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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The Administrative Law Court
Honorable Ralph K. Anderson III, Chief Administrative Law Judge

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Appellate Case No. 2022-000965

JOSEPH KELSEY, # 217218 .....APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICES .....RESPONDENT.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE ISSUES IN JOE'S INITIAL BRIEF ARE PROPERLY PRESERVED FOR REVIEW AND RIPE FOR CONSIDERATION BY THIS COURT.

Respondent first maintains that Joe's appeal should be dismissed solely on the grounds that Joe did not file an initial brief in the ALC. Because this is the exact argument this Court already considered and rejected by denying Respondent's Motion to Dismiss, only a few points warrant a response. First, summary dismissal is not appropriate because all of the issues that Joe raises in this appeal were raised in the Administrative Law Court (ALC) sitting in its appellate capacity. Nothing more was necessary. *See Pye v. Estate of Fox*, 369 S.C. 55, 564–65, 633 S.E.2d 505, 510 (2006); *Floyd v. Floyd*, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (2005).[1]

Second, Respondent ignores the fact that Joe did request permission to file a brief outside of time. App. Mot. to Supp. ROA, *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 22-ALJ-15-0004-AP at 4 (Admin L. Ct. May 12, 2022). The ALC denied Joe's request to file a delayed brief in its June 3 Order. Order, *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 22-ALJ-15-0004-AP at 6 (Admin. L. Ct. June 3, 2022). Since Joe was prohibited by S.C. Admin. L. Ct. Rule 65 from asking Judge Anderson to reconsider his decision, filing or requesting to file a delayed brief after Joe was already told that he could not would have been frivolous. *See* S.C. Admin. L. Ct. Rule 72 ("If the presiding administrative law judge determines that a contested

[1] Joe raised all of the issues presented in his Initial Brief to the ALC in his Notice of Appeal, his Motion to Supplement the Record, and his Motion to Compel. *See* Notice of Appeal, *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 22-ALJ-15-0004-AP (Admin. L. Ct. Feb. 15, 2022); App. Mot. to Supp. ROA, *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 22-ALJ-15-0004-AP (Admin L. Ct. May 12, 2022); App. Mot. to Compel Resp't to Complete ROA, *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 22-ALJ-15-0004-AP (Admin L. Ct. May 28, 2022).

case, appeal, motion, or defense is frivolous . . . , the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.").

If embraced, Respondent's position would require courts to treat appeals that are dismissed before the appellant has a chance to file an initial brief as if they never existed at all. The ALC decided that it did not have jurisdiction over Joe's case before Joe had a chance to file an initial brief, but that decision does not require (or permit) this Court to ignore the issues that Joe squarely raised.

II. THE ALC IS BOUND BY THE SAME COURT'S PRIOR JURISDICTIONAL DETERMINATION.

Respondent argues that the ALC's jurisdictional determination in *Kelsey I* carries no weight with respect to *Kelsey II*. This is incorrect. Because the ALC sits as an appellate court when reviewing parole cases, *see Al-Shabazz v. State*, 338 S.C. 354, 376, 527 S.E.2d 742, 754 (1999), a ruling becomes the law of the case in that court and a subsequent ALC judge in a related case may not revisit it, unless or until that decision is reversed. *See Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969) ("It is well settled in this jurisdiction that a decision of [a] court on a former appeal is the law of the case."). In 2020, the ALC held that it had jurisdiction over Joe's case, and that decision has not been reversed; in 2021, the ALC had no authority to reach a different conclusion.

Respondent does not directly respond to this argument. Instead, it misinterprets Joe's argument to be that the ALC's 2020 jurisdictional decision is binding on *this* Court. Of course, that is not the case—this Court, as the higher court, is free to review the ruling in *Kelsey I*. The decision is, however, binding on the ALC as the court that made the initial jurisdictional

determination.[2] Alternatively, Respondent insists that the ALC's 2021 decision became the law of the case when Joe appealed it instead of moving the ALC to reconsider. But as Joe has previously noted, motions for reconsideration are prohibited in the ALC and Joe therefore had no procedural mechanism by which he could have asked the ALC to reconsider its decision. S.C. Admin. L. Ct. Rule 65 ("The decision of an Administrative Law Judge is a final decision and motions for reconsideration will not be considered."); 2015 Revised Notes, S.C. Admin. L. Ct. Rule 63 ("[M]otions for reconsideration [of an ALC decision on a motion] are not permitted and will not be considered by the administrative law judge.").[3] At bottom, Respondent's argument is simple but flawed: A decision in Respondent's favor is the law of the case but a decision in Joe's favor is not. For the reasons described above and in Joe's opening brief, the Court should reject this argument.

[2] Unsurprisingly, Respondent makes the same argument with respect to the 2021 ALC opinion in Respondent's favor. Respondent argues *that* opinion is now the law of the case because Joe appealed to this Court instead of asking the ALC to reconsider its decision. Br. Resp't at 7. Quite simply, this is not how the law of the case doctrine works. Because Judge Funderburk's 2020 decision was first in time, it controls the law of Joe's case in the ALC unless or until it is reversed.

[3] The two cases Respondent cites on this point deal with appeals from circuit courts (whose rules permit objections and motions to reconsider), where the appealing party either failed to preserve the issue or failed to include the relevant issue in an appeal. *See ML-Lee Acquisition Fund, L.P., v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (overturning a ruling by the Court of Appeals that relied on a prior unappealed ruling by the circuit court); *State v. Brewton*, 437 S.C. 44, 60, 876 S.E.2d 141, 150 (Ct. App. 2022) (determining that a circuit court ruling became the law of the case where appellant failed to include the issue in his brief on appeal). Those cases are inapposite because, as is explained above, Joe had no mechanism by which to challenge the decision below other than appealing to this Court, and Joe explicitly raised the jurisdictional issue both to the ALC in its appellate capacity and in his brief on appeal to this Court.

III. BOTH THE ALC AND THIS COURT HAVE THE AUTHORITY TO REVIEW THE PAROLE BOARD'S DECISION IN JOE'S CASE.

A. Joe Has Been Permanently Denied Parole.

Joe offered extensive argument in his opening brief establishing that he has been permanently denied parole, but several points are worth emphasizing here. First, by denying Joe parole on the sole basis of factors involving the nature and circumstances of his offense, "the Parole Board apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by any rehabilitation efforts on the part of [Joe]." *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 502, 661 S.E.2d 106, 113 (2008). Basing the parole decision solely on the original crime—on facts that can never change—"effectively denies [Joe]'s eligibility for parole." ROA, *Kelsey I* at 168.

Second, by paroling Payne and denying parole to Joe, the Board arbitrarily rejected the South Carolina Supreme Court's explicit finding that Payne was by far the more culpable party. *State v. Kelsey*, 331 S.C. 50, 60, 502 S.E.2d 63, 68 (1998); *Payne v. State*, 355 S.C. 642, 646, 586 S.E.2d 857, 859 (2003). The Board is not free to ignore judicial decisions from the Supreme Court or this Court, and the Board's actions reflect their failure to actually consider and apply the requisite criteria to Joe's case. Third, and relatedly, while Joe acknowledges that he does not have a constitutional right to a parole decision in his favor—and has never argued that he does—he does have a right to a "realistic opportunity to participate in the South Carolina Parole program." *Cooper*, 377 S.C. at 493, 661 S.E.2d at 108. He also has a right to "the opportunity to be heard by a fair and impartial Board or panel." S.C. Dep't of Probation, Parole & Pardon Servs. Policy & Procedure Manual at 20 (Nov. 2019) (hereinafter "Parole Board Manual"). It is clear from Joe's last two hearings that the Board is not giving Joe a "realistic opportunity" to receive parole—it is impossible for him to do any more than he has already done to show the Board that he deserves,

at the very least, a hearing before an impartial decision-maker willing to apply the criteria in a non-arbitrary manner.

Finally, Respondent disregards the fact that the ALC *already decided that Joe was permanently denied parole*. In doing so, the ALC rejected Respondent's argument that the mere fact that Joe will have another parole hearing negates a finding of permanent denial and instead determined that the Board, through their actions since 2019, has in effect permanently denied him parole. ROA, *Kelsey I* at 169. The fact that the Board denied Joe parole again in 2021 only further highlights this point.

B. The ALC and This Court Have Jurisdiction to Review Parole Decisions and Procedures that Violate Inmates' Rights.

Respondent maintains that the ALC (and therefore this Court) only have jurisdiction to review parole decisions that explicitly state that the Board has permanently denied an inmate parole eligibility or where "the Board's procedure has a negative impact on the inmate's right to parole eligibility." Br. Resp't at 11. Any other decision from the Board, Respondent argues, falls under the Board's "decision-making capacity" and is therefore wholly insulated from any judicial review. Br. Resp't at 10–11. Respondent is wrong for two primary reasons.

First, like all other executive branch agencies, Respondent and the Board are subject to judicial review and the requirements of the law. Consistent with that simple principle, the Supreme Court has repeatedly emphasized that "the Legislature created [the] Board to operate within certain parameters," and the Board therefore may not "render decisions without any means of accountability." *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111; *see also Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 685 S.E.2d 175 (2009). If Respondent is correct that the Board's actions in this case fall under the Board's "decision-making capacity," Br. Resp't

at 12, then no inmate can ever appeal any decision of the Board at all no matter how arbitrary and capricious it is—which, at bottom, is Respondent's position.

Second, "a sufficient liberty interest may be implicated to trigger due process requirements even though the Parole Board's decision did not constitute a permanent denial of parole eligibility." *Cooper*, 377 S.C. at 498, 661 S.E.2d at 111; *Steele v. Benjamin*, 362 S.C. 66, 72–73, 606 S.E.2d 499, 503 (Ct. App. 2004). Thus, a parole denial can be arbitrary and capricious even if Respondent and the Board affirmatively assert that the Board considered its own written criteria. *See* ROA, *Kelsey I* at 169. *Compton,* despite Respondent's argument to the contrary, did not give the Board free license ignore the relevant criteria in practice or to act in an arbitrary and capricious manner so long as a denial letter parrots one statutory factor. Allowing the Board to repeatedly deny parole to exemplary candidates on the basis of their offense alone—without a demonstration that its decisions are the product of logical and unbiased reasoning—does just that, and that is not what the Legislature or the Supreme Court intended.

IV. RESPONDENT'S ARGUMENTS AGAINST JOE'S RETALIATION CLAIM ARE WITHOUT MERIT.

Respondent insists that the Board cannot possibly have retaliated against Joe for appealing its previous decision because PPP shields the Board from knowledge of any appeals. Br. Resp't at 15. Even putting aside the fact that all pleadings in this case have been publicly filed on the Court's website and are accessible to any member of the public, including Board members, such a policy does not appear in any statute or official SCDPPPS or Parole Board documentation that is available to Appellant or the public, and Respondent cites no such source in support of its claim.[4]

[4] The statute that Respondent cites makes no reference to litigation by PPP on behalf of the Parole Board. The statute, entitled "Powers and duties of director," provides in full:

> The director is vested with the exclusive management and control of the department and is responsible for the management of the department and for the proper care,

McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (same); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (same).

Further, even assuming that Respondent is correct in its assertion that none of the Board members knew about Joe's prior appeal, PPP did, and PPP provides an administrative recommendation to the Board concerning each case. S.C. Code Ann. § 24-21-35; Parole Board Manual at 22, 27 ("The Department, though its parole examiners, then interviews these offenders, investigates their cases, and submits a recommendation for or against parole."). Thus, it is entirely possible that PPP provided a negative recommendation to the Board in retaliation for Joe's appeal that infected the Board's decision-making, which is still an unconstitutional retaliatory abuse of power. Because PPP hides the parole file from the applicant, including the statement of the case[5]

> assessment, treatment, supervision, and management of offenders under its control. The director shall manage and control the department and it is the duty of the director to carry out the policies of the department. The director is responsible for scheduling board meetings, assuring that the proper cases and investigations are prepared for the board, maintaining the board's official records, and performing other administrative duties relating to the board's activities. The director must employ within his office such personnel as may be necessary to carry out his duties and responsibilities including the functions of probation, parole, and community supervision, community-based programs, financial management, research and planning, staff development and training, and internal audit. The director shall make annual written reports to the board, the Governor, and the General Assembly providing statistical and other information pertinent to the department's activities.

S.C. Code Ann. § 24-21-220.

[5] Hiding their file from applicants under the guise of protecting "work product" may well explain the absurdity in this outcome. Included in those hidden documents is the statement of the case that is presented to the Board as the official version of the facts of the crime. Such a document should come from the official court transcript, exhibits and judicial opinions. It should not include extra-judicial allegations from victims, law enforcement, information from warrants, and statements and other information from pretrial investigations. However, since the Board reached the conclusion that Joe was more culpable than the other co-defendants, it is reasonable to assume that this statement of the case contains information beyond the information from the trial transcript and

and the COMPAS assessment,[6] there is no way for Joe to know for sure what PPP's recommendation was or why it was made, regardless of its counsel's assurances in legal pleadings that there was no retaliatory basis for Joe's parole denial.

In contrast, Joe provided ample evidence to illustrate why it was reasonable for him to argue that knowledge of his 2019 appeal infected the Board's decision-making. There was no "valid, non-retaliatory basis," *Mackey v. Hilkey*, No. 21-cv-1225-WJM-NRN, 2022 WL 1198002, at *4 (D. Colo. Apr. 22, 2022), for the decision of one Board member to change their vote from in favor of parole to against. Joe had done nothing but improve his institutional record in the two years between his 2019 and 2021 parole hearings, and nothing else changed between 2019 and 2021 except the composition of the Board. Despite the fact that he only improved his record, Joe received *even fewer votes* for parole in 2021 than he did in 2019, and one member who considered his case in 2019 and voted for parole then changed her vote in 2021. Quite simply, this is logically absurd. Contrary to Respondent's argument, Joe has never contended that Board members are

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exhibits. In our State, the transcripts of criminal trials and pleas are not secret. The most frightening reason for PPP to contend that the factual summary of a completed criminal proceeding should be protected as "work product" is precisely because PPP ***is*** supplementing the judicial record (the transcript) with extra-judicial allegations, opinions, and theories from victims and others: work product indeed. That would explain both the obsession with secrecy and the outrageous decision in this case.

[6] PPP's decision to hide Joe's COMPAS assessment and results provides further evidence of retaliation. It is absurd to allege that a commercially developed, nationally recognized risk evaluation tool, purchased and administered to applicants pursuant to a requirement added to state law in the 2010 Omnibus Sentencing Reform Bill, is somehow agency "work product." Failing to disclose each assessment to the applicant is horrible correctional practice. COMPAS assessments reveal strengths and weaknesses that impact risk. Nationally, they are routinely used to allow offenders to identify those weaknesses and take steps to improve thereon. While it is sad and ironic that PPP does not wish to help offenders reduce risk, the staff at SCDC would be more than willing. Beyond simple meanness (retaliation) what other reason could be put forth for not allowing applicants access to this taxpayer-funded risk assessment tool? What reason could be offered for failing to allow offenders to reduce their risk of reoffending? Why does PPP want to make prisons and the public less safe? Such a policy is so illogical it reeks of retaliation.

locked into their votes. Certainly, if Joe's prison record had deteriorated between 2019 and 2021, it would have been perfectly reasonable for any Board member to conclude that they should change their vote and deny parole. However, the exact opposite happened—Joe's already stellar record only improved. It is logically impossible for the Board to conclude that an improved record (and otherwise unchanged facts) reflects unfavorably on an inmate such that the inmate should receive fewer votes for parole unless the Board is considering something other than the inmate's record and the relevant criteria. Nonetheless, at Joe's 2021 hearing, the Board appeared to conclude exactly that. Furthermore, the Board engaged in no deliberation on the record that might have shed light on their reasons for denying Joe parole.

Moreover, since Respondent repeatedly argues that Joe must lose because he has no right to receive parole, it bears repeating that Joe never argued that he has a right to receive parole. Instead, he argues that the Board denied him a fair parole hearing because he exercised his right to appeal. Nor must Joe prove that he has a right to parole in order to prevail. Br. App. at 20 (citing *Nyberg v. Davidson*, 776 Fed. App'x 578, 582 (11th Cir. 2019) ("To state a retaliation claim, [a potential parolee] is not required to show that he had a right to the benefit denied. He must instead show he was denied a benefit because he exercised his rights.")).

Finally, Respondent's argument that finding in Joe's favor on his retaliation claim will open the door to a flood of retaliation litigation is meritless. Joe has presented a number of specific facts supporting his retaliation claim that are unique to his case, and Joe's stellar prison record is unique. He has never had a violent disciplinary infraction and has had no infractions of any kind in twenty years. He is one of only a handful of inmates to pursue a Master's Degree while incarcerated, and he is the only inmate in SCDC trained as both a Peer Support Specialist and a Para-Professional Counselor. 2021 Addendum to Parole Package Submitted on Behalf of Joseph

Kelsey at 1, 24. Simply put, Joe's retaliation claim is not made in a vacuum, and relief on this claim would not open the door to similar claims by inmates in different circumstances.

CONCLUSION

For the reasons articulated above and in Joe's opening brief, this Court should remand this case to the ALC with an order that the ALC has jurisdiction and must allow a new appeal with a complete record. Alternatively, this Court should remand the case to PPP and the Parole Board with an order that the Board hold a new parole hearing, free from arbitrary, capricious, and retaliatory decision-making and free from the procedural defects the ALC identified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Reply Brief was served on opposing counsel by e-mail at the address provided in the Attorney Information System: Matthew.Buchanan@ppp.sc.gov. Service was made on February 6, 2023.

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