**STATE OF SOUTH CAROLINA**
**ADMINISTRATIVE LAW JUDGE DIVISION**

| | | |
|---|---|---|
| James E. McNeil, #147700,<br><br>Appellant,<br><br>vs.<br><br>South Carolina Department of Corrections,<br><br>Respondent. | ) | Docket No. 00-ALJ-04-00336-AP<br><br>**EN BANC ORDER** |

**ANDERSON, J.** : This matter is before the Administrative Law Judge Division (Division) pursuant to the appeal of James McNeil, an inmate incarcerated in the South Carolina Department of Corrections (Department). The Inmate seeks appellate review of the Department's actions against him arguing that the Department's treatment of him was cruel and unusual in violation of the Eighth Amendment. This Division has decided to hear this case en banc pursuant to ALJD Rule 70 to determine whether the Division has subject matter jurisdiction over an inmate's allegation of an Eighth Amendment violation(s) by the Department. [1]

## STATEMENT OF FACTS

On March 9, 2000, Department employee Morgan observed Inmate McNeil, who was housed in the Special Management Unit ("SMU") of Lieber Correctional Institution ("Lieber"), kicking his cell door. On several occasions, Officer Morgan ordered Inmate McNeil to stop kicking the door. Inmate McNeil continued to kick the door and use vulgar and obscene language. Officer Morgan then opened the food service flap and administered two bursts of chemical munitions spray ("spray"). Prior to its use, the spray canister weighed 128.4 grams. After Officer Morgan used it to control Inmate McNeil, the canister weighed 121.3 grams.

Inmate McNeil then threw a can of deodorant at Officer Morgan, striking him in the throat. Officer Morgan secured the food service flap and called for backup. Officer Morgan was then taken to Trident Hospital for treatment. Two other Department employees, Sergeant Buncomb and Officer

[1] "Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court." Lake v. Reeder Const. Co., 330 S.C. 242, 498 S.E.2d 650 (199[illegible]

Thurman, removed Inmate McNeil from his cell, at which time a Department physician, Dr. Bobbie Ayers, examined him. Because Inmate McNeil continued to be disruptive, the warden gave the order to place Inmate McNeil in the restraint chair. Nurse Tonya Coleman responded to Inmate McNeil's complaints of chest pain while he was restrained in the chair. Nurse Coleman noted no significant findings. Once Inmate McNeil calmed down, he was released from the restraint chair and allowed to take a shower.

## ANALYSIS OF THE DIVISION'S JURISDICTION PURSUANT TO AL-SHABAZZ V. STATE

In Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), the Supreme Court created a new avenue by which inmates could seek review of final decisions of the Department of Corrections in "non-collateral" matters (*i.e.*, matters in which an inmate does not challenge the validity of a conviction or sentence) by appealing those decisions to the Division and ultimately to the circuit court pursuant to the Administrative Procedures Act ("APA"). Section 1-23-310(3) of the APA sets forth that " '[c]ontested case' means a proceeding . . . in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.' " S.C. Code Ann. § 1-23-310 (Supp. 2000)(emphasis added). The S.C. Supreme Court held that an administrative hearing is "required by law" under two circumstances: (1) "when an inmate faces the potential loss of sentence-related credits," and (2) when the "Department properly has chosen to give an inmate a hearing in other matters in which the inmate does not have a constitutionally protected liberty interest." Al-Shabazz at 753. The Court further held that "[t]hese administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status." Al-Shabazz at 749.[2]

An examination of Wolff v. McDonnell, 418 U.S. 539 (1974) elucidates this Division's jurisdiction under Al-Shabazz for sentence-related credits. In Wolff v. McDonnell, an inmate

[2] Additionally, in determining which APA provisions to apply to inmate appeals, the Court addressed only two Departmental proceedings: (1) "the internal prison disciplinary process," and (2) "the internal decision-making process used when an inmate alleges Department has miscalculated his sentence, sentence-related credits, or custody status." Al-Shabazz at 753.

challenged Nebraska's forfeiture of his good-time credit without granting him a due process hearing concerning that forfeiture. The U.S. Supreme Court held that though the Due Process Clause itself does not create a liberty interest in credit for good behavior, Nebraska's statutory provision granting a "shortened prison sentence" as a result of the acquisition of good-time credits creates a liberty interest. Once a State grants an inmate a liberty interest, the Court held that due process protections are necessary "to insure that the state-created right is not arbitrarily abrogated." Wolff at 557.

The Court then addressed the procedure necessary for the forfeiture of that earned credit. The Court recognized that inmates lose "many rights and privileges of the ordinary citizen" upon entering prison and the difficulty of judicial involvement in prison matters. Therefore, the Court declined to grant the entire panoply of procedures guaranteed in traditional due process cases to prisoners challenging the loss of constitutionally protected interests. Rather, the Court held that when an inmate earns good-time credit, taking that liberty interest necessitates merely "minimal due process" to protect his due process rights. Consequently, the U.S. Supreme Court established specific administrative procedures to be followed before depriving an inmate of statutorily granted earned credit. [3]

That administrative process should also be followed when the Department makes a "quasi-judicial decision" to forfeit an inmate's earned credit in the South Carolina prison system. [4] Likewise, this Division's appellate jurisdiction over Wolff-type proceedings is derived solely from the mandatory administrative proceedings in which the Department reviews the punitive deprivation of a created liberty interest. Furthermore, the taking of a created liberty interest by the Department occurs pursuant to "major disciplinary hearings" involving "more serious rule violations."

---

[3] "Minimal due process" includes the following administrative procedures: adequate advance notice of charges; adequate opportunity for a hearing in which the inmate may present witnesses and documentary evidence; availability of counsel substitute to impaired inmates or in complex cases; an impartial hearing officer who prepares a written statement of all the evidence presented and the reasons for his or her decision; and the opportunity to appeal the decision to another impartial body with the authority to overrule or reverse the hearing officer. See Wolff.

[4] There is no specific statutory authorization for this Division to hear inmate appeals. Nevertheless, the South Carolina Supreme Court has interpreted S.C. Const., Art. 1, Section 22 as "specifically guaranteeing persons the right to notice and an opportunity to be heard by an administrative agency, even when a contested case under the APA is not involved." Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997). The derivation of the right to a proceeding under Art. 1, Section 22 is a "judicial or quasi-judicial decision" of an administrative agency.

Constitutional "due process" rights are not impacted by minor disciplinary proceedings.[5] Therefore, in order for an inmate to raise a cognizable claim for appellate review by the Division, the discipline must involve punishment which results in the deprivation of a created constitutionally protected liberty interest (e.g., loss of good time credits or placement in solitary confinement).

Additionally in Al-Shabazz, the S.C. Supreme Court held that the Division shall review whether an inmate's "sentence, sentence-related credits, or custody status" has been erroneously calculated by the Department. Al-Shabazz at 750. The same procedures are not essential to satisfy due process requirements in these appeals to the Division.[6] Indeed, the South Carolina Supreme Court determined that:

> [i]nitiating a grievance is the method an inmate uses to challenge [the Department's miscalculation of sentence, sentence-related credits, or custody status] within the prison system. The grievance procedure Department has established is sufficient to give an inmate a method to raise the matter to prison officials and create a reviewable record.

Al-Shabazz at 375. Accordingly, no Wolff-type hearing is required in such cases. Rather, the Division can determine whether the Department afforded an inmate due process in its calculation of sentence, sentence-related credits, or custody status by reviewing the Department's records from below and applicable Departmental policy.

## CONCLUSION

The Administrative Law Judge Division's appellate jurisdiction in inmate appeals is limited to either:

1. Cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; [7] or

---

[5] "An inmate has no protected liberty interest in a "minor" disciplinary proceeding in which he does not face the potential loss of sentence-related credits, but only lesser penalties such as extra duty, loss of television privileges, or cell restriction. See Wolff at 418." Al-Shabazz at 751 n.8.

[6] "Due process is flexible and calls for such procedural protections as the particular situation demands." Stono River Envtl. Protection Ass'n v. S.C. Dept. of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 30, 34 (1991)[quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[7] "The federal constitution vests no liberty interest in inmates retaining or receiving any particular security or custody status as long as the challenged conditions or degree of confinement are within the sentence imposed and are not otherwise violative of the Constitution." Brown v. Evatt, 322 S.C. 189, 194, 470 S.E.2d 848, 851 (1996).

2. Cases in which the Department has taken an inmate's created liberty interest as punishment in a major disciplinary hearing.

This Division does not hear appeals concerning all "constitutionally protected interests." If an inmate believes that conditions in the South Carolina correction system – that are not listed above as jurisdiction of the Division – erroneously violate their constitutional rights, those inmates have an existing opportunity to have other courts decide those issues. Therefore, because our review is limited solely to the determination of whether the Department granted "minimal due process" in reaching decisions within the parameters set forth above, those appeals must be made to another forum. Furthermore, the decision by the corrections officer to administer chemical munitions spray and to place Inmate McNeil in a restraint chair, was not a "quasi-judicial decision." See supra note 4. Moreover, the Supreme Court has emphasized a "hands off" doctrine concerning the review of matters involving "prison disciplinary procedures and other internal prison matters." Al-Shabazz at 757. Review by this Division concerning administering chemical spray and the short-term placement of an inmate in a restraint chair, involves undue oversight into "prison disciplinary procedures and other internal prison matters." Id.

**AND IT IS SO ORDERED**

**KITTRELL, C.J., MATTHEWS and SCOTT, JJ., concur.**

September 5, 2001
Columbia, South Carolina

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, postage paid, in the United States mail addressed to the party(ies) or their attorney(s).

This 5th day of September 2001

BY: Kelly H Crawford
Judicial Law Clerk

---

Therefore, the South Carolina Supreme Court limited review of the Department's transfer of an inmate within the prison system or the downgrading of an inmate's custody status to whether the prison officials " acted arbitrarily, capriciously or from personal bias or prejudice." Crowe v. Leeke, 273 S.C. 763, 763, 259 S.E.2d 614, 615 (1979). Furthermore, the U.S. Supreme Court held that a protected liberty interest or status is established only when a case presents "a dramatic departure from the basic conditions" of inmate's sentence. Sandin v. Conner, 515 U.S. 472, 485, 115 S.Ct. 2293, 2301 (1995). Thus, the relevant question in reviewing custody cases is whether the Department acted arbitrarily, capriciously or from personal bias or prejudice in imposing a custody status that is atypical and a significant hardship on the inmate in relation to the ordinary incidents of prison life.