

1978 WL 207593 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 30, 1978

*1 Dr. Jack S. Mullins
Director
Personnel Division
Budget & Control Board
1205 Pendleton Street
Columbia, SC 29201

Dear Dr. Mullins:

You have requested an opinion from this Office as to whether the State Employee Grievance Committee has jurisdiction to consider the appeal of Mr. Dick Little, an employee of the University of South Carolina. You enclosed with your request for an opinion a copy of the file materials which have been compiled by your Office pursuant to S.C. Code Ann. § 8-17-40 (1976), as amended, which states in part:

The State Personnel Director shall assemble all records, reports, and documentation of the earlier hearings on the grievance and review the case to ascertain there has been full compliance with the established grievance policies, procedures, and regulations within the agency or department involved and determine whether the action is grievable to the State Committee.

The rules and regulations of the State Employee Grievance Committee, S.C. Code Ann. § R-59-5 (1976), as amended, state:

Upon receipt of appeals of questionable jurisdiction, the State Personnel Director shall immediately request an opinion from the Attorney General.

The file materials which were submitted indicate that on or about December 8, 1977, the University of South Carolina notified Mr. Little that his position as Director of Alumni Activities was being discontinued by the University as of February 1, 1978, and the position would be deleted from the "classified jobs". From the correspondence contained in the file, it appears that Mr. Little then employed counsel, and a suit was filed in Federal District Court prior to the termination date of February 1, 1978. Further, on January 30, 1978, the employee filed a memorandum with various officials of the University entitled "Dismissal from Employment". This memorandum stated, in part:

Please be advised that I hereby request review of the decision of the University to dismiss me from employment, pursuant to the policies and procedure memorandum D-5.09, dated 3-1-75. This decision has arisen in the course of my employment, and takes effect on February 1, 1978.

I am, if the University so desires, amenable to waiving steps 1 and 2 under said procedure, with the understanding that this letter shall constitute both an effort to seek consultation with my supervisor under step 1 thereof and a formal grievance under step 2, without regard to whether the University chooses to go directly to step 3.

Specifically, I asked that the University return me to my former position.

The memorandum further sets out allegations of facts which the memorandum stated would “aid in achieving a prompt and definitive resolution and which constitutes the basis upon which I form my belief that I should not be dismissed”.

On that same date, January 30, 1978, the attorney representing the grievant notified the counsel for the University that his client was seeking a grievance hearing pursuant to the University grievance procedures. This letter stated:

*2 It is apparent that no relief is available in the Federal District Court and, accordingly, the action there now pending is being dismissed pursuant to Rule 41(a)(1). An early response to this request will be appreciated.

It appears that the action in the Federal District Court was dismissed “without prejudice” pursuant to the Federal Rules of Civil Procedure cited in the letter by Mr. Little's counsel.

At some point in time after Mr. Little's termination (there is no date set forth in the records provided), Mr. Little made application for retirement pursuant to the statutes and rules and regulations which govern the South Carolina Retirement System.

Mr. Little's grievance concerning his termination has not been processed by the University through its grievance procedures, and consequently, no hearings have been held or decisions issued by the University on this matter. On March 14, 1978, counsel for Mr. Little submitted a letter to your office in the form of a Petition requesting an appeal to the State Employee Grievance Committee pursuant to S.C. Code Ann. § 8-17-40 (1976), as amended.

During the pendency of this matter, the University appears to have taken three basic positions, all of which are succinctly stated in a memorandum to your office dated April 10, 1978, from the University counsel. The memorandum states in part:

It is our position that Mr. Little is not entitled to grieve his termination for the following reasons:

(1) Mr. Little did not follow the steps of the University grievance procedure. He filed an initial grievance from which he never received any reply, but Mr. Little failed to affirmatively appeal such non-reply (or adverse decision) to the next step in the procedure as he is required to do.

(2) Mr. Little voluntarily chose to pursue his grievance by filing suit in the Federal Courts rather than following University procedures. We feel by his election of remedies he has foreclosed his availability of the grievance process.

(3) Mr. Little is not now a state employee; he has retired, thus the grievance procedure is not now available to him.

I.

S.C. Code Ann. § 8-17-20 (1976), as amended, sets forth the requirements each agency and department of State government must meet in establishing internal agency grievance procedures. One of those requirements is that “[t]he plan shall provide that the department or agency shall act on a grievance within 45 days. Failure to act positively within such period will be considered an adverse decision which the employee may appeal [to the State Employee Grievance Committee]”. The grievant initiated action under the University's grievance procedure on January 30, 1978, as noted above. The file does not indicate that any decision was made concerning the employee's request to consolidate steps in the procedure. Four days after the employee's grievance request was initially filed, counsel for the University on February 3, 1978, notified counsel for Mr. Little as follows:

*3 I am of the opinion that when Dick filed the action in the Federal Court, and we commenced the taking of testimony in that action, that he had waived his right to proceed through the administrative process. I am accordingly going to advise the University that he is not entitled to proceed in his grievance, as he has previously elected his remedy.

The overall purpose of the State Employee Grievance Procedure, as stated in § 8-17-10 of the Code, is the establishment of a “proper forum for the understanding and resolution of employee grievances [which] will contribute to the establishment and maintenance of harmony, good faith and the quality of public service.” Considering the overall purpose of the Act, both the agency and the employee are expected to act in good faith at all times to resolve employee grievances. If the agency or department of State government initially takes the position that the employee is precluded from using the internal grievance procedure, and the agency's position is later proven incorrect, the agency should be precluded from subsequently asserting that the employee failed to follow the time limits set forth in its grievance procedure.

It is the opinion of this Office that the University has failed to act positively within the 45 day period set forth in S.C. Code Ann. § 8-17-20, and that this may be properly considered “an adverse decision” from which the employee may appeal to the State Employee Grievance Committee.

II.

The University has consistently asserted that the grievant in this case is precluded from using the grievance procedure, either within the agency, or through the State Employee Grievance Committee, because he has chosen to pursue his grievance by filing suit in Federal Court and has thereby “elected his remedy”. As previously noted, the Federal Court action commenced by the grievant in this matter was ended, as far as we can determine, by the filing of a non-suit, “without prejudice”. Thus, there was no determination made by the Federal Courts on the merits of Mr. Little's law suit as it may have regarded his dismissal.

With regard to the theory of election of remedies, the South Carolina Supreme Court has stated:

It is well established that the choice of a fancied remedy and the futile pursuit of it, because either the facts turn out to be different from what the parties suppose them to be, or the law applicable to the facts is found to be other than supposed, does not bar the party from thereafter invoking the proper remedy. If the party has no such remedy as he invokes, his action in pursuing it does not constitute an election.

[Lancaster vs. Smithco, Inc.](#), 241 S.C. 451, 128 S.E.2d 915 (1962).

It is our opinion that the employee in this case is not precluded from pursuing the grievance procedure under the State Employee Grievance Procedure Act where the employee initially seeks unsuccessfully a remedy in Federal Court, where there is no final adjudication on the merits and where the employee has adequately preserved his right to pursue the grievance procedure.

III.

*4 Mr. Little, after termination, applied for, and has received, retirement benefits. There appears to be nothing in the State Employee Grievance Procedure Act or in the provisions of law relating to the South Carolina Retirement System, which would preclude an employee availing himself of the benefits of the retirement system while proceeding with a grievance concerning his termination which was filed in a timely fashion. If the employee is successful in his grievance appeal, and he is ordered reinstated, the employee must make adequate arrangements with the retirement system if the employee chooses to return to work.

In summary, based upon all the information which you have submitted in the file, it is the opinion of this Office that the appeal filed by Mr. Little is grievable to the State Employee Grievance Committee, and that Committee does have jurisdiction to make a determination in this matter. I hope this provides sufficient information.

With kind regards, I remain
Very truly yours,

Nathan Kaminski, Jr.
Assistant Attorney General

Approved by:

Raymond G. Halford
Deputy Attorney General

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