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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 S. Phillip Lenski, Administrative Law Judge

Case No. 2024-001471
ALC Docket No. 2024-ALJ-15-0002-AP

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 IN REPLY

I. Appellant has raised a cognizable retaliation claim.

Respondent argues that Appellant—and the Court—must blindly assume, despite evidence to the contrary, that the Board did not retaliate against Appellant for his successful appeal. *See* Br. Resp't at 13. Blind trust in an agency's good faith is not a sufficient safeguard of due process. *S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 596, 86 S.E.2d 466, 471 (1955)) ("The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion.").

Even if Respondent is correct in assuming that the Board's changed votes were not retaliatory (which Respondent cannot know for sure any more than Appellant can, given that the Board never offers any reasons for its decisions on the record), the best-case scenario that Respondent can put forward is that the Board members had no reason at all for changing their votes—a direct violation of the APA's prohibition of arbitrary and capricious decisions. S.C. Code §§ 1-23-380(5)(f); 1-23-610(B)(f). Tellingly, Respondent does not—because it cannot—try to rebut Appellant's argument by presenting any facts in the actual record of Joe's case that might have justified a changed vote, and similarly does not try to present any explanation for why, if such a justification existed, the Board continued to deny Joe parole on the basis of the same factors relating to the unchanging nature of his offense. At the very least, changing a vote in favor of parole to one opposed in a subsequent hearing *for no reason* is the very definition of arbitrary and capricious and is prohibited by the APA. S.C. Code §§ 1-23-380(5)(f); 1-23-610(B)(f); *Blackmon v. S.C. Dep't of Health & Env't Control*, 441 S.C. 342, 353 (Ct. App. 2022) (a decision is arbitrary and capricious if it lacks rational basis, is based on one's will and not upon any reasoning or exercise of judgment, is made at pleasure, or is governed by no fixed rules or standards); *see also*

Turbeville v. Morris, 203 S.C. 287, 315, 26 S.E. 2d 821, 832 (1943) ("'Arbitrary' means based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; done capriciously or at pleasure, without adequate determining principle, nonrational; not governed by any fixed rules or standard." (citing 6 C.J.S., Arbitrary, p. 145)). *See also* S.C. Code § 1-23-380.

The slippery slope that Respondent envisions, whereby any inmate denied parole more than once will "cry retaliation," Br. Resp't at 13, is foreclosed by the nature of Appellant's argument. As argued in Appellant's brief, Joe's retaliation claim is cognizable as a result of the convergence of a specific sequence of events: (1) Joe received votes in favor of parole; (2) Joe appealed the Board's denial of his parole and won a ruling that required PPP and the Board to be more transparent and increased their workload; (3) at subsequent hearings, Board members who had previously voted for parole changed their votes to deny even though Joe's record had only improved; and, (4) each of the Board's denials has been based solely on factors regarding Joe's offense, which can never change, after having paroled his judicially and objectively more culpable codefendant. In other words, this is a very unique case, and there is no reason to believe, as Respondent argues, that a judicial finding of retaliation in this case would lead to an avalanche of retaliation litigation by other inmates who could not present similar evidence. Even if that were the case, as with any other type of frivolous litigation, any appeals that are clearly not meritorious will be easily dismissed by this Court and the ALC.[1]

[1] Respondent notes that there is currently "no means for the entire membership to recuse itself," Br. Resp't at 14, but offers no reason why PPP could not create one. The fact that PPP or this Court may need to establish an alternative decision-maker when the existing Board has proven itself unwilling or incapable of making parole determinations without trampling on inmates' constitutional rights does not justify allowing the Board and the Agency to continue violating the First Amendment and due process.

II. Despite this Court's decision in *Kelsey*, Appellant was never granted access to his parole file before his 2023 hearing.

Respondent incorrectly argues that Appellant's file access claim is moot because, PPP alleges, it complied with *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 441 S.C. 373, 893 S.E.2d 588 (2023), which was decided in advance of Joe's 2023 hearing, by providing Joe's file to him on the day of his 2024 hearing. The fact that the file was provided (immediately prior to the hearing, with no opportunity for correction, contra *Kelsey*) for Joe's 2024 hearing does not cure the constitutional violation that PPP committed by refusing to turn over the file in advance of the 2023 hearing. This Court's decision in *Kelsey* perfectly illustrates that fact: Instead of allowing PPP to simply provide Joe's file at future hearings, the Court explicitly ordered PPP to give Joe a new parole hearing with full access to his file. *Id.* at 379, 893 S.E.2d at 591–92. The same circumstances apply here: PPP willfully violated *Kelsey*, and Joe's due process rights, by refusing to turn over Joe's file after *Kelsey* was decided, and that constitutional violation was not cured by provision of the file at a subsequent hearing.[2] Just as in *Kelsey*, this Court can remedy that violation by providing Joe with a new parole hearing at which PPP is required to give Joe meaningful access to his file and correct any inaccuracies.

III. PPP and the Parole Board are not above judicial review.

PPP has taken the position that its actions, unlike those of all other agencies, are immune from review by the ALC or other courts because the Board has "absolute power" over its decisions. Br. of Resp't at 13. PPP further contends that the Board is free to ignore existing caselaw in reaching those decisions, maintaining that the Board is "certainly not beholden to a rendition of

[2] PPP similarly argued in the ALC that the fact that Joe was to receive a new parole hearing in 2024 rendered the instant case moot. Resp't Mot. to Dismiss Appeal, *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 24-ALJ-15-0002 (S.C. Admin. L. Ct. Apr. 15, 2024). The ALC rejected this argument in its denial of PPP's motion to dismiss. Order, *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 24-ALJ-15-0002 (S.C. Admin. L. Ct. May 13, 2024).

facts outlined [by the South Carolina Supreme Court] in an unrelated appeal." Br. Resp't at 14. PPP's interpretation of its own powers is not only breathtaking but reflects a fundamental misunderstanding of the role of the ALC, the purpose of judicial review, and Supreme Court precedents.

Under PPP's reading, parole decisions are categorically exempt from APA review simply because "[p]arole is a privilege, not a right."[3] Br. of Resp't at 13. But there is no statutory or decisional law to support this unprecedented assertion. Because PPP is an agency, and because parole determinations constitute agency action, parole denials are subject to APA review. *E.g.*, *Rose v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 429 S.C. 136, 142, 838 S.E.2d 505, 509 (2020) (applying the APA to an appeal from a final decision by PPP); *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (1999). This is reinforced by the fact that in all of the Supreme Court's decisions on the scope of the ALC's power to review PPP's actions, the Court has relied on opinions interpreting the scope of the ALC's power to review actions of *other* agencies—PPP, in other words, is not subject to a special set of rules simply because its expertise lies in parole decisions. *E.g.*, *Rose v. S.C. Dep't of Prob.*, 429 S.C. 136, 143, 838 S.E.2d 505, 509 (2020) (citing *Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 665 S.E.2d 231 (2008), a case involving a prisoner's non-wage deposits, and *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 530 S.E.2d 653 (Ct. App. 2000), a case involving conditions imposed by hazardous waste permits); *Barton v. S.C. Dep't of Probation Parole & Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013) (citing *Hill v. S.C. Dep't of Health & Envt'l Control*, 389 S.C. 1, 698 S.E.2d 612 (2010), a case

[3] Respondent similarly urges this Court to turn away from Respondent's and the Board's repeated constitutional violations by insisting that Appellant cannot possibly have been permanently denied parole because he will have another parole hearing in two years, and therefore each denial cannot possibly be anything other than routine. Br. Resp't at 7. However, *Cooper* established that parole denials are not routine where the parolee's due process right to fair parole procedures has been violated. *Cooper v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 377 S.C. 489, 499–500, 661 S.E.2d 106, 111–12 (2008).

involving coast zone management permit violations by a property owner). Moreover, the United States Supreme Court has recently rejected the notion the courts must be required to defer to agencies' statutory interpretations on the grounds that such deference usurps the judicial function. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2250, 2257 (2024) (rejecting the requirement of *Chevron v. NRDC*, 467 U.S. 837 (1984) that "courts mechanically afford binding deference to agency interpretations" because it infringed on the province and duty of the judicial branch "to say what the law is" (quoting *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803)).

Further, Joe has not requested that this Court—or any court—order him released directly on parole. Instead, he continues to seek a parole hearing that complies with the APA's prohibition on arbitrary and capricious decisions. The fact that such a parole hearing can on the facts of this case produce only one legally sound result—a grant of parole—does not deprive the judiciary of jurisdiction over the case. This outcome does not, as PPP insists, allow any inmate to successfully challenge a parole denial by "argu[ing] that the statement by the Board that abides by *Cooper* and *Compton* [*v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 685 S.E.2d 175 (2009)] is not enough." Br. Resp't at 10. To the contrary, this outcome merely holds the Board and PPP accountable and requires that they meet standards of basic fairness that reinforce the Agency's ultimate goal: "prepare offenders under [their] supervision toward becoming productive members of the community." S.C. Dep't of Probation, Parole & Pardon Servs., *About PPP*, https://www.dppps.sc.gov/About-PPP. If parole-eligible inmates are led to believe, by force of arbitrary parole decisions, that their conduct while they are incarcerated plays no role in their eligibility for release, any incentive to "becom[e] productive members of the community" goes away. Similarly, contrary to Respondent's argument, Br. Resp't at 10, it is not necessary for this Court to contradict either *Cooper* or *Compton* in order to reach the conclusion that the Board has

acted arbitrarily and capriciously. Given that *Cooper*'s due process guarantee remains the law, this Court need only determine whether PPP and the Board violated Joe's "substantial rights" under *Cooper* and the Administrative Procedures Act. S.C. Code § 1-23-380(5).

Finally, PPP's assertion that the Board is "certainly not beholden to a rendition of facts outlined [by the South Carolina Supreme Court] in an unrelated appeal," Br. Resp't at 14, makes clear that PPP believes it and the Board are above judicial review. PPP's view of Joe Kelsey's court case (*State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998); *Payne v. State*, 355 S.C. 642, 586 S.E.2d 857 (2003)) as "unrelated" to Joe Kelsey's parole hearing makes clear that PPP believes it and the Board are free to ignore findings and orders of the judiciary relevant to criminal culpability and then substitute, with no basis whatsoever for doing so, an alternative set of facts with no factual foundation. This further evinces true arbitrary and capricious nature of the Board's decision-making.

At bottom, Respondent's argument is simple: PPP believes that it and the Parole Board have "absolute power," Br. Resp't at 13, when it comes to the granting or denial of parole, are free to ignore the law and the South Carolina Supreme Court, and may continue to violate inmates' constitutional rights with impunity. Contrary to that argument, this Court has the authority to stop such constitutional violations, determine that the Board and PPP are not above judicial review, and grant Appellant the relief he has requested.

CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's Brief, this Court should grant the relief requested.

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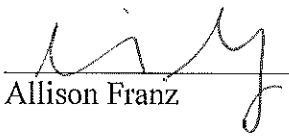
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Initial Reply Brief was served on opposing counsel by first-class United States mail, postage prepaid, at the address provided in the Attorney Information System:

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