

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
CAROLYN C. MATTHEWS, ADMINISTRATIVE LAW JUDGE

CASE NO. 11-ALJ-04-00992-AJ

SHANGO DAMBALLAH #137525

Appellant,

V

South Carolina
Department of Corrections

Respondent.

Final BRIEF

SHANGO DAMBALLAH #137525
KERSHAW CORRECTION INSTITUTION
4848 GOLD MINE HWY
SMC # 90
KERSHAW, S.C. 29067
PO SE

Shanika Kenyatta Johnson
OFFICE OF GENERAL COUNSEL
P.O. Box 21787
4444 Broad River Road
Columbia, S.C. 29221-1787

(803) 896-8508

RECEIVED
JAN 24 2013
SC Court of Appeals

TABLE OF CONTENTS

Table of authorities	ii
Statement of ISSUES on appeal	1
Statement of the CASE	2

ARGUMENTS

I. WAS THE APPELLANT'S RIGHT TO DUE PROCESS UNDER BOTH THE STATE AND THE FEDERAL CONSTITUTIONS VIOLATED WHEN HE WAS CONVICTED OF 801 "ASSAULT AND/OR BATTERY OF AN SEDC EMPLOYEE" AT THE VENE 6, 2011 DISCIPLINARY HEARING WHERE THE EVIDENCE PRESENTED WAS INSUFFICIENT TO CONVICT HIM OF ANYTHING OTHER THAN THE LESSER INCLUDED OFFENSE OF 807 "STRIKING AN SEDC EMPLOYEE"? 3

II. WAS THE APPELLANT DENIED HIS RIGHT TO CALL WITNESSES IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER BOTH STATE AND FEDERAL CONSTITUTIONS? . 10

III. WAS THE APPELLANT DENIED HIS PROCEDURAL DUE PROCESS RIGHTS UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS TO PRESENT DOCUMENTARY EVIDENCE? 14

IV. DID THE SEDC OVER THE YEARS ARBITRARILY TAKE THE APPELLANT'S GOOD-TIME IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS? 15

V. DID THE ALC JUDGE ABUSE HER DISCRETION AND WAS SHE BIASED AGAINST THE APPELLANT IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER BOTH STATE AND FEDERAL CONSTITUTIONS? 15

TABLE OF AUTHORITIES

I CASES

ABLE COMMUNICATIONS INC. V S.C. PUB. SERV. COMM'N 290 S.C. AT 441, 351 SE2D 152 () .	16
AI-STABAZZ V STATE, 338 S.C. 354, 527 SE2D 742 (2000)	14
Banks V Batesburg Hauling Co., 202 S.C. 273, 24 SE2D 496 ()	5
Brooks V Andelina, 826 F.2d 1266 (3rd. Cir. 1987)	13
Brown V Martin 203 S.C. 84, 26 SE2D 317 (1943)	4
Brown V STATE, 343 S.C. 342, 540 SE2D 846 (2001).	4
Charleston County School Dist. V Inland Transit Inc. 348 S.C. 420, 559 SE2D 362 (2001) .	19
CRANE V Kentucky 476 S.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)	14
Dalton V Hutto, 713 F.3d 75 (4th Cir. 1983)	12
Fox V Coughlin, 893 F.2d 475 (2nd Cir. 1990)	13
Frankis V Bowman Transp. Co, 424 N.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 404 (1976)	15
Hoy V SC TAX COMM'N 273 S.C. 268, 255 SE2D 839 (1979)	5
Henson V STATE - SC - , 422 SE2D 265 (1992)	5
Howard V SC TAX COMM'N 240 S.C. 347, 126 SE2D 15 (1962)	5
Lark V Bi-Lo, Inc., 276 S.C. 130, 276 SE2D 304 (1981)	9
LEE V Michigan Miller's Market, Ins. Co., 250 S.C. 462, 158 SE2D 774 (1968)	5
LEE V SUESS - SC. - , 457 SE2D 344 (1995)	19
Mechinichles Inc. V SC DEPARTMENT OF REVENUE, 331 S.C. 628, 503 SE2D 723 (1998).	5
Milligan & Co V SC DEPT OF LABOR ETC., - SC - , 267 SE2D 763 ()	5
Morgan V DRETKE, 433 F.3d 455 (5th Cir. 2005)	10
Porter V S.C. PUB. SERV. COMM'N 333 S.C. 12, 507 SE2D 328 (1998)	16
Postal V Manning 308 S.C. 385, 418 SE2D 332 (Ct. App. 1992).	19
Purvis V STATE Farm Mut. Auto Ins. Co. - SC. - , 403 SE2D 662 (S.C. App. 1994)	4
Remy V Dobb's House Inc. 275 S.C. 562, 274 SE2D 290 (1981).	19
Singleton V STATE - SC. - , 437 SE2D 53 (1993)	6
Society of Professional Journalists V SEaton 283 S.C. 563, 324 SE2D 313 (1984)	5
State V Attardo, 263 S.C. 546, 211 SE2D 868 (1975)	6
State V Barksdale 311 S.C. 210, 428 SE2D 498 (Ct. App. 1993).	6
State V Bland - SC. - , 457 SE2D 611 (1995)	8

State v Mabe, — S.C., 412 S.E.2d 386 (1991)	•	•	•	•	•	•	•	•	•	14
State v Foxworth — S.C., 238 S.E.2d 172 (1977)	•	•	•	•	•	•	•	•	•	8
United States v Witherser. (18 U.S.) 5 Wheaton 94, 95-96, 5 L.E. 37, 42 (1820)	•	•	•	•	•	•	•	•	•	4
Williams v State, 306 S.C. 89, 410 S.E.2d 563, (1991)	•	•	•	•	•	•	•	•	•	4
Wolf v McDannell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)	•	•	•	•	•	•	•	•	•	13

Statutes

S.C. Code Ann. § 1-23-610(B)	•	•	•	•	•	•	•	•	•	•	10
S.C. Code Ann. § 16-3-600(A)(1) + (2)	•	•	•	•	•	•	•	•	•	•	7
S.C. Code Ann. § 24-1-90	•	•	•	•	•	•	•	•	•	•	15
S.C. Code Ann. § 24-1-140	•	•	•	•	•	•	•	•	•	•	15
S.C. Code Ann. § 24-13-210(C)	•	•	•	•	•	•	•	•	•	•	15

Statement of Issues on appeal

I. WAS THE APPELLANT'S RIGHT TO DUE PROCESS UNDER BOTH THE STATE AND THE FEDERAL CONSTITUTIONS VIOLATED WHEN HE WAS CONVICTED OF 801 "ASSAULT AND/OR BATTERY OF AN SDC EMPLOYEE" AT THE SAME GAZELL DISCIPLINARY HEARING WHERE THE EVIDENCE PRESENTED WAS INSUFFICIENT TO CONVICT HIM OF ANYTHING OTHER THAN THE LESSER INCLUDED OFFENSE OF 807 "STRIKING AN SDC EMPLOYEE"?

II. WAS THE APPELLANT DENIED HIS RIGHT TO CALL WITNESSES IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER BOTH STATE AND FEDERAL CONSTITUTIONS?

III. WAS APPELLANT DENIED HIS PROCEDURAL DUE PROCESS RIGHTS UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS TO PRESENT DOCUMENTARY EVIDENCE?

IV. DID THE SDC OVER THE YEARS ARBITRARILY TAKE THE APPELLANT'S GOOD-TIME IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS?

V. DID ALC JUDGE ABUSE HER DISCRETION AND WAS SHE BIASED AGAINST THE APPELLANT IN VIOLATION OF HIS RIGHTS TO DUE PROCESS UNDER BOTH STATE AND FEDERAL CONSTITUTIONS?

Statement of the case

On May 23, 2011 the appellant became involved in a physical altercation with officers James Lance and Lieutenant Jaquie Holsinger. On June 2, 2011 the appellant was served notice of the charges for two (2) South Carolina Department of Corrections ("SCDC") rules violation of 801 "Assault and/or Battery of an SCDC Employee" . . . (R.P. 9, lines 11-23 & 10 Lines 1-11)

On June 2, 2011 of the same day appellant sent a request to staff member SCDC Form 19-11 to disciplinary hearing officer ("DHO") R.L. Turner requesting to have nurse Amy Spencer to be present at his disciplinary hearing to testify on his behalf. (R.P. 10).

DHO Turner denied receiving appellant's request (R.P. 12, line 9)

At the hearing of June 6, 2011 Lt. Jaquie Holsinger could not be reached via telephone by DHO Turner, who then issued a continuance of the matter until the following week of June 13, 2011. However, he denied appellant's request for an extension to allow for his requested witness, nurse Amy Spencer to be present at his disciplinary hearing. (R.P. 12, lines 17-19)

Appellant was found guilty and convicted of 801 "Assault and/or Battery of an SCDC Employee" of officers James Lance and filed his step 1 disciplinary appeal on June 24, 2011, which was denied by Tiger River Correctional Warden on July 11, 2011. Appellant lost five (5) days at the June 2, 2011 hearing.

Appellant then filed his step 2 disciplinary appeal on July 13, 2011 and was denied in a final agency decision on November 10, 2011.

Appellant filed his notice of appeal with the administrative law court ("ALC") on December 19, 2011 and was assigned ALC case number 11-CO-892- and ALC Judge Carolyn C. Matthews.

In an order dated October 15, 2012 ALC Judge Carolyn C. Matthews dismissed appellant's appeal. Appellant filed his notice of appeal with this court on November 13, 2012.

Argument

I. THE APPELLANT'S RIGHT TO DUE PROCESS UNDER BOTH THE STATE AND THE FEDERAL CONSTITUTIONS WERE VIOLATED WHEN HE WAS CONVICTED OF 801 "ASSAULT AND/OR BATTERY OF AN SCDC EMPLOYEE" AT THE JUNE 6, 2011 DISCIPLINARY HEARING WHERE THE EVIDENCE PRESENTED WAS INSUFFICIENT TO CONVICT HIM OF ANYTHING OTHER THAN THE LESSER INCLUDED OFFENSE OF 807 "STRIKING AN SCDC EMPLOYEE".

THE APPELLANT ARGUES THAT THE EVIDENCE PRESENTED AT THE DISCIPLINARY HEARING OF JUNE 6, 2011 TO CONVICT HIM OF 801 "ASSAULT AND/OR BATTERY OF AN SCDC EMPLOYEE" WAS INSUFFICIENT TO CONVICT HIM OF ANYTHING OTHER THAN THE LESSER INCLUDED OFFENSE OF 807 "STRIKING AN SCDC EMPLOYEE" BECAUSE THE STATE FAILED TO PROVE THE ELEMENT OF BODILY INJURY (C.R.P. 23)

THE SCDC DEFINES 801 "ASSAULT AND/OR BATTERY OF AN SCDC EMPLOYEE" AS THE FOLLOWING:

THE WILLFUL HITTING, STRIKING, OR UNAUTHORIZED TOUCHING OF AN SCDC EMPLOYEE OR OTHER GOVERNMENT AGENCY EMPLOYEE, CONTRACT EMPLOYEE, VOLUNTEER, OR MEMBER OF THE PUBLIC WITH OR WITHOUT A WEAPON OR THE THROWING OF ANY SUBSTANCE AT OR ON AN SCDC EMPLOYEE, OTHER GOVERNMENT AGENCY EMPLOYEE, CONTRACT EMPLOYEE, OR VOLUNTEER, WHO IS EXERCISING LEGITIMATE AUTHORITY OVER AN INMATE, WHEN SUCH HITTING, STRIKING, THROWING, OR UNAUTHORIZED TOUCHING **CAUSES BODILY INJURY.**

SCDC Policy 08-22.14, § 801 (C.R.P. 34)

HOWEVER, THE SCDC DEFINES 807 "STRIKING AN SCDC EMPLOYEE" AS THE FOLLOWING:

THE WILLFUL HITTING, STRIKING, OR UNAUTHORIZED TOUCHING OF AN SCDC EMPLOYEE OR OTHER GOVERNMENT AGENCY EMPLOYEE, CONTRACT EMPLOYEE,

Volunteer, or member of the public with or without a weapon or the throwing of any substance at or on an SDC employee, other government agency employee, contract employee, or volunteer who is exercising legitimate authority over an inmate, when such hitting, striking, throwing, or unauthorized touching does not cause bodily injury

SDC Policy 01-22.14 8807 (R.P. 35)

Appellant argues that the SDC defines both offenses in the ~~SAME~~ exact language except as to the element of "Bodily Injury" but that regardless of how the SDC defines either offenses the sole authority to define crime and its punishment rests with the South Carolina General Assembly.

"THE GENERAL ASSEMBLY HAS POWER TO PRESCRIBE LEGAL DEFINITIONS BY STATUTE, AND SUCH DEFINITIONS ARE BINDING UPON THE COURTS AND JURY"
Durvis v State Farm Mut. Auto. Ins. Co., - S.C., 403 S.E.2d 662, 665 (S.C. App. 1991) citing Brown v Martin 203 S.E.2d 84, 86, 26 S.E.2d 317, 318 (1943).

SEE BROWN v STATE, 343 S.C. 342, 540 S.E.2d 846, 849-50 (2001) (First and Foremost, a penal statute must be construed strictly against the state and in favor of the defendant. Williams v State, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991). "THE RULE THAT PENAL LAWS ARE TO BE CONSTRUED STRICTLY... IS FOUNDED... ON THE PLAIN PRINCIPLE THAT THE POWER OF PUNISHMENT IS VESTED IN THE LEGISLATURE, NOT THE JUDICIAL DEPARTMENT. IT IS THE LEGISLATURE, NOT THE COURT, WHICH IS TO DEFINE A CRIME, AND ORDAIN ITS PUNISHMENT") Id. quoting UNITED STATES v WILTBARGER, (18 U.S.) 5 Wheaton 76, 95-96, 5 L.Ed. 37, 42 (1820)

THE INCIDENT THAT LED TO THE APPELLANT BEING CHARGED WITH THE OFFENSE OF 801 "ASSAULT AND/OR BATTERY OF AN SDC EMPLOYEE" OCCURRED ON MAY 23, 2011.

"IT IS AXIOMATIC THAT A DEFENDANT SHOULD BE TRIED IN ACCORDANCE WITH THE LAW IN EFFECT AT THE TIME THE OFFENSE OCCURRED." Hanson v State,

- S.C. - 422 SE2d 265, - (1992).

Appellant argues that the director has authority to prescribe rules and regulations pursuant to S.C. Code Ann § 24-1-140 for the disciplining of prisoners but that such rules and regulations must be in correspondence with the laws of this state. "A RULE MAY ONLY IMPLEMENT THE LAW" SEE MCKNICHLES INC., V S.C. DEPARTMENT OF REVENUE, 331 S.C. 629, 503 SE2d 723, 725 (1998) (citing Banks V Batesburg Hauling Co., 202 S.C. 273, 24 SE2d 496 () (holding "AN ADMINISTRATIVE REGULATION MAY ONLY IMPLEMENT THE LAW")

Appellant further argues that where an agency rule or regulation does not comply with and correspond to statutory laws of this state it is void. "Although a regulation has the force of law, it must fall when it alters or adds to a statute". SOCIETY OF PROFESSIONAL JOURNALISTS V SECTION 283 S.C. 563, 324 SE2d 313, 315 (1985).

"IT IS WELL SETTLED THAT AN ADMINISTRATIVE ORDER WHICH MATERIALLY ALTERS OR ADDS TO ~~THE LAW~~ IS VOID." MILLIKEN & CO. V S.C. DEPT OF LABOR ETC - SC 269 SE2d 763, 764. LEE V MICHIGAN MILLERS MIT. INS. CO. 250 S.C. 462, 158 SE2d 774 (1968) "THE SAME PRINCIPLE APPLIES TO ADMINISTRATIVE RULE-MAKING." SEE HAY V S.C. TAX COMM'N 273 S.C. 269, 255 SE2d 837 (1979); also HEWARD V S.C. TAX COMM'N, 240 S.C. 347, 126 SE2d 15 (1962)

First the Appellant establishes for the record that officer Vance suffered only alleged "minor wounds" and did not suffer a bodily injury as a result of being allegedly "assaulted" by the Appellant. (R.P. 23) In the 19-29(A) "Incident report" of officer Vance the commenting supervisor clearly documents for the record that he received only "minor wounds". SEE SUPERVISOR'S COMMENTS, 19-29(A) "Incident report" (R.P. 23)

Furthermore, at the disciplinary hearing of June 6, 2011 his own testimony acquits the Appellant of inflicting any bodily injury upon his person as a result of being struck by the Appellant (R.P. 14, lines 10-13) and as

defined by the south carolina legislature in S.C. Code Ann. §16-3-600 (A)(1) & (2) (Ch. §. 36)

Appellant argues that Bodily Injury is an element of the SDC offense of §01 "Assault and/or Battery of an SDC Employee" and had to be proved at the June 6, 2011 disciplinary hearing in order to meet the "substantial evidence" standard of the Administrative Procedures Act (APA)

THE STATE IS REQUIRED TO PROVE EVERY ELEMENT OF A CHARGED OFFENSE TO OBTAIN A CONVICTION OF THE CRIME FOR WHICH THE ACCUSED IS CHARGED, STATE V BARKSDALE, 311 S.C. 210, 214, 428 S.E.2d 498, 501 (Ct. App. 1993) citing STATE V ATTARD, 263 S.C. 546, 211 S.E.2d 868 (1975).

In PORTER V SC. PUBLIC SERVICE COM. IN, 333 S.C. 12, 507 S.E.2d 328, 332 (1998), the south carolina supreme court held that "an administrative body must make findings which are sufficiently detailed to enable this court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings."

the supreme court also held in SINGLETON V STATE, - S.C., 437 S.E.2d 53, 58 (1993) that "THE COMMON LAW REMAINS IN FULL FORCE AND EFFECT IN SOUTH CAROLINA UNLESS CHANGED BY CLEAR AND UNAMBIGUOUS LEGISLATIVE ENACTMENT."

Appellant argues that the south carolina general assembly changed the common law definition for all crimes/offenses dealing with assault and battery by passing Act no. 273, section 7(b) which provides:

THE COMMON LAW OFFENSES OF ASSAULT AND BATTERY WITH INTENT TO KILL, ASSAULT WITH INTENT TO KILL, ASSAULT AND BATTERY OF AN HIGH AN AGGRAVATED NATURE, SIMPLE ASSAULT AND BATTERY, ASSAULT OF A HIGH AND AGGRAVATED NATURE, AGGRAVATED ASSAULT, AND SIMPLE ASSAULT ARE ABOLISHED FOR OFFENSES OCCURRING ON OR AFTER THE EFFECTIVE DATE OF THIS ACT

Act no. 273 section 7(b) (Ch. §. 38)

Thus Appellant Argues that the law in effect at the time of the incident of May 23, 2011 was as it was defined by the South Carolina General Assembly on June 2, 2010 in S.C. Code Ann. § 16-3-600(A)(1) & (2) which provides:

§ 16-3-600 - Assault and Battery

(A) For purposes of this section

(1) "Great Bodily Injury" means bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ

(2) "Moderate Bodily Injury" means physical injury requiring treatment to an organ system of the body other than the skin, muscles, and connective tissues of the body, except when there is penetration of the skin, muscles, and connective tissues that require surgical repair of a complex nature or when the treatment of the injuries requires the use of regional or general anesthesia

S.C. Code Ann. § 16-3-600(A)(1) & (2) (R.P. 3(e))

Appellant argues that Officer Vance suffered neither of the above General Assembly described "Injuries" and that it was an error of law for the Dto to find him guilty of and convicting him for Assault and/or Battery where Officer Vance did not receive a bodily injury.

A) causing a substantial risk of death; (R.P. 23)

B) or serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ (R.P. 14, lines 10-13).

C) requiring treatment to an organ system of the body other than

the skin, muscles and connective tissues of the body; (R.P. 14, lines 10-13)

D) or treatment to any injuries to the skin, muscles or connective tissues requiring surgical repair of a complex nature or when the treatment of the injuries requires the use of regional or general anesthesia (R.P. 23)

The 19-28(A) "Incident report" shows that officer lance went directly to the tiger river correctional institutional nurse, MRS. WEAVER and was treated for only so-called "minor wounds". (R.P. 23)

Even under the old common law and statutory scheme of law simple assault and battery required a violent injury as an element of the offense, see State v Foxworth, - se. -, 238 S.E.2d 172, 173 (1977).

(Both assault and battery of a high and aggravated nature and simple assault and battery require as an element of the offense that a violent injury be done to the person of the victim).

Appellant argues that because he committed an "unauthorized touching" or "striking" of officer lance as described by SDC Policy of 22.14 section 807, unaccompanied by a "bodily injury" he could only have been convicted of the lesser included offense (R.P. 35)

The test for determining when a crime is a lesser included offense of the crime charged is whether the greater offense includes all the elements of the lesser offense, if the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater, see State v Bland - se. - 457 S.E.2d 611 (1995).

Appellant argues that the SDC charge of 807 "Striking an SDC Employee" (R.P. 35) is the lesser included offense of the SDC charge of 801 "Assault and/or Battery of an SDC Employee" (R.P. 34) and that the evidence presented at the hearing of June 6, 2011 was insufficient

to convict him of anything other than the lesser included offense. cf. 807 "striking an SDC employee" (R.P. 35) to 801 "Assault and/or Battery of an SDC employee" (R.P. 34)

Appellant also argues that the law was not applied properly to the findings made by ALJ Judge Carolyn C. Matthews where in her order she finds that the record contained "substantial evidence" for which to convict the appellant of 801 "Assault and/or Battery of an SDC employee" (R.P. 34, lines 204-23)

In Lark v Bi-Lo, Inc 276 S.E. 130, 276 S.E.2d 304 at 307 (1981) the South Carolina Supreme Court held "THE SUBSTANTIAL EVIDENCE RULE, PRESCRIBED IN THE STATUTE, MEANS THAT WE WILL NOT OVERTURN A FINDING OF FACT BY AN ADMINISTRATIVE AGENCY UNLESS THERE IS NO REASONABLE PROBABILITY THAT THE FACTS COULD BE AS RELATED BY A WITNESS UPON WHOSE TESTIMONY THE FINDING WAS BASED."

THE RECORD SHOWS THAT THE APPELLANT WAS FOUND GUILTY AND CONVICTED BY THE DIB BASED ON THE TESTIMONY OF THE WITNESS OFFICER LANCE. (R.P. 24).

THE TRIAL JUDGE IS TO CHARGE THE JURY ON A LESSER INCLUDED OFFENSE IF THERE IS ANY EVIDENCE FROM WHICH IT COULD BE INFERRED THE LESSER, RATHER THAN THE GREATER OFFENSE WAS COMMITTED. STATE

V. GOURDINE - S.C. - , 472 S.E.2d 241, 242 (1996) SEE SDC POLICY OF-22.14 § 9.6 WHERE IT PROVIDES:

IF DURING THE HEARING, THE HEARING OFFICER DETERMINES THAT THE REPORT SHOULD HAVE BEEN PROCESSED AS A LESSER INCLUDED OFFENSE THAT MORE APPROPRIATELY CHARACTERIZES THE INCIDENT, THE HEARING OFFICER SHOULD REDUCE THE CHARGE TO THE LESSER INCLUDED OFFENSE (R.P. 30).

5C CODE ANN. § 1-23 (6)(C)(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 AN ABUSE OF DISCRETION OR CLEARLY UNWARRANTED EXERCISE OF DISCRETION.

APPELLANT ARGUES THAT THE DTE VIOLATED ALL OF THE ABOVE AT THE JUNE 6, 2011 DISCIPLINARY HEARING BECAUSE THE RESPONDENT AT NO TIME PROVED THE OFFENSE ELEMENT OF "BODILY INJURY". SEE MORGAN V. DRETTE, 433 F.3d 455, 458 (5th Cir. 2005) (WHILE RECORD DEMONSTRATED THAT ASSAULT OCCURRED, THERE EXISTED "NO EVIDENCE" OF RESULTING INJURY WHICH WAS ESSENTIAL ELEMENT OF MISCONDUCT CHARGE).

II. APPELLANT WAS DENIED HIS RIGHT TO CALL WITNESSES IN VIOLATION OF DUE PROCESS UNDER BOTH STATE AND FEDERAL CONSTITUTIONS. APPELLANT WAS SERVED NOTICE OF THE CHARGES ON JUNE 2, 2011 AND SENT

An Inmate request to staff member (SCDC Form 19-11) to DHO R.L. Turner requesting to have nurse Amy Spencer as his witness to testify on his behalf about the two knots and/or bumps that he received as a result of being struck repeatedly by officer Lance (R.P. 19)

Appellant argues such testimony would have contradicted Ofc. Lance's 19-29 (A) "Incident report" (R.P. 23) that he only struck appellant once and such testimony would have contradicted the accusing official's testimony at the hearing in which he was required to do under SCDC Policy of 22.14.815.7 (R.P. 30)

Appellant further argues that witness testimony would have also rebutted the accusing official's testimony that appellant struck him intentionally which was also relied upon by the DHO at the hearing to convict him as charged (R.P. 24)

under SCDC Policy of 22.14.88.2.4 inmates are procedurally required to address their requests for witnesses to the counsel substitute or to the DHO (R.P. 30)

the appellant complied with agency policy (R.P. 19). At the hearing of June 6, 2011 the DHO denied receiving the appellants' request for witnesses (R.P. 12, lines 9-16). Further note, appellant requested an extension of the proceeding until he could locate his request for witnesses. (R.P. 12, lines 17-19)

THE DHO DENIED THE SAME. THE APPELLANT WROTE SGT. POOLE ON JUNE 13, 2011 INQUIRING OF HER HAD SHE "INTERCEPTED" HIS REQUEST FOR WITNESSES. SEE RESPONSE OF SGT. POOLE (R.P. 18)

Appellant detailed for the record that Roger River Correctional Institution has a blanket unwritten policy and practice of using Sgt. Poole to deny inmates their requested witnesses and provided AlC Judge Matthews with two exhibits to prove the same. SEE exhibits of Christopher Williams # 306684 (R.P. 20) and Thomas Waters # 321296 (R.P. 21)

Furthermore, the appellant submitted said exhibits pursuant to Rule 56(c)

sergey, along with his notice of motion and motion for summary judgment and his memorandum of law in support of his motion for summary judgment. ALC Judge Matthews refused to rule upon the appellants motion, yet, turned right around and agreed in her order of dismissal with the claim of respondent that forth that appellants' request for witnesses was never received.

Appellant argues that he had a constitutional right to call witnesses on his behalf at his disciplinary hearing of June 6, 2011. "An inmate has the right to present documentary evidence and to request witnesses in his defense." Al-Shabazz v State, 338 S.C. 354, 527 S.E.2d 742 at 751 (2000).

Furthermore, SCDC Policy of-22.14, § 15.3 provides:

If an employee has been called as a witness and has information that is relevant to the case, then he/she is obligated to provide said information (R. §. 30).

In her order dated September 6, 2011, Docket no. 11-ALW-04-0284-AJ, ALC Judge Deborah Brooks Duden stated "In Dalton v Hutto, 713 F.2d 75 (4th Cir. 1983), the fourth circuit court of appeals recognized a duty on the part of the hearing officer in a prison disciplinary matter to compel prison employees and residents to appear and give testimony when requested to do so by the inmate..."

not only did the DHO refuse to call the witness forth as the appellant requested but he also refused to grant appellants' request for an extension until the requested witness could be reached (R. §. 12, lines 17-19)

the DHO then framed appellants' counsel substitute's argument as if he was making a case of brutality, where appellant had a right to present a defense. (R. §. 13, lines 16 & 17)

Appellant contends that he was substantially prejudiced by the DHO, and that the biasness of the DHO is on the record where he tells appellant him having a copy of his request "doesn't mean a thing to me..." (R. §. 12, lines 11 & 12).

Appellant argues that Sgt. Peete should have never have had his request for his witness in her possession in the first place when agency policy required him to submit the request to either the counsel substitute or the Dtb under SCDC Policy 08-22.14, 88.2.4. (R.P. 30)

"An Administrative [Agency] must follow its own rules and regulations" ITISHA V DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, 292 S.E.2d 190, 355 S.E.2d 531, 533 (1987)

Further, the Appellant argues that the reason provided by the respondent for denying Appellant his witness was inadequate under Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), especially, where the Appellant alleged that certain employees at Tiger River Correctional conspired to deprive him of the same.

THE Dtb WAS REQUIRED UNDER SCDC Policy 08-22.14 88.1.2 "Whether any requested witnesses were excluded and, if so, the reasons for the exclusion." (R.P. 33). THE Dtb WAS ALSO MANDATED BY SCDC Policy 08-22.14, 818.1 (R.P. 33) TO USE SCDC FORM 19-69 TO PROVIDE A WRITTEN RECORD OF THE HEARING. (R.P. 33).

INSTEAD OF UTILIZING SECTION (3) OF THE APPROPRIATE SECTION ON THE SCDC 19-69 FORM, THE Dtb INSTEAD WROTE ON THE HEARING RECORD THAT THE APPELLANT'S WITNESS WAS DENIED UTILIZING SECTION (6), SEE SCDC FORM 19-69 "Disciplinary report and hearing record" (R.P. 24)

Appellant argues that the Dtb's failure to permit him to summon witnesses offends the framework of Wolff and its progeny. SEE Fox v. Coughlin, 893 F.2d 475 (2nd Cir. 1990); also Brooks v. Andolina, 826 F.2d 1266 at 1269 (3d Cir. 1987) (moreover, under Wolff v. McDonnell, 418 U.S. 539, 566, 94 S.Ct. 2963, 2979, 41 L.Ed.2d 935 (1974)) "THE INMATE FACING disciplinary proceedings should be allowed to call witnesses... in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals" BECAUSE THE OFFICIAL

Failed to show that permitting Brooks to call his witnesses would have created any hazards, we conclude that the refusal to allow witnesses violated Brooks's procedural due process rights).

III. Appellant was denied his procedural due process rights under both the state and federal constitutions to present documentary evidence.

"An inmate has the right to present documentary evidence..." see Al-Shabazz v State, 338 S.C. 354, 527 S.E.2d 742 at 751 (2000). The appellant attempted to introduce documentary evidence at the hearing of June 6, 2011, that Lt. Helsing never mentioned in her incident report that appellant struck Ofc. Lance as he claimed (R.P. 11, lines 13-22).

When appellant attempted to introduce Lt. Helsing's 19-29(A) "incident report" as documentary evidence he was again cut off by the Dto (R.P. 11, lines 15-18). The appellant argues that the Dto himself was very biased against him from the start where he denied appellant nearly all of his procedural due process rights and actively participated in the hearing on behalf of the respondent.

- 1) Appellant was denied the right to call witnesses. (R.P. 12, lines 9-19)
- 2) Appellant's counsel substitute was not allowed to make a statement on appellant's behalf (R.P. 13, lines 9-20)
- 3) Appellant was denied the right to present documentary evidence (R.P. 11, lines 15-22) where such documentary evidence would have contradicted officer lance's 19-29(A) "incident report" as he was required to do under SDC Policy 01-22.14, § 15.7 (R.P.).

Appellant argues that he was substantially prejudiced by the Dto's biasness where he actively hindered appellant from presenting a complete defense on his own behalf.

"Due process requires that a criminal defendant be afforded a meaningful opportunity to present a complete defense." State v Mabe - S.C. -, 412 S.E.2d 386 at 388 (1991); Crane v Kentucky 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

IV. THE SCDC OVER THE YEARS - HAVE ARBITRARILY TAKEN THE APPELLANT'S GOOD-TIME IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS.

UNDER S.C. CODE ANN. §24-13-210(C) THE DIRECTOR(S) OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS HAVE LEGISLATIVE AUTHORITY TO PROMULGATE RULES AND REGULATIONS - PURSUANT TO S.C. CODE ANN. §§24-1-90 AND 24-1-140 - TO TAKE INMATES' GOOD-TIME CREDITS, HOWEVER, THE AUTHORITY TO DO SO IS THE SOLE RESPONSIBILITY OF THE DIRECTOR(S)

APPELLANT ARGUES THAT OVER THE YEARS THE SCDC HAS ALLOWED ITS DISCIPLINARY HEARING OFFICERS TO TAKE HUGE AMOUNTS OF THE APPELLANT'S GOOD-TIME AS IN THE PRESENT CASE IN VIOLATION OF SC CODE ANN. §24-13-210(C) AND THAT THIS VIOLATION IS "CAPABLE OF REPETITION, YET EVADES REVIEW," FRANKS V. BOWMAN, TRANS. CO, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 404 (1976)

V. THE ALC JUDGE ABUSED HER DISCRETION AND WAS BIASED AGAINST THE APPELLANT IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER BOTH STATE AND FEDERAL CONSTITUTIONS.

FROM THE OUTSET OF THE PROCEEDINGS IN THIS CASE THE APPELLANT OUTLINED FOR THE ALC JUDGE THAT THE AGENCY HAD NOT ONLY VIOLATED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, BUT MORE IMPORTANTLY, THAT VARIOUS PERSONS AMONG THE RESPONDENTS "CONSPIRED" TO DO THE SAME.

APPELLANT ESTABLISHES FOR THE RECORD THE FOLLOWING:

- 1) HE WAS DENIED HIS DUE PROCESS RIGHT TO CALL WITNESSES (CR.P. 12, LINES 9-20)
- 2) THAT IT WAS AGAINST SCDC POLICY OF 22.1488.2.4 (CR.P. 30) FOR SGT. POATE TO INTERCEPT THE APPELLANT'S INMATE REQUEST FOR WITNESSES TO THE DTH.
- 3) THAT SGT. POATE "CLAIMED" SHE DID NOT RECEIVE APPELLANT'S REQUEST WHICH WAS SUBMITTED JUNE 2, 2011, UNTIL JUNE 8, 2011 - TWO (2) DAYS AFTER THE APPELLANT'S DISCIPLINARY HEARING OF JUNE 6, 2011 (CR.P. 19)

4) that the Agency has an unwritten policy and practice of utilizing 59A, Rule 70 to intercept inmates' request for witnesses to the Dte and/or counsel substitute to deny that she received the request for witnesses before the Hearing and to deny inmates their due process rights to call witnesses (R.P. 22).

5) Appellant submitted two (2) Affidavits to ALC Judge Matthews supporting the same. SEE Affidavits of Christopher Williams #306684 (R.P. 20) and Thomas Waters #321296 (R.P. 21)

6) that the Dte, R. L. Turner denied receiving the request of the Appellant (R.P. 12, lines 9-16), and also denied receiving the requests of inmates Christopher Williams #306684 - SEE Affidavit at Paragraph 3 (R.P. 20) as well as that of inmate Thomas Waters #321296 - SEE Affidavit at Paragraph 3 (R.P. 20)

7) Furthermore, the Appellant entered the above Affidavits pursuant to Rule 56(c), 56(c)(1), into the record in a motion for summary judgement and a memorandum of law in support of his motion for summary judgement, yet, ALC Judge Matthews refused to rule upon said motion, and went so far as to parrot the reasons for denying Appellant his requested witness given by the respondent in her order of dismissal dated October 15, 2012 (R.P. 2 and 3)

8) the South Carolina Supreme Court held in Porter v S.C. Public Service comin 333 S.C. 12, 507 S.E.2d 328 at 332 (1998) that "An administrative Agency is not required to present its findings of fact and reasoning in any particular format, although the better practice is to present them in an organized and regimented manner. HOWEVER, A RECITAL OF CONFLICTING TESTIMONY FOLLOWED BY A GENERAL CONCLUSION IS PATENTLY INSUFFICIENT TO ENABLE A REVIEWING COURT TO ADDRESS THE ISSUES" Porter, supra, at 507 S.E.2d 332 citing ABLE Communications Inc. v S.C. Pub.

- 9) This is precisely what ALC Judge Matthews did in her order stating "in his Brief, the Appellant alleges that he was denied his right to present a witness for his defense. This was addressed at the hearing and the transcript reflects that the hearing officer never received an inmate request from the Appellant, which is why the witness was not present at the hearing" (R.P. 2 and 3) SEE underlined.
- 10) Furthermore, Appellant submitted the affidavits of inmate Christopher Williams # 306684 (R.P. 20) and Thomas Waters # 321296 (R.P. 21) in his Brief and in his motion for summary judgment pursuant to rule 56(c), SERP, which clearly contradicts and is in conflict with the reason given by the respondent for denying Appellant his requested witnesses.
- 11) Then Respondent at the Office of General Counsel Level "Doctored" the transcript of the June 6, 2011 disciplinary hearing to ALTER the Appellant's testimony that Officer Lance did not receive a "Bodily Injury" as required by S.C. Code Ann. § 16-3-60(A)(1) & (2) to convict Appellant of 801 "Assault and Battery of a SEC Employee" (R.P. 7)
- 12) Appellant filed a "motion to correct transcript and/or to produce the audio for proceedings" on March 19, 2012 to the ALC Judge, yet she also refused to rule upon this motion. SEE Generally "Appellant's notice of motion and motion to correct transcript and/or to produce the audio for proceedings"
- 13) Appellant argues that the most glaring abuse of discretion committed by ALC Judge Carolyn C. Matthews is that she allowed the attorney for respondent, Shanika Kenyatta Johnson, to lie to the Administrative Law Court that she (respondent) did not receive the Appellant's Brief for case no. 11-ALJ-04-00992-AF.
- 14) Respondent Shanika Kenyatta Johnson submitted a motion to Dismiss

The Appellant's appeal on March 30, 2012 (R.P. 647)

15) The Appellant then filed a motion in opposition to respondent's motion to dismiss and cross-motion to dismiss along with an affidavit by inmate Justin Griffin #315057 on April 10, 2012 exposing this abuse of respondent Shanika Kenyatta Johnson.

16) By filing the motion to dismiss, the respondent Mrs. Johnson refused to, and, indeed, could not submit her brief to the administrative law court on time as required by Rule 62, Rules of Procedure for the administrative law court.

17) In an order denying respondent's motion to dismiss ALC Judge Carolyn C. Matthews denied the respondent's motion but did not rule upon the Appellant's cross-motion to dismiss based upon Rule 62, ALC Rules. (R.P. 5)

18) Instead ALC Judge Matthews gave the respondent twenty (20) days from the date of her order in which to file its brief (R.P. 5)

19) This Appellant submitted his briefs for both case no. 11-ALJ-04-00992-AJ and case no. 11-ALJ-04-00993-AJ in the same Manila envelope on March 1, 2012, so the motion to dismiss by respondent Shanika Kenyatta Johnson was an intentional lie to deceive the ALC Judge and to abuse the Tribunal Forum and the judicial review process by attempting to "win at any and all costs"

20) Furthermore, Appellant wrote a letter to the Honorable Daniel E. Stenhouse along with a copy of his letter to ALC Judge Matthews informing him of this matter.

Under South Carolina law respondent Johnson abused the process by deceitfully filing a motion to dismiss the Appellant's appeal on the basis that Appellant had not submitted his brief to the administrative law court on time as required by Rule 62, Rules of Procedure for the administrative law court.

Under Rule 8(A), scrf, where respondent Shanika Keyatta Johnson Plead to the tribunal that she did not receive Appellants Brief pursuant to ALC Rule 62, she was bound by her Pleading, so it was an abuse of discretion for ALC Judge Carolyn C. Matthews, to grant the respondent twenty (20) days past the time for her to submit her brief to the ALC to do so.

"Any Allegations, Statements, or Admissions contained in a Pleading are CONCLUSIVE, and a Party cannot subsequently take a contrary or inconsistent position." Charleston County School Dist. v. Inland Transit Inc 348 S.C. 420, 559 S.E.2d 362 (S.C. App. 201).
rehearing denied, cert. denied.

Parties are judicially bound by their Pleadings unless withdrawn, altered or stricken by Amendment or other wise, Inland Transit, supra, 559 S.E.2d at 364 citing Postal v. Manning 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

21. Finally, the Appellant submitted to Proffer Evidence on August 27, 2012, along with his Step 2 grievance complaint showing why Sgt. Poole's statement that she had not received Appellant's request for witnesses until June 8, 2011, was implausible according to mail from Postal Director P. Crider (P. 129), Lee v. Suesse - S.C. - 457 S.E.2d 344, 345 (1995) (an abuse of discretion arises from an error of law or a factual conclusion without evidentiary support).

Conclusion

Wherefore, upon the foregoing showing that the evidence presented was insufficient to convict him of 801 "Assault and/or Battery of an SCDC Employee," that he was denied the right to call witnesses and to present documentary evidence, and that he was substantially prejudiced by the same, Appellant requests that his disciplinary conviction at the June 6, 2011 hearing be overturned and/or reversed, especially where the Dto and the ALC Judge abused their discretion. Lee v. Suesse - S.C. - 457 S.E.2d 344, 345 (1995) citing Benny v. Debb's House Inc., 275 S.C.

S.C. 562, 274 5E2d 290 (1981) (An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.)

Respectfully submitted

Shango Damballah
Shango Damballah #137525
Mershaw correctional institution
4848 Gold Mine Hwy
S.M. #90
Mershaw, S.C. 29067

January 18, 2013
Mershaw, South Carolina

The State of South Carolina
In the Court of Appeals
Appeal From the Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

CASE NO. 11-ALJ-04-00992-AJ

Shango Damballah #137525 Appellant,

v

South Carolina
Department of Corrections Respondent.

Certificate of Counsel Appellant

The undersigned pro se litigant certifies that his Final Brief
complies with Rule 211(b), SCACR, January 18, 2013

Shango Damballah

Shango Damballah #137525

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
CAROLYN C. MATTHEWS, ADMINISTRATIVE LAW JUDGE

CASE NO. 11-ALJ-04-00992-AJ

SHANGO DAMBALLAH #137525 Appellant,

V

SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS Respondent.

CERTIFICATE OF SERVICE

I certify that I have sent a copy of the Appellant's Final Brief along with a certificate of ~~counsel~~ Appellant to Administrative Law Court Judge Carolyn C. Matthews at the address below, and have served the Respondent Shanika Koyathathasan, with the same by placing it in the Kershaw Correctional Snu Mailbox with postage affixed and addressed to the office of General Counsel at P.O. Box 21787, 4444 Broad River Road, Columbia, S.C. 29221-1787, this 18th day of January, 2013.

January 18, 2013

CC: Carolyn C. Matthews,
Administrative Law Court
Edgar A. Brown Bldg,
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Respectfully submitted
Shango Damballah
Shango Damballah #137525
Kershaw Correctional Institution
4848 Gold Mine Hwy
Suite # 90
Kershaw, S.C. 29067

RECEIVED
JAN 24 2013
SC Court of Appeals