

FORM 13
BRIEF OF APPELLANT*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Paul E. Short, Jr. Circuit Court Judge

Case No. 2019-000322

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SC Court of Appeals

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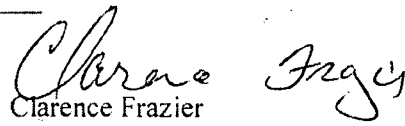
Respondent,

v.

Clarence Frazier,

Appellant.

[INITIAL] BRIEF OF APPELLANT


Clarence Frazier
205 Jade Tree Drive
Hopkins, South Carolina 29061
(803) 465-7194
Appellant

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CLARENCE FRAZIER

Appellant,

v.

SOUTH CAROLINA DEPARTMENT
OF JUVENILE JUSTICE

Appellant's Brief

Clarence Frazier
205 Jade Tree Dr.
Hopkins, SC 29061
(803) 465-7194
Appellant

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**The SEGC erred in now allowing Appellant to testify
as to the disposition of his criminal charges**

In its Brief, Respondent argues that the State Employee Grievance Committee (hereinafter "SEGC") properly ruled that Appellant was to be precluded from testifying as to the disposition of his criminal charge in accordance with S.C. Code Reg. § 19-718.05(G) as well as binding South Carolina precedent. Defendant's argument is without merit.

In its entirety as relevant to the instant issue, the S.C. Code Regulations provides:

Evidence of the dismissal, acquittal, or non-prosecution of the related criminal charges shall be inadmissible in the employee's appeal pursuant to applicable law.

S.C. Code Reg. § 19-718.05(G). Notably, the Regulation itself does not specifically prohibit such evidence but only does so pursuant to applicable law. (emphasis added). Respondent, in its Brief, baldly asserts that such a determination must be found here despite failing to cite applicable law in support of the same. [Respondent Brief, pp. 8-9]. Rather, Respondent alters its argument under the guise that such testimony was not relevant.

As Respondent admits, it relies upon the fact that neutral, detached third parties reached the same conclusion as it did by and through issuing warrants for Appellant's arrest. [Respondent Brief, p. 9]. That is to say, that because a neutral third party, including a magistrate, decided to bring charges that Respondent was necessarily correct in believing that Appellant assaulted the juvenile. In doing so, Respondent squarely placed Appellant's attempts to address the fact the charges were *nolle prosequi* within the parameters of Rule 401 of the South Carolina Rules of Evidence. Specifically, as set forth in Rule 401, the fact that the prosecutor elected to *nolle prosequi* the charges against Plaintiff identifies another third party of whom elected to not pursue the charges – directly contrary to the third parties Respondent wants the Court to rely upon. The

fact that the charges were *nolle prosequi* has the tendency to show that the determination in dispute – whether Appellant assaulted the juvenile – is more or less probable; indeed, it gives the SEGC the opportunity to weigh the fact that he was charged as compared to the fact that they were *nolle prosequi* in considering the credibility of the allegations against Appellant.

Additionally, the Committee Attorney himself caused the testimony to be relevant when he opined in from of the SEGC:

And furthermore, because the agency is attempting to show that their decision was justified, I think it's pertinent to allow him to say that a mutual and detached magistrate issued an arrest warrant based on the circumstance.

[ROA, p. 36]. It must be questioned that how such testimony, especially by the Committee Attorney and not a party, does not cause the prejudicial effect of the Court's ruling to not outweigh the prejudicial effect when considered as a whole. Moreover, Respondent's reliance upon *Brown* is misguided and unpersuasive. The Court in *Brown* was faced with a civil suit against an insurance agency for failing to pay on a claim. *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 542 S.E.2d 723 (2001). Although the Respondent desires the Court's holding to be blanket holding with respect to the non-prosecution of all criminal acts, the Court made the only that "evidence of non-prosecution for criminal arson is irrelevant and immaterial in a civil case for fire insurance proceeds." *Id.* at 2, citing *Rabon v. Great Southwest Fire Ins. Co.*, 818 F.2d 306, 309 (4th Cir. 1987) (adopting the rule "that a federal trial court commits reversible error when it permits the plaintiff in a suit for fire insurance proceeds to present evidence of his nonprosecution [sic] or acquittal on related criminal arson charges.") The *Rabon* Court goes on to qualify its holding only addressing criminal arson and not criminal act(s) as a whole.

Alternatively, Respondent argues that even if the Court was in error it was harmless. Respondent's argument is circular at best as it would stand for the proposition that it should have

also been precluded from introducing evidence that Appellant was even charged. Stated differently, if Respondent's argument was accurate than it should have been precluded from introducing evidence of the charge as it was duplicative in light of the documentation in the record. Respondent did introduce the evidence, however, and in doing so greatly prejudiced Appellant when it was further allowed to introduce bolstering evidence of the same when Appellant was not so allowed. *See* Rule 403, South Carolina Rules of Evidence.

As already set forth herein, the Committee Attorney himself potentially planted the seed in the mind of the SEGC that the fact Appellant was even charged/indicted lends credit to Respondent's position that it was reasonable and justified in its action. Evidence that Appellant was patently denied rebutting. Evidence is unfairly prejudicial if it has an undue tendency to even suggest decision on an improper basis, such as an emotional one. *State v. Martucci*, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008); see also *State v. Hawes*, 813 S.E.2d 513 (Ct. App. 2018).

Based on the foregoing, it was error for the SEGC to preclude Appellant from testifying as to the outcome of his charges. Alternatively, Appellant was subjected to unfair prejudice when he was so precluded but the Respondent was permitted to submit evidence that the charges were brought.

The SEGC erred in allowing SCDJJ to disregard its own policy in handling Appellant's termination.

Respondent admits that it failed to follow its policy in providing Appellant a meeting prior to his disciplinary action but asks this Court to look past the same as harmless error. To do so, however, would present a stark day for State employees and create nothing less than a double-standard to the benefit of State agencies.

In relevant part, Respondent policy provides:

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

[ROA, p. 418 (emphasis added)]. It is undisputed that Respondent failed to provide Appellant this opportunity. [ROA, p. 10].

In support of its position, Respondent principally relies upon *Rose. Rose v. Beasley*, 327 S.C. 197, 489 S.E.2d 625 (1997). *Rose* involved the Governor's removal of the Director of DPS without first providing a pre-removal hearing. *Id.* at 205. *Rose* is distinguishable, however, as it involved a statute, S.C. Code Ann. § 1-3-240(A), that provided for the hearing. Here, Respondent has instituted internal policy, of which is maintained in the same policies as though Respondent attempts to enforce against Appellant. Respondent thus wants to pick and choose which of its own policies shall be enforced and of which it shall be held accountable under.

Despite its patent violation of its own policy, the SEGC merely set it aside and upheld Appellant's termination, providing:

While the Committee acknowledges that SCDJJ management did not meet with Appellant prior to his termination in accordance with its Investigations Policy, the Committee felt that, under these circumstances, SCDJJ had enough evidence to immediately terminate Appellant's employment.

[ROA, p. 10]. It is impossible for the SEGC to conclude that SCDJJ had enough evidence to terminate Appellant's employment because it had not even spoken with him. It did not know Appellant's side of the story, and/or any intervening circumstances. Moreover, the SEGC justification that its disregard was permissible because returning Appellant back to work was problematic is misguided. [ROA, p. 10]. The policy does not mandate Appellant be returned to work, it mandates that he have an opportunity to provide his side of the story before employment

action is taken against him.

The State Employee Grievance Procedure Act itself requires the Agency to act within its policies and procedures without exception. To wit:

In cases involving actual or threatened abuse, neglect, or exploitation, to include those terms as they may be defined in Section 43-35-10 or 63-7-20, of a patient, client, or inmate by an employee, the agency's decision must be given greater deference and may not be altered or overruled by the committee, unless the covered employee establishes that:

...;

Facts → (b) The agency's disciplinary action was not within its established personnel policies, procedures, and regulations; or

S.C. Code Ann. § 8-17-340(E)(1)(b) (emphasis added). Practically speaking, there is no purpose for the policy to exist if it's not going to be followed and/or the Agency held accountable when not.

Based on the foregoing, just as an employee is to be held accountable to Agency policy so should the Agency itself. Accordingly, it was error for the SEGC to allow the Respondent to seek reliance and support from its policy as the basis for Appellant's termination yet ignore the same policy with respect to Respondent's responsibility(ies) under the same policy in carrying out the termination.

CONCLUSION

In light of the foregoing arguments and authorities cited, the State Employee Grievance Committee's decision is affected by error of law, clearly erroneous in view of the substantial evidence in the record, and characterized by an abuse of discretion.

WHEREFORE, Appellant prays this Court, pursuant to S.C. Code Ann. § 1-23-380, reverse the Committee's decision and reinstate him into his former position along with his former salary, backpay, and other benefits, or, in the alternative, remand the matter back to the State

September 4, 2019

Hand-Delivered

Hon. Paul E. Short Jr.
South Carolina Court of Appeal
1220 Senate St
Columbia, SC 29201

C/A No: 2019-000322

Re: Clarence Frazier v. South Carolina Department of Juvenile Justice

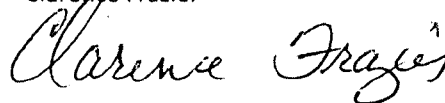
Dear Judge Short,

Enclosed you will find the original copies of the Appellant's Brief on the above referenced matter.

By copy of this letter, I am providing notice to the opposing counsel that the brief is being filed with your office today. A copy of the brief was hand delivered to the opposing counsel, Vance J. Bettis Esq. Gignillant Savitz & Bettis, LLP 900 Elmwood Avenue #100 Columbia, SC 29201 on September 4, 2019 as evidenced by the Certificate of Service.

Sincerely,

Clarence Frazier

A handwritten signature in cursive script that reads "Clarence Frazier". The signature is written in black ink and is positioned to the right of the typed name.