

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM ADMINISTRATIVE LAW COURT
Hon. Deborah B. Durden. ALJ

SC Court of Appeals

Appellate Case No. 2022-000871

GREGORY PENCILLE #312332 Appellant

V.

South Carolina Dept. of Corrections Respondent

FINAL BRIEF OF APPELLANT

Gregory Pencille 312332
Evans CI F4A275
610 Highway 9 West
Bennettsville, SC 29512
Appellant, Pro se

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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 Pencille placed an order for several books from "The Hit Pointe" a regularly used book supplier by inmates. According to a U.S. Postal tracking form received by Pencille from The Hit Pointe, the order was received at the institution [Evans CI] on December 11, 2021.

On February 16, 2022, Pencille was called to the Evans CI 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. Pencille asked the reason why "hardcover" books were no longer allowed, as just a week prior Pencille 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, Pencille wrote a kiosk message [Ref# 22-0203099][not included due to SCDC's failure to include] asking agency staff why he was forced to lose property [books] prior to a policy being posted and further concerns of potential legal and religion restrictions this new restriction would place on him and other inmates here at Evans.

On March 04, 2022, Pencille filed a Step 1 Grievance [R.P 1,2]. On March 07, 2022 a new memorandum was posted, stating "Hardcover books were prohibited and must be surrendered or mailed out". Upon closer inspection of this new memorandum it appears to be drafted and only signed by Warden Stonebreaker, but was actually drafted by AW Whittington and only signed by the Warden. Pencille's Step 1 Grievance [R.P 1,2] was denied by Warden's response on March 22, 2022 in which, AW Whittington was the authority to respond and deny.

Pencille filed a Step 2 Grievance [R.P 3] on March 24, 2022 which was denied April 20, 2022 and received by Pencille on April 26, 2022. On April 27, 2022 Pencille 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) sever books from “The Hit Pointe” 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 or 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-GA-08, 4-4491)”

“19.3 The Postal Director/Designee **will** forward the correspondence...; 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 1 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 the complaints;... **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 1 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 AEC 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 memorandum the Administrative staff has verbally recanted 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 O.P 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 to each inmate. One copy of the notifications **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 memorandum 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 invalidates the memorandum 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 SC 354, S27 S.E.2d 742 (2000); Sullivan V. SCDC, 355 SC 437, S86 S.E.2d 124 (2003); Slazak

V. SCDC 361 SC 327, 605 S.E.2d 506 (2004); SCDC V. Mitchell 377 SC 256, 659 S.E.2d 233 (2008).

The South Carolina Supreme Court offered clarification of Al-Shabazz and its progeny as to the ALC; subject-matter jurisdiction in Furtick V. SCDC 374 SC 334, 649 S.E.2d 35 (2007). In Furtick, the court reiterated Al-Shabazz's holding that "the ALC has subject-matter jurisdiction over an inmates' appeal when the claim sufficiently 'Implicates a State-created liberty interest'" [Furtick] The court further quoted its' clarification of jurisdiction in Slazak V. SCDC 361 SC 327, 605 S.E.2d 506 (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 Amendment rights to worship and legal review of grievance... this rule is excessive and a cruel state-created liberty interest," [Step 1 Grievance][R.P 1,2]. 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 Amendment 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 USCA, 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 appellant's 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 14th Amendment USCA.

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 or prison life.

An inmate claiming a protected interest must have a legitimate claim of entitlement to it. Sullivan V. SCDC 355 SC 437 (2003). 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 if the regulations substantive predicates are present, a particular outcome must follow. Hewitt V. Helm, 489 US 460, 103 Sect. 864 (1983); Sandin V. Conner 515 US472 (1995) [**See Exhibit E**][**R.P 10**] memorandum of hardcover prohibition, also, SCDC 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 offered discretion. Olim V. Wakinakona 461 US 238 (1983).

This language means if the regulation explicitly mandates an outcome based on the existence of relevant criteria than 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 changed with its administration is entitled to most respectful consideration and should not be overruled absent compelling reasons or general

policy statement depends upon whether agency action establishes binding norms, section 1-23-130 (140) Home Health Service, Inc. V. SC Tax Com'n 312 SC 324 (1994).

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

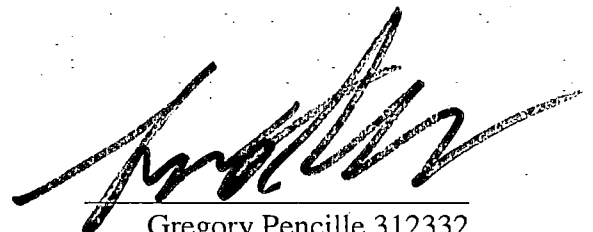
Further, SCDC agency staff improperly interprets agency policy and violates due process by not allowing accompanying documents to support grievance claims, Appellant attempted to include documents [Exhibits A, B, C, D, and E][R.P 6; 7; 8; 9; 10] to prove issues during Step 1 [R.P 1,2] and Step 2 [R.P 3] grievances, but grievance coordinator refused to allow evidence documents. [Exhibit F][R.P 11]. 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 CI, 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 on 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.

October
July ~~2021~~, 2022



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