

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Administrative Law Judge Deborah Brooks Durden

Case No. 12-ALJ-04-0547-AP

Billy Lee Lisenby, # 200273.....Appellant,

v.

South Carolina Department of Corrections.....Respondent.

INITIAL BRIEF OF RESPONDENT

June 19, 2013

South Carolina Department of Corrections

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STATEMENT OF THE ISSUES ON APPEAL

- I. WAS APPELLANT AFFORDED ALL CONSTITUTIONALLY REQUIRED DUE PROCESS?**

- II. IS RESPONDENT'S FINAL AGENCY DECISION SUPPORTED BY SUBSTANTIAL EVIDENCE?**

STATEMENT OF CASE

This matter comes before this Honorable Court pursuant to the appeal of Billy Lee Lisenby (“appellant”), an inmate incarcerated with the South Carolina Department of Corrections (“SCDC”). Appellant was convicted of Trafficking, Use, and/or Possession of Narcotics, Marijuana, or Unauthorized Drugs, offense 903 under SCDC Policy OP-22.14, Inmate Disciplinary System, following a disciplinary hearing. (R.p. ____). Appellant lost 60 days of good time due to the disciplinary conviction. (R.p. ____).

Appellant filed a Step One Grievance on February 14, 2012 challenging his disciplinary conviction. This grievance was investigated and denied. (R.p. ____). Appellant filed a Step Two Grievance on March 9, 2012, which was also denied. (R.p. ____). Appellant then filed a Notice of Appeal in the Administrative Law Court (ALC), pursuant to Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). (R.p. ____).

After the parties filed briefs, the ALC affirmed SCDC’s final decision, finding the disciplinary hearing comported with due process. The ALC rejected appellant’s arguments that he was innocent of the violation; that his due process rights were violated; and that SCDC failed to abide by its own policies and procedures. The ALC further determined the hearing officer acted within her discretion in limiting cumulative witness testimony. (R.p. ____).

Appellant now seeks review of the ALC’s decision. For the reasons that follow, SCDC respectfully requests that the ALC’s decision be affirmed.

STANDARD OF REVIEW

S.C. Code Ann. § 1-23-610(B) provides the applicable standard of review:

The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because of the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See also S.C. Code Ann. § 1-23-380(5); Lake v. Reeder Constr. Co., 330 S.C. 242, 498 S.E.2d 650, 653 (Ct. App. 1998).

In an appeal of the final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. See S.C. Code Ann. § 1-23-610(B). A reviewing Court shall not substitute its judgment for that of the ALC as to findings of fact, 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. In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that the ALC

reached. DuRant v. S.C. Dep't of Health & Environmental Control, 361 S.C. 416, 420, 604 S.E.2d 704, 706 (Ct. App. 2004). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. Id.

ARGUMENT AND CITATION OF AUTHORITY

I. APPELLANT WAS 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 (may be limited);
- c) opportunity to be heard;
- d) no right to confront and cross-examine adverse witnesses;
- e) neutral and detached hearing body;
- f) aid of counsel substitute or other substitute aid where inmate is illiterate or complex case (not attorney);
- 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 complied with in this case. The Disciplinary Report and Hearing Record demonstrate that appellant had notice of the charge. (R.p. ____). The record also reveals there was proper disclosure of evidence due to the fact that the Disciplinary Offense Report was read at the disciplinary hearing. (R.p. ____). Furthermore, appellant was afforded an opportunity to be heard at the February 14, 2012 hearing. (R.p. ____). There was a neutral and detached hearing body at the

hearing, an SCDC disciplinary hearing officer. (R.p. ____). Appellant was provided disclosure of the written statement of the hearing officer's findings. (R.p. ____).

Appellant claims he was denied the right to examine members of the Agency Search Team at the disciplinary hearing. The Agency Search Team conducts institutional searches as directed by the Director, Division of Security. Each institution assigns an employee to observe and serve in the capacity of an accusing official to ensure the Agency Search Team members can perform their sole duty of conducting searches. Due to the volume of searches performed and the volume of contraband found during these searches, the Agency Search Team would become ineffective if they were required to participate in inmate disciplinary hearings. As the Wolff Court acknowledged, the full panoply of due process right does not apply to prison disciplinary proceedings; there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application. Wolff, 418 U.S. at 556.

In addition, assuming, without conceding, that it was error to exclude witnesses, the error was harmless in view of the overwhelming evidence of appellant's guilt. State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("Error is harmless when it could not reasonably have affected the result of the trial.").

It is clear from the record appellant's requested witnesses would have given testimony that was repetitive to the evidence that had already been presented. The Hearing Officer allowed Appellant to read seven (7) inmate letters into the record. These inmates testified that Appellant did not claim ownership of the contraband, which contradicted the testimony and report of Officer Hunt. Appellant then requested that

other security personnel be called to testify.

It is clear from the record that further testimony from security personnel would have been repetitive to that of Officers Hunt and Colt. It is also clear that the Disciplinary Hearing Officer gave appellant ample opportunity to present evidence on his behalf and afforded appellant Due Process as discussed in Wolff v. McDonnell, 418 U.S. 539, 566, 94 S.Ct. 2963, 2978-2982 (1974).

Because appellant's disciplinary conviction comported with all due process requirements, SCDC respectfully requests the decision of the ALC be upheld.

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

A reviewing court will not disturb the findings of an administrative agency if those findings are supported by substantial evidence on record as a whole. Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). "Substantial evidence" is evidence which, considering the record as a whole, would allow a reasonable mind to reach conclusion that the administrative agency reached to justify its action. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). 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, 461 S.E.2d 388 (1995). Administrative agencies are afforded wide latitude in making decisions, as shown in the deferential standard of appellate review. Heater of Seabrook, Inc. v. Public Serv. Comm'n, 332 S.C. 20, 503 S.E.2d 739 (1998).

All credible evidence presented at appellant's hearing indicates appellant was

guilty of this disciplinary offense. Officer Hunt reported that during a shakedown of appellant's room, several cell phones and 22 grams of a green leafy substance were discovered in two holes in the wall. Appellant claimed ownership of all items. (R.p. __).

The green leafy substance was tested and determined to be marijuana as it contained THC. (R.p. __). The disciplinary hearing officer stated she found appellant was guilty based upon Officer Hunt's report and a pictures of the evidence. (R.p. __).

Appellant has not carried his burden of proving that the decision of the Department is clearly erroneous, or arbitrary or capricious, or an abuse of discretion. See Porter v. S.C. Public Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998). Consequently, SCDC's decision should be upheld.

CONCLUSION

WHEREFORE, for all the reasons stated above, this Court should affirm the Department of Corrections' decision in this case.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS

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CERTIFICATE OF SERVICE

I hereby certify that I have served Appellant a copy of Respondent's Initial Brief by depositing a copy of same in the United States Mail, postage prepaid, June 19, 2013 addressed to the Appellant as follows:

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