RECEIVED
Feb 28 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge S. Phillip Lenski

ALC Case No. 23-ALJ-04-0126-AP
Appellate Case No. 2023-001291

JOHN GARVIN, # 355509,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Christina Catoe Bigelow
Deputy General Counsel
Office of General Counsel
South Carolina Dept. of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-8508

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT OF ISSUE ON APPEAL

THE LOWER COURT PROPERLY DISMISSED THE APPEAL WHERE APPELLANT DOES NOT HAVE A STATE-CREATED LIBERTY OR PROPERTY INTEREST IN VISITATION AND WHERE APPELLANT'S PROSPECTIVE VISITORS' APPLICATIONS WERE DENIED BECAUSE THEY FAILED TO PROPERLY COMPLETE THE STANDARD APPLICATION FORM REQUIRED BY POLICY.

STATEMENT OF THE CASE

This matter comes before this Court pursuant to the appeal of John Garvin, an inmate in the custody of the South Carolina Department of Corrections (SCDC). On November 17, 2022, Appellant submitted a Step One grievance claiming the Department improperly denied his prospective visitors' visitation applications. On November 30, 2022, Appellant's Step One grievance was investigated and denied. Thereafter, on December 2, 2022, Appellant submitted a Step Two grievance. This grievance was investigated and denied on March 2, 2023. Appellant appealed to the Administrative Law Court, and on July 17, 2023, Administrative Law Judge S. Phillip Lenski issued an order dismissing the appeal. 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.

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

THE LOWER COURT PROPERLY DISMISSED THE APPEAL WHERE APPELLANT DOES NOT HAVE A STATE-CREATED LIBERTY OR PROPERTY INTEREST IN VISITATION AND WHERE APPELLANT'S PROSPECTIVE VISITORS' APPLICATIONS WERE DENIED BECAUSE THEY FAILED TO PROPERLY COMPLETE THE STANDARD APPLICATION FORM REQUIRED BY POLICY.

Although prisoners do not lose all constitutional rights upon entry to prison, incarceration does bring about the 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). "[S]tate law may create enforceable liberty interests in the prison setting." Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 461 (1989). However, an inmate claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interests may arise from either the Due Process Clause or the laws of the States. Id. at 460. In order to establish a state-created liberty interest, a regulation must contain explicitly mandatory language, meaning specific directives to a decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow. Id. at 463. In other words, a state creates a protected liberty interest by placing substantive limitations on official discretion. Id. at 462. If the state regulation explicitly mandates an outcome based on the existence of relevant criteria, then the state has created a liberty interest. Id. at 462.

This appeal is based on Appellant's allegation that the South Carolina Department of Corrections (SCDC) improperly denied his grandchildren's applications for visitation because their father failed to provide their social security numbers on the visitation application. As discussed above, Appellant can only claim that a state-created liberty or property interest is present when SCDC policy mandates a certain outcome when certain criteria are present. Here, SCDC Policy expressly states that visitation is a privilege and not a guaranteed right, and that SCDC reserves the right to suspend, deny, or terminate an inmate's or visitor's visitation privileges. See SCDC Policy

OP-22.09, Inmate Visitation, section 1.4, *available at* https://www.doc.sc.gov/sites/doc/files/Documents/policy/OP-22-09.pdf.

The portion of the policy addressing applications for visitation states that upon receipt of an application, the visitation staff "will review the form and information provided and will approve or disapprove the potential visitor." See SCDC Policy OP-22.09, Inmate Visitation, section 4.2. Clearly, the policy vests SCDC with wide discretion in conducting its application process and does not mandate any particular outcome. Since there is no mandated outcome, there was no state-created liberty or property interest in visitation. There is certainly no state-created liberty or property interest in a visitor being approved despite failing to properly complete the visitation application, as was the case here. Compare Allen v. South Carolina Department of Corrections, 439 S.C. 164, 171, 886 S.E.2d 671, 674 (2023) (affirming the Court of Appeals' holding that the denial of Petitioner's visitation with persons not known to him prior to incarceration does not implicate a state-created liberty interest).

In fact, what the visitation policy requires is that each proposed visitor "FULLY complete the 19-127 and return it by mail to the Office of Visitation & IDT. If the proposed visitor does not provide all requested information, the application will be returned. If the SCDC Form 19-127 cannot be processed because it is incomplete or because the prospective visitor has provided an incorrect inmate name or inmate SCDC number, the 19-127 will be returned to the prospective visitor, if the address on the form is complete. A parent, legal guardian, or other adult may assist a child in completing the form; however, only a parent or legal guardian will be permitted to sign this form. Upon receipt, the Division Director of Visitation & IDT or designee will review the form and information provided and will approve or disapprove the potential visitor." See SCDC Policy OP-22.09, Inmate Visitation, section 4.2. In this case, as stated above, Appellant's proposed visitors

failed to fully complete the 19-127 (the visitation application form) because they failed to include the social security numbers of the proposed visitors. Per policy, the forms were returned and visitation was denied. A state-created liberty or property interest could not possibly be implicated in this scenario.

The portion of SCDC policy that Appellant relies upon in his Brief to support his theory that SCDC policy "mandates an outcome" is not applicable to denial of visitation applications. (See Brief of Appellant, p. 10-12). SCDC Policy OP-22.09, section 5.3 deals with entry onto the prison premises, not denial of a visitation application. OP-22.09, section 5.3, "Identification Documents for Visitors Age Nine (9) and Under," states as follows: **Prior to entering the visiting area**, all visitors nine (9) years of age and under will be required to show a Department of Public Safety (DPS) identification card, long form birth certificate showing the appropriate parents' names, student identification card, passport, or green card, as long as the name and date of birth are listed.... (emphasis added)."

Entry onto the premises is an entirely different subject that denial of a visitation application. All of the visitation applications require social security numbers, and policy requires that all proposed visitors "fully complete" the visitation application. Accordingly, Appellant's assertion that it was "arbitrary and capricious" for SCDC to deny his particular visitors' applications (see Brief of Appellant, p. 12-13) fails because, as stated in SCDC Policy OP-22.09, section 4.2, **all** applications that do not provide the requested information will be returned.

The ALC properly dismissed the appeal because there was no state-created liberty or property interest implicated, as discussed above. However, to address Appellant's other arguments, Appellant has failed to present any valid or relevant authority supporting the notion that SCDC cannot require social security numbers to process visitation applications. The federal law cited in

Appellant's Brief, including the Social Security Act of 1935 and the Privacy Act of 1974, does not support his argument that the visitation applications were improperly denied. (See Brief of Appellant, p. 12). The Social Security Act statute Appellant refers to in his Brief, 42 U.S.C. § 405(c)(2)(C)(i), states as follows: "It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction utilize the social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Commissioner of Social Security." This has absolutely nothing to do with the information that a state department of corrections can require for visitation applications.

Appellant also cites to the federal Privacy Act in his Brief. The Privacy Act of 1974 established a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies. See 5 USC § 552a. Section 7(a)(1) of the Privacy Act states as follows: "It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." Pub. L. 93-579. To the extent that Section 7 applies to SCDC in this scenario, SCDC has not denied any "right, benefit, or privilege **provided by law**" because inmate visitation is not a right, benefit, or privilege provided by any law. To the contrary, as stated in

SCDC **policy**, inmate visitation is a privilege and not a guaranteed right. Accordingly, Appellant's argument regarding the Privacy Act fails.

Appellant's grievance did not trigger procedural due process guarantees since no state-created liberty or property interest is implicated in this case. Appellant's other arguments are without merit. Therefore, the ALC properly dismissed the appeal.

CONCLUSION

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

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

BY: _____

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

February 28, 2024