STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Clarence Frazier, Appellant, vs. South Carolina Department of Juvenile Justice, Respondent.	Docket No. 18-ALJ-30-0135-AP **FINAL ORDER**

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or court) pursuant to an appeal filed by Clarence Frazier (Appellant) challenging the decision of the State Employee Grievance Committee (SEGC or Committee). The Committee upheld the Appellant's termination by the South Carolina Department of Juvenile Justice's (DJJ or Respondent) upon finding that the Appellant failed to establish that his termination prejudiced his substantial rights and met one or more of the elements contained in Section 8-17-340(E)(1) of the South Carolina Code (2019). After careful consideration of the parties' briefs, the record, and the applicable law, the Committee's Final Decision is affirmed.

BACKGROUND

The Appellant was employed by the Respondent as a Correctional Officer from January 5, 2004, until July 27, 2010, when he was terminated, retroactive to June 10, 2010[1], for an incident of alleged misconduct in violation of departmental policies. At the time of his termination, the Appellant held the rank of Sergeant and worked at the Special Management Unit (Santee Unit) at DJJ's Broad River Complex in Columbia.

On June 3, 2010, the date of the alleged misconduct, the Appellant was the Sergeant in charge of the Santee Unit. That day, he encountered two (2) officers, Sergeant William Sumter and Sergeant Moses McFadden, escorting a juvenile to the Santee Unit who had assaulted a Juvenile Correctional Officer (JCO), JCO Fleming, at another location within the Broad River

[1] As discussed *infra*, the Appellant's termination was made retroactive to the date DJJ initially suspended his employment pending investigation into the incident.

Complex. The juvenile reported that, prior to escorting him to the Santee Unit, Sergeant McFadden smashed his head on the ground, causing his mouth to bleed.[2] The juvenile was reportedly being disrespectful and combative with officers over the course of these events. At or around this time, then-JCO Damieon Moody and JCO Jamile Rorie undertook the transport of the juvenile. What transpired next is disputed, however, the juvenile alleged that after he was placed in a small cell and while still in handcuffs, the Appellant and JCO Moody assaulted him – apparently in retaliation for attacking JCO Fleming earlier that day – causing injuries in and around the juvenile's face and head. Shortly thereafter, the juvenile was evaluated by a nurse at the infirmary and was found to have a broken tooth (with fragments of the tooth still lodged in his gums), a fractured nose, and abrasions about his face or neck. The Appellant denied any involvement in the assault.

Following this incident, and per agency policy, DJJ's then-Deputy Director for Rehabilitative Services Jerry Adger contacted the South Carolina Law Enforcement Division (SLED) to request that the incident be investigated. SLED Lieutenant Freddie Pough was assigned to the case and, on June 10, 2010, the Appellant was suspended pending the outcome of the investigation.

In addition to interviewing the juvenile victim,[3] Lieutenant Pough obtained written statements from three (3) other officers who were in the cell with the juvenile, JCO Moody and the Appellant at the time the alleged assault occurred. These statements corroborated the juvenile's allegation that JCO Moody and the Appellant assaulted him. Lieutenant Pough also reviewed surveillance video footage from the Santee Unit. The footage showed the handcuffed juvenile arriving at the Santee Unit escorted by officers, being escorted to his cell by five (5) officers, and an officer carrying a mop and bucket into and out of the juvenile's cell.[4] As a result of his investigation, on July 22, 2010, Lieutenant Pough sought and obtained two (2) arrest warrants for the Appellant, one for Assault and Battery by Mob, 3rd degree, and the other for Misconduct in Office. The Appellant was subsequently indicted by the Richland County Grand Jury on those charges.

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[2] It is unclear from the record whether the juvenile was still bleeding or whether he had any blood on his clothing or person from the earlier event when he arrived at the Santee Unit.

[3] Lt. Pough also attempted to interview the Appellant and JCO Moody; however, they reportedly both invoked their right to remain silent. Therefore, they were not interviewed by Lt. Pough as a part of his investigation.

[4] According to witness statements, the mop and bucket were retrieved, allegedly at the juvenile's request, to clean the cell floor of blood that the juvenile had spit on the ground during the earlier alleged assault by Sergeant McFadden.

On July 27, 2010, Deputy Director Adger terminated the Appellant's employment with DJJ for conduct violative of departmental policy. Specifically, the Appellant's termination letter states that his actions during the June 3, 2010 incident violated DJJ Progressive Employee Discipline Policy B-3.15, Item 13, "[a]buse, neglect, and/or exploitation (physical or psychological) of a juvenile resulting in physical or mental injury"[5]; Item 32, "[e]xcessive and/or inappropriate use of physical force and/or chemical force"; Item 40, "[f]ailure to carry out job responsibilities in security or non-security setting (failure can be related to non-compliance with agency's training requirements)"; Item 42, "[a]ssault on juvenile or other employee or person"; and Item 58, "[w]illful violation of written rules, regulations, policies, and/or local procedural guidelines."[6] Additionally, the letter stated that his conduct was also violative of DJJ's Use of Physical Force Policy H-3.12 for "physical force against a juvenile in an aggressive/non-defensive manner, for aggressive/non-defensive reasons, and/or as a means of punishment."[7] Deputy Director Adger reached this conclusion upon review of the video footage and witness statements, SLED's investigation report, and the Appellant's criminal charges, which he found provided sufficient evidence to terminate the Appellant for abusing the juvenile. However, he did not conduct a hearing or meet with the Appellant to allow him an opportunity to respond to these findings prior to terminating his employment, in accordance with departmental policy.[8]

On July 30, 2010, the Appellant filed a grievance on his termination with the Respondent. Following a hearing on September 8, 2010, DJJ's grievance panel unanimously voted on

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[5] According to DJJ's Alleged Abuse and Neglect of a Juvenile Policy I-3.1, physical abuse is defined as "hitting, striking, slamming, chocking, biting, kicking, slapping, pulling hair, paddling, spanking, spitting, or subjecting to extreme temperatures."

[6] The respective sanctions for a first violation of these policies are as follows: suspension to termination for Item 13, first offense; written reprimand to termination for Item 32, first offense; written reprimand or termination for Item 40, first offense; termination for Item 42, first offense; and written reprimand to termination for Item 58, first offense. However, the Respondent's disciplinary policy states that "[e]xtremely serious offenses may call for termination even in the absence of prior disciplinary actions."

[7] According to DJJ's Use of Physical Force policy H-3.12, Section (F)(2), an "employee can be disciplined for policy violations up to and including termination without waiting for the court system to dispose of any criminal charges and without compromising the criminal case because of management review and a criminal investigation are two separate and distinct processes."

[8] DJJ Investigations Policy I-3.5 (F)(3), states that:

> Prior to the issuance of disciplinary action, management will meet with the employee and allow the employee an opportunity to respond to the findings. At this point, the employee will be given procedural due process and may offer any explanation or mitigating circumstances that he/she feels may have played a role in the incident. This is the employee's chance to offer anything in his/her defense, and the manager should hear whatever the employee has to say, as long as it is offered in an appropriate manner.

September 13, 2010, to recommended that the Appellant's termination be upheld. Thereafter, on September 14, 2010, then-DJJ Chief of Staff Margaret Barber accepted that recommendation and upheld the termination.

On October 8, 2010, the Appellant appealed the Respondent's final decision on his grievance to the State Division of Human Resources (SDHR), requesting a hearing before the Committee. On October 28, 2010, however, the Respondent requested the Appellant's grievance be held in abeyance due to the pendency of his related criminal charges. The Director of SDHR then held the Appellant's grievance in abeyance pending disposition of those charges.

Over six (6) years later, on or around May 4, 2017, the Appellant's grievance was finally allowed to proceed following confirmation that his State charges had been *nol prossed*[9] and that no federal charges were pending against him. Accordingly, on February 14, 2018, the Committee held a hearing to determine whether DJJ properly terminated the Appellant and whether that termination should be upheld. The Appellant and the Respondent were both represented by counsel at the hearing. Additionally, former-JCO Moody testified on behalf of the Appellant at the hearing, and Lieutenant Pough and Deputy Director Adger testified on behalf of DJJ. During the hearing, the Appellant sought to offer evidence demonstrating that the criminal charges levied against him following the incident were specifically *nol prossed.* However, the Respondent objected to any reference to the precise disposition of the Appellant's criminal charges, and the Appellant was only permitted to testify that the charges against him had been resolved.

Following the hearing, on February 20, 2018, the Committee unanimously voted to uphold the Appellant's termination. Thereafter, the Committee issued its written Final Decision reflecting the same on March 12, 2018. In its Final Decision, the Committee found that "[b]ased on the documents, video, and testimony presented at the hearing, . . . substantial evidence [supports DJJ's] decision to terminate the Appellant." Specifically, the Committee concluded that, "while the video footage does not specifically show [the] Appellant strike the juvenile, it also does not exonerate [the] Appellant." It noted that the video showed "that the juvenile was escorted into the Santee Unit in a compliant manner and with no visible blood on his shirt," yet, sometime after the juvenile was placed in the cell, a mop was retrieved to reportedly clean blood from the cell. The Committee

[9] When a case has been *nolle prossed*, the prosecution has made a formal declaration of its intent not to prosecute the case further. *See* BLACK'S LAW DICTIONARY, *Nolle Prosequi* (10th ed. 2014). "It is a judicial determination in favor of [the] accused and against his conviction, but it is not an acquittal, nor is it equivalent to a pardon." *Id.* (citing 22A C.J.S. *Criminal* § 49, at 1 (1989)).

further noted that, subsequent to those events, the juvenile "received emergency medical care for a chipped tooth that was extracted, a laceration to his chin, bruising to his eye, some pain in his nose and surrounding area, and an abrasion and some pain over his collar bone," and underwent a CT scan that "revealed a cracked tooth and a mild fracture of the nasal bones" as well. Accordingly, in light of that evidence and the totality of the circumstances, the Committee determined that "a reasonable mind would conclude that the juvenile was assaulted while in the cell."

To that point, the Committee found "that the statements from [JCO Rorie, Sgt. Sumter, and Sgt. McFadden,] the three other officers present at the incident, all indicate that Appellant and Mr. Moody struck the juvenile in the cell while he was handcuffed." It noted that the Committee found those "statements to be more credible than [the] Appellant's statement and testimony when considering the totality of the other evidence." Consequently, the Committee concluded "that the three statements along with the video footage of the event provide substantial evidence that [the] Appellant did strike the juvenile" during the incident. Since the sanction guidelines for Items 13, 32, 40, 42, 58 of DJJ's Progressive Employee Discipline Policy B-3.15, *supra*, each allow for discipline up to and including termination for a first offense, the Committee, therefore, determined that "[DJJ] acted within the guidelines of its policy in terminating [the] Appellant's employment."

While the Committee considered and conceded the Appellant's claim that "[DJJ] management did not meet with Appellant prior to his termination in accordance with its Investigations Policy," it determined that the violation was harmless. In reaching this conclusion, the Committee found that the apparent procedural deficiency was cured by affording the Appellant an opportunity to be heard by management during DJJ's internal grievance process and during his appeal before the Committee. Moreover, it reasoned that, given the unique circumstances involved and the evidence available at the time, "[DJJ] had enough evidence to immediately terminate Appellant's employment" and, furthermore, that allowing the Appellant to return "to work could potentially expose [DJJ] to another similar situation." Accordingly, the Committee concluded that the Appellant failed to establish that his termination by DJJ erred under Section 8-17-340, or otherwise warranted reversal, and that the termination should therefore be upheld.

Thereafter, on April 5, 2018, the Appellant timely filed a Notice of Appeal with this court.

ISSUES ON APPEAL

I. Did the Committee err in not permitting the Appellant to introduce evidence as to the precise

disposition of his criminal charges stemming from the incident (i.e. that they were *nol prossed*)?

II. Did the Committee err in holding that DJJ's failure to provide the Appellant with a pre-termination hearing, as required by its Departmental policy, was harmless?

STANDARD OF REVIEW

The court has jurisdiction over appeals from the State Employee Grievance Committee, as provided for in Sections 1-23-380(B) and 1-23-600(D) of the South Carolina Code. *See* S.C. Code Ann. § 8-17-340(F) (2019). In such cases, the court sits in its appellate capacity under the Administrative Procedures Act (APA). *See Id.*; S.C. Code Ann. § 1-23-600(D)–(E) (Supp. 2018). Absent alleged irregularities in agency procedure, the scope of the court's review in appellate cases is confined to the record. *See* S.C. Code Ann. § 1-23-380(4) (Supp. 2018); SCALC Rule 36(G).

Section 1-23-380(5) of the South Carolina Code provides the standard of review utilized by appellate bodies, including the ALC, when reviewing agency decisions:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The 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:
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> (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. Ann. § 1-23-380(5) (Supp. 2018); *see also* S.C. Code Ann. §1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner as prescribed in Section 1-23-380).

Substantial 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 . . . ." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (citation omitted). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from

the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Res. Conserv. Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, consequently, no abuse of delegated authority occurred. *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 596, 281 S.E.2d 118, 120 (1981) (citation omitted).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (*citing Kearse v. State Health & Human Servs. Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)); 73A C.J.S. *Public Administrative Law and Procedure* § 497 (2015). A reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact for which there is room for a difference of intelligent opinion. *See Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n*, 319 S.C. 225, 229, 460 S.E.2d 383, 386 (1995) (citation omitted). Thus, the court "will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (citation omitted). The party challenging an agency action on appeal has the burden of proving convincingly that the agency's decision is not supported by substantial evidence. *Waters*, 321 S.C. at 226, 467 S.E.2d at 917 (citation omitted).

If substantial evidence exists for an agency decision, the decision may not be disturbed absent a showing that the action was arbitrary, in excess of the statutory authority, or otherwise unlawful.[10] *See* S.C. Ann. § 1-23-380(5).

DISCUSSION

While the Appellant outlined several alleged factual inconsistencies in his brief, the Appellant does not specifically challenge the sufficiency of evidence supporting the Committee's determination. Rather, on appeal, the Appellant points to two (2) Committee actions[11] that he

[10] "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." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-5, 332, S.E.2d 539, 541 (Ct. App. 1985).

[11] For purposes of this order, actions by the Committee attorney are presumed to be those of the Committee, and are,

argues were erroneous as a matter of law and necessitate reversal. First, the Appellant contends that the Committee improperly excluded evidence at the hearing on the precise disposition of his criminal charges stemming from the incident. In his second assignment of error, the Appellant maintains that the Committee erred in finding that DJJ's violation of its policy concerning pre-termination hearings did not prejudice his substantial rights and was cured by the post termination hearings afforded to him.

The Exclusion of Evidence

The parties agree that Regulation 19-718.05(G) – and, more broadly, the South Carolina Rules of Evidence (SCRE) – controls the admissibility of evidence regarding the disposition of the Appellant's criminal charges. The regulation states that "[e]vidence of the dismissal, acquittal, or non-prosecution of the related criminal charges shall be inadmissible in the employee's appeal pursuant to applicable law." S.C. Code Ann. Regs. 19-718.05(G) (2019).

Argument Preservation

Initially, it is questionable whether the Appellant sufficiently preserved this argument for review. The Appellant cites to just two (2) instances where the admissibility of testimony on the charges' dispositions was discussed during the hearing. In the first instance, and the only time the issue was explicitly raised in the context of Regulation 19-718.05(G), counsel for the Appellant successfully argued that the regulation did not prohibit him from discussing the charges' dispositions in his opening statement to establish the background of the case because he was not making an evidentiary offer. (*See* R. at 29:10-31:5.) At the time, the Appellant did not argue that the applicable law supported admission of his testimony in this case, or even more broadly that the regulation does not or should not apply. (*See Id.*) The second time this issue was raised at the hearing came during the Appellant's direct testimony when counsel for the Appellant (not the Committee) interrupted the Appellant as he was preparing to discuss the dispositions and redirected his testimony.[12] (*See* R. at 123:17-124:4.) Again, the Appellant failed to assert at the time that the testimony is admissible under the applicable law, and, therefore, the regulation. (*See Id.*)

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thus, attributed to the Committee herein.

[12] While the Committee subsequently sustained this act of self-restraint, and affirmed its position on the issue more broadly, the restriction the Appellant now complains of was, contemporaneously at least, self-imposed. (*See* R. at 124:2-125:25.)

In fact, at no point during the entire hearing did the Appellant to offer any specific grounds in support of this argument at the hearing, or even generally challenge the Committee's application of the regulation to the testimony at issue. *See Buist v. Buist*, 410 S.C. 569, 766 S.E.2d 381, (2014) (citation omitted) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."); *Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001*, 322 S.C. 127, 134, 470 S.E.2d 373, 378 (1996) (citation omitted) ("To preserve an issue for appeal, a contemporaneous objection is necessary and specific grounds must be clearly stated."). Instead, it seems that after the first instance the regulation was discussed, the Appellant merely accepted that the testimony would not be permitted for the remainder of the hearing. However, the Appellant never proffered the testimony he now claims was wrongfully excluded, so the precise content of the excluded testimony is uncertain. *See Jamison v. Ford Motor Co.*, 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007) (citations omitted) ("The failure to make a proffer of excluded evidence will preclude review on appeal . . . . It is well settled that a reviewing court may not consider error claimed in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been."). Consequently, in view of the apparent failure to challenge the ruling, raise any specific grounds in support of why the alleged exclusion was erroneous under the "applicable law," or proffer the excluded testimony, it does not appear that the Appellant sufficiently preserved this argument.

Admissibility Under the Applicable Law

Even if it were assumed, *arguendo,* that this issue was preserved, the Appellant failed to demonstrate that the Committee's decision to disallow evidence on the disposition of his charges, in accordance with Regulation 19-718.05(G), was erroneous as a matter of law. To demonstrate an error in the Committee's ruling, the Appellant must, among other things, "show that the proffered evidence was relevant." *See Recco Tape and Label Co., Inc. v. Barfield*, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994) (citation omitted); *see also* Rules 401-403, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

Here, Regulation 19-718.05(G) unambiguously provides that such evidence "shall be inadmissible in the employee's appeal pursuant to applicable law." S.C. Code Ann. Regs. 19-718.05(G). The Appellant contends that, because neither the APA nor the SCRE prohibit such

testimony as a matter of course, the Committee erroneously found that it was inadmissible under the applicable law. However, the Appellant did not cite any case law or evidentiary rule in support of his contention that the evidence was relevant or that the applicable law favors admitting the evidence. Rather, the Appellant merely suggests that weighing the probative value of the testimony against the danger of unfair prejudice, in accordance with Rule 403, favors admissibility. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). Yet, while the Appellant correctly notes that Rule 403 provides a vehicle through which relevant testimony on the charges' dispositions may be admissible, it does not stand for the proposition that the excluded testimony was admissible or even relevant under the applicable law.

To the contrary, the applicable law explicitly deems evidence of non-prosecution of criminal charges irrelevant in related civil cases in other contexts. *See Brown v. Allstate Ins. Co.*, 344 S.C. 21, 24, 542 S.E.2d 723, 725 (2001) (citations omitted) (holding that "evidence of non-prosecution for criminal arson is irrelevant and immaterial in a civil case for fire insurance proceeds."); 37 C.J.S. *Forfeiture* § 16 n.7 (December 2018 Update) (citation omitted) ("The acquittal, or even [non-prosecution], of the owner on criminal charges is irrelevant as to the forfeitability of the property."). Likewise, from a practical standpoint, the decision to *nol pros* a charge is entirely at the discretion of the prosecuting officer, and may be done for any number of reasons completely unrelated to the validity or merits of the underlying charge.[13] *See Brown*, 344 S.C. at 25, 542 S.E.2d at 725 (citation omitted) ("[A] prosecutor's decision not to prosecute and a jury's decision to acquit in a criminal trial are based on different criteria than those that apply in a civil proceeding. 'In particular, a prosecutor's decision to *nol pros* may take into account many factors irrelevant in a civil suit, such as the higher standard of proof required for a criminal conviction. In any event, a prosecutor's opinion whether the [person charged committed the offense] is inadmissible since [it is] based on knowledge outside his personal experience.'"); *In re Brown*, 294 S.C. 235, 238, 363 S.E.2d 688, 690 (1988) (citations omitted) ("In this State, the entering of a nolle prosequi at any time before the jury is impaneled and sworn is within the discretion of the solicitor; the trial judge may not direct or prevent a nol pros at that time."); Op. S.C. Att'y Gen. (June 3, 1996), 1996 WL 452687 at *1 ("[A] prosecuting officer has virtually

[13] The record reflects that the prosecution *nol prossed* the Appellant's indictments due to its inability to locate the juvenile victim of the assault. (*See* R. at 347.)

unlimited authority to decide whether or not to prosecute a case in a given instance.") (citing *State v. Green*, 294 S.C. 235, 363 S.E.2d 688 (1988) & *State v. Simmons*, 264 S.C. 417, 215 S.E.2d 883 (1 975)).

Nevertheless, even if the law leaves room for doubt on whether such evidence is admissible, the court sees no reason to reject the Committee's interpretation of the applicable law. *See Bruning v. S.C. Dep't of Health and Envtl. Control*, 418 S.C. 537, 545, 795 S.E.2d 290, 294 (Ct. App. 2016) (citations omitted) ("If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference."). Consequently, the Appellant has not shown that evidence of the subsequent discretionary decision to *nol pros* his criminal charges was relevant to the Respondent's initial decision to terminate his employment for the actions giving rise to those charges under the "applicable law," or that the Committee otherwise erred as a matter of law by excluding it under Regulation 19-718.05(G).

Prejudice from the Ruling

Even if the issue was preserved and that the Appellant demonstrated an error with the exclusion under the "applicable law," the Appellant still failed to show or even allege that he was prejudiced by the Committee's ruling. To show reversible error by the Committee in excluding the evidence in question, "the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the [agency's decision] was influenced by the challenged evidence or the lack thereof." *See Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citations omitted). Determining whether prejudice resulted from a ruling requires a two-step analysis:

> First, the court considers, *inter alia*, whether the error may be deemed harmless because equivalent or cumulative evidence or testimony was offered; the aggrieved party still managed to accomplish his primary objective, such as eliciting testimony about an issue or effectively cross-examining a witness; the jury's verdict or a proper court ruling rendered the wrongly excluded evidence moot because it was relevant to an issue that did not have to be reached; the aggrieved party failed to establish a claim or defense even when both the admitted and excluded evidence are considered; or the wrongly excluded evidence involved a generally known fact. Second, the appellate court considers whether, viewing a case as a whole, the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error,

> i.e., the aggrieved party demonstrates there is a reasonable probability the jury's verdict was influenced by the lack of the challenged evidence.

See Id at 31-33, 609 S.E.2d at 512-13 (citations omitted); *accord Recco Tape and Label Co., Inc.*, 312 S.C. at 217, 439 S.E.2d at 840 (1994); *Patterson v. I.H. Servs., Inc.*, 295 S.C. 300, 308, 368 S.E.2d 215, 220 (Ct. App. 1988) (citations omitted).

The court likewise finds no support in the record for the notion that prejudice to the Appellant resulted from the ruling. As stated *supra*, the excluded testimony was never proffered at the hearing, and the court cannot presume prejudice from the speculative impact of the Respondent's evidence on the Appellant's unknown excluded testimony. *See Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) (citations omitted) ("An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in absence of an adequate proffer of evidence in the court below."). However, to the extent that the excluded evidence was merely that the charges were *nol prossed*, that limited information was offered to and accepted by the Committee in several ways. First, it appears that counsel for the Appellant was able to offer that information in his opening statement. (*See* R. at 31:20-23 (Counsel for the Committee: "I think you've made the point that the charges were nol-prossed. I think that's as far as I'm willing to let it go. You've gotten that into evidence.").) Second, Committee Exhibit 1 – which was admitted into evidence without objection from either party – contains multiple references to the fact that Appellant's charges stemming from the incident were subsequently *nol prossed*. (*See* R. at 20:18-21:4, 321-22, 325, 327, 333-37, 347-57); *see also* S.C. Code Ann. § 8-17-350 (2019) (setting forth the contents and procedures pertaining to "Committee Exhibit 1"). Accordingly, even if the Committee erred in prohibiting such evidence from the Appellant, the excluded evidence was not contradicted at the hearing and is cumulative to evidence already in the record.

Finally, even if the excluded evidence was not duplicative of evidence already in the record, the Appellant still failed to demonstrate that there is a reasonable probability that the exclusion influenced the Committee's Final Decision, or otherwise prevented it from being supported by substantial evidence. The Appellant concedes that the Committee was aware that his criminal matters had been resolved, yet there is nothing in the record indicating that the Appellant was ever tried for or convicted of his charges. Yet, in the absence of any contradictory evidence, it is unclear what material benefit could have been derived from the Committee's awareness of the precise

disposition of his charges. Moreover, though the Appellant challenges the ruling in conjunction with the Respondent's related evidence that was admitted, he does not suggest that it was somehow erroneous for the Committee to allow such evidence from the Respondent by itself. *Contra* S.C. Code Ann. Regs. 19-718.05(G) (prohibiting "[e]vidence of the dismissal, acquittal, or non-prosecution of the related criminal charges," but not on the arrest and indictment of the related charges). Likewise, unlike the entirely discretionary decision to *nol pros* a criminal charge, discussed *supra*, the process of obtaining a search warrant is subject to certain standards designed to safeguard the rights of the accused. *See In re Friday*, 263 S.C. 156, 158, 208 S.E.2d 535, 536 (1 974) ("The determination of existence of probable cause for the issuance of an arrest warrant is clearly a judicial function."); *State v. Cope*, 385 S.C. 274, 290, 684 S.E.2d 177, 185 (Ct. App. 2009) (citation omitted) ("In assessing probable cause, the court looks to whether the facts and circumstances are sufficient for a reasonable person to believe that a crime has been committed by the person to be arrested."). As such, evidence demonstrating that a neutral and detached magistrate found evidence sufficient for a reasonable person to believe that the Appellant committed elements of the crimes for which he was arrested is reasonably relevant to determining whether the Respondent was justified in terminating the Appellant at the time for the same conduct. *See S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 145-46, 705 S.E.2d 425, 430 (2011) (citation omitted) ("Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise."). Moreover, the Appellant did not cite – and the court is unaware of – any case law or evidentiary rule limiting the admissibility of such relevant evidence under the facts of this case. To the contrary, evidence establishing probable cause is liberally admissible under South Carolina jurisprudence. *See McCarson*, 391 S.C. at 147-48, 705 S.E.2d at 431 (citations omitted) (finding that courts in this State have even permitted "hearsay evidence to establish probable cause in the limited context of a preliminary hearing"). Thus, in the absence of conflicting authority, the Appellant did not show that the exclusion resulted in prejudice, even when considered with the related evidence offered by the Respondent.

In any event, substantial evidence supports the Committee's finding that the Appellant engaged in the misconduct for which he was terminated. Here, although the Appellant and Mr. Moody denied any involvement in the alleged assault, the Committee also considered, *inter alia*, witness statements indicating that the Appellant assaulted the juvenile in his jail cell out of view

of the cameras; video footage that circumstantially supported, or at least did not materially contradict, the theory posed in the witness statements; and testimony from both Mr. Adger and Mr. Pough explaining why they found the juvenile's allegation more credible than the Appellant's denial. (*See* R. at 143-280, 307-09, 312, 315-16, 325, 330-31, 333-35, 338, 347, 361-62, 369-466, 469-71; 485-93; Agency Exhibit 1.) In view of this evidence in the record, the Appellant failed to show that the alleged ignorance of the disposition of his charges warrants reversal of the Committee's Final Decision in this matter. *See Kearse*, 318 S.C. at 200, 456 S.E.2d at 893; *Lark*, 276 S.C. at 135, 276 S.E.2d at 306 (citation omitted).

In sum, even if this argument was preserved, the Appellant has not demonstrated an error in the Committee's ruling or, if the exclusion was erroneous, any resulting prejudice. The court is, therefore, compelled to conclude that any error in the Committee's ruling was harmless.

Failure to Hold a Pre-termination Hearing

Pursuant to the State Employee Grievance Procedure Act,

> In cases involving actual or threatened abuse, neglect, or exploitation, to include those terms as they may be defined in Section 43-35-10 or 63-7-20, of a patient, client, or inmate by an employee, the agency's decision must be given greater deference and may not be altered or overruled by the committee, unless the covered employee establishes that:
>
> ***
>
> (b) *The agency's disciplinary action was not within its established personnel policies*, procedures, and regulations . . . .

S.C. Code Ann. § 8-17-340(E)(1)(b) (2019) (emphasis added). With respect to the Respondent's pre-termination hearing requirements, DJJ's Investigations Policy I-3.5 (F)(3) states that:

> Prior to the issuance of disciplinary action, management will meet with the employee and allow the employee an opportunity to respond to the findings. At this point, the employee will be given procedural due process and may offer any explanation or mitigating circumstances that he/she feels may have played a role in the incident. This is the employee's chance to offer anything in his/her defense, and the manager should hear whatever the employee has to say, as long as it is offered in an appropriate manner.

(R. at 418.) However, the Respondent's Investigations Policy I-3.5 (F)(1), also states that "[m]anagement staff may take employee disciplinary action pending the outcome of the investigation based on the seriousness of the incident."[14] (*Id.*)

Both parties concede that Investigations Policy I-3.5, required the Respondent to provide the Appellant with an opportunity to be heard prior to DJJ's decision to terminate his employment, and that no such opportunity was provided. Accordingly, in his second assignment of error, the Appellant contends that the Committee erred by concluding that DJJ had enough evidence to immediately terminate the Appellant's employment without allowing him to first present his side of the story, and that it was erroneous to allow the Respondent to use alleged policy violations to support the Appellant's termination while allowing the Respondent's policy violation in carrying out the termination to stand. Conversely, the Respondent argues that the Committee properly found, in accordance with established precedent in this State, that any pre-termination procedural deficiency in this matter was cured by affording the Appellant post-termination hearings with DJJ management during the Respondent's internal grievance process and during his appeal before the Committee. However, despite the Respondent's lengthy argument in support of this point, along with citations to relevant authority, the Appellant did not argue that the measures found by the Committee to have cured the Respondent's pre-termination hearing misstep were insufficient to remedy the harm. Rather, the Appellant argues that because the Respondent committed a violation of its policy when terminating the Appellant's employment, the Committee's decision should be reversed under Section 8-17-340. The court disagrees.

It is well established that a violation of a statutory or constitutional requirement for a pre-termination hearing can be cured by post-termination hearings. *See Rose v. Beasley*, 327 S.C. 197, 205-06, 489 S.E.2d 625, 629 (1997) (citations omitted); *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 67, 498 S.E.2d 62, 71 (1997) (citations omitted). Thus, "[a]s a general rule, a party must establish prejudice as the result of another's failure to follow mandatory statutory procedure." *Gardner v. S. C. Dep't of Revenue*, 353 S.C. 1, 14, 577 S.E.2d 190, 197 (2003) (citing *Rose*, *supra*). In *Rose*, the Governor removed the Director of the Department of Public Safety from office without a statutorily mandated pre-removal hearing. *See Rose*, 327 S.C. at 200-01, 489 S.E.2d at 626-27.

[14] As stated *supra*, the Appellant was terminated for violating Items 13, 32, 40, 42, and 58 of DJJ's Progressive Employee Discipline Policy. (R. at 361.) The Respondent's Discipline Guideline allows for termination for the first offense of each of those policies. (*See* R. at 390-93.)

Accordingly, the South Carolina Supreme Court considered whether Rose's post-removal hearing could cure the statutory violation that resulted from failing to provide a pre-removal hearing. *See Id.* at 205-06, 489 S.E.2d at 629. In holding that Rose's post-removal hearing could – and did – remedy the lack of a pre-removal hearing, the Court found that:

> Rose has failed to show any prejudice from the lack of a pre-removal hearing. At the hearing before the circuit court, he was represented by counsel and had the opportunity to introduce evidence, cross-examine adverse witnesses, and argue his case to the court. This post-removal procedure, which satisfied due process, sufficiently compensated for the lack of an oral pre-removal hearing. Accordingly, we find no error.

Id. (citations omitted). Likewise, in *Ross*, a tenured professor at the Medical University of South Carolina (MUSC) was denied an opportunity for a pre-termination hearing, despite having a constitutional right to such a hearing given his tenured status. *See Ross*, 328 S.C. at 66-67, 498 S.E.2d at 71. In affirming the holding from *Rose*, the *Ross* Court found that:

> [A]lthough 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.

See Id.

In this instance, while the Appellant was not afforded a pre-termination hearing, he was afforded two meaningful post-termination hearings wherein he was allowed to introduce evidence, cross-examine adverse witnesses, and argue his case. (*See generally* R. at 15-299; 437-51.) Moreover, at least during the hearing before the Committee, the Appellant was represented by counsel. (*See generally* R. at 16, 20:2-3.) To that end, the Appellant does not argue that he was not afforded a sufficient opportunity to be heard post-termination, or that he was specifically prejudiced by not being afforded an opportunity to be heard prior to his termination. It is likewise notable that Lieutenant Pough attempted to interview the Appellant during the course of his investigation to obtain his side of the story, but the Appellant invoked his right to remain silent.

(*See* R. at 425.) It seems doubtful that the Appellant would invoke his right to remain silent in the criminal investigation, and then divulge pertinent evidence in a pre-termination employee grievance dispute hearing shortly thereafter. Thus, the court finds no reversible error in the Committee's determination that DJJ's violation of its policy concerning pre-termination hearings did not prejudice the Appellant's substantial rights and was cured by the post termination hearings afforded to him.

Conclusion

In view of the foregoing, the court finds that even if the argument was preserved the Appellant did not demonstrate error in or prejudice from the Committee's ruling concerning the admissibility of evidence on the disposition of his criminal charges. The Appellant further failed to show that the Respondent's violation of their pre-termination hearing policy was not cured by the post-termination hearings afforded to him, or that he was otherwise prejudiced from the lack of a pre-termination hearing. Therefore, since the Committee's Final Decision is not affected by a reversible error, the Committee's decision must stand.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the decision of the State Employee Grievance Committee is **AFFIRMED.**

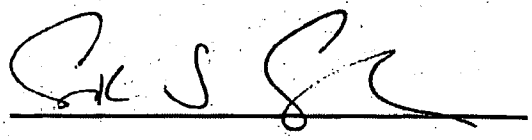
AND IT IS SO ORDERED.

January 21, 2019
Columbia, South Carolina

S. Phillip Lenski
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Erika S. Easler, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Erika S. Easler
Judicial Law Clerk

January 29, 2019
Columbia, South Carolina