

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kenneth Green, #116020,

Appellant,

vs.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

Docket No. 13-ALJ-15-0042-AP

ORDER

STATEMENT OF THE CASE

This case is before the South Carolina Administrative Law Court (“ALC”) pursuant to the appeal of Kenneth Green (“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 November 29, 2000. 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 21, 2013, which included affidavits from James M. Green, Sr., the father of the Appellant, James M. Green, Jr., the brother of the Appellant; and a letter from Douglas Jennings regarding another inmate’s parole hearing. The Department filed the Brief of Respondent on December 12, 2013. The Appellant filed his Reply Brief on December 19, 2013. On February 24, 2014, the ALC ordered, from the Department, the transcript of the November 29, 2000 parole hearing of the Appellant. On March 4, 2014, The Department provided the Appellant and the ALC the transcript of the November 29, 2000 parole hearing. After a thorough review of the complete record, including the transcript of the parole hearing, the ALC affirms the final decision of the Department denying parole to the Appellant.

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BACKGROUND

On October 24, 1982, the Appellant, along with his co-defendant, was drinking in a bar in Summerville. They observed the victim pull out a significant amount of cash to pay for his drink and leave. The victim proceeded to get into his truck and drove away, only to be followed by the Appellant and co-defendant. The Appellant and co-defendant proceeded to force the victim off the road. The appellant and co-defendant exited their vehicle, upon which time the Appellant, armed with a shotgun, shot the victim in the head, killing him instantly. The Appellant took twenty (\$20.00) Dollars in cash and another shotgun from the victim. On March 9, 1983, the Appellant appeared before the Honorable John Hamilton Smith for the offense of murder. The Appellant was sentenced to a term of incarceration for the remainder of his natural life.

The Appellant made his initial appearance before the Board on November 18, 1998. The Appellant has appeared before the Board an additional twelve (12) times since, each resulting in a denial of parole. The Appellant's last appearance occurred on January 30, 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. The Appellant filed his Petition for Release on August 13, 2013, claiming that he received four (4) votes in favor of parole at a hearing held on November 29, 2000, 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 November 29, 2000 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:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (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 November 29, 2000, 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 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 November 29, 2000 hearing. The Appellant has provided the ALC with affidavits of James M. Green, Sr., the father of the Appellant, and James M. Green, Jr., the Appellant's brother. 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 November 29, 2000 hearing. The transcript concludes with a vote tally, which was stated by the Chairman of the Board. The Chairman stated, "OK, let's see our votes please. OK. Kenneth William Green is rejected by a vote of four to two. Number 1, 2, 3 and 4." The Appellant and all affiants claim that the Appellant received four votes in favor of parole; however, the transcript concludes that four members conclusively voted against parole.

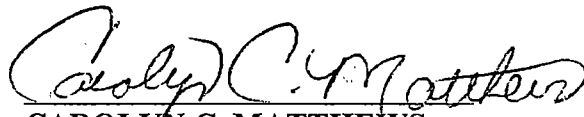
In administrative proceedings, the general rule is that the burden of proof rests upon the party challenging the agency decision. See Leventis v. S.C. Dep't of Health & Env'tl. Control, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (2000). Furthermore, an Administrative Law Judge may not reverse or modify an 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 November 29, 2000 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 heretofore, 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