

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from the Administrative Law Court
Ralph K. Anderson, III, Administrative Law Judge

Opinion No. 2023-UP-321 (S.C. Ct. App. filed 11/1/23)
Appellate Case No. 2023-001971

GREGORY PENCILLE, # 312332,

PETITIONER,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

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ISSUE PRESENTED

Petitioner's issues involving the South Carolina Religious Freedom Act and S.C. Code 24-27-500 are not properly before this Court because they were not properly preserved, and the Court of Appeals correctly affirmed the Administrative Law Court's dismissal of the appeal where the appeal did not implicate a state-created liberty or property interest.

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, Petitioner 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. Thereafter, on March 6, 2019, Petitioner filed a Step 2 grievance. On April 19, 2019, Petitioner's Step 2 grievance was denied. Petitioner 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, and Petitioner filed a Notice of Appeal on December 19, 2019. On September 27, 2023, the Court of Appeals affirmed the decision of the lower court in an unpublished opinion. Petitioner filed a Petition for Rehearing on October 12, 2023, and the Court of Appeals granted this Petition and issued a new opinion affirming the lower court. Petitioner submitted a second Petition for Rehearing on November 16, 2023, and the Court of Appeals denied this Petition on November 28, 2023. This appeal follows.

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

Petitioner's issues involving the South Carolina Religious Freedom Act and S.C. Code 24-27-500 are not properly before this Court because they were not properly preserved, and the Court of Appeals correctly affirmed the Administrative Law Court's dismissal of the appeal where the appeal did not implicate a state-created liberty or property interest.

Issue Preservation

Initially, Petitioner failed to preserve his arguments regarding the South Carolina Religious Freedom Act (SCRFA) and S.C. Code 24-27-500. Although Petitioner did refer to the SCRFA and S.C. Code 24-27-500 in his brief to the Court of Appeals, this reference was under the heading "Statement of Facts," not under the "Argument" heading, and indeed there were no arguments made regarding these laws in the "Argument" section of the brief. (See App. p. 71-86). Petitioner's attempt to make additional arguments regarding the SCRFA and S.C. Code 24-27-500 in his reply brief were insufficient to raise these arguments to the Court of Appeals. See, e.g., Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct. App. 1997) (holding an appellant may not use the reply brief to argue issues not argued in the appellant's initial brief); Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691-92 (Ct. App. 2001) (an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief); Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) (new arguments raised in a reply brief are not properly before this Court because an appellant cannot make new arguments in a reply brief); Spivey ex rel. Spivey v. Carolina Crawler, 367 S.C. 154, 161, 624 S.E.2d 435, 438 (Ct. App. 2005) (refusing to consider issues argued in a reply brief because they were not raised in the initial brief).

Further, contrary to Petitioner's assertions in his Petition for Writ of Certiorari, mere

references to SCDC Policy PS-10.05 in the record and in the final brief to the Court of Appeals are insufficient to create an arguable issue regarding the SCRFA and S.C. Code 24-27-500. It is well-settled that short, conclusory arguments are deemed abandoned on appeal and not presented for appellate review. See Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691-92 (Ct. App. 2001) (“South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”); Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (“An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.”); Brown v. Theos, 338 S.C. 305, 309 n. 2, 526 S.E.2d 232, 235 n. 2 (Ct. App. 1999), aff’d, 345 S.C. 626, 550 S.E.2d 304 (2001), (a one sentence paragraph raised in an appellant’s brief was insufficient to preserve an issue for appeal).

If short, conclusory arguments cannot preserve an issue for review, then surely the mere mention of a policy with zero supporting argument regarding SCRFA or S.C. Code 24-27-500 is insufficient to preserve an issue for review. Accordingly, the arguments made to this Court regarding the SCRFA and S.C. Code 24-27-500 were not fairly presented to the lower court and are therefore not preserved for this Court’s review. See Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.”).

Argument

Without waiving the issue preservation arguments above, Respondent submits that the Court of Appeals properly affirmed the ALC’s conclusion that Petitioner’s appeal did not

implicate a state-created liberty or property interest. This case concerns Respondent's denial of Petitioner's request for religious oils in the practice of his Wiccan religion. Although Respondent does not dispute that Petitioner has a general right to **practice his religion**, he does not have a general right to **use religious oils**.¹ Here, Petitioner failed to explain to any extent, at any time, how the use of oils related to the practice of his religion in any manner. He has never asserted that the use of oils was even important to the practice of his religion. Therefore, he failed to establish that the **practice of his religion** was impeded in any way by not having access to religious oils.

Accordingly, there was no way the ALC or the Court of Appeals could conclude that the denial of the use of religious oils presented an "atypical or significant hardship in relation to the ordinary incidents of prison life" or had any significance at all to his religious practice.² See Pencille v. SC Dep't of Corr., Op. No. 2023-UP-321 (S.C. Ct. App. filed 11/1/23) at 10. Therefore, the Court of Appeals correctly concluded that the appeal did not involve a state-created liberty or property interest, and properly affirmed the ALC's dismissal of the appeal.³

¹ SCDC Policy PS-10.05's policy statement says that "[i]nmates 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 (emphasis added)." See Pencille v. SC Dep't of Corr., Op. No. 2023-UP-321 (S.C. Ct. App. filed 11/1/23) at 11. It does **not** guarantee that any particular type of religious conduct will be permitted.

² Likewise, since Petitioner failed to establish the materiality (if any) of the use of oils in his religion, he could not establish that Respondent "substantially burdened" the practice of his religion. See S.C. Code § 1-32-40 ("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.") (emphasis added).

³ The fact that the ALC cited to case law mentioning a "lack of jurisdiction" is of no consequence and certainly does not require a "remand," as Petitioner suggests. (See App. p. 41-43; see Pencille v. SC Dep't of Corr., Op. No. 2023-UP-321 (S.C. Ct. App. filed 11/1/23) at 12; see Petition for Writ of Certiorari, p. 9-10). It is clear that the ALC dismissed the appeal because it did not implicate a state-created liberty or property interest, and this determination was correct for the reasons discussed above. The ALC's conclusion was exactly as follows: "In conclusion, because Appellant has not alleged a deprivation of a state-created liberty or property interest in this matter, the Court finds summary

CONCLUSION

For the reasons discussed above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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dismissal to be appropriate.” (App. p. 43). Petitioner is also incorrect that the ALC has the power to “take testimony” or have a “full hearing” in these types of inmate cases. (See Petition for Writ of Certiorari, p. 10). The ALC rules for “Special Appeals” (meaning cases filed pursuant to Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000)), do not provide for a “full hearing” or the taking of testimony. See Rules of Procedure for the Administrative Law Court: SCALC Rules 51-66. To the contrary, these types of cases are decided on the written filings of the parties. See id. In fact, even oral argument is disfavored in these cases. See SCALC Rule 64 (... “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....”).