**STATE OF SOUTH CAROLINA**
**ADMINISTRATIVE LAW COURT**

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| Steven Lee Higginbotham, #237685,<br><br>Appellant,<br><br>vs.<br><br>South Carolina Department of Corrections,<br><br>Respondent. | Docket No. 16-ALJ-04-0756-AP |





This matter is before the South Carolina Administrative Law Court (Court or ALC) on an appeal filed by Steven Lee Higginbotham (Appellant), an inmate housed with the South Carolina Department of Corrections (Department or SCDC).

Appellant was charged with violation of SCDC Offense 806, "Any Act Defined as a Felony by the Laws of the State of South Carolina" after SCDC guards found in Appellant's cell approximately 100 pictures depicting either children with genitalia drawn on or put onto the photos in place of their clothing, or altered photos of adult hands touching young children inappropriately. Appellant was served with the Disciplinary Report and Hearing Record on June 14, 2016. A Disciplinary Hearing Officer (DHO) held the hearing on June 22, 2016. Appellant had counsel substitute.[1] The DHO found Appellant guilty of the charge, specifically a felony pursuant to S.C. Code Ann. 16-15-410,[2] and issued sanctions that included loss of 111 days of good time.

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[1] Initially, Appellant wanted his accuser present at the hearing. However, prior to the hearing, Appellant and his counsel substitute waived the right to have the accuser present.

[2] S.C. Code Ann. § 16-15-410 (2015) sets forth the following definition of, penalties for, and exception to third degree sexual exploitation of a minor:

> (A) An individual commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.
> (B) In a prosecution pursuant to this section, the trier of fact may infer that a participant in sexual activity or a state of sexually explicit nudity depicted as a minor through its title, text, visual representation, or otherwise, is a minor.
> (C) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned not more than ten years.
> (D) This section does not apply to an employee of a law enforcement agency, including the State Law Enforcement Division, a prosecuting agency, including the South Carolina Attorney General's Office, or the South Carolina Department of Corrections who, while acting within the employee's official capacity in the course of an investigation or criminal proceeding, is in possession of material that contains a visual representation of a minor

Appellant filed a Step 1 Grievance on June 22, 1016 arguing that he should have been charged with having contraband (Offense 817) rather than a felony (Offense 806) because he had previously been charged with possessing contraband under similar circumstances; that it was double jeopardy to charge him with this crime; that the Department violated its policies because there were technical errors in the investigation dates and charge; and that the resulting penalties constituted cruel and unusual punishment. After the Warden denied the grievance, Appellant filed his Step 2 Grievance, which was also denied.

Appellant filed this appeal on October 25, 2016. The case was assigned on October 28, 2016. The Department filed a Motion for Extension of Time to File the Record and a Motion to Limit the Record From Appellant. The Court granted both Motions by Order issued January 31, 2016.

The Department filed the Record on Appeal on February 8, 2017. Appellant filed his brief on March 14, 2017. The Department filed its brief on March 8, 2017.

## STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) and *Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003). When reviewing the Department's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Al-Shabazz*, 338 S.C. at 377; 527 S.E.2d at 754; *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2016) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380(A)(5) states:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the 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:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;

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engaging in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.

(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) (Supp. 2016).

Consequently, an Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." *Id.* Furthermore, an Administrative Law Judge 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 an error of law. *Id.*; *see also Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but 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, 276 S.E.2d 304, 306 (1981) (quoting *Law v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)). Accordingly, 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, 353, 461 S.E.2d 388, 391 (1995).

Additionally, in *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455-456, 105 S.Ct. 2768 (1985), the United States Supreme Court held that "the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." Moreover, in *Al-Shabazz*, the South Carolina Supreme Court underscored that except where there is a possible Constitutional violation, since prison officials are in the best position to decide inmate disciplinary matters, the courts, and therefore this tribunal, adhere to a "hands off" approach to internal prison disciplinary policies and procedures when reviewing inmate appeals under the Administrative Procedures Act.

## DISCUSSION

### Double Jeopardy and Cruel and Unusual Punishment

SCDC personnel found in Appellant's possession photos of children with either genitalia drawn on the photos or cutouts of genitalia attached to the photos in place of the children's

clothing. They also found altered photos depicting adult hands inappropriately touching small children. SCDC officials charged Appellant with violation of SCDC Offense 806, "Any Act Defined as a Felony by the Laws of the State of South Carolina." Appellant testified that when he was at Allendale Correctional Institution, he possessed similar pictures and was charged with violation of SCDC Offense 817 (Possession of Contraband) rather than being charged with a felony. He also argues that in her report, Lieutenant Williams, one of the SCDC personnel who discovered the photos in Appellant's cell, described the photos as being altered, which falls under the definition of "contraband" under SCDC OP-22.14(817). Thus, Appellant argues that the Department's charging him with violation of a felony rather than possession of contraband constitutes double jeopardy. However, the Double Jeopardy Clauses of the United States and South Carolina Constitutions only protect against the imposition of multiple criminal punishments for the same offense. *Hudson v. U.S.*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). In this case, Appellant is charged with a different offense for a subsequent act. Also, Appellant faced a disciplinary hearing, not a criminal trial, for the act of creating and possessing these particular documents, and only criminal punishment subjects a person to jeopardy within the constitutional meaning. *U.S. ex rel Marcus v. Hess*, 317 U.S. 537, 548-49 (1943); *see also State v. Blick*, 325 S.C. 636, 642, 481 S.E.2d 452, 456 (Ct. App. 1997) (finding that "the loss of 60 days of good time credit and the imposition of 120 days of administrative segregation is not so divorced from the remedial goal of the government to encourage good conduct and maintain order in the prison as to constitute punishment for double jeopardy purposes.").[3]

[3] Appellant has also failed to establish why the Department would not be able to charge him with SCDC Offense 806. He does not dispute the facts underlying the charge of Offense 806, and even argues that he should have been charged with Offense 817 as a result of those facts. Nevertheless, he seems to argue that because the photos were altered, they met the definition of "contraband" under Offense 817, which is why he had been charged with this offense under the same circumstances twice before. However, simply because Appellant's actions could be classified under multiple offense definitions does not mean that the Department cannot charge him with different or multiple charges, nor does it negate the Department's discretion to decide which charges to pursue. In short, Appellant has not established why his actions would not also violate S.C. Code Ann. § 16-15-410, thus constituting a felony for purposes of Offense 806. He asserts that the third-degree sexual exploitation statute only primarily applies to "interstate and internet trafficking of child pornography." However, he cites to no legal authority to support this claim. Appellant also argues that because some of the photos only involved "in appropriate[] touching," which he considers "speculation," they did not meet the definition of "sexually explicit." However, pursuant to subsection (A) of Section 16-15-410, the type of material that qualifies for third degree sexual exploitation of a minor is that which "contains a **visual representation** of a minor engaging in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation." (Emphasis added). Thus, even though the photographs were altered to make children appear to exhibit their genitalia and to make adults appear to be touching children in an inappropriate manner, these photos are sufficient to qualify as "visual representation[s]" of sexually explicit nudity of minors and sexual activity involving a minor. As such, there was substantial evidence in the Record

Appellant also asserts that applying the charge of 806, "Any Act Defined as a Felony by the Laws of the State of South Carolina" is "cruel and unusual punishment." However, though Appellant cites to legal authority, he does not discuss the application of the law to the facts of this case. Appellant thus provides no authority that supports his contention. *See D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 549, 730 S.E.2d 340, 351 (Ct. App. 2012) (noting that while the appellants cited a case to support a claim, the argument was nevertheless considered "largely conclusory" and still considered abandoned on appeal); *State v. Hill*, 394 S.C. 280, 297, 715 S.E.2d 368, 377 (Ct. App. 2011) (considering a citation to a case "without any analysis whatsoever as to how or why [it] applies" insufficient to preserve an issue on appeal, and thus rendering that issue abandoned on appeal). Therefore, this argument is considered abandoned.

**Failure to Follow Department Policy**

Appellant also argues that the Department violated his due process rights. First, a disciplinary hearing is not a criminal trial, and inmates do not have the broad degree of rights to which a criminal defendant is entitled. Thus, the Department's failure to follow its own policy does not give rise to a due process violation, as long as constitutional minima are met. *See Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th 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."). The "constitutional minima" in this case is circumscribed by *Al-Shabazz*, *supra* and *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Al-Shabazz*, the South Carolina Supreme Court explained:

> [T]he [United States] Supreme Court held that due process in a prison disciplinary proceeding involving serious misconduct requires: (1) that advance written notice of the charge be given to the inmate at least twenty-four hours before the hearing; (2) that factfinders must prepare a written statement of the evidence relied on and reasons for the disciplinary action; (3) that the inmate should be allowed to call witnesses and present documentary evidence, provided there is no undue hazard to institutional safety or correctional goals; (4) that counsel substitute (a fellow inmate or a prison employee) should be allowed to help illiterate inmates or in complex cases an inmate cannot handle alone; and (5) that the persons hearing the matter, who may be prison officials or employees, must be impartial."

338 S.C. at 371, 527 S.E.2d at 751 (citing *Wolff*, 418 U.S. at 563–72).

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to support a finding of Appellant's guilt as to the felony of third degree sexual exploitation of a minor and thus to Offense 806.

The Record reflects that these factors were satisfied in this case. Appellant was given a fair hearing; was provided proper advance notice of the charges against him; was allowed to call witnesses and present evidence; presented testimony on his own behalf; was represented by counsel substitute; was able to request the presence of his accuser (though he later waived that right); and the DHO, who appears to have been fair and impartial, clearly stated the evidentiary basis for his decision, which was substantial by the Record. Thus, Appellant was afforded due process and has failed to establish otherwise.

**ORDER**

**IT IS THEREFORE ORDERED** that the Department's decision is **AFFIRMED**.

**AND IT IS SO ORDERED.**

Ralph King Anderson, III
Chief Administrative Law Judge

May 3, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

May 3, 2017
Columbia, South Carolina