STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kevin L. Fowler, 222318, Appellant, vs. South Carolina Department of Corrections, Respondent.	Docket No. 14-ALJ-04-0355-AP **ORDER**

This matter is before the South Carolina Administrative Law Court ("ALC" or "court") pursuant to the Notice of Appeal filed April 10, 2014 by Kevin L. Fowler ("Appellant"), who is incarcerated with the South Carolina Department of Corrections ("SCDC").

Appellant filed a Step One Grievance on September 11, 2013, claiming his sentence is not subject to the requirement that Appellant serve Eighty-Five percent (85%) of his sentence before he becomes eligible for release. This grievance was denied. Appellant then filed a Step Two Grievance on November 3, 2013. This grievance was investigated and denied. Appellant filed his Notice of Appeal on April 10, 2014 claiming that his offense of Distribution of Heroin, second offense should not be considered a "no parole" offense and therefore, the Appellant's work credits and good conduct credits should be applied to his entire sentence, not just the remainder of his sentence after he has served 85% of his sentence.

STANDARD OF REVIEW

The ALC'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). The ALC's appellate 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/her 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.

When reviewing the SCDC's decisions in inmate grievance matters, the ALC sits in an appellate capacity. Id. at 380, 527 S.E.2d at 756. Consequently, the review in these cases is limited to the record presented. An Administrative Law Judge may not substitute her judgment for that of an agency "as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1

23-380(5). The ALC will not disturb the findings of an administrative agency if its findings are supported by substantial evidence on record as a whole. Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). "Substantial evidence" is evidence which, considering the record as a whole, would allow a reasonable mind to reach the conclusion reached by the administrative agency. Trimmier v. S.C. Dep't of Labor, Licensing & Regulation, 405 S.C. 239, 246, 746 S.E.2d 491, 494 (Ct. App. 2013) (quoting Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998)). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

LAW/ANALYSIS

On October 4, 2012, the Appellant plead guilty to Distribution of Heroin, second offense and was sentenced to a terms of ten years' incarceration. Distribution of Heroin, second offense is in violation of S.C. Code Ann. § 44-53-370(b)(1).

The requirement that an inmate convicted of a "no parole" offense serve 85% of the sentence is found in S.C. Code Ann. § 24-13-150(A), which reads:

> Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, an inmate convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including an inmate serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20 or Section 24-3-30, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. This percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which has been suspended. Nothing in this section may be construed to allow an inmate convicted of murder or an inmate prohibited from participating in work release, early release, discharge, or community supervision by another provision of law to be eligible for work release, early release, discharge, or community supervision.

Under S.C. Code Ann. § 24-13-100, a "no parole" offense is defined as "a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more." Distribution of

Heroin, second offense is a Class A felony. See S.C. Code. Ann. § 16-1-90(A).

The Appellant contends that his conviction is not subject to the requirement that an inmate serve 85% of the sentence. Appellant relies upon language added to S.C. Code Ann. § 44-53-370(b)(1) by the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which reads:

> Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

See S.C. Act No. 273 (June 2, 2010). The Appellant contends that with the enactment of the Omnibus Crime Reduction, the General Assembly's intention was to lessen the punishment for drug offenses, and to provide for probation and parole for offenders who were previously ineligible for probation and parole. The court agrees that it appears from the plain language of the statute that the General Assembly intended to allow inmates convicted of drug offenses to be eligible for parole, therefore removing certain drug offenses from the "no parole" category. Based on the language of S.C. Code Ann. § 44-53-370(b)(1), Distribution of Heroin is no longer intended to be a "no parole" offense and work credits and good conduct credits should be applied to the entirety of an inmate's sentence when he is sentenced under § 44-53-370(b)(1).

In this case, the Department has calculated the Appellant's sentence as if he was convicted of a "no parole" offense and is not applying work credits being earned by the Appellant to the initial 85% of his sentence, and is only using them to reduce the portion of his sentence remaining after he has served the initial 85%. If the Appellant had been sentenced prior to the 2010 Omnibus Crime Reduction and Sentencing Reform Act, the Department's calculation of his sentence would be correct. However, as stated above, this court finds that the 2010 amendment to § 44-53-370(b)(1) removed the Appellant's crime from the "no parole" category. Because the Appellant committed his crime and was sentenced subsequent to § 44-53-370(b)(1)'s revision, the Department should calculate the Appellant's sentence by applying his earned work credits and good conduct credits towards the entirety of his sentence.[1]

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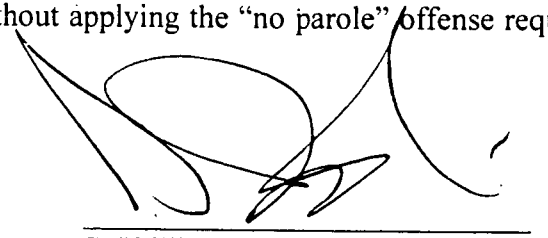
[1] The court finds specious the argument put forth in SCDC's brief that nothing in the 2010 amendment to §44-53-370(b)(1) is incompatible with the Department's interpretation that after 2010, an offender convicted of distribution of a controlled substance pursuant to the subsection must still serve 85% of his sentence before he is eligible for parole, supervised furlough,

Based on the foregoing

IT IS HEREBY ORDERED that the appeal is **REMANDED** for the Department to calculate the Appellant's sentence without applying the "no parole" offense requirements found in S.C. Code Ann. § 24-13-150(A).

AND IT IS SO ORDERED.



S. Phillip Lenski
S.C. Administrative Law Court

August 20, 2014
Columbia, South Carolina

community supervision, work release, work credits, education credits, and good time credits. Prior to the amendment, inmates convicted of no-parole offenses pursuant to §44-53-370 were eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good time credits after they had served the requisite 85% of their sentence. To accept SCDC's interpretation of the §44-53-370(b)(1) amendment would be to hold that the General Assembly amended the statute for no purpose whatsoever. Such an interpretation is unreasonable.

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

August 28, 2014
Columbia, South Carolina