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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.

RECORD ON APPEAL

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Scott Hess,)	Docket No. 21-ALJ-30-0132-AP
)	
Appellant,)	
vs.)	
)	CERTIFICATE OF SERVICE
South Carolina Criminal Justice Academy,)	
)	
Respondent.)	
_____)	

I, Bradley J. Young, certify that I have served the within Record on Appeal by hand delivery to:

The Honorable H.W. Funderburk
Administrative Law Judge
Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

And mailing a copy via United States mail, postage prepaid, addressed to:

Ryan K. Hicks, Esquire
CBPH
Attorney for Appellant
1418 Laurel Street, Suite A
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served and that all redactions required by Rule 41.2, SCRPC have been performed.

This 15th day of June, 2021.

Bradley J. Young
Bar # 102870
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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

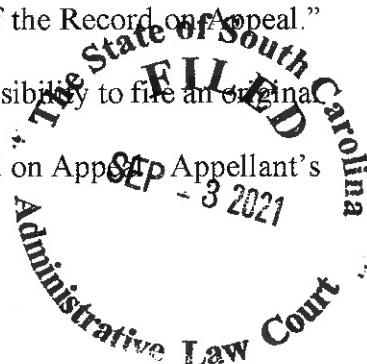
Scott Hess,)	Docket No. 21-ALJ-30-0132-AP
)	
Appellant,)	
vs.)	
)	
South Carolina Criminal Justice Academy,)	MOTION TO DISMISS
)	
Respondent.)	
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Pursuant to SCALC Rule 38, the South Carolina Criminal Justice Academy (“Respondent”) hereby submits this Motion to Dismiss this appeal, due to Appellant’s failure to file a brief.

SCALC Rule 38 states that upon “motion of any party, or on its own motion, an administrative law judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided in these rules or by order of the Court.”

On May 3, 2021, Appellant filed this appeal. (R. pgs. 14-16). On May 5, 2021, the Notice of Assignment was filed. (R. p. 3). SCALC Rule 36 requires the Record on Appeal to be filed within forty-five (45) days of the date of the notice of assignment. On June 15, 2021, Respondent filed the Record on Appeal. (R. p. 254). Additionally, CJA sent Appellant a copy of the Record on Appeal on the date of filing via US Mail and via email. (R. p. 254).

SCALC Rule 37 states that the “party first noticing the appeal shall file an original and one copy of its brief with the Court within thirty (30) days after the filing of the Record on Appeal.” Appellant noticed, or filed, this appeal on May 3, 2021. It was his responsibility to file an original and copy of his brief within thirty (30) days after the filing of the Record on Appeal.



brief was due on July 16, 2021, pursuant to the time computations of SCALC Rule 3. On July 26, 2021, after Appellant's filing deadline had passed, Appellant contacted the Respondent asking for an extension to file. Respondent did not object at that time. On September 1, 2021 the Court requested an update from both parties regarding the status of the appeal. On September 3, 2021 Appellant replied to the Court indicating that Appellant's brief was completed and would be filed as soon as possible. As of September 13, 2021, Appellant has not submitted a brief. This is more than thirty days after the Record on Appeal was filed.

Appellant's failure to file a brief is grounds for dismissal under SCALC Rule 38. Therefore, Respondent respectfully moves that this appeal be dismissed with prejudice.

I SO MOVE:

Respectfully Submitted,



Bradley J. Young
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September 13, 2021

September 13, 2021

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Scott Hess,)	Docket No. 21-ALJ-30-0132-AP
)	
Appellant,)	
vs.)	
)	CERTIFICATE OF SERVICE
South Carolina Criminal Justice Academy,)	
)	
Respondent.)	
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I, Bradley J. Young, certify that I have served the within Motion to Dismiss Appeal by hand delivery to:

The Honorable H.W. Funderburk
Administrative Law Judge
Administrative Law Court
1205 Pendleton Street, Suite 224
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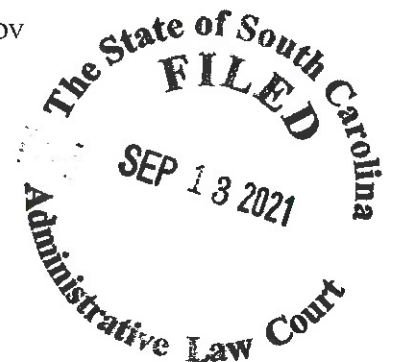
And mailing a copy via United States mail, postage prepaid, addressed to:

Ryan K. Hicks, Esquire
CBPH
Attorney for Appellant
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Columbia, SC 29201

This 13th day of September 2021.



 Bradley J. Young
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

SCOTT HESS

Appellant,

v.

Docket No. 21-ALJ-30-0132-AP

SOUTH CAROLINA CRIMINAL
JUSTICE ACADEMY,

Respondent.

APPELLANT'S BRIEF

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SC ADMIN. LAW COURT

STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Law Enforcement Training Council (hereinafter “LETC”) err in failing to consider mitigating circumstances surrounding the misconduct allegation?
- II. Was the LETC’s finding supported by substantial evidence?¹

STATEMENT OF THE CASE

In this appeal, Appellant, Scott Hess (hereinafter “Appellant” or “Hess”), seeks review of the Law Enforcement Training Council’s (“LETC”) Final Agency Decision permanently denying Appellant’s law enforcement certification in the State of South Carolina. *See* S.C. Code Ann. § 1-23-380 (“A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review[.]”).

On or about January 21, 2020, the South Carolina Criminal Justice Academy (hereinafter “SCCJA”) notified Hess that the Myrtle Beach Police Department (hereinafter “MBPD”) had filed an allegation of misconduct against him in response to his termination of employment. [Record on Appeal (“ROA”), pp. 178-179]. In pertinent part, MBPD alleged that Hess had engaged in “physical or psychological abuses of members of the public and/or prisoners.” [ROA, p. 179]. In response, Appellant requested a contested case hearing. [ROA, pp. 31-32].

A contested case hearing was held before Timothy J. Plunkett, Administrative Hearing Officer, on October 22, 2020. [ROA, pp. 19-30]. At the conclusion of the contested case hearing, a transcript of the proceedings was prepared. [ROA, pp. 33-177]. On or about January 7, 2021, Hearing Officer Plunkett issued a Findings and Recommendation of Hearing Officer (Contested Case). [ROA, pp. 19-30]. In relevant part, Hearing Officer Plunkett opined: (1) that the allegations

¹ For the purposes of judicial efficiency, Appellant has combined his final two (2) grounds for appeal, subsections (b) – (c), respectively, into a single issue.

of misconduct as reported are not supported by the evidence; (2) that the department [MBPD] failed to meet its burden of substantial evidence; and (3) that the allegations of misconduct should be deemed unsubstantiated. [ROA, p. 29]. Hearing Officer Plunkett further recommended that: (1) the LETC issue a final agency decision finding that the allegations of misconduct have not been proven by substantial evidence; and (2) expunge within thirty (30) days all evidence related to the allegations of misconduct. that all evidence related to the allegation be expunged. [ROA, p. 30].

On February 22, 2021, the Hearing Officer's Recommendation came before the LETC. [ROA, p. 4]. After discussion, the LETC voted to reject the Hearing Officer's Findings and Recommendation and voted to permanently deny Appellant's law enforcement certification. [ROA, pp. 4-13]. The Final Agency Decision was signed by Chairman Mark Keel on or about March 23, 2021. [ROA, p. 13]. Appellant received a copy of the Final Agency Decision from the LETC on April 5, 2021. [ROA, p. 15].

This Petition followed. [ROA, pp. 14-18].

STATEMENT OF FACTS

Hess began his career in law enforcement in or around 2012 and was employed by MBPD beginning in 2014. [ROA, p. 24]. Hess was promoted to a police officer first class in 2016 and assigned as a field training officer ("FTO") in 2018. *Id.* Hess was terminated from his employment with MBPD on or about January 6, 2020. [ROA, p. 179]. Following his termination, MBPD submitted a Personnel Change in Status ("PCS") to the SCCJA asserting that Appellant's separation was a termination involving misconduct – physical or psychological abuses of members of the public and/or prisoners. [ROA, pp. 178-179].

As a principal matter, the Appellant would crave reference to the Findings and Recommendation of Hearing Officer (Contested Case) for an accurate resuscitation of the facts

pertinent to this Appeal as developed during the contested case hearing held on October 22, 2020. [ROA, pp. 19-30]. Notwithstanding, Appellant would reiterate the following facts as developed in the record.

By way of its submission to the SCCJA, the MBPD identified the purported misrepresentation as nothing more than “Physical or psychological abuses of members of the public and/or prisoners.” [ROA, p. 179]. No other allegation(s) of misconduct were ever submitted to the SCCJA by MBPD, nor was there any factual overlay provided as to the basis for the misconduct allegation. [ROA, pp. 178-179].

In his case-in-chief, Hess also produced expert testimony by Don Weider. [ROA, pp. 155-165]. Mr. Weider was offered as an expert witness on use of force without objection. [ROA, p. 159].

ARGUMENT

I. STANDARD OF REVIEW

“The scope of judicial review in . . . cases arising from the final decision of state agencies is governed by Section 1-23-80 of the South Carolina Code.” *Trowell v. S.C. Dep't of Pub. Safety*, 384 S.C. 232, 235, 681 S.E.2d 893, 895 (Ct. App. 2009). In relevant part, the statute provides as follows:

The court may reverse or modify the decision if . . . the administrative findings, inferences, conclusions, or decisions are:

. . . ;

(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. § 1-23-380(5).

II. SUBSTANTIVE ARGUMENT

A. **The Law Enforcement Training Council (hereinafter “LETC”) erred in failing to consider mitigating circumstances surrounding the misconduct allegation.**

As set forth by the Hearing Officer in his Recommendation, the sole allegation of misconduct was that Appellant had engaged in physical, rather than psychological abuse. [ROA, p. 27]. First and foremost, this allegation of misconduct, as submitted, does not provide any factual detail as to the incident at issue. [ROA, p. 179]. Rather, it was merely a citation to the statutory provision purportedly violated. Arguably, the submission by MBPD fails to comply with S.C. Code Ann. § 23-23-150 as it did not provide the officer, Hess, with notice of the allegation(s) against him prior to the hearing.

Moreover, the LETC failed to consider mitigating circumstances surrounding the allegation of misconduct. While the Final Agency Decision (“FAD”) provides a brief resuscitation of the testimony offered at the contested case hearing, it is entirely absent of any factual analysis. [ROA, pp. 4-13]. The FAD does nothing more than conclude, without any explanation as to how the decision was derived, that Hess had engaged in misconduct as supported by substantial evidence. [ROA, pp. 12-13]. S.C. Code of Regulations § 37-025 specifically provides that the Council may consider the seriousness, the remoteness in time, and any mitigating circumstances; it is impossible to know if, and if so to what extent, this was done based upon the FAD. Even more, *Graham* requires that in split-second judgment scenarios, the totality of circumstances must be taken into account. *Infra*.

Weider provides an extensive list of factors that should have been considered under an objective, reasonable standard as developed by the United States Supreme Court in *Graham v. Connor*:

- a. That this was an active assault call that was upgraded to a house engulfed in fire (code 3);
- b. Prior knowledge of Bellamy, both personally and through RMS notes;
- c. Bellamy's behavior upon arrival and his continued disregard of commands;
- d. Bellamy equipping himself with potential weapons, including the rake;
- e. That the incident occurred at night;
- f. That Bellamy physical resists;
- g. That Bellamy actively tried to bite at least two (2) officers and leg-wrapped an officer;
- h. That Bellamy actively resists being detained;

[ROA, pp. 164-165].² There was no opinion, other than that of Heard and Hunter, to refute Weider's professional opinions and expertise.

Even more, Heard, another officer involved and who also admitted to conducting several knee strikes and punches on Bellamy was not subjected to a like misconduct allegation. [ROA, p. 21]. Curiously, Heard was not even aware that Hess was involved in the altercation at the time – only learning of the same after the fact – so he would have no first hand knowledge of the particular circumstances Hess was dealing with in his attempts to assist in detaining Bellamy (i.e. Bellamy attempting to bite him as well) yet was able to opine his belief that Hess engaged in excessive

² All of these factors were corroborated by the Department's witnesses as well.

force.³

In light of the foregoing, the LETC FAD fails to provide any factual analysis, is based solely on conclusions, and is absent any consideration of the wealth of mitigating circumstances as offered by an expert witness. The LETC, contrary to both the record as well as the Report and Recommendation of the Hearing Officer, solely relied upon the testimony of two officers who only recognized Hess' conduct after the fact as well as ostensibly their personal opinions in reaching their final decision.

The Hearing Officer accurately depicted these circumstances:

The evidence and testimony included on the record demonstrates Hess' use of force was ultimately reasonable under the circumstances confronting him and based on the information available to him. Hess was summoned to a rapidly evolving and chaotic scene. Once present he was tasked with taking physical custody of a belligerent and noncompliant suspect with a history of assaultive and otherwise violent conduct toward law enforcement. In the midst of attempting to control the resistive Bellamy, Hess was advised by other officers that Bellamy was attempting to bite them and otherwise physically impede their efforts to secure him. Hess himself offered testimony that Bellamy made an apparent attempt to bite him as well. Ultimately Bellamy's noncompliance and resistance placed the officers in the effort, Hess in particular, in an unsafe position exposed to oncoming traffic in the dark. As such, Hess was forced to make a split second decision about how to bring the incident to a rapid conclusion. The actions taken by Hess were reasonable under the circumstances and fall short of the definition of excessive force.

[ROA, p. 29].

This analysis, or anything remotely similar, is entirely absent from the FAD. Based on the foregoing, the LETC failed to consider these mitigating circumstances, namely the lack of evidence supported a determination under the objective reasonable standard.

B. The LETC's decision was not supported by substantial evidence.

For the same reason(s) as set forth in subsections (A) herein, and as more fully set forth

³ At the time of, Heard only have five (5) years of law enforcement experience – two (2) years in South Carolina v. Weider's nearly thirty-four (34) years.

below, the LETC's decision to permanently deny Appellant's certification in response to the allegation of misconduct as submitted by MBPD is not supported by substantial evidence.

In order for a department or agency to prevail on an allegation of misconduct, it must prove the actions alleged in the Personnel Change in Status Form ("PCS") by "substantial evidence." "Substantial evidence" is more than a mere scintilla of evidence, which based on considering the record as a whole, would allow reasonable minds to reach the conclusion reached by an administrative agency to justify its action. *South Carolina Dept. of Motor Vehicles v. Dover*, 423 S.C. 153, 813 S.E.2d 532 (Ct. App. 2018). "Substantial evidence" means "such evidence as a reasonable mind might accept as adequate to support a conclusion." *S.C. Dept of Mental Retardation v. Glenn*, 291 S.C. 279, 281, 352 S.E.2d 284, 286 (1987).

The reasonableness of arrest and force decisions are predicated upon what the officer on the scene perceived. *Graham v. Connor*, 490 U.S. 386, 395 (1989).⁴ The *Graham* Court explained: "The reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* In *Saucier*, the Supreme Court reaffirmed the doctrine of mistaken beliefs, explaining:

[P]olice officers are often forced to make split-second judgments - - in circumstances that are tense, uncertain, and rapidly evolving - - about the amount of force that is necessary in a particular situation, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. We set out a test that cautioned against the "20/20 vision of hindsight: in favor of deference to the judgment of reasonable officers on the scene. If an officer reasonably, but mistakenly believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was

⁴ During the LETC hearing on February 22, 2021, Director Woods proffers his belief as to the standard under *Graham*, which it appears the LETC principally relied upon in rendering its decision. Therein Director Woods articulates there to be other options available and thus rejects Hess' actions; while Director Woods *may* be correct in asserting there to have been other options available, *Graham* does not require the officer to take the best option as suggested. Moreover, Director Woods suggests that blows to the body are not acceptable; however, neither Heard nor Hunter were subjected to disciplinary action in response to such conduct. [ROA, pp. 224-226].

needed.”

Saucier v. Katz, 533 U.S. 194, 205 (2001).

The North Carolina Supreme Court has held that every determination of whether a public employer’s decision to discipline its employee was supported by just cause “requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken.” *N.C. Dep’t of Env’t and Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E. 2d 888, 898 (2004). “The first of these inquiries is a question of fact...[and is] reviewed under the whole record test...[T]he latter inquiry is a question of law...[and] is reviewed *de novo*.” *Id.* at 665-66. This analysis should likewise be applied to instances involving officer misconduct such as this. In doing so, not only does the record as a whole not support a conclusion that Hess engaged in excessive force, but the circumstances surrounding the incident do not support a finding for disciplinary action, let alone a complete revocation, to be taken.

In brief, the Hearing Officer provided accurate analysis of the misconduct allegations and the reasons that it should be rejected; notwithstanding, the LETC ignored the same and reached a contrary conclusion without basis ostensibly upon the erroneous advice of the law by Director Woods.

CONCLUSION

In light of the foregoing arguments and authorities cited, the Law Enforcement Training Council’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 Council’s decision and reinstate his law enforcement certification in the State of South

Carolina and Order the SCCJA to expunge any records surrounding the allegation within thirty (30) days pursuant S.C. Code Ann. § 23-23-150(M), or, in the alternative, remand the matter back to the Law Enforcement Training Council for further consideration. Appellant further prays for any other relief this Court deems just and equitable.

Respectfully Submitted,

CROMER, BABB, PORTER & HICKS, LLC

BY:


Ryan K. Hicks (#100941)
1418 Laurel Street, Suite A (29201)
Post Office Box 11675
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ryan@cbphlaw.com

Attorneys for Appellant

September 18, 2021
Columbia, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that this (3) day of September 2021, a true and correct copy of the foregoing Appellant's Brief was deposited in the U.S. mail, first-class postage prepaid, addressed as follows:

James M. Fennell, Esquire
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29212

Counsel for Respondent South Carolina Criminal Justice Academy



Ryan K. Hicks

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SEP 14 2021
SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Scott Hess,)	Docket No. 21-ALJ-30-0132-AP
)	
Appellant,)	
)	
vs.)	ORDER OF DISMISSAL
)	
South Carolina Criminal Justice Academy,)	
)	
Respondent.)	
_____)	

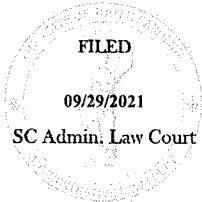
This matter is before the South Carolina Administrative Law Court (Court) pursuant to a Petition for Judicial Review of the Final Decision of the Law Enforcement Training Counsel of the South Carolina Criminal Justice Academy (Respondent). The Petition was filed on May 3, 2021, on behalf of Scott Hess (Appellant).

This appeal was assigned on May 5, 2021. Respondent filed the Record on Appeal (Record) on June 15, 2021. According to SCALC Rule 37, Appellant’s Brief was due within thirty (30) days after the Record’s filing date. Accordingly, Appellant’s brief was due on or before July 15, 2021. Respondent filed a Motion to Dismiss on September 13, 2021. Appellant submitted his brief on September 14, 2021, without an accompanying motion to allow late filing.¹ Appellant has not responded to the Motion to Dismiss.

The Court communicated with Appellant and Respondent on September 1, 2021, to inquire about the status of the case. Pursuant to an exchange of emails, the Court became aware that Appellant communicated with Respondent to obtain Respondent’s consent for an extension to file his brief.² Counsel for Appellant informed the Court on September 3, 2021, that he mistakenly thought he filed a Motion for Extension with the Court. He asserted that he had completed the brief.

¹ Appellant’s certificate of service shows that the brief was mailed to Respondent on September 13, 2021; however, it was delivered to the ALC after the clerk’s office was closed on September 13 and was stamped as received on September 14, 2021.

² According to Respondent’s Motion to Dismiss, the request for extension was made on July 26, 2021, some ten (10) days after the brief was due (on July 15, 2021).



In any event, Appellant did not timely file his brief, nor did he file a motion for an extension to file nor a motion to allow late filing.


Pursuant to SCALC Rule 37, the “party first noticing the appeal shall file . . . [his] brief within thirty (30) days after the filing of the Record on Appeal.” SCALC Rule 38 provides as follows:

Upon the motion of any party, or on its own motion, an administrative law judge may dismiss an appeal [for a party’s] failure to comply with any of the ALC rules of procedure for appeals, including the failure to comply with any of the time limits provided in these rules.

Because Appellant has not filed and served a brief in this matter within the time required by SCALC Rule 37(A), the Court finds that Respondent’s Motion to Dismiss should be **GRANTED** and this appeal should be **DISMISSED**.

AND IT IS SO ORDERED.

September 29, 2021
Columbia, South Carolina


H.W. Funderburk, Jr.
Administrative Law Judge



CERTIFICATE OF SERVICE

I, Elizabeth A. Perkins, hereby certify that I have this date served this **Order of Dismissal** upon all parties to this cause by depositing a copy hereof by electronic mail to the addresses provided by these parties and/or their attorneys:

Ryan K. Hicks, Esquire
ryan@cbphlaw.com
Counsel for Appellant

Bradley J. Young, Esquire
bjyoung@sccja.sc.gov
Counsel for Respondent

September 29, 2021
Columbia, South Carolina

Elizabeth A. Perkins

Elizabeth A. Perkins
Judicial Law Clerk



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Scott Hess,

Appellant,

v.

South Carolina Criminal Justice Academy

Respondent.

Docket No.: 21-ALJ-30-0132-AP

**APPELLANT'S MOTION TO
RECONSIDER**

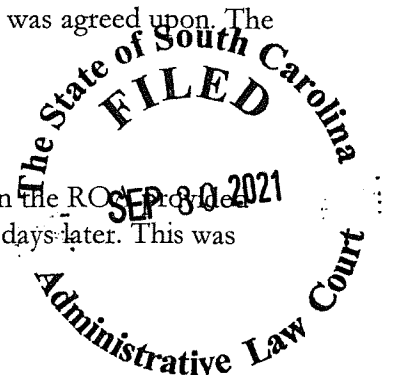
Pursuant to SCALC Rules 29(D) and 40, Appellant, Scott Hess, by and through his undersigned counsel, hereby submits this Motion to Reconsider the Court's Order of Dismissal filed September 29, 2021. This motion for reconsideration is based on the following grounds:

Procedural History

This is an appeal from the Final Agency Decision of the Law Enforcement Training Council issued March 23, 2021, permanently denying Appellant certification as a law enforcement officer in the State of South Carolina. The Petition was filed May 3, 2021, and was assigned on May 5, 2021. The Record on Appeal ("ROA") was filed on or about June 15, 2021.¹ Appellant's Brief was due within thirty (30) days after the ROA being filed – on or before July 15, 2021, not including the delay in receiving the DVD from Respondent.

On July 26, 2021, while out of state on family vacation, the undersigned realized there had been an issue in the calendaring of the deadlines prescribed by the Notice of Assignment and immediately contacted counsel for Respondent to request an extension, which was agreed upon. The

¹ The DVD containing State Exhibits 1, 2, and 2 were not originally included in the ROA provided to Appellant and were placed in the mail on June 16, 2021, and received a few days later. This was acknowledged by Respondent's counsel in an email dated June 16, 2021.



undersigned then prepared a Motion for Extension of Time but the same was not timely filed.

On September 1, 2021, the Court requested an update from both parties regarding the state of the appeal.² On Friday, September 3, 2021, the undersigned responded apologizing for the confusion as to deadlines and that the initial brief was ready to be filed; moreover, the undersigned advised that he was currently addressing a quarantine based upon a COVID-19 exposure of a minor child. [Exhibit A, September 3rd email].

On September 13, 2021, Respondent filed its Motion to Dismiss. On that same date, the undersigned advised the Court that he had returned from quarantine and was delivering a hard copy of his Initial Brief to the Court for filing that date. [Exhibit B, September 13th email]. Appellant's Brief was marked filed September 14, 2021, per the Court's Order.

Argument for Reconsideration

Plaintiff now seeks reconsideration of the Court's Order by way of this motion pursuant to SCALC Rules 29(D) and 40.

In its Order, the Court opines that based upon Appellant's failure to file the Motion for Extension and/or a response to the Motion to Dismiss, that the Petition should be dismissed as the Brief was not timely filed.³ Admittedly, there is very little law analyzing SCALC Rule 38, but Rule 41(b), SCRCP, and its progeny provide direction on this issue.⁴

First, turning to the filing of the motion for extension, Appellant was not aware a motion still needed to be filed with the Court. Indeed, in email communication from Ms. Elizabeth A. Perkins, Esquire on September 3, 2021, she advised: "We will keep an eye out for your filing and CJA will have

² The undersigned was in mediation on September 1, 2021, and attended an out-of-town funeral on September 2, 2021.

³ Appellant's Brief otherwise complies with SCALC Rule 37(B).

⁴ A review of Administrative Law Court decisions surrounding SCALC Rule 38 primarily involves situations where the Petitioner never filed a brief and/or response to a motion to dismiss. As set forth, the Brief has been filed in this matter, and, upon information and belief, prior to the filing of the motion.

the opportunity to respond. Thank you.” [Ex. A]. Based upon the same, Appellant’s counsel was under the firm understanding that the motion was not needed based upon the acknowledgement from Respondent’s counsel as to the request for additional time. Additionally, Ms. Perkin’s email was in response to the undersigned’s email advising as to the calendaring issue and office turnover that had caused the confusion.

Similarly, Appellant’s counsel was not aware of a remaining need to provide a memorandum in opposition to Respondent’s motion. Upon receiving a copy of the motion via e-mail on September 13, 2021, the only response from the Court was from Ms. Perkins denoting receipt and looking forward to receiving the original USPS copy for filing. [Ex. B]. Appellant’s Brief was contemporaneously filed.⁵ At no time was Appellant or his undersigned counsel advised that a response to the motion to dismiss was sought by the Court or that it was rendering a decision on the motion. SCALC Rule 19(a) provides that “any party may file a written response to the motion within ten (10) days...” Because Appellant contemporaneously filed his Brief, if not before the filing of the motion, Appellant’s counsel thought the matter addressed based upon the prior communication(s) with the Court. *See e.g., Miller v. SCDMV*, 2019 WL 267901, 18-ALJ-21-0343-AP (“Appellant has not filed a response to Respondent’s motion nor an Appellant’s Brief. Consequently...”)

In *McComas*, the Court of Appeals reiterated that the plaintiff has the burden of prosecution and that a trial court may dismiss an action for unreasonable neglect. *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006). “In those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities

⁵ Appellant is not aware on what date Defendant’s motion to dismiss was ‘filed’ as Ms. Perkins’ email advised that she was awaiting the original for filing. Upon information and belief, Appellant’s Brief was filed with the Court prior to the motion to dismiss. Appellant’s counsel received the motion to dismiss via mail on September 20, 2021, and is not in possession of a Court clocked copy.

to proceed with trial, and only then upon a finding of unreasonable neglect.” *Id.* (citations omitted).

Citing Fourth Circuit precedent, the *McComas* Court continued:

Our Fourth Circuit Court of Appeals has also addressed this issue. The court in *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir.1976) held that dismissal is a harsh sanction, which “should be resorted to only in extreme cases.” Dismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff. *Id.* The discretion should be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal. *Id.*; *Bush v. U.S. Postal Serv.*, 496 F.2d 42, 44 (4th Cir.1974). The Fourth Circuit has said the trial court must consider four factors before dismissing a case for 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. *Hillig v. Comm’r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir.1990). See also *Herbert v. Saffell*, 877 F.2d 267, 270 (4th Cir.1989); *McCargo*, 545 F.2d at 396; *Chandler Leasing Corp. v. Lopez*, 669 F.2d 919, 920 (4th Cir.1982).

Id. at 63.

Here, dismissal would be an extremely harsh sanction based upon the circumstances giving rise. First, the calendaring error of initial deadlines was inadvertent by a new staff member who is no longer employed. Second, upon immediately realizing the same, while on vacation, the undersigned promptly contacted Respondent’s counsel to seek an extension; the undersigned acknowledges that the motion was not filed upon his return from vacation. Third, the undersigned communicated with the Court to advise of the inadvertence as well as complications concerning quarantine. Fourth, upon information and belief, Appellant’s Brief was filed prior to Defendant’s motion and Appellant respectfully requests that if the Court is/was going to still act on Respondent’s motion that Appellant, by and through his undersigned, have the opportunity to respond and set forth the extenuating circumstances giving rise to the delay. *Supra*.

The factors set forth in *Hillig* are also persuasive. *Hilling*, 916 F.2d at 174. The Appellant was not directly responsible for the delays caused, and it would be severe prejudice him to dismiss this matter. In contrast, there is very little prejudice to the Respondent for not dismissing this action. The ROA has previously been provided as well as Appellant’s Initial Brief; no delay or hardship exists as

Respondent would have still prepared a Response but for this inadvertent delay. There is also not the presence of deliberate delay; Appellant's undersigned counsel sought to keep the Court informed and was forced away from the office because of quarantine⁶. Adjudication of this matter further serves the interests of justice. *See, Laquiere v. SCDMV*, 2021 WL 3812196, 21-ALJ-21-0169-AP (holding "this Court prefers to decide cases on the merits" but Appellant had still never filed a brief or additional time to do so).

In *Karppi*, the Court of Appeals addressed default and/or dismissal of an action as a discovery sanction pursuant Rule 37, SCRCP. *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542 489 S.E.2d 679, 682 (Ct. App. 1997). In so doing, the Court provided that dismissal is "harsh medicine that should not be administered lightly." The Court held:

Before invoking this severe remedy, the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants. The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case.

Id. (citations omitted). While *Karppi* does involve discovery sanctions as compared to a delayed filing, it involved a party's failure to comply with a court order on a prior motion to compel. *Id.* Appellant proffers that the analysis in *Karppi* is instructive in the instant matter, and as set forth, the delay was based upon extenuating circumstances and not based upon bad faith, willfulness, or gross indifference.


The undersigned fully acknowledges that the filing of Appellant's Initial Brief was outside of the deadline set forth in the Notice of Assignment, and is further outside the undersigned's character and history of practice before this Court. The undersigned would note that the delay was inadvertent, not willful, and was extenuated by COVID-19 surrounding a minor child exposure. The undersigned also maintains that dismissal of the action causes severe prejudice on the Appellant whereas allowing the Petition to be adjudicated on the merit's places little, if any, prejudice on Respondent.

⁶ The undersigned has also appeared before the Court on numerous occasions and would iterate that this delay is outside the course of his practice and was truly inadvertent.

Conclusion

For the reasons stated herein, Appellant respectfully requests that this Court reconsider its Order of Dismissal, allow the remaining briefs to be filed, and adjudicate this matter on the merits.

CROMER BABB PORTER & HICKS, LLC

BY: 
Ryan K. Hicks (SC Bar # 100941)
1418 Laurel Street, Suite A
Post Office Box 11675
Columbia, South Carolina 29211
T : (803) 799-9530
F : (803) 799-9533
Ryan@cbphlaw.com

Attorney for Appellant

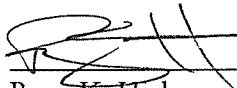
September 30, 2021
Columbia, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that this 29 day of September 2021, a true and correct copy of the foregoing Appellant's Motion to Reconsider was deposited in the U.S. mail, first-class postage prepaid, addressed as follows:

James M. Fennell, Esquire
Bradley J. Young, Esquire
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29212

Counsel for Respondent South Carolina Criminal Justice Academy



Ryan K. Hicks



E.A.

Ryan Hicks

From: Elizabeth A. Perkins <eperkins@scalc.net>
Sent: Friday, September 3, 2021 2:35 PM
To: Ryan Hicks; Young, Bradley J.
Cc: Fennell, James
Subject: RE: Scott Hess v. S.C. Criminal Justice Academy (21A0132) - STATUS

We will keep an eye out for your filing and CJA will have the opportunity to respond. Thank you.

Elizabeth A. Perkins
Judicial Law Clerk to The Honorable H.W. Funderburk, Jr.
S.C. Administrative Law Court
Edgar Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201
803.734.6401 Chambers

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From: Ryan Hicks <Ryan@CBPHLaw.com>
Sent: Friday, September 3, 2021 9:47 AM
To: Elizabeth A. Perkins <eperkins@scalc.net>; Young, Bradley J. <BJYoung@sccja.sc.gov>
Cc: Fennell, James <JFennell@sccja.sc.gov>
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Ms. Perkins-

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Regards,

Ryan K. Hicks
CROMER BABB PORTER & HICKS, LLC

1418 Laurel St., Suite A (29201) | P.O. Box 11675 | Columbia, SC 29211
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From: Elizabeth A. Perkins <eperkins@scalcn.net>
Sent: Wednesday, September 1, 2021 3:10 PM
To: Ryan Hicks <Ryan@CBPHLaw.com>; Young, Bradley J. <BJYoung@sccja.sc.gov>
Cc: Fennell, James <JFennell@sccja.sc.gov>
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Importance: High

Good afternoon. I wanted to check with you all to see if the parties have reached a resolution in this matter or have another update. The Court received the Record on Appeal on June 15th, but nothing since. Thank you.

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E. B.

Ryan Hicks

From: Ryan Hicks
Sent: Monday, September 13, 2021 1:43 PM
To: Elizabeth A. Perkins; Young, Bradley J.
Cc: Fennell, James
Subject: RE: Scott Hess v. S.C.CJA (21A0132) - Motion to Dismiss

I had child quarantined and was unable to get by the Court. I have my brief being delivered today. Again, my apologies.

From: Elizabeth A. Perkins <eperkins@scalcalc.net>
Sent: Monday, September 13, 2021 1:24 PM
To: Young, Bradley J. <BJYoung@sccja.sc.gov>
Cc: Fennell, James <JFennell@sccja.sc.gov>; Ryan Hicks <Ryan@CBPHLaw.com>
Subject: RE: Scott Hess v. S.C.CJA (21A0132) - Motion to Dismiss

Received. Thank you. I look forward to receiving the original USPS copy for filing.

Elizabeth A. Perkins
Judicial Law Clerk to The Honorable H.W. Funderburk, Jr.
S.C. Administrative Law Court
Edgar Brown Building
1205 Pendleton St., Suite 224
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From: Young, Bradley J. <BJYoung@sccja.sc.gov>
Sent: Monday, September 13, 2021 12:43 PM
To: Elizabeth A. Perkins <eperkins@scalcalc.net>; Ryan Hicks <Ryan@CBPHLaw.com>
Cc: Fennell, James <JFennell@sccja.sc.gov>
Subject: RE: Scott Hess v. S.C. Criminal Justice Academy (21A0132) - STATUS

Good Afternoon,

Attached please find Respondent's Motion to Dismiss.

Thank you,

V/R

Bradley J. Young
Attorney/Instructor
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29210

(803) 896-7617



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Judicial Law Clerk to The Honorable H.W. Funderburk, Jr.
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Ms. Perkins-

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Regards,

Ryan K. Hicks
CROMER BABB PORTER & HICKS, LLC

1418 Laurel St., Suite A (29201) | P.O. Box 11675 | Columbia, SC 29211
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Cc: Fennell, James <JFennell@sccja.sc.gov>
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Importance: High

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Scott Hess,)	Docket No. 21-ALJ-30-0132-AP
)	
Appellant,)	
vs.)	
)	
South Carolina Criminal Justice Academy,)	MOTION IN OPPOSITION
)	
Respondent.)	
)	

The South Carolina Criminal Justice Academy (“Respondent”) hereby submits this Motion in Opposition of “Appellant’s Motion to Reconsider “. Respondent requests that the Court deny rehearing and uphold its dismissal.

BACKGROUND

Appellant’s Brief was due on or before July 15, 2021. Appellant’s Brief was filed on September 13, 2021, 60 days after the filing deadline had passed. In Accordance with SCALC Rule 38, Respondent filed a motion to dismiss the same day. The Court ordered dismissal on September 29, 2021 and Appellant filed a “Motion to Reconsider” on September 30, 2021.

ARGUMENTS

Rehearing is Not Appropriate in This Matter

SCALC Rule 38 provides that, “Upon motion of any party, or on its own motion, an administrative law judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided in these rules or by order of the Court.” SCALC Rule 38. All parties are in agreement as to the untimely nature of the filing of Appellant’s Brief. Accordingly, the Court correctly utilized its authority to Dismiss in this matter.



Appellant seeks relief from this dismissal and cites ALC Rules 29(d) and 40¹. Rule 40 authorizes a request for rehearing if the moving party specifies particular points that have allegedly been overlooked or misapprehended by the Court, SCALC Rule 40. The ALC Rules leave rehearing solely in the discretion of the Court. Id. Respondent contends that Appellant's motion to reconsider does not dispute the underlying grounds for dismissal here, nor does it undermine the authority to dismiss granted to the Court by Rule 38. Accordingly, dismissal was proper and rehearing is not appropriate in this matter.

Appellant's Failure to File a Brief Constitutes Unreasonable Neglect

Appellant cites McComas v. Ross as authority supporting reconsideration in this matter. McComas v. Ross, 368 S.C. 59, 63, 626 S.E.2d 902, 905 (Ct. App. 2006). To the contrary, the precedent in this case favors affirming dismissal. McComas establishes the grounds for upholding dismissal for a failure to prosecute as "unreasonable neglect". Id. McComas involved a plaintiff who diligently prepared her case but was late to court on the day of her trial. Id., at 63. McComas did not appear on time due to scheduling confusion. Upon recognizing her error, she immediately proceeded to the courthouse, arriving just minutes after the case was dismissed. Id.

Based off the above facts, the Court in McComas concluded that there was no unreasonable neglect on behalf of the plaintiff in that matter. Id. This matter presents starkly different circumstance.

Appellant's delay in filing of 60 days from the initial deadline, a period twice as long as the original filing period, should be considered unreasonable neglect. Attorney for Appellant

¹ Rule 29(D) concerns motions to reconsider decisions made by Administrative Judges presiding over contested case hearings, SCALC Rule 29(D).

points out that he experienced hardship leading up to and past the filing deadline in the form of a calendar issue. Appellant further points out hardship in the form of dealing with a COVID-19 quarantine during the period when the Court asked for a status update. These explanations neglect to address a 37 day gap from the time Appellant realized his Brief was Tardy on July 26, 2021 and the Court requesting a status update on September 1, 2021.

Respondent does not wish to make light of the difficulties and inconveniences stated above but urges the court to consider the continuous delays by Appellant firmly in the realm of unreasonable neglect.

Conclusion

Based on the above, Respondent respectfully requests that the Court deny Appellant's motion and uphold its dismissal of this matter.

I SO MOVE.

Respectfully Submitted,



Bradley J. Young
Attorney for Respondent (Bar # 102870)
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29212
(803) 896-7617
bjyoung@sccja.sc.gov

October 7, 2021



**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Scott Hess,)	Docket No. 21-ALJ-30-0132-AP
)	
Appellant,)	
)	
vs.)	ORDER DENYING APPELLANT'S MOTION TO RECONSIDER
)	
South Carolina Criminal Justice Academy,)	
)	
Respondent.)	
_____)	

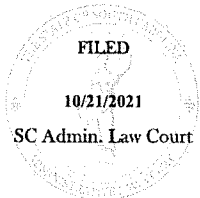
This matter came before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Petition for Judicial Review of the Final Decision of the Law Enforcement Training Counsel of the South Carolina Criminal Justice Academy (Respondent). The Petition was filed on May 3, 2021, on behalf of Scott Hess (Appellant).

The Record on Appeal (ROA) was filed on June 15, 2021. Appellant’s Brief was due within thirty (30) days after the ROA was filed or on or before July 15, 2021. Appellant’s counsel admitted that he realized on July 26, 2021, that the brief had not been filed. He contacted Respondent’s attorney to ask for an extension. Respondent agreed to the request, but Appellant did not contact the Court, nor did Appellant submit any motion to obtain an extension or to allow the brief to be filed beyond the due date. No brief was submitted until September 14, 2021.¹ Respondent filed a Motion to Dismiss on September 13, 2021.

Prior to the Respondent’s motion to dismiss and in response to a status inquiry from the Court, Appellant, on September 3, 2021, informed the Court by email that the brief was ready to be filed. Because he had a child in quarantine, he noted that he was “trying to get downtown today so I can get [the brief] filed ASAP.”

The Court’s law clerk replied that she would “keep an eye out for your filing and [the Criminal Justice Academy] will have the opportunity to respond.” 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

¹ Appellant delivered a brief to the ALC offices after 5:00 pm on September 13, 2021. The brief was time-stamped on September 14, 2021, sixty (60) days after it was due.



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.

Respondent's counsel, on September 13, 2021, filed the above-referenced Motion to Dismiss on the ground that Appellant had not filed a brief. Appellant's counsel submitted a brief, received by the Court on September 14, 2021. Neither a motion to extend the time nor a motion to allow late filing was included with the brief. Furthermore, Appellant's counsel did not reply to the Motion to Dismiss.

The Court, hearing nothing further from Appellant, issued an order on September 29, 2021, granting the motion and dismissing the case.

On September 30, 2021, Appellant filed a motion asking the Court to reconsider its dismissal order. Respondent replied in opposition to the request for reconsideration on October 7, 2021.

Appellant's brief was received sixty (60) days after it was due. Although Appellant's counsel was aware of his failure to file the brief within ten (10) days of its being due, he took no steps to rectify the situation. In addition, he has not requested any relief from the Court that would provide an extension of time or allow late filing of the brief.

In opposition to the Court's dismissal order, Appellant relies on *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006). In *McComas*, the trial began at 2:00 P.M., and available witnesses testified. However, the plaintiff, herself, was not present. Her attorney informed the judge that McComas was on the way. The judge recessed the trial for approximately ten minutes until 4:00 P.M. at which time he announced that if she were "not here [he would] dismiss [the case] for lack of prosecution" (second brackets in original). *Id.* at 61, 626 S.E.2d at 903. At 4:16 P.M., on the motion of the defendant, Ross, the judge dismissed the case. "According to McComas and her friend who drove her there, she arrived at the courthouse at approximately 4:18 [P.M.] and learned that her case had been dismissed with prejudice." *Id.* 626 S.E.2d at 904.

The *McComas* court reversed the dismissal on the basis that the attorney was present and put available witnesses on the stand, that McComas had not previously requested continuances nor otherwise delayed the proceedings, nor had counsel demonstrated unreasonable neglect. *Id.* at 64, 626 S.E.2d at 905.

This matter differs from *McComas* in several significant ways. *McComas* was dismissed in the early stage of a trial and denied plaintiff the opportunity to have her case heard.² The cases distinguished in *McComas* involved “repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect. *Id.* at 62, 626 S.E.2d at 904 (citing *Small v. Mungo*, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970)). *McComas* also required “a showing of indifference to the rights of the defendant” or denying a witness the opportunity to testify would be “an abuse of discretion without a showing of willful disobedience when exclusion amounted to a judgement of default.” *McComas*, at 63, 626 S.E.2d at 904 (discussing *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996)).

In addition, this case was not dismissed at the trial level but on the appellate level. Appellant had a contested case hearing before a hearing officer from which the Law Enforcement Training Council made factual findings and unanimously concluded that Appellant committed misconduct in his “physical or psychological abuse of [a] member[] of the public or [a] prisoner[.]” (ROA, 13.) Appellant sought review by the ALC and received a copy of the notice of assignment that provided a schedule for service of the ROA and for submission of the parties’ respective briefs.

Appellant’s counsel received the ROA and understood when his brief was due. Further, counsel was aware in July 2021, as he admitted, that he had not submitted the brief on time and knew that he should take appropriate steps that began with his request for additional time from Respondent’s counsel. Although counsel agreed to the request, Appellant’s counsel took no further steps to contact the Court to obtain an extension or to obtain permission to file the brief out of time.

Although Appellant’s counsel contends that his failure to submit a timely brief was inadvertent and that he “sought to keep the Court informed,” the facts show otherwise. Counsel became aware of his omission while on vacation some ten days after the initial due date. When he returned to the office, he took no further steps to rectify his omission until after the Court contacted the parties on September 1, 2021.

The Court emphasizes that even though Appellant ultimately submitted a brief, he has done nothing that would allow the Court to consider this delinquent document.

² The majority in *McComas* concluded that “dismissal . . . was too harsh a sanction for her conduct or the conduct of her counsel. Therefore, we find the trial court abused its discretion in dismissing [the] case.” *Id.*

Where appellant has sufficient time within which to file the brief, or where counsel has not shown due diligence in preparing the brief or applying for an extension of time, no extension of time will be granted.

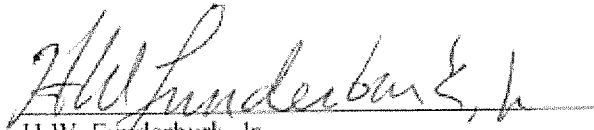
4 C.J.S. Appeal and Error § 744, Westlaw Edge (updated October 2021).

Although Appellant contends that he “sought to keep the Court informed,” he made no effort between July 16, 2021, and September 3, 2021, to apprise the Court of why a brief had not been submitted nor did he request from the Court additional time nor permission for late filing.

Accordingly, Appellant’s Motion for Reconsideration is **DENIED**.

AND IT IS SO ORDERED.

October 21, 2021
Columbia, South Carolina


H.W. Funderburk, Jr.
Administrative Law Judge

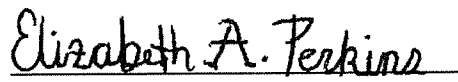
CERTIFICATE OF SERVICE

I, Elizabeth A. Perkins, hereby certify that I have this date served this **Order Denying Appellant’s Motion to Reconsider** upon all parties to this cause by depositing a copy hereof by electronic mail to the addresses provided by these parties and/or their attorneys:

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Counsel for Respondent

October 21, 2021
Columbia, South Carolina


Elizabeth A. Perkins
Judicial Law Clerk



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Apr 19 2022

SC Court of Appeals

Certificate of Appellant

The undersigned hereby certifies, in accordance with Rule 210(g), SCACR, that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully Submitted,

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