

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
Honorable S. Phillip Lenski, Administrative Law Court Judge

SC Court of Appeals

Case No. 14-ALJ-04-0273-AP
Appellate Case No. 2014-001592

Michael Richard Higgins, #247499. Appellant

v.

South Carolina Department of Corrections Respondent

INITIAL BRIEF OF APPELLANT

Michael Richard Higgins
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Post Office Box 205
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APPELLANT, *Pro se*

Other counsel of record:

Daniel J. Crooks, III, Esquire
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Attorney for Respondent

Questions Presented

- I. Does South Carolina Code of Laws Annotated §1-23-600(D) amended by 2008 Act No. 334, § 7, violate South Carolina Constitution Article I, § 2 and Article I, § 22, in that it bars prisoners who receive sentence-related credits from judicial review of final agency grievances / decisions under the Administrative Procedures Act?

- II. Did the Administrative Law Court err in applying *Howard v. S.C. Department of Corrections*, 399 S.C. 618, 737 S.E.2d 211 (2012) by finding Appellant's appeal concerned *only* the loss of opportunity to earn good-time credits?

Table of Authorities

Cases

<i>Al-Shabazz v. State</i> , 338 S.C. 354, 527 S.E.2d 742 (2000)	3, 6
<i>Howard v. S.C. D.C.</i> , 399 S.C. 618, 737 S.E.2d 211 (2012)	5, 7
<i>Landgraff v. USI Film Products</i> , 511 U.S. 244 (1974)	6
<i>United States v. Klein</i> , 80 U.S. (Wall.) 128, 20 L.Ed. 519 (1872)	6
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974)	7

Statutes

S.C. Code Ann. § 1-23-380(5) (2008)	4
S.C. Code Ann. § 1-23-600(D) (2008)	passim

Constitution

S.C. Constitution Article I. § 2	3, 6
S.C. Constitution Article I. § 22	4

STATEMENT OF THE CASE

Appellant filed an agency grievance with the South Carolina Department of Corrections (“DOC” or “Department”) on November 21, 2013 objecting to the DOC’s Drug Testing Policy (GA-03.03). Appellant challenged the policy did not make provisions for prisoners such as Appellant who could not provide a urine sample in a specified amount of time due to medical or psychological complications and refusal to allow witnesses at the subsequent agency disciplinary hearing. A final agency decision was issued on February 12, 2014.

Appellant filed a timely Notice of Appeal in the South Carolina Administrative Law Court (“ALC”). Respondent filed a Motion to Dismiss pursuant to S.C. Code Ann. § 1-23-600(D) on June 16, 2014. The ALC, the Honorable S. Phillip Lenski, issued an Order dated June 20, 2014 dismissing the appeal pursuant to §1-23-600(D) in that Appellant’s appeal was based *solely* on the opportunity to earn good-time credits.

STATEMENT OF FACTS

Appellant was unable to provide a urine sample for a drug test under DOC’s Inmate Drug Testing / Screening Program, SCDC Policy GA-03.03 within the three (3) hour limitation period prescribed by GA-03.03 § 6 (Inmate Inability or Refusal to Produce a Specimen). Policy GA-03.03 makes no medical provision (catheterization) of prisoners who are willing to produce a sample for testing. Appellant demonstrated previous tests where he was within mere minutes of the three (3) hour sample limitation and tested negative.

On November 5, 2013, Appellant was unable to produce a specimen / sample within three (3) hours and was charged with a major disciplinary violation. Appellant had a confirmed problem urinating and received surgery for a genital tumor in the immediate future following the failed test. The Disciplinary Hearing Officer refused to call the three (3) employee

witnesses who previously witnessed and noted Appellant's difficulty urinating. That refusal to allow witnesses was not documented on the official record.

Appellant subsequently failed two (2) additional drug tests for not being able to produce a sample (February 29, 2014 and June 10, 2014). Since then, Appellant has been placed on Flomax® to allow him to pass urine and has since been able to produce a urine sample with negative test results (October 2, 2014).

ARGUMENT

- I. South Carolina Code Ann. § 1-23-600(D), as amended by 2008 Act No. 334, § 7 violates South Carolina Constitution Article I, § 2 and Article I, § 22 as it bars prisoners who receive sentence-related credits from judicial review of final agency decisions challenging disciplinary proceedings under the South Carolina Administrative Procedures Act and rights created by *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000).**

In *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), the South Carolina Supreme Court held that “[T]oday we add credits-related issues and other conditions of imprisonment to the list of administrative matter”, 527 S.E.2d at 749-50. The Court went on to hold “[T]he question of whether an inmate may seek judicial review of Department’s decisions under the South Carolina Administrative Procedures Act (APA) went unanswered in *Pruitt v. State*, 274 S.C. 565, 567 n. 2, 266 S.E.2d 779, 780 n. 2 (1980). Today we answer the question affirmatively and hold that an inmate may seek review of Department’s final decision in an administrative matter under the APA,” 527 S.E.2d at 750. “These administrative matters 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,” *Id.* In footnote 6 the Court explained that judicial review of decisions under the APA would include S.C. Code Ann. §§ 1-23-310 to -400 and S.C. Code Ann. §§ 1-23-500 to – 660.

South Carolina Constitution article I, § 2, guarantees to South Carolina citizens the right of assembly and petition, specifically, to petition the government or any department thereof for a redress of grievances.

South Carolina Constitution article I, § 22, guarantees to South Carolina citizens the right of judicial review of administrative agency decisions.

In 2008, the South Carolina Legislature amended Section 1-23-600(D) in part:

[A]n administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the loss of the opportunity to earn sentence-related credits pursuant to Section 24-13-210(A) or Section 24-13-230(A).

S.C. Code Ann. §1-23-600(D) (as amended by 2008 Act No. 334, § 7, Acts 3308)

In 2008, the South Carolina Legislature also amended Section 1-23-380 in part:

(5)...[T]he court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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 of the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly warranted exercise of discretion.

S.C. Code Ann. §1-23-380(5) (a)-(f) (as amended by 2008 Act No. 334, § 5, Acts 3308)

The amendment to §1-23-600(D) is contrary to the constitutional requirements underpinning the South Carolina Administrative Procedures Act where judicial review of administrative agency decisions and the right to redress grievances are constitutional guarantees in South Carolina.

The South Carolina Constitution provides that no person “shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and opportunity to be heard...and he shall have in all such instances the right to judicial review.” S.C. Const. article I, §22. Thus, our Constitution guarantees a due process

proceeding within the administrative agencies and further guarantees that persons adversely affected by an agency action have a presumptive right to judicial review and to redress grievances. S.C. Const. article I, §2.

South Carolina Code §1-23-60(D) violates the afore-cited constitutional provisions by completely barring judicial review of a Department of Corrections' disciplinary hearing sanction for all prisoners who receive some type of statutory-related sentence-related credit for good behavior, with the sole exclusion of prisoners serving life sentences who received sentences after 1986. Section 1-23-600(D), as amended, forecloses judicial review of the final agency decision following exhaustion of internal grievance procedures / remedies despite the finding, conclusion, or decision affecting the substantial rights of the prisoner under the provisions of S.C. Code Ann. § 1-23-380(5).

In *Howard v. S.C. Department of Corrections*, 399 S.C. 618, 737 S.E.2d 211 (2012), our Supreme Court found that the General Assembly could amend a statute to limit the subject matter jurisdiction of a court. However, neither the Court nor the Legislature, without a constitutional ballot, may create decisions or laws that contradict or abrogate provisions of the South Carolina Constitution, as was done in the 2008 amendment of §1-23-600(D) and *Howard v. S.C. Department of Corrections, supra*. Indeed, such a practice violates the separation of powers doctrine.

The Supreme Court has held that provisions of the APA are applicable where an inmate is seeking review of the Department of Corrections' final decision in non-collateral or administrative matters.

Both the United States and South Carolina Constitutions prohibit retroactive application of laws that disadvantage or remove vested rights once acquired. Retroactive lawmaking is a

particular concern because of the legislative temptation to use it as a means of retribution against unpopular groups or individuals, *Landgraft v. USI Film Products*, 511 U.S. 244, 266 (1974).

Section 1-23-600(D) violates the separation of powers doctrine in that it bars a majority of prisoners seeking to redress grievances following challenges disciplinary actions and legislatively prescribes a rule of decision without changing the underlying substantive law of our Supreme Court set forth in *Al-Shabazz, supra*; see *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1872), and thus conditionally restricts the remedial jurisdiction of the Administrative Law Court and prisoner access to the Administrative Procedures Act. Simply put, the separation of powers doctrine was breached when the Legislature amends laws that affect rights created by the judiciary.

Section 1-23-600(D), as amended in 2008, violates Article I, §§ 2 and 22 of the South Carolina Constitution and rights created by the Supreme Court holding in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). Section 1-23-600(D), as amended in 2008 also bars persons incarcerated that earn sentence-related credits from access to the South Carolina Administrative Procedures Act to challenge statutory and constitutional violations as set forth in §1-23-380(5). Moreover, Section 1-23-600(D), as amended in 2008 is a violation of the separation of powers doctrine and is beyond the scope and authority of the legislature without a constitutional amendment.

II. The Administrative Law Court erred in applying *Howard v. S.C. Department of Corrections*, 399 S.C. 618, 737 S.E.2d 211 (2012) by finding Appellant’s appeal concerned *only* the loss of opportunity to earn good-time credits.

The June 20, 2014 Order of the ALC was in error where it held “[B]ecause the Appellant only complains of the loss of the opportunity to earn good-time credit and S.C. Code §1-23-600(D) specifically prohibits administrative law judges from hearing cases involving the loss of *only* the opportunity to earn good-time credit...” Order, pages. 2-3 (emphasis supplied).

Appellant submits that the appeal before the ALC challenged the DOC’s Drug Testing Policy for not making concession for those inmates in Appellant’s position of not being able to provide a sample; for ignoring documented medical information to support Appellant’s contentions; and for refusing to allow Appellant to call employee witnesses under the due process standard enunciated in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

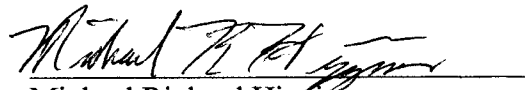
Based on the foregoing, the ALC’s application of *Howard v. S.C. Department of Corrections*, 399 S.C. 618, 737 S.E.2d 211 (2012) to dismiss Appellant’s administrative appeal was in error and deprived Appellant of the right to judicial review from an administrative agency action.

CONCLUSION

WHEREFORE, based upon the unconstitutional amendment and application of S.C. Code Ann. §1-23-600(D) (2008) and *Howard v. S.C. Department of Corrections*, 399 S.C. 618, 737 S.E.2d 211 (2012), Appellant asks this Honorable Court to make a finding of the constitutionality of S.C. Code Ann. §1-23-600(D) and to reverse and modify the decision of the Administrative Law Court to review Appellant's case in light of *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000).

Respectfully submitted,

November 4, 2014



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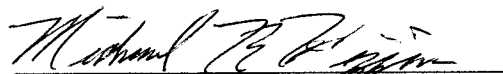
APPELLANT, *Pro se*

CERTIFICATE OF *PRO SE* COUNSEL

The undersigned certifies that the Initial Brief of Appellant complies with Rule 211(b),

SCACR

November 4, 2014



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Michael Richard Higgins, #247499. Appellant

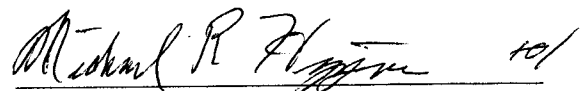
v.

South Carolina Department of Corrections Respondent

PROOF OF SERVICE

The undersigned hereby certifies that he has served a true and correct copy of Initial Brief of Appellant upon Respondent by placing a copy in the U.S. Mail, first-class postage affixed thereto, this 7 day of November, 2014, addressed as follows:

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November 4, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
Court of Appeals of South Carolina
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Michael Richard Higgins, #247499, Appellant v. South Carolina Department of
Corrections, Respondent*
Appellate Case No. 20 14-001592

Dear Ms. Kitchings:

Please find enclosed the below documents for filing in the above-referenced appeal:

- 1) Appellant's Motion for Late Filing: original (unbound) and six (6) copies and proof of service; and
- 2) Initial Brief of Appellant: original (unbound) and six (6) copies and proof of service;

Please note that the appeal here may only address the lower court's order declining to entertain the appeal of a final agency decision, thus, I do not believe a Record on Appeal or Matter of Designation is required in this matter. If I am in error, or any part of the filings do not comport to Appellate Court Rules, please notify me of the deficiency so I may promptly correct.

Your assistance in this matter is sincerely appreciated.

Sincerely,



Michael Richard Higgins
APPELLANT, pro se

Cc: Daniel J. Crooks, III, Esquire

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