

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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JUN 16 2015

SC Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, *Administrative Law Judge*

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Lower Case No. 14-ALJ-04-0020-AP

Appellate Case No. 2014-001096

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Perry Gilmore, # 344879,.....Appellant,

v.

South Carolina Department of Corrections.....Respondent.

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**INITIAL BRIEF OF RESPONDENT**

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June 12, 2015

SOUTH CAROLINA DEPARTMENT  
OF CORRECTIONS

DANIEL J. CROOKS III  
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**STATEMENT OF THE ISSUES ON APPEAL**

- I. WAS APPELLANT AFFORDED ALL CONSTITUTIONALLY REQUIRED DUE PROCESS?**
  
- II. IS RESPONDENT'S FINAL AGENCY DECISION SUPPORTED BY SUBSTANTIAL EVIDENCE?**

## STATEMENT OF CASE

This matter comes before this Honorable Court pursuant to the appeal of Perry Drake Gilmore, Jr. (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (Department). On May 6, 2013, Appellant was convicted of yet another disciplinary offense 854, *i.e.*, “Exhibitionism and Public Masturbation.” (R. \_\_\_\_). As a result of this conviction, Appellant forfeited 90 days of good time credit. (R. \_\_\_\_).

Appellant appealed his May 6, 2013 conviction by filing a Step One grievance on May 8, 2013. (R. \_\_\_\_). The Warden denied the grievance on May 23, 2013. (R. \_\_\_\_). Subsequently, Appellant filed a Step Two grievance on May 24, 2013, and the Department denied the grievance on December 10, 2013. (R. \_\_\_\_). Thereafter, pursuant to *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), Appellant filed a notice of appeal to the Administrative Law Court (ALC), which issued a final order on April 14, 2014 affirming the May 6, 2013 conviction. (R. \_\_\_\_). The ALC’s order addressed each of Appellant’s arguments, ultimately finding them to be without merit. (R. \_\_\_\_).

Appellant appealed the ALC’s order to this Court on May 20, 2014, but the Court dismissed the appeal on October 28, 2014 due to Appellant’s failure to timely file his initial brief and designation of matter. (R. \_\_\_\_). After the Court reinstated the appeal on May 6, 2015, briefing was ordered continued, and the appeal is now before the Court.

## 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 reviewing tribunal 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 of 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(5); *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 498 S.E.2d 650, 653 (Ct. App. 1998).

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 was 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.*

### **ARGUMENT AND CITATION OF AUTHORITY**

#### **I. APPELLANT WAS AFFORDED ALL CONSTITUTIONALLY REQUIRED DUE PROCESS.**

Prison disciplinary cases are not criminal trials in federal or state courts. Instead, they are administrative hearings in an institutional setting. Therefore, due process in prison disciplinary hearings is substantially less than would be required in a criminal trial before a court. Due process requires the following in prison disciplinary cases:

- a) notice of charges;
- b) disclosure of evidence against defendant (may be limited);
- c) opportunity to be heard;
- d) no right to confront and cross-examine adverse witnesses;
- e) neutral and detached hearing body;
- f) aid of counsel substitute or other substitute aid where inmate is illiterate or complex case (not attorney);
- g) written statement by the fact-finder as to the evidence relied upon.

*Wolff v. McDonnell*, 418 U.S. 539, 566 (1974).

The requirements enumerated in *Wolff* were complied with in this case. The Disciplinary Report and Hearing Record demonstrate that Appellant had timely notice of the charge. (R. \_\_\_\_). The Record also reveals there was proper disclosure of evidence

due to the fact that the Disciplinary Offense Report was read at the disciplinary hearing. (R. \_\_\_\_). Furthermore, Appellant was afforded an opportunity to be heard at the May 6, 2013 hearing, but he forfeited this opportunity by acting in a disruptive manner—even telling the disciplinary hearing officer: “I’m gonna get your ass hurt.” (R. \_\_\_\_). As a result of his absence, the hearing officer entered a not guilty plea and proceeded to consider the evidence. (R. \_\_\_\_). Because Appellant was not present for most of the hearing, the evidence that was submitted to support the charge included the incident report and the testimony of the witnessing officer who testified as to the veracity of his report. (R. \_\_\_\_). There was a neutral and detached administrative hearing officer who presided over the hearing. (R. \_\_\_\_), and Appellant was provided a counsel substitute and a disclosure of the written statement of the disciplinary hearing officer’s findings. (R. \_\_\_\_).

Appellant’s claims that the Department violated his due process in this case are without merit for the same reasons articulated by Judge McLeod in his April 14, 2014 order affirming the Department’s decision. (R. \_\_\_\_). The ALC properly concluded that the Department did not violate Appellant’s due process rights. Accordingly, the Court should affirm as to this ground.

**II. RESPONDENT’S FINAL AGENCY DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.**

A reviewing court will not disturb the findings of an administrative agency if those 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 conclusion that the administrative agency reached to justify its action. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). 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, 461 S.E.2d 388 (1995). Administrative agencies are afforded wide latitude in making decisions, as shown in the deferential standard of appellate review. *Heater of Seabrook, Inc. v. Public Serv. Comm’n*, 332 S.C. 20, 503 S.E.2d 739 (1998).

The facts underlying this case could not be more straightforward: A correctional officer witnessed Appellant “standing in clear view, nude, with his penis in his hand stroking in a back and forth motion, masturbating.” (R. \_\_\_\_). The evidence introduced at the hearing to support the conviction included the correctional officer’s incident report and testimony at the hearing corroborating the account and affirming the veracity of the report. (R. \_\_\_\_). The credible evidence presented at the hearing satisfied the substantial evidence standard necessary to sustain the conviction. The ALC properly concluded that the Department presented substantial evidence to sustain Appellant’s conviction. Accordingly, the Court should affirm as to this ground.

**CONCLUSION**

For the foregoing reasons, Respondent respectfully requests that this Honorable Court affirm the ALC's April 14, 2014 order.

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT  
OF CORRECTIONS**

BY: 

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June 12, 2015

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, *Administrative Law Judge*

Lower Case No. 14-ALJ-04-0020-AP

Appellate Case No. 2014-001096

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SC Court of Appeals

Perry Gilmore, # 344879,.....Appellant,

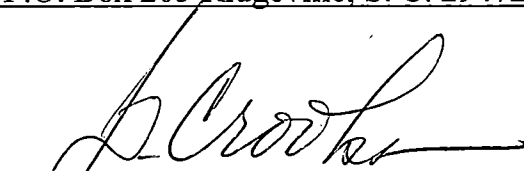
v.

South Carolina Department of Corrections.....Respondent.

**CERTIFICATE OF SERVICE**

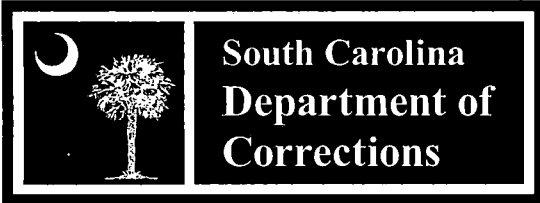
I, the undersigned, certify that on today's date I placed a copy of the foregoing *Initial Brief of Respondent* in the U.S. Mail, addressed as follows: Perry Gilmore, Jr., #344879, Lieber Correctional Institution, P.O. Box 205 Ridgeville, S. C. 29472.

Dated: June 12, 2015



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South Carolina  
Department of  
Corrections

NIKKI R. HALEY, Governor  
BRYAN P. STIRLING, Director

OFFICE OF GENERAL COUNSEL

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Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
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Reference: App. Case No.: 2014-001096 (*Gilmore v. S.C. Dep't of Corr.*)

Dear Ms. Kitchings:

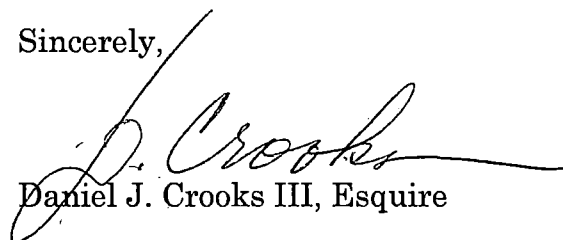
Enclosed herein, please find:

- The original and one (1) copy of *Respondent's Initial Brief*; and,
- The original and one (1) copy of *Respondent's Designation of Matter*.

Kindly file the originals, and stamp and return each copy to me in the enclosed, interagency envelope.

Thank you for your assistance.

Sincerely,



Daniel J. Crooks III, Esquire

Enclosures

cc: **VIA UNITED STATES MAIL**  
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