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SC COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Case No. 2015-01548

William Henry Chapman, Appellant,

v.

South Carolina Department of Social Services, Respondent.

FINAL REPLY BRIEF OF APPELLANT

Dwight C. Moore, SC Bar No. 63008
Moore Law Firm, L.L.C.
26 North Main Street
Post Office Box 1229
Sumter, South Carolina 29151-1229
Telephone (803) 778-6520
Fax (803) 775-6365
Email: moorelawfirm@ftc-i.net
Attorney for 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. 214-217*)

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

Dear Mr. Chapman and Ms. Layton:

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

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

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

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

By letter dated July 7, 2014, and received by Appellant's Counsel on July 9, 2014, Funneaser "Neisie" Jacobs, the Director of Human Resources Management Division, E-

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

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

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

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

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

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

Mr. Moore,

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

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

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

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

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

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

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

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

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

This concludes the processing of the appeal.

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

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

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

June 16, 2015, R. p. 1) Appellant filed Notice of Appeal in the South Carolina Court of Appeals on July 20, 2015.

ARGUMENT

A. Respondent's Statement of the Case

First, Appellant strenuously objects to Respondent's Statement of the Case in the Brief of Respondent in which it adopts as its statement of the case paragraphs 1-6 of the "Findings of Fact" set forth in the June 16, 2015, Final Order and Decision of the Administrative Law Court. (*Brief of Respondent, p. 4, R. pp. 100-101*) Furthermore, Respondent asserts as follows: "To the extent that Appellant's statement of the case is inconsistent with the findings set forth by the Administrative Law Court, Respondent contests any such inconsistent matter."

Rule 208(C), SCACR, provides that in briefs, the Statement of the Case "shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters ..." (Emphasis supplied) Finding of Fact #1 of the said Order states that "Appellant was terminated from employment with the Clarendon County Division of the South Carolina Department of Social Services ("DSS") for substandard job performance." Appellant respectfully argues that the Administrative Law Court Judge committed error in finding that the Appellant was terminated from employment for substandard job performance because substandard job performance is a contested matter. Wrongful termination forms the basis of this appeal. The issue before the ALC Judge did not include the merits of Respondent's action in terminating the Appellant but, rather, whether or not he had exhausted his administrative remedies to initiate an appeal on the merits. Appellant notes with concern the following finding in the Final Order and Decision of the

ALC Court: “Under the present state of the record, we have dual proceedings – both of which have been pursued to the conclusion of their respective phases.” *Final Order and Decision, 06/16/2015, Findings of Fact #8, p. 6, R. pp. 3-4.* If the ALC Judge did, indeed, consider the merits of the case, then the finding was made upon unlawful procedure because the Appellant was deprived of the opportunity for a full and fair hearing on the issue of wrongful termination and suffered a grave injustice in this matter.

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

Respondent contends in its Initial Brief that “[t]he mandatory language of the DSS Human Resources Policy and Procedure Manual required that Appellant’s grievance be initiated by submitting the form and not through other means.” (*Resp. Initial Brief, p. 8*)

Appellant respectfully shows that 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 grievances shall be initiated only by filing DSS Form 1449. Section 8-17-330 states only that “**the procedure must be initiated internally by such employee within fourteen calendar days of the effective date of the action ...**” *S.C. Code Ann. § 8-17-330 (1986) as amended.* 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. (Emphasis supplied)

(Grievance Procedure Model Policy, Revised and effective 4/8/2013, R. p. 208)

As stated in the Initial Brief of the Appellant, his letter dated June 12, 2014, initiating the grievance procedure contained a clear summary of the facts of the grievance and the relief sought. *(Initial Brief of Appellant, Argument #1, pp. 6-7, R. pp. 68-69)*

The ALC Judge cited Skinner v. Westinghouse Electric Corp., 380 S.C. 91, 668 S.E.2d 795 (2008) "for the proposition that "[o]ur jurisprudence confirms that jurisdictional appealability issues are governed by statute, and not by the rules of civil procedure.'" Skinner, supra, 380 S.C. at 94, 668 S.E.2d at 796. The ALC Judge found that, "[b]y this reasoning, the letter from Appellant's counsel would have been satisfactory to initiate the appeal within DSS ..." *(Final Order and Decision, 06/16/2015, Finding of Fact #7, R. p. 3).*

Respondent misapprehends Appellant's point in asking 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) in which the Court stated: "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. However, 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 and § 8-17-330 (1986), and the case law in Skinner and in Trowell thereby precluding consideration of his case on the merits.

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

The Respondent contends in his Initial Brief that “[a]ppellant has only now raised equitable grounds for the first time in the present appeal.” *Brief of Respondent, Argument II, p. 8.* Appellant refutes Respondent's allegation. The issue has been raised and ruled upon; therefore, it is properly before this Court for consideration. The issue was raised in Appellant's Request for Reconsideration of the *Final Decision of the State Human Resources Director, Argument, Page 5, R. pp. 18-19*, and ruled upon by the HR Director, *Letter dated October 16, 2014, Page 4, R. p. 10.* The issue was raised in the ALC, *Brief of Appellant, Pages 11-12, R. pp. 73-74*, and ruled upon by the ALC Judge, *Final Order and Decision, 06/16/2015, Findings of Fact #8, Page 4, R. pp. 3-4; Conclusions of Law #6, Pages 5-6, R. pp. 5-6)*

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 (2005), the Administrative Procedures Act, provides that “[i]n 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.” Furthermore, the court may reverse or modify the decisions if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions show the Respondent acted in violation of constitutional and statutory provisions, that its actions exceeded the statutory authority of the agency, that its decisions were made upon unlawful procedure, that decisions were affected by other errors of law, were clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and were arbitrary, capricious and characterized by abuse of discretion and the clear unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(5) (Supp. 2014)

CONCLUSION

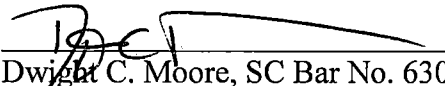
For the foregoing reasons, Appellant respectfully urges this Court to issue its Decision making the following disposition of this appeal:

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.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

MOORE LAW FIRM, L.L.C.


Dwight C. Moore, SC Bar No. 63008
26 North Main Street 29150
Post Office Box 1229
Sumter, South Carolina 29151-1229
Telephone (803) 778-6520
Fax (803) 775-6365
Email: moorelawfirm@ftc-i.net
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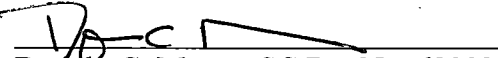
South Carolina Department of Social Services, Respondent.

CERTIFICATE OF COUNSEL

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

November 16, 2015

MOORE LAW FIRM, L.L.C.


Dwight C. Moore, SC Bar No. 68003
26 North Main Street (29150)
Post Office Box 1229
Sumter, South Carolina 29151-1229
Telephone: (803) 778-6520
Fax: (803) 775-6365
Email: moorelawfirm@ftc-i.net
Attorney for Appellant