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Oct 12 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

Gregory Pencille, № 312332, Appellant

v.

South Carolina Department of Corrections, Respondent.

Appellate Case № 2019-002115

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Appeal From The Administrative Law Court  
Ralph King Anderson, Jr. Administrative Law Judge

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Unpublished Opinion № 2023-UP-321  
Heard October 5, 2022 - filed September 27, 2023

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**Petition for Rehearing**

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Gregory Pencille, the Appellant above, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court to Rehear this matter based upon the following:

1. This Court correctly noted that Gregory Pencille filed his action pursuant to SCDC Policy PS-10.05. This Court failed to recognize that SCDC Policy PS-10.05 incorporates South Carolina Code §1-32-10 and §24-27-500. For its authority to implement this policy, the policy says, “STATE/FEDERAL STATUTES: South Carolina Code of Laws, Section 1-32-10, et seq., as amended; S.C. Code §24-27-500; 42 U.S.C. §2000cc, et seq.” By invoking SCDC Policy, Mr. Pencille is also invoking the underlying statutes upon which the policy was based. This Court should rehearing this matter and acknowledge that Mr. Pencille invoked the statutes by invoking SCDC Policy PS-10.05

This Court further erred in holding that “[H]is state claims were neither raised to nor ruled upon by the ALC.” *Pencille v. South Carolina Department of Corrections*, Op. № 2023-UP-321 (S.C.Ct. App. filed September 27, 2023) at 6. As noted above Mr. Pencille raised the SCDC Policy PS-10.05 which incorporates the state law as to the protections of religious freedom. If this Court does not recognize that the Policy incorporates the state Religious Freedom Restoration Act, then this court erred in failing to recognize that the Policy itself is in fact a state-created liberty interest to which Mr. Pencille is entitled to rely in seeking relief.

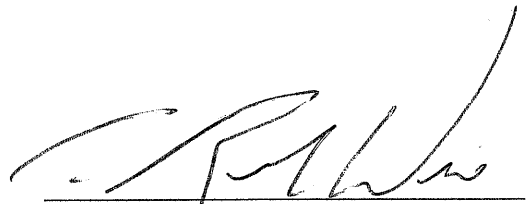
2. This Court erred in failing to remand the case back to the Administrative Law Judge for two reasons. First, as noted by this Court the administrative law judge did not rule upon the merits of the case because the judge deemed he did not have jurisdiction. This Court has found that conclusion to be in error. Having found error, this court should remand to the administrative law judge for a ruling on the merits. Secondly, this court erred in failing to remand this case rather than finding that Mr. Pencille’s failure to request a rehearing forfeited his claim on the merits. Perhaps if Mr. Pencille had filed such a specific rehearing, this court could then address the merits. The failure to file such a rehearing petition simply means this Court should have remanded the case once this Court determined that the Administrative Law Court did in fact have jurisdiction. Once the Administrative Law judge determined it did not have jurisdiction, then the judge had no need to rule upon the merits. The failure to rule on the merits was not inadvertent, but a conscious decision based upon the judge’s belief in the lack of jurisdiction. Once a judge has ruled they do not have jurisdiction, this court should not expect that judge to then rule upon the merits. If the judge had simply denied the motion for rehearing with no further finding, this court would still have been required to remand the case back to the Administrative Law judge to

rule upon the merits before this court ruled upon the merits. The Administrative Law judge would then have the authority to expand the record and take testimony, a power his court does not have. The ruling on the merits would then be after a full hearing.

3. This Court further erred in holding “To the extent Pencille expands upon his SCRFRA argument in his reply brief, we find this argument is not properly before the court.” *Id.* at 7. The error in this conclusion is that Mr. Pencille did site the SCRFRA in his opening brief at page 4. This Court should now recognize that the issue was raised in his opening brief. The fact that the issue was more fully discussed in his reply brief, does not change the fact that the opening brief advised the South Carolina Department of Corrections that he was seeking relief under the SCRFRA.

For the foregoing reasons, this Court should grant the petition for rehearing and remand this matter to the Administrative Law Court for a ruling of the merits of the claim of Gregory Pencille.

October 12, 2023



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APPEAL FROM ADMINISTRATIVE LAW COURT  
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ALC Case No. 19-ALJ-04-0277-AP  
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Gregory Pencille # 312332 ..... Appellant.

vs.

South Carolina Department of Corrections ..... Respondent

CERTIFICATE OF SERVICE

Sandy Traynham, Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case hereby certifies that on October 12, 2023, she did send a copy of the Petition for Rehearing in the above matter, via e-mail, to Kensey Evans, South Carolina Department of Corrections, at [evans.kensey@doc.sc.gov](mailto:evans.kensey@doc.sc.gov) and Christina Catoe Bigelow at [bigelow.christina@doc.sc.gov](mailto:bigelow.christina@doc.sc.gov)

October 12, 2023

/s/ Sandy Traynham  
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Secretary

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