

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Administrative Law Judge John D. McLeod

Case No. 12-ALJ-04-0849-AP

Billy Lisenby, # 200273,.....Appellant,

v.

South Carolina Department of Corrections.....Respondent.

INITIAL BRIEF OF RESPONDENT

April 10, 2013

South Carolina Department of Corrections

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STATEMENT OF THE ISSUES ON APPEAL

**DID THE ADMINISTRATIVE LAW COURT PROPERLY DISMISS THE
APPEAL PURSUANT TO S.C. CODE ANN. § 1-23-600(D)?**

STATEMENT OF CASE

This matter comes before this Honorable Court pursuant to the appeal Billy Lisenby (“appellant”), an inmate incarcerated with the South Carolina Department of Corrections (“SCDC”). Appellant was convicted of the inmate disciplinary infraction of possession or attempt to possess a cell phone, offense 898 under SCDC Policy OP-22.14, Inmate Disciplinary System, following a disciplinary hearing. (R.p. ____). Appellant did not lose any accrued good time credit due to the disciplinary conviction. (R.p. ____).

Appellant filed a Step One Grievance on June 29, 2012, challenging his disciplinary conviction. This grievance was investigated and denied. (R.p. ____). Appellant filed a Step Two Grievance on July 30, 2012, which was also denied. (R.p. ____). Subsequently, it came to light that the response to the Step Two Grievance incorrectly stated that appellant lost good time credit as a result of the disciplinary conviction. As a result, the Department issue a new response clarifying that no accrued good time credit was lost as a result of the disciplinary conviction. (R.p. ____).

Appellant filed a notice of appeal in the Administrative Law Court (ALC), pursuant to Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). (R.p. ____). By way of an order dated January 4, 2013, Administrative Law Judge John D. McLeod ruled the appeal should be dismissed pursuant to S.C. Code Ann. § 1-23-600(D) because appellant did not lose any accrued good time credit as a result of his disciplinary conviction. (R.p. ____).

Appellant now seeks review of the ALC’s decision. For the reasons that follow, SCDC respectfully requests that the ALC’s decision be affirmed.

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 court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals 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.

See also S.C. Code Ann. § 1-23-380(A)(5); Al-Shabazz v. State, 338 S.C. 354, 380, 527 S.E.2d 742, 756 (2000).

In an appeal of the final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence.

See S.C. Code Ann. § 1-23-610(B). A reviewing Court shall not substitute its judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions which are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole. Id. In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, considering the record as a whole,

evidence from which reasonable minds could reach the same conclusion that the ALC reached. Durant v. S.C. Dep't of Health & Environmental Control, 361 S.C. 416, 420, 604 S.E.2d 704, 706 (Ct. App. 2004). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. Id. at 420.

ARGUMENT AND CITATION OF AUTHORITY

THE ADMINISTRATIVE LAW COURT PROPERLY DISMISSED THE APPEAL PURSUANT TO S.C. CODE ANN. § 1-23-600(D).

The ALC appropriately dismissed the appeal because appellant did not lose any accrued good time credit. Instead, he lost only the opportunity to earn good time credit.

Pursuant to S.C. Code Ann. § 1-23-600(D), the ALC shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the loss of the opportunity to earn sentence-related credits. By its plain meaning, section 1-23-600(D) precludes the ALC from hearing all inmate appeals involving the loss of the opportunity to earn sentence-related credits. See Howard v. SCDC, Op. No. 27170 (S.C. Sup. Ct. filed September 12, 2012). Moreover, an inmate's loss of the opportunity to earn sentence-related credits does not implicate a state-created liberty interest. Id. Consequently, the ALC may summarily dismiss an inmate appeal that involves only the loss of the opportunity to earn sentence-related credits. Id.

In his appeal to the ALC appellant attempted to challenge his disciplinary conviction for possession or attempt to possess a cell phone. (R.p. __). The ALC dismissed the appeal pursuant to S.C. Code Ann. § 1-23-600(D), finding it involved only

the loss of the opportunity to earn good-time credit. (R.p. __).

In his brief, appellant claims his appeal should be treated as a challenge to the calculation of his sentence. However, a review of appellant's Step One grievance reflects that appellant's complaint was, in fact, a challenge to his disciplinary conviction. (R.p. __). Appellant should not be permitted to evade dismissal pursuant to S.C. Code Ann. § 1-23-600(D) by belatedly adding a cursory reference to the calculation of his sentence to his appeal. (R.p. __). See Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (declining to address an issue raised for the first time on appeal; State v. Addison, 338 S.C. 277, 285, 525 S.E.2d. 901, 906 (Ct. App. 1999) (explaining a conclusory argument is deemed abandoned).

The ALC appropriately dismissed the appeal pursuant to S.C. Code Ann. § 1-23-600(D). Appellant's disciplinary conviction involved only the loss of the opportunity to earn good time credits. Therefore, it did not implicate a state-created liberty interest. See Howard, supra. Consequently, summary dismissal was appropriate. See also Skipper v. SCDC, 370 S.C. 267, 279, 633 S.E.2d 910, 917 (Ct. App. 2006) (holding the ALC "should have dismissed" an appeal because it did not implicate a state-created liberty interest). As a result, the ALC's decision should be upheld.

CONCLUSION

WHEREFORE, for all the reasons stated above, SCDC respectfully requests the Court affirm the decision of the ALC.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
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CERTIFICATE OF SERVICE

I hereby certify that I have served Appellant a copy of Respondent's Initial Brief by depositing a copy of same in the United States Mail, postage prepaid, on April 10, 2013, addressed to the Appellant as follows:

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