THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Administrative Law Judge S. Phillip Lenski

Docket No.: 14-ALJ-04-0355-AP

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

v.

South Carolina Department of Corrections, ...Appellant.

FINAL BRIEF OF APPELLANT

December 31, 2014

South Carolina Department of Corrections

Shanika Johnson
Deputy General Counsel
S.C. Dept. of Corrections
P.O. Box 21787
Columbia, South Carolina 29221
(803) 896-8508

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STATEMENT OF THE ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW COURT ERR WHEN IT REVERSED THE DEPARTMENT OF CORRECTIONS' CALCULATION OF RESPONDENT'S SENTENCE?

STATEMENT OF CASE

On October 4, 2012, Respondent was sentenced to ten years for Distribution of Heroin 2nd. (R.pp. 11-12). The Department of Corrections ("Department") determined that Respondent is required to serve 85% of his sentence before any good time or work release credits could be applied to reduce said sentence. Respondent filed a Step One Inmate Grievance on September 11, 2013, claiming his sentence should be eligible for the application of good time and work credits prior to him serving 85% of his sentence. This grievance was investigated and denied (R. pp. 7-8). Respondent filed a Step Two Grievance on November 3, 2013. The Step Two Grievance was also investigated and denied. (R. p. 9). Respondent subsequently filed a Notice of Appeal in the Administrative Law Court (ALC) on April 9, 2014. (R.p. 13).

Administrative Law Judge S. Phillip Lenski reversed SCDC's decision in its August 28, 2014 Order. (R.pp. 2-5). 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). (R.p. 5).

Appellant now appeals that determination to this Honorable Court. For the reasons that follow, SCDC respectfully requests this Court reverse the ALC's decision requiring the Department to calculate 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 the record. The court may not substitute its judgment for 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.

See also S.C. Code Ann. § 1-23-380(A)(5); Al-Shabazz v. State, 338 S.C. 354, 380, 527 S.E.2d 742, 756 (2000).

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. See S.C. Code Ann. § 1-23-610(B). A reviewing Court shall not substitute its judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions which are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole. Id. In determining whether the ALC's decision is supported by substantial evidence, the Court need only find, considering the record as a whole,

evidence from which reasonable minds could reach the same conclusion that the ALC reached. Durant v. S.C. Dep't of Health & Environmental Control, 361 S.C. 416, 420, 604 S.E.2d 704, 706 (Ct. App. 2004). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. Id. at 420.

ARGUMENT AND CITATION OF AUTHORITY

THE ADMINISTRATIVE LAW COURT ERRED IN REVERSING THE DEPARTMENT OF CORRECTIONS' CALCULATION OF RESPONDENT'S SENTENCE.

The ALC erred when it reversed SCDC's final agency decision that Respondent is subject to the requirement that he serve 85% of his incarcerative sentence before credits are applied to his sentence. Pursuant to S.C. Code Ann. § 24-13-150(A), "[n]otwithstanding any other provision of law . . . an inmate convicted of a 'no parole offense' as defined in Section 24-13-100 . . . 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." In addition, "[n]o prisoner who is serving a sentence for a 'no parole offense' is eligible to participate in a community supervision program until he has served the minimum period of incarceration as set forth in Section 24-13-150." S.C. Code Ann. § 24-21-560(A).

For purposes of definition under South Carolina law, a "no parole offense" means 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.

S.C. Code Ann. § 24-13-100. Respondent's offense Distribution of Heroin is a Class A Felony. See S.C. Code Ann. § 16-1-90.

Both the ALC and Respondent take the position that the amendment to § 44-53-370(b)(1) exempt Respondent from serving 85% of his sentence prior to the application of good time or work credits. Respondent submits that since he was sentenced after the language was added to S.C. Code Ann. § 44-53-370(b)(1) by the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the amendment not only applies to him, but the amendment also removes the 85% service requirement prior to the application of credits to his sentence. The act provides:

> 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.

However, nothing in the amended language of section 44-53-370(b)(1) reflects a legislative intent to remove the 85% requirement. See State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("Whenever possible, legislative intent should be found in the plain language of the statute itself."). The plain language of the statute states only that an offender is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. None of these items is incompatible with the requirement that offenders serve 85% of their incarcerative sentence. See S.C. Code Ann. § 24-13-210(B) (providing for good time credits for

offenders who are subject to the 85% requirement); § 24-13-230(B) (providing for work and education credits for offenders who are subject to the 85% requirement); § 24-21-560(A) (requiring participation in the community supervision program for offenders subject to the 85% requirement).

In the notes within his Order, Judge Lenski stated that the Department's interpretation of Respondent's sentence is "incompatible" with the 2010 amendment. (R. p. 3). However, there is no conflict between the amended language of S.C. Code Ann. § 44-53-370(b)(1) and the 85% requirement of S.C. Code Ann. § 24-13-150(A) because it is possible to give effect to the plain language of both statutes. See Beaufort County v. SC State Election Comm'n, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."); Richardson v. City of Columbia, 340 S.C. 515, 520, 532 S.E.2d 10, 12 (Ct. App. 2000) ("When two statutes can be reconciled, the court must construe the statutes in such a way that both remain functional. The more recent statute takes precedence over the earlier statute only if there is a conflict between the two statutes.") (internal citations omitted). As described above, offenders can be afforded each item listed in amended S.C. Code § 44-53-375(B) without altering the requirement of service of 85% of the sentence. Under the amended language, offenders are eligible for parole, but if they are not paroled, they are still required to serve 85% of their sentences. See S.C. Code Ann. § 24-13-150(A) ("**Notwithstanding any other provision of law** . . . an inmate convicted of a 'no parole offense' **as defined in Section 24-13-100** . . . 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.") (emphasis added).

The plain language of the Omnibus Crime Reduction and Sentencing Reform Act does not remove the requirement of service of 85% of an inmate's sentence. Instead, it only provides that Respondent is eligible to earn credits and have those credits applied to his sentence after he has served 85% of his sentence. Therefore, the ALC erred in its holding that Respondent's sentence should not be subject to the "no parole" offense requirements.

CONCLUSION

For the reasons stated above, SCDC respectfully requests that the ALC's decision be reversed.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Attorney for Appellant

Shanika Johnson
Deputy General Counsel
S.C. Department of Corrections
P.O. Box 21787
Columbia, South Carolina 29210
(803) 896-8508

Columbia, South Carolina
December 31, 2014

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR and the Supreme Court's order of August 13, 2007.

Shanika K. Johnson
Deputy General Counsel
S.C. Dept. of Corrections
P.O. Box 21787
Columbia, SC 29221
(803) 896-8508

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CERTIFICATE OF SERVICE

I hereby certify that I have served Respondent's attorney a copy of the foregoing Final Brief by depositing a copy of same in the United States Mail, postage prepaid, on December 31, 2014, addressed as follows:

Tommy A. Thomas, Esq.
P.O. Box 88
Irmo, S.C. 29063

Shanika K. Johnson
Deputy General Counsel
S.C. Dept. of Corrections
P.O. Box 21787
Columbia, SC 29221-1787
Attorney for Appellant