STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Terry Smith, #160785, Appellant, vs. South Carolina Department of Corrections, Respondent.	)	Docket No. 18-ALJ-04-0050-AP [Grievance No.: LEECI 590-17] **FINAL ORDER**

This matter is before the South Carolina Administrative Law Court (Court or ALC) on an appeal filed by Terry Smith (Appellant), an inmate incarcerated by the South Carolina Department of Corrections (Department or SCDC).

FACTS/PROCEDURAL HISTORY

On August 9, 1994, Appellant was sentenced to ten (10) years for the offense of distribution of crack cocaine;[1] his sentence started on that date.[2] Appellant alleges that he was released on parole in 2000 and was arrested in 2002.[3] Appellant's parole was eventually revoked on March 3, 2004. Appellant was then apparently moved to jail on May 26, 2006, where he remained until he was sentenced on October 16, 2006 on the charges for which he was arrested in 2002. Specifically, Appellant was sentenced to twenty-three (23) years for the offense of armed robbery in violation of S.C. Code Ann. § 16-11-330(A); twenty-three (23) years for kidnapping in violation of S.C.

[1] Appellant also refers in his reply brief to another 1994 charge – for assault and battery of a high and aggravated nature (ABHAN). He had been sentenced to ten (10) years on that charge, too; however, he served that sentence in five (5) years, completing it in 1999, before he was released on parole in 2000. Therefore, the Court will only refer to his distribution of crack cocaine charge when mentioning the 1994 charge.

[2] Though the Record reflects that Appellant's projected completion date for this offense was June 5, 2006, this is based on a document dated March 15, 2018; there is no evidence that this was the projected completion date at the time Appellant started serving his sentence. Regardless, as will be discussed *infra*, Appellant's projected completion date could not have been beyond ten years from his start date (August 9, 1994), as he was serving a ten-year sentence for the crack cocaine distribution offense.

[3] Appellant's parole date is not in the record and neither is his arrest date in 2002. However, the Department notes in its brief Appellant's assertion that he was arrested in 2002 and does not dispute it. There is also an indication in the Record that Appellant was on parole because it was revoked on March 3, 2004, according to a Jail Time Report for SCDC Transfer dated October 17, 2006. The Court also assumes that Appellant was in some form of custody between his arrest in 2002 and his parole revocation in 2004.

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Code Ann. § 16-3-90; twenty (20) years for carjacking in violation of S.C. Code Ann. §16-3-1075; fifteen (15) years for common law robbery in violation of S.C. Code Ann. § 16-11-325; and ten (10) years for assault and battery of a high and aggravated nature in violation of the common law. All of these sentences were to run concurrently. The start date for these sentences was backdated to April 10, 2006, after the Department applied 189 days of jail time credit.[4]

Appellant filed a Step 1 Grievance on May 26, 2017, challenging the Department's sentencing calculation because Appellant alleged that SCDC failed to properly apply to his 1994 crack cocaine distribution conviction his earned work credits (EWC), time served on while on parole, time served while in Canada awaiting extradition to the United States, and time served while awaiting extradition from New York to South Carolina. He argued that had these credits been applied to his sentence, his sentence would have ended before June 4, 2006, and thus his start date for his subsequent sentences would have begun earlier, too.

The Warden denied Appellant's Step 1 Grievance, finding that the Inmate Records Office verified that Appellant had been credited for his time served in New York and Canada. The Warden also acknowledged two discrepancies in Appellant's EWCs from 2008 and 2010 and put in a corresponding EWC Backdate Request. Appellant then filed a Step 2 Grievance, in which he reasserted that his 10-year sentence, begun on August 9, 1994, for a nonviolent offense was miscalculated because his sentence did not end until June 5, 2006. He argued that a "straight max-out calculation without EWCs comes to 6 years absolute," but he instead served twelve years. He argued that even excluding the time that he was on parole – between August 2, 2000, and May 2, 2002 – and the period thereafter when he was held until he returned to custody on July 13, 2002, he could not have been required to serve the sentence that he served. He further contends that because of the miscalculation regarding the end date of his sentence for the 1994 conviction, the start date and, hence, the end date for his current sentences have also been miscalculated. On January 20, 2018, Appellant's Step 2 Grievance was also denied, and Appellant was informed in the response that the Warden had responded to his concern about the credits and that "[a]ll credits have been reflected in [Appellant's] incarcerated sentence and [his] sentence is correct." Appellant was also informed in the response that his projected release date was October 22, 2025. On

[4] According to the Jail Time Report for SCDC Transfer, Appellant was given forty-six (46) days of credit for jail time served between January 17, 2004 and March 3, 2004, and 143 days for jail time served between May 25, 2006 and October 16, 2006.

February 8, 2018, Appellant filed a Notice of Appeal to the ALC, in which he alleged that the Department violated S.C. Code Ann. § 1-23-380(5)(a), (c), (e), and (f).

On April 3, 2018, Appellant filed a brief.[5] The Department filed the Record on Appeal on May 1, 2018. The Department filed Respondent's Brief on June 12, 2018. Appellant filed a Reply Brief on June 22, 2018.

ISSUE ON APPEAL

Did the Department err in its sentencing calculation?[6]

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. 2017) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380(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

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[5] On May 8, 2018, Appellant filed a "Motion for Expansion of the Record," seeking to include a Step 2 Grievance in an unrelated matter to demonstrate that the Department is relying on an overturned conviction for homicide by child abuse in its alleged miscalculation of his sentence. However, because this proposed document does not address the grievance at issue in this case, and the homicide was not listed as a reason for denying the Step 2 Grievance that was appealed in his case, the Court will not consider the Step 2 Grievance from another matter. Appellant's motion is therefore denied.

On June 20, 2018, Appellant filed a "Motion for Summary Judgment," arguing that the Department failed to timely file its brief, which was due by June 13, 2018. However, the Department had already filed its brief on June 12, 2018. Therefore, Appellant's improper motion is denied.

[6] Appellant lists two issues in his brief, one of which is generally reflected above. The other issue is whether the Department's application of S.C. Code Ann. § 24-13-40 violates the 6th, 8th, and 14th Amendments to the United States Constitution. In discussing this issue, he argues that the government unduly delayed its prosecution, thereby unconstitutionally violating his right to a speedy trial and extending his confinement. However, Appellant did not raise this constitutional issue prior to his initial brief. As such, this issue was not preserved for appeal and will not be considered. *See Young v. S.C. Dep't of Health and Envtl. Control*, 383 S.C. 452, 458, 680 S.E.2d 784, 787 (Ct. App. 2009) ("A court has a limited scope of review of the final decisions of administrative agencies and cannot ordinarily consider issues that were not raised to and ruled on by the agency from which an appeal is taken."). The Department's enumerated arguments (it does not list any issues on appeal) in its brief can all, with the exception of the constitutional argument that the Court cannot consider, be reduced to the general issue stated above. The Court will not, however, address substantial evidence because a lack of substantial evidence in the record to support the Department's decision was not an issue raised by Appellant. The Court will address the Department's other arguments in its discussion of the issue above.

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:

> (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;
>
> (d) affected by other error of law;
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> (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. 2017); *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).

DISCUSSION

Appellant argues that while serving the sentence imposed on him in 1994, he was released on parole in 2000 and was on parole until his arrest in 2002. He argues that he should be given credit for all time that he served while on parole and during his confinement following his arrest in 2002 until his sentence start date of April 10, 2006. He also argues that his 1994 sentence should have expired at least two years prior to his April 10, 2006 sentence start date on the 2002 charges, and therefore the start date on the 2002 charges should have been that much earlier, meaning that he should be given credit for time served on the 2002 charges from the time that his 1994 sentence expired through April 10, 2006.

The Department, on the other hand, addresses Appellant's sentencing calculation on the sentences imposed on October 16, 2006, arguing that Appellant was credited with 189 days prior to his sentencing date of October 16, 2006, making his start date April 10, 2006. The Department also argues that pursuant to S.C. Code Ann. § 24-13-40, Appellant is not entitled to forty-five (45) months of jail time credit for his time spent in jail after his 2002 arrest until his 2006 sentence start date because he was transferred to SCDC on March 3, 2004, on charges other than the one for which he was already serving a sentence. Finally, the Department argues that Appellant is not entitled to sentencing credit for time spent on parole because Section 24-13-40 "only allows for

sentencing credit for time served prior to trial and sentencing, and may be given for time spent under house arrest."[7]

In his reply brief, Appellant argues that he never challenged the "facial construction of his *2006 sentences*") (emphasis in original), but rather "construction and computation of his 1994 sentences[,]" for which the Department provided no documentation in the Record and which the Department did not address in its brief. He also argues that he should have been given credit for the three (3) years and seven (7) months he served on parole, between when he was released on parole in 2000 and March 2004, when his parole was revoked and he "returned to State custody." Finally, Appellant argues that his 1994 sentence legally expired before he was released for trial in 2006, and that he was "held . . . in custody illegally" during this time he was awaiting trial.

From the outset, it appears that the Department has proceeded under the premise that "time spent while released on parole is not eligible for sentencing credit." The Department's position is that because S.C. Code Ann. § 24-13-40 (2007) only addresses sentencing credit for time served prior to trial and sentencing, and for time spent under house arrest, that time spent on parole is excluded from being considered time served for sentencing calculation purposes. I disagree.

Section 24-13-40 states in pertinent part:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. . . In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

Though Section 24-13-40 only addresses sentencing credit for time served prior to trial and sentencing, there is nothing in the statute that states that time served while on parole is not considered time served for purposes of sentencing calculation. Rather, our courts have long held

[7] The Department also made an argument that its final decision should be affirmed because it is confined the face of the sentencing sheets since there are no ambiguities in the sentencing sheet, citing *Tant v. S.C. Dept' of Corr.*, 408 S.C. 334, 337, 759 S.E.2d 398, 399 (2014), *reh'g denied* (July 10, 2014).

that "[a] prisoner upon release on parole continues to serve his sentence outside the prison walls. The word parole is used in contra-distinction to suspened [sic] sentence and means a leave of absence from prison during which the prisoner remains in legal custody until the expiration of his sentence." *Sanders v. MacDougall*, 244 S.C. 160, 163, 135 S.E.2d 836, 837 (1964) (citing *Crooks v. Sanders*, 123 S.C. 28, 115 S.E. 760 (1922)). Every such prisoner must remain in the jurisdiction of the [Parole Board] and may at any time on the order of the board, be imprisoned as and where therein designated." S.C. Code Ann. § 24-21-660 (2007). Following a parole violation and the issuance of a warrant or citation for the parole violation, "a final determination must be made by the board as to whether the prisoner's parole should be revoked and whether he should be required to serve any part of the **remaining unserved sentence**." *Id.* § 24-21-680 (emphasis added). "An order revoking parole simply restores a defendant to the status he would have occupied had this form of leniency never been extended to him. The effect of [parole] revocation does not exceed or transcend the effect of the original sentence." *Sanders*, 244 S.C. at 164, 135 S.E.2d at 837 (citation and quotation marks omitted). Thus, although time spent serving parole does not give rise to credit for time served in jail or under house arrest pending a trial or sentencing, it is nonetheless time served on the parolee's sentence, regardless of whether it is revoked. In the case of parole revocation, the inmate simply serves the remaining (unserved) part of his sentence inside the prison walls instead of outside.

It appears that the Department proceeded under its misunderstanding regarding parole when it listed Appellant's projected release date on his 1994 distribution charge as June 5, 2006, when the sentence imposed was ten (10) years and the start date of the sentence was August 9, 1994.[8] However, based on the Record, and notwithstanding the Department's view about the applicability of time served on parole to an inmate's sentence, it was impossible for Appellant's projected release date to be any later than August 9, 2004 (and was possibly earlier based on the application of possible sentence credits).

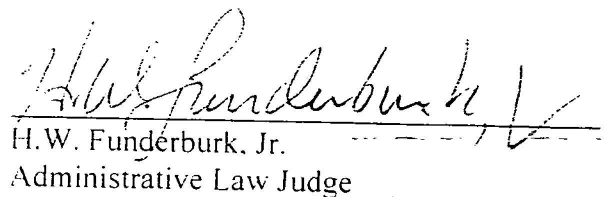
[8] Because the Department failed to document, or even explain, how it calculated Appellant's projected sentence completion date for the 1994 distribution sentence, the Court is left to surmise as to how it performed this calculation. Therefore, it is possible that the Department did not add the time Appellant served on parole to Appellant's original projected completion date and instead used some other calculation method.

Appellant continued to serve his 1994 10-year sentence while he was in custody awaiting parole revocation and then trial on the 2002 charges, and so he should receive credit on his 1994 sentence for the time served between his arrest in 2002 and when his 1994 sentence expired, which could be no later than August 9, 2004. However, under Section 24-13-40, Appellant cannot receive credit for time served during this time towards the sentences imposed on October 16, 2006, because he was already serving a prior sentence (his 1994 sentence) from the time of his arrest in 2002 until his 1994 sentence expired. Nevertheless, following the expiration of his 1994 sentence, Appellant was entitled to time served for all time served in jail or prison until he was sentenced on October 16, 2006. Appellant has already received 189 days of credit towards the October 16, 2006 sentences, which is reflected in backdating his start to April 10, 2006. However, the Court must remand the case to the Department to calculate the remaining credit owed to him for time served prior to April 10, 2006, or between April 10, 2006, and the end of the 1994 sentence. This calculation will also require a determination of when Appellant's 1994 sentence expired and will also require a calculation of any applicable credits.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REVERSED AND REMANDED** for recalculation of Appellant's 1994 distribution sentence, including time served while on parole and other applicable credits and the correct expiration date of that sentence, and for recalculation of his October 16, 2006 sentences, including time served and any other applicable credits and the proper start dates and projected completion dates, in accordance with this Order.

AND IT IS SO ORDERED.

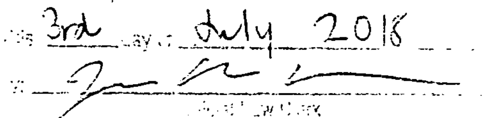


H.W. Funderburk, Jr.
Administrative Law Judge

July 3, 2018
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 [illegible] Mail Service, addressed to the party(ies) or [illegible]

this 3rd day of July 2018



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