STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gene Richardson, #93614, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	Docket No. 13-ALJ-15-0043-AP **ORDER**

STATEMENT OF THE CASE

This case is before the South Carolina Administrative Law Court ("ALC") pursuant to the appeal of Gene Richardson ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections. On August 13, 2013, Appellant, through counsel, petitioned the South Carolina Parole Board ("Board") for release. In his Petition for Release, the Appellant claims to have received four (4) votes in favor of parole when he appeared before the Board on June 20, 2001. The Appellant claims that he is entitled to parole in light of the recent South Carolina Supreme Court ruling in Barton v. S.C. Dep't of Prob., Parole and Pardon Servs., 404 S.C. 395, 745 S.E.2d 110 (2013). The South Carolina Department of Probation, Parole and Pardon Services ("Department") responded to the Appellant on August 27, 2013, informing him that he did not receive the required number of votes for parole and he "will not be conditionally paroled pursuant to [the] Barton decision." Appellant filed his appeal before the ALC on September 17, 2013. The Department filed the Record on Appeal on October 9, 2013. The Appellant filed his Brief on November 19, 2013, which included affidavits from Victoria Richardson, the wife of the Appellant, Peggy Granger, the sister of the Appellant; and a letter from Douglas Jennings regarding the June 20, 2001 parole hearing. The Department filed the Brief of Respondent on January 30, 2014.[1] The Appellant filed his Reply Brief on February 11, 2014. On February 24, 2014, the ALC ordered, from the Department, the transcript of the June 20, 2001 parole hearing of the Appellant. On March 4, 2014, The Department provided the Appellant and the ALC the transcript of the June 20, 2001 parole hearing. After a thorough review of the complete record, including the transcript of the parole hearing, the ALC affirms the

[1] The Department was granted an additional thirty (30) days to file the Brief of Respondent.

final decision of the Department denying parole to the Appellant.

BACKGROUND

On May 25, 1978, in Dorchester County, the victim, a real estate agent, entered an empty home, which was on the market for sale. The Appellant was inside the home and attacked the victim, stabbing her more than twenty-nine (29) times. Her body was found partially clothed in a wooded area near the home. On September 27, 1978, the Appellant appeared before the Honorable David Harwell and was sentenced to a period of incarceration for the remainder of his natural life.

The Appellant made his initial appearance before the Board on March 18, 1997. The Appellant has appeared before the Board an additional eight (8) times since, each resulting in a denial of parole. The Appellant's last appearance occurred on November 6, 2013, which resulted again in his denial of parole. The Board decided to deny parole due to: 1) the nature and seriousness of the current offense; 2) an indication of violence of this or a previous offense; and 3) a use of a deadly weapon in this or a previous offense. Prior to the most recent parole hearing, the Appellant issued his Petition for Release. The Petition for Release claims that he received four (4) votes in favor of parole at a hearing held on June 20, 2001, and therefore in light of the recent ruling in Barton, Appellant is entitled to his release. The Department responded to the Appellant, informing him he did not receive the required number of votes for parole during the June 20, 2001 hearing. This appeal followed.

DISCUSSION

An individual has a right to ALC review of a final decision of the Board only when that decision affects a liberty interest for which due process is required. See Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs., 352 S.C. 594, 598-99, 576 S.E.2d 146, 149-50 (2003); see also Sullivan v. S.C. Dep't of Corrections, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review). In Furtick, the South Carolina Supreme Court held that although an inmate has a liberty interest in parole eligibility pursuant to S.C. Code Ann. § 24-21-620, the statute does not create a liberty interest in the granting of parole itself. Furtick, 352 S.C. at 598, 576 S.E.2d at 149 n. 4. Therefore, claims arising from the Board's decision denying parole are not appealable to the ALC, only claims that the Board failed to consider the appropriate criteria so as to be tantamount to an abrogation of parole eligibility. Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs., 377 S.C. 489, 661 S.E.2d 106 (2008). The South Carolina Department of Probation, Parole and Pardon Services, specifically the Parole Board,

"has the sole authority to determine parole eligibility." Id. at 496, 661 S.E.2d at 110 (citing State v. McKay, 300 S.C. 113, 115, 386 S.E.2d 623, 623-24 (1989)). Here, the Appellant is claiming that he received the requisite number of votes required for parole pursuant to Barton, and that he was denied parole in an arbitrary and capricious manner.

When acting in an appellate capacity, the ALC must apply the criteria of S.C. Code Ann. § 1-23-380(5), which reads:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2012).

The Appellant claims that on June 20, 2001, he received four (4) affirmative votes and therefore he should be granted parole pursuant to the ruling in Barton. At the time the Appellant committed his offense, South Carolina law specifically stated:

> The Board may issue an order authorizing the parole which shall be signed either by a majority of its members or by all three members meeting as a parole panel on the case, ninety days prior to the effective date of the parole.

S.C. Code Ann. § 24-21-645 (Supp. 1984).

As part of the Omnibus Criminal Justice Improvement Act of 1986, additional language was added to state, "at least two-thirds of the members of the board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60." S.C. Code Ann. § 24-21-645 (Supp. 2012).

Due to this change, the Board was requiring all inmates convicted of committing a

violent offense receive two-third vote in the affirmative to be granted parole. However, the South Carolina Supreme Court recently decided that requiring an inmate convicted of a violent crime prior to 1986 receive a two-thirds vote to be granted parole is a violation of *ex post facto*. Barton, 404 S.C. at 412-14, 745 S.E.2d at 119-20.

In Barton, Ms. Thalma Barton was serving a life sentence for the offense of murder. She appeared before the Board on January 8, 2012, and of the six Board members present, four voted in favor of parole. Id. at 399, 745 S.E.2d at 112. The existing law required a two-thirds vote of all seven (7) members, so the Board determined Ms. Barton failed to receive the required number of votes to be released on parole. Upon receiving the order denying parole, Ms. Barton appealed. The South Carolina Supreme Court decided that since the law existing at the time of the offense allowed a majority to grant parole, it was unlawful to deny parole to Ms. Barton. Since the Barton decision, the Department has informed the ALC that five (5) other individuals have had their prior denials reversed and have been granted parole.

The Appellant claims that he should have his prior parole denial reversed in light of the Barton decision. The Appellant claims that he received four (4) votes in favor of parole at the June 20, 2001 hearing. The Appellant has provided the ALC with affidavits of Victoria Richardson, the wife of the Appellant, Peggy Granger, the sister of the Appellant, and Douglas Jennings, the attorney for the Appellant at the June 20, 2001 hearing. All of these affidavits claim that the Appellant received four votes granting parole.

The Department has provided the ALC and the Appellant with a transcript of the June 20, 2001 hearing. The transcript concludes with a vote tally, which was stated by the Chairman of the Board. The Chairman stated, "[f]inal votes are in. Gene Ray Richardson is rejected 1, 2 and 3. The vote is 4 to 2. Hearing concluded." The Appellant, and all affiants claim that the Appellant received four votes in favor of parole, however, the transcript concludes that at least three members conclusively voted against parole (Appellant "is rejected 1, 2 and 3") with the final vote total being four to two against the granting of parole.

In administrative proceedings, the general rule is that the burden of proof rests upon the party challenging the agency decision. See Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (2000). Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence on the whole record, arbitrary, or affected by an error of law. See S.C. Code Ann. § 1-23-380(5) (Supp.

2012); see also Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety, 337 S.C. 133, 522 S.E.2d 605 (Ct. App. 1999). In this case, the substantial evidence in the record supports the decision of the Department. The record, specifically the transcript, clearly determined that the Appellant did not receive the required majority affirmative vote for parole. Therefore, the decision of the Department denying the Appellant parole for the June 20, 2001 hearing in light of Barton is affirmed.

ORDER

IT IS THEREFORE ORDERED that the Department's decision denying Appellant's Petition for Release is **AFFIRMED**.

AND IT IS SO ORDERED.

CAROLYN C. MATTHEWS
S.C. Administrative Law Court

March 21, 2014
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 21st day of March 2014

BY _____
Judicial Law Clerk