

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from the Administrative Law Court  
Deborah Brooks Durden, Administrative Law Judge  
ALC Case Nos. 12-ALJ-04-0546-AP  
and 12-ALJ-04-0547-AP

**RECEIVED**

APR = 1 2016

**SC SUPREME COURT**

Opinion No. 2015-UP-240 (S.C. Ct. App. filed 5/6/2015)  
Appellate Case No. 2015-002313

---

BILLY LEE LIENBY, # 200273,

PETITIONER,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

---

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

---

**SOUTH CAROLINA DEPARTMENT  
OF CORRECTIONS**

**Christina Catoe Bigelow**  
Deputy General Counsel  
Office of General Counsel  
South Carolina Dept. of Corrections  
Post Office Box 21787  
Columbia, South Carolina 29221  
(803) 896-8508

**ATTORNEY FOR RESPONDENT**

**INDEX**

INDEX ..... ii

ISSUE PRESENTED ..... 1

STATEMENT OF THE CASE ..... 2

STANDARD OF REVIEW ..... 3

ARGUMENT ..... 4

CONCLUSION ..... 9

**ISSUE PRESENTED**

**The Court of Appeals properly affirmed the decision of the Administrative Law Court denying Petitioner's request to overturn his disciplinary convictions where Petitioner was afforded the appropriate due process at his disciplinary hearing and where the agency decision to deny Petitioner's grievances was supported by substantial evidence.**

## STATEMENT OF THE CASE

This matter comes before the Court pursuant to the appeal of Billy Lee Lisenby, Jr., (Petitioner), an inmate incarcerated with the South Carolina Department of Corrections (SCDC). Following a disciplinary hearing on February 14, 2012, Petitioner was convicted of two offenses, offense number 898, possession of a cell phone, and offense number 903, possession of marijuana. Petitioner filed separate Step 1 grievance forms regarding each offense, and following the denial of these grievances, he filed separate Step 2 grievance forms. After Petitioner's Step 2 grievances were denied, he appealed both disciplinary convictions to the Administrative Law Court. On March 22, 2013, Administrative Law Judge Deborah Brooks Durden affirmed the denial of both of Petitioner's grievances in separate orders. Petitioner appealed to the South Carolina Court of Appeals, and the two cases were consolidated. On May 6, 2015, the Court of Appeals affirmed the decision of the Administrative Law Court. See Billy Lee Lisenby, Jr., v. South Carolina Department of Corrections, Op. No. 2015-UP-240 (S.C. Ct. App. filed 5/6/2015). Petitioner's request for rehearing was denied on October 8, 2015.

Petitioner filed a Petition for a Writ of Certiorari in this Court on November 18, 2015, after receiving an extension of time in which to file. The matter was initially dismissed for Petitioner's failure to file an Appendix, but was reinstated by order dated March 2, 2016. This Return follows.

## 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 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.

S.C. Code Ann. § 1-23-380(5).

In an appeal of a final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-610(B). "Substantial evidence" is evidence which, considering the record as a whole, would allow a reasonable mind to reach the same conclusion that administrative agency reached. Hendley v. S.C. State Budget & Control Bd., 325 S.C. 413, 481 S.E.2d 159 (Ct. App. 1996). A reviewing court shall not substitute its own judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions that are controlled by errors of law or that are clearly erroneous in view of the substantial evidence on the record as a whole. Id.

## ARGUMENT

**The Court of Appeals properly affirmed the decision of the Administrative Law Court denying Petitioner's request to overturn his disciplinary convictions where Petitioner was afforded the appropriate due process at his disciplinary hearing and where the agency decision to deny Petitioner's grievances was supported by substantial evidence.**

### Petitioner was Afforded Procedural Due Process

Prison disciplinary cases are not criminal trials in federal or state courts; they are administrative hearings in an institutional setting. As stated by the United States Supreme Court, “[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.” Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (citations omitted). Therefore, due process in prison disciplinary hearings is **substantially less** than in a trial before a court of law. Due process, as the Supreme Court has noted in Wolff, requires the following in prison disciplinary cases:

- a) advance written notice of the charges at least twenty-four hours prior to the disciplinary hearing;
- b) a written statement by the factfinder as to the evidence relied on and the reasons for the disciplinary action;
- c) opportunity to call witnesses and present documentary evidence in his defense, if permitting him to do so would not be unduly hazardous to institutional safety or correctional goals;
- d) no right to confront and cross-examine witnesses due to the potential danger to institutional interests;
- e) limited right to assistance from a counsel substitute in cases where an inmate is illiterate or the issue is highly complex;
- f) a neutral and detached hearing body.

These requirements were complied with in this case. The Disciplinary Report and Hearing Record shows Petitioner had appropriate advance notice of the charge. (R. p. 41). Petitioner had a hearing before an impartial hearing officer on February 14, 2012, at which time he had the opportunity to be heard, to present witnesses, and to present documentary

evidence. (See R. p. 21-31). Further, although Petitioner did not qualify for a counsel substitute, the hearing officer allowed Counsel Substitute Armstrong to participate and assist Petitioner. (See R. p. 21-22). At the hearing, Petitioner spoke at length on his own behalf and presented witness statements from seven different individuals. (See R. p. 23-30). Finally, the hearing officer provided Petitioner with a written statement regarding the evidence she relied upon and the reasons for the disciplinary action. (R. p. 41). Accordingly, Petitioner received the procedural due process to which he was entitled under Wolff v. McDonnell.

In his grievances and on appeal, Petitioner complained that he was denied the opportunity to call witnesses. This complaint is unpreserved for review because Petitioner did not clearly express to the hearing officer at the hearing that he wished to call witnesses and did not object in any fashion to the failure of any witnesses to testify at his hearing. (See R. p. 21-31). Although Petitioner mentioned that “Ms. Moore and Officer Lee” were present when the incident took place, he never specifically asked the hearing officer at the hearing to have these witnesses called. (See R. p. 26). In fact, near the end of the hearing, and after Petitioner spoke at length on his own behalf and presented seven witness statements, the hearing officer specifically asked Petitioner if he had “anything else” and Petitioner clearly stated that he did not. (R. p. 30, lines 8-9). Accordingly, it is Respondent’s position that the issue of whether Petitioner was denied the opportunity to call witnesses is unpreserved for appellate review. See generally Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the

objector.”) (citation omitted).

Furthermore, Petitioner cannot show prejudice from the failure of his purported witnesses to testify. When the disciplinary hearing officer asked what these witnesses were supposed to verify, Petitioner responded that “They were . . . they were the, um, that was the three people that found the contraband. They were the ones in the room shaking down: Ms. Moore, Colt, and Lee.”<sup>1</sup> (R. p. 26). Although Petitioner contends on appeal, in a conclusory fashion, that Moore and Lee’s testimony would have been favorable to him, there is no reason to believe this is in fact so. Accordingly, Petitioner cannot show prejudice from the exclusion of these witnesses and he is not entitled to reversal. See State v. Wyatt, 317 S.C. 370, 372-73, 453 S.E.2d 890, 891 (1995) (error without prejudice does not warrant reversal).

#### The Final Agency Decision is Supported by Substantial Evidence

Petitioner also contends on appeal that the Administrative Law Court erred by failing to rule in his favor because “at the hearing they presented no evidence of marijuana, and the picture they presented for the phones and charger is not visible, and you cannot tell what it is.” (Petition for Writ of Certiorari, p. 7). He further claims that “the [hearing officer] never presented any evidence that the alleged marijuana tested positive for THC” and that SCDC failed to follow its own policy because “the [hearing officer] did not have the SCDC Form 19-79 available.” (Petition for Writ of Certiorari, p. 7).

---

<sup>1</sup> As Respondent pointed out in its Brief to the Court of Appeals, members of the Agency Search Team conduct institutional searches as directed by the Division of Security Director. (See Final Brief of Respondent in ALC case number 12-ALJ-04-0546-AP, at page 5). Each institution assigns an employee to observe and act in the capacity of an accusing official (in this case, Officer Hunt) to ensure the Agency Search Team members can perform their sole duty of conducting searches. (See id.). Due to the volume of searches performed and the volume of contraband found during these searches, the Agency Search Team would become ineffective if its members were required to participate in inmate disciplinary hearings. (See id.). As the Wolff court acknowledged, the full panoply of due process rights does not apply in prison disciplinary proceedings; instead, there must be a mutual accommodation between institutional needs and objectives and the provisions of the

Contrary to Petitioner's claims, there was ample evidence supporting the disciplinary convictions. Officer Hunt's incident report indicated as follows:

Officer Hunt and the Agency Search Team conducted a routine shake down of Oak A-Side Room 11 and found a Verizon Samsung cell phone in a hole in the bottom of the wall. Both Rooms, 11 and 10, have access to this bottom hole in the wall. Then at the top of the wall, inside a hole, we found two (2) Verizon Samsung cell phones, two (2) Samsung chargers, 22 grams of what appeared to be a green leafy substance. Only Room 11 has access to the top hold in the wall and one surge . . . surge powtech (sic) turned into a cell phone charger plugged in the wall. Inmate Lisenby, Billy, 200273, claimed ownership to all items listed that was found in Room 11 and is being charged with 898-Possession of a Cell Phone, 903-Possession of Marijuana. The above marijuana was NIC Test. The test was positive for THC."

At the disciplinary hearing, Officer Hunt confirmed that his report was true and accurate. (See R. p. 25). He further stated that he would not have written in his incident report that an inmate claimed an item unless the inmate had in fact done so. (See R. p. 28). He elaborated as follows: "I believe in everybody having a fair trial. If [Lisenby] wouldn't have claimed it, it wouldn't be on my Incident Report." (R. p. 28, lines 7-8). Regarding the marijuana, note that Petitioner never claimed at the hearing that the substance found was not, in fact, marijuana; instead, he claimed that none of the contraband belonged to him. (See R. p. 23-30). Regardless, the SCDC Controlled Substance and Disposition Form clearly reflects that the green leafy substance was tested on 2/4/12 and that the test was positive for marijuana. (See R. p. 46). Furthermore, Petitioner's claim that he is entitled to relief because SCDC failed to follow its own policy is plainly without merit. It is well established that an agency's failure to follow its own procedural rules and regulations does not violate a party's constitutional due process rights since no such constitutional right exists. See Board of

---

Constitution that are of general application. Wolff, 418 U.S. at 556.

Curators v. Horowitz, 435 U.S. 78, 92 n8 (1978); Hernandez v. Estelle, 788 F.2d 1154 (5<sup>th</sup> Cir. 1986); see also Myers v. Klevenhagen, 97 F.3d 91, 94 (5<sup>th</sup> Cir. 1996) (“A prison official's failure to follow the prison's own policies, procedures or regulations does not constitute a violation of due process, if constitutional minima are nevertheless met.”).

After hearing all the evidence, including Petitioner’s explanations and the seven witness statements presented by Petitioner, the disciplinary hearing officer found Petitioner guilty. Clearly, substantial evidence supported that Petitioner was guilty of the possession of marijuana and possession of a cell phone. See Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 455-56 (1985) (“The relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.”).<sup>2</sup> Petitioner cannot show that the final agency decision of SCDC was clearly erroneous, arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record. See Porter v. Public Service Comm’n, 333 S.C. 12, 507 S.E. 2d 328 (1998). Petitioner’s disciplinary hearing complied with due process requirements, and Petitioner’s disciplinary convictions were supported by substantial evidence. Accordingly, the decision of the lower courts should be upheld.

---

<sup>2</sup> In Hill, the Court further elaborated, “The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Revocation of good time credits is not comparable to a criminal conviction, and neither the amount of evidence necessary to support such a conviction, nor any other standard greater than some evidence applies in this context.” Id. (citations omitted).


**CONCLUSION**

For the reasons discussed above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT  
OF CORRECTIONS**

BY:

  
**CHRISTINA CATOE BIGELOW**  
Deputy General Counsel  
Office of General Counsel  
S. C. Department of Corrections  
Post Office Box 21787  
Columbia, South Carolina 29221  
(803) 896-8508

April 1, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from the Administrative Law Court  
Deborah Brooks Durden, Administrative Law Judge  
ALC Case Nos. 12-ALJ-04-0546-AP  
and 12-ALJ-04-0547-AP

Opinion No. 2015-UP-240 (S.C. Ct. App. filed 5/6/2015)  
Appellate Case No. 2015-002313

---

BILLY LEE LIENBY, # 200273,

PETITIONER,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

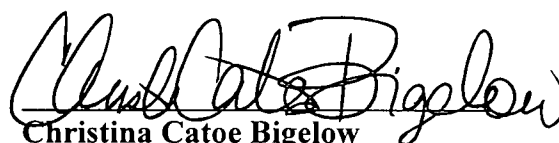
RESPONDENT.

---

**CERTIFICATE OF SERVICE**

---

Undersigned counsel hereby certifies that on today's date she mailed a copy of the **Return to Petition for Writ of Certiorari** to Petitioner, addressed as follows: **Billy Lee Lisenby, Jr., # 200273**, Ridgeland Correctional Institution, Post Office Box 2039, Ridgeland, South Carolina 29936.



**Christina Catoe Bigelow**  
Deputy General Counsel  
Office of General Counsel  
S. C. Department of Corrections  
Post Office Box 21787  
Columbia, S. C. 29221  
(803) 896-8508

April 1, 2016