STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Perry Drake Gilmore, #344879,	)	Docket No. 18-ALJ-04-0110-AP
	)	
Appellant,	)	
	)	
vs.	)	**ORDER**
	)	
South Carolina Department of Corrections,	)	
	)	
Respondent.	)	

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

FACTS/PROCEDURAL HISTORY

On January 23, 2018, Heather Francis, who was teaching a class at the prison, reported that she saw Appellant masturbating in a bathroom. Appellant was charged with violation of SCDC offense 854 (Exhibitionism and Public Masturbation). Appellant received notice of the charge on January 26, 2018, and he requested that his accuser be present at the hearing. Appellant did not require counsel substitute.

On January 31, 2018, a Disciplinary Hearing Officer (DHO) held a hearing on the charge. Appellant's accuser, Ms. Francis, was present at the hearing. The DHO found Appellant guilty of the charge and issued sanctions that included the loss of twenty days of good time.

On February 5, 2018, Appellant filed his Step 1 Grievance, arguing nine reasons why the DHO's decision was in error. The fourth reason Appellant gave to reverse the DHO's decision was that a bathroom is not a "public setting," and it is the Department's fault if someone's genitals are seen because they do not have doors in the bathroom. After the Warden denied his Step 1 Grievance, Appellant filed a Step 2 Grievance in which he contested the DHO's decision based on the same nine reasons "verbatim." The Department denied the Step 2 Grievance.

On March 19, 2018, Appellant filed this appeal. On April 5, 2018, the Notice of Assignment was filed. On April 17, 2018, Appellant filed his brief. In his brief, Appellant argues the Department's decision is a violation of his right to privacy under *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981). He contends he is "judicially protected" from being observed by a female staff member while in a state of undress while in a bathroom which does not have a door. On June 14,

2018, the Record on Appeal was filed. On July 19, 2018, the Department filed its brief, arguing Appellant received minimum due process and substantial evidence supports the Department's decision. On July 31, 2018, Appellant filed a Reply brief, and on August 14, 2018, Appellant filed a Demand for Judgment.

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. South Carolina Department of Probation, Parole and Pardon Services*, 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(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:
>
> (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) (Supp. 2017).

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 in the Record, 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). 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, the United States Supreme Court has held that "the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455-456 (1985).

DISCUSSION

Appellant argues the Department's decision is in error because he is "judicially protected" from being observed by a female staff member while he is in a bathroom pursuant to *Lee v. Downs*, 641 F. 2d 117(4th Cir. 1981). This is the sole issue Appellant raises on appeal. Although Appellant argued in his Step 1 and Step 2 Grievances that it was the Department's fault if he was observed in a bathroom without a door, he did not specifically argue he had a right to privacy from being observed by female staff. Therefore, I find Appellant is raising the issue of his alleged right to privacy from the observation of female staff in a bathroom for the first time on appeal. Appellant cannot raise an argument for the first time on appeal, and this issue is therefore unpreserved for this Court's review. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

Furthermore, the Court finds Appellant received minimal due process pursuant to *Al-Shabazz*. Inmates have a protected liberty interest in their earned statutory good-time credits under the Fourteenth Amendment. Therefore, when, as here, the Department revokes an inmate's good-time credits, prison officials must provide that inmate with "minimal due process." *Al-Shabazz*, 338 S.C. at 369, 527 S.E.2d at 750. Consequently, specific administrative procedures must be followed before depriving an inmate of statutorily granted earned credit, including:

> [(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. The Supreme Court also held that the inmate does not have a constitutional right to confront and cross-examine witnesses who testify against him, although prison officials have the discretion to grant that right in appropriate cases. Furthermore, the inmate does not have a constitutional right to retained or appointed counsel at a disciplinary hearing.

Id., 338 S.C. at 371, 527 S.E.2d at 751 (citing *Wolff v. McDonnell*, 418 U.S. 539, 563-72 (1974)).

Here, the Record indicates that Appellant received more than twenty-four hours' written notice of the charges against him. Further, the hearing was held before an impartial Disciplinary Hearing Officer, and Appellant was given the opportunity to call witnesses.[1] Appellant also received a written statement of the findings of fact and the evidence on which the DHO relied. Appellant was not illiterate or entitled to counsel substitute. Based upon these findings, I conclude Appellant was afforded minimum due process. *See id.*

Finally, I find substantial evidence supports the Department's decision because reasonable minds could arrive at the same conclusion as the DHO. *See Superintendent*, 472 U.S. at 455-56 (holding the revocation of good time must be supported by "some evidence in the record" and "the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board").

ORDER

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

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

October 4, 2018
Columbia, South Carolina

[1] A few hours before the hearing, Appellant submitted a request for two witnesses to be present at his hearing. However, inmates are required by SCDC policy OP- 22.14 to request witnesses at least twenty-four hours in advance, which Appellant failed to do.

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

October 4, 2018
Columbia, South Carolina