

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph King Anderson, III

ALC Case No. 16-ALJ-04-0756-AP
Appellate Case No. 2017-001317

RECEIVED

DEC 28 2017

SC Court of Appeals

STEVEN LEE HIGGINBOTHAM, # 237685,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

Christina Catoe Bigelow
Deputy General Counsel
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ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

THE ADMINISTRATIVE LAW COURT PROPERLY UPHELD APPELLANT'S DISCIPLINARY CONVICTION WHERE APPELLANT'S RIGHTS WERE NOT VIOLATED AND THE DISCIPLINARY CONVICTION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

STATEMENT OF THE CASE

This matter comes before this Court pursuant to the appeal of Steven Lee Higginbotham, an inmate in the custody of the South Carolina Department of Corrections (“SCDC”). Appellant was charged with SCDC disciplinary offense number 806, “Any Act Defined as a Felony by the Laws of the State of South Carolina,” after correctional officers found a number of sexually explicit photographs involving children in Appellant’s cell. On June 22, 2016, following a hearing before the disciplinary hearing officer, Appellant was found guilty of the charged offense. Sanctions included a loss of 111 days of good time.

Appellant filed a Step One Grievance on June 22, 2016, arguing that he should have been charged with possession of contraband rather than offense number 806 because he had been charged with possessing contraband in the past under similar circumstances; that it violated his double jeopardy rights to charge him with offense number 806; that the Department of Corrections violated its own policies because there were technical errors in the investigation dates and charge; and that the sanctions imposed on him constituted cruel and unusual punishment. After the warden denied Appellant’s Step 1 Grievance, Appellant submitted a Step 2 Grievance, which was also denied. Appellant appealed to the Administrative Law Court on October 25, 2016. On May 3, 2017, Administrative Law Judge Ralph King Anderson, III, issued an order denying Appellant’s appeal. The order concluded that Appellant’s constitutional rights were not violated and that Appellant’s disciplinary conviction was supported by substantial evidence. This appeal 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 ADMINISTRATIVE LAW COURT PROPERLY UPHELD APPELLANT'S DISCIPLINARY CONVICTION WHERE APPELLANT'S RIGHTS WERE NOT VIOLATED AND THE DISCIPLINARY CONVICTION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

SCDC Did Not Violate Appellant's Constitutional Rights

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. Here, Appellant was given notice of the charges when he was served on June 14, 2016, which was more than twenty-four hours in advance of his June 22, 2016 hearing. (See SCDC Form 19-69, Disciplinary

Report and Hearing Record; see also Hearing Transcript, p. 2.) Appellant had a neutral and detached hearing officer in the form of the disciplinary hearing officer. (See Hearing Transcript, p. 1.) At the hearing, Appellant had an opportunity to present his witnesses and documentary evidence. Although Appellant originally requested that his accuser, Lieutenant Williams, be present as a witness, he changed his mind on the day of the hearing. (See Hearing Transcript, p. 2.) Appellant presented testimony on his own behalf at the hearing. (See Hearing Transcript, p. 2-6.) Appellant also had the assistance of a counsel substitute, Mr. Armstrong. (See Hearing Transcript, p. 1.) The hearing officer provided Appellant with a written statement of the findings and the evidence relied upon in the form of SCDC Form 19-69, Disciplinary Report and Hearing Record. Appellant's signature on the line marked "Inmate Signature for Receipt of Final Report" indicates his receipt of this information. Based on the foregoing, Appellant received the procedural due process to which he was entitled.

Appellant asserts that SCDC's alleged failure to follow its own policy violated his due process rights. However, SCDC'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). The "constitutional minima" required here are set forth above in the Wolff case. Since the factors in Wolff were met, as discussed above, any violation of SCDC policy did not violate Appellant's due process rights.

Double Jeopardy

Appellant also argues that SCDC violated double jeopardy by charging him with offense 806 rather than offense 817, possession of contraband. This argument is plainly

without merit. 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. United States, 522 U.S. 93, 98-101 (1997). Here, Appellant was not subjected to any criminal punishments, only disciplinary sanctions. See State v. Blick, 325 S.C. 636, 642, 481 S.E.2d 452, 456 (Ct. App. 1997) (finding that loss of good time credits and administrative segregation did not implicate double jeopardy). Moreover, Appellant was charged with only one disciplinary offense for his actions in connection with the photographs in question. It was well within SCDC's discretion to select the most appropriate charge under the circumstances, regardless of what Appellant had been charged with in the past for previous disciplinary violations. Accordingly, SCDC did not infringe upon Appellant's right to be free from being subjected to double jeopardy.

The Disciplinary Conviction is Supported by Substantial Evidence

Furthermore, there was ample evidentiary support for Appellant's disciplinary conviction. The salient facts brought forth at the disciplinary hearing are as follows:

1. Lieutenant Williams stated in her incident report that on June 8, 2016, Sergeant Hunt brought Appellant's legal box to her in the contraband office for search. She found approximately 100 pictures of young children with genitalia drawn or pasted on. In some of the photos adult hands had been added or drawn touching children inappropriately. She recommended that Appellant be charged with disciplinary offense 806 and stated that SC Code Ann § 16-15-410 was the South Carolina law she believed Appellant had violated.
2. DHO Bittinger had as evidence 15 pages of the photographs in question.
3. SCDC Policy OP-22.14 Inmate Disciplinary System defines Offense 806 as "Any Act Defined as a Felony by the Laws of the State of

South Carolina or the United States and not otherwise Defined in these Rules. (State Criminal Statute must be provided.)”

4. S.C. Code § 16-15-410 says, in relevant part, “Third degree sexual exploitation of a minor defined; penalties; exception.
(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.”

The disciplinary hearing officer weighed the evidence based on the facts and testimony presented at the hearing and came to a just and fair decision. (See Hearing Transcript, p. 1-7). Appellant has failed to show to the Court that his substantial rights have been prejudiced or that the hearing officer’s decision was clearly erroneous, arbitrary, or affected by a legal error. Therefore, because Appellant’s conviction was supported by substantial evidence, this Court should uphold the Administrative Law Court’s order affirming SCDC’s final agency decision. 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.”).¹

¹ 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.

CONCLUSION

For the foregoing reasons, this Court should affirm the Administrative Law Court's decision below.

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

BY: 

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December 28, 2017

STATE OF SOUTH CAROLINA
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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph King Anderson, III

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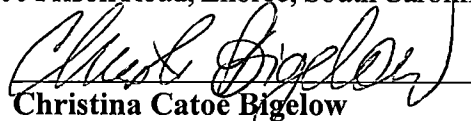
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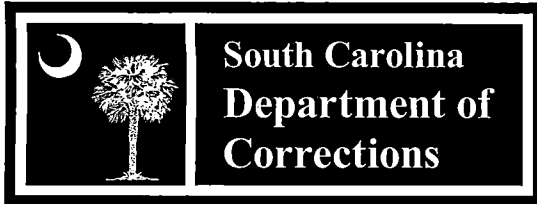
CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on **December 28, 2017**, I mailed a copy of the **Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal** to Appellant, addressed as follows: Steven Lee Higginbotham, # 237685, Tyger River Correctional Institution, U3-0109-B, 200 Prison Road, Enoree, South Carolina, 29335.



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South Carolina
Department of
Corrections

HENRY McMASTER, Governor

BRYAN P. STIRLING, Director

OFFICE OF GENERAL COUNSEL

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SC Court of Appeals

December 28, 2017

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Steven Lee Higginbotham, # 237685, v. South Carolina Department of Corrections
Appellate Case No. 2017-001317

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent** and **Designation of Matter** in the above captioned appeal, along with **Proof of Service**. Also enclosed is the original and six copies of Respondent's **Motion to File Out of Time**, along with **Proof of Service** for the same.

Thank you for your attention to this matter, and please do not hesitate to contact me should you have any questions or concerns.

Sincerely,

Christina Catoe Bigelow
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cc: Steven Lee Higginbotham, # 237685
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