsequently by certified mail. The certified letter advising of the Step II decision was received and signed for on February 7. Eight days later, on February 15, Trowell's attorney faxed Trowell's State Appeal Form to the State Human Resource Director ("Director") indicating his desire to appeal the Department's final decision. The Department's internal policy related to appealing the outcome of an internal grievance proceeding provided that an employee could appeal the final decision of the agency, and that the appeal had to "be in writing and submitted to the State Human Resources Director within ten (10) calendar days of receipt of the Final Agency Decision...." (Emphasis supplied)

The State Human Resources Director held Trowell's appeal was not timely filed, determining that the fax notification started the ten day time frame during which the appeal had to be filed. This Court, however, disagreed reversing the Director's decision and holding that because facsimile messages are not ordinarily used to effect notice of a final decision by a department, agency, or court, notice of the Department's internal decision was not effected until the certified letter was received.

At footnote 5 of its decision, this Court noted that under the South Carolina Rules of Civil Procedure, Rule 5(b) (1), service is effected by delivering a copy of a decision to an individual or by mailing the same to a last known address or, under the Administrative Procedures Act, by providing the final decision or order either personally or by mail. In either eventuality, the problem in Trowell related to determining when Trowell, through his attorney, had received notice of the Department's final decision for purposes of calculating the time frame for filing his appeal.

The Trowell case has no precedential value for the present matter inasmuch as there is no dispute whatsoever that notice of the agency's final action was delivered to the Appellant **by hand** on June 3, 2014 and that he was also provided, at his own request, that same date, a copy of the DSS Form

1449 which was required to initiate his grievance, as well as a copy of Chapter 6 of the DSS Human Resources Policy and Procedure Manual relating to the requirements for filing a grievance. The mandatory language of the DSS Human Resources Policy and Procedure Manual required that Appellant's grievance be initiated by submitting the form and not through other means. By failing to do so, Appellant did not comply with either DSS policy or the State Employee Grievance Act.

II. Appellant's failure to file his grievance in accordance with clearly established statutory and policy requirements precludes his now asserting a claim of estoppel against Respondent.

Estoppel is an equitable doctrine. Courts apply the doctrine of equitable estoppel when one party, "by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." [See *State Accident Fund v. South Carolina Second Injury Fund*, 388 S.C. 67, 693 S.E.2d 441(2010), quoting *Rushing v. McKinney*, 370 S.C. 280, 293, 633 S.E.2d 917, 924 (Ct.App.2006)]

Similarly, laches is an equitable doctrine that may be stated to involve "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." [See *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)]

In the present action, Appellant alleges that "estoppel by laches has attached in this case and that he has been prejudiced by the unreasonable and negligent delay of the Defendant in its administration of the Act." (Sic) (See Appellant's Brief at p. 12)

It is altogether unclear from Appellant's brief precisely how his assertion of the defense of laches or the doctrine of estoppel fits into the established facts of this case or in what fashion the "Defendant" delayed "administration of the Act." First, this appeal originates from an action at law and Appellant has only now raised equitable grounds for the first time in the present appeal. Second, there has been no showing in the facts asserted or established below that the Respondent has in any fashion

either concealed any material fact that would have precluded the Appellant from exercising his grievance rights in an appropriate fashion or that Respondent has neglected “to do in law what should be done.”

While Appellant correctly points out that in order to prove a defense of laches, “the burden is on the respondent to establish (1) delay, (2) unreasonable delay, and (3) prejudice,” (See Appellant’s Brief at p. 17), it is manifestly clear that the Appellant, by his own neglect and delay, failed to initiate the grievance promptly. As noted previously, the record in this matter clearly shows that the Appellant was in possession of the required DSS form, and the necessary DSS policy and instructions, to do so on June 3, 2014 when he was advised of his termination. That he did not properly do so is through no fault of the Respondent. For Appellant to suggest that Respondent has, in some unexplained way, “deceived” the Appellant “into exhausting his administrative remedies within the Respondent Agency” (See Appellant’s Brief at p. 15) is nonsensical inasmuch as Appellant never took the necessary steps to properly initiate the administrative grievance process. Had Appellant, or his counsel, simply reviewed the DSS form and policy manual provisions hand delivered by the Respondent on June 3, 2014 when Appellant’s termination was implemented, Appellant’s grievance rights would have been secured and this appeal supported. That was not the case, however, and through the lack of diligence on the part of Appellant, or his counsel, he failed to secure administrative review of his termination.

III. The Court should affirm the prior orders in this matter based upon the grounds appearing in the Record on Appeal.

Through the considered and detailed analyses of both the State Human Resources Director and the Administrative Law Court, Appellant has been determined to have failed to comply with the mandates of both the State Employee Grievance Act (S.C. Code Ann. § 8-17-310 *et seq.*) and the requirements of DSS Policy in properly initiating his purported grievance. The grounds for their determinations that Appellant did not exhaust his administrative remedies and that he is precluded

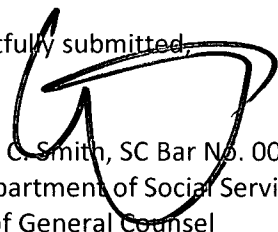
from seeking judicial review are set forth in the present Record on Appeal and should be affirmed.

Pursuant to its authority under Rule 220, SCACR, this Court should affirm the Final Order and Decision of the Administrative Law Court based upon the grounds appearing in the Record on Appeal.

Conclusion

For the reasons herein stated, the Respondent requests that this Court uphold the decision of the Administrative Law Court and deny the relief requested by the Appellant.

Respectfully submitted,



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November 17, 2015

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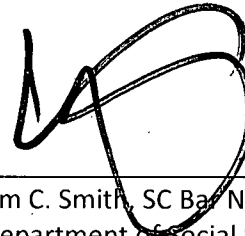
PROOF OF SERVICE AND CERTIFICATION OF COMPLIANCE WITH SCACR 211(b)

I certify that I have served the Respondent's Final Brief, which I hereby certify to be in compliance with SCACR 211(b), upon the Honorable Jenny Abbott Kitchings, Clerk of the South Carolina Court of Appeals, by depositing sixteen (16) copies of the same with the United States Postal Service in Columbia, South Carolina, postage prepaid, on November 17, 2015, addressed as follows:

Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

I further certify that I have also served the Respondent's Final Brief upon the Appellant's attorney of record by depositing one (1) copy of the same with the United States Postal Service in Columbia, South Carolina, postage prepaid, on November 17, 2015, addressed as follows:

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