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Oct 20 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Administrative Law Judge Ralph King Anderson, III

Unpublished Opinion No. 2023-UP-321
Heard October 5, 2022 – Filed September 22, 2023
Appellate Case No. 2019-002115

Gregory Pencille, #312332,

APPELLANT,

v.

South Carolina Department of Corrections,

RESPONDENT.

RETURN TO PETITION FOR REHEARING

On September 27, 2023, this Court affirmed as modified the Administrative Law Judge’s conclusion that Appellant’s grievance did not implicate a state-created liberty interest in his appeal regarding the denial of his use of religious oils. Appellant filed a Petition for Rehearing on October 12, 2023. Respondent respectfully requests this Court deny the petition for rehearing as this Court’s opinion is correct, as discussed below.

In its opinion, this Court found that Appellant did not properly preserve a number of his arguments for appeal. As this Court stated, Appellant’s “state claims were neither raised to nor ruled upon by the [Administrative Law Court (ALC)].” *Peniclle v. SCDC*, Op. No. 2023-UP-321 (S.C. Ct. App. filed 9/27/23). Appellant’s new claim that referencing SCDC policy or raising an issue under SCDC policy is equivalent to invoking those statutes listed in the policy is

without merit. Furthermore, raising an issue under SCDC policy in no way means that the issue or statute was ruled upon by the ALC, which is the issue at hand. This also applies to Appellant's failure to preserve his SCRFA argument which were expanded upon in his reply brief. These issues were neither raised nor ruled upon by the ALC. Therefore, they are not preserved for appeal, and this Court's opinion regarding them should stand.

This Court also found that Appellant's "claim did not implicate a state-created liberty interest" because the *Sandin* test was not met. *Peniclle v. SCDC*, Op. No. 2023-UP-321 (S.C. Ct. App. filed 9/27/23) (citing *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293 (1995)). Appellant claims that because this Court also determined that the ALC does have subject matter jurisdiction, that the case should be remanded to the ALC for a decision on the merits. Despite the fact that the ALC used the term "subject matter jurisdiction", it nevertheless correctly determined that Appellant failed to establish a state-created liberty or property interest. Appellant failed to establish in his grievances or filings to the ALC any significance of the oils to his religion. Therefore, he cannot now argue that prohibiting the oils for security reasons created an atypical or significant hardship as required by the *Sandin* test. Therefore, there is no state-created liberty interested and this case was properly dismissed by the ALC.

CONCLUSION

For the reasons set forth above, Respondent respectfully asks that this Court deny Appellant's Petition for Rehearing.

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

BY: _____

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on today's date she e-mailed a copy of the **Return to Petition for Rehearing** to C. Rauch Wise at rauchwise@gmail.com.



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