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Feb 28 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
State of South Carolina

H. W. Funderburk, Jr.
Administrative Law Judge

Case No. 2021-001353

Scott HessAppellant

v.

South Carolina Criminal Justice AcademyRespondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT

Respondent filed its Initial Brief in response to Appellant's Initial Brief, received by this Court on February 18, 2022. There, Respondent maintains that the Administrative Law Court ("ALC") properly dismissed the appeal based upon a failure to timely file a brief, citing two principle arguments: (1) failure to request extension or leave to file late brief; and (2) lack of motion in opposition of dismissal. Appellant Hess respectfully replies to show this Court:

1. That Appellant reasonably believed a request for extension or leave was not needed or that such belief was excusable neglect,
2. That a motion in opposition was not needed as Appellant's ALC Brief was filed prior to the motion to dismiss, and
3. That cause exists for setting aside the dismissal.

Hess, therefore, ask this Court to remand this case, and allow it to be adjudicated on the merits.

1. Hess reasonably believed a request for extension was unnecessary.

As acknowledged, a request for extension was not filed with the Administrative Law Court. Notwithstanding, Respondent's Brief cites no cases in support of its assertion that as a result Appellant's Appeal before the ALC should nevertheless be dismissed.

In the e-mail communication cited in Respondent's Brief, Appellant's counsel advised the Court: "I have the initial brief completed and ready to be filed but am dealing with a child in quarantine because of a direct exposure at school yesterday." In response, Judge Funderburk's law clerk responded: "We will keep an eye out for your filing and CJA will have the opportunity to respond. Thank you." Based upon that communication, Appellant's undersigned counsel advised, believed, and reasonably understood the discussion to be concerning the filing of the Initial Brief. While the ALC, based upon the Order of Dismissal, saw differently, Appellant's

counsel's understanding was not unreasonable. Counsel reasonably believed that the Initial Brief filing satisfied the inquiry.

Even assuming the ALC understood that a request for extension was to be accompanied, the dismissal of this action would stand for the proposition that the failure to file said motion, which would have outlined the same basis that had already been communicated with the Court as to the delay – calendaring issues, office turnover, and COVID-19 quarantine of a minor child – is sufficient to warrant dismissal. Such a determination is an unduly harsh sanction. In *McComas*, the Court of Appeals weighed in on dismissal for failure to prosecute, opining, “dismissals were imposed [...] in the face of repeated warning to the offending party or multiple opportunities to proceed with trial.” *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006). This instance was not one of repeat warning or multiple opportunities. 2021, like much of 2020, was accompanied by many unknowns, struggles and tribulations, and difficulties as a result of COVID-19. Counsel's prior appearances before the ALC, while not a factor directly identified in *McComas*, further supports that this was an isolated situation.

Fourth Circuit Court of Appeals analysis on this issue is also supporting of setting aside the dismissal. In *McCargo*, cited by the *McComas* Court, the Fourth Circuit set forth the four factors to be considered before dismissing a case: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn-out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976). Here: (1) Appellant was not personally responsible; (2) the prejudice of Respondent is *de minimis* at best, as this is a review of the Final Order issued by the LETC and does not directly affect Respondent other than briefing the same; (3) there is no history of deliberately delaying this matter – or other

matters previously handled by Appellant’s counsel before the ALC; and (4) other sanctions, if necessary, existed. *Supra*.

2. Hess reasonably believed a motion in opposition was unnecessary.

Respondent further argues that Appellant’s failure to file a motion (i.e. memorandum) in opposition to its motion to dismiss further warrants upholding dismissal. Again, Respondent cites no caselaw to support this proposition but concludes that such was unreasonable neglect. Curiously, Respondent’s Brief avoids setting forth the date in which its motion to dismiss was filed with the ALC – a copy of which Appellant has still never received.

Appellant filed his Initial Brief with the ALC on September 13, 2021, but recognizes the Court stamped the brief as filed on September 14, 2021 (ostensibly first thing that morning). Respondent *emailed* its Motion to Dismiss on September 13, 2021, at 12:43pm. In response, at 1:24pm, Judge Funderburk’s law clerk, Ms. Perkins, responded: “Received. Thank you. I look forward to receiving the original USPS copy for filing.” While it can be assumed that the motion was mailed that same date, Appellant never received a mailed copy nor receive a ‘stamped, filed copy’ anytime thereafter. Indeed, it can only be concluded that the motion was ‘filed’ with the ALC sometime after Appellant’s Brief was filed.

In the motion, Respondent avers that it is filing the motion “due to Appellant’s failure to file a brief.” Moreover, Respondent’s motion moves that the appeal be dismissed with prejudice due to “Appellant’s failure to file a brief [as] grounds for dismissal under SCALC Rule 38. Again, upon clear information and belief, Appellant’s Brief was filed prior to the motion to dismiss, thus rendering the motion moot. Stated differently, the sole argument in the motion – that Appellant had failed to file a brief – was inaccurate as of the time the motion was ‘filed’ with the Court: sometime on or after September 14, 2021.

3. Hess established that cause exists for setting aside the Order of Dismissal.

“A dismissal sanction is usually inappropriate when it unjustly penalizes a blameless client for the attorney’s behavior.” *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir. 1990). Appellant’s counsel regrets what happened here, and has since taken further measures to ensure issues were isolated and do not occur again. Appellant’s counsel further reiterates the difficulties surrounding the COVID-19 pandemic and the strain it caused both in the workplace but at home, especially when dealing with minor school-age children.

Still, the Administrative Law Court dismissal prohibits this case from being adjudicated on the merits, enjoins Appellant from ever serving in law enforcement in South Carolina again, and otherwise dismisses this appeal on the basis of failing to file a request for extension setting forth the basis indisputably provided the law clerk in e-mail communications and/or based upon a failure to respond to a ‘motion to dismiss for failure to file a brief’ at most contemporaneously filed with said brief. Hess is able to show “good cause” to support reversing dismissal of the Petition. Specifically, the Record on Appeal provides that the Hearing Officer, who conducted the initial contested case hearing, accepted evidence, and issued the initial Report and Recommendation, made a finding that misconduct had not been proven by substantial evidence. Importantly, he recommended that the misconduct allegation should be dismissed as against Hess and any records expunged within thirty (30) days. While the LETC retains the final decision-making authority, the Final Decision issued by Chairman Keel provides no analysis why it ruled contrary to the Hearing Officer Recommendation. Rather, it merely resuscitates the testimony gathered at the hearing from the Report and Recommendation and makes the bald conclusion that the allegation of misconduct was supported by the evidence.

Again, the calendaring error of initial deadlines and failure to file the request for extension, which was requested of and consented to by Respondent's counsel, was inadvertent by a new staff member who is no longer employed. *See Oppenheimer v. City of Madiera*, 2020 WL 5106710, *4 (S.D. Ohio 2020) (finding "the default is a result of unprecedented circumstances rising from the COVID-19 pandemic"); *see also, Adams v. McMaster*, 432 S.C. 225, 244, 851 S.E.2d 703, 712 (2020) (discussing the effects of the COVID-19 pandemic across the State). The undersigned also communicated with the Court to advise of the inadvertence as well as complications concerning quarantine. *Supra*.

CONCLUSION

Appellant Scott Hess respectfully asks this Honorable Court to Reverse the holding of the Administrative Law Court and Remand this case for the reasons discussed above and so that this matter may be decided on the merits.

Respectfully Submitted,

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PROOF OF SERVICE

Pursuant to Section (d)(1) of the South Carolina Supreme Court’s Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (issued August 25, 2021), the undersigned employee of Cromer Babb Porter & Hicks, LLC, counsel for the Appellant, does hereby certify that service of the **Reply Brief of Appellant and** in the above-captioned matter was made upon all counsel of record by e-mail only at the below email addresses this 28th day of February 2022:

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