

RECEIVED

Mar 30 2026

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.

**REPLY BRIEF OF
APPELLANT THERESA BARTON GUNTER**

Travis Dayhuff
S.C. Bar No. 15916
travis.dayhuff@nelsonmullins.com
Arslan S. Valimohamed
S.C. Bar No. 106648
arslan.valimohamed@nelsonmullins.com
NELSON MULLINS RILEY &
SCARBOROUGH LLP
1320 Main Street, 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Theresa Barton Gunter

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
I. THERE IS NO “SHIELD” IN THE APA ELIMINATING THE ALC’S JURISDICTION OVER THE DEPARTMENT’S FINAL AGENCY DECISIONS.....	1
II. THE ALC HAD JURISDICTION AND SHOULD HAVE PROVIDED RELIEF FOR THE DEPARTMENT’S VIOLATIONS OF LAW	3
III. GUNTER HAS SHOWN THAT THE DEPARTMENT’S UNCONSTITUTIONAL PROCESS DENIED HER A FAIR HEARING	4
CONCLUSION	7

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allen v. S.C. Dep't of Corrections,</i> 439 S.C. 164, 886 S.E.2d 671 (2023)	1, 2, 3
<i>Barton v. S.C. Dep't of Probation, Parole, and Pardon Servs.,</i> 404 S.C. 395, 745 S.E.2d 110 (2013)	3
<i>Buchanan v. S.C. Dep't of Prob., Parole, & Pardon Servs.,</i> 442 S.C. 393, 899 S.E.2d 600 (Ct. App. 2023)	1, 2, 3
<i>Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.,</i> 377 S.C. 489, 661 S.E.2d 106 (2008)	2, 3, 4
<i>Kelsey v. S.C. Dep't of Probation, Parole, and Pardon Servs.,</i> 441 S.C. 373, 893 S.E.2d 588 (Ct. App. 2023)	3
<i>State v. Fletcher,</i> 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996)	4
Statutes	
S.C. Code Ann. § 1-23-10(4)	1
S.C. Code Ann. § 1-23-600(D)	1, 2

ARGUMENT IN REPLY

Appellant Theresa Barton Gunter submits this reply to the brief filed by Respondent Department of Probation, Parole, and Pardon Services (the “Department”).

I. THERE IS NO “SHIELD” IN THE APA ELIMINATING THE ALC’S JURISDICTION OVER THE DEPARTMENT’S FINAL AGENCY DECISIONS.

The Department says it has a “specific exclusion” in the Administrative Procedures Act (“APA”) which serves as a “statutory ‘shield’” preventing the Administrative Law Court (“ALC”), and presumably this Court, from exercising jurisdiction over appeals of the Department’s final agency decisions. Department’s Br. at 3-4. The Department finds this “shield” in the APA provision which excludes decisions and orders of the Board of Pardons and Pardon (the “Board”) from the definition of “regulation.” *Id.*; S.C. Code Ann. § 1-23-10(4). The Department is mistaken.

The Board’s decisions and orders are, without question, not regulations, but this observation is untethered from the subject matter jurisdiction analysis. As explained in *Allen v. South Carolina Department of Corrections*, section 1-23-600(D) of the APA provides the ALC with subject matter jurisdiction to review final decisions of state agencies when a party satisfies the ALC’s prerequisites for the appellate jurisdiction. 439 S.C. 164, 168, 886 S.E.2d 671, 672-73 (2023). Because the Department’s decisions denying Gunter’s pardon request and her rehearing request are final agency decisions, and Gunter properly perfected her appeal at the ALC, the ALC had jurisdiction and should have adjudicated her claim that the Department’s hearing process violated her constitutional rights.

The notion that the APA provides the Department with a jurisdictional “shield” is also belied by decades of decisions where courts have exercised jurisdiction and adjudicated appeals of the Department’s final agency decisions. Gunter Principal Br. at 6 (providing citations to cases); *see also Buchanan v. S.C. Dep’t of Prob., Parole, & Pardon Servs.*, 442 S.C. 393, 899 S.E.2d 600

(Ct. App. 2023) (demonstrating that both the ALC and the Court of Appeals possess jurisdiction to review an appeal asserting that the Department’s process violated due process and the Eighth Amendment).

Lastly, while the APA expressly identifies the specific types of appeals excluded from the ALC’s jurisdiction, an appeal challenging the Department’s violations of due process and other constitutional rights is not among them. S.C. Code Ann. § 1-23-600(D); *Allen*, 439 S.C. at 168, 886 S.E.2d at 672 (describing section 600(D) as providing “limited exceptions” to the ALC’s appellate jurisdiction); *Buchanan*, 442 S.C. at 406, 899 S.E.2d at 607 (“The ALC and our supreme court have continued to review these appeals [from the Department] where they implicate an alleged deprivation of due process.”).

The Department makes the related argument that the ALC’s dismissal of Gunter’s appeal for lack of jurisdiction is appropriate because no statute or case law provides for subject matter jurisdiction. Department’s Br. at 4. This argument, like the Department’s previous argument, ignores the existence of section 1-23-600(D) and the teaching of *Allen v. South Carolina Department of Corrections*.¹

¹ The Department says its hearings are not contested cases under the APA. Department Br. at 3. Because parole and pardon are privileges, the Department’s hearing process is more truncated and less trial-like than other agencies’ contested case hearing process. That difference does not, however, eliminate the ALC’s jurisdiction over appeals from the Department’s final agency decisions. *Cooper v. S.C. Dep’t of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008) (“Because the limited appeal of parole decisions is governed by the Administrative Procedures Act (APA), the Parole Board and the Administrative Law Court must comply with its provisions.”).

II. THE ALC HAD JURISDICTION AND SHOULD HAVE PROVIDED RELIEF FOR THE DEPARTMENT'S VIOLATIONS OF LAW.

The Department discusses how parole and pardon are privileges, not rights, how there are few restrictions imposed by statute upon the Board, and how the Board's parole and pardon decisions are exercises of the Board's discretion. Department Br. at 4-6. The Department then contends that Gunter's appeal does not comport with these well-recognized legal principles. Department Br. at 6 (describing Gunter as seeking to "turn all of this on its head . . ."). The Department is mistaken.

The legal principles referenced by the Department do not eliminate the ALC's subject matter jurisdiction. *Allen*, 439 S.C. at 170, 886 S.E.2d at 674. These legal principles do limit what the ALC can do with its jurisdiction. The ALC cannot overturn routine denials of parole and pardon. *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."); *Buchanan*, 442 S.C. 393 at 407, 899 S.E.2d at 608 ("reluctantly" affirming parole denial because the Board followed utilized proper procedure when it denied parole); *Kelsey v. S.C. Dep't of Probation, Parole, and Pardon Servs.* 441 S.C. 373, 378-79, 893 S.E.2d 588, 591-92 (Ct. App. 2023) (denial of parole reversed and remanded for new hearing because the Department failed to allow inmate to access parole file, when the Department's policy requires inmates to notify the Board if information in the parole file is incorrect). Notwithstanding these legal principles, the ALC most certainly can and should adjudicate cases asserting that the Department's hearing process violates constitutional rights and the APA. *Barton v. S.C. Dep't of Probation, Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013) (remedying Department/Board violations of *ex post facto* and the parole

statute); *Cooper*, 377 S.C. at 498-99, 661 S.E.2d at 111 (remedying Department/Board violation of the parole statute).

The Department makes the related argument that there is “no liberty right” or “constitutional expectation” to receiving a pardon. Department Br. at 7. Gunter agrees that there is no entitlement to a pardon. It is a privilege not a right. This appeal is not about having the ALC, or this Court, pardon Gunter. This appeal is about remedying a situation where unconstitutional considerations were injected into the pardon hearing process. Agencies like the Department are not immune from the constitutional prohibition on retaliating against individuals for bringing cases to court. *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.”).

III. THE DEPARTMENT’S UNCONSTITUTIONAL PROCESS DENIED HER A FAIR HEARING.

The Department contends that Gunter’s claim that her hearing process violated the law is based on “speculation without evidence. . .” Department Br. at 8. The Department is ignoring the evidence.

As set forth in more detail in Gunter’s previous brief, the Department’s recording reveals that, after Gunter’s hearing had concluded and just as the voting was about to commence, the Board’s Vice Chairman interrupted the proceedings. R. at 13 (03:10 – 04:30 (Track 3)). The Vice Chairman did not interrupt the voting to deliberate about the testimony or information presented to the Board during the hearing, which would have been appropriate. Rather, he interrupted to inject inaccurate and prejudicial information concerning Gunter’s prior litigation against the Department—information that had no bearing on Gunter’s fitness for pardon and whose introduction was wholly inappropriate.

The Vice Chairman wanted his fellow members to know before they voted that Gunter had not received parole from the Board in 2013 in the normal manner. She had received parole because “the whole thing went to the Supreme Court.” *Id.* He also wanted his fellow members to know that because of Gunter they “had to change” the way they voted, and that they “had to pardon [sic] her. . .” in 2013. *Id.* The Vice Chairman’s repeated use of “had to” is a small detail, but it’s telling. “Had to” conveys compulsion and disapproval, suggesting that the Vice Chairman did not support changing the old method of voting or the parole of Gunter. In context, these remarks unconstitutionally prejudiced Gunter by implying that her parole was not legitimately earned and was instead imposed upon the Board through resort to the Supreme Court.

The Vice Chairman’s remarks are also important because of what he did not say. The Vice Chairman did not mention that Gunter brought her case against the Department and Board because they had been engaged in a vote counting which violated the United States and South Carolina constitutions and the parole statute. The Vice Chairman did not mention that Department’s illegal vote counting had caused Gunter and many other inmates to unjustly spend extra years in prison. And the Vice Chairman did not say that taking the Department to court was entirely appropriate, because, after all, Gunter’s case righted a serious wrong.²

Impliedly forsaking its claim that Gunter has no evidence of unconstitutional considerations being introduced into the decision making on her pardon request, the Department next claims that Gunter “fails to produce any objective evidence of substantial prejudice” caused by the Vice Chairman’s remarks. Department Br. at 10. The Department again ignores the

² Even now the Department does not appear to acknowledge the gravity of the illegality. Department’s Br. at 1 (describing Gunter as having received “at the time an unfavorable vote count” when she actually received a favorable vote count which the Department did not recognize).

evidence. After the Vice Chairman concluded his remarks, and the Department's counsel did not take action to mitigate the damage done, the first Board member who was asked to vote said that those remarks "clouded things for him" and then voted to deny Gunter's request for a pardon. R. at 13 (5:00 – 05:27 (Track 3)).

The Department claims that a ruling in favor of Gunter would open the proverbial floodgates for pardon appeals at the ALC. Department Br. at 10. Simply put, that seems very unlikely.

For the Department's prognostication of a flood to come to fruition, the extremely unusual circumstances that resulted in this appeal would need to repeat themselves again and again. First, there just are not that many individuals out there who have successfully sued the Department to obtain parole. Second, if a Board member attempts to inject unconstitutionally prejudicial considerations into a pardon hearing in the future, one would expect that the Department's counsel will take remedial steps like recusal and curative instructions to ensure due process. Lastly, it bears mentioning that even this ALC appeal of a pardon decision would not have existed, but for the Department's decision to deny Gunter a rehearing. R. at 58-60.

CONCLUSION

For the reasons set forth above and set forth in her previous brief, Gunter respectfully requests that the Court reverse the ALC's order dismissing Gunter's appeal and grant her the relief requested in her previous brief.



Travis Dayhuff
S.C. Bar No. 15916
travis.dayhuff@nelsonmullins.com
Arslan S. Valimohamed
S.C. Bar No. 106648
arslan.valimohamed@nelsonmullins.com
NELSON MULLINS RILEY &
SCARBOROUGH LLP
1320 Main Street, 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Columbia, SC

March 30, 2026

Attorneys for Theresa Barton Gunter