STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

James Anthony Primus, #252315, Appellant, v. South Carolina Department of Corrections, Respondent.	Docket No. 18-ALJ-04-0100-AP ORDER

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed by James Anthony Primus (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (Department or Respondent). Appellant appeals the Department's decision in response to his Step 2 Grievance. After careful consideration, the decision of the Department is affirmed.

BACKGROUND

Appellant was convicted of kidnapping and assault and battery of a high and aggravated nature (ABHAN) and sentenced to consecutive terms of thirty years and ten years, respectively.

On September 27, 2017, Appellant filed a Step 1 Grievance disagreeing with the Department for having interpreted his ABHAN conviction in accordance with the statute as opposed to the CDR code.[1] In support of his disagreement, Appellant maintained that ABHAN is a lesser included offense of criminal sexual conduct in the first degree and that he was acquitted of criminal sexual conduct in the first degree. Appellant averred that the interpretation of ABHAN must be made by a judicial officer, not by an executive agency, and requested that the Department bring a declaratory action in the Circuit Court of General Sessions under section 15-53-20 of the

[1] "The abbreviation, CDR, stood for 'Criminal Docket Report,' indicating the paper docket sheets maintained by criminal justice agencies. Since that time, paper dockets are no longer maintained. The term has been redefined to mean 'Criminal Data Report.' The Codes are also called 'offense codes.'" *State v. Bennett*, 375 S.C. 165, 173 n.7, 650 S.E.2d 490, 495 n.7 (Ct. App. 2007) (citing South Carolina Judicial Department, CDR Codes Frequently Asked Questions, https://www.sccourts.org/cdr/userInstructions.cfm.)

South Carolina Code. The Warden denied Appellant's grievance on November 24, 2017. Appellant then appealed via a Step 2 Grievance submitted on November 29, 2017. Within this grievance, Appellant cited *Tant v. South Carolina Department of Corrections*, 408 S.C. 334, 759 S.E.2d 398 (2014),[2] for the proposition that if an inmate is dissatisfied with the reinterpretation ostensibly of his or her sentence, the Department must bring a declaratory judgment action in Circuit Court. Appellant noted that this is not an inmate's responsibility; instead, the responsibility for bringing such an action is that of the Department. The Responsible Official considered and denied Appellant's grievance on February 2, 2018.

Thereafter, Appellant filed his Notice of Appeal with the Court on March 13, 2018. This matter was assigned to the undersigned on March 22, 2018. Appellant filed his brief along with accompanying exhibits on March 27, 2018.[3] The Department filed the Record on Appeal (Record) on May 29, 2018,[4] and its brief on July 11, 2018. Appellant filed a reply brief on July 18, 2018.[5]

JURISDICTION/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 non-collateral or administrative matters 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 369, 527 S.E.2d at 750. In *Slezak v. South Carolina Department of Corrections*, 361 S.C. 327, 605 S.E.2d 506 (2004), the court clarified that the ALC has subject matter jurisdiction to hear appeals from final decisions of the Department in non-collateral or

[2] Despite Appellant only listing "Tant vs State SCOC" within his grievance, the Court believes he is referring to the case correctly identified *supra*.

[3] Although the Court appreciates the effort and thoroughness Appellant has undertaken by providing numerous exhibits along with his brief, to the extent the contents of the exhibits accompanying Appellant's brief are not contained in the record on appeal, the Court has not considered the contents therein in its review. *See* S.C. Code Ann. § 1-23-380(4) (Supp. 2018) (explaining the Court's review "must be confined to the record.").

[4] On June 5, 2018, Appellant filed a letter objecting to the Record filed by the Department contending that it was "fraudulent with the intent to deceive." The Department has not filed a response to Appellant's objection. By virtue of this order, Appellant's objection is denied.

[5] This document is untitled; nevertheless, the Court has interpreted it as a reply brief.

administrative matters. In the case at bar, Appellant alleges that the Department is erroneously interpreting his ABHAN conviction leading to an incorrect calculation of his sentence. "There can be no doubt the length of an inmate's incarceration implicates a constitutional liberty interest." *Tant v. S.C. Dep't of Corr.*, 408 S.C. 334, 341, 759 S.E.2d 398, 401 (2014) (citation omitted). Therefore, pursuant to *Al-Shabazz* and *Slezak*, the Court has subject matter jurisdiction over Appellant's appeal.

When reviewing the Department's final decision in a non-collateral or administrative matter, the Court sits in an appellate capacity. *Al-Shabazz*, 338 S.C. at 376-77, 527 S.E.2d at 754. Accordingly, the Court's review is limited to the record presented. S.C. Code Ann. § 1-23-380(4) (Supp. 2018). Subsection 1-23-380(5) of the South Carolina Code (Supp. 2018) provides the standard used by appellate bodies to review agency decisions. *See* S.C. Code Ann. § 1-23-600(E) (Supp. 2018) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Pursuant to this standard:

> 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:
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> (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)(a)-(f).

The Court's review of the facts is governed by the substantial evidence standard. *See generally Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 295, 422 S.E.2d 118 (1992) (recognizing that under the APA, the Court must sustain an agency decision if there is substantial evidence to support it). The South Carolina Supreme Court has observed that "[s]ubstantial evidence is not a mere scintilla; rather, it is evidence which, considering the record as a whole, would allow 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) (citation omitted). Thus, 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). "The burden is on [an] appellant[] to prove convincingly that the agency's decision is unsupported by the evidence." *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 260, 659 S.E.2d 233, 235 (Ct. App. 2008) (quoting *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996)).

DISCUSSION

The thrust of Appellant's contention is that the Department violated his due process rights by failing to provide him with prior notice before modifying his sentence. In that regard, Appellant maintains that the Department is erroneously interpreting his ABHAN conviction by an incorrect statute—section 16-3-652 of the South Carolina Code—which he insists causes him to be incarcerated for a longer period of time since it is codified as a violent crime.[6] To rectify this perceived error, Appellant claims that he is entitled to a declaratory judgment action in Circuit Court. The Court disagrees.

In *Tant*, the South Carolina Supreme Court addressed the Department's authority to alter its initial determination as to the length of an inmate's sentence. *Id.* at 337, 759 S.E.2d at 399. Based upon receipt of the inmate's sentencing sheets, the Department originally recorded his sentence as fifteen years imprisonment. *Id.* Without notifying the inmate, the Department thereafter determined that the sentencing judge intended to sentence him to forty years imprisonment and changed its records to reflect such. *Id.* In determining that the Department violated the inmate's due process rights by altering his sentence without his involvement, the court held that "whenever the Department alters an inmate's sentence in its records, it must give the inmate formal notice of the change and advise him of his right to file a grievance and obtain a hearing." *Id.* at 342, 759 S.E.2d at 401. Stated differently, the court ruled: "the Department must provide an inmate with timely, formal notice when it seeks to recalculate its initial determination of his sentence and advise him of his right to file a grievance and obtain a hearing." *Id.* at 346, 759 S.E.2d at 404.

In addition, the court clarified that, when administering and enforcing an inmate's sentence, the Department, absent ambiguity, must refer to the sentencing sheet. *Id.* at 337, 759 S.E.2d at 399 (holding "the Department is generally confined to the face of the sentencing sheets in determining

[6] *See* S.C. Code Ann. § 16-1-60 defining a violent crime to include criminal sexual conduct in the first degree under section 16-3-652.

the length of a sentence . . . [unless] there is an ambiguity in the sentencing sheets."). "Ambiguity in a sentence is established the same way as it is established for contract terms or statutes, essentially where the language, and therefore the intent, is in some way unclear." *Id.* at 345 n.4, 759 S.E.2d at 403 n.4; *see also Bordeaux v. State*, 410 S.C. 495, 499, 765 S.E.2d 143, 145 (2014) ("A sentence is ambiguous if its pronouncement is susceptible of differing interpretations based on the totality of the circumstances.") (citation omited). Here, Appellant's applicable sentencing sheet reveals that he received a ten-year sentence following being convicted at trial for ABHAN.[7] While the sentencing sheet does not list which statute his ABHAN conviction was in violation of, it indicated that the applicable statute bore CDR Code # 13, which correlates to ABHAN.[8] Therefore, because the Court finds this sentencing sheet unambiguous, the Department appropriately utilized it in calculating Appellant's sentence.

The Court finds the due process violation identified in *Tant* inapplicable to the case *sub judice*. Unlike the inmate in *Tant*, there is no evidence that the Department altered, recalculated, or otherwise modified Appellant's original sentence for the ABHAN offense in any manner. A review of the Department's conviction summary further reveals that the Department is not treating any of Appellant's convictions as criminal sexual conduct in the first degree as he claims.[9] Instead, the conviction summary lists the convictions he is currently serving sentences for as possession of cocaine, kidnapping, and ABHAN. The conviction summary also indicates that Appellant is to be incarcerated for ten-years for the ABHAN conviction and that this offense is non-violent, which is consistent with his sentencing sheet for this offense. Accordingly, the Department did not violate Appellant's due process rights. Furthermore, aside from relying on the concurring opinion in *Tant* for the proposition that he entitled to a declaratory judgment action in Circuit Court, which the

[7] The Court notes that the box for "PLEA" was originally checked but was clearly marked out and the "TRIAL" box was checked in its place.

[8] *See* South Carolina Judicial Branch, CDR Codes, https://www.sccourts.org/cdr/displayCDRCode.cfm (last visited July 23, 2019).

[9] This offense is codified in section 16-3-652 of the South Carolina Code (2015).

majority expressly declined to adopt,[10] Appellant has cited no authority in support of his position. Consequently, without more, the Court denies this requested relief.

Finally, to the extent Appellant challenges his conviction for kidnapping, Appellant raises this issue for the first time on appeal. Accordingly, this issue is not preserved for the Court's review. *See, e.g., Cowburn v. Leventis*, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005) ("In order for an issue to be preserved for appellate review, with few exceptions, it must be raised and ruled upon by the trial judge.") (citation omitted); *see generally S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.") (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)).[11]

ORDER

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

AND IT IS SO ORDERED.

July 24, 2019
Columbia, South Carolina

Milton G. Kimpson, Judge
South Carolina Administrative Law Court

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~~
This 24 day of July, 2019
By: [signature]
Judicial Law Clerk

[10] Appellant's argument is grounded in the procedure laid out in the concurring opinion in *Tant*. *See id.* at 347, 759 S.E.2d at 404 (Pleicones, J., concurring). Within the majority's opinion, however, the court disagreed with the concurrence's procedure:

> The concurrence would have us require the Department to bring a declaratory judgment action in the circuit court in instances where the inmate disagrees with a reinterpretation of his sentence. The concurrence sets forth no basis in law for imposing this procedure upon the Department. The relevant legal doctrine at issue here is that of due process, and as applied in our opinion, due process requires notice and an opportunity to be heard, both of which are afforded by the procedure outlined above. The inmate who is allegedly aggrieved by an ambiguous sentence can, if he chooses, seek judicial review through the grievance process and thus, "the interpretation of the unclear sentence" would be "made by a judicial officer."

Id. at 342 n.3, 759 S.E.2d at 401 n.3.

[11] Moreover, even if this issue had been properly preserved, which it has not, the ALC is the improper forum for this type of challenge. "[A]side from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence ....". *Williams v. State*, 378 S.C. 511, 515, 662 S.E.2d 615, 617 (Ct. App. 2008) (alteration in original) (quoting *Al-Shabazz*, 338 S.C. at 367, 527 S.E.2d at 749 (2000)).