STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

James Wesley Patterson, #296129, Appellant, vs. South Carolina Department of Corrections, Respondent.	Docket No. 17-ALJ-04-0362-AP **ORDER AFFIRMING DECISION**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the Notice of Appeal filed by James Wesley Patterson (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (SCDC or Department). Appellant appeals the Department's decision regarding his Step 2 Grievance, which affirmed that his current sentence should be calculated at eighty-five (85) percent of his original term of imprisonment pursuant to S.C. Code Ann. §§ 44-53-370 (Supp. 2016) and 44-53-375 (Supp. 2016). On July 6, 2017, Appellant filed a Notice of Appeal with this Court challenging the Department's decision. Upon careful consideration of the record on appeal and briefs of the parties, the Department's decision is affirmed.

BACKGROUND

On June 12, 2013, Appellant pled guilty in General Sessions Court to Manufacturing Methamphetamine, Third Offense, in violation of S.C. Code Ann. § 44-53-375(B); and to Possession of Methamphetamine/Cocaine Base, Third Offense, in violation of S.C. Code Ann. § 44-53-375(A).[1] He was sentenced for a term of 160 months imprisonment for the Manufacturing Offense (§ 44-53-375(B)(3)) and ten years imprisonment for the Possession Offense, to run concurrently. Appellant had been previously convicted of the following methamphetamine and/or cocaine base offenses: (1) September 8, 2003, Possession of Methamphetamine with Intent to Distribute pursuant to Section 44-53-375; (2) November 10, 2005, Possession of

[1] As will be explained below, Appellant's § 44-53-375(B) conviction is characterized as a "no parole offense."

Methamphetamine/Crank, pursuant to Section 44-53-375(A); and, (3) March 15, 2007, Possession of Methamphetamine/Cocaine with Intent to Distribute under Section 44-53-375(B)(1). [2]

On February 2, 2017, Keisha Fogle, a classification case manager for the Department, convened a Due Process Hearing to inform Appellant of the following:

> South Carolina Department of Corrections General Counsel's recent interpretation of SCDC Code 44-53-0370 and 0375, which I just gave you a copy of, in conjunction with Bolin v. South Carolina Department of Corrections, is that inmates convicted of 3rd offense drug offenses are to be treated as 85% offenders unless all the offender's prior drug offenses are for simple possession under the same subsection. If an offender has prior drug convictions for Manufacturing, Distribution, Possession with Intent to Distribute, or Conspiracy, he or she must be treated as [an] 85% offender on the 3rd or a subsequent offense. The Inmate Records Office has been informed that because of your prior conviction or convictions for Manufacturing, Distribution, Possession with Intent to Distribute, or Conspiracy, your current sentence of a 3rd or subsequent drug offense should be calculated at 85%. Your new projected date...Maxout date is May 23rd, 2024.

Thereafter, Appellant filed a Step 1 grievance form, contending that the Department misinterpreted Section 44–53–375(B) and incorrectly calculated his projected release date by requiring him to serve eighty-five (85) percent of the imposed sentence. [3] The Warden denied his grievance. Appellant then filed a Step 2 grievance form, which was also denied. This appeal ensued.

ISSUE ON APPEAL

Did the Department incorrectly calculate Appellant's release date by requiring him to serve eighty-five (85) percent of his sentence for his conviction of Manufacturing Methamphetamine, Third Offense, before becoming eligible for work credits, good-time, educational credits, or work release?

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[2] These offenses are reported on the prior conviction summary from the SCDC Offender Management System contained in the Record on Appeal (Record), filed September 19, 2017. On November 8, 2017, the Court ordered the Department to supplement the Record with the sentencing sheets for Appellant's §44-53—370 and §44-53-375 offenses. The Department complied on November 16, 2017.

[3] According to Appellant's brief, he determined that his previous max out date was set to occur in October 2019.

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). In *Al-Shabazz*, the Court held that the ALC's jurisdiction in inmate appeals is limited to state-created liberty interests typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. *Id.* at 382, 527 S.E.2d at 757. "The only way for the [ALC] to obtain subject matter jurisdiction over [an inmate's] claim is if it implicates a state-created liberty interest." *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003). Because Appellant contends that the Department incorrectly calculated his sentence, the ALC has jurisdiction pursuant to *Al-Shabazz* to decide this matter.

When reviewing the Department's decisions in inmate grievance matters, the Court sits in an appellate capacity. *Al*-Shabazz, 338 at 377. 527 S.E.2d. at 754. Under the appellate standard of the Administrative Procedures Act, the court's review is limited to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2016). 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." S.C. Code Ann. § 1-23-380(5). Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless substantial rights of the Appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence on the whole Record, arbitrary, or affected by an error of law. *See Id.*; *see also Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 136-37, 522 S.E.2d 605, 607 (Ct. App. 1999); *see also S.C. Dep't. of Lab., Licensing and Reg. v. Girgis*, 332 S.C. 162, 503 S.E.2d 490 (Ct. App. 1998). A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). 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).

DISCUSSION

Appellant contends that the Department erred in calculating his sentence by requiring him to serve eighty-five (85) percent of the sentence imposed for his June 12, 2013, conviction for

Manufacturing Methamphetamine, Third Offense, in violation of S.C. Code Ann. § 44-53-375 (B), before he is eligible for work credits, good-time, educational credits, or work release. [4] The Court disagrees. A review of the relevant statutes and Appellant's prior convictions supports the Department's determination that he is required to serve eighty-five (85) percent of his sentence before becoming eligible for the various sentence credits.

As a preliminary matter, the eligibility of persons convicted of no-parole offenses for early release, discharge, or community supervision is addressed in S.C. Code Ann. § 24-13-150(A) (Supp. 2016), which states:

> Notwithstanding any other provision of law...**an inmate convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including an inmate serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20 or Section 24-3-30, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed.** This percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which has been suspended.

(emphasis added).

S.C. Code Ann. § 24-13-100, enacted in 1995, defines Class A, B, and C felonies as "no parole offenses." [5] S.C. Code Ann. § 16-1-20 entitled "Penalties for classes of felonies" provides that a person convicted of a Class A felony must be imprisoned not more than 30 years. *See also Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 279, 781 S.E.2d 914, 915 (Ct. App. 2016), reh'g denied (Feb. 24, 2016) (finding "Whether a felony is a Class A, B, or C felony depends on the maximum sentence for the felony—a Class A felony is a felony punishable by not more than thirty years.") A person convicted of a "no-parole" offense is not eligible for early release, discharge, or community supervision until he serves at least eighty-five percent of the actual term of

[4] This Court has previously addressed analogous arguments advanced by Appellant in the context of whether he was entitled to parole for his June 12, 2013, conviction for Manufacturing Methamphetamine, Third Offense, in violation of S.C. Code Ann. § 44-53-375. *See Patterson, #296129 v. S.C. Dep't. of Probation Parole and Pardon Serv.* ALC Docket No. 16-ALJ-15-0038-AP (Jan. 23, 2017). That case, decided adversely to Appellant, is currently on appeal with the South Carolina Court of Appeals (Appellate case number 2017-000486).

[5] Offenses classified as Class A, B, and C felonies are listed in S.C. Code Ann. § 16-1-90.

imprisonment imposed. S.C. Code Ann. § 24-13-150(A). Furthermore, at least three additional consequences attach to a conviction of a "no-parole" offense: (1) no-parole offenders are given significantly less credits for good conduct, work, or education than other offenders; (2) no-parole offenders are required to participate in a community supervision program before their sentences are considered completed; and, (3) no-parole offenders are required to serve eighty percent of their sentences before they are eligible for work release. *Id.* at 281, 781 S.E.2d at 916.

In this case, Appellant's June 12, 2013, conviction for Manufacturing Methamphetamine, Third Offense, in violation of Section 44-53-375(B)(3), is a Class A felony and is therefore characterized as a "no-parole offense" because this statute imposes a maximum sentence of thirty years. S.C. Code Ann. § 44-53-375(B)(3) ("for a third or subsequent offense, the offender must be imprisoned for not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars, or both.")

However, on June 2, 2010, the Omnibus Crime Reduction and Sentencing Reform Act of 2010 became effective and modified the rules regarding "no parole offenses" for certain offenses involving controlled substances. *See Bolin*, 415 S.C. at 282, 781 S.E.2d at 917. S.C. Code Ann. § 44-53-375(B), the part of the sentencing statute under which Appellant was convicted, provides:

> Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (A), may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted. [6]

The South Carolina Court of Appeals has construed this language added to Section 44-53-375(B) by the Omnibus Crime Reduction and Sentencing Reform Act of 2010 to repeal Section

[6] The relevant language was amended, effective June 2, 2010, by 2010 S.C. Act Number 273, Section 38. That amendment is construed in the recent *Bolin* case cited above. Because Appellant was sentenced on June 12, 2013, that amendment is relevant in this case. *See State v. Dawson*, 402 S.C. 160, 164, 740 S.E.2d 501, 503 (2013) (citation omitted). Section 44-53-375(B) was again amended by 2016 S.C. Act 154, Section 9. However, no changes were made to the language at issue here.

24-13-100 insofar as there is a conflict. *Bolin*, 415 S.C. at 282, 781 S.E.2d at 917 ("The legislature's use of the phrase 'Notwithstanding any other provision of law,' in the amendments to sections 44-53-375 and 370 expresses its intent to repeal section 24-13-100 *to the extent* it conflicts with amended sections 44-53-375 and -370." (emphasis in original)). The holding in *Bolin* is very specific and does not repeal Section 24-13-100 in all applications of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which amended Section 44-53-375. The "notwithstanding any other provision of law" language repeals Section 24-13-100 as applied to a second offense under subsection (B). *See Bolin*, 415 at 286, 781 S.E.2d at 919 (holding that a second offense under section 44–53–375(B) is no longer a no-parole offense); *see also* S.C. Code Ann. § 44-53-375(B) ("Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have his sentence suspended and probation granted.") However, the instant case is distinguishable from *Bolin* as Appellant's conviction involves a third offense, not a second offense. Although similar "notwithstanding any other provision of law" language appears in the operative sentence of § 44-53-375(B) addressing third offenses, unlike for a first or second offense under this Section, its effect to repeal § 24-13-100 is limited. For a third or subsequent offense of § 44-53-375(B), § 24-13-100 is repealed to potentially allow sentence suspension, probation and eligibility "for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits," only if all previous drug offenses have been for possession of a controlled substance under Section 44-53-375(A). Section 44-53-375(A) provides as follows:

> A person possessing less than one gram of methamphetamine or cocaine base, as defined in Section 44-53-110, is guilty of a misdemeanor and, upon conviction for a first offense, must be imprisoned not more than three years or fined not more than five thousand dollars, or both. For a first offense the court, upon approval of the solicitor, may require as part of a sentence, that the offender enter and successfully complete a drug treatment and rehabilitation program. For a second offense, the offender is guilty of a felony and, upon conviction, must be imprisoned not more than five years or fined not more than seven thousand five hundred dollars, or both. For a third or subsequent offense, the offender is guilty of a felony and, upon conviction, must be imprisoned not more than ten years or fined not more than twelve thousand five hundred dollars, or both. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

Section 24-13-100 still applies in all cases unless there is specifically expressed legislative intent to the contrary. *See Bolin*, 415 S.C. at 283, 781 S.E.2d at 917 (quoting *Strickland v. State*, 276 S.C. 17, 19, 274 S.E.2d 430, 432 (1981)) ("Statutes of a specific nature are not to be considered as repealed in whole or in part by a later general statute unless there is a direct reference to the former statute or the intent of the legislature to do so is explicitly implied therein.") While the two sentences beginning with "Notwithstanding" in Section 44-53-375(B) express such an intent by the legislature, Appellant does not fall into the parameters set by either of those sentences —first or second offense, or third with only simple possession priors.

Conversely, the Record reveals that Appellant's prior offenses are not limited to simple possession of a controlled substance under Section 44-53-375(A). To wit, Appellant's conviction summary indicates that he has prior convictions for Possession of Methamphetamine with Intent to Distribute and Possession of Methamphetamine/Cocaine with Intent to Distribute. Accordingly, because all of Appellant's prior offenses were not for possession of a controlled substance pursuant to Section 44-53-375(A), the no parole mandate of § 24-13-100 continues to apply such that § 44-53-375(B)(3) continues to be a no-parole offense. Thus, Appellant may not have his sentence affected by suspension, nor probation granted, and is not "eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits" until he serves at least eighty-five (85) percent of his original term of imprisonment. [7] This result is required by the plain meaning of the statutory language and is consistent with *Bolin*. Therefore, the Department correctly determined that Appellant's sentence should be calculated at eighty-five (85) percent. *See* S.C. Code Ann. § 24-13-150(A) ("an inmate convicted of a "no parole offense" as defined in Section 24-13-100...is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed.")

[7] The General Assembly's intent that the § 44-53-375(A) condition be met before a term of imprisonment for a third offense may be truncated in any manner is further clarified by the instruction contained in the last sentence of § 44-53-375(B) that "[i]n all other cases, the sentence must not be suspended nor probation granted." The fact that "parole" is not specified in this final sentence is of no consequence given that where the § 44-53-375(A) condition is not met, § 24-13-100 continues to define an offense under § 44-53-375(B)(3) as a "no-parole" offense.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the decision of the Department is **AFFIRMED.**

AND IT IS SO ORDERED.

Milton G. Kimpson, Judge
South Carolina Administrative Law Court

December 11, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 11 day of December, 2017

By: _____
Judicial Law Clerk

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