

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT Court of Appeals

Carolyn C. Matthews, Administrative Law Judge

Case No. 2015- 01548

William Henry Chapman, Appellant,

v.

South Carolina Department of Social Services, Respondent.

FINAL BRIEF OF APPELLANT

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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. 215-217*)

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. pp. 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. pp. 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 DSS 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. (*R. pp. 228-229*) 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.

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. p. 230*)

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

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. pp. 12-13)

On September 18, 2014, Appellant filed and served his Request for Reconsideration of the Final Decision of the State Human Resources Director. *(R. pp. 14-20)* On October 3, 2014, Counsel for DSS filed and served the Agency's Statement in Opposition to Appellant's Request for Reconsideration. *(R. pp. 43-48)* 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. pp. 49-54)* 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. pp. 1-6)*. Appellant filed Notice of Appeal in the South Carolina Court of Appeals on July 20, 2015.

ARGUMENT

I. Whether or not the Appellant failed to exhaust administrative remedies with the Respondent in accordance with the requirements of the Act.

Appellant respectfully asserts that he has exhausted his administrative remedies under S.C. Code Ann. § 8-17-310, et seq., (1986) as amended, the State Employee Grievance Procedure Act (hereinafter referred to as the "Act") as it applies to his termination and that he is in full compliance with the Act.

In his Analysis, the State Human Resources Director (hereinafter referred to as "HR Director") reasoned as follows.

According to the record, Appellant was notified via hand-delivered letter on June 3, 2014, that his employment was terminated effective June 2, 2014. Appellant initiated a grievance concerning his termination via facsimile which was received by Respondent's Human Resources Management Office on June 20, 2014. The date Appellant's grievance was submitted, June 20, 2014, is seventeen (17) calendar days from the effective date of the action, June 3, 2014. Section 8-17-330 of the S.C. Code of Laws of 1976, as amended, states in part 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...." ... Appellant's grievance was submitted beyond this fourteen calendar day timeframe. (*R. p. 12*)

The foregoing Analysis omits any mention of the critical events which occurred between the June 3, 2014, notification to Appellant that his employment had been terminated and the June 20, 2014, submission of the faxed DSS Form 1449. The record reflects that Appellant initiated his grievance internally by Counsel's letter to the Clarendon County Interim Director dated June 12, 2014 - five (5) days prior to the expiration of the June 17, 2014, fourteen-day cut-off period. His letter stated unambiguously (1) the effective date of the grievable action: "...June 3, 2014," (2) his desire to grieve the action, (3) described the action that was the subject of his grievance: "termination," and asked to be notified of the date and time of any proceedings. (*Dwight C. Moore's Letter dated June 12, 2014, R. p.*

213) An examination of DSS Form 1449 reveals that the substantive information requested by and provided on the form was provided initially in Appellant's June 12, 2014, letter initiating his grievance; to wit,

1. **Effective date of grievable action:** June 3, 2014
2. **Give a full explanation of the grievance/grievance action:** Wrongful Termination

(South Carolina Department of Social Services Grievance Form 1449, R. p. 217)

After his grievance letter was forwarded to the State Office of the South Carolina Department of Social Services (hereinafter "SC DSS"), there was communication between the State Office and the office of Appellant's Counsel which resulted in the letter dated June 20, 2014, and DSS Form 1449 being faxed from Counsel's paralegal to the Employee Relations Director. The cover letter contains the following illuminating statement: "Please find enclosed the DSS Form 1449 which you requested in the above-referenced matter." (Emphasis added) *(R. p. 216)* Clearly, the Respondent acknowledged Appellant's grievance letter for what he intended it to be and for what it was in actuality - the initiation of the grievance process. Although the HR Director cites receipt of DSS Form 1449 as the initiation of the grievance, and bases his decision upon the fact that the form was received on June 20, 2014, the Act does not state that the grievances shall be initiated only by filing DSS Form 1449. Section 8-17-330 states only that [t]he procedure must be initiated internally by such employee within fourteen calendar days of the effective date of the action ... The South Carolina Department of Social Services Human Resources Policy and Procedure Manual, Chapter 6, Procedure for Grievance and Appeal, **effective 01/22/2010**, Section 606, Procedure to File a Grievance, in Step One provides that "[t]he grievance of an adverse employment action must be filed in writing on DSS Form 1449 Grievance and Appeal Form

with the Human Resources Management Director within fourteen (14) calendar days of the effective date of the employment action." (DSS Human Resources Policy and Procedure Manual) However the Grievance Procedure Model Policy (**Revised and Effective 4/8/2013**), under Procedure, Step One, states as follows:

A covered employee who wishes to file a grievance must initiate the grievance with the agency's Human Resources Office. The grievance must be in writing and must be received (or, if mailed, postmarked) within 14 calendar days of the effective date of the action or 14 calendar days from when the employee is notified of the action, which is later. The employee should include a written summary of the facts of the grievance and the relief sought.

(Grievance Procedure Model Policy, Revised and effective 4/8/2013, R. p. 207-211)

Appellant contends that the failure to earlier submit DSS Form 1449 is not fatal to his grievance because his grievance was initiated in writing, his initial grievance letter provided the same information requested on the form, the Respondent accepted his letter, requested that he submit the DSS Form 1449, which he did, and Respondent continued the process. Therefore, Respondent waived the right to disclaim the sufficiency of his letter as initiation of the grievance process, and it is estopped from denying Appellant the right to a hearing on the merits of his grievance under the pretext that Appellant did not file a grievance with Respondent pursuant to time frames established by the Act.

Although the HR Director cites receipt of DSS Form 1449 as the initiation of the grievance, and bases his decision upon the fact that the form was received on June 20, 2014, the Act does not state that the grievance must be initiated only by filing DSS Form 1449. **Section 8-17-330 states only that [t]he procedure must be initiated internally by such employee within fourteen calendar days of the effective date of the action ...**

Likewise, the Grievance Procedure Model Policy (Revised and Effective 4/8/2013) states the following: "A covered employee who wishes to file a grievance must initiate the

grievance with the agency's Human resources Office. The grievance must be in writing and must be received (or, if mailed, postmarked) within 14 calendar days of the effective date of the action or 14 calendar days from when the employee is notified of the action, whichever is later. The employee should include a written summary of the facts of the grievance and the relief sought."

The SC DSS Human Resources Policy and Procedure Manual, Chapter 6, Procedure for Grievance and Appeal, effective 01/22/2010, Section 606, Procedure to File a Grievance, in Step One provides that "[t]he grievance of an adverse employment action must be filed in writing on DSS Form 1449 Grievance and Appeal Form with the Human Resources Management Director within fourteen (14) calendar days of the effective date of the employment action." (R. pp. 203-206)

Appellant respectfully calls attention to the fact that the Policy and Procedure Manual of the Respondent became effective January 22, 2010. There is no indication that the Respondent conducted an update or a review subsequent to the effective date of the revised Model Policy on April 8, 2013, with regard to what effect, if any, the revision had on the 2010 edition of the Manual. Additionally, neither the enabling statute, the Model Policy nor the Respondent's Manual uses the mandatory term "shall" with regard to use of DSS Form 1449 when filing an employee grievance; instead, all documents use the permissive term "must" when referring to the subject provision.

In the case of Paschal v. Price, 380 S.C. 419, 670 S.E.2d 374 (2008), *Withdrawn, Substituted and Refiled Nov. 24, 2008, Reh'g Denied Dec. 19, 2008, Cert. Granted March 17, 2010*), a workers compensation appeal filed without the mandatory cover sheet, the South Carolina Court of Appeals found that the company's failure to provide a civil cover sheet when it appealed to the circuit court did not deprive the circuit court of jurisdiction. The Paschal Court noted:

Section 1-23-380 of the South Carolina Code (2005) sets forth the filing requirements for appeals of administrative decisions under the South Carolina Administrative Procedures Act prior to July 1, 2006. Nowhere in that section or in section 42-1-60, which addresses procedures for appealing a workers compensation award, is there any mention that a cover sheet is necessary when filing an appeal. In keeping with the supreme court's recent decision in Skinner v. Westinghouse Electric Corp., we decline to hold that a cover sheet, which is not required by statute, is essential to invoke appellate jurisdiction Paschall 380 S.C. at 440, 670 S.E.2d 386.

...
In addition, the notice of appeal received by the Clerk on March 3, 2006, satisfied the applicable requirements of the South Carolina Administrative Procedures Act, the South Carolina Workers' Compensation Act, and the South Carolina Appellate Court Rules. Both this Court and the supreme court have held clerical errors in the notice of appeal do not destroy an appeal. See State v. Scott, 351 S.C. 584, 587, 571 S.E.2d 700, 701 (2002) acknowledging that service of the notice of appeal is a jurisdictional requirement, but that "non-prejudicial clerical errors in the notice are not detrimental to the appeal. Paschal, 380 S.C. at 441, 670 S.E.2d at 386.

...
We recognize that courts of this State have refused to elevate form over substance and accordingly affirm the circuit court's denial of Paschal's motion to dismiss. Paschal, 380 S.C. at 442, 670 S.E.2d at 387. (Emphasis supplied)

In his Opinion dated October 16, 2014, denying Appellant's Request for Reconsideration, the HR Director cites Hyde v. South Carolina Department of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583, (1994) Reh'g. Denied May 4, 1994, and Law v. South Carolina Department of Corrections 368 S.C. 424, 440, 629 S.E.2d 642, 651, (2006) Reh'g Denied May 24, 2006), in which the South Carolina Supreme Court held that "[w]here an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts."
(HR Director's Opinion Letter dated 10/16/14, pg. 4, R. p. 10)

Both Hyde and Law are clearly distinguishable from Appellant Chapman's case. Hyde commenced his action under the Whistleblower Statute in the circuit court. Our Supreme Court held that the employee was required to exhaust administrative remedies

available under the State Employees Grievance Procedure Act prior to bringing the whistleblower action. 314 S.C. 207, 442 S.E.2d 582. In Law, the Supreme Court found that the Appellants had a grievable action under the State Employee Grievance Procedure Act which they voluntarily did not pursue by appeal. Law, 368 S.C. at 440, 629 S.E.2d at 651. Unlike the employee in Hyde, Appellant Chapman duly exhausted his remedies under the Act; hence this appeal. Contrary to Law, Appellant Chapman did timely initiate a grievance under the Act and aggressively pursued his appeal.

The ruling of the HR Director forecloses on Appellant's right to have his grievance accorded determination as provided by the Act. Appellant respectfully asks this Court to consider the import and applicability of the finding by the South Carolina Court of Appeals in the case of Trowell v. South Carolina Department of Public Safety, 384 S.C. 232, 681 S.E.2d 893 (Ct. App. 2009). "We find the agency's interpretation of its service rules was overly harsh in this situation." Trowell, 384 S.C. at 237, 681 S.E.2d at 896. The issue in Trowell was service; the Director notified Trowell, via letter, that his appeal was untimely because Trowell had failed to file it within ten calendar days of receipt of the Department's February 2nd fax. The HR Director noted that the Act is not specific as to how the final agency decision must be delivered and determined that it could be accomplished through hand delivery, by fax or mail and denied the appeal because it was not filed within the ten-day period following the service on February 2nd. The Court of Appeals concluded, as complained of in our case, that the HR Director's overly narrow interpretation of the rules under the Act was too harsh.

Appellant asserts that in his case, such an overly narrow and harsh interpretation of the Act contravenes the intent of the enabling legislation. S.C. Code Ann. § 8-17-310 (1986) states as follows:

The General Assembly also recognizes that the most effective and cost efficient means of resolving grievances occurs at the lowest level, and state agencies are encouraged to use methods of alternative dispute resolution to avoid a grievance hearing and further litigation. It is for the protection of the interests of both the employee and the agency via a fair administrative review, that this act, which may be cited as the "State Employee Grievance Procedure Act", is enacted.

(Emphasis supplied) S.C. Code Ann. § 8-17-310 (Supp. 2014)

Under the applicable case law and enabling statute, the Appellant is entitled to a fair administrative review of his grievance and a determination of fact at a hearing on the merits of his case.

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

Appellant respectfully contends that estoppel by laches has attached in this case and that he has been prejudiced by the unreasonable and negligent delay of the Defendant in its administration of the Act. Therefore, the Final Decision of the HR Director and the ensuing Final Order and Decision of the Administrative Law Court Judge should be vacated and the Appellant should be granted a hearing on the merits of his grievance.

The Appellant was terminated on June 3, 2014. By letter to the Respondent dated June 12, 2014, Appellant initiated his internal grievance. Respondent requested and received the DSS Grievance Form 1449 on June 20, 2014. On June 25, 2014, five days after receiving the Form 1449, Human Resource Management Director Jacobs sent a letter to the Clarendon County DSS Director and to the Appellant stating that "[p]er policy," the

grievance will be forwarded to the Reviewer or Designee "to initiate Step Two of the grievance process." He noted that voluntary mediation has failed "at this time; however, the option remains open for both parties for the duration of the Agency grievance process." Mr. Jacobs' letter further informed the Clarendon County Director and the Appellant that "[i]n 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.**" Copies of the letter were sent to Respondent's Counsel and to Appellant's counsel. (R. pp. 218-219)

At this point, the Appellant was in Step Two of the grievance procedure. On July 7, 2014, Respondent's Director of Human Resources, emailed and sent by USPS a letter to Leigh Bolick, Director of Child Care Services, enclosing the Grievance and appeal forms for Appellant and gave instructions and the procedure for handling Appellant's grievance. Copies of the letter were sent to Appellant, his counsel, Ms. Robin Layton, County Director, Clarendon County DSS, and Mr. William Smith, DSS Office of General Counsel. Ms. Bolick was directed to submit her recommendation, along with the grievance file and/or documents from each party, to the Human Resources Management Division by July 16, 2014. (*Funneaser "Neisie" Jacobs' letter dated July 7, 2014, R. p. 220*)

Appellant's grievance progressed through Step Three of the procedure. In a letter dated July 25, 2014, Ms. Amber Gillum, Acting State Director, sent a certified letter to Appellant with "cc" notation to Robin Layton, County Director, Clarendon County DSS, William Smith, Esq., Office of General Counsel and Appellant's counsel stating that the Decision of the State Director, (DSS Form 1449-2, Grievance Division Form) was enclosed.

Ms. Gillum upheld the Agency's decision to terminate the Appellant. The letter further advised Appellant as follows:

If you do not agree with this decision, you may appeal to the State Employee Grievance Committee through the Director of Human Resources at the Office of Human Resources, 8301 Parklane Road, Suite A220, Columbia, South Carolina 29223. 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.

(Amber Gillum's Letter dated July 25, 2014, transmitting DSS Form 1449-2, R. pp. 221-222)

By letter dated August 4, 2014, Appellant's counsel submitted his letter appealing the Grievance Decision handed down by the State Director on July 25, 2014. *(Dwight C. Moore's Letter dated August 4, 2014, R. p. 223)* By letter dated August 5, 2014, Ms. Carrie Coats, of the ADR Program, said she was sending the appeal forms to Appellant's counsel. Ms. Coats requested that the forms be returned to their office within five (5) days of receipt. *(Carrie Coats' Letter dated August 5, 2014, R. p. 224²)*. The forms were not in the letter and by fax dated six days later on August 11, 2014, Ms. Coats transmitted the omitted forms. *(Carrie Coats' two-page fax dated August 11, 2014.)* Appellant completed the requested form and received a State Appeal Form Confirmation dated August 11, 2014. *(Confirmation of State Appeal Form dated August 11, 2014)*

As shown above, the Appellant's grievance had completed the three steps provided for in Chapter 6 (606) of the Policy and Procedure Manual, and he had already appealed the decision of the Acting State Director when he received the Final Decision of the HR Director dated September 4, 2014, in which the HR Director determined that the Appellant had failed

² Disregard Record Page 225 containing the State Appeal Form which was included by error.

to exhaust his administrative remedies and that he was not entitled to a review of his case on the merits. (*Final Decision of State Human Resources Director dated September 4, 2014, R. p. 11*)

Appellant's request for Reconsideration of the Final Decision of the State Human Resources Director was filed September 18, 2014 (*R. pp. 14-20,*) and the HR Director upheld his Final Decision of September 4, 2014. (*R. pp. 7-10*)

Through no fault of his own and due solely to the irresponsible and callous conduct of the Respondent in the manner in which it managed his grievance, the Appellant has been put in an untenable position. On one hand, he was deceived into exhausting his administrative remedies within the Respondent Agency as provided by the Act based upon information, correspondence, communication and conduct by the Respondent. On the other hand, the Respondent had Appellant's grievance under active consideration as the single grievance diverged, bifurcated, and morphed into dual grievance tracks at the threshold of Step One of the Procedure, to wit: Appellant's grievance entered and completed Steps One, Two and Three down to and into the appeal process. At the same time the process was undergoing review within the Agency, Respondent barred Appellant's grievance at the entrance of Step One, and it languished with the HR Director until after the same grievance had already completed the procedure elsewhere within the Agency. By this time the travesty had come full circle for the Appellate as he was being forced to pursue the appellate process seeking a hearing on the merits of his grievance because the Respondent determined that he failed to exhaust his administrative remedies. As a result, the Appellant had commenced the Appeal of Ms. Gillum's decision on August 4, 2014 (*R. p. 223*), which upheld the Agency's decision to terminate the appellate. Appellant's appeal of Ms. Gillum's decision was pending at the

time Appellant received the HR Director's Final Decision on September 4, 2014. The HR Director's Final Decision is also on appeal to this Court.

In his statement in opposition to Appellant's Request for Reconsideration of the State Human Resources Director's Final Decision, Mr. Smith sought to excuse Respondent's dilatory handling of the Appellant's case. He stated: "Notwithstanding the fact that a lapse in counsel within the agency resulted in moving forward with an internal grievance finding in this matter, Appellant has no basis upon which to assert that further proceedings must be permitted." (*R. p. 48*) Appellant argues, first, that at no point during the proceedings that gave rise to the "internal grievance finding" within the Agency was the Appellant noticed of such proceedings and he was not permitted to participate or provide evidence or testimony in the record before the reviewer or to examine and challenge the record upon which the finding was based. Appellant contends, secondly, that the record reflects that copies of all correspondence generated by the Respondent were sent to the appropriate persons within the agency, including William C. Smith, Esquire, Respondent's Counsel, beginning at least as early as July 7, 2014. (*R. pp. 218-219, 220, 221, 223*) Appellant asserts that Respondent had ample time, opportunity and information to realize that the manner in which it was handling Appellant's grievance was not in compliance with the Act.

Due to the negligent conduct of the Respondent, the Appellant has suffered delay in the outcome of his grievance, mental anguish, emotional stress and financial loss.

The Record on Appeal contains Attachments which, presumably, were considered by the State DSS Director in arriving at her decision dated July 25, 2014. (*R. pp. 221-222*) Since The HR Director's Final Decision was based upon the onset of the grievance process; i.e., the actual filing and his determination that no grievance had been filed, all events

occurring thereafter would be irrelevant. Under the present state of the record, we have dual, inconsistent proceedings – both of which have been pursued to conclusion of their respective phases. Because different persons were conducting simultaneous procedures in processing Appellant's grievance, the completeness of any record upon which the decisions were based comes into question. Likewise, any decisions made upon incomplete records are suspect.

Appellant respectfully asserts that he should be permitted to pursue further proceedings on the basis of laches, which may be established if there is an unreasonable and unexplained delay in asserting a legal claim.

In order to prove the affirmative defense of laches, the burden is on the respondent to establish (1) delay, (2) unreasonable delay, and (3) prejudice. "The inquiry into the applicability of laches is highly fact specific and each case must be judged on its own merits."

Ables v. Gladden, 378 S.C. 558, 570, 664 S.E.2d 442,448 (2008).

Appellant has proven delay in the appropriate processing of Appellant's grievance appeal. Appellant has proven unreasonable delay which resulted in two separate steps of the grievance appeal process being conducted simultaneously by different components of the Agency. Appellant has proven that he has suffered prejudice at the hands of DSS in that he has had to respond to both the Decision of the State Director and the Final Decision of the HR Director based upon the record which showed, by the actions of DSS, that his grievance appeal had been accepted, that it was being acted upon, and he was misled into believing so until he received the Final Decision of the HR Director dated September 4, 2014, which ended Appellants appeal on the grounds that Appellant had not timely filed his grievance appeal – AFTER the July 25, 2014, letter transmitting the Acting State Director's July 25, 2014, decision on DSS Form 1449-2, Grievance Decision Form, and AFTER Appellant had appealed the State Director's Decision.

Throughout this process DSS has been the controlling party; the policies and regulations were promulgated by DSS, the records were in the possession of DSS, the delays were caused by DSS, and the delay occasioned by inter-agency issues with Counsel all rests with DSS.

He who comes into equity must come with clean hands They (courts of equity) apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter of litigation. * *

* They apply the maxim, not by way of punishment for extraneous transgressions but upon considerations that make for the advancement of right and justice. They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.

Ford v. Buffalo Eagle Colliery Co., 122 F.2d 555, 563, headnote 1, (1941)

The Appellant should not be denied the right to pursue a fair and just conclusion under the procedure provided by the Act for a disposition of his grievance upon the merits.

S.C. Code Ann. § 1-23-380, the Administrative Procedures Act, provides as follows:

(4) The review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in the procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate.

(5) 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:

- (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.

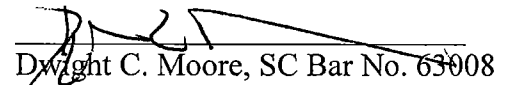
CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to issue its Decision making the following disposition of this appeal:

1. Determining that Appellant timely initiated his internal grievance process;
2. Determining that Appellant timely filed his appeal with the Human Resources Management Director;
3. Vacating the Final Decision of the HR Director;
4. Vacating the Final Order and Decision of the Administrative Law Court Judge;
5. Nullifying and voiding all other Respondent Agency findings, determinations and actions as a result of Agency review(s) conducted with regard to the merits of Appellant's grievance, and
6. Remanding the case to the Respondent Agency for the purpose of having Appellant's grievance proceed to a hearing on the merits as provided by the Act.

Respectfully submitted,

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November 16, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

SC COURT of Appeals

Appellate Case No. 2015-001548

William Henry Chapman, Appellant,
v.

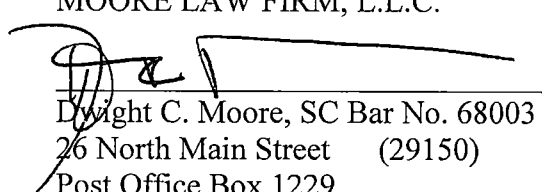
South Carolina Department of Social Services, Respondent.

CERTIFICATE OF COUNSEL

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

November 16, 2015

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