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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Administrative Law Judge H. W. Funderburk, Jr.

Appellant Case No. 2021-001353
Case No. 2021-ALJ-30-0132-AP

Scott Hess, ……..……...Appellant

v.

South Carolina Criminal Justice Academy, ……..Respondent.

FINAL BRIEF OF RESPONDENT

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April 18, 2022

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STATEMENT OF THE CASE

January 17, 2020, the South Carolina Criminal Justice Academy (CJA) received a PCS of Separation (PCS) form for Scott Hess (Appellant) from the Myrtle Beach Police Department (Agency). the Department alleged that Appellant committed law enforcement certification misconduct in the form of physical or psychological abuses of members of the public and/or prisoners.

On January 21, 2020, Appellant was served the misconduct allegation. Appellant requested a contested case hearing on August 27, 2020. On September 11, 2020, a Contested Case Hearing Notice was sent to Appellant and the Department notifying them of a October 22, 2020 hearing.

The Contested Case Hearing was held on October 22, 2020.The Hearing Officer's Findings and Recommendation, hearing transcript and exhibits were sent to the parties. On February 8, 2021, the parties were notified that the Law Enforcement Training Council (LETC) would meet to render a Final Agency Decision in the present case on February 22, 2021. On February 22, 2021, LETC met to discuss the present case and vote on a Final Agency Decision.

William Luse, Esquire and James Battle, Esquire were present at this meeting and addressed LETC. LETC voted to permanently deny Appellant a law enforcement certification. March 23, 2021, a Final Agency Decision was signed. On March 29, 2021, a certified letter was sent, which contained a copy of the Final Agency Decision, to Appellant.

Appellant filed a Notice of Appeal to the Administrative Law Court (ALC) on May 3, 2021. The Notice of Assignment was filed on May 5, 2021. On June 15, 2021, Respondent filed the Record on Appeal. On September 13, 2021 Respondent filed a motion to dismiss the appeal based on Appellant's failure to comply with time limits. On September 29, 2021 The ALC granted

Respondent's motion to dismiss. Appellant filed a motion to reconsider on September 30, 2021. Respondent filed a motion in opposition of reconsideration on October 7, 2021. The ALC Denied Appellant's motion to reconsider on October 21, 2021.

STATEMENT OF FACTS

The ALC's Notice of Assignment served on both parties, filed May 5, 2021, clearly outlined the timeline for when filings by both parties were due. (R. p. 1) In accordance with the ALC Court Rules, Appellant's Brief was due thirty days after the filing of the Record on Appeal. Respondent filed the Record on Appeal on June 15, 2021, setting a deadline for submission of Appellant's brief on July 15, 2021. (R. p. 2) On July 26, 2021, Appellant realized the tardiness of his Brief. Appellant contacted Respondent asking for an extension to file. Respondent consented. Appellant did not at the time, nor ever, file a motion for extension of the filing deadline or for leave to submit a late brief.

48 days after the initial filing deadline, on September 1, 2021, the ALC reached out to both parties asking for a status update on the case. (R. p. 28) Respondent indicated to the court that it had no communication with Appellant since the request for extension in July. Two days later, on September 3, 2021, Appellant responded stating that no motion for extension was filed due to an office error and that he would attempt to file the brief that same day. (R. p. 27) The ALC Clerk responded saying the Court would be waiting for a filing from Appellant. (R. p. 27)

On September 13, 2021, having received no notice of any filing by Appellant, Respondent filed a motion to dismiss based on Appellant's failure to comply with time limits. (R. pp. 3-5) Appellant filed no motion in response. The following day, 61 days from the initial filing deadline,

Appellant filed a brief[1]. On September 29, 2021 The ALC granted dismissal (R. p. 17) The following day, September 30, 2021, Appellant filed a motion to reconsider. (R. p. 20) Respondent filed a motion in opposition on October 7, 2021. (R. p. 33) The ALC denied the motion to reconsider on October 21, 2021. (R. p. 36) Appellant subsequently brought this Appeal.

STANDARD OF REVIEW

The Decision of the ALC may be overturned on limited grounds:

> "(B) 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 on 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 abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-610[2]

As Appellant notes, this Court "can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion." Olson v. S.C. Dep't of Health & Env't Control, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008).

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[1] As the ALC's order indicates, Appellant attempted to file his brief on September 13, 2021 after the Court was closed so the brief was clocked the following day, September 14, 2021. (Order of Dismissal pg. 1 n.1). The filed Brief was not accompanied by any motion for extension of the filing deadline or leave to submit a late brief.

[2] Appellant's Brief cites the outdated 2005 Code of Laws. The current version condenses the statute from three sections (A,B,C) to two (A,B) and importantly adds the language "**The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact**". S.C. Code Ann. § 1-23-610 (emphasis added).

ARGUMENT

1. THE ADMINISTRATIVE LAW COURT PROPERLY DISMISSED THE APPEAL DUE TO APPELLANT'S FAILURE TO TIMELY FILE A BRIEF

Olsen summarizes the grounds for reversal of ALC rulings into three categories: error of law, lack of substantial evidence, and abuse or clear unwarranted use of discretion. Id.

Appellant advances no argument challenging the existence of substantial evidence for the facts dismissal is based on. Nor is error of law claimed. Admittedly, Appellant's brief submission failed to comply with the time limits established by ALC court rules. SCALC Rule 37. Further Appellant does not dispute that Court rules authorize dismissal of appeals based on failure to comply with time limits. SCALC Rule 38. (App. Br. Pgs. 8,12)

Appellant's request for reversal rests on the third prong, abuse or clear unwarranted use of discretion. Appellant argues that the ALC's imposition of dismissal was either clearly unwarranted or an abuse of discretion. To this point Appellant makes two arguments:

First, that the ALC mischaracterized the nature of Appellant's efforts to timely file. Appellant contends that he put forth diligent efforts to comply with Court rules, only to be hampered by a myriad of misunderstandings and external detractors. (App. Br. Pg. 5, passim)

Second, Appellant cites various precedent to characterizing the ALC's dismissal of the appeal as unwarranted or an abuse of discretion. (App. Br. Pgs. 6-8) For reasons outlined below these arguments are unpersuasive and this Court should affirm the ruling of the ALC.

Failure to Request Extension or Leave to File Late Brief

As Appellant concedes, no motion for an extension of the filing deadline or motion to file late was ever submitted in this matter. Counsel for Appellant argues that he believed that he did not need to address the tardiness of his filing because an email conversation with an ALC Law

Clerk served as a waiver of any need to petition the court for forgiveness of a then 49 day delay in filing. The email conversation consisted of:

Appellant: My apologies on this. There was some confusion on my end with the initial deadline etc. because of some calendaring issues and office turnover; I had prepared and believe our motion for extension was filed but in looking back do not see a filed copy. 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. I am trying to coordinate to get downtown today so that I can get this filed ASAP. Again, my apologies and please do not contact me with any questions. (R. p. 27)

Law Clerk: We will keep an eye out for your filing and CJA will have the opportunity to respond. Thank you. (R. p. 27)

Per Appellant's Brief, Counsel for Appellant was:

"of the understanding that the motion [for extension] was not needed based upon the acknowledgment from Respondent's counsel as to the request for additional time and the Court's indication that it was looking out for the filing." (App. Br. Pgs. 5-6)

Respondent shares the ALC's confusion as to how this cursory statement made by the law clerk was reasonably understood by Appellant to be a sua sponte granting of leave to file a late brief with no accompanying motion. The ALC stated in its order denying reconsideration:

"In Appellant's argument for reconsideration, he questions why the Court would expect a motion to be filed when the Court's law clerk referred to keeping "an eye out for your filing." It is unclear why Appellant would assume that his email referring to a motion for extension and his readiness to file the brief should not be considered as a reference to filing both documents." (R. p. 36)

Appellant not only failed to comply with time limits but failed to ever petition the court for an opportunity to remedy the failure. Appellant's attempt to characterize these failures as anything other than unreasonable neglect is unpersuasive.

Lack of Motion in Opposition of Dismissal

Appellant asserts that there is no requirement to file an opposition to a motion for dismissal. Legally, Appellant is correct. However, due to Appellant's appeal largely resting on an assertion of due diligence on behalf of counsel for Appellant, the lack of opposition to dismissal is worth addressing.

In his brief, Appellant claims to have filed his Brief prior to or simultaneous to the filing of the Motion to Dismiss[3]. Based on this claim Appellant states:

"Assuming Appellant's Initial Brief was filed [before the Motion to Dismiss], it follows that the motion to dismiss was moot." (App. Br. Pg. 6)

[3] As noted prior, there is dispute on the record as to whether Appellant's Brief should be counted as filed on September 13, 2021 or the following day. The distinction is immaterial to the argument here.

Respondent's motion to dismiss was based on SCALC Rule 38, which authorizes dismissal for failure to comply with time limits. SCALC Rule 38. Assuming for the sake of argument Appellant did file his Brief before the Motion to Dismiss, the argument is still flawed. It is puzzling how Appellant jumps to the conclusion that because his Brief was filed 60 days late, but before the motion to dismiss, it would somehow render Respondent's request for dismissal based on Rule 38 "moot". A severely late brief is grounds for dismissal under Rule 38, regardless of whether it comes before or after a motion to dismiss.

Like the lack of a motion for extension, the lack of opposition to dismissal in this case should be viewed as unreasonable neglect, not legal maneuvering.

McComas v. Ross Does Not Favor Reversal

Appellant relies on McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006) for his argument that dismissal was unwarranted. In McComas the Court reversed a dismissal at trial based on the plaintiff's failure to appear at trial. The plaintiff arrived approximately two hours late for trial and two minutes after the dismissal. Id. at 62. Attorney for the plaintiff was present on time and prepared for trial. There was no history of delay or unreasonable neglect by plaintiff. Id. at 63.

As the ALC pointed out, this case differs in several ways. McComas involved a dismissal at trial, denying the plaintiff the opportunity to be heard on the matter at all. (R. p. 38) The present matter concerns a dismissal by an appellate court. Prior to appeal, Appellant had a full contested case hearing before being denied certification by unanimous decision of the LETC. (R. p. 38)

The Court in McComas specifically differentiated its opinion from application to cases such as this that involve "unreasonable neglect." McComas at 62. The severity of delay and neglect

in the present matter is far from the facts of McComas. The plaintiff in McComas was two hours late for trial. Appellant's brief was two months late.

Hillig v Comm'r Does Not Favor Reversal

Appellant further relies on Hillig v. Comm'r, 916 F.2d 171 (4th Cir. 1990). In Hillig the Fourth Circuit set forth factors for a Court to consider prior to dismissal based on a failure to prosecute:

> (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. Id. at 174.

Notably, like McComas, Hillig was also dismissed at trial, not appeal. Hillig involved a dismissal of a case *prior* to its scheduled trial date due to pretrial discovery failures. Id. at 173. Appellant contends the factors in Hillig support reversal of the ALC dismissal. To the contrary, they warrant affirming it.

While it is proper to consider the personal responsibility of a plaintiff in causing delay, the fact that the procedural faults in this case rest solely on counsel for Appellant does not invalidate a dismissal based on said faults. Link v. Wabash R. Co., 370 U.S. 626, 633–34, 82 S. Ct. 1386, 1390, 8 L. Ed. 2d 734 (1962).

Causing repeated delay and characterized by tardiness, Appellant's actions on appeal are the archetype of "dilatory[4]" proceeding condemned by Hillig.

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[4] **Dilatory** 1. Designed or tending to cause delay. 2. Given to or characterized by tardiness. DILATORY, Black's Law Dictionary (11th ed. 2019).

Lastly, to impose any sanction other than dismissal here would serve as no sanction at all. The proceeding of the appeal is a binary issue that cannot be tempered by any alternative sanction for Appellant's violations. Permitting Appellant to proceed with his appeal after continuous and unexcused delay would treat Appellant the same as a petitioner who diligently complied with court rules, making the time limit and dismissal provisions of the ALC rules meaningless.

CONCLUSION

Respondent does not ask the Court to take lightly the dismissal of an appeal. It asks the court to take seriously the need for rules in the judicial process. An affirmation of the ALC's dismissal of this matter is an affirmation of the Court's ability to enforce order for the benefit of all litigants.

Based on the above Respondent asks that the Court affirm the dismissal of the ALC. In the alternative, if the Court were to find error, Respondent would ask the Court to remand to the ALC for review.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned of the South Carolina Criminal Justice Academy, counsel for Respondent, does hereby certify that Respondent's Final Brief complies with Rule 211(b), SCACR.

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