

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Appellate Case No. 2015-001548

RECEIVED

MAY 30 2017

SC Court of Appeals

William Henry Chapman, Appellant,

v.

South Carolina Department of Social Services, Respondent.

APPELLANT'S RETURN TO
RESPONDENT'S PETITION FOR REHEARING

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Pursuant to Rule 240(e), South Carolina Appellate Court Rules, Appellant William Henry Chatman, hereby submits his Return to Respondent's Petition for Rehearing filed May 18, 2017, in the within case.

STATEMENT OF THE ISSUES ON APPEAL

- I. Whether or not the Appellant failed to exhaust administrative remedies with the Respondent in accordance with the requirements of the Act
- II. Even if Appellant had failed to exhaust his administrative remedies the Respondent, by its own actions, constructively waived the time line under consideration and it is, therefore, estopped from barring the Appellant from a hearing on the merits of the case

STATEMENT OF THE CASE

Appellant was terminated from employment with the Clarendon County Division of the South Carolina Department of Social Services (DSS) on June 3, 2014. The termination letter was hand-delivered over the signature of Robin H. Layton, Interim Director of Clarendon County, and the last paragraph stated: "You may contact the Office of Human Resource Management at (803) 898-7315 regarding your possible grievance rights." (*Robin H. Layton's Letter dated June 3, 2014, R. p. 212*)

Appellant retained counsel and by letter dated June 12, 2014, Appellant's attorney advised Ms. Layton that he represented the Appellant and stated: "Pursuant to § 600 of the South Carolina Department of Social Services grievance procedure, I desire to grieve the termination handed down on June 3, 2014. Please advise as to date and time as to any proceedings." (*Dwight C. Moore's Letter dated June 12, 2014, R. p. 213*)

Appellant's DSS Form 1449 was transmitted under cover of a letter dated June 20, 2014, sent by United States Postal Service (USPS), facsimile and e-mail addressed to Ms. B. Glenise Elmore, Employee Relations Director of Respondent's Office of Human Resources, by Crystal Stokes, Paralegal to Appellant's counsel, with the following message:

Dear Ms. Elmore:

Please find enclosed the DSS Form 1449 which you requested in the above-referenced matter. Please let me know if there is anything further required from us at this time. ...

The DSS Form 1449 was signed by Appellant and dated June 20, 2014. (*Fax Report, Fax Cover Sheet, and Crystal C. Stokes' Letter, and DSS Form 1449, all dated June 20, 2014, R. pp. 214-217*)

Respondent's Director of Human Resource Management, Funneaser "Neisie" Jacobs sent a letter dated June 25, 2014, by postal service and e-mail addressed to Ms. Robin Holly Layton, County Director, Clarendon County DSS, and to Mr. William Chapman, 214 Lantern Lane, Manning, SC 29102, the pertinent part of which stated:

Dear Mr. Chapman and Ms. Layton:

Per policy, the grievance for Mr. Chapman will be forwarded to the Reviewer or Designee to initiate Step Two of the grievance process. Voluntary mediation has failed at this time; however, the option remains open for both parties for the duration of the Agency grievance process.

In accordance with Chapter 6 (606), Procedure to File a Grievance, Step One, the grievance has been assigned to grievance reviewer, Ms. Leigh Bolick, Director of Child Care Service. Please send documents concerning this grievance to the reviewer by **Wednesday, July 9, 2014** at the following address:

Ms. Leigh Bolick, Director of Child Care Service
Department of Social Services,
Post Office Box 1520
Columbia, South Carolina 29202-1520

The letter bears a "cc" notation to Mr. William Smith, Esq., DSS Office of General Counsel, and Moore Law Firm, LLC, Attn: Crystal Stokes, Paralegal. (*Funneaser "Neisie" Jacobs' Letter dated June 25, 2014, R. p. 218-219*)

By letter dated July 7, 2014, and received by Appellant's Counsel on July 9, 2014, Funneaser "Neisie" Jacobs, the Director of Human Resources Management Division, E-mailed and sent by USPS a letter to Ms. Leigh Bolick, Director of Child Care Services, enclosing the Grievance and Appeal forms for Mr. Chapman and giving the instructions and procedure for handling Appellant's grievance. The letter reflected "cc" to Appellant, Moore Law Firm, LLC, Ms. Robin Layton, County Director, Clarendon County DSS, and Mr. William Smith, Esq., DSS Office of General Counsel. (*Funneaser "Neisie" Jacobs' Letter dated July 7, 2014, R. p. 220*)

Ms. Amber Gillum, Acting State Director, addressed a letter dated July 25, 2014, "sent via certified mail" to Mr. William Chapman, transmitting the Decision of the State Director (DSS Form 1449-2, Grievance Decision Form). Ms. Gillum informed the Appellant that he may appeal to the State Employee Grievance Committee through the Director of Human Resources at the Office of Human Resources and provided the street address. She also advised him as follows: "This appeal must be in writing and made within ten (10) calendar days of receipt of this decision or within fifty-five (55) calendar days after the grievance was filed with the Agency, whichever occurs later." The letter contained a "cc" notation to Robin Layton, County Director, Clarendon County DSS, William Smith, Esq., Office of General Counsel, and Dwight C. Moore, Esq., Moore Law Firm, LLC. Appellant's counsel received the letter on July 29, 2014. (*Amber Gillum's Letter and DSS Form 1449-2, both dated July 25, 2014, R. p. 221-222*)

Appellant's counsel wrote a letter on Moore Law Firm, L.L.C., letterhead dated August 4, 2014, to the State Employee Grievance Committee, Director of Human Resources, at the address furnished by Ms. Gillum. The pertinent part of the letter stated: "Please be advised that pursuant to this letter, I wish to appeal the decision handed down by Ms. Gillum on or about July 25, 2014. Please refer all correspondence to the address indicated above." A "cc" notation

indicated that copies of the letter were sent to Amber Gillum, SCDSS Acting State Director and Robin Layton, Clarendon County D9S County Director. (*Dwight C. Moore's Letter dated August 4, 2014, R. p. 223*)

Carrie Coats, of the Alternative Dispute Resolution Program, wrote a letter on SC Budget And Control Board, Human Resources Division, letterhead dated August 5, 2014, addressed to Appellant's Counsel, stating that "the enclosed form" was to be completed and returned to their office at 8301 Parklane Road, Suite A220, Columbia, South Carolina 29223, within five (5) days of receipt. Counsel received the letter on August 6, 2014. No form was enclosed. (*Carrie Coats' Letter dated August 5, 2014, R. p. 224*)¹

On August 11, 2014, Ms. Carrie Coats transmitted the following message to Appellant's Counsel by fax.

Mr. Moore,

Please find attached the State Appeal Form. My apologies for the oversight in not including this last week. Please call 803-896-5300 if you have any additional questions.

Form GC101, State Employee Grievance Procedure State Appeal Form was included in the fax transmission. (*Two-page Fax dated August 11, 2014, including Form GC101-Revised 10-01-96 from Carrie Coats, R. pp. 226-227*)

Appellant's State Employee Grievance Procedure State Appeal Form was completed and the Form GC101 was returned. Appellant's Counsel received a document entitled "Confirmation of State Appeal Form" dated August 11, 2014, which stated:

The Office of Human Resources has received your State Employee Grievance Procedure State Appeal Form. A request will be made to the employing agency to send the documents relating to your appeal. All future correspondence sent to the Human Resources Division should be copied to the employing agency.

¹Page numbering error in Record on Appeal; disregard numbering on left side of page and Record Page Number 225 which should have been omitted.

If you have any questions, you may call the Human Resources Division at (803) 896-5300.

(State Appeal Form Confirmation dated August 11, 2014, R. pp. 228, 229, 230)

The Final Decision of Mr. Samuel L. Wilkins, State Human Resources Director, dated September 4, 2014, was received by Appellant's Counsel on September 8, 2014. The conclusion of the Human Resources Director was as follows:

Because Appellant failed to file a grievance with Respondent within 14 calendar days of the effective date of his termination, the State Human Resources Director has determined that the appeal must be denied. Since Appellant did not file a grievance with Respondent pursuant to time frames established by the Act, he failed to exhaust his administrative remedies, and the merits of the case were not reviewed.

This concludes the processing of the appeal.

(Final Decision of State Human Resources Director dated September 4, 2014, R. p. 12)

On September 18, 2014, Appellant filed and served his Request for Reconsideration of the Final Decision of the State Human Resources Director. On October 3, 2014, Counsel for DSS filed and served the Agency's Statement in Opposition to Appellant's Request for Reconsideration. By letter dated October 16, 2014, and received by Appellant on October 22, 2014, the State Human Resources Director advised Counsel for the Appellant and for DSS that he was upholding his Final Decision of September 4, 2014. *(Human Resources Director Samuel L. Wilkins' Letter dated October 16, 2014, R. p. 7)*

Appellant filed Notice of Appeal in the South Carolina Administrative Law Court on November 20, 2014. *(Notice of Appeal to the SC ALC filed November 20, 2014, R. 49)* On June 16, 2015, Administrative Law Court Judge Carolyn C. Matthews issued her Final Order and Decision in which she ordered that the Department's (DSS) decision stands and that the matter is

concluded. (*Final Order and Decision of ALC Judge Carolyn C. Matthews dated June 16, 2015, R. p. 1*)

Appellant filed Notice of Appeal in the South Carolina Court of Appeals on July 20, 2015. The case came on for Argument before a three-judge Panel of the Court of Appeals on February 13, 2017. In Opinion Number 5482 filed May 3, 2017, the Court of Appeals Reversed and Remanded the case to the Administrative Law Court based upon its finding that the Appellant had complied with the regulations applicable at the time of his grievance by initiating his grievance in his attorney's letter within the required fourteen-calendar-day limit. (*Opin. 5482, Law/Analysis*)

On May 18, 2017, Respondent filed a Petition for Rehearing by the Court *en banc* upon the following grounds:

- I. **The Court's reliance on selected language of S.C. Code Ann. § 8-17-330 as supporting the Appellant's position misconstrues the requirements of the statute read as a whole and ignores legislative intent**
- II. **The Opinion's reliance on selected language in the Grievance Procedure Model Policy as supporting the Appellant's position does not consider the policy fully and is misplaced.**

ARGUMENT

Respondent petitions the Court to rehear the matter *en banc* asserting the exceptional importance of the potential impact of the Court's ruling prospectively on other actions by agencies of the State of South Carolina.

With regard to Respondent's request for a rehearing *en banc*, Rule 219(a), SCACR, provides that "[a] hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." The

Respondent gives the potential impact of the Court's ruling prospectively on other actions by agencies of the State as the element of exceptional importance required for the Court to hear the case *en banc*. The Appellant disputes Respondent's apparent suggestion that other State agencies need and would receive further guidance from consideration of the issues raised in the Petition by convening the Court *en banc*. First, the reason stated does not rise to the level of exceptional importance such as to warrant consideration by the Court *en banc*. Second, the facts of the case will not change on rehearing. As the Court set forth in its Opinion, our case law has been considered, reconsidered and is unambiguous in its instructions to State agencies with regard to the prohibition against elevating form over substance in the implementation of statute, policy and procedure. See, *Gordon v. Busbee*, 367 S.C. 116, 120-121, 623 S.E.2d 857, 859-860 (Ct. App. 2006), *Reh'g denied Jan. 19, 2006, Cert. denied February 14, 2007.* Therefore, Respondent has failed to show the prerequisite merit in his request to have his Petition for Rehearing considered by the Court *en banc*.

I. The Court's reliance on selected language of S.C. Code Ann. § 8-17-330 as supporting the Appellant's position misconstrues the requirements of the statute read as a whole and ignores legislative intent

Respondent takes exception to the fact that the Court's Opinion references excerpts from § 8-17-330 as such relevant portions relate to its holding that the statute requires only that a grievance be initiated internally within fourteen calendar days. Respondent alleges that the cited provision, "in no apparent form or fashion, effectively renders meaningless the statutory mandate that that "[e]ach agency **shall** establish an agency employee grievance procedure that must be reduced to writing and submitted for approval to the Office of Human Resources." (Emphasis supplied)"

Section 8-17-330, in its entirety, provides as follows:

Each agency shall establish an agency employee grievance procedure that must be reduced to writing and submitted for approval to the Office of Human Resources. A copy of the approved agency grievance procedure must be made available to covered employees of the agency. 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, but the covered employee has the right to a representative, including counsel. When a final decision is rendered, it must be given to the covered employee or the employee's representative in writing. If the covered employee chooses to exercise the right to counsel, the employee does so at his own expense.

The procedure must provide that all grievances of agency actions affecting a covered employee must be initiated internally by such employee within fourteen calendar days of the effective date of the action and that the agency shall make a final decision on a grievance within forty-five calendar days of the filing of the grievance by the covered employee. Failure by the agency to make a final decision on the grievance within forty-five calendar days after the filing of the grievance is considered an adverse decision, and the covered employee may appeal thereafter to the State Human Resources Director. The internal time periods of the agency grievance procedure may be waived upon the mutual written agreement of both parties. The forty-five-calendar-day period for action by the agency may not be waived except by mutual written agreement of both parties. The time periods for appeal to the State Human Resources Director may not be waived.

A covered employee who wishes to appeal the decision of the agency grievance procedure to the State Human Resources Director shall file an appeal within ten calendar days of receipt of the decision from the agency head or his designee or within fifty-five calendar days after the employee files the grievance with the agency, whichever occurs later. The covered employee or the employee's representative shall file the request in writing with the State Human Resources Director. Failure to file an appeal with the State Human Resources Director within ten calendar days of the agency's final decision or fifty-five calendar days from the initial grievance, whichever occurs later, constitutes a waiver of the right to appeal.

An employee must not be disciplined or otherwise prejudiced in employment for exercising rights or testifying under these processes.

As used in this article, a covered employee may file a grievance or appeal concerning the following adverse employment actions: terminations, suspensions, involuntary reassignments, and demotions. Reclassifications are considered a grievance only if an agency or an appeal if the State Human Resources Director, determines that there is a material issue of fact that the action is a punitive reclassification. However, reclassifications, reassignments, and transfers within

the same state salary range are not adverse employment actions which may be considered grievances or appeals. Promotions are not adverse employment actions which may be considered grievances or appeals except in instances where the agency, or in the case of appeals, the State Human Resources Director, determines that there is a material issue of fact as to whether or not an agency has considered a qualified covered employee for a position for which the employee formally applied or would have applied if the employee had known of the promotional opportunity. For purposes of this article when an agency promotes an employee one organizational level above the promoted employee's former level, that action is not a grievance or appeal for any other qualified covered employee. Salary decreases based on performance are adverse employment actions that may be considered as grievances or appeals. 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.

A covered employee has the right to appeal to the State Human Resources Director an adverse employment action involving the issues specified in this section after all administrative remedies to secure relief within the agency have been exhausted.

S.C. Code Ann. § 8-17-330 (1986) as amended.

Respondent contends that "[t]he statutory language requiring that every agency to establish its own "internal grievance procedure" can only be read as clearly contemplating a legislative intention that different agencies will develop different procedures as appropriate for their operational needs to insure compliance with the minimal requirements set forth in the language of the statute."

The Court determined that "[n]either the statute nor the governing regulation requires an employee to initiate a grievance on a particular form; rather, only the Manual includes this requirement." Unquestionably, the enabling legislation empowered the Respondent to establish its own internal grievance procedure. Apparently, the analysis of the Court determined that the internal grievance procedure established by the Respondent did not contain the requirement that the Appellant initiate his grievance on a particular form. Under the argument presented in its

Petition, Respondent would have the Court read into the statute and the governing regulation a requirement that is nonexistent. “The Court will reject a statutory interpretation that would “lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.”” *Gordon v. Busbee*, 367 S.C. at 119, 623 S.E.2d at 859.

Appellant submits that the finding of the Court is supported by the facts, the law and the evidence.

II. The Opinion’s reliance on selected language in the Grievance Procedure Model Policy as supporting the Appellant’s position does not consider the policy fully and is misplaced.

Respondent argues that “irrespective of whether Appellant filed a DSS Form 1449 timely, as the Court has concluded he was not obligated to do, he did not comply with the requirements of either the DSS Manual or the Grievance Procedure Model Policy, which he cited for the Court as support for his position inasmuch as no written grievance was timely initiated with the DSS Human Resources Office.” (*Petition for Rehearing*, p. 5)

The Opinion of the Court states: “At the time of this action, Section 19-718.04(B) of the State Human Resources Regulations provided, “A covered employee must initiate a grievance in writing internally with the agency within 14 calendar days of the effective date of the employment action. 1 S.C. Code Ann. Regs. 19-718.04(B)(2011).” (Emphasis added)

Appellant’s grievance arose out of his termination on June 3, 2014. His grievance was governed by the foregoing procedure, which was in effect at the time of this action. The Court was careful to set forth in its opinion that, effective October 28, 2016, the regulation was amended to read as follows: “A covered employee must initiate a grievance in writing internally with the agency within 14 calendar days of the effective date of the employment action in

accordance with the agency's grievance policy. S. C. State Register Volume 40, Issue No. 10, eff. October 28, 2016) (Emphasis added)”

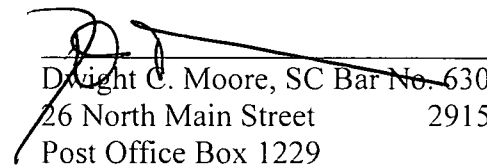
To follow Respondent's argument to its logical conclusion would lead one to the query of why was it necessary to amend the regulation to add “in accordance with the agency's grievance policy,” so as to incorporate the provisions of the policy into the regulation by reference. The logical answer is, as the Court determined, the requirement was non-existent at the time Appellant's grievance was initiated.

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to deny Respondent's Petition for Rehearing and affirm its Conclusion in Opinion No. 45482 reversing and remanding the case to the Administrative Law Court for proceedings consistent with the said Opinion.

Respectfully submitted,

MOORE LAW FIRM, L.L.C.


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Attorney for Appellant

May 26, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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MAY 30 2017
SC Court of Appeals

Appellate Case No. 2015-001548

William Henry Chapman, Appellant,

v.

South Carolina Department of Social Services, Respondent.

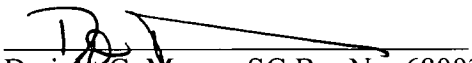
PROOF OF SERVICE

I certify that I have served the Appellant's Return to Respondent's Petition for Rehearing in the above-referenced case upon the Respondent, addressed to Respondent's attorney of record, by depositing a copy of the same in the United States Mail, postage prepaid, on May 26, 2017, addressed as follows:

William C. Smith, Esquire
Assistant General Counsel
South Carolina Department of Social Services
Office of General Counsel
Post Office Box 1520
Columbia, South Carolina 29202

May 26, 2017

MOORE LAW FIRM, L.L.C.


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Sumter, South Carolina 29151-1229
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May 26, 2017

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MAY 30 2017

SC Court of Appeals

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

Re: William Henry Chapman v. South Carolina Department of Social Services
Appellate Case Number: 2015-001548
Moore File Number: 4136

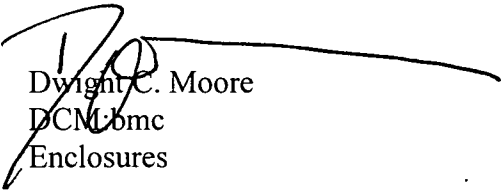
Dear Ms. Kitchings:

Enclosed for filing are the following documents in the above-referenced case:

1. The original and six copies of Appellant's Return to Respondent's Petition for Rehearing
2. Proof of Service

Also enclosed is a copy of each document. Please file-stamp these and return them to this office in the enclosed, self-addressed postage prepaid envelope. Under cover of a copy of this letter, copies of the Appellant's Return to Respondent's Petition for Rehearing and Proof of Service are being served upon Attorney William C. Smith, Counsel for the Respondent.

Yours very truly,


Dwight C. Moore
DCM/bmc
Enclosures

c: William C. Smith, Esquire
Assistant General Counsel
South Carolina Department of Social Services
Office of General Counsel
Post Office Box 1520
Columbia, South Carolina 29202

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- FedEx Standard Overnight Next business afternoon.* Saturday Delivery NOT available.
- FedEx 2Day Second business day.* Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx Express Saver Third business day.* Saturday Delivery NOT available.
- Packages up to 150 lbs.**
- FedEx First Overnight Earliest next business morning delivery to select locations.* Saturday Delivery NOT available.

4b Express Freight Service

- FedEx 1Day Freight Next business day.** Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx 2Day Freight Second business day.** Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx 3Day Freight Third business day.** Saturday Delivery NOT available.
- Packages over 150 lbs.**

5 Packaging

- FedEx Envelope* FedEx Pak* Includes FedEx Small Pak, FedEx Large Pak, and FedEx Sturdy Pak. FedEx Box FedEx Tube Other
- Declared value limit \$500.**

6 Special Handling and Delivery Signature Options

- SATURDAY Delivery NOT available for FedEx Standard Overnight, FedEx First Overnight, FedEx Express Saver, or FedEx 3Day Freight.
- No Signature Required Package may be left without obtaining a signature for delivery.
- Direct Signature Someone at recipient's address may sign for delivery. Fee applies.
- Indirect Signature If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only. Fee applies.

Does this shipment contain dangerous goods?

- One box must be checked.
- No Yes As per attached Shipper's Declaration. Yes Shipper's Declaration not required. Dry Ice Dry ice, 9, UN 1845 Cargo Aircraft Only
- Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box.

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