THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Administrative Law Judge S. Phillip Lenski

APPELLATE CASE NO.: 2014-002040

Kevin L. Fowler, #222318 . . . . Respondent

v.

South Carolina Department of Corrections . . . . .Appellant

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INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES

Did the Administrative Law Court err when it reversed the Department of Corrections' calculation of Respondent's sentence?

STATEMENT OF THE CASE

The case is before the Court of Appeals pursuant to the Appeal of the Department of Corrections (Department) of the Administrative Law Court's (ALC) decision to reverse SCDC's final agency decision.

On October 4, 2012, Respondent was sentenced to ten (10) years for a non-violent, second offense violation of S.C. Code Ann. §44-53-370 (b)(1), Distribution of Heroin. The Department determined the Respondent is required to serve a mandatory 85% of his sentence and ineligible to receive good time and work credits towards his sentence, although the Department was applying these credits towards his parole and work release eligibility. Respondent filed a step one grievance on September 11, 2013 claiming his sentence should have work credits and good conduct credits applied to his sentence pursuant to the 2010 Sentencing Reform Act. This grievance was denied. Respondent filed a Step two grievance on November 3, 2013 and this grievance was also denied. Respondent subsequently filed a Notice of Appeal in the ALC on April 9, 2014.

Administrative Law Judge S. Phillip Lenski reversed SCDC's decision in its August 28, 2014 Order. Judge Lenski remanded the appeal to the Department to calculate Respondent's sentence without applying the "no parole" offense requirements found in S.C. Code Ann. §24-13-150 (A).

Consequently, after the ALC rendered its decision, the Department recalculated Respondent's sentence without applying the "no parole" offense requirements.

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 record. The court may not substitute the Judgment of the Administrative Law Judge as to the weight of the evidence on questions of fact. The Court of Appeals 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 the final decision of an Administrative agency, the standard of Appellate review is whether the ALC's findings are supported by substantial evidence. In determining whether the decision of the ALC was supported by substantial evidence, the Supreme Court need only find looking at the entire record of appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached Barton v. SCDPPS, 404 S.C. 395, 745 S.E. 2d 110 (2013). The Court will not disturb the findings of the ALC if its findings are supported by

substantial evidence on the 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 ALC. Trimmier v. S.C. Dept. 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 ALC'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)).

ARGUMENT

The Administrative Law Court was correct to reverse the Department of Corrections' calculation of Respondent's sentence.

The Department asserts that the Respondent's sentence should be calculated according to the "no Parole" offense requirements provided in S.C. Code Ann. §24-13-150 (A). That the Amendments that the general Assembly made to §44-53-370 (b)(1), pursuant to the 2010 Omnibus Crime Reduction and Sentencing Reform Act, are only applicable to the issue of parole eligibility and should only be applied after service of 85% of his sentence.

S.C. Code Ann. §24-13-100 and all corresponding statutes went into effect January 1, 1996. See Act. No. 83 (1995). §24-13-100 defines a "no parole" offense as a class A, B. or C felony which is punishable by a maximum term of imprisonment for twenty years or more. A "no parole" offense means an offense with no parole eligibility for the offender. A person convicted of a "no parole" offense is subject to the following stipulations: Not eligible for work release until the inmate has served no less than 80% of the actual term of imprisonment imposed,

§24-13-125 (A); Not eligible for early release (parole, furlough), discharge, or community supervision until the inmate has served at least 85% of the actual term of imprisonment imposed. The 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, §24-13-150(A) not entitled to good conduct credits, §24-13-210(B), or work credits, §24-13-230 (B), with a reduction below the maximum term of incarceration provided in §24-13-125(A) or 24-13-150(A).

The Respondent contends his conviction is not subject to the 85% requirement and his work credits and good conduct credits should be applied to his entire sentence as provided in §24-13-210(A) and §24-13-230 (A). The Respondent relies upon the 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). This Language did not appear in S.C. Code Ann §44-53-370 (b)(1) prior to the Act.

With the enactment of the 2010 Amendment to §44-53-370 (b)(1), the General Assembly's intention was to lessen the punishment for certain non-violent drug offenses and to provide for probation and parole for offenders who were previously ineligible for probation and parole. The ALC agrees that it appears from the plain language of the statute that the General Assembly intended to allow inmates convicted of a second offense violation of §44-53-370 (b)(1) to be eligible for parole, therefore removing the Respondent's offense from the "no parole" category and making all the stipulations of a "no parole" offense inapplicable to the

Respondent. Because the Respondent committed his crime and was sentenced subsequent to §44-53-370 (b)(1) revision, the Department should calculate the Respondent's sentence by applying his earned work credits and good conduct credits toward the entirety of his sentence and pursuant to Judge Lenski's Order.

The question before the Court is whether the Department's interpretation of the 2010 Amendment to §44-53-370 (b)(1) is fallacious. In construing the terms of a statute, the primary rule of statutory construction is that a statute should be construed to give effect to the intent of the legislature. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E. 2d 278, 283 (2011). A Court should not attempt to divine the intent of the legislature when the statutory language of the statute is clear and unambiguous. Town of Mt. Pleasant (supra). The Court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. State v. Baker, 310 S.C. 510, 427 S.E. 2d 670 (1993). A statute must receive a practical and reasonable interpretation consonant with the design of the Legislature. Id.

The Department claims nothing in the Amended language of §44-53-370 (b)(1) reflects a legislative intent to remove the 85% requirement. If the Respondent has to serve a mandatory minimum of 85%, then the Respondent is not eligible to receive work credits and good conduct credits, which is in direct conflict with the language of the Amended Statute. The legislative intent was to afford those convicted and sentenced for a second offense pursuant to §44-53-370 (b)(1), under the 2010 Sentencing Reform Act, the opportunity to receive all privileges outlined in the statute, including work credits and good conduct credits, thereby modifying the mandatory minimum requirement which would allow the Respondent to reduce his sentence below the 85% requirement claimed by the Department even if the Respondent is not granted parole. The language of the Amended Statute is neither vague in its understanding nor can it be misconstrued

in its meaning. Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or it would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E. 2d 280, 283 (2000). Yet, where the plain language of the statute is contrary to the Department's interpretation, the Court shall reject the Department's interpretation. In this case, the Department is not entitled to any deference in its interpretation because the plain language of The 2010 Amendment to §44-53-370 (b)(1) refutes the Departments position.

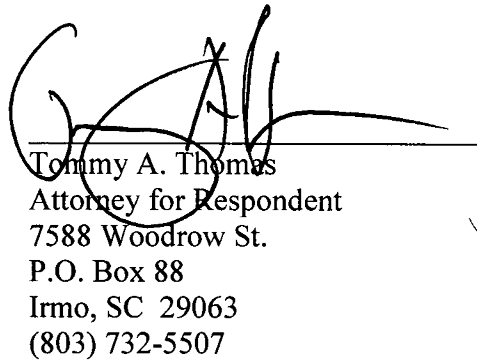
The Department interprets the amended language in §44-53-370 (b)(1) to mean that offenders are eligible for parole. However, if they are not granted parole they are still required to served 85% of their sentences. To substantiate their interpretation, the Department refers to §24-13-150 (A) and emphasizes the terms "notwithstanding any other provision of Law, ...an inmate convicted of a "no parole" offense as defined in section 24-13-100...". The phrase "notwithstanding any other provision of law" is in reference to those provisions made beforehand. It has no weight over any statute that succeeds it in nature, especially a conflicting statute. If two statutes are in conflict, the latest statute passed prevails as to repeal earlier statute to the extent of repugnancy. Hair v. State, 305 S.C. 77, 406 S.E. 2d 332 (1991). In the amendment to §44-53-370 (b)(1), the General Assembly uses the terms "Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a ... second offense... is eligible for parole...work credits, education credits, and good conduct credits." To plainly state its intent to exempt second offenses from the "no parole" provisions of S.C. Code Ann. §24-13-100 and 150 (A). Accordingly, Respondent's offense should not be treated as a "no parole" offense.

Judge Lenski states "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, community supervision, work release, work credits, education credits, and good time credits... 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." When a statute is penal in nature, it is construed strictly against the State and in favor of the Defendant. Since the 2010 Omnibus Crime Bill was enacted after §24-13-150 (A), this section has been implicitly repealed in favor of those convicted of a second offense violation of §44-53-370 (b)(1).

Furthermore, if it was the intent of the General Assembly for a second offense to remain a "no parole" offense, the General Assembly could have done so by omitting the language regarding parole eligibility or the earning of any credits. The Amended language of §44-53-370 (b)(1), which makes a person convicted of a first offense or second offense similarly eligible for probation, parole, or credits is further "substantial evidence" of the intent of the General Assembly to treat both first offenses and second offenses of §44-53-370 (b)(1) the same.

CONCLUSION

For the reasons stated above, the Respondent respectfully requests this Honorable Court to affirm the decision of the Administrative Law Court.



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