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The State of South Carolina
In The Court of Appeals

Appeal From Administrative Law Court
Administrative Law Judge Robinson

Case NO. 14-ALJ-04-0069-AP

Billy Lee Lisenby JR; #200273 .... Appellant

v.

South Carolina Department of Corrections .... Respondent

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Initial Brief of Appellant

Dated: Aug. 21st 2014

PRO-SE

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Statement of Issues ON Appeal

1. Did the ALC eRR in denying Appellant Relief when Respondent's had his Disciplinary Hearing in his absences without him Refusing to attend? Was counsel substitute ineffective for not performing his duties?

2. Did the ALC eRR in denying Appellant Relief when Respondent's and his counsel substitute denied him the Right to call witnesses? Was Appellant denied Due process of law?

Statement of The Case

On 12-17-12 appellant was found guilty in his absences for the charge of 836 DisRespect. He appealed to his Step 1 and Step 2 and they both were denied. On Jan. 17th, 2014 he appealed to the ALC and on Jan. 30th 2014 he was assigned a case number and Judge Robinson was assigned to the case, and later denied it. Now he appeals TO The South Carolina Court oF Appeals.

The above Appellant will combine Arguments 1 and 2 because they are so close in nature and the violations.

Argument #1 and #2

The Respondents are intentionally denying inmates their Right to attend their disciplinary hearings even though the inmate plainly Requested to be present. Appellant was denied his Right to attend his hearing even though he Requested to be present. No incident Report was prepared stating "he did not want to be present at his hearing."

Also he did not check on SCDC Form 19-69 "I do not want to be present at my hearing". Further he did not check "I waive my Right to a hearing." Instead he checked "I do want my accuser present at my hearing." He then checked "I want a counsel substitute."

On 12-14-12 Counsel Substitute Medver (name maybe misspelled) came to visit Appellant, and Appellant asked him to get or obtain statements from Inmate Christopher Allan Rainey #336389, and Inmate John Fortunato #347020, he assured Appellant he would do this, but never did. Although he didn't obtain the statements he was prepared for the hearing, and Appellant obtained statements from Rainey and Fortunato see Exhibit #1 and #2. Also he asked his C/s to have L.T. Copeland present as a witness. Appellant does not know if he spoke with L.T. Copeland or not.

There is no way Appellant's hearing could be held in his absences, he never signed a waiver, or told anyone he didn't want to attend his hearing. But he told his C/s and put in writing he wanted to be present at the hearing.

Appellant's c/s knew he had a valid defense, if they thought Appellant was refusing to attend his C/s should've came and consulted with Appellant to confirm the allegation. No S.C.D.C Employee came to escort him, or ask him did he want to attend a hearing on 12-17-12. Enclosed are (4) sworn affidavits to support his claim. The Affidavits are from I/M Demario Clyburn #260856, Christopher Allan Rainey #336389, Moses L. Stallings #341006 and John M. Fortunato #347020 and they listed as exhibits 3-6, [See enclosed.] OP-22.14 Section 7.2 states in part "In addition, an inmate may waive his/her Right to a hearing and indicate such on SCDC Form 19-69. When an inmate waives his/her Right to a hearing, the Hearing Officer will review the waiver section of the SCDC Form 19-69, conduct the hearing in the absence of the inmate, determine guilt or innocence," Had the D.H.O viewed the waiver section of the S.C.D.C Form 19-69 then he would've seen he didn't waive his Right to attend his hearing. OP-22.14 Section 14. Presence of Inmate At Disciplinary Hearing: States in part:

"14.1 Inmates charged with Rules violations will be present at their disciplinary hearings unless s/he has waived the Right to be present or if the D.H.O determines that his/her behavior prior to, or during the hearing justifies their exclusion."

There is no evidence to show Appellant waived his Right to a hearing. In Battle v. Barton Cite as 970 F.2d 779 (11th Cir 1992) it states:

"An inmates' Right to attend a prison disciplinary hearing is one of the essential due process protections afforded by the Fourteenth Amendment and Recognized in Wolff."

By Appellant not being allowed to attend his hearing he was denied his constitutional Right to call witnesses, and confront his accuser.

Ross v. Medical Univ. of S.C. States:

"South Carolina Constitution of 1895 p. 21 (1969) Article I, §22 provides in part No person shall be finally bound by judicial or quasi-judicial decision of an administrative agency affecting private Rights except on due notice and opportunity to be heard, nor shall he be subject to the same person for both prosecution and adjudication."

See Moody vs. Miller Cite 864 F.2d 1178 (5th Cir. 1989)
Lower Courts, similarly, have assumed that the due process Requirement of an "opportunity to be heard" includes the Right to appear personally before the decision maker; indeed, that assumption forms the basis for one of the Remedial Measures imposed by Judge Justice, in the landmark Ruiz litigation.

The Respondents did infact err in having Appellants disciplinary hearing in his absences, and he never Refused to attend, Counsel was ineffective for not performing his duties. Cases Requiring assistance:

"Staff assistance must be provided "in good faith and in the best interests of the inmate." Courts have held that sometimes staff members are appointed as assistants pursuant to prison Rules but then do little or nothing to help the prisoner, this denies due process:

Eng. v. Coughlin 858 F.2d at 898
Grandison v. Cuyler 774 F.2d 598, 604 (3d. Cir. 1985)
Giano v. Sullivan, 709 F. Supp. 1209, 1215 S.D.N.Y. 1989)
Pino v. Dalsheim 605 F. Supp. 1305, 1318 (S.D.N.Y. 1985)
Balla v. Idaho State Bd. of Corrections, 595 F. Supp. 1558, 1582 (D. Idaho 1984)
Hendricks v. State of New York Dept. of Correctional Services, 165 A.D. 2d. 923,
560 N.Y.S 2d 534, 535 (N.Y. App. Div. 1990)
Nix v. Evatt, 850 F. Supp. a 458

The Respondents and counsel substitute did infact err in not allowing Appellant to call witnesses. This Violated Dueprocess of Law. A qualified Right to call witnesses in one's behalf is one of the due process Rights accorded in inmate disciplinary proceedings by WolFF. v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974).

There is no documentation showing Appellant refused to appear at his hearing and the D.H.O did not investigate the issue. They are assuming all officers are honest, they took an officers word and assumed Appellant did not want to attend his hearing. When the D.H.O could've came to Appellants cell with the miniature Recorder and asked Appellant "do you want to be present." The officer has not witness that Appellant Refused to attend, but yet Appellant has two witnesses who say he didn't Refuse, and Appellant ask to be present in writing.

Apodictically, a inmate has a Right to be present at a D.H.O to confront his witness and accuser. Additionally the D.H.O must make findings of fact that the inmate Received notice of the Right to be present and was warned the hearing will proceed in his absence. S.C. D.C never notifies an inmate of the exact date and time they are going to the D.H.O. They just call you out the blue.

Conclusion

WhereFore, for all the reasons stated above, this Court should overturn Appellant's case

Respectfully Submitted,

Dated: Aug. 21st 2014

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Certificate of Counsel

The undersigned hereby certifies that this Initial Brief complies with the SCACR and the Supreme Court's order of August 13, 2007.

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Proof of Service

I hereby certify that I have served Respondent a copy of Appellant's Initial Brief by depositing a copy of same in the United States Mail postage prepaid, Aug., 21st, 2014 addressed as follows:

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