

THE STATE OF SOUTH CAROLINA

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In the Court of Appeals

JUL 26 2022

SC Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Hon. Deborah B. Darden, ALJ

Appellate Case No 2022-000871

GREGORY PENCILLE # 312332

Appellant

v.

South Carolina Dept. of Corrections

Respondent

[INITIAL] BRIEF OF APPELLANT

Gregory Pencille 312332

Evans CE FYA275

610 Hwy 9 West

Bennettsville SC 29512

Appellant, Pro se

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1. Because the ALC dismissed the appeal without allowing briefs, the court deprived appellants of due process and the ability to present facts and supporting documents of appellants' claims of State-created liberty and property interest.

conclusion

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STATEMENT OF ISSUE(S) ON APPEAL

1. Did the ALC err in dismissing Appeal by Improperly determining Appellant did not State a State-created Liberty or property Interest?

STATEMENT OF THE CASE

In October of 2021 Penille placed an order for several books from "The Hit Point" a regularly used book supplier by inmates. According to a US Postal tracking form received by Penille from the hit point, the order was received at the institution [Evans CE] on December 11, 2021.

On February 16, 2022, Penille was called to the Evans CE property control window, there he was informed that due to these books being hardcovers, he could not have them and must mail out or have them destroyed. Penille asked the reason why "hardcover" books were no longer allowed, as just a week prior Penille had received a hardcover book without issue. Lt. Bruce [an SCDC employee] that "hardcover" books were now prohibited by AW Whittington here at Evans.

On February 17, 2022, Penille wrote a kiosk message [Ref# 22-0203099] asking agency staff why he was forced to lose property [books] prior to a policy being posted and further concerns of potential legal and religious restrictions this new restriction would place on him and other inmates here at Evans.

On March 04, 2022, Penille filed a Step 1 grievance. On March 07, 2022 a new memorandum was

posted, stating "Hard cover books were prohibited and must be surrendered or mailed out. Upon closer inspection of this New Memo it appears to be drafted and signed by Warden Stonebreaker but was actually drafted by AW Whittington and only signed by the Warden. Perille's Step 1 grievance was denied by Warden's response on March 22, 2022 in which AW Whittington was the authority to respond and deny.

Perille filed a Step 2 Grievance on March 24, 2022 which was denied April 20, 2022 and received by Perille on April 26, 2022. On April 27, 2022 Perille filed his notice to Appeal with the ALC. The case was assigned on May 19, 2022 and received by Appellant on May 24, 2022. The Administrative Law Court dismissed Appellant's case without allowing briefs to be filed on May 25, 2022 which appellant received on June 01, 2022. Notice of appeal was filed on June 20, 2022. This initial brief follows;

FACTS

As of the time Appellant ordered and was told he could not possess the Hardcover books, Appellant had no notice that he could not order or receive these books or that the order had been received by Evans property control months earlier. This caused appellant loss of property and Damages. Facts that caused this violation of due process and the agencies state-created liberty and property interest are summarized as follows;

On October 05, 2021 appellant ordered (7) seven books from "The hit point" a commonly used book supplier. (4) Four of the books in this order were only available in Hardcover versions and at the time there was no issues receiving hardcover versions of books. Appellant received notice of shipment from the bookstore. In which Appellant found the books had arrived at Evans on December 11, 2021 yet had not received them. Staff at Evans told appellant the order was not at the Institution as of mid January. On February 16, 2022 Appellant was ordered to report to the property control room and was told he must

mail out or dispose of this order. Appellant was told then, that he could no longer have hardcover books.

According to "SCDC policy/procedure" PS.10.08 Inmate Correspondence privileges. "Policy statement: ... Inmate correspondence privileges will be administered in accordance with all applicable Agency policies, American Correctional Association Standards, and State and Federal statutes."

"5.1 Delivery: All incoming mail will be delivered to the mailroom or designated area for processing. SCDC's goal is to distribute ... packages within (7) seven days of receipt ... provided they are not rejected or withheld for investigation/review. (4-4495)"

"7.8 Rejected; If an inmates incoming/outgoing correspondence is rejected for delivery ... the Postal Director/Designee will advise the inmate within (72) seventy-two hours ... using SCDC form 10-7, "Notice of Rejected Incoming/Outgoing Correspondence, indicating the reason for rejecting the mail..."

"19.2 The Postal Director/Designee will advise the inmate within (72) seventy-two hours the reason for withholding the publication using SCDC poster, 'Notice to Subscribers', which will be posted in

each living area. (4-ACRS-6A-08, 4-4491)"

"19.3 The postal Director/designee will forward the correspondence ~~etc~~, along with SCDC Form 10-6 'Notice to Withhold Incoming/Outgoing Correspondence', to the CRC.

On February 16, 2022, Appellant was told to sign and give address to send books to using SCDC Form 19-53 "Property Control room unauthorized items". Prior to the 16th of February, Appellant had not received any Notice required by SCDC policy/procedures. Which is also the minimal requirement of due process rights.

On March 04, 2022, Appellant initiated SCDC's Grievance process by filing a Step one grievance.

According to "SCDC Policy/procedure GA.01.12 Inmate Grievance System", "Policy statement, At a minimum, the grievance system will be designed to provide inmates with a mechanism by which they may seek formal review of their complaints; ~~it~~ provide a means for management review of staff decisions and policies/procedures that may be the source of a complaint. Notification of this policy/procedure

will be made in compliance with the Civil Rights of Institutionalized Persons Act." 42 USCA § 1997.

"7. Grievable issues: 7.1 Department policies/procedures, directives, or conditions which directly affect the inmate; 7.4 Inmate property complaints."

Appellant's complaint clearly falls under a grievable issue pursuant to this policy/procedure.

During the grievance process issues occurred, the grievance coordinator violated the appellant's due process by not allowing evidence documents and by failing to investigate the appellant's assertions.

"13.3 All Grievances... The Inmate Grievance coordinator (IGC) will conduct an investigation (i.e. talking with the appropriate staff and/or inmate(s), reviewing all documents and/or reports, etc) into the situation and will make recommendations to the Warden concerning disposition of the matter. No employee involved or addressed in a grievance will be assigned to conduct any investigation regarding the same."

Further, The Warden and Associate Warden were involved in the improper creation of the policy for which the grievance was filed, yet were directly responsible for deciding the outcome of the step one grievance by giving the warden's response. And Appellant was further prevented from including

evidentiary documentation with his Step 2 grievance and was not given opportunity to brief his ALC Appeal.

Lastly, Appellant presents facts that this "Newly created prohibition against books received by inmates due to being hardcover," is improperly created by SCDC Policy/procedures, due process rights, and Equal protection of rights.

Evans correctional institution created and posted a memorandum on March, 07, 2022, which prohibits inmates from possessing any hardcover books.

Since posting this memo the Administration staff has verbally searched parts of the memo; hardcover books already in the possession of inmate prior to March 7, 2022 are not needed to be mailed out, Education/Vocation/college books that are hardcover can be possessed by inmates, no amnesty boxes were provided. All of this violates equal protection of rights. Further, No other SCDC institution prohibits hardcover books.

SCDC Policy/procedure OP. 22.35 "Contraband Control"

"1. Items considered to be Contraband: Section 24-3-950 of South Carolina Code, provides that it shall be a felony to furnish or attempt to furnish an inmate with any matter declared to be contraband by the Director of SCDC. Declared items present in this

policy/procedure 1.1 through 1.29 do not include any mention of hardcover books. Further 1.29 states, "Other items as specified by the Warden. Written notification of any items so specified will be provided each intake. One copy of the notification will be made part of this policy and will also be provided to the Inspector General and the Division of Operations."

None of these provisions have been followed by SCDC staff at Evans, Specifically the memo posted on March 07, 2022, came after Appellant's books were ordered, arrived, and were forced to be mailed out. Further, the above mentioned steps to codify the prohibition into policy have not occurred which invalid the memo until such time. Also, P.S. - 10.08, "Inmate Correspondence Privileges" policy specifically defines Publications as any printed communications such as ... books, paperbacks, ... Separating this description in policy clearly intends approval of both paperback books and "books" intended to mean Hardcover books.

JURISDICTION

According to section 1-23-610 of the South Carolina code sets forth the standard of review when the Court of Appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency. "The review of the administrative Law Judge's order must be confined to the record." The court of appeals may reverse or modify the decision only if substantive rights of the appellant have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law.

The ALC obtains subject-matter jurisdiction in accordance with Al-shabazz v. State 338 S.C. 384, 527 S.E.2d 742 (2000); Sullivan v. SCDC, 355 S.C. 437, 586 S.E.2d 124 (2003); Slczek v. SCDC 361 S.C. 327, 605 S.E.2d 506 (2004); SCDC v. Mitchell 377 S.C. 256, 659 S.E.2d 233 (2008).

The South Carolina Supreme Court offered clarification of Al-shabazz and its progeny as to the ALC's subject-matter jurisdiction in Furtich v. SCDC 374 S.C. 334, 649 S.E.2d 35 (2007). In Furtich,

The court reiterated *Al-shabazz's* holding that "the ALC has subject-matter jurisdiction over an inmate's appeal when the claim sufficiently 'implies a state-created liberty interest'"; [Furtick] The court further quoted its clarification of jurisdiction in *Slezak v.*

SCDC 361 SC 327, 605 SE2d 906 (2004), stating, "The ALC has jurisdiction over all inmate grievance appeals that have been properly filed, further in *Mitchell*, following *Furtick*, holding that when an inmate's grievance to an ALC does not implicate a state-created liberty or property interest, the ALC may summarily dismiss the appeal at its discretion.

ARGUMENT

1. Did the ALC err in dismissing Appeal by improperly determining Appellant did not state a state-created liberty or property interest?

The ALC claims that appellant "has not alleged the infringement of any other state-created liberty or property interest."

This is incorrect, as stated in Appellant's Step (1) one grievance, "rule would violate 1st Amend rights to worship and legal review of grievance and this rule is excessive and a cruel state-created liberty interest," [Step 1 grievance]. Appellant's Step (2) two grievance states, that Step (1) one grievance response does not explain reasons why hardcover books are unauthorized and process violates due process and 1st Amend rights. Further, Notice of Appeal states, "such prohibitions imposes hardships against legal and religious access by not allowing 'these' books." Also, "Violates agency policy, state and federal constitutional rights of due process, 1st Amend U.S.C.A., and needs to be addressed," [Notice of Appeal]

Appellant clearly states a "state-created liberty or property interest", and by the ALC not allowing briefs in this matter infringes on appellants rights of due process and equal protection of rights.

The question of law becomes whether or not appellant states a liberty or property interest pursuant to the Due process clause under the Fourteenth Amendment U.S.C.A.

First, Al-shabazz states clearly that procedural due process is guaranteed when an inmate

is deprived of an interest encompassed by the 14th Amendment's protection of liberty and property.

A prisoner's State-created liberty interests will generally be limited to freedom from restraint that imposes atypical or significant hardship on the inmate in relation to ordinary incidents of prison life.

An inmate claiming a protected interest must have a legitimate claim of entitlement to it. Sullivan v.

SEC, 355 S.Ct. 437 (2007). In order to establish a state-created liberty interest, a regulation must "contain explicitly mandatory language", i.e. specific directions to the decision maker. That is, the regulation's substantive predicates are present, a particular outcome must follow.

Hewitt v. Helms, 459 US 460, 103 S.Ct. 864 (1983); Sandis v. Connor, 85 US 5472 (1995)

[See Exhibit E] Memorandum of hardcover prohibition, also, SEC Policy/Procedures P.S. 10.08 Inmate correspondence privileges, definitions as pertaining to books, as in hardcover books.

Stated simply, a State creates a protected liberty interest by placing substantive limitations of Discretion. Olin v. Watkinson, 461 US 238 (1983)

This language means if the regulation explicitly mandates an outcome based on the existence of relevant criteria then the State has created a liberty interest.

Further, the terms "Policy" and "Procedure" constitute approved guidelines for handling the agency day-to-day operations, as well as statements expressing the basic expectations of conduct for agency staff and inmates. More formally stated, the terms policy and procedure constitute agency directives deemed by the responsible agency officials as "necessary to preserve internal order and discipline, and to maintain institutional security in the prison".

Construction of statute by agency charged with its administration is entitled to most respectful consideration and should not be overruled absent compelling reasons.

Whether particular agency's proceeding announces rule or general policy statement depends upon whether agency action establishes binding norms, Section 1-23-130(140) Home Health Service, Inc v. St. Tax Comm 312 SC 324 (1994).

Statements by SDC concerning documents entitled "SDC Policy/Procedure", are binding norms, and, thus, are more like rules or regulations that may be interpreted using statutory construction rules than they are true policy statements. Ackerman v. SDC, 415 SC 412 (2016). Statutory interpretation is a question of law.

Further, SDC agency staff improperly interprets agency policy and violates due process by not allowing accompanying documents to

Support grievance claims, Appellant attempted to include documents [Exhibits A, B, C, D, and E] to prove issues during Step 1 and Step 2 grievance, but grievance coordinator refused to allow evidence documents [Exhibit F]. Evidence is essential to support claims and denying the ability to support claims violates due process.

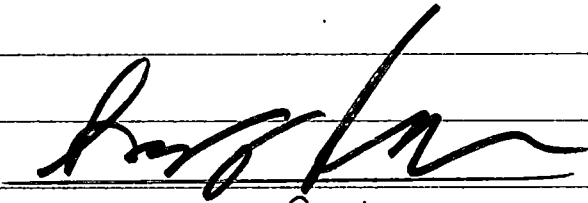
CONCLUSION

At the time appellant ordered and the books arrived at Evans CT, there was No prohibition against "hardcover" books. SCDC's negligence in improperly creating and retroactively applying a new policy against their own policy/procedure standards directly caused appellant's loss of property and additional fees created an atypical and significant hardship and through the agency's grievance process and the ALC not allowing supportive evidence and not allowing full briefs in appellant's claims, his due process rights have been violated.

Appellant prays this court grant remand to the ALC for full hearing of

appellant's claims or for any other ruling
this court deems appropriate.

July 15, 2022



Gregory Perille #312332

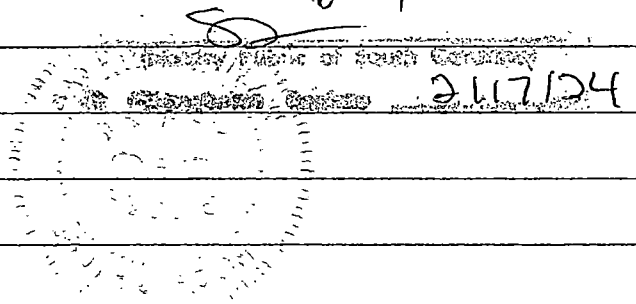
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South Carolina Dept. of Corrections

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PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief, Designation of Matter, and Proof of Service on all parties by depositing the same in the US. mail, postage paid or by placing in the institution's mail room on July 15, 2022 and addresses as follows;

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July 15, 2022

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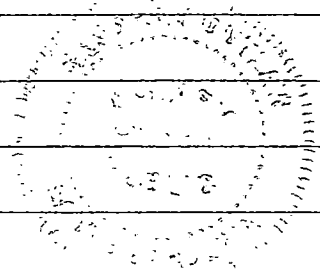
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2022 JUL 15th day of July 2022
S. J. Percille
Clerk of Court
County of York
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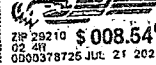
Gregory P. Miller 31232
Evans Ct F48-275
610 Hwy 9 West
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CERTIFIED MAIL

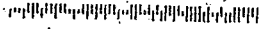


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