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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Crystal M. Rookard, Administrative Law Judge

Case No. 25-ALJ-15-0027-AP
Appellate Case No. 2025-002487

Theresa Barton Gunter,..... Appellant,

v.

South Carolina Department of Probation, Parole, and
Pardon Services, Respondent.

**BRIEF OF APPELLANT
THERESA BARTON GUNTER**

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the ALC err when it dismissed Gunter's appeal for lack of subject matter jurisdiction on the grounds that there is no law which provides the ALC jurisdiction over pardon determinations?
2. Did the ALC err when it dismissed Gunter's appeal for lack of subject matter jurisdiction on the grounds that this case involves a routine pardon denial which does not implicate the deprivation of a liberty interest?

STATEMENT OF THE CASE

This is an appeal of an Administrative Law Court ("ALC") order dismissing Appellant Theresa Barton Gunter's appeal of agency decisions of the South Carolina Department of Probation, Parole, and Pardon Services (the "Department"). The ALC's dismissal of Gunter's appeal rests upon the erroneous legal determination that the ALC does not have subject matter jurisdiction to address violations of law that occurred during the consideration and denial of Gunter's pardon request by the Board of Pardons and Pardon (the "Board").

FACTS

On July 9, 2025, Gunter appeared before the Board for a hearing on her request for a pardon. At the hearing, Gunter's counsel, Gunter, and one of her supporters offered comments for the Board's consideration. R. at 13 (01:20 – 05:02 (Track 1), 00:00 – 05:02 (Track 2), and 00:00 – 02:11 (Track 3)). After these comments and a Board member's remark to Gunter, Gunter, her counsel, and her supporter were asked to leave the hearing room so the Board members could vote on the pardon request. R. at 13 (02:49 – 02:55 (Track 3)).¹

¹ The Board votes in private, and the Department does not announce the result of the Board's vote at the hearing. The Department provides notice of the hearing result via subsequent letter and by posting the result on its website. *Id.*

In a letter from the Department dated July 10, 2025, Gunter received notice that the Board had denied her request for a pardon. R. at 14. The Department's letter provided, in pertinent part, as follows:

"After thorough consideration of all the facts in your client's case, the Board at its meeting on 7/9/2025, rejected your client's request for a Pardon. Please be advised that the Board does not provide reasons for the decision to reject and that the Board's decision is final and may not be appealed."

Id. (emphasis added).

In a letter to the Department dated July 10, 2025, Gunter's counsel requested the audio recording of her pardon hearing. R. at 28. It is the practice of Gunter's counsel to request the audio recordings from hearings when the Board denies a pardon request or a parole request because these recordings reveal which Board members voted for and against the request, and the recordings, at times, provide information about why the request was denied, both of which can be helpful.² In a letter from the Department dated August 14, 2025, Gunter's counsel received the audio recording of the pardon hearing. R. at 29.

Listening to the recording revealed that the Board had considered something more than just "all the facts in your client's case . . ." as reported by the Department's letter. The recording revealed that a member of the Department's staff attempted to begin the voting process by asking one of the Board members for his vote on Gunter's pardon request. R. at 13 (03:10 – 04:30 (Track 3)). Before this Board member could vote, however, the Vice Chair of the Pardon Board announced that he wanted to "make a statement" and provide "more information." *Id.* The Vice Chair then proceeded to provide the Board members information that included the following:

² Knowing that one or more Board members voted in favor of a pardon or parole request can encourage an individual to continue efforts to better themselves in hopes of getting the votes of the other Board members at a subsequent hearing, and information regarding why a pardon or parole request was denied can help guide those self-improvement efforts.

That Ms. Gunter was paroled in 2013, “but it was not because of the Board’s vote in 2013 it was because of a prior vote.”

“But that whole thing went to the Supreme Court. If you hear us talking about the *Barton* case, this is the *Barton* case.”

“We had to change the way we counted our votes because of the *Barton* case . . . We had to pardon[sic] her based on her getting so many votes at a prior time.”

“Thought y’all should know that this is the *Barton* case.”

Id.

The *Barton* case was brought by Gunter (then Barton) in the Administrative Law Court against the Department and was ultimately resolved by the South Carolina Supreme Court. *Barton v. S.C. Dep’t of Probation, Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013). This case arose from a 2012 parole hearing at which Gunter (Barton) received enough votes to receive parole, but she was nonetheless denied parole because the Department’s method of counting votes violated the law. *Id.* In 2013, the Supreme Court unanimously held that the Department’s vote counting method violated the *ex post facto* clauses of the United States and South Carolina constitutions and violated the parole statute, and that Gunter had received enough votes to receive parole. *Id.* Because of this case, Gunter and other similarly situated inmates whose parole requests had been illegally denied had to be paroled by the Department and the Board.

After the Vice Chair’s comments about the *Barton* case, the Department’s counsel said that it would better for him to answer questions about the *Barton* case after the vote, so as not to “color anything.” R. at 13 (04:29 – 04:38 (Track 3)). When the Department’s staff member resumed the voting process, she returned to the Board member whom she had previously asked for his vote. *Id.* This Board member paused and said, “Hmm, this kind of clouded things,” and

then he voted to deny Gunter's pardon request. *Id.* Thereafter, the Vice Chair voted to deny Gunter's pardon request, one Board member voted in favor of a pardon, and three Board members voted to deny the request. *Id.*

After the vote, a Board member said to the Department's counsel, "Ok, now tell us" – referring to the *Barton* case. *Id.* The Board members were then asked, and they agreed, that the audio recording should be terminated before counsel commented on the *Barton* case. *Id.*

The Vice Chairman's comments were inappropriate, inaccurate, and irrelevant. More concerningly, these comments appeared to evince retaliatory bias against Gunter for exercising her constitutional right to seek redress in court against the Department and Board for illegally denying her parole in 2012. As evidenced by the comments of the first Board member to vote on Gunter's pardon request, the Vice Chair's comments about the *Barton* case and the absence of remedial measures to address this situation resulted in Gunter not receiving a fair hearing on her pardon request. In an attempt to rectify these violations of law and process, Gunter's counsel requested a rehearing of Gunter's pardon request. On September 12, 2025, the Department denied this request. R. at 58-60.

On September 15, 2025, Gunter filed a Notice of Appeal with the ALC challenging the Department's decisions. On November 14, 2025, the ALC dismissed Gunter's appeal. On December 12, 2025, Gunter appealed the ALC's decision to this Court. For the reasons set forth below, the Court should reverse the ALC's order of dismissal and remand this matter back to the Department and Board for a rehearing on Gunter's pardon request with instructions for remedial measures that will remedy the violations of law that compromised the fairness of her previous hearing.

ARGUMENT

I. THE APA PROVIDES THE ALC WITH SUBJECT MATTER JURISDICTION OVER GUNTER'S APPEAL

The ALC determined that it lacks subject matter jurisdiction over Gunter's appeal because of the absence of "some statutory or court-recognized grant of jurisdiction." R. at 01. The ALC is mistaken. The ALC has subject matter jurisdiction to hear challenges to final decisions of state agencies and boards – including the Department's final decisions – and this jurisdiction arises from statute.

The Administrative Procedures Act ("APA") provides that "[a]n administrative law judge also shall preside over all appeals from final decisions of contested cases pursuant to the Administrative Procedures Act, Article I, Section 22, Constitution of South Carolina, 1895, or another law. . ." S.C. Code Ann. § 1-23-600(D). The Supreme Court recently described the nature of the Administrative Law Court's subject matter jurisdiction and appellate jurisdiction.

Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong.

...

The ALC has subject matter jurisdiction to review a final decision of an administrative agency.

...

The ALC has appellate jurisdiction over any matter where the procedural requirements for perfecting an appeal have been met.

Allen v. S.C. Dep't of Corrections, 439 S.C. 164, 167-68, 886 S.E.2d 671, 672 (2023). Because the Department is a state agency, because its decisions to deny Gunter's pardon request and her rehearing request are final decisions, and because Gunter has satisfied the procedural

requirements for perfecting her appeal, the ALC has both subject matter jurisdiction and appellate jurisdiction over this appeal.

The ALC's conclusion that it lacks jurisdiction is also undermined by multiple cases where the ALC has adjudicated appeals of the Department's final agency decisions and where appellate courts have held that the ALC had jurisdiction and should have adjudicated the appeals. *Rose v. S.C. Dep't of Probation, Parole, and Pardon Servs.*, 429 S.C. 136, 838 S.E.2d 505 (2020); *Barton*, 404 S.C. 395, 745 S.E.2d 110; *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008); *Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003); *Kelsey v. S.C. Dep't of Probation, Parole, and Pardon Servs.* 441 S.C. 373, 893 S.E.2d 588 (Ct. App. 2023); *Steele v. Benjamin*, 362 S.C. 66, 72, 606 S.E.2d 499 (Ct. App. 2004).³ The ALC's dismissal of Gunter's appeal for lack of jurisdiction should, therefore, be reversed.

II. THE ALC HAS JURISDICTION BECAUSE GUNTER CHALLENGES VIOLATIONS OF LAW – NOT A ROUTINE PARDON DENIAL

The ALC determined that it lacks jurisdiction because Gunter is challenging a routine pardon denial which does not implicate a liberty interest. R. at 01-02. The *Allen* decision again provides the appropriate starting place for the analysis. In *Allen*, the Supreme Court made it clear that a liberty interest is not a prerequisite for the ALC's subject matter jurisdiction. *Allen*,

³ While the decisions in these cases involve parole, there is no basis in either the APA or in *Allen* for treating the Department's pardon hearings and decisions any differently than its parole hearings and decisions with respect to subject matter jurisdiction.

439 S.C. at 171, 886 S.E.2d at 674 (“A claim that implicates a state-created liberty or property interest is not required for the ALC to have subject matter jurisdiction over the appeal”).⁴

Even if it were necessary for Gunter’s appeal to implicate a deprivation of a liberty interest for the ALC to have jurisdiction, which it is not, the manner in which Gunter’s pardon request was considered and denied clearly implicates an important constitutional right – the right not to be punished, retaliated against, or otherwise disadvantaged for having sought redress in the court. *See infra* at p.8.

The ALC correctly notes that receiving a pardon, like being paroled, is a privilege and not a right. R. at 02. The effect of pardon and parole being privileges is that routine denials of requests for pardons and parole – for failing to demonstrate sufficient qualifications or rehabilitation to receive these privileges – cannot be reversed by the courts. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112 (denial of parole through application of the appropriate criteria is a routine denial “and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure.”). That pardon and parole are privileges does not, however, grant the Department carte blanche to disregard constitutional rights or otherwise violate the law.

It is well-established that when the Department or Board violates the law, it is not a routine denial, and the Administrative Law Court and appellate courts will remedy the violations. *Barton*, 404 S.C. at 419, 745 S.E.2d at 123 (Department/Board violations of *ex post facto* and the parole statute); *Cooper*, 377 S.C. at 498-99, 661 S.E.2d at 111 (Department/Board violation of the parole statute). Our courts remedy violations of law, even though the relief sought is a

⁴ While not jurisdictionally relevant, if an inmate’s appeal of a parole determination does not involve the deprivation of a liberty interest, it may affect the relief the ALC can provide when it ultimately adjudicates the appeal. *Allen*, 439 S.C. at 171, 886 S.E.2d at 674.

privilege, because otherwise we'd have the obviously unacceptable situation that the Department and Board could engage in illegal conduct with impunity.⁵ *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111 (“[T]he Legislature created this Board to operate within certain parameters. We do not believe the Legislature established the Board and intended for it to render decisions without any means of accountability.”).⁶

Both the United States Constitution and the South Carolina Constitution guarantee the right to freedom of speech, which includes the right to petition the government for redress. U.S. Const. Amend. 1 (“Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to . . . petition the Government for a redress of grievances.”); S.C. Const. Art. I, § 2 (“The General Assembly shall make no law . . . abridging the freedom of speech. . . or the right of the people . . . to petition the government or any department thereof for a redress of grievances.”). The right to petition the government for redress includes the right to seek redress in the courts. *Smartt v. Avery*, 370 F.2d 788, 790 (6th Cir. 1967) (“[T]he right to petition the courts of the United States is a constitutional right”); *In re Addleman*, 991 P.2d 1123, 1124 (Wash. Sup. Ct. 2000) (“The right of access to the courts is rooted in the petition clause of the First Amendment to the United States Constitution.”).

Actions and decisions by state actors that punish or retaliate against individuals for seeking legal redress violate the First Amendment.

Official reprisal for protected speech “offends the Constitution [because] it threatens to inhibit exercise of the protected right,” *Crawford–El v. Britton*, 523 U.S. 574, 588, n. 10, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998), and the law is settled that as a general matter the First Amendment prohibits government

⁵ If it were otherwise, for example, the Court could not review and provide relief if pardon requests were being denied based upon factors like race, gender, or religion.

⁶ While the violations of law in these cases involve parole decisions and process, courts have the same duty and power to remedy violations of law involving the pardon process.

officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out, *id.*, at 592, 118 S.Ct. 1584; *see also Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (noting that the government may not punish a person or deprive him of a benefit on the basis of his “constitutionally protected speech”).

Hartman v. Moore, 547 U.S. 250, 256 (2006); *Crawford-El v. Britton*, 523 U.S. 574, 588 n. 10 (1998) (“Retaliation is thus akin to an ‘unconstitutional condition’ demanded for the receipt of a government-provided benefit.”) (citation omitted).

It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, ‘penalizing those who choose to exercise’ constitutional rights, ‘would be patently unconstitutional.’

North Carolina v. Pearce, 395 U.S. 711, 723-24 (1969) (internal citations omitted); *State v. Fletcher*, 322 S.C. 256, 259, 471 S.E.2d 702, 704 (Ct. App. 1996) (“‘It is a due process violation to punish a person for exercising a protected statutory or constitutional right.’”) (citations omitted).

Agencies like the Department are not immune from the constitutional prohibition on retaliating against individuals for bringing cases to court. *In re Addleman*, 991 P.2d at 1125-26 (vacating parole denial because inmate’s litigation and grievance activities are protected by the First Amendment and Board’s consideration of those activities impermissibly chills right of access to courts); *Smartt*, 370 F.2d at 791 (parole board regulation delaying parole consideration for one year for filing a *habeas corpus* action violates the constitutional right to petition the courts).

Retaliating against an individual for exercising the constitutional right to seek redress in court also violates the APA.

A reviewing court may reverse the decision of an administrative agency if substantial rights of the appellant have been prejudiced because the agency's findings, inferences, conclusions or decisions (1) violate constitutional or statutory provisions, (2) exceed the statutory authority of the agency, (3) are based upon unlawful procedure, (4) are affected by other error of law, (5) are clearly erroneous in light of the reliable, probative and substantial evidence on the entire record, or (6) are either arbitrary, capricious, or reflect abuse of discretion or the obvious unwarranted exercise of discretion.

Weaver v. S.C. Coastal Council, 309 S.C. 368, 374, 423 S.E.2d 340, 343 (1992) (citing S.C. Code Ann. § 1-23-380) (emphasis added).

In this appeal, Gunter asserts that the Department's decisions denying her pardon request and denying her a rehearing should be reversed because the Board's consideration of her pardon request and its decision were marred by unconstitutional and retaliatory bias against her for her participation in the *Barton* case. Gunter also asserts that these decisions violate due process and the APA. Because Gunter's appeal seeks to remedy the Department's violations of law, Gunter's appeal is not an appeal of a routine pardon denial, and the ALC has jurisdiction over this appeal.⁷

CONCLUSION

For the reasons set forth above, Gunter respectfully requests that the Court reverse the ALC's dismissal of this appeal for lack of subject matter jurisdiction and enter an order requiring the following:

1. The Department will conduct a rehearing of Gunter's pardon request as soon as practicable.
2. The Vice Chairman of the Board will be recused from the rehearing.

⁷ In the order's penultimate sentence, the ALC says that "if the Court had jurisdiction, the review would be limited to violations of statutory procedure or equal protection, and not the Board's substantive decision denying Appellant a pardon." R. at 02. Here the ALC appears to recognize that it has jurisdiction to remedy violations of law, which is all Gunter seeks with this appeal.

3. At the start of the rehearing, the Department's General Counsel will provide the following statements and instructions to the Board:
 - a. Ms. Gunter's pardon request is being reheard today because the Vice Chairman's comments regarding Ms. Gunter's legal case against the Department, the "Barton case," were improper and prejudiced Ms. Gunter's right to a fair hearing.
 - b. In 2012, Ms. Gunter (Ms. Barton) received enough votes to receive parole, but she was denied parole because, at that time, the Department was not counting votes in a manner that complied with the law.
 - c. In 2013, the South Carolina Supreme Court unanimously determined that the Department had violated the law and that Ms. Gunter had received enough votes from the Board in 2012 to receive parole.
 - d. Ms. Gunter seeking redress from the Supreme Court was entirely appropriate and cannot be held against her at this rehearing.
4. At the rehearing the Board will be provided and will consider Gunter's application with attachments and will listen to the recording of the testimony and the responses to Board questions during the public portion of the previous hearing.
5. The Department will record the rehearing, including the statements to the Board set forth above, the Board's deliberation, and the Board's voting, and the recording will be provided to the ALC and Gunter.
6. The ALC will retain jurisdiction over this appeal to ensure that the rehearing is conducted appropriately.

Gunter further respectfully requests such other and further relief as the Court finds just and proper.



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