

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Hardy Marvin Lanier, #381975,)
)
 Appellant,)
)
 vs.)
)
 South Carolina Department of Corrections,)
)
 Respondent.)
 _____)

Docket No. 20-ALJ-04-0283-AP

ORDER

RECEIVED

DEC 10 2020

SC Court of Appeals

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

FACTS/PROCEDURAL HISTORY

On December 19, 2019, Appellant pled guilty to Trafficking Methamphetamine 28 grams or more, but less than 100 grams, 1st offense and received a sentence of thirteen years' imprisonment. He also pled guilty to Trafficking Methamphetamine 10 grams or more and was sentenced to ten years' imprisonment, to run concurrently with his other sentence.

On April 6, 2020, Appellant filed a Step 1 Grievance alleging he was improperly classified as not eligible for parole. Appellant asserts that "[u]nder Section 44-53-375(F), the statute specifically provides that the offenses which are not parole eligible are 44-53-375(C)(3), (4) and (5). I however entered a plea to 44-53-375(C)(1) and (2). Thus, the specificity with which the 'no parole' language is omitted in this statute as to (1) and (2) and specifically makes (1) and (2) parole eligible."

The Warden denied Appellant's Step 1 Grievance, finding that "[a]ccording to documentation you are currently serving an 85% non-parole able sentence for trafficking meth offense, dated 8/16/2018. You are currently not eligible for parole." Appellant then filed a Step 2 Grievance, which was also denied. On June 16, 2020, Appellant filed a Notice of Appeal with the Court, in which he argued the "Department of Corrections incorrectly calculated the project release date of Appellant by classifying and treating the offense of Trafficking Methamphetamine more than 28 grams, but less than 100 grams (1st offense) as a 'no parole' offense under the provisions of S.C. Code Ann. §§ 24-13-100 and 150."

FILED

November 23, 2020

SC ADMIN. LAW COURT

On August 28, 2020, Appellant filed his brief. On October 27, 2020, the Department filed its brief. Appellant filed his reply brief on November 2, 2020.

ISSUE ON APPEAL

Did the Department err in calculating Appellant's projected release date by classifying him as ineligible for parole?

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) and *Furtick v. South Carolina Department of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003). In *Al-Shabazz*, the court held the ALC's jurisdiction in inmate appeals is limited to state-created liberty interests 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 382; 527 S.E.2d at 757.¹ Furthermore, when reviewing the Department's decisions in inmate grievance matters, the Court sits in an appellate capacity. *Id.* at 377, 527 S.E.2d at 754; *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2019) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 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;

¹ In *Sullivan v. South Carolina Department of Corrections*, the Supreme Court also found that other conditions of confinement could potentially implicate state-created liberty interests. 355 S.C. 437, 586 S.E.2d 124 (2003). However, those interests are "generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 442, 586 S.E.2d at 126 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)); *see also* *Slezak v. S.C. Dep't of Corr.*, 361 S.C. 327, 605 S.E.2d 506 (2004).

(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. 2019).

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, 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).

DISCUSSION

Appellant asserts Department of Corrections erred in calculating his projected release date because it improperly classified his offense of Trafficking Methamphetamine more than 28 grams, but less than 100 grams, 1st offense, as a “no parole” offense under section 24-13-100 and section 24-13-150 of the South Carolina Code. He also asserts this offense is a “parole eligible offense pursuant to the provisions of S.C. Code Ann. § 44-53-375(F)” because it “specifically provides that the offenses which are not parole eligible are § 44-53-375(C)(3), (4) and(5).”

In contrast, the Department asserts “Appellant was charged with and convicted of Trafficking Methamphetamine more than 28G or more 1st offense under S.C. Code Ann. § 44-53-375(C)(2)(a), a violent crime under S.C. Code Ann. § 16-1-60 and a Class B Felony and thus is not eligible for parole as a matter of law.”

First, section 44-53-375 of the South Carolina Code of Laws (2018) provides:

(C) A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as "trafficking in methamphetamine or cocaine base" and, upon conviction, must be punished as follows if the quantity involved is:

(1) ten grams or more, but less than twenty-eight grams:

(a) for a first offense, a term of imprisonment of not less than three years nor more than ten years, **no part of which may be suspended nor probation granted**, and a fine of twenty-five thousand dollars;

* * *

(2) twenty-eight grams or more, but less than one hundred grams:

(a) for a first offense, a term of imprisonment of not less than seven years nor more than twenty-five years, **no part of which may be suspended nor probation granted**, and a fine of fifty thousand dollars;

* * *

(3) one hundred grams or more, but less than two hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars;

(4) two hundred grams or more, but less than four hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of one hundred thousand dollars;

(5) four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars.

* * *

(F) Sentences for violation of the provisions of subsections (C) or (E) may not be suspended and probation may not be granted. **A person convicted and sentenced under subsection (C) or (E) to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole**, extended work release as provided in Section 24-13-610, or supervised furlough as provided in Section 24-13-710.

(emphasis added). Subsections 44-53-375(C)(1) and (2), under which Appellant was sentenced, clearly state that neither suspension nor probation may not be granted for first offense sentences

under these subsections, but they do not address parole eligibility. Similarly, subsection 44-53-375(C)(3), (4) and (5) do not address parole eligibility; however, 44-53-375(F) provides that offenses under these particular subsections are not parole eligible based upon their mandatory sentences of 25+ years. Based upon the distinction between subsections 44-53-375(C)(1)-(2) and subsections 44-53-375(C)(3)-(5) created by subsection 44-53-375(F), Appellant argues his offenses under subsections 44-53-375(C)(1)-(2) are parole eligible.

However, Appellant fails to account for how felony classification affects his parole eligibility. In terms of felony classification, trafficking in ice, crank, or crack cocaine in an amount of 28 grams or more, but less than 100 grams, first offense, is a Class B felony under section 16-1-90(B) of the South Carolina Code (2015 & Supp. 2019). In contrast, Trafficking in ice in an amount of 10 grams or more is a Class E felony under section 16-1-90(E) of the South Carolina Code (2015 & Supp. 2019). Therefore, Appellant committed both a Class B and a Class E felony. Pursuant to section 24-13-100, “a class A, B, or C felony” is a “no parole offense.” S.C. Code Ann. § 24-13-100 (2007). Regarding no parole offenses, section 24-13-150(A) provides:

(A) Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, an inmate convicted of a “no parole offense” as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections . . . is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. . . . Nothing in this section may be construed to allow an inmate convicted of murder or an inmate prohibited from participating in work release, early release, discharge, or community supervision by another provision of law to be eligible for work release, early release, discharge, or community supervision.

S.C. Code Ann. § 24-13-150(A) (2007 & Supp. 2019) (emphasis added). Because Appellant’s offense is a Class B felony, it is a “no parole offense” that generally requires 85% of the sentence be served (the 85% rule).

Even so, the Court must also consider the South Carolina Supreme Court’s decision in *Bolin v. South Carolina Department of Corrections*, 415 S.C. 276, 781 S.E. 2d 914 (Ct. App. 2016). In *Bolin*, the Supreme Court held the amended version of section 44-53-375(B) (pursuant to the Omnibus Crime Reduction and Sentencing Reform Act of 2010) repealed section 24-13-100 to the extent section 24-13-100’s classification of non-parole offenses conflicted with the amended section’s granting of parole eligibility. More specifically, the amended version of 44-53-375(B) made certain offenses parole-eligible that were previously classified as non-parole offenses under

section 24-13-100. *Id.* Reviewing the legislative history of section 44-53-375 for the purposes of this case, it is clear that neither subsections 44-53-375(C) nor (F) have been amended to include the repealing language at issue in *Bolin* such that Appellant's sentences under subsections 44-53-375(C)(1) and (2) have become parole-eligible.² *Cf.* Omnibus Crime Reduction and Sentencing Reform Act of 2010, 2010 S.C. Act 273, § 38 (amending subsection 44-53-375(B) to add: "**Notwithstanding any other provision of law**, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and **is eligible for parole**, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." (emphases added)).

Because the application of *Bolin* to this case does not change the parole eligibility of Appellant's sentences under subsections 44-53-375(C)(1)-(2) or (F), all that remains is reconciling subsections 44-53-375(C)(1)-(2) and (F) with the 85% rule under section 24-13-150(A). Ironically, *Bolin* returns to guide us here. *Bolin* instructs that when two statutes conflict, if the more recent statute uses the phrase "notwithstanding any other provision of the law," the legislature is evincing an intent to repeal the older statute and for the more recent statute to control. *Bolin*, 415 S.C. at 282, 781 S.E.2d at 917. Here, the applicable language in section 44-53-375 has remained the same since 1995 and sections 24-13-150(A) became effective in 1996. *See* S.C. Code Ann. §§ 44-53-375(C)-(D) (Supp. 1995) (effective January 12, 1995); S.C. Code Ann. § 24-13-150 (Supp. 1995) (effective Jan. 1, 1996). Because section 24-13-150(A) uses the phrase "notwithstanding any other provision of the law" and it is the more recent statute, its language controls over subsections 44-53-375(C) and (F).³ Therefore, because section 24-13-150(A)

² In 1995, the section 44-33-375 was amended to add subsection (D) which later became subsection (F) that is before the Court today. 1995 S.C. Act No. 7 (effective Jan. 12, 1995). In 1995, subsection (D) read:

(D) Except for a first offense, as provided in subsection (A) of this section, sentences for violation of this section may not be suspended and probation may not be granted. **A person convicted and sentenced under subsection (C) or (E) to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole**, extended work release as provided in Section 24-13-610, or supervised furlough as provided in Section 24-13-710.

S.C. Code Ann. § 44-53-375(D) (Supp. 1995) (emphasis added)/ In 2005, subsection (D) was re-codified as subsection 44-53-375(F). 2005 S.C. Act No. 127, § 5 (effective June 7, 2005). Section 44-53-375(F) was then amended in 2010, which is the current version now at issue before the Court. 2010 S.C. Act No. 273 (effective June 2, 2010). None of the amendments to section 44-53-375(F) alter the outcome of this case pursuant to the holding in *Bolin*.

³ Applying the last legislative expression rule would also lead to the conclusion that section 24-13-150(A) controls. *See Williams v. Town of Hilton Head Island*, S.C., 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993) ("[T]he Last

controls, the Department correctly classified Appellant's conviction as a "no parole" offense. I therefore find the Department did not err in calculating Appellant's projected release date as Appellant is ineligible for parole and must be classified as an 85% offender.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **AFFIRMED**.
AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

November 23, 2020
Columbia, South Carolina

Legislative Expression Rule requires that in instances where it is not possible to harmonize two sections of a statute, the later legislation supersedes the earlier enactment."); *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 572, 666 S.E.2d 892, 896 (2008) ("Under the 'last legislative expression' rule, where conflicting provisions exists, the last in point of time or order of arrangement, prevails." (citing *Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991)). The Court recognizes that the last legislative expression rule has been interpreted as "an arbitrary rule of construction and is to be resorted to only when there is clearly an irreconcilable conflict, and all other means of interpretation have been exhausted." *Feldman v. S.C. Tax Comm'n*, 203 S.C. 49, 54, 26 S.E.2d 22, 24 (1943). However, in this instance it further substantiates the Court's reasoning.

CERTIFICATE OF SERVICE

I, Stephanie Perez, 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, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Stephanie Perez
Judicial Law Clerk

November 23, 2020
Columbia, South Carolina