

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. ALJ-30-0489-AP

E. Shawn Sorrell, ... Appellant,

v.

South Carolina Department of Public Safety, ... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the ALC correctly hold that the Grievance Committee's determination that DPS properly terminated Sorrell's employment due to misconduct is supported by substantial evidence and not legally erroneous?
2. Did the ALC correctly conclude that the Grievance Committee's determination that Sorrell engaged in misconduct by arresting three citizens for public disorderly conduct based on one of three person's verbal resistance to her detention, not amounting to fighting words, is supported by substantial evidence and not legally erroneous?
3. Are Sorrell's due process challenges procedurally barred because he failed to raise and preserve these challenges below and because he seeks to raise abstract, hypothetical issues that are not justiciable in this appeal?

STATEMENT OF THE CASE

This is an appeal from a decision of the Administrative Law Court (“ALC”) which, acting in an appellate capacity, affirmed the final decision of the State Employee Grievance Committee upholding the termination of Appellant E. Shawn Sorrell (“Sorrell”) by Respondent South Carolina Department of Public Safety (“DPS”). Sorrell was employed by DPS as a law enforcement officer and was assigned to the Bureau of Protective Services. He was terminated effective July 12, 2010 due to improper conduct stemming from his arrest of three persons for disorderly conduct on March 28, 2010 outside the South Carolina Lottery Commission’s headquarters in downtown Columbia. [R. pp. 588-89].

Sorrell grieved his termination under the State Employee Grievance Procedure Act, S.C. Code Ann. § 8-17-310 *et seq.* [R. pp. 669-77]. After DPS denied his grievance, Sorrell appealed to the State Employee Grievance Committee (“Grievance Committee” or “Committee”) in accordance with the provisions of that Act. S.C. Code Ann. §§ 8-17-330 and -340 (Cum. Supp. 2011). [R. pp. 576-82].

On March 22, 2011, the Committee Attorney assigned to the Grievance Committee by the South Carolina Attorney General’s Office pursuant to S.C. Code Ann. § 8-17-340(c) (Cum. Supp. 2011) conducted a hearing on Sorrell’s objections to certain documents submitted by DPS to the State Human Resources Director for inclusion in the file to be provided to members of the Grievance Committee assigned to hear his appeal. [R. pp. 83-122]. In a ruling entered on April 12, 2011, the Committee Attorney sustained all of Sorrell’s objections and ruled that those documents to which objections were sustained would not be included in the materials made available to Grievance Committee. [R. pp. 26-31].

The Grievance Committee thereafter conducted a two-day hearing on the merits of Sorrell's appeal of his termination. During the two days of hearing, the Committee heard from numerous witnesses, received documentary evidence and heard argument of counsel. [R. pp. 133-398; 433-553]. On the second day of hearing, after both sides had concluded their presentations, the Committee Attorney instructed the Committee on the law, without objection from either side. [R. pp. 545-50]. After being instructed on the law, the Committee went into executive session to deliberate its decision. Following deliberations, the Committee reconvened in open session and voted unanimously to uphold Sorrell's termination. [R. pp. 550-51]. In accordance with the requirements of the State Employee Grievance Procedure Act, S.C. Code Ann. § 8-17-340(D) (Cum. Supp. 2011), the Committee issued its written Final Decision setting forth Findings of Fact, Statements of Policy and Conclusions of Law on August 26, 2011, within twenty days of its August 8, 2011 vote in open session. [R. pp. 18-25].

Sorrell timely appealed the State Employee Grievance Committee's Final Decision to the ALC. On July 12, 2012, the ALC (Honorable Deborah Brooks Durden) affirmed the Grievance Committee's decision upholding Sorrell's termination. [R. pp. 1-8].

Sorrell filed a Notice of Appeal on August 8, 2012, and an Amended Notice of Appeal on August 13, 2012, and this appeal followed.

STATEMENT OF FACTS

Sorrell was on duty at the South Carolina Lottery Commission headquarters in the CBRE building on Main Street in downtown Columbia from 5:30 p.m. March 27, 2010 until 5:30 a.m. March 28, 2010. At about 2:30 a.m., he was viewing the security camera monitors in a room on the fourth floor when he noticed what appeared to be liquid splashing on the ground in front of the building. Sorrell took the elevator downstairs to check out the situation. As he was riding the elevator down, he radioed for backup from a DPS Bureau of Protective Services officer in the vicinity and reported that bottles of liquid were being thrown against the outside walls of the building. [R. pp. 163-167].

What happened *after* Sorrell went outside was a matter of considerable factual dispute before the State Employee Grievance Committee.

According to Sorrell's testimony, what transpired is as follows:

As he walked out the Main Street door of the building, Sorrell heard a female voice say "Don't hit me," or words to that effect. [R. p. 168]. As he walked out further, he heard a voice yelling "hit her" or "get her." [R. p. 169]. Sorrell then raised his hand and yelled "Stop!" whereupon the female and two males "looked up" and stayed in position until he ordered them to turn around, spread their feet apart and place their hands on the wall. According to Sorrell, the males complied immediately but the female did not comply until he approached her. Sorrell separate the female's feet with his feet and pulled her "hoody" back to determine whether anything was in it. [R. pp. 170-75].

Within minutes of Sorrell's initial encounter with the three persons on the street, DPS Officer Rogerson, who was at the State House two blocks south, responded to Sorrell's radio call. Sorrell asked the female, who identified herself as Samantha Swanson, and the males, who identified themselves as Matthew Keith and Charles Spaht, what they were doing. They responded that Mr. Spaht had just arrived in town from Atlanta and Ms. Swanson and Mr. Keith were welcoming him to town with water balloons. Sorrell decided to arrest all three because, he said, they were loud and boisterous and had left residue from the balloons all over the sidewalk. [R. pp. 175-83]. He arrested them for public disorderly conduct. [R. p. 182].

While Sorrell testified that he "didn't arrest the individuals because they didn't comply" but because they were disorderly, he conceded that "if I had got three cooperative individuals out on that street that night[,] [a]bsolutely the outcome would have been different." [R. p. 183]. Yet, Sorrell admitted that "both males were extremely cooperative, [but that] she [Ms. Swanson] was not." [R. p. 188]. Indeed, Sorrell testified that he arrested Mr. Spaht even though Spaht "was not loud and boisterous." [R. pp. 204-05].

Sorrell's testimony was not the only version of the facts that the Grievance Committee heard.

According to the testimony of other witnesses who testified before the Grievance Committee--including, among others, Ms. Swanson, Mr. Keith, Officer Rogerson, Corporal Harris, Investigator Carter and Security Guard Brenard Malone--this is what happened beginning around 2:30 a.m. on March 28, 2010:

Ms. Swanson, Mr. Keith and Mr. Spaht were tossing around water balloons that Swanson and Keith had prepared to surprise Spaht who had just arrived from Atlanta to spend the night with Mr. Keith who lived nearby in a downtown apartment on Main Street. Swanson, Keith and Spaht were tossing the water balloons quietly and without raising their voices when Sorrell came outside, confronted them and ordered them all to spread their legs and place their hands against the wall. Sorrell called Swanson a “smart butt,” accused her of not listening to him, and came up from behind her and kicked her feet apart with enough force that she responded: “You’re hurting me!” Although Swanson tried to comply with Sorrell’s instructions, he smugly told her: “[Y]ou, ma’am, are under arrest and you’re going to jail.” [R. pp. 258-68; 272-74].

Mr. Keith testified that Sorrell kicked Ms. Swanson’s feet apart with such force that he (Keith) heard the kick even though he was standing at a distance from them. Keith further testified that Sorrell pulled Ms. Swanson’s “hoody” back so forcefully that it bent her neck backwards. [R. pp. 298-302]. When Keith asked Sorrell if he (Sorrell) could “go easy on” them because they were trying to be polite and cooperative, Sorrell responded: “[T]hat option went out the window when your girl [referring to Ms. Swanson] started giving me lip.” [R. p. 307]. Sorrell repeatedly referred to Ms. Swanson in disparaging terms such as “that girl” and “your girl.” [R. pp. 307-08].

Officer Rogerson responded to the radio call for assistance that Sorrell made as he was riding the elevator down to the ground floor. Rogerson arrived on the scene from his State House post two blocks down Main Street within minutes of the call and was on the scene before any arrests were effected and while the three individuals were still leaning

against the wall with their feet spread apart. Officer Rogerson testified that Ms. Swanson, Mr. Keith and Mr. Spaht's demeanor was not consistent with what Sorrell was telling him about their behavior. In fact, Rogerson testified that it was Sorrell who escalated the situation with his behavior, not Swanson, Keith or Spaht. [R. pp. 383-93; 735-36].

Corporal Harris, who like Officer Rogerson responded to Sorrell's call for backup, arrived on the scene after Rogerson. He (Harris) testified that Sorrell told him that the reason that he arrested Swanson, Keith and Spaht was because Ms. Swanson was "disobedient to him." Corporal Harris told the Grievance Committee that he considered the arrests to be "over the top." [R. pp. 374; 622-23].

DPS Investigator Lee Carter testified that during the internal investigation that preceded Sorrell's termination, Sorrell acknowledged that his primary concern on March 28, 2010 was "with Swanson's attitude problem and giving him lip" and said that was a "good characterization." [R. pp. 345; 635]. Sorrell also confirmed that he had told Corporal Harris that all three individuals were arrested because of Ms. Swanson's "lip" and attitude. [R. pp. 343-45; 349-50].

Brenard Malone, the security guard on duty in the CBRE building on March 28, 2010 when Sorrell arrested Ms. Swanson, Mr. Keith and Mr. Spaht testified that Sorrell "basically told them that they were all going to be arrested because of the way the female was acting." [R. pp. 230-31; 627]. According to Malone, Sorrell made no secret of the fact that the three were being arrested for lack of cooperation, not for any loud or boisterous behavior. [R. p. 232].

In its Final Decision, the State Employee Grievance Committee wrote:

Based on the record and testimony presented at the hearing, the Committee found substantial evidence to support SCDPS's decision to terminate [Sorrell]

* * *

A review of all the evidence submitted at the hearing indicates that [Sorrell's] actions on March 28, 2010, were inconsistent with the accepted conduct for a BPS officer. A review of the incident by [Sorrell's] supervisors found that Mr. Spaht's, Mr. Keith's, and Ms. Swanson's actions did not constitute Disorderly Conduct under the law because there is no evidence the individuals were intoxicated or used fighting words when talking with [Sorrell]. *State v. Perkins*, 306 S.C. 353, 354-355, 412 S.E.2d 385, 386 (1991) (recognizing that the 'State may not punish a person for voicing an objection to a police officer where no "fighting words" are used' because '[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state'). The extent of the loud and boisterous behavior is questionable and, based on [Sorrell's] own statements to Corporal Harris, the Committee finds the arrests were based primarily on [Sorrell's] perception that Ms. Swanson was not complying with his directives rather than the individuals behaving in a loud or boisterous manner. * * * [Sorrell] has a history of incidents in which he conducted himself in a rude and aggressive manner. Despite [Sorrell's] having completed mandatory counseling through the Department's Employee Assistance Program, [Sorrell] again abused his position as a law enforcement officer.

The Committee also finds that SCDPS carefully considered the appropriate disciplinary action when deciding to terminate [Sorrell]. Based on [Sorrell's] disciplinary history, which included previous incidents of Improper Conduct and [Sorrell's] failure to avoid Improper Conduct - despite receiving assistance from the Law Enforcement Assistance Program - SCDPS made the decision to terminate [Sorrell] for this latest occurrence of Improper Conduct. * * * The Committee concludes that SCDPS's decision to terminate

[Sorrell] was appropriate and consistent with its established policy guidelines.

[R. pp. 24-25].

Additional pertinent facts are set forth in Argument.

ARGUMENT

Standard of Review

At the outset, it is important to note the standard of appellate review applicable to this appeal. That standard is prescribed by S.C. Code Ann. § 1-23-610 (Cum. Supp. 2011), and is as follows:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence or questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings, or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or 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 an abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code § 1-23-610(B) (Cum. Supp. 2011); *see also* S.C. Code Ann. § 1-23-600(E) (Cum. Supp.). As this standard and the substantially similar standard prescribed by S.C. Code Ann. § 1-23-380(5) make clear, a reviewing court does not sit to retry state employee grievances but only to determine (1) that the Grievance Committee's decision is not based on legal error and (2) is supported by substantial evidence. "Substantial evidence" means "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." *Risher v. S.C. Dep't of Health and Env'l Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011) (internal quotations omitted). Importantly, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's finding from being supported by substantial evidence." *Id.* (internal quotations omitted).

In affirming the Grievance Committee's decision upholding DPS's decision to terminate Sorrell for improper conduct, the ALC was faithful to the standard of review prescribed by section 1-23-380(5). Adherence to the similar standard prescribed by section 1-23-610(B) likewise requires this Court to affirm.

1. The ALC correctly held that the Grievance Committee's determination that DPS properly terminated Sorrell's employment due to misconduct is supported by substantial evidence and not legally erroneous.

In his first and third arguments, Sorrell argues that the Grievance Committee misapprehended and misapplied the standard of probable cause in its decision, but the Grievance Committee did no such thing. The Grievance Committee simply resolved disputed factual testimony and evidence about what really happened outside the Lottery Commission's headquarters on March 28, 2010 and, in so doing, determined that DPS had

properly concluded that Sorrell engaged in improper conduct and lacked probable cause to arrest Swanson, Keith and Spaht because they were not behaving in a disorderly or boisterous manner and because he arrested all three not because of any unlawful activity but because of Ms. Swanson's attitude ("lip") toward him when detained. The Grievance Committee thus correctly determined both that South Carolina law does not permit an arrest for disorderly conduct based on a detainee's voicing objections to a police officer over her detention *and* that Ms. Swanson's voicing objections to Sorrell over her detention is what motivated Sorrell to arrest not only Swanson but also Keith and Spaht. Hence, neither the Grievance Committee nor the ALC erred in upholding Sorrell's termination due to improper conduct.

Sorrell's argument concerning probable cause is to the effect that the existence of probable cause is an issue of law, not fact, and that a court and/or quasi-judicial body like the Grievance Committee is bound to accept the testimony of the arresting officer and whatever he puts in his arrest report regardless of any conflicting testimony and evidence. But the existence of probable cause is an issue of fact where, as here, the evidence on that question is conflicting, and neither a court or the Grievance Committee is bound to accept the testimony of the arresting officer and/or what he puts in his report over conflicting evidence.

In South Carolina, the existence of probable cause or not is a factual issue to be resolved by the fact-finder. *See Jones v. City of Columbia*, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990) ("[T]he issue of probable cause is a question of fact and ordinarily for the jury.") Indeed, in both *Jones* and *Wortman v. City of Spartanburg*, 310 S.C. 1, 425 S.E.2d 18 (1992), the South Carolina Supreme Court reversed trial judges for *not* submitting the issue

of probable cause to a jury. Speaking for a unanimous court in *Wortman*, Chief Justice Harwell wrote:

The fundamental question in determining whether an arrest is lawful is whether there was ‘probable cause’ to make the arrest. Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. In South Carolina, the issue of probable cause is a question of fact and ordinarily one for the jury. Accordingly, because the existence or nonexistence of probable cause is a question of fact material to the lawfulness of [plaintiff’s] arrest, we hold that it was improper for the trial judge to grant summary judgment.

Wortman, 310 S.C. at 4, 425 S.E.2d at 20.

Sorrell’s suggestion that the United States Supreme Court’s decisions in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Beck v. Ohio*, 379 U.S. 89 (1964) do not permit a factfinder to determine that a police officer lacked probable cause for an arrest if the officer testifies that he *did* is untenable. Indeed, the United States Court of Appeals for the Fourth Circuit recently reversed a trial judge for determining as a matter of law that probable cause existed to support an arrest based on a police officer’s say-so where the evidence was conflicting. *Hayes v. City of Seat Pleasant, Md.*, 469 Fed. Appx. 169 (4th Cir. 2012). The Fourth Circuit held that because there was a factual dispute as to what transpired between the plaintiffs and the arresting officer “that goes directly to the question of whether probable cause existed to arrest the [plaintiffs] for hindering,” the issue of probable cause was one for a jury. *Hayes*, 469 Fed. Appx. at 174. Obviously, if *Harlow* and *Beck* required courts to accept the testimony of the officer regardless of what other witnesses said about the circumstances of arrest, *Hayes* would have been affirmed, not reversed, by the Fourth Circuit.

In this case, there was conflicting testimony as to what transpired outside the Lottery Commission headquarters building on Main Street on March 28, 2010. To be sure, Sorrell's testimony before the Grievance Committee and his arrest report, if believed, would support a finding of probable cause to arrest. However, as discussed in the Statement of Facts, the testimony offered by other witnesses who were interviewed incident to DPS's internal investigation and who testified before the Grievance Committee tell a different story of what happened on March 28, 2010. And, because the testimony of Sorrell was no more inherently credible than the testimony of the witnesses who disputed his account, *cf. Rainey v. Conerly*, 973 F.2d 321, 325 (4th Cir. 1991) (court's failure to question potential jurors as to whether they would credit the testimony of a police officer simply because of his status was reversible error in civil trial), the Grievance Committee was free to credit the testimony of witnesses whose account of the events that led to the arrests of Swanson, Keith and Spaht was different than Sorrell's account. As the ALC noted, that is precisely what happened. [R. pp. 6-7]

As the ALC explained:

[T]he Committee was confronted with conflicting evidence and testimony. In executing its duty as fact-finder the Committee was free to disbelieve Sorrell's report and to credit the testimony of Swanson, Keith and Charles Spaht, Jr. (Spaht) that they were neither loud nor boisterous. Sorrell's account was discredited by Malone's and Rogerson's testimony that [Sorrell's] account of what he confronted with the three young people did not square with what either of them observed on the scene and the overwhelming evidence that the arrest was primarily motivated by the fact that Sorrell took offense at Swanson's attitude and not by a good faith belief that the three individuals had been boisterous.

[R. p. 7]. Sorrell's insistence that the Committee was legally bound to accept his testimony and his account of the circumstances surrounding the arrests over the testimony and accounts of other witnesses is not only unsupported by statutory or decisional law but, in fact, is at odds with relevant law. *See Carson v. S.C. Dep't of Natural Resources*, 371 S.C. 114, 119, 638 S.E.2d 45, 47-48 (2002); *Glenn v. S.C. Dep't of Mental Retardation*, 291 S.C. 279, 353 S.E.2d 284 (1987); *see also Milliken & Co. v. S.C. Employment Security Comm'n*, 321 S.C. 349, 350, 68 S.E.2d 638, 639 (1996) ("[O]n questions of witness credibility we defer to the judgment of the agency").

Because it was the Grievance Committee's prerogative to determine, on the basis of the substantially conflicting evidence before it, whether Sorrell had probable cause to arrest all three individuals and because substantial evidence supports the Grievance Committee's determination that he did not have probable cause, that factual determination was properly affirmed by the ALC and should be affirmed here.

Two matters merit mention before concluding this argument. First, at the hearing before the Grievance Committee, Sorrell himself testified that "[a]bsolutely, the outcome would have been different[]" "if I had got three cooperative individuals out on that street that night." [R. p. 183]; that "both males were extremely cooperative" although Ms. Swanson "was not." [R. p. 188]; and that he arrested Mr. Spaht even though Spaht "was not loud and boisterous." [R. pp. 204-05]. This testimony is consistent with the testimony of Corporal Harris and Investigator Carter that Sorrell told them that he arrested all three individuals because of Ms. Swanson's attitude [R. pp. 344-45; 374; 622-23; 635] and the testimony of

the security guard, Mr. Malone, that Sorrell “basically told them that they were all going to be arrested because of the way the female was acting.” [R. pp. 231-32; 627]. Second, although Sorrell argues that “[t]he sole basis for the termination of Appellant Sorrell was for making an arrest absent probable cause[.]” [Appellant’s Initial Br., p. 6 (emphasis added)], that is manifestly not true. Sorrell was terminated for improper conduct, which included his arrest of Swanson, Keith and Spaht for disorderly conduct without probable cause but which also included his rude, overly aggressive, threatening and bullying behavior in the course of his encounter with the *and* his history of conducting himself in a rude and aggressive manner. [R. pp. 18-19; 588-89].

For the foregoing reasons, Sorrell’s first assignment of error is without merit.

2. The ALC correctly held that the Grievance Committee’s determination that Sorrell engaged in misconduct by arresting three citizens for public disorderly conduct based on one of three person’s verbal resistance to her detention, not amounting to fighting words, is supported by substantial evidence and not legally erroneous.

In his second argument, Sorrell contends that the Grievance Committee erred in concluding that the actions of Ms. Swanson, Mr. Keith and Mr. Spaht did not constitute disorderly conduct under *State v. Perkins*, 306 S.C. 353, 412 S.E.2d 385 (1991), which holds that it is unlawful to charge someone with disorderly conduct “for voicing an objection to a police officer where no ‘fighting words’ are used[.]” because individuals enjoy “[t]he freedom . . . verbally to oppose or challenge police action without thereby risking arrest[.]” *Id.*, 306 S.C. at 354-55, 412 S.E.2d at 386. Sorrell maintains that *Perkins* is irrelevant to the issues before the Grievance Committee because “the facts are simply that the subjects were *not arrested for what they said, but what they did.*” [Appellant’s Initial Br. p. 14 (emphasis

added)]. Although Sorrell testified that he arrested Ms. Swanson, Mr. Keith and Mr. Spaht for their conduct, there is substantial evidence in the record--including some from Sorrell himself--that all three were arrested not for their conduct but because of Ms. Swanson's "lip" and/or perceived lack of cooperation with his instructions. The fact that Sorrell chooses to ignore this substantial evidence does not make it disappear from the record.

The ALC identified "ample evidence in the record to support the finding that the arrests] w[ere] not motivated by loud or boisterous behavior but instead by Sorrell's perception that Samantha Swanson (Swanson) was disrespectful to him, and that Sorrell's behavior toward the three individuals was improper and abusive, including:"

(1) The testimony of Swanson and Matthew Keith (Keith) that the three were not behaving boisterously when throwing water balloons before being apprehended by Sorrell;

(2) The testimony of Mark A. Keel (Keel) that a videotape of the incident that showed the three individuals picking up the balloon pieces after the water balloons were thrown to avoid littering;

(3) The testimony of Swanson and Keith that Sorrell kicked Swanson's legs so hard that the impact was heard and pulled on her sweatshirt with such force that it bent her head backwards;

(4) Investigator C. Lee Carter, III's (Carter) testimony that the videotape showed Swanson's feet were already approximately shoulder-width apart before Sorrell kicked them further apart;

(5) Officer K.A. Rogerson's (Rogerson) testimony that the demeanor of the three individuals was not consistent with [Sorrell's] report and that it was [Sorrell] who escalated the situation;

(6) Corporal Marvin E. Harris's (Harris) testimony that Sorrell told him that the reason all three individuals were arrested was because Swanson was 'disobedient to him;'

(7) Keel's testimony that he considered the arrests to be 'over the top;'

(8) Carter's testimony that [Sorrell] acknowledged that his primary concern on March 28 was with Swanson's 'attitude problem in giving him lip;'

(9) Sorrell's statement to Harris that all three individuals were arrested because of Swanson's 'lip' and attitude;

(10) Security Guard Brenard Malone's testimony that Sorrell stated 'they were all going to be arrested because of the way the female was acting,' and that the three were arrested for lack of cooperation.

[R. pp. 6-7].

As previously noted, the credibility of witnesses is for the Grievance Committee to determine, *see Milliken & Co. v. South Carolina Employment Security Comm'n*, 321 S.C. at 350, 468 S.E.2d at 639; *Webber v. Michelin Tire Corp.*, 385 S.C. 581, 330 S.E.2d 547 (Ct. App. 1985), and the Committee obviously chose to believe the testimony and evidence that Ms. Swanson, Mr. Keith and Mr. Spaht were *not* arrested because of loud and boisterous conduct but because of Ms. Swanson's "lip" and perceived uncooperative attitude. The Committee, confronted with conflicting testimony evidence, was free to believe the testimony and evidence that it found most credible, and this Court cannot, under the guise of the limited review available under the APA, substitute its judgment for that of the

Committee. *See Carson v. S.C. Dep't of Natural Resources*, 371 S.C. at 119, 638 S.E.2d at 47-48; *Glenn v. S.C. Dep't of Mental Retardation*, 291 S.C. 279, 353 S.E.2d 284 (1987).

Because substantial evidence in the record supports the Grievance Committee's finding that Sorrell did not arrest Ms. Swanson, Mr. Keith and Mr. Spaht due to disorderly or boisterous conduct but due to Ms. Swanson's perceived uncooperative attitude, that finding must be affirmed. Accordingly, Sorrell's contention that the Grievance Committee erred in its reliance on *State v. Perkins* for the proposition that the arrests were unlawful is without merit.

3. Sorrell's due process challenges are procedurally barred because he failed to raise and preserve these challenges below and because he seeks to raise abstract, hypothetical issues that are not justiciable in this appeal.

In his final assignment of error, Sorrell purports to raise a constitutional due process challenge to S.C. Code Ann. § 8-17-350 (Cum. Supp. 2011) insofar as that statutory provision directs the State Human Resources Director "to forward the appeal and documents [submitted by the parties] . . . to the designated committee panel and to the committee attorney for a hearing" before the hearing convenes. Sorrell contends that making documents submitted by the parties available to members of the Grievance Committee scheduled to hear a grievance before the grievance hearing is convened "is a structural defect which, in its face, denies procedural due process in the basic adjudication of this case." [Appellant's Initial Br., p. 22]. He also contends that the time lapse between the first day of hearing before the Grievance Committee (June 27, 2011) and the second day (August 8, 2011) [R. pp. 133; 135; 433; 435] denied him due process. [Appellant's Initial Br., pp. 22-23]. Whatever the merits of these arguments may be, Sorrell cannot raise them because he waived and/or failed to

preserve these issues for review. In any event, his suggestion that Committee members had improper advance access to inadmissible evidence in *this* case is refuted by the record.

As to Sorrell's contention that the 43-day (actually 41-day) break between the first and second day of his hearing deprived him of due process, he did not raise this issue to the Committee Attorney, the Grievance Committee or the ALC. Indeed, the transcript reflects that at the end of the first day of the hearing, the Committee Chair stated that the hearing would "reconvene at a later date, potentially either August 8th, 19th, or the 23rd. The date will be confirmed and everyone--all parties will be notified. Thank you very much," [R. p. 398]. No objection was registered by Sorrell either on that day or on August 8, 2011, when the hearing reconvened. [R. pp. 398; 435-36].

Issues not raised before the Grievance Committee cannot be raised for the first time on appeal. *Carson v. S.C. Dep't of Natural Resources*, 371 S.C. at 120, 638 S.E.2d at 48. Here, Sorrell not only failed to raise the time-lapse issue before the Committee, he failed to raise it--or attempt to raise it--to the ALC. Accordingly, he is foreclosed from raising this issue at this late stage.

As to his "structural defect" argument concerning Committee members' potential exposure to inadmissible evidence prior to the convening of a hearing at which that evidence can be challenged, Sorrell is seeking nothing more than an advisory ruling because he was not subjected to such a process. Moreover, as the ALC held, to the extent Sorrell has standing to raise this issue, he waived it by not raising it to the Committee when he was offered a golden opportunity to do so.

The State Employee Grievance Procedure Act directs the State Human Resources Director to perform certain ministerial duties associated with a grieving employee's appeal from the employing agency level to the State Employee Grievance Committee. As relevant here, the statute provides:

When an appeal is filed, the State Human Resources Director shall assemble all records, reports, and documentation of the earlier proceedings on the grievance and review the case to ascertain that there has been full compliance with established grievance policies, procedures and regulations within the agency involved and shall determine whether or not the action is grievable to the committee[.] . . . If the State Human Resources Director determines that the action is grievable, he shall forward the appeal *and documents* . . . after the mediation process has been completed, *to the designated committee panel and to the committee attorney for a hearing[.] . . . The documents transmitted by the State Human Resources Director to the designated committee panel and committee attorney must be marked into evidence as 'Committee Exhibit I' during the committee chairman's opening statement at the beginning of the hearing unless excluded by the committee attorney based on a prior objection raised by either party.*

S.C. Code Ann. § 8-17-350 (Cum. Supp. 2011) (emphasis added).

Sorrell asserts that this statutory procedure, which theoretically permits panel members to have access to document any evidence before either party has had the opportunity to object to and secure a ruling on whether any of those documents should be excluded from Committee Exhibit 1, constitutes a “structural defect which, on its face, denies procedural due process” because committee members’ impartiality may be compromised by exposure to inadmissible evidence prior to the hearing. [Appellant’s Initial

Br., p. 22]. For the reasons that follow, this issue is not properly before the Court in this appeal and, in any event, has not been preserved for review.

As the Statement of the Case reflects, Sorrell's objections to certain documents submitted by DPS to the State Human Resources Director for inclusion in Committee Exhibit 1 were heard and ruled on by the Committee Attorney outside the presence of the Grievance Committee three months before the hearing on the merits commenced.¹ Moreover, it is clear from the transcript of the March 22, 2011 evidentiary hearing conducted by the Committee Attorney on Sorrell's objections that no Committee member had seen any documents submitted by either side prior to that date. Indeed, twice during that hearing, Sorrell's counsel acknowledged his understanding that the Committee members had *not* seen the parties' documentary submissions as of that date. [R. pp. 105-06; 113].

Sorrell's attempts to convey the impression to the Court that Committee members *had* seen documents prior to March 22nd by referring the Committee Attorney's comments at that hearing about having to "unring the bell," but his attempt to convey this false impression is belied by the record. As the record makes clear, the Committee Attorney's mention of "unring[ing] the bell" was in the context of an academic discussion about whether objections to the content of Committee Exhibit 1 should be made and heard *prior to* the date of the hearing on the merits instead of on the first day of the hearing on the merits. The Committee Attorney remarked that although some attorneys wait until the day of the hearing on the merits--after Committee members have already seen the contents of Committee

¹ The record reflects that the hearing on Appellant's objections was conducted on March 22, 2011 [R. pp. 83-122], while the hearing on the merits began on June 27, 2011. [R. pp. 35; 135].

Exhibit 1--to raise objections to its content, he (the Committee Attorney) was of the opinion that raising and resolving those objections prior to the time that the record was disseminated to the Committee members was obviously preferable to avoid having to “unring the bell.” [R. pp. 84-88; 104-110]. That Committee Exhibit 1 had not been finalized and distributed to the panel members as of the March 22, 2011 hearing on Sorrell’s objections is further evident from the Committee Attorney’s statement at the outset of that hearing as to the purpose of the hearing: “raising some objections to some of the documents that have been submitted in *proposed* exhibit number 1.” [R. p. 84 (emphasis added)].

It is true that, at the outset of the hearing on the merits, the Committee Attorney disclosed on the record that the Chair had that day (*i.e.*, June 27, 2011) “inadvertently reviewed the old version of Committee Exhibit 1, including some documents that were subsequently redacted.” [R. p. 143]. But, when Sorrell’s counsel was expressly offered the opportunity to challenge the Chair’s impartiality, he declined and responded that Sorrell had “no objection” to the Chair’s continuing to serve. [R. p. 144].

Thus, whatever the merits of the due process issue Sorrell poses may be in the abstract, in *this* case, Sorrell received a ruling on his objections to certain documents proposed by DPS for inclusion in Committee Exhibit 1 *before* that exhibit was finalized and disseminated to members of the Committee. Indeed, at the end of the March 22nd hearing on Sorrell’s objections, the Committee Attorney made clear that his rulings would determine “what’s going to be in Committee Exhibit 1” [R. p. 121], and, in his ruling dated April 12, 2011, the Committee Attorney sustained Sorrell’s objections to each of the documents to which he had objected. [R. pp. 27-31; 36-39]. Hence, because Sorrell was not subjected to

the “structural defect” that purportedly denies grievants due process and because he waived any issue as to the Chair’s impartiality being compromised by his inadvertent exposure to inadmissible evidence, his due process claim is not properly before the Court.

In *Wallace v. City of York*, 276 S.C. 693, 281 S.E.2d 487 (1981), the Supreme Court explained:

The function of appellate courts is not to give opinions or merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation. Accordingly, . . . issues which have become moot or academic in nature are not a proper subject of review.

Id., 276 S.C. at 694, 281 S.E.2d at 488. Therefore, where a party’s procedural due process rights have been safeguarded through the administrative process, he cannot insist on pursuing on appeal a procedural due process issue that, for him at least, is academic or moot. *See Seabrook v. Knox*, 369 S.C. 191, 196-98, 631 S.E.2d 907, 910-11 (2006). Because Sorrell’s objections to certain DPS documents were considered and sustained and thus were excluded from Committee Exhibit 1 prior to that exhibit’s dissemination to the Grievance Committee members who heard Sorrell’s grievance appeal, his due process claim must be dismissed as a mere abstract or hypothetical matter and, as such, not proper for consideration in *this* appeal.

Moreover, Sorrell cannot attempt to resurrect or revive his due process claim through the Chair’s inadvertent exposure--on the first day of the hearing on the merits--to some of the documents excluded from Committee Exhibit 1 because, when expressly afforded the opportunity to challenge the Chair’s continued participation and/or make a record as to the

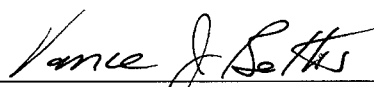
effect of his exposure to those documents, Sorrell's counsel responded: "We have no objection to the chairman's continued participation." [R. p. 144]. By choosing not to pursue the extent and/or effect of the Chair's exposure or otherwise object to his continued participation as a member of the Committee considering his appeal, Sorrell waived any right to raise that issue on appeal or to attempt to use it as a back door means of pursuing his due process attack on the grievance appeal process. *See State v. Johnson*, 248 S.C. 153, 162-63, 149 S.E.2d 248, 352 (1966) (party's failure to explore possible juror exposure to improper influence/information before trial commences constitutes waiver of any objection to impartiality of that juror); *see also Carson v. SC Dep't of Natural Resources*, 371 S.C. at 120, 638 S.E.2d at 48 (employee must raise and secure a ruling from Grievance Committee and/or Committee Attorney on a legal issue to preserve that issue for judicial review *and* must demonstrate that his rights were prejudiced by whatever ruling was made).

For the foregoing reasons, Sorrell's due process challenge to the dissemination of Committee Exhibit 1 to Grievance Committee members before any objections to its content have been ruled on is an abstract matter not properly before the Court and, in any event, not properly preserved for review. Accordingly, the Court need not and, under South Carolina law, cannot reach that issue.

CONCLUSION

The ALC properly determined that the Grievance committee's decision holding that Sorrell was properly terminated by DPS due to misconduct is supported by substantial evidence and is not affected by any legal error. Accordingly, the ALC's decision should be affirmed.

Respectfully submitted,

A handwritten signature in cursive script, reading "Vance J. Bettis".

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December 12, 2012

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. AJL-30-0489AP

E. Shawn Sorrell, ...Appellant,

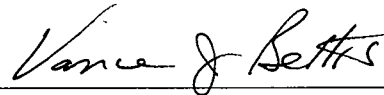
v.

South Carolina Department of Public Safety, . . .Respondent.

PROOF OF SERVICE

I certify that I have this date caused to be served a copy of the foregoing Brief of Respondent upon counsel for Appellant by deposit in the United States mail, first-class, postage-paid, addressed as follows:

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SC Court of Appeals

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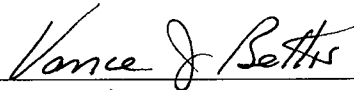
Deborah Brooks Durden, Administrative Law Judge

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CERTIFICATE OF COUNSEL

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



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