STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph K. Anderson, III

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ALC Case No. 19-ALJ-04-0277-AP
Appellate Case No. 2019-002115

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GREGORY PENCILLE, # 312332,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

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# FINAL BRIEF OF RESPONDENT

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**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS**

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## STATEMENT OF ISSUES ON APPEAL

I. **DID THE ADMINISTRATIVE LAW COURT PROPERLY DISMISS APPELLANT'S APPEAL WHERE NO STATE-CREATED LIBERTY OR PROPERTY INTERST WAS IMPLICATED IN THE CLAIMS RAISED BY APPELLANT?**

II. **DID THE ADMINISTRATIVE LAW COURT PROPERLY ACT IN DISMISSING APPELLANT'S APPEAL WITH PREJUDICE AND DECLINING TO ALLOW ORAL ARGUMENTS?**

## STATEMENT OF THE CASE

This matter comes before the Court pursuant to the appeal of Gregory Pencille, an inmate incarcerated with the Department of Corrections. On February 7, 2019, Appellant filed a Step 1 grievance asserting that SCDC discriminated against the Wiccan religious community by denying its requests for religious oils for religious services. On February 22, 2019, the Warden denied the Step 1 grievance, explaining to Appellant that while religious oils can be kept by the Chaplain for the Wiccan community to use during worship services, these items must be approved by the Warden, who in this case disapproved the requested items for security reasons. Thereafter, on March 6, 2019, Appellant filed a Step 2 grievance. On April 19, 2019, Appellant's Step 2 grievance was denied by the Responsible Official who advised Appellant, *inter alia,* that while SCDC is committed to upholding and facilitating the constitutional rights afforded inmates to religious freedom, inmates will be given the opportunity to practice their religious faith to the extent that such practice does not interfere with the security and safety of the institution, staff, or others. Appellant filed a Notice of Appeal in the Administrative Law Court on May 21, 2019. The Department of Corrections filed a Motion to Dismiss on October 22, 2019. Thereafter, on November 27, 2019, the Honorable Ralph K. Anderson, III issued an order granting the Department's Motion to Dismiss, dismissing Appellant's appeal with prejudice. Appellant filed Notice of this appeal on December 19, 2017. Appellant subsequently filed a Motion to Stay, Motion for Issuance of Writ of Supersedeas, and Petition to Compel Response on December 31, 2019. The Honorable Ralph K. Anderson, III issued an order denying Appellant's Motion to Stay, Motion for Issuance of Writ of Supersedeas, and Petition to Compel Response on January 23, 2020.

## STANDARD OF REVIEW

S.C. Code Ann. § 1-23-610(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 abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5).

In an appeal of a final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-610(B). "Substantial evidence" is evidence which, considering the record as a whole, would allow a reasonable mind to reach the same conclusion that administrative agency reached. Hendley v. S.C. State Budget & Control Bd., 325 S.C. 413, 481 S.E.2d 159 (Ct. App. 1996). A reviewing court shall not substitute its own judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions that are controlled by errors of law or that are clearly erroneous in view of the substantial evidence on the record as a whole. *Id.*

## ARGUMENT

### I. THE ADMINISTRATIVE LAW COURT PROPERLY DISMISSED APPELLANT'S APPEAL WHERE APPELLANT'S CLAIMS DID NOT IMPLICATE A STATE-CREATED LIBERTY OR PROPERTY INTERST.

The ALC's jurisdiction to hear appeals from final agency decisions of the South Carolina Department of Corrections is derived entirely from the decision of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). When reviewing SCDC's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Id.* at 377, 527 S.E.2d at 754. Subsequently, the South Carolina Supreme Court clarified the ALC's appellate jurisdiction over inmate appeals in *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 586 S.E.2d 124 (2003). In affirming, as modified, the ALC's *en banc* decision of *McNeil v. S.C. Dep't of Corr.*, 02-ALJ-04-00336-AP (September 5, 2001), the supreme court held the ALC's jurisdiction was limited to (*1*) cases in which an inmate contends prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; (*2*) cases in which SCDC has taken an inmate's *state-created* liberty interest in major disciplinary hearings; and (*3*) cases in which an inmate's confinement implicates a *state-created* liberty interest. *See Sullivan*, 355 S.C. at 443, 586 S.E.2d at 127 (emphasis added).

Moreover, regarding categories (*2*) and (*3*), *supra*, the South Carolina Supreme Court has consistently emphasized that the liberty or property interest implicated must be one that is *state-created*. *See Wicker v. S.C. Dep't of Corr.*, 360 S.C. 421, 602 S.E.2d 56 (2004) (emphasizing that the ALC's jurisdiction extends only to those cases involving the denial of "state-created liberty interests" and that the Court's holding [*i.e.*, in *Wicker*] "is not to be viewed as expanding the jurisdiction of the [ALC] in any other circumstance."); *Slezak v.*

*S.C. Dep't of Corr.*, 361 S.C. 327, 605 S.E.2d 506 (2004) (holding that the ALC "may summarily dismiss those appeals that do not implicate an inmate's *state-created* liberty or property interest") (emphasis added). Further, this Court has interpreted *Slezak* to mean that where a state-created liberty interest is not implicated in a prisoner appeal, a judge of the ALC "should" dismiss the appeal. *Skipper v. S.C. Dep't of Corr.*, 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006).

This appeal concerns Respondent's denial of Appellant's request for religious oils for use during religious ceremonies. *See* R. p. 21. The denial of these implements was due to institutional security concerns. *See* R. p. 11. While Appellant does have a right to engage in ceremonies that conform to his religious beliefs, that right can be limited where doing so serves a legitimate penological interest. *Simms v. Edmonds*, 232 F.3d 889 (4th Cir. 2000). Pursuant to SCDC policy, religious activities may be limited by concerns for the safety of volunteers, staff, and inmates. This is a legitimate penological goal. In this case, the Warden determined that allowing inmates to use oils in religious ceremonies poses a threat to the penological goal of maintaining a safe environment for volunteers, staff, and inmates. As such, Appellant has no right to oils for use in religious ceremonies.

Even assuming, for the sake of argument, that Appellant did have a liberty interest in access to religious oils, that liberty interest is not one which is state-created. The United States Supreme Court, in *Kentucky Department of Corrections v. Thompson*, articulated the test by which a court can determine if a state has created a liberty interest. 490 U.S. 454 (1989). The Court stated that a state creates a liberty interest by (1) "establishing 'substantive predicates' to govern official decision-making" and (2) mandating a certain outcome "be reached upon a finding that the relevant criteria have been met." *Id.* at 462. (internal citation

omitted). In *Town of Castle Rock, Colorado v. Gonzales*, the Supreme Court further clarified the second prong of the *Thompson* test stating that a person is not entitled to, and thus has no property interest in, a benefit "if officials have discretion to grant or deny it." 545 U.S. 748, 748 (2005). Under the authority granted him by S.C. Code § 24-1-90, the Director of the Department of Corrections has promulgated policies regarding the facilitation of inmates' right to freedom of religion within SCDC institutions, namely SCDC Policy PS-10.05 "Inmate Religion." This policy acknowledges that the use of religious oils is common in carrying out certain religious ceremonies, but further provides that it does not mandate that oils be provided to inmates for these purposes. In fact, section 19 of SCDC Policy PS-10.05 specifically provides that oils will be allowed only if approved by the Warden. As was explained to Appellant, his request for religious oils was denied by the Warden due to security concerns. *See* R. p. 11. As such, neither part of the *Thompson* test is satisfied and Appellant has no state-created liberty interest in receiving religious oils for the use in religious ceremonies.

Appellant alleges that SCDC's denial of his use of religious oils infringes upon his ability to practice his religion. *See* R. pp. 26-27. Restricting inmates' use of certain items due to security concerns, as done here, does not impose an "atypical or significant hardship on the inmate in the relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 482 (1995). Wardens must take security concerns seriously and balance such concerns with inmate programs. Such action does not alter or exceed Appellant's sentence in such a manner "as to give rise to protection by the Due Process Clause of its own force." *Id.*

Even though Appellant's grievance was properly dismissed due to lack of

jurisdiction, Respondent will address the Appellant's claims that his constitutional rights have been burdened. Appellant's ability to practice any religion he chooses has not been abridged in any way by the Respondent's policy governing the practice of religion by inmates within SCDC institutions. SCDC Policy/Procedure PS-10.05 provides:

> Within the limitations imposed on the Agency as a result of its safety and security needs, the South Carolina Department of Corrections (SCDC) will be committed to upholding and facilitating the constitutional rights afforded inmates to religious freedom. Inmates will be given the opportunity to practice their religious faith to the extent that such practice does not interfere with the security and safety of the institution, staff, or others. The South Carolina Department of Corrections will provide necessary programs to facilitate the practice of any recognized religion based on inmate request, need, and available resources.

Appellant cites S.C. Code Ann. § 1-32-40, S.C. Code Ann. § 24-27-500, and alleges that the Respondent's unwillingness to allow him the use of religious oils infringes upon his ability to practice his religion at all in violation of his rights under the First and Fourteenth Amendments of the United States Constitution, 42 U.S.C.A. [sic], and SCDC Policy P.S.-10.05. *See* R. pp. 24-26.

Respondent is aware of the requirements of the law cited by the Appellant and has implemented policies and procedures that meet or exceed Federal and State law requirements. S.C. Code Ann. § 1-32-40 provides:

> The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is: (1) in furtherance of a compelling state interest; and (2) the least restrictive means of furthering that compelling state interest.

In the case at bar, Respondent (1) has a compelling interest in ensuring the security and safety necessary to be maintained in a correctional setting and (2) has attempted to achieve those goals through the *least restrictive means* available. In fact, the express stated purpose

of SCDC Policy/Procedure PS-10.05 is "[t]o provide guidelines in the development and monitoring of a religious program which will ensure that the constitutional guarantees of religious freedom for inmates are protected within the limitations of security and safety necessary to be maintained in a correctional setting." The Respondent has never denied the Appellant the ability to hold whatever religious beliefs he chooses or practice the Wiccan religion. Instead, as is the express policy of the Respondent, within the limitations imposed on the Agency as a result of its safety and security needs, the Respondent will uphold and facilitate the constitutional rights afforded inmates to religious freedom. SCDC's policies on religion apply to all inmate religions and are not biased towards inmates of any particular faith. Wardens and the correctional staff at the institutional level are in the best position to identify threats and areas of potential abuse with regard to institutional safety thus substantial deference is accorded to the professional judgment of prison administrators, in "defining the legitimate goals of a corrections system" and "determining the most appropriate means to accomplish them." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

Because no state-created liberty or property interest is implicated in this case, Administrative Law Judge Anderson's November 27, 2019 Order dismissing the appeal on this basis was proper and should be upheld.

## II. THE ADMINISTRATIVE LAW COURT PROPERLY DISMISSED APPELLANT'S APPEAL WITH PREJUDICE WHERE THERE WAS NO SUBJECT MATTER JURISDICTION AND PROPERLY ACTED WITHIN ITS DISCRETION IN DECLINING TO ALLOW ORAL ARGUMENTS.

There was no abuse of discretion in the ALC's dismissal of Appellant's appeal with prejudice because it had no subject matter jurisdiction over the matter. Appellant argues that the Administrative Law Court erred in dismissing his appeal with prejudice. *See* R. p. 43.

Appellant first contends that the ALC dismissed his appeal due to a failure to state a claim pursuant to Rule 12(b)(6)[1], SCRCP. *Id.* This is not the case; it was due to a lack of subject matter jurisdiction that the ALC correctly dismissed the Appellant's grievance. *See* R. pp. 39-41. As discussed herein, the ALC's jurisdiction to hear this matter was derived from the decisions of the South Carolina Supreme Court in *Al-Shabazz v. State* and *Sullivan v. SCDC*. Since none of those items enumerated in *Sullivan* were implicated by the Appellant's claim and the ALC was simply without jurisdiction to rule on any of the issues raised by the Appellant. With regard to the dismissal being with prejudice, Appellant argues that it was an abuse of discretion for the ALC to dismiss his case with prejudice without allowing him leave to amend. *See* R. p. 43. The Supreme Court of South Carolina has held that typically a plaintiff is given an opportunity to file and serve an amended complaint; however "if it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations" the complaint may be dismissed with prejudice. *Spence v. Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). The sole basis for Appellant's grievance and subsequent appeal, is the denial of oils for religious ceremonies, implements for which he enjoys no state-created interest. Thus, in this case Appellant could not possibly amend his grievance to implicate a state-created interest over which the ALC has jurisdiction.

The ALC properly acted within its discretion in not allowing oral arguments. Appellant also argues that the ALC erred in not allowing an oral argument. The Rules of

[1] Appellant also asserts that Respondent's Motion to Dismiss in the ALC fails to comply with Rules 7(b)(2) and 10(e) of the South Carolina Rules of Civil Procedure because it was "unsworn" and "unauthenticated by affidavit". *See* R. p. 43. To the extent that a response is required to this assertion, Respondent puts forth to the Court that there is no requirement under either SCRCP 7(b)(2) or 10(e) that motions be verified or accompanied by affidavit.

Procedure for the Administrative Law Court provide that whether or not to allow oral arguments is within the Administrative Law Judge's discretion. "Oral argument will ordinarily not be ordered by the Administrative Law Judge unless the proceeding involves a novel issue or a question of exceptional importance." SCALC Rule 64. Here, the ALC did not find that Appellant's case involved a "novel issue or question of exceptional importance" sufficient to move the court to "exercise its discretion and grant oral arguments." *See* R. p. 55. The ALC further found that since Appellant's allegations did not implicate a state-created liberty or property interest the ALC did not have jurisdiction to grant oral arguments. *Id.* Therefore, there the ALC did not err in not allowing oral arguments.

## CONCLUSION

For the foregoing reasons, the Court should affirm the Administrative Law Court's decision below.

Respectfully submitted,

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December 4, 2020

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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