THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

---

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

---

RECEIVED
JUN 19 2017
SC Court of Appeals

Case No. 15-ALJ-30-0318-AP

---

South Carolina Department of Corrections, Respondent,

v.

Stephen L. Barnes, Appellant.

---

# Initial Brief on Appeal

---

Shane Goranson, Esquire
Attorney, Capital Trial Division
1330 Lady Street, Suite 401
Columbia, South Carolina
(803)-734- 7818
sgoranson@sccid.sc.gov

Attorney for Appellant

Lake Summers, Esquire
Malone, Thompson, Summers & Ott LLC
Attorneys & Counselors at Law
339 Heyward Street – Suite 200
Columbia, South Carolina 29201
(803) 254-3300 – Office
(803) 254-0309 – Office Fax
summers@mtsolawfirm.com

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUES ON APPEAL ..... 1

STATEMENT OF THE CASE ..... 2

STATEMENT OF THE FACTS ..... 3

ARGUMENT ..... 5

I. The ALJ erred in not remanding to the DOC for further fact finding regarding their recommendation for Barnes to be classified as a safekeeper.

II. The ALJ erred in not reversing the decision of the DOC to deny books and canteen access for Appellant.

III. The ALJ erred when it determined that Appellant had not established the statute was unconstitutionally applied? (ie that he had a state created liberty interest in his mere classification as a Safekeeper?

CONCLUSION ..... 12

TABLE OF AUTHORITIES

**Cases**

Beard v. Banks, 548 U.S. 521 (2006).....9

Bell v. Wolfish, 441 U.S. 520 (1979).....9-10

Dorman v. S.C. Dep't of Health & Envtl Control, 350 S.C. 159 (Ct. App. 2002).....5

Durant v. South Carolina Dep't of Health and Environmental Control, 361 S.C. 416 (Ct.App. 2004).....5

Fontroy v. Beard, 559 F.3d 173 (3rd Cir. 2009).....10

Grant v. S.C. Coastal Council, 319 S.C. 348 (1995).....5

Hodges v. Rainey, 341 S.C. 79 (2000).....7

Hampton v. Haley, 403 S.C. 394 (2013).....7

Lark v. Bi-lo, 276 S.C. 130 (1981).....6

State ex rel. Condon v. Hodges, 349 232 (2002).....6

Turner v. Safley, 482 U.S. 78 (1987).....10

Virginia v. Cannon, 228 F.2d 313 (4th Cir. 1955).....7

Wiles v. Ozmint, 2006 WL 2260136 (D.S.C. 2006).....10

Wilkinson v. Austin, 545 U.S. 209 (2005).....12

Wolff v. McDonnell, 418 U.S. 539 (1974).....12

**Other Sources**

12 S.C. Jur Governor §46(2017).....7

**Statutes and Constitution**

Executive Order 2000-11..... 8,12

SC Code Ann. §1-23-380.....5, 6. 7

SC Code Ann. §1-23-610(D).....5

SC Constitution Art. IV §15.....6

## STATEMENT OF ISSUES ON APPEAL

I. Whether the ALJ erred in not remanding to the DOC for further fact finding regarding their recommendation for Barnes to be classified as a safekeeper.

II. Whether the ALJ erred in not reversing the decision of the DOC to deny books and canteen access for Appellant.

III. Whether the ALJ erred when it determined that Appellant had not established the statute was unconstitutionally applied? (ie that he had a state created liberty interest in his mere classification as a Safekeeper?

## STATEMENT OF THE CASE

On or about April 20, 2015 the Edgefield County Sheriff, Adell Doby, sought to have Appellant classified as a safekeeper and have the South Carolina Department of Corrections (SCDC) take custody of Mr. Barnes. ALJ Order p1. The governor issued an executive order to transfer custody of Mr. Barnes to SCDC on April 28, 2015. As a result of the executive order Mr. Barnes was removed from the county jail and transferred to SCDC as a safekeeper on April 28, 2015. ALJ Order p1. Barnes became subject to the same "security measures" as the other inmates who were held in the same area at SCDC for disciplinary reasons. Mr. Barnes objected to this classification and, eventually, properly filed Step-2 grievances of which fifteen (15) of the sixteen (16) grievances filed were denied. Appellant then filed his initial brief in the Administrative Law Court (ALC) on January 17, 2017. SCDC filed its brief on February 24, 2017. On March 29, 2017 the Administrative Law Judge (ALJ) Ralph King Anderson, III issued an order denying relief on all fifteen (15) of Appellant's claims with prejudice.

Appellant filed a timely notice of appeal. This brief follows.

## STATEMENT OF THE FACTS

Beginning February 7, 2014 through April 28, 2015,[1] Appellant was housed as a pre-trial detainee at the following county jails: Aiken; Laurens; and Greenwood. On or about April 20, 2015, Edgefield County Sheriff Adell Doby petitioned the General Counsel's Office of the S.C. Department of Corrections (hereinafter, "SCDC" or "Department") to classify Appellant as a "Safekeeper" and transfer him to the custody of SCDC. On or about April 28, 2015, Appellant was approved by SCDC as a Safekeeper. The Governor then issued an Executive Order on April 28, 2015, also approving Appellant's designation as a Safekeeper. On the same day, April 28, Appellant was removed from a county jail and transferred to the custody of SCDC as a Safekeeper (assigned SK #5290).

On April 30, 2015, Appellant filed a written objection, through his attorneys, to his Safekeeper status within SCDC on constitutional and statutory grounds. ROA 46-47. On June 10, 2015, Appellant's attorneys submitted a second letter regarding the Department's denial of Appellant basic canteen-privileges and for a clarification of Appellant's Safekeeper status. ROA 48-49. Subsequently, on July 6, 2015, Appellant received notice in the form of a letter from SCDC, dated July 2, 2015, explaining SCDC's decision, the reasons for said decision for his placement within SCDC as a Safekeeper, and a final rejection by SCDC to Appellant's objections. ROA 50-51. On July 6, 2015, Appellant filed an action in the Administrative Law Court (hereinafter, "Court"), objecting to his classification as a Safekeeper and also challenging

[1] Barnes had previously been incarcerated within SCDC pursuant to a murder conviction and death sentence; however, his case was reversed in January 2014, *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014), and he was remanded on February 7, 2014, by SCDC to the custody of the Edgefield County jail for re-trial. The Edgefield Sheriff then asked other county jails to house Barnes.

certain conditions of confinement. On August 28, 2015, the Department filed a Memorandum of Law in Support of Dismissal of the Petition.

On November 5, 2015, the Court issued a written Order. The Order granted the Department's motion for dismissal as to the issue of Appellant's classification as a Safekeeper and transfer to SCDC. The Order further remanded the case to the Department to allow Appellant to file Step-2 Grievances for the Department's consideration.

On February 11, 2016, Appellant filed 16 (sixteen) separate Step-2 Grievance forms. On March 11, 2016, the Department responded in a letter denying all of Appellant's grievances because he had used attachments to the forms; thus, the letter instructed Appellant to re-file his grievances and to use only the space allocated in the Step-2 form to write his complaint. On April 5, 2016, Appellant re-submitted his 16 listed Grievances, complying with the instructions to use only the space on the Step-2 forms. ROA 1-45. On July 21, 2016, the Department filed its response to each grievance. ROA 1-45. On August 22, 2016, Appellant filed a timely appeal to this Court. ROA 1-45.

On September 7, 2016, Appellant filed a Motion for Miscellaneous Relief. On October 17, 2016, the Court issued an Order On Motion For Miscellaneous Relief And Order Governing Procedure. The Order set forth a timetable and filing deadlines for the parties in this matter. The parties submitted briefs, the ALJ decided the matter based on the briefs and without a hearing, and issued its final order denying all of Appellant's claims on March 29, 2017. This appeal followed.

## ARGUMENT

### STANDARD OF REVIEW

The standard for appellate review to the Appellate Panel is whether the ALJ's findings are supported by substantial evidence under section 1-23-610(D). S.C.Code Ann. § 1-23-610(D) (Supp. 2003); *Dorman v. S.C. Dep't of Health & Envtl. Control,* 350 S.C. 159, 165, 565 S.E.2d 119, 122 (Ct.App.2002). In determining whether the ALJ's decision was supported by substantial evidence, this court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the administrative agency reached. *Grant v. **707 S.C. Coastal Council,* 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Id.* (citation omitted). 5 v. South Carolina Department of Health and Environmental Control, 361 S.C. 416 (Ct. App. 2004).

When reviewing the Department's decisions the Administrative Law Court (ALC) sits in an appellate capacity and the Administrative Law Judge (ALJ) is directed to conduct appellate review in the same manner as prescribed by statute. S.C. Code Ann. §1-23-380. The Court may not substitute its judgment for the judgment of the agency as to the weight of evidence on questions of fact. The Court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (in relevant parts) (a) in violation of statutory decisions or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. SC Code Ann. §1-23-380.

The Administrative law Judge (ALJ) may not reverse or modify an agency's decision unless the record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence, arbitrary, or affected by error of law. S.C. Code Ann. §1-23-380(5).

Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side, but it is evidence which considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Lark v. Bi-lo, 276 S.C. 130, 135 (1981)

Appellant's Step-2 Grievances.

Appellant Barnes filed 16 separate Step-2 grievances. The ALJ found that many of the claims were not preserved for appeal or were abandoned. As such Appellant appeals the ALJ's order in regard to the following claims:

ISSUE I: The ALJ erred in not remanding to the DOC for further fact finding regarding their recommendation for Barnes to be classified as a safekeeper.

On February 16, 2000, the Governor of South Carolina issued Executive Order No. 2000-11, Section 1 of which states:

> An individual held in a county pretrial confinement facility may be transferred to the custody of the [Department] by commitment duly authorized by the Governor pursuant to §24-3-80, if the individual: (1) is a high escape risk; (2) exhibits extremely violent and uncontrollable behavior; and/or (3) must be removed from the county facility to protect the individual from the general population or from other detainees.

The South Carolina Constitution charges the governor with ensuring "the laws be faithfully executed." S.C. Const. Art. IV § 15. In exercising this responsibility, South Carolina has established that the governor's general authority is restricted to what is allowed by legislative

statute. See, e.g., State ex rel. Condon v. Hodges, 349 S.C. 232, 245-46, 562 S.E.2d 623, 630-31 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that ...," so "the authority ... [does not lie] with the executive branch."); Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("The text of the Restructuring Act is certain—the Act grants the Governor the right to ... while specifically exempting ...."); Hampton v. Haley, 403 S.C. 394, 404, 743 S.E.2d 258, 262 (2013) ("The executive branch is constitutionally tasked with ensuring that the laws be faithfully executed. Of course, the executive branch ... may exercise discretion in executing the laws, but only that discretion given by the legislature.") (citations omitted) This approach is consistent with other states, which have construed executive orders to have authority comparable to that of legislation. 12 S.C. Jur. Governor § 46 (2017) (citing Virginia v. Cannon, 228 F. 2d 313 (4th Cir. 1955).

If substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, decisions, or conclusions are: in violation of constitutional or statutory provisions or were clearly erroneous in view of reliable probative, and substantial evidence in the whole record or were arbitrary or capricious or characterized by abuse of discretion...then the ALJ can reverse or modify the Judgement of the Agency. S.C. Code Ann §1-23-380(A)(5).

In this case, Department of Corrections recommended Appellant be classified as a safekeeper and the Governor approved Appellant's safekeeper classification based on information received via affidavit from Edgefield County Sheriff Adel Doby and the recommendation of SCDC. The ALJ failed to properly analyze the affidavit and therefore (1) was in violation of statutory decisions and/or (2) the decision was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(1) Violation of statutory decisions

In this case the recommendation to the Governor that Appellant be classified as a Safekeeper was in violation of the executive order which governs classification of Safekeepers: Executive Order 2000-11. This executive order mandates that detainees fit into one of three categories before they may be committed as safekeepers. It cannot be ascertained from the bare bones assertions of Sheriff Doby regarding allegations of "failure to obey," "assault," and "possession of a weapon" squarely place Appellant within the category of "exhibiting extremely violent behavior and uncontrollable conduct." It may be that Appellant's conduct was extremely violent and uncontrollable but such cannot be determined from the allegations. At any rate, it is clear that Appellant's last citation was in 2009. See ROA Brief of Department, ex B. p3.

(2) The decision was arbitrary or capricious

Nowhere in Sheriff Doby's affidavit does it state that Barnes had been extremely violent and uncontrollable (which was the basis for Barnes's classification as a safekeeper). Nor do the words used to describe allegations against Mr. Barnes rise to the level of extremely violent and uncontrollable behavior.[2]

Because there is no evidence in the record that supports the finding that Appellant exhibited "extremely violent and uncontrollable behavior" the ALJ erred in not either not remanding for further proceedings to determine the level of Appellant's misconduct or reversing the Department's finding that Barnes should be classified as a safekeeper. The ALJ could have remanded the issue to the Department for further fact finding regarding the allegations against the appellant, including, but not limited to: whether Appellant had exhibited any extremely violent and uncontrollable behaviors such as aggravated assault and battery, what types of

[2] It is interesting to note that although the Sheriff included no more egregious description than a simple 30 day misdemeanor offenses, possession of a weapon, and failure to obey while trying to make the case that the Appellant exhibited extremely violent and uncontrollable behavior, went to lengths to note that Mr. Barnes had filed many grievances (100+).

weapons the Appellant was alleged to have had and whether they actually may have belonged to a cell-mate, what were the circumstances surrounding the allegations of "failure to obey a command" and did they arise while Appellant was exhibiting extremely violent behavior? Without more information regarding the severity of misbehavior that Appellant is alleged to have done or exhibited the ALJ was simply not equipped to decide whether the determination that the Department's recommendation that Appellant be classified as a Safekeeper was arbitrary and capricious or controlled by an error of law.

II. The ALJ erred in not reversing the decision of the DOC to deny books and canteen access for Appellant.

The Department refused to allow Appellant to receive a book called the "Prisoner's Self-Help Litigation Manual" directly from the publisher, Prison Legal News. ROA 215-271. In *Beard v. Banks*, the United States Supreme Court held that a prison may institute some punitive measures for inmates subject to disciplinary procedures, even such inmates are still entitled to religious and law-related books and materials. Beard, 548 U.S. 521(2006). Mere imprisonment does not automatically deprive a prisoner of all constitutional protection. Id. 548 U.S. at 529.

In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law the proper inquiry is whether these conditions amount to punishment of the detainee.

In order to determine whether a detainee is being subjected to punishment the proper question to ask is whether "there is a rational relationship to a legitimate non-punitive governmental purpose and whether they appear excessive in relation to that purpose." Bell v. Wolfish, 441 U.S. 520 (1979)

Restraints that are reasonably related to the institutions interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are

discomfiting and are restrictions that the detainee would not have experienced had he been released."Id.

When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78, 89 (1987). In order to determine whether a restraint is reasonably related to legitimate penological interests, a court must consider (1) "whether there is a valid, rational connection between the prison regulation and the legitimate interest put forth to justify it"; (2) "whether inmates have an alternative means of exercising the right"; (3)"the burden on prison resources that would be imposed by accommodating the right"; and (4) whether there are alternatives to the regulation that fully accommodate the inmate's rights at *de minimis* cost to valid penological objectives." Fontroy v. Beard, 559 F.3d 173, 177-89 (3rd Cir 2009)(internal citations omitted). These standards apply to safekeepers. Wiles v. Ozmint, 2006 WL 2260136, *8 (D.S.C. 2006).

In this case, the regulation is not reasonably related to legitimate penological interests. First, the Department says that inmates are only allowed to have a Qu'ran or a Bible and are not allowed to have other books. The stated purpose of this rule is to prevent inmates subject to these measures from having places to hide contraband. There is a rational connection between allowing a single book per cell in order to limit the ability to hide items or burn paper but there is not a rational connection between the Qu'ran and the Bible and this purpose. Any book would be reasonably related to this purpose. Second, the alternative means of exercising the right to possession of a legal book in the cell would be to store it in the library. SCDC has refused to allow this for unstated reasons. Thirdly, the burden on prison resources would be *de minimis*, it would not be difficult for a correctional officer to swap out a book for an inmate at his cell or to

store it on a shelf for the library. Clearly, there the aforementioned alternatives maintain valid penological objectives and cost very little, if anything, to implement.

The ability to prepare a defense is a substantial right of the accused. In this case that right was prejudiced by SCDC and the determination to deny Appellant a book regarding *pro se* defense preparation and this determination was characterized by an abuse of discretion. The obvious solution would be to allow Appellant to trade his Quran for the legal book as needed. This would maintain security and allow the Appellant to prepare his legal defense in his pending cases, thus protecting Appellant's constitutional right to freedom of religion and to prepare a defense.

The decision to deny Appellant the legal book which was sent straight from the publisher affected a substantial right of the appellant and prejudiced him because he has been hindered in his ability to prepare a defense. This denial was controlled by an error of law initiated by SCDC and endorsed by the ALJ, namely, that the institutional policy trumped a constitutional right to prepare a defense. The record reflects that a substantial right of the Appellant has been prejudiced because the decision is clearly erroneous in view of the substantial evidence.

Moreover, the denial of the book is punishment. There is no rational relationship to a legitimate non-punitive governmental purpose and the denial of this book being the single book allowed in the Appellant's cell. The legitimate purpose may be that SCDC limits books to one per cell in order to limit hiding places or to minimize flammable material within the cell. However, *which* book, is not rationally related to this purpose.

Therefore, because a substantial right of the accused was at issue and the decision was controlled by an error of law the ALJ should have reversed or remanded SCDC's denial of Appellant's request.

III. The ALJ erred when it determined that Appellant did not establish he had a state-created liberty interest in classification as a safekeeper.

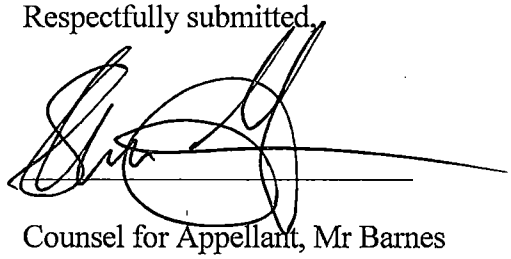
A state created liberty interest arises when a state's policies or regulations create a liberty interest for an inmate and the inmate has a right to due process when that interest is harmed by disciplinary actions. Wolff v. McDonell, 418 U.S. 539, 557 (1974); Wilkinson v. Austin, 545 U.S. 209 (2005) (adding the requirement that the interest needs to arise from state policies or regulations).

In this case, Executive Order 2000-11 creates a liberty interest in being free from classification as a safekeeper unless one of three conditions are met. If and when a detainee is found to fit within the requirements of the executive order the detainee is then subject to the same restrictive policies as inmates who have been confined within the Department under disciplinary procedures which provided due process to those inmates. Logically, Appellant should be given the same process. Additionally, SCDC inmates who are serving time because they have been convicted of crimes are housed in these units and have the opportunity to leave by serving the disciplinary time or proving their good behavior. Barnes can do neither and must stay in segregation indefinitely despite his good behavior while classified as a Safekeeper.

## CONCLUSION

Because the ALJ erred in determining the above made claims should be denied this court should reverse and remand the ALJ's decision for further proceedings in accordance with the law set out above.

Respectfully submitted,



Counsel for Appellant, Mr Barnes

Shane Goranson
Capital Trial Division, SCCID
SC Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201
Tel. 803-734-1358
Email: sgoranson@sccid.sc.gov

June 19, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Administrative Law Court

Ralph King Anderson, III, Administrative Law Judge

---



SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT,

V.

STEPHEN L. BARNES,

APPELLANT

---

CERTIFICATE OF SERVICE

---

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Lake Summers, Esquire, at Molone, Thompson, Summers, Ott, LLC, 339 Heyward Street, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Stephen L. Barnes, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 19th day of June, 2017.

Shane Goranson
Capital Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of June, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.