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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

James Michael Millholland, #367569, Appellant, v. South Carolina Department of Corrections, Respondent.	)	Docket No. 19-ALJ-04-0492-AP RECEIVED **ORDER** JAN 05 2023 SC Court of Appeals

The above-captioned matter was originally filed by James Michael Millholland (Appellant), an inmate housed with the South Carolina Department of Corrections (Department or SCDC), on September 26, 2019, in the South Carolina Administrative Law Court (Court). Thereafter, on March 4, 2020, the Court issued an Order of Dismissal (Order of Dismissal) for lack of jurisdiction. Appellant then appealed to the South Carolina Court of Appeals (Court of Appeals), which found this Court had jurisdiction. *See Millholland v. S.C. Dep't of Corr.*, 436 S.C. 547, 549, 873 S.E.2d 784, 785 (Ct. App. 2022), *reh'g denied* (June 22, 2022). Therefore, in an order issued August 4, 2022, the Court of Appeals reversed and remanded the decision to this Court. Upon reviewing the case on the merits, the Department's decision is affirmed.

BACKGROUND

On June 25, 2019, Appellant filed a Step 1 Grievance objecting to the deduction of funds from his personal account to pay a DNA processing fee. He argued that he had already paid the fee while on probation in the early 2000s, and he believed it should have been a one-time fee. The Warden denied the grievance, and Appellant filed a Step 2 Grievance asserting that his Fifth Amendment rights were violated when they charged him the fee twice. The Responsible Official denied his grievance citing to SCDC Policy 21.09 and advising Appellant, *inter alia*, that "records indicate [Appellant was] admitted into SCDC as a New Admission on 03/26/16. New admissions will be assessed the fee as required by SLED."

Appellant filed a Notice of Appeal on September 26, 2019. On March 4, 2020, this Court summarily dismissed the case because Appellant's complaint did not implicate a state-created liberty or property interest. However, on appeal, the Court of Appeals determined Appellant had a property interest in his trust account from which the DNA fee was taken; therefore, summary

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dismissal was inappropriate, and this Court had jurisdiction.[1] The Court of Appeals remanded the case for a hearing on the merits. Yet, the Court does not conduct hearings on the merits in inmate matters. *See Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). Rather, the Court reviews these matters in "an appellate capacity." *Id.* at 388, 527 S.E.2d at 754. Nonetheless, as a result of the decision being remanded, the Court sent a letter to the parties on September 27, 2022, allowing them to submit additional arguments. The Department filed a Motion to Supplement the Record on October 19, 2022. Appellant did not object to the Department's request, and thus the motion is granted.[2] On November 2, 2022, Appellant filed his additional arguments, and the Department filed a Response on November 9, 2022.

ISSUE ON APPEAL

Did the Department err in charging Appellant for his DNA collection pursuant to section 23-3-670(A) of the South Carolina Code (Supp. 2021)?[3]

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) and *Furtick v. South Carolina Department of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003). In *Al-Shabazz*, the court held the ALC's jurisdiction in inmate appeals is

[1] It is notable that this Court had addressed the substantive issue in a footnote in its Order, stating:

> Even if the Court had jurisdiction, Appellant's argument is without merit. S.C. Code Ann. § 23-3-670(A) (Supp. 2019) provides that: "A person who is required to provide a sample pursuant to this article . . . **must** pay a two hundred fifty-dollar processing fee which **may not be waived** by the court. *See Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) (emphasis added) ("Under the rules of statutory interpretation, use of words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement."). Furthermore, the DNA samples are not even taken by the Department but rather by other law enforcement agencies prior to conviction. *See* S.C. Code Ann. § 23-3-620(A). The Department is thus simply charged with collecting the fee for actions taken by another agency. Moreover, Appellant has not presented any evidence that his previous sample was determined to be suitable by SLED.

[2] The Department requested to supplement the Record to include an Affidavit of Debra Long as well as the Inmate Restitution display screens referenced in the affidavit to show that Appellant has only been charged once by the Department for his DNA testing.

[3] Appellant raises other issues on appeal in his additional arguments filing, including: "[d]oes the funds that are gifted to Appellant and deposited on his inmate EH Cooper Trust account hold enough merit to be considered a state created liberty or property interest?"; "[d]id the ALC err in summarily dismissing Appellants appeal because his grievance did, in fact, implicate a protected property interest – his inmate trust account?"; "[d]id the ALC err in finding it did not have subject matter jurisdiction to hear the Appellant's appeal?"; and "[d]oes the ALC have jurisdiction over all inmate grievances that have been properly filed?" These issues all relate to whether the Court has jurisdiction, and that issue has already been resolved by the Court of Appeal's order. Therefore, the Court will not consider these issues.

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limited to state-created liberty interests typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. *Id.* at 382; 527 S.E.2d at 757.[4] Furthermore, when reviewing the Department's decisions in inmate grievance matters, the Court sits in an appellate capacity. *Id.* at 377, 527 S.E.2d at 754; *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2021) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 1-23-380). Section 1-23-380(A)(5) states:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
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> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2021).

Consequently, an Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." *Id.* Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless the Record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence, arbitrary, or affected by an error of law. *Id.*; *see also Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492

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[4] In *Sullivan v. South Carolina Department of Corrections*, the Supreme Court also found that other conditions of confinement could potentially implicate state-created liberty interests. 355 S.C. 437, 586 S.E.2d 124 (2003). However, those interests are "generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 442, 586 S.E.2d at 126 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)); *see also Slezak v. S.C. Dep't of Corr.*, 361 S.C. 327, 605 S.E.2d 506 (2004).

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(Ct. App. 1998). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Accordingly, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

DISCUSSION

In Appellant's additional arguments, he asserts the Department improperly charged him for the DNA processing fee twice for a total of $500.00. Specifically, he argues his DNA had already been taken and the processing fee paid sometime between 2000-2003 when he was on probation in Anderson County, South Carolina, for a Burglary charge. He therefore claims the Department improperly took another sample and erroneously charged him for the processing fee again in 2016 for his current convictions. Because he was allegedly charged twice, he asserts his fifth and fourteenth amendment rights were violated. Appellant attached documents to support his arguments, including an affidavit and his sentencing sheet from 2000. However, Court's review is confined to the Record; therefore, the Court cannot consider the documents attached to this filing. S.C. Code Ann. § 1-23-380(4) (Supp. 2021) ("The review . . . must be confined to the record."); SCALC Rule 36(G) ("The Administrative Law Judge will not consider any fact which does not appear in the Record."); Rule 210(c), SCACR (explaining a record on appeal "shall not, however, include matter which was not presented to the lower court or tribunal").

In contrast, the Department argues Appellant was properly charged for the fee. It contends Appellant has presented no documentation to support his claim that he paid for a DNA test in 2000-2003 other than his own affidavit—an assertion the Department does not find credible. Rather, the Department asserts it charged Appellant one processing fee for a DNA sample taken as a result of his current offenses.

Section 23-3-620 governs the collection of DNA and provides that:

> (A) Following a lawful custodial arrest, the service of a courtesy summons, or a direct indictment for:
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> > (1) a felony offense or an offense that is punishable by a sentence of five years or more; or

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(2) eavesdropping, peeping, or stalking, any of which are committed in this State, a person, except for any juvenile, arrested or ordered by a court must provide a saliva or tissue sample from which DNA may be obtained for inclusion in the State DNA Database. Additionally, any person, including any juvenile, ordered to do so by a court, and any juvenile convicted or adjudicated delinquent for an offense contained in items (1) or (2), must ~~provide a saliva or tissue sample from which DNA may be obtained for~~ inclusion in the State DNA Database.

This sample must be taken at a jail, sheriff's office that serves a courtesy summons, courthouse where a direct presentment indictment is served, or detention facility at the time the person is booked and processed into the jail or detention facility following the custodial arrest, or other location when the taking of fingerprints is required prior to a conviction. The sample must be submitted to SLED as directed by SLED. If appropriately trained personnel are not available to take a sample from which DNA may be obtained, the failure of the arrested person to provide a DNA sample shall not be the sole basis for refusal to release the person from custody. An ~~arrested person who is released from custody before providing a DNA~~ sample must provide a DNA sample at a location specified by the law enforcement agency with jurisdiction over the offense on or before the first court appearance.

* * *

(D) Unless a sample has already been provided pursuant to the provisions of subsection (A), before a person is released from confinement or released from the agency's jurisdiction, a suitable sample from which DNA may be obtained for inclusion in the State DNA Database must be provided as a condition of probation or parole.

S.C. Code Ann. § 23-3-620 (Supp. 2021). Meanwhile, section 23-3-670 further provides that:

(A) The cost of collection supplies for processing a sample pursuant to this article must be paid by the general fund of the State. A person who is required to provide a sample pursuant to this article, upon conviction, pleading guilty or nolo contendere, or forfeiting bond, **must** pay a two hundred fifty dollar processing fee which **may not** be waived by the court. However:

(1) if the person is incarcerated, the fee must be paid before the person is paroled or released from confinement and may be garnished from wages the person earns while incarcerated; and

(2) if the person is not sentenced to a term of confinement, payment of the fee must be a condition of the person's sentence and may be paid in installments if so ordered by the court.

SC. Code Ann. § 23-3-670(A) (Supp. 2021) (emphasis added). *See Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the rules of statutory interpretation, use of words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement.").

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Here, despite Appellant's allegations that his DNA was collected and invoiced twice, the Record only shows the Department collected one sample of Appellant's DNA sample in 2016 and charged Appellant the $250 processing fee in March 2016. Additionally, the Record shows the $250 fee was collected through a series of thirty-eight deductions from Appellant's account, with the first deduction in April 2016 and the last in May 2018. Furthermore, even if a sample had been taken twice from Appellant, subsection (E) of the statute provides that "a person may be required to submit another sample if the original sample is lost, damaged, contaminated, or unusable for examination prior to the creation of a DNA record or DNA profile suitable for inclusion in the State DNA Database." S.C. Code Ann. § 23-3-670(E) (Supp. 2021). Appellant acknowledges subsection (E) but maintains there was "no need for a second sample or processing fee." Appellant has not presented any evidence that if a sample was taken in 2000-2003, it was determined to be suitable by SLED. Nonetheless, there is no documentation in the Record that shows a previous sample and processing fee was taken from Appellant while he was serving a five-year probation sentence in 2000-2003.

In sum, Appellant failed to carry his burden of proving that the Department improperly charged him for his DNA collection; therefore, the Department's decision must be affirmed. *See Porter*, 333 S.C. at 20, 507 S.E.2d at 332 (holding "the party challenging [an administrative agency's] order bears the burden of convincingly proving that the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record.").

ORDER

For the reasons set forth in this Order,

IT IS HEREBY ORDERED that the Department's final agency decision is **AFFIRMED**.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

December 5, 2022
Columbia, South Carolina

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CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

Stephanie Perez
Judicial Law Clerk

December 5, 2022
Columbia, South Carolina

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