

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jan 24 2024

S.C. SUPREME COURT

CERTIORARI-COA
APPEAL FROM ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge

Appellate Case No. 2023-001971

Gregory Pencille # 312332 Petitioner.

vs.

South Carolina Department of Corrections Respondent

APPENDIX

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
864-229-5010
SC Bar No 6188
rauchwise@gmail.com

Attorney for Petitioner

KENSEY EVANS
S.C. Department of Corrections
4444 Broad River Road
PO Box 21787
Columbia, SC 29221-1787
SC Bar No. 102215
evans.kensley@doc.sc.gov
(803) 896-1943

CHRISTINA CATOE BIGELOW
S.C. Department of Corrections
4444 Broad River Road
Columbia, SC 29210
SC Bar No. 73562
bigelow.christina@doc.sc.gov
(803) 896-1738

Attorneys for Respondent

APPENDIX INDEX

Court of appeals Records	
Record on Appeal	1
Final Brief of Appellant	66
Final Brief of Respondent.	88
Final Reply Brief of Appellant	102
Unpublished Opinion No. 2023-UP-321 Heard October 5, 2022 – Filed September 27, 2023	
Withdrawn, Substituted and Refiled November 1, 2023	113
Appellant’s Petition for Rehearing filed October 12, 2023	126
Respondents Return to Petition for Rehearing filed October 20, 2023	129
Order Granting with Substitute Opinion November 1, 2023	132
Appellant’s Petition for Rehearing filed November 16, 2023	133
Order filed November 28, 2023, denying Petition for Rehearing.	138

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Oct 27 2020

Administrative Law Judge Ralph K. Anderson, III

SC Court of Appeals

ALC-Case No. 19-ALJ-04-0277-AP
Appellate Case No. 2019-002115

Gregory Pencille #312332 Appellant,

v.

South Carolina Department of Corrections Respondent,

RECORD ON APPEAL

KENSEY EVANS
S.C. Department of Corrections
PO Box 21787
Columbia, SC 29221-1787
SC Bar No. 102215
evans.kensley@doc.sc.gov
(803) 896-1943

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. Bar # 006188
rauchwise@gmail.com
(864) 229-5010

Attorney for Respondent

Attorney for Appellant

INDEX

Notice of appeal to Administrative Law Court dated May 21, 2019	1
Notice of address change filed July 3, 2019	7
Respondent's Record dated August 8, 2019	8
Step 2 grievance	9
Step 1 grievance	10
Request to staff	12
Motion for extension of time filed September 3	15
Order denying Motion of Extension filed September 17, 2019	19
Appellant's brief filed September 23, 2019	20
Respondent's Motion to Dismiss dated October 22, 2019	31
Response to Respondent's Motion to Dismiss dated October 30, 2019	35
Order of Administrative Law Judge Anderson Motion to Dismiss Granted, Appeal dismissed with Prejudice filed November 27, 2019	39
Affidavit, response to Order and Notice and Demand dated December 10, 2019	42
Appellant's Motion to Stay, Issuance of Writ of Supersedeas, Petition to Compel Response dated December 31, 2019	45
Order of SC Court of Appeals filed January 15, 2020	52
Administrative Law Judge Anderson's Order denying motion to stay, issuance of writ of supersedeas, and petition to compel a response dated January 23, 2020, ...	53
Order Denying Motion to be heard on the Original Record filed March 6, 2020	57
Motion for Clarification of Order filed March 19, 2020	58
Courts Response to Motion to clarify dated April 23, 2020	60
Notice of appeal, motion to proceed in forma pauperis filed December 27, 2019	61

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gregory Penille

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

NOTICE OF APPEAL

DOCKET NO. -ALJ-04-
GRIEVANCE NO.: Lee CJ - 0135-19

Notice is hereby given that Gregory Penille does hereby appeal the final decision of the South Carolina Department of Corrections dated April 19, 2019 and received on May 13, 2019, a copy of which is attached. A general statement of the grounds for appeal is (See S.C. Code Ann. § 1-23-380(A)(6)):

SCDC has Violated Equal Protection by denying one Religious group (Witnesses) access to Religious Materials (Sacramental oil) supposedly for security Reasons, while allowing other groups (Muslims, Bullies, etc.) access to similar religious materials (Sacramental oil) and other Religious needs.
(See Step 1 Griev. for case law quoted.)

Gregory Penille

Appellant's Name

990 Wisacky Hwy

Mailing Address

Signed

Dated

05/21/2019

FILED

MAY 22 2019

g-13

City, State, Zip Code

SC ADMIN. LAW COURT

CERTIFICATE OF SERVICE

I hereby certify that I, Gregory Penille (your name), on the 21st day of May, 2019, in Beaufort (city), South Carolina, served a copy of the foregoing Notice of Appeal on all parties to this matter by depositing the same in the United States Mail, postage paid, or in the mail room of the undersigned's institution and addressed as follows:

Name of person/Agency served:

SCALC

Address:

1205 Pendleton St., Suite 224

City, State, Zip Code:

Columbia SC 29201

General Counsel

P.O. Box 21787

Columbia, SC 29221

Print your name Sign your name
(See reverse side for instructions)

Gregory Penille

[Signature]

Instructions for filing an appeal of the final agency decision from the South Carolina Department of Corrections:

- 1) You must complete the **Notice of Appeal** on the reverse side of these instructions and mail it to the Administrative Law Court at the following address:

**Clerk's Office
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201**

A copy of the Notice of Appeal must also be forwarded to the Office of General Counsel at the Department of Corrections.

- 2) **In order for your case to be processed by the ALC, a copy of the final decision from the Department of Corrections must be attached to the Notice of Appeal.**

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
INMATE GRIEVANCE FORM**

STEP 1

INMATE COPY

INMATE NAME: <u>Gregory Pencille</u>	OFFICE USE ONLY Grievance No. <u>Lee CI 0135-19</u> Code: General <u>RI/IS</u> Policy _____ Disc. Hear. _____ Class. _____ PREA _____ Date Received <u>2/8/19</u> IGC Initials <u>JS</u>
SCDC NUMBER: <u>312332</u>	
INSTITUTION: <u>Lee CI</u>	
HOUSING UNIT: <u>F2B 2254</u> <u>FEB 07 2019</u>	
WORK ASSIGNMENT: <u>Education</u> <u>DP</u>	

STATEMENT OF GRIEVANCE (Indicate the date of incident, and if the grievance is a challenge to SCDC Policy, specify which policy. Include supporting documentation and attach answered RTSM or Kiosk reference number.)

Original incident; 12/12/18, on date paper request sent and copy given to chaplain. 12/21/18 kiosk #18-01112528 resent request. As of 2/5/19 no response as per GA 6.04-3.6

Supporting policies; PS 10.05 handbook 3.4; 1st amend. U.S.Con; 42 U.S.C.A (sept.22.2000) chap. 21(c); 42 U.S.C 2000bb; case law as follows;

Turner v. Safely, 482 US 78 (1987)

Kikumura v. Hurley 247 F3d 950 (2001)

LaPlante v. Mass. DOC 89 F supp. 3d 235 (2015)

Mintz v. Catholic church of springfield 424 F supp. 2d. 309 (2006)

Schlemm v. Wall, 784 F3d 362 (2015)

Nance v. Miser, 700 Fed appx. 629 (2017)

Jenkins v. Sinclair- 2018 WL4608312

Henderson v. Ayers CD col 2007. 476 F supp 2d 1168

Statement of grievance; Administrative staff refuses to respond to RSTM/kiosk requests to allow use of religious oils in the Wiccan community services and discriminates against religious requests for Wiccan communities needs.

 2/7/19
 Grievant Signature Date

ACTION REQUESTED: Respectfully respond and approve Religious oils for use in Wiccan Religious activities
 Discontinue discriminating against Wiccan community requests and disciplinary action taken towards deficient staff according to ADM. 11.04 employee corrective action.

ACTION TAKEN BY IGC: ☒ PROCESSED ☐ UNPROCESSED ☐ OTHER

 2/21/19
 IGC Signature Date

(CONTINUE ON REVERSE SIDE)

RECEIVED

Step 2 Due 3/13/19

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

MAR 18 2019

INMATE GRIEVANCE FORM

STEP 2

Office Use Only

INMATE GRIEVANCE

INMATE NAME: Gregory PencilleSCDC NUMBER: 312332INSTITUTION: Lee CIHOUSING UNIT: F2-2254

WORK ASSIGNMENT: _____

Grievance No. Lee CI-0135-19Code: General RL/IS

Policy _____

Disc. Hear. _____

Class _____

PREA _____

Date Received: 3/13/19IGC Initials: JPB

Date Received: _____

IGA Initials: _____

INMATE'S REASON FOR APPEAL (state specific dissatisfaction):

For reasons stated in Step 1 Grievance. The procedures Lee CI's Administration are following are against SCDC policy and are unconstitutional. And, must be corrected as stated in Step 1 "Action Requested".

Grievant Signature [Signature]Date 3/4/19

RESPONSIBLE OFFICIAL'S DECISION AND REASON:

I have reviewed your concern. In your grievance, you stated that SCDC Staff has refused to respond to RTSM and ARTSM regarding the use of religious oils in the Wiccans Community. You believe that such action is discriminatory. You would like religious oils to be available for use and disciplinary action to be taken against those who refuse to allow use of the same. The Warden responded to your concern on SCDC Step 1 Inmate Grievance Form 10-5 dated 2/22/19. Your request to use religious oils that you have identified and requested were disapproved consistent with SCDC Policy PS-10.05, Inmate Religion. That Policy provides that, "Within the limitations imposed on the Agency as a result of its safety and security needs, the South Carolina Department of Corrections (SCDC) will be committed to upholding and facilitating the constitutional rights afforded inmates to religious freedom. Inmates will be given the opportunity to practice their religious faith to the extent that such practice does not interfere with the security and safety of the institution, staff, or others. The South Carolina Department of Corrections will provide necessary programs to facilitate the practice of any recognized religion based on inmate request, need, and available resources." Additionally, subsection 10. Religious Materials sets forth materials that may be considered for an inmate's use to support his/her religious beliefs. Your request has been properly considered and denied.

Therefore, your grievance is denied

You may appeal this decision under the South Carolina Administrative Procedures Act to the South Carolina Administrative Law Court. In order to appeal, you must complete the attached Notice of Appeal Form (Form) and submit it as instructed on the Form within thirty (30) days of receipt.

Responsible Official Signature [Signature] Date 4/19/19

The decision rendered by the responsible official exhausts the appeal process of the Inmate Grievance Procedure. I hereby acknowledge receipt of the official's response and understand this is the Agency's final response to this matter.

Grievant Signature [Signature]Date 5/2/19IGC Signature [Signature]Date 5/13/19

INSTRUCTIONS FOR COMPLETING STEP 2 GRIEVANCE FORM

1. Complete form in its entirety, writing only in the space provided for inmate use.
2. State your specific reason for further appeal. Do not submit any new issues for review. No additional pages will be permitted.
3. Submit this completed form with your copy of the Step 1 form by placing in the Grievance Box within five (5) days of your receipt of the Warden's decision. Do not write in the space provided for the responsible official.
4. The decision rendered by the responsible official exhausts the appeal process of the SCDC Inmate Grievance Procedure.

WARDEN'S DECISION AND REASON:

Gregory Pencille

SCDC #: 312332

SCDC #: Lee CI-0135-19

In your grievance you stated that the Administrative staff refuses to respond to your RTSM/Kiosk requests to use religious oils in the Wiccan community services and discriminates against religious requests for Wiccan community needs.

You are requesting that the Administrative staff respond and approve the use of religious oils to be use in Wiccan Religious activities according to ADM.11.04 employee corrective action.

SCDC Handbook of Inmate Religious Practice section 3.4 addresses a number of items that can be kept by the Chaplain for the Wiccans to use during their worship times. Incense and oil are among those items, however, they must be approved by the Warden. A request to receive oils for the Wiccan Community was given to A.W. Tisdale to approve or disapprove. A.W. Tisdale disapproved the request due to security reasons.

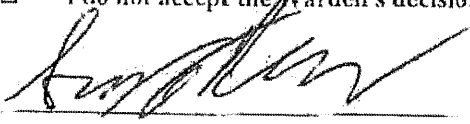
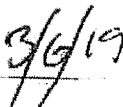
Therefore, your grievance is denied.

If you disagree with this Warden's Decision (Decision), you may file an appeal by completing SCDC Inmate Grievance Form 10-5A, provided to you while serving you this Decision, and placing it in the Grievance Box at your local correctional institution within five (5) days of your receipt of this Decision.

 
Warden Signature Date

☐ I accept the Warden's decision and consider the matter closed.

☐ I do not accept the Warden's decision and wish to appeal.

 
Grievant Signature Date

 
IGC Signature Date

INSTRUCTIONS FOR COMPLETING STEP 1 GRIEVANCE FORM

1. An informal resolution shall be attempted prior to the filing of Step 1 by sending an Inmate Request to Staff Member (RTSM) form or Kiosk reference number to the appropriate supervisor. A copy of the answered RTSM must be attached to the grievance when the grievance is filed.
2. Complete each section in its entirety writing only in the space provided for inmate use. No additional pages will be permitted.
3. Only one (1) issue is to be addressed on each form.
4. Submit the completed form by placing it in the Grievance Box at your institution within eight (8) working days of the date on the RTSM response; policy grievances can be filed at any time. Disciplinary and Classification Review appeals must be submitted within five (5) working days of the hearing/review. Do not write in the space provided for the Warden's response.
5. If you are not satisfied with the Warden's decision, you may appeal to the appropriate responsible official within five (5) days of your receipt of the Warden's decision, by placing your Step 2 appeal form in the Grievance Box at your institution.

State of South Carolina
Administrative Law Court

Date: 7/3/19

Grievance No: Lee CI-0135-19
Case No. 19C0277

Notice of Address change

The above listed case was Assigned
6/13/2019. The appellant has been transferred
to Evans CI from Lee CI. New
address as follows:

Gregory Pencille 312332
Evans CI F3A266
610 Hwy 9 west
Bennettsville SC 29512

FILED

JUL -3 2019

SC ADMIN LAW COURT

Gregory Pencille 312332



SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS
Safety, Service, and Stewardship

HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

August 8, 2019

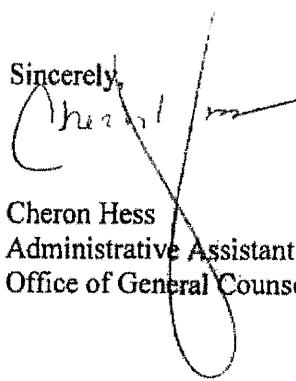
The Honorable Ralph King Anderson, III
South Carolina Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, SC 29201

Reference: Inmate Gregory Thomas Pencille, #312332, vs. SCDC
Docket No. 19-ALJ-04-0277-AP

Dear Judge Ralph King Anderson, III:

Find enclosed a copy of the Respondent's Record, consisting of Inmate Grievance LEECI 135-19, in the above referenced case. Please file the original and return a clocked-in copy of the cover letter in the enclosed envelope.

Sincerely,


Cheron Hess
Administrative Assistant
Office of General Counsel

Enclosures

cc: Inmate Gregory Thomas Pencille, #312332
File

FILED

AUG - 9 2019

SC ADMIN. LAW COURT

P.O. Box 21787 - 4444 Broad River Road - Columbia, SC 29221-1787 - Telephone (803) 896-8555
<http://www.doc.sc.gov> Email: corrections.info@doc.sc.gov

RECEIVED

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
INMATE GRIEVANCE FORM
STEP 2

MAR 18 2019

Office Use Only

INMATE GRIEVANCE

INMATE NAME: Gregory Pencille
SCDC NUMBER: 312332
INSTITUTION: Lee CJ
HOUSING UNIT: F2-2254 MAR 12 2019
WORK ASSIGNMENT: 21

Grievance No. Lee CJ-0135-19
Code: General 11/15
Policy _____
Disc. Hear. _____
Class _____
PREA _____
Date Received: 3/13/19
IGC Initials: JP
Date Received: _____
IGA Initials: _____

INMATE'S REASON FOR APPEAL (state specific dissatisfaction):

For reasons stated in step 1 Grievance. The procedures Lee CJ's Administration are following are against SCDC policy and are unconstitutional. And must be corrected as stated in step 1 "Action Requested".

Grievant Signature [Signature]

Date 3/4/19

RESPONSIBLE OFFICIAL'S DECISION AND REASON:

I have reviewed your concern. In your grievance, you stated that SCDC Staff has refused to respond to RTSM and ARTSM regarding the use of religious oils in the Wiccans Community. You believe that such action is discriminatory. You would like religious oils to be available for use and disciplinary action to be taken against those who refuse to allow use of the same. The Warden responded to your concern on SCDC Step 1 Inmate Grievance Form 10-5 dated 2/22/19. Your request to use religious oils that you have identified and requested were disapproved consistent with SCDC Policy PS-10.05, Inmate Religion. That Policy provides that, "Within the limitations imposed on the Agency as a result of its safety and security needs, the South Carolina Department of Corrections (SCDC) will be committed to upholding and facilitating the constitutional rights afforded inmates to religious freedom. Inmates will be given the opportunity to practice their religious faith to the extent that such practice does not interfere with the security and safety of the institution, staff, or others. The South Carolina Department of Corrections will provide necessary programs to facilitate the practice of any recognized religion based on inmate request, need, and available resources." Additionally, subsection 10. Religious Materials sets forth materials that may be considered for an inmate's use to support his/her religious beliefs. Your request has been properly considered and denied.

Therefore, your grievance is denied.

You may appeal this decision under the South Carolina Administrative Procedures Act to the South Carolina Administrative Law Court. In order to appeal, you must complete the attached Notice of Appeal Form (Form) and submit it as instructed on the Form within thirty (30) days of receipt.

Responsible Official Signature [Signature]

Date 4/19/19

The decision rendered by the responsible official exhausts the appeal process of the Inmate Grievance Procedure. I hereby acknowledge receipt of the official's response and understand this is the Agency's final response to this matter.

Grievant Signature _____ Date _____

IGC Signature _____ Date _____

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

INMATE GRIEVANCE FORM

STEP 1

INMATE COPY

INMATE NAME: <u>Gregory Pencille</u>	OFFICE USE ONLY Grievance No. <u>Lee CL 0135-19</u> Code: General <u>RL/IS</u> Policy: _____ Disc. Hear. _____ Class. _____ PREA _____ Date Received <u>2/8/19</u> IGC Initials <u>JS</u>
SCDC NUMBER: <u>312332</u>	
INSTITUTION: <u>Lee CI</u>	
HOUSING UNIT: <u>F2B 2254</u> <u>FEB 07 2019</u>	
WORK ASSIGNMENT: <u>Education</u> <u>DF</u>	

STATEMENT OF GRIEVANCE (Indicate the date of incident, and if the grievance is a challenge to SCDC Policy, specify which policy. Include supporting documentation and attach answered RTSM or Kiosk reference number.)

Original incident; 12/12/18, on date paper request sent and copy given to chaplain. 12/21/18 kiosk #18-0112528 resent request. As of 2/5/19 no response as per GA 6.04-3.6

Supporting policies; PS 10.05 handbook 3.4; 1st amend. U.S.Con; 42 U.S.C.A (sept.22.2000) chap. 21(c); 42 U.S.C 2000bb; case law as follows;

Turner v. Safely, 482 US 78 (1987)

Kikumura v. Hurley 247 F3d 950 (2001)

LaPlante v. Mass. DOC 89 F supp. 3d 235 (2015)

Mintz v. Catholic church of springfield 424 F supp. 2d. 309 (2006)

Schlemm v. Wall, 784 F3d 362 (2015)

Nance v. Miser, 700 Fed appx. 629 (2017)

Jenkins v. Sinclair- 2018 WL4608312

Henderson v. Ayers CD col 2007. 476 F supp 2d 1168

Statement of grievance; Administrative staff refuses to respond to RSTM/kiosk requests to allow use of religious oils in the Wiccan community services and discriminates against religious requests for Wiccan communities needs

Grievant Signature

Date

ACTION REQUESTED: Respectfully respond and approve Religious oils for use in Wiccan Religious activities. Discontinue discriminating against Wiccan community requests and disciplinary action taken towards deficient staff according to ADM. 11.04 employee corrective action.

ACTION TAKEN BY IGC: ☒ PROCESSED ☐ UNPROCESSED ☐ OTHER

IGC Signature

Date

(CONTINUE ON REVERSE SIDE)

WARDEN'S DECISION AND REASON:

Gregory Pencille

SCDC #: 312332

SCDC #: Lee CI-0135-19

In your grievance you stated that the Administrative staff refuses to respond to your RTSM Kiosk requests to use religious oils in the Wiccan community services and discriminates against religious requests for Wiccan community needs

You are requesting that the Administrative staff respond and approve the use of religious oils to be use in Wiccan Religious activities according to ADM.11.04 employee corrective action.

SCDC Handbook of Inmate Religious Practice section 3.4 addresses a number of items that can be kept by the Chaplain for the Wiccans to use during their worship times. Incense and oil are among those items, however, they must be approved by the Warden. A request to receive oils for the Wiccan Community was given to A.W. Tisdale to approve or disapprove. A.W. Tisdale disapproved the request due to security reasons.

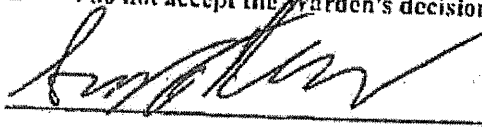
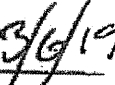
Therefore, your grievance is denied.

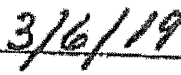
If you disagree with this Warden's Decision (Decision), you may file an appeal by completing SCDC Inmate Grievance Form 10-5A, provided to you while serving you this Decision, and placing it in the Grievance Box at your local correctional institution within five (5) days of your receipt of this Decision.

 
Warden Signature Date

☐ I accept the Warden's decision and consider the matter closed.

☐ I do not accept the Warden's decision and wish to appeal.

 
Grievant Signature Date

 
IGC Signature Date

INSTRUCTIONS FOR COMPLETING STEP 1 GRIEVANCE FORM

1. An informal resolution shall be attempted prior to the filing of Step 1 by sending an Inmate Request to Staff Member (RTSM) form or Kiosk reference number to the appropriate supervisor. A copy of the answered RTSM must be attached to the grievance when the grievance is filed.
2. Complete each section in its entirety writing only in the space provided for inmate use. No additional pages will be permitted.
3. Only one (1) issue is to be addressed on each form.
4. Submit the completed form by placing it in the Grievance Box at your institution within eight (8) working days of the date on the RTSM response; policy grievances can be filed at any time. Disciplinary and Classification Review appeals must be submitted within five (5) working days of the hearing/review. Do not write in the space provided for the Warden's response.
5. If you are not satisfied with the Warden's decision, you may appeal to the appropriate responsible official within five (5) days of your receipt of the Warden's decision, by placing your Step 2 appeal form in the Grievance Box at your institution.

18-0112528 - 12/22/18 to sent
K.ush 12/21/18
Paper

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
REQUEST TO STAFF MEMBER

2/5/19 - 4/5/19

TO: NAME: A W Tisdale	TITLE: Security	DATE: 12/12/18
INMATE'S NAME: Gregory Pencille	SCDC #: 312332	
INSTITUTION: LCC C	LIVING QUARTERS: F2B2254	

It has come to my attention that the Wiccan Community has been denied approval to order and use Religious oil in Services. As the Wiccan Coordinator it is my responsibility to address this issue. PS10.05 issue date Aug. 6, 2015 § site - (Purpose/Policy Statement)

1. Institutional requirements: "Space and equipment adequate to conduct worship and religious education programs"
2. Religious Handbook. "Wicca" 3.4 items for use during worship times - Incense and oil; (If approved by warden...)
3. Turner V. Safley, 482 U.S. 78 (1987) defines Turner test, when applied to reasonable regulation of religious rights against disparaging or discriminating actions from prison officials. Disapproving the use of oil in Wiccan Services and yet allowing other religions the approval of oil for use discriminates against the Wiccan Religion and Wiccan Community and Violates the 1st Amend. US Cons.

I respectfully request that you reconsider your decision to disapprove the Wiccan Community Use of Oil during its Religious activities. The Wiccan Coordinator and Community has shown no reason to assume any Violation of SCDC Relig. Policy concerning use of oil and its procedures of care.

DISPOSITION BY STAFF MEMBER:

[Signature]

DATE:

SIGNATURE:

Inmate Request - General

Today's Date: 2/11/19 10:41

Name: PENCILLE, GREGORY THOMAS
 Booking #: 312332
 Permanent #: 312332
 Reference #: 18-01112528
 Date Requested: 12/21/18 06:28
 Request Type: Security
 Requested By: Kiosk

Request Details: AW TISDALE, it has come to my attention that the wiccan community has been denied approval to order and use religious oil in services. as the wiccan coordinator it is my responsibility to address this issue, p.s 10 05 site; purpose/ policy. 2. institutional requirements, sace and equipment adequate to conduct worship and religious education programs, religuos handbook, wicca. 3.4 items for use during worship times- insense and oil, if approved by the warden... turner v. afley. 482 u.s. 78 [1987] defines turner test, when applied to resonable regulation of religuos rights in prisons, 1st amedment u.s. cons. establishes protection of religiuos rights against disparaging or discriminating actions from prison officials. disapproving the use of oil in wiccan services and yet allowing other religions the approval of oil discriminates against the wiccan religion and the community and violates the 1st amend. I respectfully request that you reconsider your decision and approve oil for use during services in the wiccan activites. the wiccan coordinator and community has shown no reason for to assume any violatlion of sdc religious policy concerning use of oil and its procedures. thank you.

Disposition: Complete
 Officer:
 Disposition Date: 12/28/18 12:12

Request Responses

Date	Author	Note
12/28/18 12:12	c056385	You need to send this on a written staff request.

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
REQUEST TO STAFF MEMBER**

TO: NAME: <i>Mrs. Prince</i>	TITLE: <i>Griev. Counselor</i>	DATE: <i>2/6/19</i>
INMATE'S NAME: <i>Gregory Perelle</i>	SCDC #: <i>312332</i>	
INSTITUTION: <i>Lee CI</i>	LIVING QUARTERS: <i>F2B 2254</i>	

Please add these Att.(2) two
Papers to Step 2 Grievance No. 0134-19
They show that sheets in Grievance
were ordered and sent to me. Plus
costs.

Thank you
[Signature]

DISPOSITION BY STAFF MEMBER:

DATE:

SIGNATURE:

A

State of South Carolina
Administrative Law Court

Gregory Penille, 312332,
Appellant,

v.

S.C. Dept. of Corrections,
Respondent,

Hon. Ralph King Anderson, III
Docket No. 19-ALJ-04-0277-AP

Motion for Extension
of time

Case No. 19C0277

Griev. No. LCI 135-19

Comes Now, Appellant Gregory Penille in the entitled case. So moves on this day 3rd of September, 2019 for a (90) ninety day extension of time to prepare and file appellants original brief. Appellants brief is due September 12th, 2019. To be due on or before December 12th, 2019 with Granting (90) ninety day extension pursuant to Rule 60A, SCACR.

"MEMORANDUM

Appellant respectfully moves this court to grant this motion for extension of time for (90) ninety days for exceptional circumstances shown to file his original brief

FILED

SLP - 3 2019

SC ADMIN. LAW COURT

due 09/12/2019. Requested extension for (90) ninety days would allow Appellant's filing of his original brief due on or before December 12th, 2019. This request is made in good faith and not for any other reason or for delay ~~but~~ ^{but} for the following reasons:

1. Appellant was transferred from Lee CI to Evers CI on 06/05/2019 and the letter of ALC appointment was received by Lee CI's mailroom 06/24/2019 and forwarded to Evers CI. Appellant received ALC notice at Evers CI mailroom 07/01/2019.

2. Appellant has several ongoing cases in various courts simultaneously;

- U.S. Court of Appeals, Fourth Circuit (Appeal No. 19-7185)

- SC. Court of Appeals (Case No. 18-ALJ-04-0547-AD)

- SC. PCR court in Horry County (Case No. 2018-LP-26-06065)

- (2) two ALC cases were assigned 07/11/19 to ALJ Durden and dismissed 07/15/19 (Case No 19C0332, No. 19C0333) for which appellant was attempting to perfect his original brief and research for.

3. Access to the Law library is greatly insufficient for the case load the Appellant is currently

Working on and the adequacy of Evans institutional Law library is basic at best, servicing approx. 1200 inmates with out of date or no law books, only (2) two westlaw computers, and little to no time in the Law library (Appellant is granted (3) three hours daily (3) three days weekly but staff shortage and negligence affords Peralle less than (1) one and (1) one half hours daily less than (2) two days weekly) and most days gets no useage of westlaw computers. Rules at Evans Law library exclude use of stationary (i.e. pens, paper, whiteouts, tape, etc) and the clerk rarely has these items/ materials in stock to allow purchase. A new rule has lengthened the processing time for legal copies and D.C. policy negates the ability to create document copies that were written by hand at Evans (I. Most court rules force multiple copies of filings and reproducing copies by hand becomes very time consuming [Emphasis Added]).

4. Appellant is proceeding Pro Se in all cases currently and must do extensive research in all current cases, laws, and court rules.

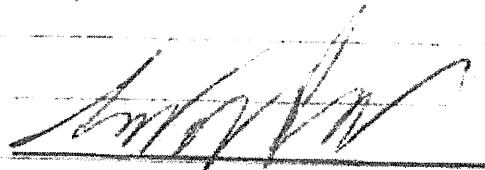
5. Due to S.C.D.C.'s high percentage of improperly trained, uneducated, negligent, corrupted, abusive, lax, and overly mismanaged administrative policies and procedures

innates such as myself suffer "force majeure" on the agencies part with out remedy. This makes court deadlines nearly impossible.

CONCLUSION

Petitioner is diligently perfecting this cases original brief and for the above reasons and other possible unseen reasons respectfully prays that this court grants requested motion for (90) ninety day extension of time to allow original brief's due date on or before 12/12/2019. All above is true and correct to the best of my knowledge".

Date: Sept 3rd, 2019



Gregory Paille, 312332
Evening LI F3A266
~~610 Hwy 9 west~~
Barnettsville, SC 29512

Entered to and subscribed before me
on 3 day of Sept, 2019

J. Over
(Notary Public of South Carolina)

My Commission Expires 2/1/24

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Gregory Pencille, #312332,	)	Docket No. 19-ALJ-04-0277-AP
	)	
Appellant,	)	
	)	
vs.	)	ORDER ON MOTION
	)	
South Carolina Department of Corrections,	)	
	)	
Respondent.	)	

This matter is before the South Carolina Administrative Law Court (ALC or Court) on an appeal filed by Gregory Pencille (Appellant), an inmate housed with the South Carolina Department of Corrections (Department or SCDC).

Appellant filed this appeal on May 22, 2019. The Notice of Assignment was filed June 13, 2019. Pursuant the Rules of Procedure for the Administrative Law Court (SCALC Rules), Appellant's brief is due ninety days after the Notice of Assignment was filed, or September 11, 2019. *See* SCALC Rule 60(A). By letter filed September 3, 2019, Appellant requested an extension of time to file his brief.¹ In his request for an extension of time, Appellant does not provide an adequate reason for granting such an extension.

IT IS THEREFORE ORDERED that the Motion for Extension of Time is Denied.

IT IS FURTHER ORDERED that Appellant shall file his brief within 5 days of the date of this Order.

IT IS FURTHER ORDERED that the Department shall have an additional five days, or until October 23, 2019, to file its brief.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

September 17, 2019
Columbia, South Carolina

¹ Appellant sent his request to the Court by certified mail. The court received by the Motion on September 6. Unfortunately, the mail was not forwarded to chambers until September 10.

FILED

September 17, 2019

SC ADMIN. LAW COURT

State of South Carolina
Administrative Law Court

Gregory Parille, 312233
Appellant,

V.

S. Dept. of Corrections,
Respondent.

Case No. 19C0277
Grev. No. LCI 135-19
Docket No. 19-ALJ-04-0277-AP

Appellants Brief

Comes Now, Gregory Parille, Appellant,
who duly Swears and deposes and states on the
23rd day of September, 2019. The Appellants brief
in the entitled matter pursuant to Rule 60 SCACR
as follows;

"MEMORANDUM

Statement of Issues

Did SCDC Violate the religious rights,
protection of liberty and property, equal protection, and
due process of the Appellant and the Wiccan community
protected by the US Constitution, State Constitution,
1st and 14th Amendments, 42 USCA, and SCDC Rule
PS. 10.05?

FILED

SEP 23 2019

SC ADMIN. LAW COURT

Order Filed Sept. 17th, 2019, Received by Appellant Sept. 20th, 2019. 5 days ordered on this.
on Sunday 22nd, 2019 by Rule 52 SCACR. Enter next day, 23rd, 2019. Filed in Int. and
noted on.

Statement of the Case

In September of 2014, The Senior chaplain [Kain] at Lee CB with the Warden [Reynolds] and program director [Sligh] approved the Appellant for the Wiccan Community, "Use of Religious oils for use during Wiccan Services to be given out to the Wiccan Community" coordinator [Appellant, Innate Percille #312532], [Exhibit A]. Following two (2) successful purchase orders for oil by the Appellant the third (3) purchase order was delayed for unknown reasons. Percille discussed this with the new chaplain [McKnight] and Associate Warden [Sharp]. It was advised to update the approval of Religious oils. By the chaplains clerk a renewal was submitted to associate Warden [Sharp] and Warden [Joyner] for approval. In November of 2018, appellant Percille in the capacity, as the Wiccan Community Coordinator was denied [disapproved] by the associate Warden [Tisdale] in capacity as the Warden renewed approval of religious oils for use in services, Percille attempted several times to speak to A/W Tisdale as to the reasons why the Wiccan Community was disapproved while other religious groups [i.e. Muslims, Buddhists, Rastafarians] were being approved use of religious oils.

Other potential issues of discrimination to the Wiccan Community where that passes allowed

religious coordinators of all faiths access to their respective communities in their own dorms and access to Restriction housing unit [RHU] to deal with religious issues except Percille as the Wiccan coordinator. At times the Wiccan Community, was denied access to the Chapel to attend or hold worship. Other faiths had no issues attending or allowed adequate space and time to conduct worship. Percille questioned staff about issues several times. Also, Religious donations that in the past were approved without issue were now being denied without reason to the Wiccan community only. Donations were replacements or new items such as DVDs, food for Seads [two(2) frost walked a year per £5.10.05], ritual equipment, media equipment. Other faiths were given approval without issue.

On January 31st, 2019, A meeting was held in which Percille, associate Warden Sharp and chaplain McKnight discussed the many issues that Percille as coordinator was facing with the Wiccan communities requests due to SCDC administration at Lee. During the meeting issues discussed consisted of leadership, coordinator passes, donations, use of oils and policies. The only answer Percille received was that Percille was indeed confirmed as the religious coordinator of the Wiccan community at Lee and had been since 2008. All other issues had to be discussed with other

issues had to be discussed with other upper administration and that associate warden sharp would have to get back to Penille. He never did answer the raised issues.

On May, 2019, Penille was finally allowed an audience with A/W Tisdale, during which Tisdale denied use of Religious oil for the Wiccan, but would not state any reasons why other than it was due to security. He did allude to a reason after the meeting being due to another faith's ability to assert control of SDC's discretion. He also stated that the only way he could say the reason of security was if he were "on the stand" in court and he would gladly explain the reasons and the Smith group.

On June 5th, 2019, Penille was transferred to another SDC facility violating Rule 23 FRAP. This transfer eliminated qualified leadership for the Wiccan Community at Leary leaving the community to effectively "start from scratch". At the current prison that Penille is at the Wiccan community is completely inadequate due to the chaplain's control. No services by schedule, No equipment [chaplain (wrote) admitted to disposing of Wiccan Box, equipment], No oil, No adequate space for worship, and the inmate coordinator/leadership is unqualified. Penille has

not been able to worship or effectively practice his faith since the transfer.

ARGUMENT SUPPORTED BY FACTS OF LAW

The Administrative Law Court has Jurisdiction to hear cases involving State-created liberty or property interests. Al-Shehazz V. State, 338 S.C. 527, S.E.2d 742 (2000), that procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth (14th) Amendment's protection of liberty and property and Furtick V. SC. Dept. of Probation, Parole, and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003) when reviewing the Department's decisions in inmates grievance matters, the ALC sits in an appellate capacity, id 338 S.C. 527, S.E.2d 742, and S.C. Code Ann 1-23-600(F); 1-23-380(A)(5) in direction the ALJ can conduct in reviewing grievance decisions.

Turner V. Safely, 482 U.S. 78 (1987), States whether prison regulations that impinge on an inmates rights is "reasonably related" to legitimate penological interests. Mintz V. Catholic Church of Springfield, 424 F. Supp 2d 309 (2006)

Substantial or unequal burdens are violations of equal rights and City of Boerne V. Flores, 521 US 507, 117 S.Ct. 2151 (1997) Explains the constitutionality of RFRA and RLUIPA that no government shall impose a "substantial Burden" on the religious exercise of a person residing in or confined in an institution... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that Person 1). is in the furtherance of compelling government interest 2). or is the least restrictive means. 42 USCA chap 21 (c). This Federal rule is listed on the cover of SDC's Religious Policy PS 10.05. Lighthouse institute of evangelism V. city of longbeach 510 F3d 253 (2007) challenging RLUIPA ^{burden} regulations under equal terms does not need to show a 'substantial burden'. In Henderson V. Ayers CD cal 2007, 476 F supp 2d 1168. pertaining to the eleventh (11th) amendment and PLRA/RLUIPA the judge blocked the respondents motion to dismiss the religious grievance.

Religious o'its do not constitute a security risk and prison officials must show reasons and demonstrate a substantial burden as in Nance V. Mizer, 700 Fed appx. 629 (2017) In which appellant sued for monetary damages

in the amount exceeding \$80,000.00; Jenkins V. Sinclair 2018 WL 4608312, certain religious materials, equipment, and funds to accommodate religious practices upheld in Schlemmer V. Wall, 781 F.3d 362 (2015) materials central to their practices. SC DOC continues to deny religious rights relying on cases to be burned in the courts. This effectively denies religious rights to prisoners and in most cases courts support this miscarriage of justice or petitioners struggle to timely file due to SCDC's whims and violations fall through the cracks.

The agencies policy clearly states PS/DK005 section 1.3.10... ensures that the religious freedom of inmates is protected. All religious requests are handled in a fair and impartial manner.

Appellant contends that the administration at Lee CP substantially and exceedingly burdened his right to practice his religion and in so doing burdened an entire religious community and by transferring him the agency further punished and discriminated him and the Wiccan community at Lee by removing the qualified instructor. And by placing Percilla at an institution where wiccan practice is almost completely prejudiced and non-existent by the administration and the chaplain. In this regard appellant reserves the right to keep

This briefs information relevant on Record as evidence against the state agency (SCDC) for further violations of civil and religious rights.

CONCLUSION

Therefore, Appellant asserts by the above substantial evidence and facts of State and Federal Laws that petitioner believes he has met his burden of proof showing SC, DOC agents and chaplains do not properly protect the religious rights of certain individuals and certain religious communities within its institutions. Violating free exercise of religious rights, is bias, and discriminates against certain individuals and communities. Due to this appellant prays the ALJ reverses and modifies the agencies decision pursuant to SC. code Ann 1-23-380 (A)(5) 1-5 and ensures discontinues discriminating against Wiccan communities behind its fences and allows Penick the ability to practice his religious rights in the least restrictive way. To allow use of religious oils and use of religious materials and to more easily facilitate the donations of religious materials for use by Wiccan Practitioners and disciplines those staff that violate any above matters pursuant to ADM 11.04. Appellant prays this court rules

in favor of the Appellants brief.

Date: Sept 23rd, 2019


Gregory Pencille 312332
Pr Sec.

I have read and subscribed before me
on 23 day of Sep, 2019


Notary Public of South Carolina
Commission Expires 2/17/24

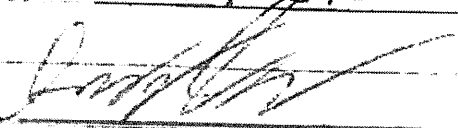
Certificate of Service

I hereby certify that I, Gregory Pencille, on the 23rd day of September, 2019 in Bennettsville, South Carolina served a copy of the Appellants brief on all parties in this matter by depositing the same in the US. mail, postage paid, on in the mail room of the undersigned's institution and addressed as follows

SC. General Counsel
S.C. Corrections
PO Box 21787,
Columbia, SC. 29221

SC ALC
Judge Anderson
1205 Pendleton Street, Suite 224
Columbia, SC. 29201

Date: Sept 23rd, 2019


Gregory Pencille, 312332
Pr Sec

[Exhibit A]

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
LEE CORRECTIONAL INSTITUTION
PASTORAL SERVICES, WC WILKS CHAPEL

MEMORANDUM

TO: Warden Reynolds, Warden
THRU: James E. Sligh, Director of Programs
FROM: L. L. Cain, Senior Chaplain
SUBJECT: Wiccan Religious Oil
DATE: September 22, 2014

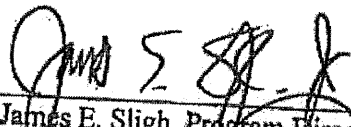
It is respectfully requested that the Wiccan Community be allowed to purchase non-alcoholic religious oils for their religious services. These oils will be under strict supervision through the Chaplain's Office.

The oil will be given out by the Wiccan Coordinator (Inmate Gregory Pencille 312332) and over seen by the Chaplain.

Thank you for your consideration.

S/ 
L. L. Cain, Senior Chaplain

☒ Approve/Disapprove

S/ 
James E. Sligh, Program Director

☒ Approve/Disapprove

S/ 
Cecilia Reynolds, Warden

LLC/jkg

cc: Warden Reynolds
A/W Davis
A/W Sharp
Contraband

J. Sligh
Major's Office
File

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

[Exhibit B]

LEE CORRECTIONAL INSTITUTION
PASTORAL SERVICES, W.C. WILKS CHAPEL

RECEIVED

*** MEMORANDUM ***

NOV 21 2018

TO: Aaron S. Joyner, Warden
THRU: Kenneth Sharp, Associate Warden
FROM: Edward R. McKnight, Senior Chaplain
SUBJECT: Wiccan Religious Oil (UPDATE)
DATE: November 20, 2018

LEE CI
AW PROGRAMS

WARDEN

NOV 26 2018

LEE CI
It is respectfully requested that the Wiccan Community be allowed to purchase non-alcoholic religious oils for their religious services. These oils will be under strict supervision through the Chaplain's Office.

The oil will be given out by the Wiccan Coordinator (Inmate Gregory Pencille # 312332) and overseen by the Chaplain.

This memo is an update for the previously approved Memo dated back to September 22, 2014. Said Memo will be attached to this one.

Thank you for your consideration.

S/ Edward R. McKnight
Edward R. McKnight, Senior Chaplain

Date: 11-20-18

Approve / Disapprove

S/ Kenneth Sharp
Kenneth Sharp, Associate Warden

Date: 11/21/2018

Approve / Disapprove

S/ Aaron S. Joyner
Aaron S. Joyner, Warden

Date: 11-29-18

ERM/ajrc

cc: Warden
A/W Operations
A/W Programs
File

Major
Contraband
Front Gate

**STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT**

Gregory Pencille, # 312332,	)	Docket No.: 19-ALJ-04-0277-AP
	)	<u>[Grievance No.: LEECI 135-19]</u>
Appellant,	)	
	)	<i>Hon. Ralph K. Anderson, III</i>
v.	)	
	)	RESPONDENT'S MOTION TO
South Carolina Department of Corrections,	)	DISMISS
	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal of Gregory Pencille ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections ("SCDC"). Appellant is appealing SCDC's final agency decision of April 19, 2019, denying Appellant's Step 2 grievance.

On February 7, 2019, Appellant filed a Step 1 grievance asserting that SCDC discriminated against the Wiccan religious community by denying its requests for religious oils for religious services. On February 22, 2019, the Warden denied the Step 1 grievance, explaining to Appellant that while religious oils can be kept by the Chaplain for the Wiccan community to use during worship services, these items must be approved by the Warden, who in this case disapproved the requested items for security reasons. Thereafter, on March 6, 2019, Appellant filed a Step 2 grievance. On May 6, 2016, Appellant's Step 2 grievance was denied by the Responsible Official who advised Appellant, *inter alia*, that while SCDC is committed to upholding and facilitating the constitutional rights afforded inmates to religious freedom, inmates will be given the opportunity to practice their religious faith to the extent that such practice does not interfere with the security and safety of the institution, staff, or others. This appeal followed.

131 15 03
OCT 23 2019

SC ADMIN. LAW COURT

STANDARD OF REVIEW

The ALC's jurisdiction to hear this matter is derived entirely from the decision of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). When reviewing SCDC's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Id.* at 377, 527 S.E.2d at 754. Subsequently, the South Carolina Supreme Court clarified the ALC's appellate jurisdiction over inmate appeals in *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 586 S.E.2d 124 (2003). In affirming, as modified, the ALC's *en banc* decision of *McNeil v. S.C. Dep't of Corr.*, 02-ALJ-04-00336-AP (September 5, 2001), the Supreme Court held the ALC's jurisdiction was limited to (1) cases in which an inmate contends prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; (2) cases in which SCDC has taken an inmate's *state-created* liberty interest in major disciplinary hearings; and (3) cases in which an inmate's confinement implicates a *state-created* liberty interest. *See Sullivan*, 355 S.C. at 443, 586 S.E.2d at 127 (emphasis added).

Moreover, regarding categories (2) and (3), *supra*, the South Carolina Supreme Court has consistently emphasized that the liberty or property interest implicated must be one that is *state created*. *See Wicker v. S.C. Dep't of Corr.*, 360 S.C. 421, 602 S.E.2d 56 (2004) (emphasizing that the ALC's jurisdiction extends only to those cases involving the denial of "state created liberty interests" and that the Court's holding [*i.e.*, in *Wicker*] "is not to be viewed as expanding the jurisdiction of the [ALC] in any other circumstance."); *Slezak v. S.C. Dep't of Corr.*, 361 S.C. 327, 605 S.E.2d 506 (2004) (holding that the ALC "may summarily dismiss those appeals that do not implicate an inmate's *state created* liberty or property interest") (emphasis added).

SCDC interprets *Slezak* as encouraging, for the sake of judicial economy, the ALC to summarily dismiss inmate cases that do not involve a state created liberty or property interest. Recently, the South Carolina Court of Appeals has interpreted *Slezak* to mean that where a state

created liberty interest is not implicated in a prisoner appeal, a judge of the ALC “should” dismiss the appeal. *Skipper v. S.C. Dep’t of Corr.*, 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006).

ARGUMENT

Appellant alleges that SCDC “substantially and exceedingly” burdened his right to practice his religion by denying the use of religious oils and transferring him to an institution where the Wiccan practice is almost non-existent and prejudiced by the chaplain. *See* Appellant Brief p. 7. There is no state created liberty interest implicated by Appellant’s allegations. Restricting inmates’ use of certain items due to security concerns, as done here, does not impose an “atypical or significant hardship on the inmate in the relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 482 (1995). Wardens must take security concerns seriously and balance such concerns with inmate programs. Such action does not alter nor exceed Appellant’s sentence in such a manner “as to give rise to protection by the Due Process Clause of its own force.” *Id.* Further, addressing Appellant’s allegation that his transfer to another institution burdened his right to practice his religion, the United States Supreme Court in considering the state created interests protected by *Wolff v. McDonnell*, 418 U.S. 539 (1974), found that where State law “conferred no right on the prisoner to remain in the prison to which he was initially assigned . . .”, the discretion to “transfer in a wide variety of circumstances was vested in prison officials,” and the discretion to transfer prisoners could be “for whatever reason or for no reason at all.” *Meachum v. Fano*, 427 U.S. 215, 226-28 (1976). Therefore, because no state created liberty interest is implicated in this case, the Court should dismiss this appeal.

Additionally, Appellant contends that his right to practice his religion is being burdened in violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). *See* Appellant’s Brief p. 6. This Court should dismiss Appellant’s case because a cause of action under RLUIPA is not proper in this Court. An inmate who brings a cause of action under RLUIPA must

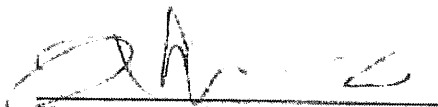
plead and prove the existence of claims under the Spending Clause or the Commerce Clause. *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005). Such claims would be properly brought in federal court. Therefore, because this case implicates a federal statute and the Appellant has failed to prove the existence of claims under the Spending or Commerce Clause, this Court should dismiss this appeal.

CONCLUSION

For the reasons stated above, this Court should dismiss this appeal.

Respectfully Submitted,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**



Kensey Evans
Deputy General Counsel
South Carolina Department of Corrections
4444 Broad River Road
Columbia, South Carolina 29221
(803) 896-8508

October 22, 2019
Columbia, South Carolina

State of South Carolina
In the Administrative Law Court

Gregory Perille, 312332
Appellant,

V.

SC. Dept. of Corrections,
Respondent,

Docket No. 19-ALJ-04-0277-MP

Case No. LFELC 135-19

Hon. Ralph K. Anderson III

Response to Respondent's
Motions to dismiss

Comes Now, Gregory Perille, Appellant, Pro Se
who duly swears and deposes his responses to respondent's
motion to dismiss pursuant to Rule 63 SCACR. Also, if
deemed necessary an oral argument pursuant to Rule
64 SCACR, to further establish the record in the
matter.

ARGUMENT

Where respondent states "There is no state-created
Liberty interest implicated by appellants' allegations";
Appellant contends that the entirety of his brief
in fullibly explains (per curiam) the state-created
Liberty interests. A constitutional violation caused by
the actions of a state agency are clearly "state-created
Liberty interests".

To expound on the issues and arguments

FILED
JUL 31 2019

SC ADMIN. LAW COURT

already raised in appellant's initial brief; RLUIPA, defines religious exercise to include "any exercise of religion, whether or not compelled by, or control over, a system of religious beliefs, 42 USC § 2006cc - (5)(A). "A person may assert a violation of [the RLUIPA] as a claim or defense in a Judicial proceeding and obtain appropriate relief against a government," 42 USC § 2006cc - (2)(a) [Emphasis added],

To plead a violation of the 1st Amendment, free exercise clause, an inmate must merely allege that defendant's burdened practice of his religion by preventing him from engaging in conduct mandated by his faith, USCA const. Amend 1.

In considering the motion to dismiss, The court must accept the allegations of the complaint as true. Albright v. Oliver, 510 US 266, 114 Sct 807, 127 LEd 2d 114 (1994), Hixon, 467 US at 73, 104 Sct 2232, Kierul V. Espn, 393 F3d 1068, 1073, (2005). The court also must construe the pleadings in the light most favorable to the party opposing the motion and resolve all doubts in the pleader's favor. S Jenkins V. McKeithen, 395 US 411, 421, 89 Sct 1843, 1849, 23 LEd 2d 404 (1969), Berg V. Popham, 412 F3d 1122, 1125 (2005). moreover, Pro Se pleadings are held to a less stringent standard than those drafted by a lawyer. Haines V. Kerner, 404 US 519, 520, 92 Sct 544, 596, 30 LEd 2d 51 (1972)

SC ADMIN. LAW COURT

(per curiam). Jackson V Carey, 353 F.3d 750, 757 (2003),
and, The complaint should not be dismissed if it states a
claim under any legal theory, even if the plaintiff
erroneously relies on a different legal theory. Haddock V.
 Bd. of Dental Examiners of Cal, 777 F.2d 462, 464, (1985)

In opposition to motion to dismiss, the plaintiff clarifies
his claim/defense is brought under RLUIPA.

Both state and federal constitutions assure
religious freedom without secular interference, USA const.
Amend 1, 14, const. Art 1 § 2, Pearson V. church of God
318 S. 417, 458 S.E.2d 68.

furthermore, respondent cites McNeil V.
SCDC, 404 S. 186, 743 S.E.2d 843 (2013). In which the
court ruled it would have remanded for further proceedings.
Court must consider whether case posed a novel issue and
whether the facts should have been developed further.
As by Rule 64 SCACR, Oral argument. And/or the
"ALC", as fact finder, was authorized to visit site
that was subject of petition and draw its own conclusions
therefrom, Richter V. St. Dept of Health environment control, 343
S. 198, 712 S.E.2d 428 (2011). Issue preservation is required
in administrative appeals. Hone medical systems V. St. Dept. of
revenue, 382 S. 556, 677 S.E.2d 532 (2009). As per judgement
by Judge Ralph M. Anderson III, in Gatewood V. SCDC, 416
S. 304, 787 S.E.2d 660 (2017). "An issue that is not raised

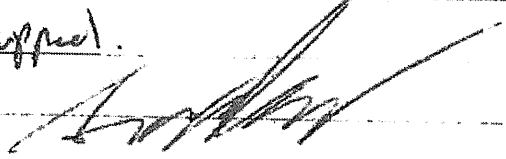
to an administrative agency is not preserved for appellate review by the ALJ; even if the issue has been addressed by the agency, it is not preserved if the appellant did not raise it. Appellant has raised all issues (see Step 1 Grievance) for preservation. Therefore, respondents argument is moot and motion to dismiss should be denied.

As to Respondents argument about appellant being transferred to another prison arguing Wolff v. McDonnell, 418 U.S. 539, (1974) and Manchum v. Fong, 427 U.S. 215, 226-28 (1976) allegedly protecting the agencies reason or lack of reason to transfer, appellant was protected from transfer due to an at the time, pending Federal Habeas petition by Rule 23 FRAP. The transfer was therefore in violation of a Federal rule and Vindictive which is in fact a, "State-created Liberty Interest" Violation.

CONCLUSION

Therefore, Respondents motion to dismiss should be denied for all above reasons and those stated in Appellants brief. And, The ALJ should rule in favor of appellants appeal.

October, 30th, 2019


Gregory P. Smith, 312352

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Gregory Thomas Pencille, #312332,)
)
Appellant,)
)
v.)
)
South Carolina Department of Corrections,)
)
Respondent.)
_____)

Docket No. 19-ALJ-04-0277-AP

ORDER

This matter is before the South Carolina Administrative Law Court (Court or ALC) pursuant to an appeal filed by Gregory Thomas Pencille (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (SCDC or Department).

On February 7, 2019, Appellant filed a Step 1 Grievance asserting that the Department discriminated against the Wiccan religious community by denying his requests for religious oils for religious services. The Warden denied the Step 1 Grievance, noting that religious oils can be kept by the Chaplain for the Wiccan community for worship services but that these items must be approved. The Warden also disapproved the requested items for security reasons. Appellant then filed a Step 2 Grievance on March 6, 2019, which was denied on May 6, 2019. The denial explained that while the "Department is committed to upholding and facilitating the constitutional rights afforded to inmates to religious freedom, inmates will be given the opportunity to practice their religious faith to the extent that such practice does not interfere with the security and safety of the institution, staff or others." SCDC Policy P.S. 10.05 (August 6, 2015).

On May 22, 2019, Appellant filed a Notice of Appeal asserting that the Department substantially and exceedingly burdened his right to practice his religion by (1) denying him the use of religious oils and (2) transferring him to an institution where the Wiccan practice is almost non-existent and the chaplain is prejudiced against it. The case was assigned on June 13, 2019. The Record on Appeal was filed on August 9, 2019. Appellant filed his brief on September 23, 2019.

On October 23, 2019, the Department filed a Motion to Dismiss (Motion) asserting the Department has not deprived Appellant of a state-created liberty interest. On October 31, 2019,

FILED

November 27, 2019

SC ADMIN. LAW COURT

Appellant filed a Response to Respondent's Motion to Dismiss and argued "a constitutional violation caused by the actions of a state agency are clearly "state-created liberty interests."

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). In *Al-Shabazz*, the Court held that the ALC's jurisdiction in inmate appeals is 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. "The only way for the [ALC] to obtain subject matter jurisdiction over [an inmate's] claim is if it implicates a state-created liberty interest." *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003) (emphasis added). Thus, in *Slezak v. South Carolina Department of Corrections*, 361 S.C. 327, 331, 605 S.E.2d 506, 508 (2004), our Supreme Court explained that while the ALC has jurisdiction over properly filed inmate grievance appeals, summary dismissal is appropriate "where the inmate's grievance does not implicate a state-created liberty or property interest." See also *Skipper v. S.C. Dep't of Corr.*, 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006) (finding dismissal of inmate's appeal appropriate because his grievance did not implicate a state-created liberty interest).

Appellant requests permission to use religious oils for Wiccan religious services; however, he has not demonstrated a state-created liberty or property interest to possess those oils. As the Supreme Court held in *Slezak*, an inmate's interest in "religious tapes" did not implicate a state-created liberty interest. 361 S.C. at 331-32, 605 S.E.2d at 508. Likewise, in this case, an inmate's desire to obtain religious oils does not implicate a state-created liberty interest.

Furthermore, Appellate alleges that his transfer to another institution burdened his right to practice his religions and that the "transfer was therefore in violation of a federal rule and vindictive which is in fact a state created liberty interest violation." Appellant also argues in his brief that his transfer violates the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Causes of action brought under RLUIPA implicate federal law involving claims under the Spending or Commerce Clause. Thus, RLUIPA claims do not involve a state-created liberty interest and are not proper in this Court. Furthermore, as the Supreme Court explained in *Skipper v. South Carolina Department of Corrections*: "Absent an atypical and significant hardship on the

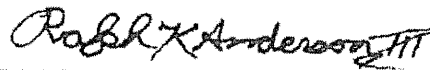
inmate, or an arbitrary, capricious, or biased decision by the prison, the court has no authority to interfere with inmate housing decisions." 370 S.C. 267, 272, 633 S.E.2d 910, 913 (Ct. App. 2006).

In conclusion, because Appellant has not alleged a deprivation of a state-created liberty or property interest in this matter, the Court finds that summary dismissal is appropriate. *See Slezak*, 361 S.C. at 331, 605 S.E.2d at 508.

ORDER

IT IS THEREFORE ORDERED that the Department's Motion to Dismiss is **GRANTED** and Appellant's appeal is **DISMISSED WITH PREJUDICE**.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

November 27, 2019
Columbia, South Carolina

State of South Carolina
In the Administrative Law Court

Gregory Pencille, #312332
Appellant,

V.

SC Dept of Corrections,
Respondent.

Docket No. 19-ALJ-04-0277-AP

Griev. No LEECI-135-19

Hon. Ralph K. Anderson III

Response to Order and
Notice and Demand

Comes now, Gregory Pencille, Appellant, Pro Se,
who duly swears and deposes his response to
Order and Notice and Demand, in which the Department's
motion to dismiss is granted and Appellant's appeal
is dismissed with prejudice.

AFFIDAVIT

The Order filed November 27th, 2019 is
clerically incorrect, misconstruing facts and appellants
arguments and is per incuriam.

Pursuant to SC Code Ann §1-23-600(E) which
directs Administrative Judges to conduct appellate
review in the same manner prescribed in SC Code
Ann § 1-23-380. The court may affirm or remand
Dismissal with prejudice should not be appropriate.

SC ADMIN. LAW COURT

for this court.

Furthermore, this court has biased and prejudiced the Appellant by granting respondent's motion to dismiss without proper evidence or facts of law due to the lack of admissible or substantial evidence when in fact respondent had filed No brief, No record or Appeal and No testimony under oath or affirmation. A "motion" even a motion to dismiss must be supported by affidavit which respondent had not done. Appellant's filings all have been sworn to and/or Notarized and are the only substantial evidence admissible on the record. Therefore, this court has made a grievous error and a miscarriage of Justice and must be corrected within (30) thirty days of receipt of this response. This Notice is not in any way or form to be construed as a motion to reconsider. The Judgment was decreed per incuriam and imposes no duties, confers no rights, creates no oblige, bestows no power or authority on anyone, affords no protection and justifies no acts performed under it, [16 Am Jur 2^d § 177] and is void.

It is further presumed that any and all issues not addressed or rebutted in respondent's motion to dismiss or the subsequent order are therefore Granted in Appellant's favor and an Order should be

drafted, issued, and signed by Judge Anderson III stating the issues defaulted by respondent and granted by acquiescence to Appellant within (30) thirty days of receipt of this paper.

CONCLUSION

Appellant concludes this response and Notice with full faith that this court will comply with the conditions set herein within the allotted time or rebut, point-for-point by sworn affidavit of respondent. No response within (30) thirty days to this notice and demand will signify acquiescence to its terms and may result in further punitive and criminal damages. Notice is therefore given.

I certify under penalty of perjury under the laws of this state in accordance with 28 USC §1746(1) that the facts provided in this document are true, correct, and complete to the best of my knowledge and belief.

Date: December 10th, 2019

Witnessed and subscribed before me
on 10 day of December, 2019
S. Newman
(Notary Public of South Carolina)
Commission Expires 01/21/24


Gregory Paele, #312332
Appellant, Pro se

The South Carolina Court of Appeals

Appeal from Administrative Law Court

Hon. Ralph K. Anderson III

Case No. 19-ALS-04-0277-AP

Gregory Penille, #312332, Appellant
v.

S.C. Dept. of Corrections, Respondant

MOTION TO STAY ISSUANCE OF WRIT
OF SUPERSEDEAS AND PETITION TO COMPEL
A RESPONSE

This motion comes now by Gregory Penille, Appellant, Pro Se, who duly swears and deposes the following as declaration of issues addressed and issues unanswered by the Administrative Law Court held by Hon. Ralph K. Anderson III, pursuant to Rule 225(a)(b)(v) SCALC and Rule 12(b) SCRCP, Rule 68 SCALC, applicability of SCRCP and SCALC, "may be applied" in Administrative Law courts.

DECLARATION

FILED

DEC 31 2019

SC ADMIN. LAW COURT

Appellant addressed the ALC by "Response to Respondent's motion to dismiss" [Enclosed] in which appellant requested pursuant to Rule 64 SCALCR oral argument, at the judges discretion, to further establish the record.

Respondent had filed a motion to dismiss pursuant to Rule 12(b)(6) SCRCP failure of pleading to state facts sufficient to constitute a cause of action, Appellant argued in his response that the entirety of his complaint is a "state-created liberty interest" which constitutes a cause of action and appellant was the only party to state facts sufficient to require remedy. The Dept of corrections clearly deprived appellant his right to practice his religious beliefs as well as other stated issues in his complaint. The court and the respondent did not respond to the appellants response.

According to Rule 12(b) SCRCP, On a motion asserting the defense numbered (6) six to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleadings are presented to and not excluded by the court, [non-response constitutes exclusion] the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 SCRCP, and all parties shall be given reasonable opportunity to present all material [Appellant contends by rules of evidence to have been the only party to present any admissible evidence] made pertinent to

Such a motion by Rule 56 SCRPC. In Rule 56, the adverse party may demand a right to trial by jury in a manner prescribed in Rule 38, 39. Where the issues are legal in nature, so that both parties would have a right to a jury trial, one party may not by invoking declaratory procedure, deprive another party of his constitutional right to a jury trial [oral argument in this case] Leggett v. Smith 226 S.C. 403, 85 S.E. 2d (1955). And where issue raised in proceedings for declaratory judgment are legal and not equitable in nature, they must be tried at law if either party insists upon it, and right of jury trial [oral argument] in what is essentially an action at law may not be denied merely because adversary asked that controversy be determined under declaratory procedure, Code 1952 § 10-2001 to 10-2014; 10-2004.

When a complaint is dismissed for failure to state facts sufficient to constitute a cause of action, the dismissal is generally without prejudice; the plaintiff in most cases should be given an opportunity to file and serve an amended complaint. Rule 12(b)(6) SCRPC.

In considering a motion to dismiss, the court must accept the allegations of the complaint as true. Krievell v. ESPN 393 F.3d 1068, 1072 (2005) and the court must construe the pleadings in the light most favorable to the party opposing the motion and resolve all doubts in the pleader's favor. Berg v. Popham 412 F.3d 1122, 1125 (2005);

SS. code Ann § 17-27-20(b).

The court filed an order granting respondents motion to dismiss and dismiss "with prejudice" appellants appeal on Nov 27th, 2019. Received by appellants Dec. 4th, 2019. Without responding to appellants response dated Oct. 28th, 2019. Furthermore, Appellant filed a response to order and notice and demand on Dec. 10th, 2019 [Enclosed]. The respondent and/or the Court was given (30) Thirty days to respond to the response dated Dec 10th, 2019. And Notice of Appeal was filed December 19, 2019.

CONCLUSION

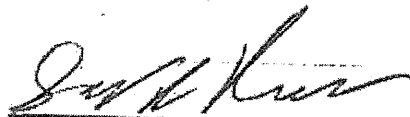
For the above stated facts and to the appellants "layman" understanding to the best of his knowledge of this situation. Appellant requests and prays this court will grant a stay of appeal in this entitled case and Petition to compel a response from the respondent and the ALJ in compliance with Rule 10 SCACR to both responses the appellant had filed in the ALC. And also, believes an issuance of a writ of superseas ~~is~~ pursuant to Rule 241 SCACR is needed in this case due to the misadvised ruling from the ALJ Hon. Ralph K. Anderson III, being dismissed "with prejudice" and granted without any admissible evidence by the respondent.

RELIEF REQUESTED

- A) Place appellant's notice of appeal in abeyance until;
- B) The ALJ (Lower court) is compelled and properly responds to the (2) two timely filed responses of the appellant, and
- C) The ALJ denies respondent's motion to dismiss due to it failing to comply with court rules; or
- D) allow appellant pursuant to Rule 12 (b)(6) SCRPC (give an opportunity to file and serve an amended complaint); or
- E) order the lower court to hold an oral argument evidentiary hearing, or jury trial as requested by appellant.

All declarations above are true and correct under penalty of perjury to the best of the undersigned's knowledge and is in the interest of Justice.

Date: December 31st, 2019



Gregory Penell #312332
Evans LI EYA 275
610 Hwy 9 West
Bennettsville, SC 29512

Witness and subscribed before me this 31 day of Decem. 2019


(Notary Public of South Carolina)

My Commission Expires 2/17/24

5

In The State of South Carolina

Case No. 19-ALJ-04-0277-AP

Gregory Penille, #372332, Appellant
V,

S.C. Dept. of Corrections, Respondent

RECEIVED

JAN 06 2020

SC Court of Appeals

SUPERSEDEAS BOND

This order hereby commands the Dept. of Corrections,
Respondent to:

- 1) Refrain from all retributive acts towards Appellant,
Gregory Penille.
- 2) Refrain from religious discrimination against Appellant.
- 3) Allow Appellant free exercise of his religious beliefs,
use of religious materials and oils, allow proper space and times
to worship and proper foods for religious feasts.

Or;

Respondant obtain an Appeal Bond in the amount
of \$255,000.00 in damages and costs.

Date of execution before me

the 31 day of 11

(Notary Public of South Carolina)

Commission Expires

Court ordered by

Certificate of Service

I hereby certify that the undersigned on the 31st day of December, 2019 in Bennettsville South Carolina served a copy of Appellant's motion to stay, Issuance of writ of Superseas, and petition to compel a response on all parties by depositing the same in the U.S. mail, postage paid, or in the mail room of the undersigned's institution and addressed as follows:

Jenny A. Hutchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC. 29211

SC General Counsel, SDC
P.O. Box 21787
Columbia SC 29221

SCALL
Judge R. K. Anderson III
1205 Rendleton St suite 224
Columbia, SC. 29201

RECEIVED

JAN 06 2020

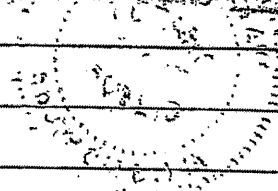
SC Court of Appeals

Date: December 31st, 2019



Gregory Runkle #312332
Evans LF F4A 275
610 Hwy 9 west
Bennettsville, SC 29572
Appellant's Pro Se

and subscribed before me
on 31 day of Dec 2019
(Notary Public for South Carolina)
Commission Expires 2/17/20



The South Carolina Court of Appeals

Gregory Pencille, #312332, Appellant,

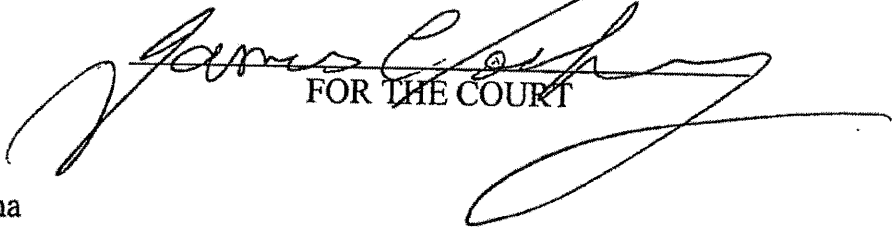
v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2019-002115

ORDER

Appellant's "motion to stay, issuance of writ of supersedeas, and petition to compel a response" is denied. This court will consider the merits of this appeal after final briefing is complete. Appellant's motion to proceed without costs is granted.


FOR THE COURT

Columbia, South Carolina

cc:

Gregory Pencille, 00312332

Christina Catoe Bigelow, Esquire

FILED

January 15, 2020

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Gregory Thomas Pencille, #312332,)
)
Appellant,)
)
v.)
)
South Carolina Department of Corrections,)
)
Respondent.)
_____)

Docket No. 19-ALJ-04-0277-AP

ORDER

This matter is before the South Carolina Administrative Law Court (Court or ALC) on a Motion to Stay, Issuance of Writ of Supersedeas and Petition to Compel a Response filed by Gregory Thomas Pencille (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (SCDC or Department).

On February 7, 2019, Appellant filed a Step 1 Grievance asserting that the Department discriminated against the Wiccan religious community by denying his requests for religious oils for religious services. The Warden denied the Step 1 Grievance. Appellant then filed a Step 2 Grievance on March 6, 2019, which was denied by the Responsible Official. On May 22, 2019, Appellant filed his Notice of Appeal asserting the Department substantially and exceedingly burdened his right to practice religion by (1) denying the use of religious oils and (2) transferring him to an institution where the Wiccan practice is almost non-existent and the chaplain is prejudiced against it. The case was assigned on June 13, 2019. The Record on Appeal was filed on August 9, 2019. Appellant filed his brief on September 23, 2019. On October 23, 2019, the Department filed a Motion to Dismiss on the ground that there is no state-created liberty interest implicated by Appellant's allegations pursuant to *Slezak v. South Carolina Department of Corrections*, 361 S.C 331, 605 S.E 2d 508 (2004). On October 31, 2019, Appellant filed a Response to the Motion to Dismiss, arguing that "a constitutional violation caused by the actions of a state agency are clearly state-created liberty interests."

By Final Order dated November 27, 2019, the Court granted the Motion to Dismiss and dismissed Appellant's appeal with prejudice. Appellant filed a response to the Final Order on

FILED

January 23, 2020

SC ADMIN. LAW COURT

December 11, 2019, in which he argued that the Final Order was clerically incorrect; however, Appellant clarified his response was not to be construed as a motion to reconsider.

On December 31, 2019, Appellant filed a Motion to Stay, Issuance of Writ of Supersedeas and Petition to Compel a Response (Motion). In this Motion, Appellant moves the Court to take several actions, to include issuing a writ of supersedeas. In support of his Motion, Appellant cites to multiple cases and rules but never argues how or why these cases and rules apply to him. Appellant's statements supporting his motion are "conclusory" and fail to sufficiently support his Motion. See *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 549, 730 S.E.2d 340, 351 (Ct. App. 2012) (noting that while the appellants cited one case to support their argument, the argument was nevertheless "largely conclusory" and considered abandoned on appeal); *State v. Hill*, 394 S.C. 280, 297, 715 S.E.2d 368, 377 (Ct. App. 2011) (considering a citation to a case "without any analysis whatsoever as to how or why [it] applies" insufficient to preserve an issue on appeal, and thus rendering that issue abandoned on appeal). Because Appellant has failed to sufficiently support his conclusionary statements with authority, I find he has abandoned his arguments. *Potter v. Spartanburg School Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory."). However, even if Appellant's arguments are not deemed abandoned, Appellant's Motion still fails for the reasons discussed below.

First, Appellant's Motion asks this Court to compel a response from the Department and this Court in compliance with Rule 10 of the Rules of Procedure for the Administrative Law Court (SCALC Rules). However, SCALC Rule 10 discusses simplification of procedures within contested cases. This case is an appeal, not a contested case. Therefore, SCALC Rule 10 does not apply to this case.

Appellant also notes in his Motion that the Department filed a motion under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure (SCRPC) and argues this rule requires that "when a complaint is dismissed for failure to state facts sufficient to constitute a cause of action, the dismissal is generally without prejudice; the plaintiff in most cases should be given an opportunity to file and serve an amended complaint." However, the Court did not dismiss Appellant's appeal pursuant to Rule 12(b)(6), SCRPC, which does not apply to appeals. Rather, the Court dismissed Appellant's appeal pursuant to *Slezak v. South Carolina Department of Corrections* because there

was no state-created liberty interest implicated by Appellant's allegations. 361 S.C at 331, 605 S.E.2d at 508. As stated in the Final Order, "[t]he only way for the [ALC] to obtain subject matter jurisdiction over [an inmate's] claim is if it implicates a state-created liberty interest." *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 586 S.E.2d 12, 127 (2003). Therefore, summary dismissal was appropriate.

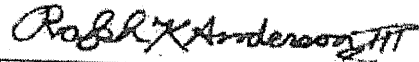
Next, Appellant moves this Court to grant oral arguments in his case pursuant to SCALC Rule 64.e Whether to grant oral arguments is within the discretion of this Court and "oral argument will ordinarily not be ordered by the Administrative Law Judge unless the proceeding involves a novel issue or a question of exceptional importance." SCALC Rule 64; *see* SCALC Rule 68 ("The South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules [(SCACR)], in contested cases and appeals respectively, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." (emphasis added)). This case does not involve a novel issue or a question of exceptional importance that would move this Court to exercise its discretion and grant oral arguments. *See id.* Moreover, because Appellant's allegations do not implicate a state-created liberty or property interest, this Court does not have jurisdiction to grant oral arguments.

Finally, Appellant moves this Court to grant a writ of supersedeas. In determining whether an order for supersedeas should be granted by this appellate court (ALC), it helpful to refer to SCACR Rule 241, which governs the imposition of a supersedeas in appeals. Rule 241(b), SCACR, sets forth exceptions to the general rule that cases are stayed pending appeal. Specifically, Rule 241(b)(11) provides that appeals from administrative tribunals are not stayed pending appellate review. However, Rule 241(c) further provides that a party may move for an order imposing a supersedeas in matters decided by administrative tribunals. In determining such motions, the court shall consider "whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(11), SCACR. In this case, Appellant has not provided grounds or an argument establishing that a writ of supersedeas is necessary to preserve the jurisdiction of the appeal or to prevent the issue from becoming moot. Accordingly, the Motion fails.

ORDER

IT IS THEREFORE ORDERED that Appellant's Motion to Stay, Issuance of Writ of Supersedeas and Petition to Compel a Response is **DENIED**.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

January 23, 2020
Columbia, South Carolina

The South Carolina Court of Appeals

Gregory Pencille, #312332, Appellant,

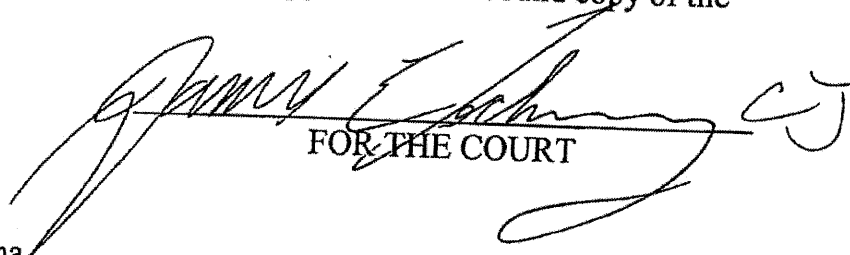
v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2019-002115

ORDER

Appellant's "motion for leave to be heard on the original record" is denied. Within thirty days after service of the last brief, Appellant is required to serve a copy of the record on appeal on Respondent, and the record must include all documents listed in the parties' designations of matter. *See* Rule 210, SCACR. The copy requirement for the briefs and record on appeal, however, is reduced to the extent that the parties shall file one bound copy and one unbound copy of their final briefs, and Appellant shall file one bound copy and one unbound copy of the record on appeal.


FOR THE COURT

Columbia, South Carolina

cc:

Gregory Pencille, 00312332

Christina Catoe Bigelow, Esquire

FILED

March 6, 2020

The South Carolina Court of Appeals

Appeal from the Administrative law Court

Hon. Ralph K. Anderson III

RECEIVED

MAR 19 2020

Case No. 19-ALJ-04-0277-AP

SC Court of Appeals

Gregory Pencille, #312332, Appellant

V.

South Carolina Department of Corrections, Respondent

MOTION FOR CLARIFICATION OF ORDER

Appellant requests this court for clarification or to better understand the ruling appellant received on March 11th, 2020. In which Judge Lockemy, denied appellant's motion by only one line stating verbatim ("Appellant's "motion for leave to be heard on the original record" is denied.). this gives no explanation as to why it was denied, when pursuant to Rule 24 (b) leave to proceed in forma pauperis on appeal or review of an administrative-agency proceeding. When an appeal or review of a proceeding before an administrative agency, board, commission, or officer... proceeds directly in a court of appeals, a party may file in the court a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by rule 24(a)(1). And, Rule 24 (c) leave to use original record. A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

Halo Electronics, Inc., v. Pulse Electronics Inc., 136 S.ct 1923, 195 L.Ed 2d 278 (2016).
(A) When construing a statute, the word "may" clearly connotes discretion. (B) In a system of laws, discretion is rarely without limits, even when the statute does not specify any limits upon the courts discretion. (C) motion to a court's discretion is a motion, not to its inclinations but to

its judgment, and its judgment should be guided by sound legal principles, and in light of consideration. Bultman v. Barber, 277 S.C. 5, 7 281 S.Ed. 2d 791, 792 (1981), U.S v. Read, 778 F3d 1437, 1441 (1984), Construing ambiguities in favor of the appellant makes sense in light of the parties respective bargaining power and expertise.

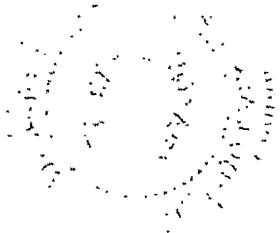
Appellant requests this court to consider rescinding the denial of appellant's" motion to be heard on the original record" and prays this court grants" motion for leave to be heard on the original record" in the entitled case due to appellant's inability to financially reproduce any part of the record in this case. Such inability to do would be to the detriment of appellant's case.



Gregory Pencille, #312332
Evans CI F4A-275
610 Hwy 9 West
Bennettsville, S.C. 29512
Appellant, Pro se

Date: March 17th, 2020

SWORN to and subscribed before me this 17
Day of march, 2020
S. Oulaw (L.S.)
Notary Public
My Commission Expires: 2/17/24





The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

April 23, 2020

Gregory Pencille, 00312332
Evans Correctional Institution
610 Highway #9, West
Bennettsville SC 29512

Re: Gregory Pencille, #312332 v. SCDC (2)
Appellate Case No. 2019-002115

Dear Mr. Pencille:

The Court is in receipt of your Motion for Clarification of Order filed on March 19, 2020. No action will be taken on your motion pursuant to Rule 221(c), SCACR, which states that "the appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal."

Very truly yours,

V. Claire Allen

CLERK

cc: Christina Catoe Bigelow, Esquire

The South Carolina Court of Appeals

Appeal from Administrative Law Court
Hon. Ralph K. Anderson III

Case No. 19-ALJ-04-0277-AP

Gregory Percille, #312332, Appellant
V,

SC Dept. of Corrections, Respondent

RECEIVED

DEC 27 2019

SC Court of Appeals

ENC

NOTICE OF APPEAL

comes now, Gregory Percille, Appellant, Pro Se
Who Appeals the Decision of the Hon. Ralph
K. Anderson III dated November 27th, 2019; Appellant
received a copy of this decision December 04th, 2019
A copy of the order and envelope is enclosed. Also,
Appellants application to proceed In forma pauperis
is enclosed to this court.

Date: December 19, 2019

[Signature]

Gregory Percille #312332
Evans GE F4A-275
610 Hwy 9 west
Barnesville, SC. 29712

19th day of December, 2019
[Signature]
Clerk of Court
South Carolina
2019

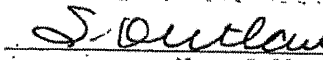
APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Gregory Penille, hereby apply for leave to
proceed in this action without prepayment of fees or costs or security therefor. In support of my
application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give
security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
19 day of December, 2019


Notary Public

My Commission Expires: 2/17/24

RECEIVED
DEC 27 2019
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM THE ADMINISTRATIVE LAW COURT **Oct 27 2020**

Administrative Law Judge Ralph K. Anderson, III **SC Court of Appeals**

ALC-Case No. 19-ALJ-04-0277-AP
Appellate Case No. 2019-002115

Gregory Pencille #312332 Appellant,

v.

South Carolina Department of Corrections Respondent

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Oct 26th, 2020



C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S.C. Bar No. 006188

Attorney for Appellant

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Nov 13 2020

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph K. Anderson, III

ALC-Case No. 19-ALJ-04-0277-AP
Case No. 2019-002115

Gregory Pencille #312332 Appellant,

v.

South Carolina Department of Corrections Respondent,

FINAL BRIEF OF APPELLANT

Gregory Pencille, #312332
Evans CI F4A-275
610 Hwy 9 West
Bennettsville, S.C. 29512

Appellant, Pro se

TABLE OF CONTENTS

	Page:
Table of Authorities	ii
Other Authorities	iv
Statement of Issues on Appeal	1
Statement of the Case	2
Statement of the Facts	4
Argument	
Question I. Did SCDC violate the religious rights, protection of liberty and property, equal protection and due process to the Appellant and the Wiccan community protected by the U.S. Const. 1 st , 14 th amendments, 42 U.S.C.A. and SCDC policy P.S. 10.05?	8
Question II. Did the Administrative court err in granting Respondent's summary Judgment without any admissible evidence?	10
Question III. Did the Administrative Law court err in dismissing Appellant's Appeal <u>with</u> prejudice?	13
Question IV. Did the Administrative court err in not allowing an oral argument to further the record?	14
Conclusion	15

Table of Authorities

Cases:	Page:
<i>A'l-Shabazz v. State</i> , 338 S.C. 354, 527 S.E.2d 742 (2000)	5, 8, 9, 12
<i>B&J Enterprises, LTD v. Giordano</i> 329 Fed. Appx. 411 (2009)	10
<i>Benedict College v. National Credit Systems, Inc.</i> 400 S.C. 538 (2012)	13
<i>Board or Ed. Of Kirgas Joel Village School Dist. v. Gromet</i> , 512 U.S.687 (1994)	4
<i>Brown v. Evatt</i> , 332 S.C. 189, 194, 470 S.E.2d 848, (1996)	5
<i>EEOC. v. Firestone Fibers & Textiles Co.</i> , 515 F.3d 307, 312, (4 th cir 2008)	5
<i>ESA Services, LLC v. S.C. Dept. Of Revenue</i> , 392 S.C. 11, 77 S.E.2d 437 (2011)	11
<i>Forrester v. Smith & Steele Builder's, Inc.</i> , 295 S.C. 504, 369 S.E2d 156 (Ct. app 1988)	14
<i>Hill v. S.C. Department of Health and Environmental Control</i> , 389 S.C. 1, 698 S.E.2d 612 ...	12
<i>Humphery's & Partners Architects, LP v. Lessard Design, Inc.</i> , 790 F3d 532 (2015)	10
<i>Kennedy v. Joy technologies, Inc.</i> 269 Fed. Appx 302 (2008)	11
<i>Krentz v. Robertson</i> , 228 F3d. 897 (2000)	9
<i>Lasher v. Day & Zimmerman Intern, Inc</i> 516 F.Supp.2d 565 (2007)	11
<i>Nance v. Miser</i> , 700 Fed Appx. 629 (9 th cir 2017)	9
<i>Original Blue Ribbon Taxi corp. v. S.C. Department of Motor Vehicles</i> , 380 S.C. 600, 670 S.E.2d 674 (2008)	12
<i>Parodis v. Charleston Cty, School Dist.</i> , 819 S.E.2d 147	13
<i>Sandlin v. Conner</i> , 515 U.S. 472 (1995)	8
<i>Schmidt v. Courtney</i> , 357 S.C.310, 592 S.E2d 326 (2003)	9
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	4

<i>Skipper v. SCDC</i> , 370 S.C. 267, 633 S.E.2d 910 (2006)	5
<i>Skydive Myrtle Beach, Inc. v. Horry County</i> , 426 S.C. 175, 826 S.E.2d 585 (2019)	13
<i>Slezak v. SCDC</i> , 361 S.C. 331, 605 S.E.2d. 508 (2004)	3, 9
<i>Spence v. Spence</i> , 368 S.C. 106, 628 S.E.2d (2006)	13
<i>Trejo v. Hospitality Property, Inc.</i> , 795 F3d 442 (4 th cir. 2015)	13
<i>Whittaker v. Morgan State University</i> , 524 Fed. Appx. 58 (2013)	10, 11
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	4
<i>Wolff v. McDonnell</i> , 418 U.S. 539, 99 S.ct.2063, 41 L.Ed.2d 935 (1974)	8

STATUTES:

S. C. Code § 1-23-350	10
S. C. Code 1976 § 1-23-380(A)(6)	12
S. C. Code § 1-23-10, <i>et. seq.</i>	8
S. C. Code § 1-23-610(C) (2007)	12
S.C. Code § 1-32-30	4
S.C. Code § 1-32-40	4
S.C. Code § 1-32-50	4
S.C. Code § 1-32-60	4
S. C. Code § 1-23-310, <i>et. seq.</i>	8
S. C. Code §1-23-610(B)	11
S.C. Code § 24-27-500, <i>et. seq.</i>	4

OTHER AUTHORITIES:

19 S.C. Jur. Const. Law §35.1	4
42 U.S.C.A. §2000e-2(a)(1)	5, 8
Civil Rights Act of 1964 § 703(a)(1)	5
Code 1952 § 10-2001, 10-2009	14
S. C. Rules of Civil Procedure, Rule 12 (b)(6)	13
S.C. Rules of Civil Procedure, Rule 15(a)	14
28 U.S.C.A.	10
S. C. Rules Appellate Procedure, Rule 240 (g)	10
S. C. Rules of Civil Procedure, Rule 7(b) (2) and 10 (e)	10

Statement of Issues On Appeal

1. Did SCDC violate the religious rights, protection of liberty and property, equal protection and due process to the Appellant and the Wiccan community protected by the U.S.

Const. 1st, 14th amendments, 42 U.S.C.A. and SCDC policy P.S. 10.05?

2. Did the Administrative court err in granting Respondent's summary Judgment without any admissible evidence?

3. Did the Administrative Law court err in dismissing Appellant's Appeal with prejudice?

4. Did the Administrative court err in not allowing an oral argument to further the record?

Statement of the Case

In September of 2014, the senior chaplain (Cain) at Lee CI with the Warden (Reynolds) and the Program Director (Sligh) approved the Appellant for the Wiccan community use of Religious oils for use during Wiccan services to be given out to the Wiccan Community Coordinator (Pencille, Appellant). In November of 2018, Appellant in the capacity as Wiccan Coordinator was denied (disapproved) [by the Associate Warden (Tisdale) acting as the Warden] renewal of Religious oils for use in services.

On February 7, 2019, Appellant filed a Step 1 grievance asserting “respond and approve religious oils for use in Wiccan Religious activities. And discontinue discriminating against Wiccan Community requests”. Rec. on App. at 10. The Warden denied the step 1 grievance. Appellant then filed a step 2 grievance on March 6, 2019, which was denied by the responsible official. On March 21, 2019, Appellant filed his notice to appeal asserting the department violated equal protection rights by denying wiccans use and allowing other religions use of (sacramental oil) and other religious needs, substantially and exceedingly burdened his right to practice religion by denying the use of religious oils. Appellant was transferred to another facility on June 6, 2019. The Appellant filed a change of address notice on June 10, 2019, and the case was assigned on June 13, 2019. The record on appeal was filed on August 9, 2019. Appellant filed his brief on September 23, 2019, and added that transferring him to an institution where the Wiccan practice is almost non-existent, and the chaplain is prejudiced against it had added an extra element of prejudice and so asked the Court to allow it to be preserved for future litigation. On October 23, 2019, the department filed a motion to dismiss on the ground that there is no state-created liberty interest implicated by Appellant’s allegations pursuant to *Slezak v.*

Appellant's allegations pursuant to *Slezak v. South Carolina Department of Corrections*, 361 S.C. 331, 605 S.E.2d 508 (2004). On October 28, 2019, Appellant filed a Response to the Motion to Dismiss, arguing that "constitutional violations caused by the actions of a state agency are clearly state-created liberty interests."

By final order dated November 27, 2019, the court granted the motion to dismiss and dismissed Appellant's appeal with prejudice. On December 10, 2019, Appellant filed a Response to Order and Notice and Demand by Affidavit, which the Respondent never acknowledged or responded to. Appellant filed a response to the final Order on December 11, 2019, in which he argued that the Final Order was clerically incorrect, Appellant clarified his response was not to be construed as a motion to reconsider [as motion for reconsiderations are not allowed pursuant to Rule 65 SCALCR].

On December 31, 2019, Appellant filed a motion to stay, issuance of Writ of Supercedes and Petition to Compel a Response (motion). The Court of Appeals received notice of appeal on December 27, 2019, and assigned a case no. on January 3, 2020. The Court of Appeals denied motion to stay, issuance of Writ of Supersedeas and Petition to Compel a Response (and granted motion to proceed without payment on January 15, 2020. The Administrative court responded to the same motion for issuance of Writ of Supercedes by order, filed on January 23, 2020.

Statement of the Facts

S.C. Code § 24-27-500 Application of Religious Freedom Act to Prison

Regulations, (B) A state or local correctional facility regulation may not be considered the “least restrictive means” of furthering a compelling state interest if a reasonable accommodation can be made to protect the safety or security of prisoners, correctional staff, or the public. 19 S.C. Jur. Const. Law § 35.1.

S.C. Code § 1-32-30, Purpose of Chapter, (1) Restore the compelling interest test as set forth in, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963) and to guarantee that a test of compelling state interest will be imposed on all states and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened. (2) Provide a claim or defense to persons whose exercise of religion is substantially burdened by the State.

S.C. Code § 1-32-40, Restriction on State’s ability to Burden exercise of Religion

S.C. Code § 1-32-50, Burden on exercise of religion claim or defense. If a person’s exercise of religion has been burdened in violation of this chapter, the person may assert this violation as a claim or defense in a judicial proceeding. Assertions, as a claim or defense in a judicial proceeding award- Attorney fees and costs.

S.C. Code § 1-32-60, (B) Nothing in this chapter may be construed to burden any religious belief.

“The Religious Clause prohibits the government from favoring religion, but they provide no warrant for discriminating against religion.” *Board of Ed. Of Kirgas Joel Village School Dist. v. Gromet*, 512 U.S.687, 717 (1994)(J. Blackmun, concurring).

Religious accommodation in cases contain burden-shifting scheme analogous to that McDonnell Douglas: employee must first establish a prima facie case of religious discrimination and the burden then shifts to employer to show that it could not reasonably accommodate employee's religious needs without undue hardship Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C.A. - §2000e-2(a)(1). In the instant case the staff and administration at both Lee CI and Evans CI had been accommodating then due to neglect and personal bias chose to stop accommodating only the Wiccan Community's Rights. *EEOC. v. Firestone Fibers & Textiles Co.*, 515 F.3d307, 312, (4th Cir 2008).

Issues presented in Appellant's brief as to institutional transfer was an additional form of punishment and religious depravity. Respondent took it out of context and argued incorrectly. *Brown v. Evatt*, 332 S.C. 189, 194, 470 S.E. 2d 848, (1996) transfer within prison system or downgrading custody not subject to judicial review as long as prison officials do not act arbitrarily, capriciously, or from personal bias or prejudice. *see also *A'l-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), *Skipper v. SCDC*, 370S.C. 267, 633 S.E.2d 910 (2006), Appellant was merely establishing for the record of a possible second grievance issue to be filed against the Appellants receiving institution, where upon arrival Appellant Pencille was immediately sown a religious discriminating atmosphere. Pencille wanted only to state for the record that although the two separate institutions were acting in kike fashion against "Wiccans", it was still the same Agency acting accordingly.

The fact still remains the same, "I am still not allowed to practice my religion and/or use religious oil in my [non-existent] religious worship. The institutions policies' and practices infringe upon my ability to practice my religion at all. [ex. Policy states that no inmate can be

deprived the opportunity to attend worship, but in the Wiccan policy handbook, it is explained that worship in participatory and one attending must have completed a basic course in the study of the practice. If inmates attend who are not proficient in the practice of the worship [by religious beliefs] then the service is ineffective. Policy states that no inmate can be deprived the opportunity to attend worship, but in the Wiccan policy handbook it is explained that worship in participatory and one attending must have completed a basic course in the study of the practice. If inmates attend who are not proficient in the practice of the worship [by religious beliefs] then the service is ineffective. Policy states that Wiccans will conduct their worship according to the cycle of the full or new moon schedule and yet the allowance at Evans CI has service scheduled every Monday, clearly not according to agency policy and clearly not allowing proper worship. Policy and the protection against discriminatory actions clearly are not effective if they are not enforced or properly understood. Where these protections may be written they become wholly inert if never applied or possible misapplied to inmates religious practices. This effectively violates the rights of religious practice and when applied to one religion over another it becomes prejudicial. Because it is a result of actions personal and professional,, applied "state-created" liberty interest and violates equal protection when policy and practices substantially burdens one religion over another. This further violates due process when proper grievances are mismanaged and/or ignored.

It also states that if studies or services are interrupted, there must be an incident report filed by an officer as to the reasons for cancelling. This policy is rarely if ever followed. The inmate coordinator does fill out a comment section on the back of a sign-in sheet in which Appellant tries to always comment as to deficiencies of the agency's actions. Unfortunately, the

agency keeps the records in its possession, and it is unknown as to how long they keep the records or their policy on retention of those records.

All these issues where and are properly preserved for the record by the Appellant from the very first request stating the issues of the as applied civil rights, equal protection, and state-created liberty, property interest correctly and clearly addressed and the inaction of the agency and the lower courts is completely repugnant and is a miscarriage of justice which can be easily corrected by the court, however, the Appellant is entirely powerless to remedy this situation. As explained in the following arguments and in the Appellants lower court filings in which need to be considered as record and evidence in these matters.

ARGUMENT

Question I

Did SCDC violate the religious rights, protection of liberty and property, equal protection and due process to the Appellant and the Wiccan community protected by the U.S. Const. 1st, amendments, 42 U.S.C.A. and SCDC policy P.S. 10.05?

Wolff v. McDonnell, 418 U.S. 539 (1974) requires minimal due process when for state-created liberty interests, which are not necessarily limited to sentence-related credits and major disciplinary decisions. *Sandlin v. Conner*, 515 U.S. 472 (1995), due process is offended only when inmate is subject to atypical and significant hardships in relation to ordinary incidents of prison life. Due process guarantees judicial review of liberty interests. Whereas other religions are afforded more freedoms to practice their religions, Wiccans have not and the requested remedy to this issue falling on deaf ears creates hardships to the practice of Appellant's religion and the resulting treatment by the agencies administration and staff is atypical considered to other religions practices.

A'l-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), an inmate may seek judicial review of the DOC final decision in an administrative matter under the provisions for contested cases contained in the (APA) Admin. Proc. Act. Code 1976 §§ 1-23-10 to 1-23-160, 1-23-310 to 1-23-400, 1-23-500 to 1-23-600.

A "contested case", for the purposes of the provision of the Missouri Administrative Act (MAPA) that defines, "agency" as an administrative officer or body authorized to make rules or to adjudicate (contested cases, is a proceeding before an agency in which legal rights, duties, privileges of a specific party are required by law to be determined after hearing.) (Contested

cases). *Krentz v. Robertson*, 228 F3d. 897 (2000), the appellant requested assistance by court rules and according to *A'l-Shabazz v. State* should have been afforded that assistance to overcome the legal bias from the state agencies filings which in themselves were not proper before the court.

The accusation of “conclusory” statements is a pale attempt to exclude arguments. The appellant’s history of the case included the discriminatory actions and issues the department perpetrated against the Appellant and his faith’s community as well as an inclusive list of cases to which the agency and the administrative court should have followed precedent and fixed the problem of discrimination instead of continued prejudice and bias towards a recognized faith *Schmidt v. Courtney*, 357 S.C.310, 592 S.E2d 326 (2003), alleging negligent design-affidavit revealed high level of specificity of facts (reversed and remanded). Affidavit was attorney written, in Appellant’s case, affidavits and all other documents were drafted by Pro Se Litigant (himself) and still surpasses the inadmissible submissions by respondent’s professional legal counsel.

Slezak v. SCDC, 361 S.C. 331, 605 S.E2d. 508 (2004), in *Slezak* case, it is determined that educational tapes not religious tapes were not considered state-created liberty interest. Where religious oils may be restricted by the Warden of an institution, the Warden does not have the decision to deny one religion use of oil and yet allow another and may not deny without stating concisely the reasons it is being denied. As in *Nance v. Miser*, 700 Fed Appx. 629 (9th cir 2017), prison officials failed to demonstrate that prison security would have been substantially burdened by prisoners use of scented oils. The agency refuses to give any explanation let alone demonstrate any burdens. The court should have called on this process of demonstrations from the beginning

and still has not required the agency to do so.

Review of Appellant's brief to the Administrative Law Court, there are further inclusive cases which are not cited due to space constraints but are still pertinent to this case and question 1 of this argument and should be preserved of review on appeal.

QUESTION II

Did the Administrative court err in granting Respondent's summary Judgment without any admissible evidence?

Upon review of any of the agency's submitted papers to the administrative law court, none of them follow the SCRAP or SCRCF to be considered as admissible as evidence before any court. Notably Rule 240 (g) SCRAP, failure to comply, failure of the moving party to perform any act required by this rule may be deemed abandonment of the motion or petition. And Rule 7 (b) (2) and 10 (e) SCRCF. All of Respondent's motions/petitions are "unsworn" and "unauthenticated by affidavit". Thus, the judges granting was based on inadmissible evidence and is bias. 28 U.S.C.A.

Humphery's & Partners Architects, LP v. Lessard Design, Inc, 790 F3d 532 (2015), subsequent verification or reaffirmation of an unsworn report, either by affidavit or deposition, allows the court to consider the unsworn report on a ruling for motion for summary judgement. No subsequent or reaffirmation was made by the agency even after Appellant's voicing concern as to the admissibility of Respondent's filings. *B&J Enterprises, LTD v. Giordano* 329 Fed. Appx. 411 (2009), letters containing statements and opinions concerning owner and business reputation were inadmissible on summary judgement, where letters were unsworn and unauthenticated by affidavit. *Whittaker v. Morgan State University*, 524 Fed. Appx. 58 (2013),

content of unsworn letter by student attached to summary judgment affidavit would be inadmissible hearsay insufficient to create genuine issues of material fact ... Notarization of unsworn letter was insufficient to require court to consider it... In *Whittaker*, summary judgement was submitted as affidavit whereas in this case, Respondent did not swear or authenticate the document in any way to conform to court rules to allow it to be admissible as evidence the court could consider. *Kennedy v. Joy Technologies, Inc.*, 269 Fed. Appx 302 (2008), district court abused its discretion, at summary judgment stage by improperly excluding evidence. The administrative court abused its discretion by improperly including evidence in allowing any and all "papers filed by Respondent in this case. And, *Lasher v. Day & Zimmerman Intern, Inc.*, 516 F.Supp.2d 565 (2007), hearsay evidence may not be considered on motion for summary judgement.

The routine prejudicial practices of this State's judicial system has created contemptible situations which are ignored as common place as if they were proper, resulting in the doling of miscarriages of justice a daily occurrence. An improper practice no matter how often it is overlooked is still no less improper.

Although reviewing court shall not substitute it's judgment for that of the administrative law court, as to findings of fact, reviewing court may reverse or modify decisions that are controlled by error of law are clearly erroneous in view of the substantial evidence on the record as a whole. Code 1976 §1-23-610(B), in determining whether the administrative law courts (ALC), decision is supported by substantial evidence, reviewing court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that ALC reached. *ESA Services, LLC v. S.C. Dept. Of Revenue*, 392 S.C. 11, 77

s.e.2D 437 (2011). substantial evidence”, for the purpose of reviewing an agency’s decision under the Administrative Procedures Act (APA), is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support the agency’s actions. S.C. Code 1976 § 1-23-380(A)(6), see also *A’l-Shabazz v. State*. In Appellant’s case, the situation is that the agency offered no evidence, gave no explanation or demonstration, and did not challenge any assertions made by Appellant. To afford meaningful judicial review of ALC’s final decision on the administrative law judge must adequately explain the decision by documenting the findings of fact and basing the decision on reliable, probative, and substantial evidence on the whole record. S.C. Code § 1-23-350, since the Respondent asserted there was no stated claim (when clearly there was), Respondent attempted to circumvent statute as a whole when in fact the ALJ should not have abused his discretion and denied the Respondent’s summary judgment.

The decision of the ALC should not be overturned on appeal unless it is unsupported by substantial evidence or controlled by some error of law. S.C. Code Ann § 1-23-610(C) (2007), *Original Blue Ribbon Taxi corp. v. S.C. Department of Motor Vehicles*, 340 S.C. 600, 670 S.E.2d674, to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and the prejudice; prejudice is a reasonable probability that the fact-finder’s determination was influenced by the challenged evidence or lack thereof. *Hill v. S.C. Department of Health and Environmental Control*, 389 S.C. 1, 698 S.E.2d 612, there is no evidence entered by the Respondent that would substantiate any defense or that would conclude that summary judgement was warranted. The ruling was clearly an error of law because of all the previous and presently stated reasoning, and the prejudice is obvious, the Appellant was and is being denied his protected right to practice his religious beliefs and is not

being afforded equal protection of the law by the courts adverse ruling. S.C.D.C. is without standing. A party must be a real party in interest to the litigation to have standing. A “real party in interest” for the purposes of standing is a party with a real, material, or substantial interest in the outcome of the litigation. S.C.D.C. does not care how this litigation ends, therefore, cannot cognize any “real” defense in this matter other than to accuse the Appellant of failure to state a claim, which is absurd on its face.

QUESTION III

Did the Administrative Law court err in dismissing Appellant’s Appeal with prejudice?

Court of Appeals reviews grant of motion to dismiss for failure to state a claim, de novo. *Trejo v. Hospitality Property, Inc.*, 795 F3d 442 (2015), the same standard as the circuit court, *Benedict College v. National Credit Systems, Inc.* 400 S.C. 538 (2012).

The Administrative court dismissed Appellant’s appeal with prejudice. Dismissal of a complaint “with prejudice” is intended to bar re-litigation of the same claim. *Spence v. Spence*, 368 S.C. 106 (2006), when a complaint is dismissed for failure to state facts sufficient to constitute a cause of action, the dismissal is generally “without” prejudice: the Plaintiff in most cases should be given an opportunity to file and serve an amended complaint. Rules civ. Proc. Rule 12 (b)(6).

Courts do not have decision to dismiss a complaint “with” prejudice for failure to state a claim without at least considering whether to allow leave to amend. *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585, abrogating, *Parodis v. Charleston Cty, School Dist.*, 819 S.E.2d 147.

Forrester v. Smith & Steele Builder's, Inc, 295 S.C. 504, 507, 369 S.E2d 156, 158 (Ct. app 1988), (Stating “a proper reason” to deny a motion to amend could be “bad faith”, undue delay, or prejudice)- in the absence of a proper reason...a denial of leave to amend is an abuse of discretion.) Reverse on grounds of opportunity to amend complaint under Rule 15(a)

- When a court finds a complaint fails to state facts sufficient to constitute a cause of action, Court should give the Plaintiff an opportunity to amend the complaint before filing final order of dismissal SCRcivP-12(b)(6), 15(a)

- Sufficiency of a pleading stating a claim, not the merits.

-Vacating or setting aside dismissal

In this case, the court dismissed “with prejudice and upon Appellant’s request for amended filing ignored several attempts until Appellant filed Writ of Supersedes in which the Respondent returned a “conclusory” reasoning in which is just the same as failing to state a cause of action, which Appellant clearly has.

QUESTION IV

Did the Administrative court err in not allowing an oral argument to further the record?

Where Appellant requested an oral argument, the administrative court did not respond. Where issues raised in proceedings for declaratory judgment are legal and not equitable in nature, the must be tried at law if either party insists upon it, and the right of a jury trial in what is essentially an action at law may not be denied merely because adversary asked that controversy be determined under declaratory procedure. Code 1952 § 10-2001, 10-2009.

Appellant requested guidance from the court in that to remedy prejudice in this case oral

CONCLUSION

Appellant prays this court considers issues raised in Appellant's filings in the lower court as well as in this brief as Appellant properly requested this court to grant motion to be heard on the original record without reproducing any part. Appellant is indigent and was granted motion to proceed without payment which this court should have granted motion to be heard on the original record.

Appellant prays this court upon review of the admissible evidence sees it proper to grant Appellant's brief returning this case to the lower court for further "oral arguments" to expand the record to properly review the record as a whole or simply rule in favor of Appellant by granting default judgment against Respondent. Appellant only wishes that justice prevail in allowing Appellant to practice his religion even at the barest sense. As to this point, the department still discriminates against the Wiccan faith and does not follow any agency policy or constitutional law protecting the practice of religion. Presently not allowing Wiccans to study, worship, or use religious food, equipment, or religious oils and gives no reason other than security in which the agency must demonstrate (which they cannot) that it burdens the agencies normal operations.

November 13, 2020

/s/Gregory Pencille
Gregory Pencille, #312332
Evans CI F4A-275
610 Hwy 9 West
Bennettsville, SC 29512

Appellant, Pro se

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph K. Anderson, III

ALC-Case No. 19-ALJ-04-0277-AP
Appellate Case No. 2019-002115

RECEIVED

Nov 13 2020

SC Court of Appeals

Gregory Pencille #312332 Appellant,

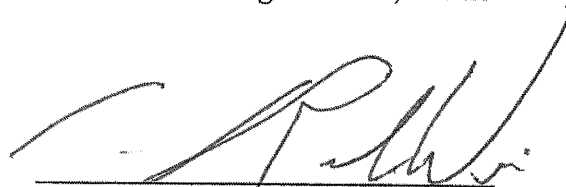
v.

South Carolina Department of Corrections Respondent,

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR. Technically, stylistic changes were made from original brief, but no substantive changes were made.

Nov. 13th, 2020



C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorney for Appellant

RECEIVED

Dec 04 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph K. Anderson, III

ALC Case No. 19-ALJ-04-0277-AP
Appellate Case No. 2019-002115

GREGORY PENCILLE, # 312332,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

FINAL BRIEF OF RESPONDENT

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

Kensy Evans
Deputy General Counsel
Office of General Counsel
South Carolina Department of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-8508

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE ON APPEAL	1
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	3
ARGUMENT	4
THE ADMINISTRATIVE LAW COURT PROPERLY DISMISSED APPELLANT'S APPEAL WHERE APPELLANT'S CLAIMS DID NOT IMPLICATE A STATE-CREATED LIBERTY OR PROPERTY INTERST	4
THE ADMINISTRATIVE LAW COURT PROPERLY DISMISSED APPELLANT'S APPEAL WITH PREJUDICE WHERE THERE WAS NO SUBJECT MATTER JURISDICTION AND PROPERLY ACTED WITHIN ITS DISCRETION IN DECLINING TO ALLOW ORAL ARGUMENTS.....	8
CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES

<i>Al-Shabazz v. State</i> , 338 S.C. 354, 527 S.E.2d 742 (2000).....	4, 9
<i>Hendley v. Budget & Control</i> , 325 S.C. 413, 481 S.E.2d 159 (Ct. App. 1996).....	3
<i>Kentucky Department of Corrections v. Thompson</i> , 490 U.S. 454 (1989)	5
<i>McNeil v. S.C. Dep't of Corr.</i> , 02-ALJ-04-00336-AP (September 5, 2001)	4
<i>Overton v. Bazzetta</i> , 539 U.S. 126 (2003)	8
<i>Porter v. Public Service Comm'n</i> , 333 S.C. 12, 507 S.E.2d 328 (1998)	6
<i>Sandin v. Conner</i> , 515 U.S. 472 (1995).....	6
<i>Simms v. Edmonds</i> , 232 F.3d 889 (4th Cir. 2000)	5
<i>Skipper v. S.C. Dep't of Corr.</i> , 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006).....	5
<i>Spence v. Spence</i> , 368 S.C. 106, 628 S.E.2d 869 (2006).....	9
<i>Sullivan v. S.C. Dep't of Corr.</i> , 355 S.C. 437, 586 S.E.2d 124 (2003).....	4, 9
<i>Town of Castle Rock, Colorado v. Gonzales</i> , 545 U.S. 748 (2005).....	6
<i>Wicker v. S.C. Dep't of Corr.</i> , 360 S.C. 421, 602 S.E.2d 56 (2004).....	4

STATUTES

S.C. Code § 1-23-380.....	3
S.C. Code § 1-23-610.....	3
S.C. Code § 1-32-40.....	7

COURT RULES

SCALC Rule 64	10
---------------------	----

STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT PROPERLY DISMISS APPELLANT'S APPEAL WHERE NO STATE-CREATED LIBERTY OR PROPERTY INTEREST WAS IMPLICATED IN THE CLAIMS RAISED BY APPELLANT?**

- II. DID THE ADMINISTRATIVE LAW COURT PROPERLY ACT IN DISMISSING APPELLANT'S APPEAL WITH PREJUDICE AND DECLINING TO ALLOW ORAL ARGUMENTS?**

STATEMENT OF THE CASE

This matter comes before the Court pursuant to the appeal of Gregory Pencille, an inmate incarcerated with the Department of Corrections. On February 7, 2019, Appellant filed a Step 1 grievance asserting that SCDC discriminated against the Wiccan religious community by denying its requests for religious oils for religious services. On February 22, 2019, the Warden denied the Step 1 grievance, explaining to Appellant that while religious oils can be kept by the Chaplain for the Wiccan community to use during worship services, these items must be approved by the Warden, who in this case disapproved the requested items for security reasons. Thereafter, on March 6, 2019, Appellant filed a Step 2 grievance. On April 19, 2019, Appellant's Step 2 grievance was denied by the Responsible Official who advised Appellant, *inter alia*, that while SCDC is committed to upholding and facilitating the constitutional rights afforded inmates to religious freedom, inmates will be given the opportunity to practice their religious faith to the extent that such practice does not interfere with the security and safety of the institution, staff, or others. Appellant filed a Notice of Appeal in the Administrative Law Court on May 21, 2019. The Department of Corrections filed a Motion to Dismiss on October 22, 2019. Thereafter, on November 27, 2019, the Honorable Ralph K. Anderson, III issued an order granting the Department's Motion to Dismiss, dismissing Appellant's appeal with prejudice. Appellant filed Notice of this appeal on December 19, 2017. Appellant subsequently filed a Motion to Stay, Motion for Issuance of Writ of Supersedeas, and Petition to Compel Response on December 31, 2019. The Honorable Ralph K. Anderson, III issued an order denying Appellant's Motion to Stay, Motion for Issuance of Writ of Supersedeas, and Petition to Compel Response on January 23, 2020.

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 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.

S.C. Code Ann. § 1-23-380(5).

In an appeal of a final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-610(B). "Substantial evidence" is evidence which, considering the record as a whole, would allow a reasonable mind to reach the same conclusion that administrative agency reached. Hendley v. S.C. State Budget & Control Bd., 325 S.C. 413, 481 S.E.2d 159 (Ct. App. 1996). A reviewing court shall not substitute its own judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions that are controlled by errors of law or that are clearly erroneous in view of the substantial evidence on the record as a whole.

Id.

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT PROPERLY DISMISSED APPELLANT'S APPEAL WHERE APPELLANT'S CLAIMS DID NOT IMPLICATE A STATE-CREATED LIBERTY OR PROPERTY INTEREST.

The ALC's jurisdiction to hear appeals from final agency decisions of the South Carolina Department of Corrections is derived entirely from the decision of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). When reviewing SCDC's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Id.* at 377, 527 S.E.2d at 754. Subsequently, the South Carolina Supreme Court clarified the ALC's appellate jurisdiction over inmate appeals in *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 586 S.E.2d 124 (2003). In affirming, as modified, the ALC's *en banc* decision of *McNeil v. S.C. Dep't of Corr.*, 02-ALJ-04-00336-AP (September 5, 2001), the supreme court held the ALC's jurisdiction was limited to (1) cases in which an inmate contends prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; (2) cases in which SCDC has taken an inmate's *state-created* liberty interest in major disciplinary hearings; and (3) cases in which an inmate's confinement implicates a *state-created* liberty interest. *See Sullivan*, 355 S.C. at 443, 586 S.E.2d at 127 (emphasis added).

Moreover, regarding categories (2) and (3), *supra*, the South Carolina Supreme Court has consistently emphasized that the liberty or property interest implicated must be one that is *state-created*. *See Wicker v. S.C. Dep't of Corr.*, 360 S.C. 421, 602 S.E.2d 56 (2004) (emphasizing that the ALC's jurisdiction extends only to those cases involving the denial of "state-created liberty interests" and that the Court's holding [*i.e.*, in *Wicker*] "is not to be viewed as expanding the jurisdiction of the [ALC] in any other circumstance."); *Slezak v.*

S.C. Dep't of Corr., 361 S.C. 327, 605 S.E.2d 506 (2004) (holding that the ALC “may summarily dismiss those appeals that do not implicate an inmate’s *state-created* liberty or property interest”) (emphasis added). Further, this Court has interpreted *Slezak* to mean that where a state-created liberty interest is not implicated in a prisoner appeal, a judge of the ALC “should” dismiss the appeal. *Skipper v. S.C. Dep't of Corr.*, 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006).

This appeal concerns Respondent’s denial of Appellant’s request for religious oils for use during religious ceremonies. *See* R. p. 21. The denial of these implements was due to institutional security concerns. *See* R. p. 11. While Appellant does have a right to engage in ceremonies that conform to his religious beliefs, that right can be limited where doing so serves a legitimate penological interest. *Simms v. Edmonds*, 232 F.3d 889 (4th Cir. 2000). Pursuant to SCDC policy, religious activities may be limited by concerns for the safety of volunteers, staff, and inmates. This is a legitimate penological goal. In this case, the Warden determined that allowing inmates to use oils in religious ceremonies poses a threat to the penological goal of maintaining a safe environment for volunteers, staff, and inmates. As such, Appellant has no right to oils for use in religious ceremonies.

Even assuming, for the sake of argument, that Appellant did have a liberty interest in access to religious oils, that liberty interest is not one which is state-created. The United States Supreme Court, in *Kentucky Department of Corrections v. Thompson*, articulated the test by which a court can determine if a state has created a liberty interest. 490 U.S. 454 (1989). The Court stated that a state creates a liberty interest by (1) “establishing ‘substantive predicates’ to govern official decision-making” and (2) mandating a certain outcome “be reached upon a finding that the relevant criteria have been met.” *Id.* at 462. (internal citation

omitted). In *Town of Castle Rock, Colorado v. Gonzales*, the Supreme Court further clarified the second prong of the *Thompson* test stating that a person is not entitled to, and thus has no property interest in, a benefit “if officials have discretion to grant or deny it.” 545 U.S. 748, 748 (2005). Under the authority granted him by S.C. Code § 24-1-90, the Director of the Department of Corrections has promulgated policies regarding the facilitation of inmates’ right to freedom of religion within SCDC institutions, namely SCDC Policy PS-10.05 “Inmate Religion.” This policy acknowledges that the use of religious oils is common in carrying out certain religious ceremonies, but further provides that it does not mandate that oils be provided to inmates for these purposes. In fact, section 19 of SCDC Policy PS-10.05 specifically provides that oils will be allowed only if approved by the Warden. As was explained to Appellant, his request for religious oils was denied by the Warden due to security concerns. *See* R. p. 11. As such, neither part of the *Thompson* test is satisfied and Appellant has no state-created liberty interest in receiving religious oils for the use in religious ceremonies.

Appellant alleges that SCDC’s denial of his use of religious oils infringes upon his ability to practice his religion. *See* R. pp. 26-27. Restricting inmates’ use of certain items due to security concerns, as done here, does not impose an “atypical or significant hardship on the inmate in the relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 482 (1995). Wardens must take security concerns seriously and balance such concerns with inmate programs. Such action does not alter or exceed Appellant’s sentence in such a manner “as to give rise to protection by the Due Process Clause of its own force.” *Id.*

Even though Appellant’s grievance was properly dismissed due to lack of

jurisdiction, Respondent will address the Appellant's claims that his constitutional rights have been burdened. Appellant's ability to practice any religion he chooses has not been abridged in any way by the Respondent's policy governing the practice of religion by inmates within SCDC institutions. SCDC Policy/Procedure PS-10.05 provides:

Within the limitations imposed on the Agency as a result of its safety and security needs, the South Carolina Department of Corrections (SCDC) will be committed to upholding and facilitating the constitutional rights afforded inmates to religious freedom. Inmates will be given the opportunity to practice their religious faith to the extent that such practice does not interfere with the security and safety of the institution, staff, or others. The South Carolina Department of Corrections will provide necessary programs to facilitate the practice of any recognized religion based on inmate request, need, and available resources.

Appellant cites S.C. Code Ann. § 1-32-40, S.C. Code Ann. § 24-27-500, and alleges that the Respondent's unwillingness to allow him the use of religious oils infringes upon his ability to practice his religion at all in violation of his rights under the First and Fourteenth Amendments of the United States Constitution, 42 U.S.C.A. [sic], and SCDC Policy P.S.-10.05. *See R.* pp. 24-26.

Respondent is aware of the requirements of the law cited by the Appellant and has implemented policies and procedures that meet or exceed Federal and State law requirements. S.C. Code Ann. § 1-32-40 provides:

The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is: (1) in furtherance of a compelling state interest; and (2) the least restrictive means of furthering that compelling state interest.

In the case at bar, Respondent (1) has a compelling interest in ensuring the security and safety necessary to be maintained in a correctional setting and (2) has attempted to achieve those goals through the *least restrictive means* available. In fact, the express stated purpose

of SCDC Policy/Procedure PS-10.05 is “[t]o provide guidelines in the development and monitoring of a religious program which will ensure that the constitutional guarantees of religious freedom for inmates are protected within the limitations of security and safety necessary to be maintained in a correctional setting.” The Respondent has never denied the Appellant the ability to hold whatever religious beliefs he chooses or practice the Wiccan religion. Instead, as is the express policy of the Respondent, within the limitations imposed on the Agency as a result of its safety and security needs, the Respondent will uphold and facilitate the constitutional rights afforded inmates to religious freedom. SCDC’s policies on religion apply to all inmate religions and are not biased towards inmates of any particular faith. Wardens and the correctional staff at the institutional level are in the best position to identify threats and areas of potential abuse with regard to institutional safety thus substantial deference is accorded to the professional judgment of prison administrators, in “defining the legitimate goals of a corrections system” and “determining the most appropriate means to accomplish them.” *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

Because no state-created liberty or property interest is implicated in this case, Administrative Law Judge Anderson’s November 27, 2019 Order dismissing the appeal on this basis was proper and should be upheld.

II. THE ADMINISTRATIVE LAW COURT PROPERLY DISMISSED APPELLANT’S APPEAL WITH PREJUDICE WHERE THERE WAS NO SUBJECT MATTER JURISDICTION AND PROPERLY ACTED WITHIN ITS DISCRETION IN DECLINING TO ALLOW ORAL ARGUMENTS.

There was no abuse of discretion in the ALC’s dismissal of Appellant’s appeal with prejudice because it had no subject matter jurisdiction over the matter. Appellant argues that the Administrative Law Court erred in dismissing his appeal with prejudice. *See R. p. 43.*

Appellant first contends that the ALC dismissed his appeal due to a failure to state a claim pursuant to Rule 12(b)(6)¹, SCRCP. *Id.* This is not the case; it was due to a lack of subject matter jurisdiction that the ALC correctly dismissed the Appellant's grievance. *See R.* pp. 39-41. As discussed herein, the ALC's jurisdiction to hear this matter was derived from the decisions of the South Carolina Supreme Court in *Al-Shabazz v. State* and *Sullivan v. SCDC*. Since none of those items enumerated in *Sullivan* were implicated by the Appellant's claim and the ALC was simply without jurisdiction to rule on any of the issues raised by the Appellant. With regard to the dismissal being with prejudice, Appellant argues that it was an abuse of discretion for the ALC to dismiss his case with prejudice without allowing him leave to amend. *See R.* p. 43. The Supreme Court of South Carolina has held that typically a plaintiff is given an opportunity to file and serve an amended complaint; however "if it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations" the complaint may be dismissed with prejudice. *Spence v. Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). The sole basis for Appellant's grievance and subsequent appeal, is the denial of oils for religious ceremonies, implements for which he enjoys no state-created interest. Thus, in this case Appellant could not possibly amend his grievance to implicate a state-created interest over which the ALC has jurisdiction.

The ALC properly acted within its discretion in not allowing oral arguments. Appellant also argues that the ALC erred in not allowing an oral argument. The Rules of

¹ Appellant also asserts that Respondent's Motion to Dismiss in the ALC fails to comply with Rules 7(b)(2) and 10(e) of the South Carolina Rules of Civil Procedure because it was "unsworn" and "unauthenticated by affidavit". *See R.* p. 43. To the extent that a response is required to this assertion, Respondent puts forth to the Court that there is no requirement under either SCRCP 7(b)(2) or 10(e) that motions be verified or accompanied by affidavit.

Procedure for the Administrative Law Court provide that whether or not to allow oral arguments is within the Administrative Law Judge's discretion. "Oral argument will ordinarily not be ordered by the Administrative Law Judge unless the proceeding involves a novel issue or a question of exceptional importance." SCALC Rule 64. Here, the ALC did not find that Appellant's case involved a "novel issue or question of exceptional importance" sufficient to move the court to "exercise its discretion and grant oral arguments." *See* R. p. 55. The ALC further found that since Appellant's allegations did not implicate a state-created liberty or property interest the ALC did not have jurisdiction to grant oral arguments. *Id.* Therefore, there the ALC did not err in not allowing oral arguments.

CONCLUSION

For the foregoing reasons, the Court should affirm the Administrative Law Court's decision below.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS



Kensey Evans
Deputy General Counsel
Office of General Counsel
South Carolina Department of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-8508

December 4, 2020

RECEIVED

Dec 04 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph K. Anderson, III

ALC Case No. 19-ALJ-04-0277-AP
Appellate Case No. 2019-002115

GREGORY PENCILLE, # 312332,

APPELLANT,

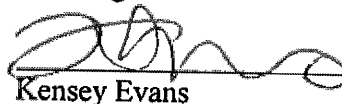
v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Kensey Evans
Deputy General Counsel
Office of General Counsel
South Carolina Department of Corrections
Post Office Box 21787
Columbia, S. C. 29221
(803) 896-8508

December 4, 2020

RECEIVED

Nov 13 2020

SC Court of Appeals

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph K. Anderson, III

**ALC-Case No. 19-ALJ-04-0277-AP
Case No. 2019-002115**

Gregory Pencille #312332 Appellant,

v.

South Carolina Department of Corrections Respondent,

FINAL REPLY BRIEF

**C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. Bar # 006188
(864) 229-5010**

Attorney for Appellant

Index

	Page:
Table of Authorities	ii
Argument:	
Question I	
Did the Administrative Law Court properly dismiss Appellant's appeal by finding that Appellant's claims did not implicate a state-created or property interest?	1
Question II	
Did the Administrative Law Court properly dismiss Appellant's appeal with prejudice where the Court concluded there was no subject matter jurisdiction and properly acted within its discretion in declining to allow oral arguments?	5
Conclusion	7

Table of Authorities

Cases:	Page:
<i>Al-Shabazz v. State</i> , 338 S.C. 354, 527 S.E.2d 742 (2000)	6
<i>Crowe v. Leeke</i> , 273 S.C. 763, 259 S.E.2d 614 (1979)	5
<i>Hammons v. Saffle</i> , 348 F.3d 1250 (10 th Cir. 2003)	4
<i>Olim v. Wakinekona</i> , 461 U.S. 238 (1983)	3
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	4
<i>Skipper v. S.C. Dep't of Corr.</i> , 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006)	5
<i>United States v. Denver & R G R Co</i> , 191 U.S. 84 (1903)	4
<i>White v. Fauver</i> , 219 N.J. Super. 170, 530 A.2d 37 (App. Div. 1987)	3
 Statutes:	
South Carolina Code § 1-32-10	2, 3
South Carolina Code § 1-32-30	2
South Carolina Code § 24-27-500	1, 2, 3, 6, 7
 Constitutional Provisions:	
Article I, § 2 of the Constitution of the State of South Carolina	3, 6
First Amendment, United States Constitution	3, 7

Argument

Question I

Did the Administrative Law Court properly dismiss Appellant's appeal by finding that Appellant's claims did not implicate a state-created or property interest?

Appellant agrees with the basic principles of law the Respondent set forth in its brief. The application of the law to the facts of this case is the difference. First, this Court should note the appeal was dismissed on the ground that the Administrative Law Court did not have jurisdiction to hear the case. The merits of the claim of appellant are not in issue. As such, the claims, on their face, must be accepted as true. The basic allegation in the grievance is that the Department of Corrections, without a factual basis, banned the use of an oil as part of religious services of Wiccans while allowing the use of oils in other religious services. Rec. on App at 12-14.

The record in this case establishes that the only reason given for denying the use of oils was the vague statement that religious practices will be accommodated "to the extent that such practice does not interfere with security and safety" Rec. on App. at 9. No reason is given as to why the oil used in Wiccan services is more dangerous or a safety hazard as opposed to other religious services use of oil. South Carolina Code § 24-27-500(B) also specifically places the burden on the Department of Corrections to make reasonable accommodations for religious practices.

The Respondent correctly states that religious practices "can be limited where doing so serves a legitimate penological interest." Br. of Resp. at 5. Appellant has no quarrel with this general proposition. The Respondent argues the warden has "determined that allowing inmates

to use oils in religious services poses a threat to the penological goal of maintaining a safe environment for volunteers, staff, and inmates.” Br. at 5. The Respondent then erroneously concludes, “As such, Appellant has no right to oils for use in religious ceremonies.” The Respondent is wrong in two regards. First, the facts, as alleged in this matter, refute the allegation that the warden has determined that the use of oil in all religious services has been deemed to be a threat. The allegations in this record show that other religious groups are allowed to use oils. So, the ban on religious oils is not a ban as to all religious practices, but a ban on a religious practice of one specific religion. Second, even if the ban applies to all religious practices, the Respondent has failed to address how such a ban does not violate South Carolina Code § 24-27-500, which by statute, makes applicable to the South Carolina Department of Corrections the provisions of the South Carolina Religious Freedom Act. South Carolina Code § 1-32-10, *et seq.* South Carolina Code § 1-32-30 specifically states the law provides a “claim or defense whose exercise of religion is substantially burdened by the State.” The obligation is upon the State to establish a compelling interest in denying any inmate the basic tenets of their religious practices. Here, the State has completely failed in that effort.

First, the practice of using oils by the Wiccan community had previously been approved. By Memorandum dated September 22, 2014, the Warden approved the use of oils in the Wiccan services. Rec. on App at 29. Over four years later, by Memorandum dated November 20, 2018, the previously approved practice was denied. Record on App at 30. The record shows no problems with the previous use of oils nor does the record show the composition of the oil changed over the years. Second, with no facts given to support the conclusion, the Warden disapproved the use of oil in the Wiccan services based on some unknown reason or facts related

to the alleged safety of the institution. If a State agency is able to discriminate against a particular religion without providing a factual basis for the discrimination, then the application of the Religious Freedom Restoration act in our State would be a nullity. No person deprived of their right to exercise their religious practices would ever be able to use the act to vindicate their rights. As the New Jersey court said, "However, if the decision maker is not required to base its decision on objective and defined criteria, but instead can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected liberty interest." *White v. Fauver*, 219 N.J. Super. 170, 179, 530 A.2d 37, 41 (App. Div. 1987). *See also, Olim v. Wakinekona*, 461 U.S. 238 (1983). This Court should require the Department of Corrections to give a factually sufficient reason, if they can, to deny the Wiccans their right to use oils in their religious services. To hold otherwise would relieve the Department of Corrections of the obligation to have having a valid reason for denying the practice.

Mr. Pencille argues that Article I, § 2 of the Constitution of the State of South Carolina and the First Amendment to the United States Constitution are sufficient reasons to find a state-created liberty interest to be protected in this litigation. If that position is rejected, the act of the General Assembly in passing South Carolina Code § 24-27-500 surely establishes a state-created liberty interest in freedom to practice the religion of one's choice.

The Respondent further argues an inmate does not have a property interest if the official has the discretion to deny the benefit. Br. of Resp. At 6. An official does not have the arbitrary power to deny an inmate the right to exercise a religious practice. In a case originating from South Carolina, the United States Supreme Court said, "It is too late in the day to doubt that the

liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Once Mr. Pencille has established a deprivation of this right to a religious practice, the burden is upon the Department of Corrections to prove that the practice does have a negative impact on the Department of Corrections. Mr. Pencille does not have the burden of proving the negative. As the United States Supreme Court said over a century ago, “[W]hen the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative.” *United States v. Denver & R G R Co*, 191 U.S. 84, 92 (1903). Mr. Pencille is not in possession of the facts to show a need to regulate the use of Wiccan religious oils as opposed to the oil of other religions.

The issue of use of religious oils within a Department of Corrections is not without precedent. In *Hammons v. Saffle*, 348 F.3d 1250 (10th Cir. 2003), a Muslim inmate in the Oklahoma Department of Corrections brought an action to require the Department of Correction to permit him to keep religious oils in his cell for use during his five times a day daily prayers. While the Court denied his right to have religious oils in his cell, the Court did note that the Department of Corrections had reasonably accommodated him by permitting the use of religious oils at his religious services. The use of the oil was supervised by a volunteer Chaplin. This practice, recognized by the Tenth Circuit as being a reasonable accommodation, is precisely what Mr. Pencille is seeking in his grievance.

Mr. Pencille also alleges that he was transferred to another institution in retaliation for his religious beliefs. Again, the fact that he alleges this must be accepted as true in this case as the state prevailed on a Motion to Dismiss and not on the merits of the claim. This Court has said, "Absent an atypical and significant hardship on the inmate, or an arbitrary, capricious, or biased decision by the prison, the court has no authority to interfere with inmate housing decisions." *Skipper v. S.C. Dep't of Corr.*, 370 S.C. 267, 272, 633 S.E.2d 910, 913 (Ct. App. 2006). What Mr. Pencille has alleged here is that when the Department of Corrections transferred him, they did so to prevent him from exercising his particular religious beliefs. This allegation, if established, would in fact be an "arbitrary, capricious or biased decision." This Court in *Skipper* recognized that *Crowe v. Leeke*, 273 S.C. 763, 259 S.E.2d 614 (1979) establishes such to be the law. Under the Religious Freedom Restoration Act, the Department of Corrections can no more transfer him because of their animosity to his religious beliefs than they can deny him his right to practice a religious belief with which they disagree. Mr. Pencille has alleged a state-created liberty interest that is recognized by the Courts and the legislation of our state.

Question II

Did the Administrative Law Court properly dismiss Appellant's appeal with prejudice where the Court concluded there was no subject matter jurisdiction and properly acted within its discretion in declining to allow oral arguments?

The appeal in this case is within the jurisdiction of the Administrative Law Court. The Respondent contends that Mr. Pencille can never amend his pleading in such a matter to afford the Administrative Law Court jurisdiction in this case. Br. of Resp. at 9. Mr. Pencille does not

need to amend any of his pleadings to allege the deprivation of a state-created property right. Mr. Pencille has a state-created property right in his right to practice his religion even while incarcerated.

The South Carolina Supreme Court held, “Courts traditionally have adopted a ‘hands off’ doctrine regarding judicial involvement in prison disciplinary procedures and other internal prison matters, although they must intercede when infringements complained of by an inmate reach constitutional dimensions.” *Al-Shabazz v. State*, 338 S.C. 354, 382, 527 S.E.2d 742, 757 (2000). Here, the only complaint Mr. Pencille raises is a constitutional violation. The constitutional violation is one that the South Carolina legislature specifically applied to the Department of Corrections in South Carolina Code § 24-27-500.

The allegation that the Department of Corrections is depriving Mr. Pencille of his right to practice the tenets of his religion falls within the *Al-Shabazz* decision. He has alleged his religion is being treated differently from other religions. He has alleged he is being transferred not because of a Department of Corrections policy, but to punish him for his religious beliefs. A more specific deprivation of constitutional rights could not have been alleged.

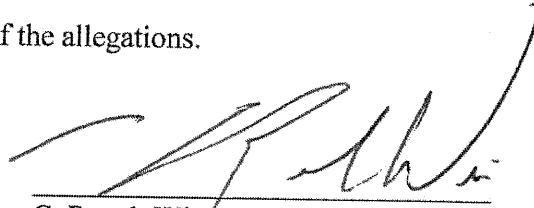
The Brief of Respondent does not explain how the use of oils by some religious groups but depriving the same use to the religion of Mr. Pencille is not a deprivation of a state-created liberty interest. The brief simply states it is not a state-created liberty interest. Simply saying it is not so with no explanation does not make it not so. Just as the Department of Corrections gave no reason as to why the Wiccan use of oils created a safety hazzard, the Respondent gave no reason why depriving Mr. Pencille the use of such oils does not violate a state-created property right. Both have conclusions with no supporting evidence.

As Mr. Pencille alleged a deprivation of a state-created right under Article I, § 2 of the Constitution of the State of South Carolina the First Amendment to the United States Constitution, as applied to the Department of Corrections through South Carolina Code § 24-27-500, the Administrative Law Court has jurisdiction to hear this case.

Conclusion

For the foregoing reasons, this Court should remand the matter to the Administrative Law Court for a full hearing and ruling on the merits of the allegations.

November 13th, 2020



C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 6188

Attorney for Gregory Thomas Pencille

RECEIVED

Nov 13 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph K. Anderson, III

ALC-Case No. 19-ALJ-04-0277-AP
Case No. 2019-002115

Gregory Pencille #312332 Appellant,

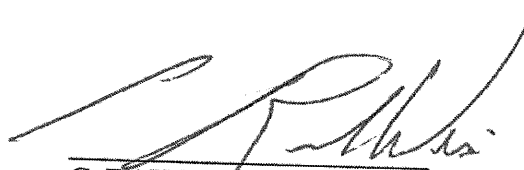
v.

South Carolina Department of Corrections Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

November 13, 2020



C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorneys for Appellant



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

September 27, 2023

Ms. Christina Catoe Bigelow, Esquire
Ms. Kensey Evans, Esquire
4444 Broad River Road
PO Box 21787

Mr. Clarence Rauch Wise, Esquire
305 Main St.
Greenwood SC 29646

Re: Gregory Pencille, #312332 v. SCDC (2)
Appellate Case No. 2019-002115

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in cursive script, reading "Jenny A. Kitchings".

CLERK

cc: The Honorable Ralph King Anderson, III

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Gregory Pencille, #312332, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2019-002115

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Unpublished Opinion No. 2023-UP-321
Heard October 5, 2022 – Filed September 27, 2023
Withdrawn, Substituted and Refiled November 1, 2023

AFFIRMED AS MODIFIED

Clarence Rauch Wise, of Greenwood, for Appellant.

Christina Catoe Bigelow and Kensey Evans, both of
Columbia, for Respondent.

PER CURIAM: Gregory Pencille appeals the Administrative Law Court's (ALC's) order summarily dismissing his appeal of the South Carolina Department of Corrections' (SCDC's) determination that he was not entitled to the use of religious oils. Pencille argues the ALC erred in (1) determining it did not have

jurisdiction to review his appeal, (2) granting SCDC's motion to dismiss without admitting evidence, (3) dismissing his appeal with prejudice, and (4) refusing to hold oral argument. We affirm as modified.

FACTS AND PROCEDURAL HISTORY

In November 2018, the senior chaplain at Lee Correctional Institution (Lee Correctional) submitted a written request (the 2018 request) to the warden and associate warden for approval to purchase religious oils for Lee Correctional's Wiccan community's use. As noted in the 2018 request, a similar purchase request was approved in 2014 (the 2014 request). The associate warden approved the 2018 request but the warden denied it without explanation. Thereafter, Pencille, the Wiccan coordinator at Lee Correctional, submitted a written request seeking reconsideration of the denial. Pencille alleged the warden discriminated against the Wiccan religion by denying the 2018 request while allowing other religious communities at Lee Correctional to use religious oils. The warden did not respond to Pencille's inmate request.

Pencille subsequently filed a step one grievance, alleging Lee Correctional administrative staff discriminated against the Wiccan community by refusing to respond to his requests for use of religious oils in the Wiccan community's religious services. He requested approval of the use of religious oils in the Wiccan community's services and that corrective action be taken against the administrative staff. In support of his request, he cited to SCDC Policy PS-10.05 (2015), the First Amendment of the United States Constitution, the federal Religious Freedom Restoration Act (RFRA),¹ and federal caselaw addressing claims raised under RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA)² and constitutional challenges to state prison regulations. The warden denied Pencille's step one grievance, explaining the previous warden denied the 2018 request "due to security reasons."

Pencille filed a step two grievance, arguing the denial of his requests was unconstitutional and against SCDC policy by citing to his step one grievance. SCDC denied Pencille's step two grievance, stating the warden's denial of his 2018 request was pursuant to SCDC Policy PS-10.05, which provided:

Within the limitations imposed on [SCDC] as a result of

¹ 42 U.S.C §§ 2000bb to 2000bb-4.

² 42 U.S.C §§ 2000cc to 2000cc-5.

its safety and security needs, [SCDC] will be committed to upholding and facilitating the constitutional rights afforded to inmates to religious freedom. Inmates will be given the opportunity to practice their religious faith to the extent that such practice does not interfere with the security and safety of the institution, staff, or others. [SCDC] will provide necessary programs to facilitate the practice of any recognized religion based on inmate request, need, and available resources.

Pencille appealed SCDC's denial of his step two grievance to the ALC, arguing SCDC violated the Equal Protection Clause of the United States Constitution by denying the Wiccan community access to sacramental oil for security reasons, while allowing other religious groups to use sacramental oil. In support of his argument, Pencille referred to the caselaw cited in his step one grievance. In his supporting memorandum to the ALC, Pencille framed his argument as whether SCDC "violate[d his and the Wiccan community's] religious rights, protection of liberty and property, equal protection, and due process" as "protected by the [United States] constitution, State Constitution, 1st and 14th Amendments, 42 U.S.C.A., and SCDC Policy PS-10.05." Specifically, Pencille asserted evidence showed SCDC burdened the free exercise of his religion by not allowing him access to oils necessary to practice his religion and by transferring him to a correctional institution where the practice of the Wiccan religion was "non-existent" and the chaplain was "prejudiced" against the religion. SCDC filed a motion to dismiss, contending Pencille's allegations did not implicate a state-created liberty interest and therefore, the ALC lacked subject matter jurisdiction to hear his claims. In his response to SCDC's motion to dismiss, Pencille argued constitutional violations caused by state agency actions implicated a state-created liberty interest.

The ALC summarily dismissed Pencille's appeal with prejudice, finding Pencille's "desire to obtain religious oils d[id] not implicate a state-created liberty interest." In support of its decision, the ALC cited to *Slezak v. South Carolina Department of Corrections*,³ stating our supreme court found in that case "an inmate's interest in 'religious tapes' did not implicate a state-created liberty interest." The ALC further found Pencille's allegations regarding his transfer were not properly before the ALC because federal RLUIPA claims do not implicate a state-created liberty

³ 361 S.C. 327, 605 S.E.2d 506 (2004).

interest. It noted that under *Skipper v. South Carolina Department of Corrections*,⁴ the ALC has limited authority to interfere with inmate housing decisions.

Pencille filed a response to the ALC's order, arguing dismissal with prejudice was procedurally flawed and it was presumed that all issues not addressed in SCDC's motion were granted in his favor. Pencille stated his response was "not in any way or form to be construed as a motion to reconsider." The ALC did not respond to Pencille's response.

After filing his notice of appeal with this court, Pencille filed a "motion to stay, issuance of writ of supersedeas, and petition to compel a response" with the ALC. Pencille also requested the ALC, under SCALC Rule 10, require SCDC to respond to his allegations and grievances. The ALC denied Pencille's motion, finding Pencille's arguments were abandoned. On the merits, the ALC found SCALC Rule 10 did not apply to Pencille's case because it involved an appeal, not a contested case; summary dismissal was appropriate because the ALC lacked subject matter jurisdiction over Pencille's appeal; Pencille's appeal did not involve any matter that would cause the ALC to exercise its discretion and hold oral arguments; and Pencille failed to establish a writ of supersedeas was necessary to preserve the jurisdiction of the appeal or prevent the issue from becoming moot. This appeal followed.

ISSUES ON APPEAL

1. Did SCDC violate Pencille's and the Wiccan community's religious, protection of liberty and property, equal protection, and due process rights, which are protected by the First and Fourteenth Amendments of the United States Constitution, federal statute, and SCDC internal policy?
2. Did the ALC err in granting SCDC's motion to dismiss without admitting evidence?
3. Did the ALC err in dismissing Pencille's appeal with prejudice?
4. Did the ALC err in refusing to hold oral arguments to further the record?

STANDARD OF REVIEW

⁴ 370 S.C. 267, 272, 633 S.E.2d 910, 913 (Ct. App. 2006).

Section 1-23-610(B) of the South Carolina Code (Supp. 2022) sets forth the standard of review for this court when sitting in review of a decision by the ALC. *See S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 258, 659 S.E.2d 233, 234 (Ct. App. 2008).

The court of appeals may . . . reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because 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.

S.C. Code Ann. § 1-23-610(B). "The review of the administrative law [court]'s order must be confined to the record." *Id.* "In an appeal of the final decision of an administrative agency, the standard of appellate review is whether the AL[C]'s findings are supported by substantial evidence." *Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 417, 665 S.E.2d 231, 234 (Ct. App. 2008). "However, when the issue on review raises a question of law, this court 'may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law.'" *Torrence v. S.C. Dep't of Corr.*, 433 S.C. 633, 642-43, 861 S.E.2d 36, 41 (Ct. App. 2021) (quoting *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014)).

LAW AND ANALYSIS

Pencille argues the ALC erred in summarily dismissing his claim for lack of subject matter jurisdiction when his claim implicated a state-created liberty interest. We agree in part and disagree in part.

Initially, as to Pencille's arguments under the South Carolina Religious Freedom Act (SCRFA)⁵ and section 24-27-500 of the South Carolina Code (2007),⁶ we find these claims are unpreserved for appellate review. In his brief of appellant filed with this court, Pencille cites to these state statutes as well as federal RFRA and RLUIPA statutes and caselaw in support of his state-created liberty interest argument; however, his state claims were neither raised to nor ruled upon by the ALC. Although Pencille cited to federal RFRA and RLUIPA statutes and caselaw on his inmate grievance forms and in his filings to the ALC, he failed to cite to SCRFA or section 24-27-500. The ALC did not expressly rule on Pencille's SCRFA claim. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [ALC] to be preserved for appellate review."); *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate

⁵ S.C. Code Ann. §§ 1-32-10 to -60 (2005). Under SCRFA,

The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is:

- (1) in furtherance of a compelling state interest; and
- (2) the least restrictive means of furthering that compelling state interest.

S.C. Code Ann. § 1-32-40.

⁶ *See* S.C. Code Ann. § 24-27-500 ("For the purposes of Chapter 32 of Title 1: (A) A state or local correctional facility's regulation must be considered 'in furtherance of a compelling state interest' if the facility demonstrates that the religious activity: (1) sought to be engaged by a prisoner is presumptively dangerous to the health or safety of that prisoner; or (2) poses a direct threat to the health, safety, or security of other prisoners, correctional staff, or the public. (B) A state or local correctional facility regulation may not be considered the 'least restrictive means' of furthering a compelling state interest if a reasonable accommodation can be made to protect the safety or security of prisoners, correctional staff, or the public.").

court will review those issues and arguments."). The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. To the extent Pencille expands upon his SCRFA argument in his reply brief, we find this argument is not properly before this court. *See Spivey ex rel. Spivey v. Carolina Crawler*, 367 S.C. 154, 161, 624 S.E.2d 435, 438 (Ct. App. 2005) (declining to consider issues raised for the first time in the appellants' reply brief when not raised in their initial brief). Accordingly, we find Pencille's SCRFA and section 24-27-500 arguments are unpreserved.⁷

"Admittedly, prisoners do not shed all constitutional rights at the prison gate, but '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Sandin v. Conner*, 515 U.S. 472, 485 (1995) (citation omitted) (quoting *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)). "Courts traditionally have adopted a 'hands off' doctrine regarding judicial involvement in prison disciplinary procedures and other internal prison matters, although they must intercede when infringements complained of by an inmate reach constitutional dimensions." *Skipper*, 370 S.C. at 274, 633 S.E.2d at 914 (quoting *Al-Shabazz v. State*, 338 S.C. 354, 382, 527 S.E.2d 742, 757 (2000)). "[A]n inmate's complaint must encompass an infringement of a liberty interest that imposes an atypical and significant hardship on the inmate to trigger due process guarantees and judicial review." *Id.*

A claim that implicates a state-created liberty or property interest is not required for the ALC to have subject matter jurisdiction over the appeal. However, the ALC is not required to hold a hearing in every matter and may summarily dismiss an inmate's grievance if it does not implicate a state-created liberty or property interest sufficient to trigger procedural due process guarantees.

Allen v. S.C. Dep't of Corr., 439 S.C. 164, 171, 886 S.E.2d 671, 674 (2023).

⁷ In its order summarily dismissing Pencille's claim, the ALC addressed Pencille's allegations regarding his transfer to another correctional institution as raising a RLUIPA claim. We find Pencille failed to raise this allegation in his step one or step two grievance and therefore any claims relating to his transfer were not properly before the ALC. *See Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 324, 785 S.E.2d 600, 611 (Ct. App. 2016) ("An issue that is not raised to an administrative agency is not preserved for appellate review by the ALC.").

"Summary dismissal may be appropriate where the inmate's grievance does not implicate a state-created liberty or property interest." *Slezak*, 361 S.C. at 331, 605 S.E.2d at 508.

Administrative matters subject to review by the ALC "typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status." *Al-Shabazz*, 338 S.C. at 369, 527 S.E.2d at 750. "[S]tates may create liberty interests which are protected by the Due Process Clause, but . . . 'these interests will be generally limited to freedom from restraint which . . . impose[] *atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.*'" *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 442, 586 S.E.2d 124, 126 (2003) (third alteration in original) (quoting *Sandin*, 515 U.S. at 484), *abrogated on other grounds by Allen*, 439 S.C. at 169, 886 S.E.2d at 673. In *Prieto v. Clarke*, the United States Court of Appeals for the Fourth Circuit clarified, "*Sandin* holds that, while a state statute or policy may 'create liberty interests' giving rise to Due Process protection, this is so only if the denial of such an interest 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" 780 F.3d 245, 249 (4th Cir. 2015) (quoting *Sandin*, 515 U.S. at 484); *see also Halcomb v. Ravenal*, 344 F. Supp. 3d 844, 848 (D.S.C. 2018) ("To demonstrate a prisoner has such an interest, and invoke the procedural protections of the Fourteenth Amendment Due Process Clause, the prisoner must show (1) denial of 'an interest that can arise either from the Constitution itself or from state laws or policies,' and that (2) this denial imposed on him an 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life.'" (quoting *Lovelace v. Lee*, 472 F.3d 174, 202 (4th Cir. 2006))), *rev'd and remanded sub nom. Halcomb v. Ravenell*, 992 F.3d 316 (4th Cir. 2021); *Skipper*, 370 S.C. at 274, 633 S.E.2d at 914 ("[A]n inmate's complaint must encompass an infringement of a liberty interest that imposes an atypical and significant hardship on the inmate to trigger due process guarantees and judicial review.").

In *Sullivan*, an inmate challenged SCDC's denial of his admission to the Sex Offender Treatment Program. 355 S.C. at 440, 586 S.E.2d at 125. The ALC summarily dismissed the inmate's appeal. *Id.* Our supreme court found the inmate's grievance did not arise in any of the "'typical' ways enumerated in *Al-Shabazz*; it [wa]s not the result of a disciplinary proceeding and d[id] not involve sentence-related credits or custody status. [The inmate]'s claim [wa]s most accurately described as a 'condition of confinement claim.'" *Id.* at 443, 586 S.E.2d at 127. The court affirmed the ALC's dismissal of the inmate's appeal, finding

Article XII, Section 2 of the South Carolina Constitution⁸ did not require SCDC to grant the inmate enrollment in the Sex Offender Treatment Program because to do so, would make the ALC and the judicial branch "micromanagers of the prison system." *Id.* at 444, 586 S.E.2d at 127. Further, the court determined denying the inmate access to the program "d[id] not impose an 'atypical or significant hardship' on [the inmate] as all other inmates designated as sex offenders [we]re afforded the same access to treatment." *Id.* at 445, 586 S.E.2d at 128. Nevertheless, our supreme court noted,

[A] condition of confinement *could* implicate a state[-]created liberty interest However, we adhere to *Sandin's* pronouncement that "these interests will generally be limited to freedom from restraint which . . . imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life."

Id. at 445 n.5, 586 S.E.2d at 128 n.5 (fourth alteration in original) (quoting *Sandin*, 515 U.S. at 484).

In *Skipper*, our supreme court held the appealing inmate did not have a liberty interest in prison employment. 370 S.C. at 275-78, 633 S.E.2d at 915-16. The court found the work program at issue was statutorily created; however, participation in the work program was "a privilege, not a right." *Id.* at 275-76, 633 S.E.2d at 915. Further, it determined that "[the] employment program d[id] not meet the test for a state-created liberty interest as outlined in *Sandin* because it d[id] not present an atypical, significant hardship on inmates who [were] not permitted to participate." *Id.* at 276, 633 S.E.2d at 915.

In *Wicker v. South Carolina Department of Corrections*,⁹ the appealing inmate participated in the same work program at issue in *Skipper*. However, in *Wicker*, our supreme court determined "the state's statutory mandate that inmates be paid the prevailing wage create[d a liberty] interest, which may not be denied without due process." 360 S.C. at 424, 602 S.E.2d at 58. Our supreme court cautioned that its holding was "extremely limited and is not to be viewed as expanding the

⁸ "The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates." S.C. Const. art. XII, § 2.

⁹ 360 S.C. 421, 423, 602 S.E.2d 56, 57 (2004).

jurisdiction of the AL[C] in any other circumstance." *Id.* at 424 n.1, 602 S.E.2d at 58 n.1.

We hold Pencille's claim did not implicate a state-created liberty interest such that it invoked the procedural protections of the Due Process Clause. Similar to the claim raised in *Sullivan*, Pencille's appeal raised a challenge to a condition of confinement—his ability to practice the Wiccan religion with the use of religious oils. *See* 355 S.C. at 443, 586 S.E.2d at 127. As noted by our supreme court in *Sullivan*, state-created liberty interests are not limited to sentence calculation issues and disciplinary decisions; thus, "a condition of confinement *could* implicate a state[-]created liberty interest." *Id.* at 445 n.5, 586 S.E.2d at 128 n.5. "However . . . 'these interests will generally be limited to freedom from restraint which . . . imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Id.* (second alteration in original) (quoting *Sandin*, 515 U.S. at 484). Our supreme court has adopted the standard articulated in *Sandin* to determine whether a claim implicates a state-created liberty interest that affords due process protections.¹⁰ *See id.* at 442, 586 S.E.2d at 126 ("[S]tates may create liberty interests which are protected by the Due Process Clause, but . . . 'these interests will be generally limited to freedom from restraint which . . . imposes *atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.*'" (emphasis in original) (quoting *Sandin*, 515 U.S. at 484)).

Section 24-27-500 and SCDC Policy PS-10.05 create a liberty interest in religious practice. Section 24-27-500 applies SCRFA to prison regulations and SCDC Policy PS-10.05 provides, "Inmates will be given the opportunity to practice their religious faith to the extent that such practice does not interfere with the security and safety of the institution, staff, or others." Accordingly, we find inmates have an interest in religious practice arising from state law and policy.

Although we determine the first prong of the *Sandin* analysis is met, we find SCDC's denial of Pencille's request to use religious oils in the practice of his religion for security reasons did not present an atypical or significant hardship in relation to the ordinary incidents of prison life. *See Sullivan*, 355 S.C. at 442, 586 S.E.2d at 126; *see also Halcomb*, 344 F. Supp. 3d at 848 ("To demonstrate a

¹⁰ The ALC relied on our supreme court's holding in *Slezak* to find Pencille's claim did not implicate a state-created liberty interest; however, we find the ALC's reliance on this case was misplaced because the items seized by SCDC in *Slezak* were "educational" cassette tapes, not "religious" cassette tapes. 361 S.C. at 331-32, 605 S.E.2d at 508.

prisoner has such an interest, and invoke the procedural protections of the Fourteenth Amendment Due Process Clause, the prisoner must show (1) denial of 'an interest that can arise either from the Constitution itself or from state laws or policies,' and that (2) this denial imposed on him an 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life.'" (alteration in original) (footnote omitted) (quoting *Lovelace*, 472 F.3d at 202)); *see also Prieto*, 780 F.3d at 249 ("*Sandin* holds that, while a state statute or policy may 'create liberty interests' giving rise to Due Process protection, this is so only if the denial of such an interest 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'"). Under SCDC Policy PS-10.05, SCDC affords inmates "the opportunity to practice their religious faith *to the extent that such practice does not interfere with the security and safety of the institution, staff, or others.*" (emphasis added). While Pencille may have had an expectation in the practice of his religion, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Sandin*, 515 U.S. at 485 (alteration in original) (quoting *Jones*, 433 U.S. at 125); *see also Sullivan*, 355 S.C. at 445, 586 S.E.2d at 128 (determining that denying the inmate access to the work program "[id] not impose an 'atypical or significant hardship' on [the inmate] as all other inmates designated as sex offenders [we]re afforded the same access to treatment."); *Skipper*, 370 S.C. at 276, 633 S.E.2d at 915 (determining "[the] employment program [id] not meet the test for a state-created liberty interest as outlined in *Sandin* because it [id] not present an atypical, significant hardship on inmates who [were] not permitted to participate."). SCDC's denial of Pencille's request for the use of religious oils was due to security concerns. Due to his incarceration, Pencille is not entitled to the use of substances—even those used for religious practice—deemed a security threat.

Based on the foregoing, we find Pencille's claim did not implicate a state-created liberty interest giving rise to procedural protection under the Due Process Clause and we therefore hold the ALC did not err in summarily dismissing Pencille's claim.¹¹ *See Allen*, 439 S.C. at 171, 886 S.E.2d at 674 ("[T]he ALC is not required

¹¹ Pencille is correct that federal law protects inmates against government action that imposes a substantial burden on their free exercise of religion unless the government demonstrates a compelling interest and shows it imposed the least restrictive means necessary to further that interest. *See Nance v. Miser*, 700 F. App'x 629, 630-31 (9th Cir. 2017) (noting this aspect of federal RFRA and RLUIPA). Even so, we are not aware of any authority granting jurisdiction over

to hold a hearing in every matter and may summarily dismiss an inmate's grievance if it does not implicate a state-created liberty or property interest sufficient to trigger procedural due process guarantees.").

Although we affirm the ALC's holding that Pencille's claim did not implicate a state-created liberty interest, based on our supreme court's recent clarification in *Allen*, we find the ALC erred in determining it did not have subject matter jurisdiction over Pencille's claim. *See Allen*, 439 S.C. at 171, 886 S.E.2d at 674 ("A claim that implicates a state-created liberty or property interest is not required for the ALC to have subject matter jurisdiction over the appeal.").

CONCLUSION

Accordingly, the ALC's order is

AFFIRMED AS MODIFIED.¹²

KONDUROS, HEWITT, and VINSON, JJ., concur.

such a claim to the ALC, especially when that court is sitting in an appellate capacity as it was here.

¹² In light of our disposition, we decline to address Pencille's remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive).

RECEIVED

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

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

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

Petition for Rehearing

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.

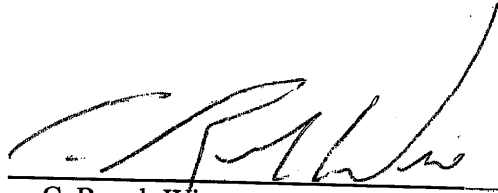
2. This Court erred in failing to remand the case back to the Administrative Law Judge for two reasons. First, as noted by this Court the administrative law judge did not rule upon the merits of the case because the judge deemed he did not have jurisdiction. This Court has found that conclusion to be 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

A handwritten signature in black ink, appearing to read 'C. Rauch Wise', is written over a horizontal line.

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S.C. Bar № 6188

Attorney for Gregory Pencille

RECEIVED

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 interest 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: _____

KENSEY EVANS

Deputy General Counsel

S. C. Department of Corrections

Post Office Box 21787

Columbia, South Carolina 29221

(803) 896-8508

ATTORNEY FOR RESPONDENT

October 20, 2023

The South Carolina Court of Appeals

Gregory Pencille, #312332, Appellant,

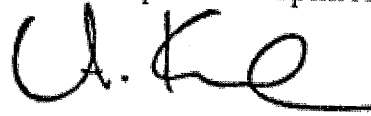
v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2019-002115

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.



J.



J.



J.

Columbia, South Carolina

cc:

Christina Catoe Bigelow, Esquire

Clarence Rauch Wise, Esquire

Kensley Evans, Esquire

Jana E. Shealy

The Honorable Ralph King Anderson, III

FILED
Nov 01 2023

RECEIVED

Nov 16 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

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

Unpublished Opinion № 2023-UP-321
Heard October 5, 2022 - filed September 27, 2023
Withdrawn, Substituted, and Refiled November 1, 2023

Petition for Rehearing

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 then incorrectly held “Although Pencille cited to federal RFRA and RLUIPA statutes and caselaw on his inmate grievance forms and in his filings to the ALC, he failed to cite to SCRFRA or section 24-27-500.” *Pencille v. South Carolina Department of Corrections*, Op. № 2023-UP-321 (S.C.Ct. App. filed November 1, 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. The SCDC Policy is cited on pages 3, 20, 25 and 26 of the

Record on Appeal. If this Court does not recognize that the Policy incorporates the South Carolina 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 cite the SCRFRA in his opening brief at page 4. The fact that the reply brief expanded on the argument is of no consequence. The SCRFRA was not raised for the first time in the reply brief. 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.

4. This Court stated, “[H]is state claims were neither raised to nor ruled upon by the ALC.” *Id.* at 6. This is simply not correct. The Administrative law judge ruled, “In conclusion, because Appellant has not alleged a deprivation of a state-created liberty or property interest in this matter, the Court finds that summary dismissal is appropriate.” *Rec. on App.* at 41. This conclusion by the administrative law judge is a finding that SCDC PS 10.05 did not create a state-created interest in the right of Mr. Pencille to practice his religion. As noted above the policy incorporated the SCRFRA and S.C. Code § 24-27-500. The ruling by the administrative law court was that the SCDC PS 10.05, and by implication the SCRFRA and S.C. Code § 24-27-500, did not give Mr. Pencille a state created liberty interest in the use of religious oils as part of this religious practice. The plain wording of both statutes creates a state-created liberty interest in the exercise of religion by prisoners in South Carolina.

5. After finding that the issue of Mr. Pencille using religious oils is not preserved for review, this Court then proceeded to rule, incorrectly, that, “We hold Pencille’s claim did not implicate a state-created liberty interest such that it invoked the procedural protections of due

process.” *Id.* at 10. This Court further held, “Section 24-27-500 and SCDC Policy 10.05 create a liberty interest in religious practice. . . . Accordingly, we find inmates have an interest in religious practices arising from state law and state policy.” *Id.* at 10. After these correct findings, this court then concluded, with no basis in fact in the record, “[W]e find SCDC’s denial of Pencille’s request to use religious oils in the practice of his religion for security reason did not present an atypical or significant hardship in relation to the ordinary incident of prison life.” *Id.* at 10. Such a statement can be made about virtually any religious practice in the Department of Corrections. After finding that S.C. Code § 24-27-500 applies to this case, this Court then ignored the clear mandate of the statute. The Statute places the burden on the institution to provide a reason the denial of a religious practice. The statute provides:

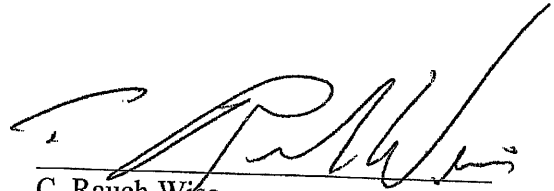
[I]f the facility demonstrates that the religious activity:

- (1) sought to be engaged by a prisoner is presumptively dangerous to the health or safety of that prisoner; or
- (2) poses a direct threat to the health, safety, or security of other prisoners, correctional staff, or the public.

The record in this case is devoid of any evidence that the use of religious oils by the Wiccan community is dangerous to the prison system or presents any security risk. This Court stated in the discussion of facts, “As noted in the 2018 request, a similar purchase request was approved in 2014 (the 2014 request.” *Id.* at 2. The record in this case demonstrates that the SCDC never produced any evidence as to any danger in the use of oils by the Wiccans. This Court erred in finding, with no evidence in the record, “Due to his incarceration, Pencille is not entitled to the use of substances - even those used for religious practices - deemed a security threat.” *Id.* at 11. The record in this case is devoid of any proof by SCDC that the oils were a security threat.

For the foregoing reasons, this Court should grant the petition for rehearing and order the South Carolina Department of Corrections to permit the use of religious oils in the Wiccan services or remand this matter to the Administrative Law Court for a ruling of the merits of the claim of Gregory Pencille.

November 16, 2023

A handwritten signature in black ink, appearing to read 'C. Rauch Wise', is written over a horizontal line.

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S.C. Bar № 6188

Attorney for Gregory Pencille

The South Carolina Court of Appeals

Gregory Pencille, #312332, Appellant,

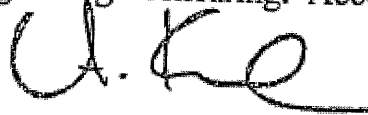
v.

South Carolina Department of Corrections, Respondent.

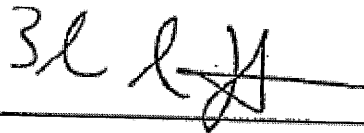
Appellate Case No. 2019-002115

ORDER

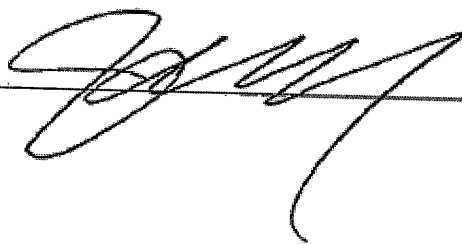
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Christina Catoe Bigelow, Esquire

Clarence Rauch Wise, Esquire

Kensley Evans, Esquire

Jana E. Shealy

The Honorable Ralph King Anderson, III

FILED
Nov 28 2023