

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ADMINISTRATIVE LAW COURT
ADMINISTRATIVE LAW JUDGE SHERLEY C. ROBINSON

CASE NO.: 12-ALJ-04-0377-AP

ANDREW PLUMMER # 299191

APPELLANT

V.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RESPONDANT

APPELLANTS REPLY BRIEF

ANDREW S. PLUMMER
TYGER RIVER C.I.
SPECIAL MANAGEMENT UNIT
ROOM 20
200 PRISON RD
ENOKEE SC 29335

RECEIVED

JUN 04 2013

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I. WAS APPELLANT AFFORDED ALL CONSTITUTIONALLY REQUIRED DUE PROCESS?

II. IS RESPONDENT'S FINAL AGENCY DECISIONS SUPPORTED BY SUBSTANTIAL EVIDENCE?

STATEMENT OF CASE

THIS MATTER COMES BEFORE THIS HONORABLE COURT PURSUANT TO THE APPEAL OF APPELLANT ANDREW PLUMMER, AN INMATE INCARCERATED WITH THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. APPELLANT WAS CONVICTED OF ASSAULT AND BATTERY OF AN SCDC EMPLOYEE WITH MEANS OR INTENT TO KILL OR INJURE, OFFENSE 806 UNDER SCDC POLICY OP-22.14 INMATE DISCIPLINARY SYSTEM, FOLLOWING HEARING: APPELLANT LOST 80 DAYS OF GOODTIME DUE TO THE DISCIPLINARY CONVICTION.

APPELLANT STATES THAT THE STATEMENT OF THE CASE IN APPELLANTS INITIAL BRIEF ON APPEAL AND OF RESPONDENTS INITIAL BRIEF ON APPEAL STATES THE VERY ESSENTIAL SET OF FACTS AND THEREOF DOES NOT NEED TO BE RESTATED.

STANDARD OF REVIEW

S.C. CODE ANN. SEC. 1-23-610(B) PROVIDES THE APPLICABLE STANDARD REVIEW. WHILE IT IS TRUE THAT A REVIEWING COURT SHALL NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE ALC AS TO FINDINGS OF FACTS, BUT IT MAY REVERSE OR MODIFY DECISIONS WHICH ARE CONTROLLED BY ERROR OF LAW OR ARE CLEARLY ERRONEOUS IN VIEW OF THE SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE. ID

ARGUMENT AND CITATIONS OF AUTHORITY

APPELLANT WAS NOT AFFORDED ALL CONSTITUTIONALLY REQUIRED DUE PROCESS.

PRISON DISCIPLINARY CASES ARE NOT CRIMINAL TRIALS IN FEDERAL OR STATE COURTS. INSTEAD, THEY ARE ADMINISTRATIVE HEARINGS IN AN INSTITUTIONAL SETTING. THEREFORE DUE PROCESS IN PRISON DISCIPLINARY HEARINGS IS SUBSTANTIALLY LESS THAN WOULD BE REQUIRED IN A CRIMINAL TRIAL BEFORE A COURT. DUE PROCESS REQUIRES THE FOLLOWING IN PRISON DISCIPLINARY CASES:

- a) NOTICE OF CHARGES;
- b) DISCLOSURE OF EVIDENCE AGAINST DEFENDANT;
- c) OPPORTUNITY TO BE HEARD;
- d) RIGHT TO CONFRONT AND CROSS-EXAMINE ADVERSE WITNESSES;
- e) NEUTRAL AND DETACHED HEARING BODY;
- f) AID OF COUNSEL SUBSTITUTE OR OTHER SUBSTITUTE AFR WHERE INMATE IS ILLITERATE OR COMPLEX CASE;
- g) WRITTEN STATEMENT BY THE FACT-FINDER AS TO THE EVIDENCE RELIED UPON.

WOLFF V. McDONNELL, 418 U.S. 539, 566 (1974)

THE REQUIREMENTS ENUMERATED IN WOLFF WERE NOT COMPLIED WITH IN THIS CASE. APPELLANT SUPPLIED THE APPEALS COURT WITH TWO COPIES OF STAFF REQUEST FORMS DATED JANUARY 19, 2012, FEBRUARY 2, 2012 REQUESTING SEVERAL WITNESSES WHICH WAS NOT ADDRESSED TO INCLUDE MEDICAL RECORDS.

THE ADMINISTRATIVE LAW JUDGE MADE ERRONEOUS FINDINGS IN DETERMINING THAT APPELLANT WAS AFFORDED ALL DUE PROCESS AVAILABLE AS STATED BY RESPONDENTS IN INITIAL BRIEF, IT WAS NEVER ADDRESSED BY RESPONDENTS NOR THE ADMINISTRATIVE LAW COURT WITHIN RESPONDENTS BRIEF OR THE FINAL ORDER THAT APPELLANT WAS AFFORDED WITNESSES NOR WAS IT ADDRESSED AS TO WHY THE DISCIPLINARY HEARING OFFICER DENIED APPELLANT INMATE WITNESSES AS REQUESTED WHICH WOULD OF PROVED THAT APPELLANT NEVER COMMITTED THE INFRACTION OF ASSAULT AND BATTERY WITH INTENT TO KILL ON AN EMPLOYEE. THE HEARING OFFICER WAS NOT IMPARTIAL AS STATED BY THE RESPONDENT AS WITNESSES AND EVIDENCE WAS UNJUSTLY EXCLUDED FROM THE RECORD.

AN INMATE SUBJECT TO A DISCIPLINARY HEARING IS ENTITLED TO, INTER ALIA, AN IMPARTIAL HEARING WOLFF V. McDONNELL 418 U.S. 539, 570-71, 94 S. CT. 2963, 2981-82, 41 L. ED 2D 935 (1974) A CONCEPTION OF AN IMPARTIAL DECISION MAKER IS ONE WHO, INTER ALIA, DOES NOT PREJUDICE THE EVIDENCE AND WHO CANNOT SAY, WITH THE UTTER CERTAINTY ADVANCE BY RESPONDENTS HOW HE WOULD ASSESS EVIDENCE THAT WAS EXCLUDED FROM THE RECORD FRANCIS V. COUGHLIN 891 F.2D 43, 46 (2D CIR. 1988) IT IS IMPROPER FOR PRISON OFFICIALS TO DECIDE THE DEPOSITION OF A CASE BEFORE IT WAS HEARD.

THE APPELLANT DID SUBMIT A STEP 1 AND STEP 2 GRIEVANCE APPEALS, WITHIN APPEALS IT WAS CLEARLY ADDRESSED THAT THE HEARING WAS PREJUDGED AT THE FACT THAT TWO INMATE WITNESSES WERE REQUESTED TO APPEAR AT HEARING OR WRITTEN STATEMENTS BE AVAILABLE WHICH FAILED TO TAKE PLACE AND SUCH WAS LEFT OUT OF THE WRITTEN RECORD FOR APPEAL BY DISCIPLINARY HEARING OFFICER.

THE WOLFF COURT HELD THAT THE INMATE FACING DISCIPLINARY PROCEEDINGS SHOULD BE ALLOWED TO CALL WITNESSES AND PRESENT DOCUMENTARY EVIDENCE WHEN PRESENTING HIM TO DO SO WILL NOT BE DULY HAZARDOUS TO INSTITUTIONAL SAFETY OR CORRECTIONAL GOALS. 418 U.S. at 516 THUS, THE RIGHT TO CALL WITNESSES AND PRESENT EVIDENCE IS ABSOLUTE, ACCORDING TO WOLFF, PRISON OFFICIALS MUST HAVE NECESSARY DISCRETION TO KEEP THE HEARING WITHIN REASONABLE LIMITS AND MAY REFUSE TO CALL WITNESSES FOR IRRELEVANCE AND LACK OF NECESSITY IN ADDITION TO LEGITIMATE SECURITY CONCERN. Id at 516.

THE DEPARTMENT OF CORRECTIONS HAS FAILED TO DEMONSTRATE THAT INMATE WITNESSES REQUESTED PROPERLY BY APPELLANT WOULD HAVE JEOPARDIZE THE OPERATION AND SECURITY OF THE INSTITUTION INSTEAD THE DEPARTMENT OF CORRECTIONS STATES THAT WITNESSES WERE AFFORDED WHICH APPELLANT EXPRESSINGLY DENIES. FURTHER, AS TO THE DISCIPLINARY ACTION ITSELF, THE PROVISION FOR A WRITTEN RECORD HELPS TO INSURE THAT ADMINISTRATORS, FACED WITH POSSIBLE SCRUTINY BY STATE OFFICIALS AND THE PUBLIC, AND PERHAPS EVEN THE COURTS, WHERE FUNDAMENTAL CONSTITUTIONAL RIGHTS MAY HAVE BEEN ABRIDGED, WILL ACT FAIRLY, WITHOUT A WRITTEN RECORD OF EXCLUSION OF WITNESSES AND EVIDENCE REQUESTED BY APPELLANT, THE INMATE IS AT A SEVERE DISADVANTAGE IN PROPOUNDING HIS OWN CAUSE TO OR DEFENDING HIMSELF FROM OTHERS: IT MAY BE THAT THERE WILL BE OCCASIONS WHEN PERSONAL OR INSTITUTIONAL SAFETY IS SO IMPLICATED THAT THE STATEMENT MAY PROPERLY EXCLUDE CERTAIN ITEMS OF EVIDENCE, BUT IN THAT EVENT THE STATEMENT SHOULD INDICATE THE FACT OF THE OMISSION.

PONTE V. REAL 471 U.S. 491, 105 S.Ct. 2192

ON A DUE PROCESS CHALLENGE TO FAILURE OF PRISON AUTHORITIES TO CALL WITNESSES REQUESTED BY A PRISONER AT A DISCIPLINARY HEARING THE COURTS ARE NOT LIMITED TO INQUIRING INTO REASONS FOR DENIAL ONLY WHEN AN INMATE POINTS TO SUBSTANTIAL EVIDENCE SHOWING THAT PRISON OFFICIALS IGNORED REQUIREMENTS IN GOVERNING WOLFF DECISIONS AND FURTHER, A PRISONER IS NOT REQUIRED TO SHOW A PATTERN OR PRACTICE OF REFUSING WITNESS REQUEST BEFORE HE MAY SUCCESSFULLY CHALLENGE FAILURE TO CALL WITNESSES.

KURSCHNER V. CITY OF CAMDEN PLANNING COMM'N 376 S.C. 165, 171, 656 S.E. 2D 346, 350 (2008)

(RECOGNIZING THAT DUE PROCESS REQUIRES A TRIAL-TYPE HEARING FOR FACT-SPECIFIC, ADJUDICATORY DECISION BY ADMINISTRATIVE AGENCIES).

THE APPELLANT SUPPLIED THE SOUTH CAROLINA COURT OF APPEALS WITH TWO (2) SCDC STAFF REQUEST FORMS (COPIES) DATED FEBRUARY 2, 2012 AND JANUARY 19, 2012 REQUESTING WITNESSES AND EVIDENCE TO BE AT HEARING.

APPELLANT PROPERLY PRESERVED THE RIGHT TO ARGUE THE DENIAL OF WITNESSES AS SUCH WAS RAISED IN ALC NOTICE OF APPEAL, COURT OF APPEALS INITIAL BRIEF, STEP 1 AND STEP 2 GRIEVANCE APPEALS. ALSO SEE DHO TRANSCRIPT DATED JANUARY 31, 2012 PAGE 2. THE CONTEMPORANEOUS OBJECTION PETITIONS TO CRIMINAL PROCEEDINGS AND LACK MERIT AS RESPONDENTS ATTEMPT TO ARGUE STATE V. WELLERMS 321 S.C. 455. IF THIS BEING TRUE, EVIDENCE IS PRESENTED THAT APPELLANT RAISED ISSUES OF DENIAL OF WITNESSES AND EVIDENCE IN ALC BRIEFS AND DURING DISCIPLINARY HEARING. SEE STATE V. BACLEY 298 S.C. 1. THE RESPONDENTS FURTHER MISTATED WOLFF V. MCDOWNELL ON PAGE 4 OF THEIR INITIAL BRIEF AS THEY STATED THAT APPELLANT HAS NO RIGHT TO CONFRONT OR CROSS EXAMINE ADVERSE WITNESSES. THUS WOLFF V. MCDOWNELL STATES THAT AN INMATE FACING A DISCIPLINARY HEARING DOES HAVE RIGHT TO CONFRONT AND CROSS EXAMINE ADVERSE WITNESSES AND CALL WITNESSES AND PRESENT DOCUMENTARY EVIDENCE FOR AN DEFENSE.

RESPONDENTS FINAL AGENCY DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

THE RESPONDENTS FINAL AGENCY DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BUT OF THE ERRONEOUS ERROR OF LAW BY NOT RULING ON THE FACT THAT THEY DID NOT RULE ON THE ISSUE OF FAILING TO CALL WITNESSES. THE DISCIPLINARY HEARING DENIED APPELLANT THE RIGHT TO SUBSTANTIAL AND PROCEDURAL DUE PROCESS IN VIOLATION OF THE SOUTH CAROLINA CONSTITUTION AND THE UNITED STATES CONSTITUTION AND THUS THE RESPONDENTS FINAL AGENCY DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. SEE 418 U.S. AT 516.

ON THE OTHER HAND, IF THE REFUSAL TO CALL A WITNESS IS NOT LOGICALLY RELATED TO PRISON SECURITY OR OTHER LEGITIMATE CORRECTIONAL GOALS. PRISON OFFICIALS HAVE VIOLATED DUE PROCESS. SEE MORGAN V. FARRER, 924 F.2D 134, 137 (8th Cir. 1991)

CONCLUSION

WHEREFORE, FOR ALL REASONS STATED ABOVE, THIS COURT SHOULD NOT AFFIRM THE SCDC DECISION IN THE ABOVE ENTITLED CASE.

By Andrew S. Plummer MAY 30, 2013

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