

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JUN 16 2015

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, *Administrative Law Judge*

Lower Case No. 14-ALJ-04-0018-AP

Appellate Case No. 2014-001093

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

v.

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

INITIAL BRIEF OF RESPONDENT

June 12, 2015

SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS

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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 February 15, 2012, Appellant was convicted of disciplinary offense 854, *i.e.*, "Exhibitionism and Public Masturbation." (R. ____). This was the Appellant's *seventh* conviction for an 854 offense in only a one-year period. (R. ____). As a result of this conviction, Appellant forfeited 30 days of good time credit. (R. ____).

Appellant appealed his February 15, 2012 conviction by filing a Step One grievance on February 15, 2012. (R. ____). The Warden denied the grievance on April 17, 2013. (R. ____). Subsequently, Appellant filed a Step Two grievance on April 23, 2013, and the Department denied the grievance on November 15, 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 February 15, 2012 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 29, 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,¹ even though Appellant refused to sign the form. (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 February 15, 2012 hearing. (R. ____). Additionally, Appellant declined to call any witnesses or to introduce any documentary evidence. (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

¹ Appellant waived his 24-hour notice requirement. (R. ____).

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 holding his erect penis and masturbating in front of his cell. (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.

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Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

BY: 

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June 12, 2015

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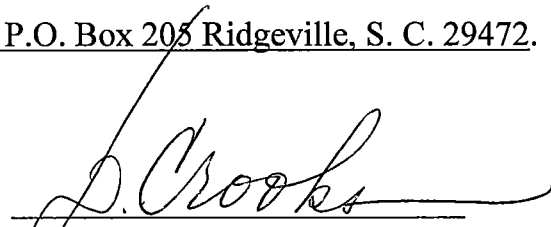
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South Carolina Department of Corrections.....Respondent.

CERTIFICATE OF SERVICE

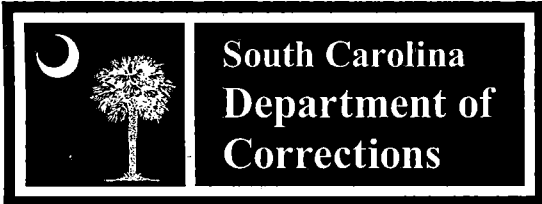
I, the undersigned, certify that on today's date I placed a copy of the foregoing *Initial Brief of Respondent* in the U.S. Mail, addressed as follows: Perry Gilmore, Jr., #344879, Lieber Correctional Institution, P.O. Box 205 Ridgeville, S. C. 29472.

Dated: June 12, 2015



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NIKKI R. HALEY, Governor
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SC Court of Appeals

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

Reference: App. Case No.: 2014-001093 (*Gilmore v. S.C. Dep't of Corr.*)

Dear Ms. Kitchings:

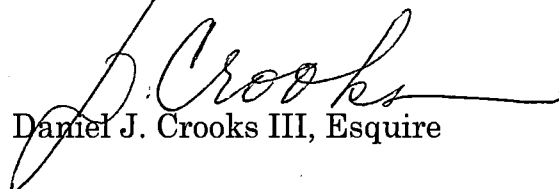
Enclosed herein, please find:

- 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
Perry Gilmore, #344879
Lieber Correctional Institution
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