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 Hess .....Appellant

v.

South Carolina Criminal Justice Academy .....Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the Administrative Law Court err in dismissing the Petition for Judicial Review of the Final Decision of the Law Enforcement Training Counsel of the South Carolina Criminal Justice Academy based upon a delay in filing Appellant's Initial Brief?

STATEMENT OF THE CASE

Appellant, Scott Hess (hereinafter "Hess") was previously a certified law enforcement officer in the State of South Carolina. Hess was terminated from his employment as a Class 1 law enforcement officer with Myrtle Beach Police Department (hereinafter "MBPD") on or about January 6, 2020.

Following his termination, on or about January 17, 2020, MBPD submitted a PCS (Personnel Change Status) Separation Due to Misconduct with the South Carolina Criminal Justice Academy (hereinafter "SCCJA"). Specifically, MBPD alleged that Hess' termination involved misconduct as defined in S.C. Code Ann. § 23-23-150 in that he allegedly engaged in "physical or psychological abuses of members of the public and/or prisoners." Pursuant the Regulations guiding the SCCJA and Law Enforcement Training Council (hereinafter "LETC"), Hess was immediately deemed ineligible to serve as a law enforcement officer in this State. In accordance with the Regulation(s), Hess timely requested a contested case hearing on the allegation of misconduct. A contested case hearing took place on October 22, 2020, before Timothy J. Plunkett, the Hearing Officer appointed by the LETC.

Hearing Officer Plunkett issued a Findings and Recommendation of Hearing Officer (Contested Case) on or about January 7, 2021, wherein he opined that the allegation against Hess had not been proven by substantial evidence, that the LETC should approve his eligibility of a law enforcement officer in the State of South Carolina, and expunge within thirty (30) days all evidence related to the allegation of misconduct. The Recommendation subsequently came before the LETC at a meeting held on February 22, 2021. At that meeting, the LETC rejected the Recommendation and voted to permanently deny Hess his law enforcement certification in the

State of South Carolina. The Final Agency Decision was signed by Chief Mark Keel, Chairman, on March 23, 2021. Hess received the Final Agency Decision April 5, 2021.

Because Hess had exhausted all administrative remedies available to him within the SCCJA and LETC appeal process, he filed a Notice of Appeal with the South Carolina Administrative Law Court on May 3, 2021, seeking judicial review. A Notice of Assignment was filed on May 7, 2021. (R. p. 1). The Record on Appeal was filed on or about June 15, 2021.[1] (R. p. 2).

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

On September 1, 2021, the Administrative Law Court requested an update from both parties regarding the state of the appeal.[2] (R. p. 28). 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. (R. p. 27).

On September 13, 2021, Respondent emailed its Motion to Dismiss to the Judge's Law Clerk. (R. p. 29). On that same date, the undersigned advised the Law Clerk that he had returned from quarantine and was delivering a hard copy of his Initial Brief to the Court for filing that

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[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.

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

date. (R. p. 29). Appellant's Brief was marked filed September 14, 2021, per the Court's Order. (R. pp. 6-16).

On September 29, 2021, the Honorable H.W. Funderburk, Jr., Administrative Law Judge, issued an Order of Dismissal dismissing the Petition citing SCALC Rule 37(A) and Appellant's failure to file a brief within the designated time. (R. pp. 17-19). On September 30, 2021, Appellant filed a Motion to Reconsider the Court's September 29th Order. (R. pp. 20-32). On or about October 7, 2021, Respondent filed a Motion in Opposition to Appellant's motion. (R. pp. 33-35). On October 21, 2021, Judge Funderburk issued an Order Denying Appellant's Motion to Reconsider. (R. pp. 36-39).

This Appeal timely followed.

STANDARD OF REVIEW

"Judicial review of any decision of the Court shall be as provided in S.C. Code Ann. § 1-23-610 (2005) (as amended)." SCALC Rule 40. Section 1-23-610(C) of the South Carolina Code of Laws provides:

> The review of the administrative law judges order must be confined to the record. The reviewing tribunal 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 has been prejudiced because of the finding, conclusion, or decision is:
> (a) in violation of constitutional or statutory provision;
> (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(C).

Decisions of the ALC judge should not be overturned by the reviewing court unless they are unsupported by substantial evidence or controlled by some error of law. *Olson v. S.C. Dept. of Health & Envtl. Control*, 379 S.C. 57, 663 S.E.2d 497, 501. The reviewing court may reverse or modify the decision of the ALC just if the finding, conclusion, or decision reached 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. *Id.*

ARGUMENT

In the Order Denying the Motion to Reconsider the Court held that "though Appellant ultimately submitted a brief, he has done nothing that would allow the Court to consider this delinquent document." (R. p. 38). In so doing, the Court seeks to dismiss the Petition 'in form over substance' in that Appellant did not specifically file a motion for extension despite the communication(s) with the Court.[3]

I. THE APPELLANT ESTABLISHED THAT CAUSE EXISTS FOR SETTING ASIDE THE ORDER OF DISMISSAL.

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. (R. pp. 36-39). Admittedly, there is very little law analyzing SCALC Rule 38, which provides that "an administrative judge may dismiss an appeal for failure to comply..."[4] SCALC Rule 38 (emphasis added).

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[3] As referenced herein, it is readily believed that the Initial Brief was filed prior to Respondent's Motion to Dismiss; however, to date, Appellant has never received a filed copy of that motion.

[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.

First, turning to the filing of the motion for extension, Hess' counsel was not aware a motion still needed to be filed with the Court. 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 the opportunity to respond. Thank you." (R. p. 27). Based upon the same, Hess' counsel was of the understanding that the motion was not needed based upon the acknowledgement from Respondent's counsel as to the request for additional time and the Court's indication that it was looking out for the filing. 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. (R. p. 27).

Similarly, Appellant's counsel was not aware of a remaining need to provide a memorandum in opposition to Respondent's Motion to Dismiss. 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. (emphasis added). (R. p. 29). Upon information and belief, Appellant's Initial Brief was filed prior to the filing of Respondent's Motion to Dismiss; Hess' counsel has still never been provided an ALC filed copy of the motion. Assuming Appellant's Initial Brief was filed first, it follows that the motion to dismiss was moot. At no time was Hess 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; indeed, Hess had already filed his Initial Brief, which was ostensibly accepted by the Court. (R. pp. 6-16). 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 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.

The factors set forth in *Hillg* are persuasive. *Hiling,* 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. 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 quarantine. Adjudication of this matter further servers 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.

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 but the same was not remotely intentional. While the undersigned admits that the delay is less than preferred, COVID-19 and its strain on managing day-to-day affairs is/has been felt nationwide.

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"). 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. *Supra.*

Based on the foregoing, Hess maintains that for the Court to take the drastic sanction of dismissing the Petition in its entirety is at a minimum, unwarranted, and at worst, an abuse of discretion. To wit, the Court's Order(s) clearly imply that had Hess filed a motion for extension, response to Respondent's motion, or accompanied his Initial Brief with a motion to accept a late filing, it would have been permitted. (R. pp. 17-19, 36-39). Hess' counsel did not file the same solely because of his ongoing communication with the Law Clerk and firm belief that everything was in order upon the filing of the Initial Brief. (R. pp. 27-32). As such, Appellant respectfully disagrees with the Court's opining that "he has done nothing that would allow the Court to consider the delinquent document." (R. p. 38). To the contrary, Appellant maintains that there is no reason that the Court may not permit the filing. *See* SCALC Rule 38 (providing a Court may dismiss not that it shall dismiss).

Moreover, it remains well settled that an adjudication on the merits is preferred. *Supra.* 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. (R. pp. 7-8). Importantly, he recommended that the misconduct allegation should be dismissed as against Hess and any records expunged within thirty (30) days. (R. p. 8). 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. (R. p. 10).

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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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Final Brief of Appellant* complies with the provisions of Rule 211(b), SCACR.

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