STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Carolyn C. Matthews, Administrative Law Court Judge
[Administrative Law Court Docket No. 13-ALJ-15-042-AP]

Appellate Case No. 2014-000773

Kenneth William Green, #116020. . . . . Appellant

v.

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

INITIAL BRIEF OF APPELLANT

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APPELLANT, *pro se*

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II. THE ADMINISTRATIVE LAW COURT ERRED IN ITS INTERPRETATION OF THE RECORD PRESENTED IN DETERMINING APPELLANT DID NOT RECEIVE THE REQUISITE FOUR (4) VOTES TO BE GRANTED PAROLED IN LIGHT OF THE RECORD AS A WHOLE.

III. THE ADMINISTRATIVE LAW COURT EXERCISED CLEARLY UNWARRANTED DISCRETION PURSUANT TO S.C. CODE ANN. §§ 1-23-380 (A) (3) - (5) (SUPP. 2012) IN FAILING TO ADMIT EVIDENCE RELEVANT TO THE PAROLE BOARD VOTING PROCEDURES.

STATEMENT OF THE CASE

The *pro se* Appellant, Kenneth William Green ("Appellant") received a written Notice of Rejection dated November 29, 2000 based on Appellant receiving only four (4) votes in favor of parole, Record on Appeal ("**ROA**"). Appellant's current counsel for parole, Tommy A. Thomas, Esq., filed a Petition for Release, dated August 13, 2013, regarding the November 29, 2000 Parole Board vote, based on the Supreme Court decision in *Barton v. South Carolina Department of Probation, Pardon, and Pardon Service*,[1] **ROA**. The South Carolina Department of Probation, Parole, and Pardon Services ("Respondent") rejected the *Barton* Petition on August 27, 2013, **ROA**.

Appellant filed a timely Notice of Appeal, dated September 17, 2013 in the South Carolina Administrative Law Court ("ALC"), **ROA**. Respondent filed a Record on Appeal on October 8, 2013, **ROA**. Appellant filed his Initial Brief on November 19, 2013, which included affidavits from Appellant's father, James M. Green, Sr., and Appellant's brother, James M. Green, Jr. Both individuals aver that it was reported that Appellant received four (4) votes in favor of parole at the November 29, 2000 hearing, **ROA**. Respondent filed the Brief of Respondent on December 11, 2013, **ROA**. Appellant filed his Reply Brief on December 18, 2013, including the correspondence of Senator Douglas Jennings, Jr., regarding Parole Voting procedures in the case of *Gene Ray Richardson v. South Carolina Department of Probation, Pardon, and Pardon Service* [2] which established the procedure at issue in this appeal, **ROA**. On February 24, 2014 the Honorable Carolyn Matthews ordered Respondent to provide the transcript of Appellant's November 29, 2000 parole hearing, **ROA**. On February 3, 2014 the

[1] 404 S.C. 395, 745 S.E.2d 110 (2013)

[2] Appellate Case No. 2014-000770 (S.C. Ct. App.)

Appellant filed a Motion to Expand the Record with the Affidavit of Douglas Jennings, Jr., **ROA**. The ALC issued an Order denying expansion of the record on February 24, 2014, **ROA**. Respondent provided an uncertified transcript to the ALC and Appellant on March 3, 2014, **ROA**. On March 11, 2014, Appellant filed motions for Respondent to Provide a Certified Transcript, **ROA**; for Respondents to Provide the Secretary's Board Minutes Affecting Parole Board Voting Procedures, **ROA**; and To Permit Subsequent Addition to the Record Pursuant to S.C. Code Ann. § 1-23-380(A) (3) [Affidavit of Senator Douglas Jennings, Jr., regarding the Parole Member Voting Procedures], **ROA**. Respondent filed a Motion to Dismiss the Motion for Certified Transcript on March 19, 2014, [Affidavit of Senator Douglas Jennings, Jr., **ROA**. The Honorable Carolyn C. Matthews issued a Final Order in this matter, dated March 21, 2014, **ROA**, without addressing Appellant's March 11, 2014 motions, *Id.*

On May 13, 2014, Marlene T. McClain, a former member of the South Carolina Parole Board, executed an affidavit detailing the specific votes in the case of *Gene Ray Richardson v. South Carolina Department of Probation, Pardon, and Pardon Service, supra,* which clarifies the voting procedures and facts for rejection being reported upon which the Administrative Law Court based its March 21, 2014 Order, **ROA**.

Appellant submits that the affidavit of Ms. McClain is of particular import and relevance in the instant case where: (1) Ms. McClain was a voting member of the Board at Appellant's November 29, 2000 hearing; (2) Ms. McClain specifically avers that the reading of the factual reasons for rejection ("1, 2, 3 and 4") is not the number of rejection votes; and (3) Ms. McClain's subjective familiarity carries more insight and weight than any objective review of the obviously ambiguous nature of the record by Respondents or Judge Matthews.

Appellant filed a timely Notice of Appeal and a Motion to Proceed *In Forma Pauperis* in the instant matter dated April 9, 2014. By Order of this Court, dated May 19, 2014, Justice H. Bruce Williams granted the motion to proceed *in forma pauperis*. Appellant filed a Motion for Extension of Time up to and including June 18, 2014 in which to file his Initial Brief in this Court. This appeal seasonably follows.

FACTS OF THE CASE

Appellant was indicted in Dorchester County for murder committed on October 26, 1982. Appellant appeared before the Honorable John Hamilton Smith and was sentenced to a period of incarceration for life on March 9, 1983.

Appellant made his initial appearance before the South Carolina Board of Parole ("Board") on November 18, 1998. The Appellant subsequently appeared before the Board and was denied parole thirteen (13) times, each resulting in a denial of parole. Immediately following the November 29, 2000 hearing the Appellant and members of Appellant's family were informed by Parole Examiner Cindy Smith that "you got four (4) votes, you missed it by one (1)," **ROA**. The affidavit of James M. Green, Sr., avers that on November 29, 2000, upon returning home from the parole hearing of Appellant, that former Senator William S. Branton called Affiant and stated that Appellant "missed parole, he had only four (4) votes and he needed five (5)," **ROA**. Counsel present at the hearing was also personally aware that Appellant received four (4) votes for parole, **ROA**. At that time Respondents applied the amended version of S.C. Code of Laws Ann. § 24-21-645 (Supp. 1987) to require a vote of "two-thirds" (five (5) votes) in order to be granted parole.

Appellant has an outstanding institutional record. He has made a continued effort to rehabilitate himself under the limited resources available to him from the South Carolina Department of Corrections ("DOC"). Appellant is currently a participant in the DOC's Character Living Unit Initiative, a peer-to-peer community designed for rehabilitative preparation for re-entry into society. The Appellant has maintained steady employment and has received only three (3) disciplinary infractions in thirty-two (32) years of incarceration.

SCOPE OF REVIEW

The Court may affirm the decision of the agency or remand the case for further proceedings. The circuit court may reverse or modify an agency 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 (A) (5) (Supp. 2012).

The reviewing court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, *Id.* The Supreme Court's scope of review is the same as that established for the circuit court, *Brown v. South Carolina Dep't of Health & Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002).

STANDARD OF JUDICIAL REVIEW

South Carolina Code of Laws § 1-23-380(A)(6) established the "substantial evidence" rule as the standard of judicial review of an agency's findings of fact, *see Heater of Seabrook, Inc. v. Public Service Comm'n*, 332 S.C. 20, 503 S.E.2d 739 (1998). Substantial evidence is neither a mere scintilla of evidence nor evidence viewed blindly from one side of the case, but rather is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached, *In re: Carroll*, 295 S.C. 426, 368

S.E.2d 909 (1988); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's finding from being supported by substantial evidence, *Concerned Citizens Comm. for Ashley River v. South Carolina Coastal Council*, 310 S.C. 267, 423 S.E.2d 134 (1992).

The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings, *Able Communications, Inc. v. South Carolina Public Serv. Comm'n.*, 290 S.C. 409, 351 S.E.2d 151 (1986). In *Heater of Seabrook, supra*, the Court held that the findings of fact of an administrative agency must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings. Implicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make specific, express findings of fact. The Court further held that the need for specificity is particularly great when complex issues are involved. The Court recognized that the writing of orders / findings, without sufficient detail or analysis, coupled with the deferential standard of review, can make administrative decisions practically unassailable on appeal.

ARGUMENTS

I. The Administrative Law Court erred in affirming that the South Carolina Department of Probation, Parole and Pardon Services correctly denied Appellant parole based on the number of votes received at Appellant's November 29, 2000 eligibility hearing and the August 13, 2013 *Barton* Petition, in contravention of South Carolina Constitutional and Statutory Law, in light of the recent South Carolina Supreme Court ruling in *Barton v. South Carolina Department of Probation, Pardon, and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013).

In *Barton*, our Supreme Court found that retroactive application of §24-21-645 of the South Carolina Code constituted an *ex post facto* violation.

> Section 24-21-645 (Supp. 1984) read in part:
>
> The Board may issue an order authorizing the parole which shall be signed either by a majority of its 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 set forth, Appellant was sentenced prior to 1986. Prior to June 3, 1986, §24-21-645 (Supp. 1984) provided that the Parole Board may authorize parole when authorized by a **majority** of its members (emphasis added).

The Parole Board is comprised of seven members.[3] At Appellant's November 29, 2000 eligibility hearing at least four (4) members voted in favor of granting Appellant parole, **ROA**. According to §24-21-645 of the South Carolina Code, the Parole Board may issue an order authorizing parole signed either by a majority of its members or by any three members meeting as a parole panel.

The Parole Board erroneously applied the amended version of §24-21-645 which requires "at least two-thirds of the members of the board must authorize and sign orders authorizing

[3] See S.C. Code Ann. § 24-21-10 (2007)

parole for persons convicted of a violent crime..."[4] This meaning implied Appellant needed five votes, rather than four, to receive parole. This resulted in the Parole Examiner, Cindy Smith, informing Appellant and his family immediately following the November 29, 2000 hearing that "you got four (4) votes, you missed it by one (1)," **ROA**.

Appellant submits that the decisions of the Board on November 29, 2000 (parole hearing) and August 27, 2013 (*Barton* Petition) were made in violation of statutory provisions [S.C. Code Ann. § 24-21-645 (Supp. 1984)], S.C. Code Ann. §1-23-380(A) (5) (a); was in excess authority of the statutory authority of the agency, §1-23-380(A) (5) (b); was made upon unlawful procedure, §1-23-380(A) (5) (c); and was affected by an error of law, §1-23-380(A) (5) (e). The decision of the ALC to rely upon the unlawful procedure despite the substantial evidence in the record as a whole was arbitrary and capricious and was a clearly unwarranted exercise of discretion, §1-23-380(A) (5) (f).

The nexus of Appellant's complaint is that the pre-amendment version of §24-21-645 [Supp. 1984] should apply to this case because Appellant committed this crime prior to the amendment. Alternatively, Appellant asserts that he should have been granted parole even under the amended statute, as the Parole Board interpreted the statute erroneously and, the Respondent now seeks to assert an irregular voting procedure for the year Appellant received the required four (4) votes, **ROA**. And finally, that having earned four (4) votes in favor of parole on November 29, 2000, Appellant's *Barton* Petition should have been granted.

Appellant made good faith efforts to obtain written documentation from Respondent for the manner in which parole votes are called, collected, counted and published, **ROA**. Respondents resisted every attempt to provide Appellant with a logical procedure to equitably

[4] S.C. Code Ann. § 24-21-645 (1987)

provide due process in this administrative tribunal, **ROA**. Respondent's resistance to the specific requests made in the Administrative Law Court ("ALC") is an attempt to cast a veil of secrecy in order to deny Appellant (and similarly situated incarcerated individuals) the correct number of votes in favor of parole. One year the yea/grant votes are reported first; another year the nay/reject votes are reported first - all without established procedure, **ROA**.

Even the Office of the South Carolina Attorney General has sanctioned the deviation from *any* clearly established due process protocol:

> "Parole hearings are informal proceedings, and the Board or its panels may properly conduct them with a fairly free hand. What follows here is a model plan for conducting hearings. In the experience of both the Board and the Department, this model has worked well. It is only a model, and *the Board or its panels are free to deviate from it.*)[5]
> (Emphasis supplied)

The procedure employed is mired so thickly in secrecy that it allows the parole vote procedure to operate unmonitored, without accountability or without knowledge of even Legislators or Attorneys.

The November 4, 2010 correspondence to Representative Huggins highlights how vague and ambiguous the procedure employed operates in the voting process: "***After deliberations, a voice and electronic vote is cast.***"[6] Respondents follow no specific procedure consistently and allegedly keep no written record of the proceedings.

Appellant asserts Respondents will not or cannot produce a published protocol to call for, collect, count and publish the "voice and electronic" (i.e., hand-raising, green/red light, or written ballot) Parole Board votes at eligibility hearings. Appellant submits Respondent's

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[5] Correspondence from Leigh Blackwell, Assistant Attorney General to Honorable Chip Huggins, S.C. House of Representatives, November 4, 2010, page 3, **ROA**.

[6] *Id.* (Original emphasis)

Operations Manual[7] is vague and ambiguous regarding an exact procedure employed sufficient to allow confidence and certainty in the outcome. Appellant sought to have the *Operations Manual* placed in the lower court record to substantiate this position, **ROA.**

Appellant suggests Respondents have failed to and refused to show the exact manner and method of these procedures in a clear and written manner, specifically as employed on November 29, 2000. The reviewing standard of the ALC required Respondents to produce a procedure by which that Court could determine the matter on reliable and accurate evidence and the record as a whole. Appellant submits that the decisions of the Board on November 29, 2000 and August 27, 2013 were clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, S.C. Code Ann. §1-23-380(A) (5) (e).

Appellant suggests that professional organizations, associations or Boards employing a method of voting historically, by custom, practice or procedure, call for "yea" [in favor] votes prior to "nay" [oppose] votes and "abstain" [no vote] votes. Where the procedure employed is in question, the Parole Board cannot produce documentation that establishes a different, reliable procedure.

Upon review of the November 29, 2000 parole hearing transcript [as a matter of custom and practice] the Chairman reports the number designated on Form 1212 criteria (1 - 15) as the factual reasons for the denial of parole ("1, 2, 3, etc." with 1, 2, 3 and 4 being the standard factual reasons). This reporting procedure is regularly misconstrued [as the ALC did here] as the number of votes.

Appellant asserts that on November 29, 2000, the Board reported four (4) votes first. Where the burden is initially on the Appellant, the Appellant here has made a diligent effort to

[7] *South Carolina Board of Paroles and Pardons Operations Manual*, January 2014

obtain the necessary documents from Respondent to rebut Respondent's assertions by clear and convincing evidence, **ROA**. Appellant suggests Respondent is the sole official custodian of all relevant government documents to show this assertion is incorrect and Respondents continue to deny any written record exists.

In Appellant's Petition for Release, Item #1, **ROA**, counsel stated that Appellant received four (4) votes [first].

The affidavit of Respondent's agent, Roosevelt Hicks, states that Mr. Hicks reviewed

> "[t]he audio cassette of Mr. Kenneth Green from his hearing held on November 29, 2000, as well as reviewed all paperwork involved with his November 29, 2000 hearing. The seven members present at this hearing were Mr. Baxter, Mr. Elliott, Mr. Bellay, Mr. Hodges, Bishop Rembert, Ms. Shissias, and Ms. McClain. While all seven members appear to be present at the hearing, the Chairman indicates that four members voted to reject Mr. Green and two voted in favor, therefore, the required number of votes were not received in order to be conditionally paroled pursuant to the Barton decision." **ROA.**

This same language was utilized by counsel for Respondents in rejecting Appellant's *Barton* Petition, **ROA**

Mr. Hicks further averred:

> "[t]he reading of the votes four to two meant four votes to reject parole and two votes in favor of parole as ***it was the practice of the Board at the time to read rejection votes first.***" **ROA**. (Emphasis added).

The affidavit of Mr. Hicks avers that he "reviewed" the "audio cassette" and "all paperwork" from the November 29, 2000 hearing, but stated that while it appeared all seven members were present, the Chairman "indicated" only six members voted. Mr. Hicks does not delineate exactly how it "appears" the Chairman "*indicated*" the voting (**ROA**) without providing some type of documentary evidence. Counsel for Respondent in denying Appellant's *Barton* Petition used the identical language for reviewing the matter and assessing the Chairman's indication.

Appellant asserts that a state agency charged with discretion to grant the liberty of an incarcerated individual, a ward of the State, is similarly charged with maintaining those records for the duration of that agency's jurisdiction over the individuals. There is no feasible reason such records of an individual, as Appellant here, are not kept where [he] has "appeared" before the Board thirteen (13) times. At a minimum, the Board stores such records at the State Archives and should be required to produce those records. Appellant suggests that Respondents are required to maintain such records pursuant to S.C. Code Ann. §§ 60-2-10 et seq. and 60-11-10 et seq.

Appellant submits the affidavits of James M. Green, Sr. and James M. Green, Jr., who were personally present, aver that Parole Examiner Cindy Smith clearly state "you got four (4) votes, you missed it by one (1)," **ROA**. Respondents do not provide the affidavit of Ms. Smith to rebut this evidence in the record. In deed, Respondents supply no reliable evidence that would allow a reasonable mind to reach the same conclusion as the Administrative Law Judge based on the record before the ALC.

Where Respondents sought to suggest that "No" votes were reported first during the years 2000 and 2001, **ROA**, Appellant submits the November 12, 2013 correspondence of Senator Douglas Jennings, Jr., clearly substantiates the procedure of vote calling, collecting and publishing of the Parole Board in the years 2000 - 2001, **ROA**. Senator Jennings' correspondence and affidavit (**ROA**) challenge the veracity of and contravene the Record before the ALC by Respondents, **ROA**, as the affidavit directly refutes Respondent's August 27, 2013 response, **ROA**, to Appellant's August 13, 2013 Petition for Release.

The affidavit of Marlene T. McClain (**ROA**) clearly settles any questions regarding the voting procedure and reporting method employed during the time of the November 29, 2000

hearing; and qualifies as substantial evidence which Respondents have failed to rebut by any documentation other than the conclusory assertions relied upon.

Ms. McClain's affidavit has specific relevance in this case, not only because she was also a voting member on this Appellant's November 29, 2000 hearing as well as the June 20, 2001 hearing of *Gene Ray Richardson, supra*, for which the affidavit was offered; but because this affidavit specifically details the inconsistencies and errors of the affidavit of Mr. Hicks and the August 27, 2013 denial of the *Barton* Petition by Respondent's counsel.

Appellant asserts that Respondents manipulated the interpretation of the reporting of Parole Board votes to wrongfully deny Appellant parole.

Appellant suggests that pre-1986 sentenced prisoners being incorrectly considered under the amended "two-thirds" language, even though receiving four votes, were rejected for not having five votes. When the vote was reported "Rejected, 4 to 2," it was simple to adopt an implication that it was four votes against. Short of the affidavits provided by Ms. McClain, Senator Jennings, and the two family members, Respondent has provided not a scintilla of evidence to support the conclusory assertion affirmed by the Administrative Law Court.

The *Barton* Court held "the change in parole consideration under §24-21-645 offends South Carolina Constitution, article I, § 4, even if the federal constitution is not offended." (Internal citations omitted.) In other words, prior to the amendment, Appellant merely needed to obtain favorable votes from a majority of the Parole Board. This amendment is not procedural, but poses a sufficient risk of increasing the measure of punishment attached to Appellant's crime and other similarly situated individuals.

This change affects an inmate's substantial personal right to statutorily correct parole review. *See Cooper v. S.C. Dep't of Probation, Parole and Pardon Services* ("Parole is a

privilege and Cooper has no right to be parole; however, Cooper does have a right to require the [Parole Board] to adhere to statutory requirements in rendering a decision.")[8]

The validity of the procedures employed, despite any statutory discretion, call into question the tactical resource manipulation of procedural and resource data by Respondents in the execution of their quasi-legislative and quasi-tribunal duties that deprived Appellant of a liberty interest and fair opportunity for parole. Every record and procedure in question in this matter is in the sole possession of Respondents.

Appellant submits that the affidavits of those parties personally present, to include counsel familiar with the proceedings and a member of the Board that day suggest that Appellant won four (4) votes in favor of parole on November 29, 2000.

[8] 337 S.C. 489,499, 661 S.E.2d 106, 111-112 (2008).

II. The Administrative Law Court erred in basing its ruling on a misinterpretation of a questionable and potentially inaccurate record in finding Appellant did not receive four (4) votes in favor of parole on November 29, 2000, in light of the remaining substantial evidence in the record as a whole.

The March 21, 2014 order of the ALC based her findings on the transcript of the November 29, 2000 parole hearing:

> "[c]oncludes with a vote tally, which was stated by the Chairman of the Board. The Chairman stated, '[f]inal votes are in. Kenneth Green is rejected 1, 2 3 and 4. The vote is 4 to 2. Hearing concluded.'"

Order, March 21, 2014, p. 4, **ROA.**

The ALC continued:

> "The Appellant, and all affiants claim that 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 3 and 4') with the final vote total being four to two against the granting of parole."

Id.[9]

The ALC finally concluded:

> "[t]he 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 votes for parole."

Id. p. 5, **ROA**

Appellant suggests the findings of the ALC based solely upon the uncertified transcript are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, *see* S.C. Code Ann. § 1-23-380(A) (5) (e). Where the ALC had every opportunity to consider written records suggested by the Appellant, **ROA**, but declined to require Respondent

[9] This same assertion was set forth by Respondents in the August 27, 2013 Rejection of Appellant's *Barton* Petition, **ROA**

to provide specific evidence requested to substantiate or rebut Appellant's parole, the ALC findings are arbitrary and capricious and characterized by a clearly unwarranted exercise of discretion, § 1-23-380(A) (5) (f).

Appellant submits that in satisfying the burden of persuasion in challenging an administrative agency; *see Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 550 S.E.2d 643 (2000), he has made every reasonable and diligent effort to provide and / or obtain substantial evidence; of which any official agency records are in sole control of Respondent, who objects to providing or insinuates that the agency does not keep written records (**ROA**), despite their own *Operations Manual*, [10] and the requirements of S.C. Code Ann. §§ 60-2-11 (Supp. 1989) and 60-11-10 (Supp. 1989), **ROA**.

Appellant's Original Brief contained evidence in the form of affidavits and correspondence **(ROA)** sufficient to be considered where no agency records are provided.

Appellant's Reply Brief included and referenced the affidavit of Senator Jennings, who was adamant about voting procedures employed, **ROA**, as well as cited the Board's *Operations Manual* regarding written records and voting procedures, **ROA**.

When the ALC ordered Respondent to provide a transcript, Respondents allowed their own agent to transcribe from the tape and the transcript is questionable in areas and omits details raised in each of the affidavits. The transcript was not certified and is potentially inaccurate.

Respondent's actions did not comply with S.C. Code Ann. § 1-23-380 (A) (3) which prescribes that within 30 days after service of a petition, or further time allowed by the court, the agency must transmit to the reviewing court the original or certified copy of the entire record. Respondent argued that either no "transcript" existed or no certification was required, **ROA**.

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[10] Pg. 16, **RESPONSIBILITIES OF THE DEPARTMENT'S DIRECTOR AND STAFF §7. MAINTAINING THE OFFICIAL RECORDS OF THE BOARD** (Original emphasis)

Appellant suggests that the transcript (Amended Record), **ROA**, may not satisfy this Court and Appellant invites the Court to order Respondents to turn over the cassette tape of the November 29, 2000 hearing for the Court's review *sua sponte* or at oral arguments.

In an effort to gain an official written record as to which members voted for or against Appellant's parole on November 29, 2000; and discover the accuracy of Respondent's assertion that the Board changed the procedure to count and report "no" votes first only for the years 2000 and 2001, **ROA**, which was an attempt to bolster the reporting method of "Rejected, 4 to 2;" Appellant sought the Board Secretary's Minutes of any such meeting, which the Director is mandated by the *Operations Manual* to retain, *supra*.

Appellant submits that the ALC grievously erred in misinterpreting the transcript language "Kenneth William Green is rejected 1, 2, 3 and 4. The vote is 4 to 2," **ROA**. The ALC further misunderstood the language "is rejected 1, 2, 3 and 4" and finding "at least XXXX members conclusively voted against parole," **ROA.**

The affidavits of James M. Green, Sr. and James M. Green, Jr. detail that the Parole Examiner, Cindy Smith, informed them that "you got four (4) votes, you missed it by one (1)," **ROA**.

The most substantial evidence, however, is the affidavit of former Parole Board Member Marlene T. McClain, in the case of *Gene Ray Richardson, supra*, who details the voting procedure and that the vote report of reading off numbers is the factual basis of the rejection and not the number of reject votes.

Appellant submits that the Administrative Law Judge misinterpreting the language in the Amended Record to affirm the denial of Appellant's *Barton* Petition was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, was arbitrary and

capricious or characterized by a clearly unwarranted exercise of discretion and affected the substantial rights of Appellant.

III. The Administrative Law Court exercised clearly unwarranted discretion pursuant to S.C. Code Ann. §§ 1-23-380 (A) (3) - (5) (Supp. 2012) in failing to admit evidence relevant to the Parole Board voting procedures.

Appellant submits that the ALC was obligated by statute to allow and admit evidence relevant to the issues and necessary determination and that such denial was an unwarranted exercise of discretion that prejudiced a fair determination and the outcome of the proceedings.

Appellant suggests that Respondents have intentionally withheld written documents that denote the proceedings of November 29, 2013 and the ALC exercised clearly unwarranted discretion in her failure to order ***all*** relevant documentation placed in the record for consideration.

Appellant submits the existence of conflicts beg this Court for a closer view. The affidavit of Mr. Hicks avers he has "reviewed all paperwork involved with his [Appellant's] November 29, 2000 hearing," **ROA**, yet Respondents have failed to offer in support and even objected to producing said "paperwork," **ROA.**

In Respondent's Motion to Deny a Certified Transcript, counsel states "The Respondent only kept audio recordings of hearings from 2001; therefore, the original recording of the 2000 hearing was erased," **ROA**.

Appellant diligently sought to have included for the ALC's consideration the Secretary's Board Minutes Affecting the Parole Board's Voting Procedures, **ROA,** and the affidavit of Senator Douglas Jennings, Jr., **ROA**. The ALC declined to order Respondents to provide any documents or records requested on the issue(s), **ROA**.

Appellant submits that the affidavit of Mr. Hicks reveals Respondent's position regarding the vote reporting "4 to 2" is because "it was the practice of the Board at that time to read the rejection votes first," **ROA**.

Appellant submits that it was based on that exact position that the motion was made to incorporate the Official Records of the Board, **ROA,** to substantiate the claim that the Board voted or decided to count and report "no" votes first. Appellant asserts those records remain necessary to the determination and by law, must exist.

The Director is mandated by the *Operation Manual*[11], *supra*, to retain such records. Appellant poses a query to what purpose such regulation of records if not to keep a legal record of government action imbued with quasi-legislative and quasi-tribunal authorities?

As previously set forth, the affidavit of Senator Douglas Jennings is relevant to the disposition where it is not cumulative and provided clarity to a very murky and veiled procedure.

Sections 1-23-380 (4) and (5) address issues related to the presentation of additional evidence and discovery.

If an application is made to the Court [ALC] for leave to present additional evidence, and it is shown that the additional evidence is material and there were good reasons for failure to present it in the proceeding before the agency upon conditions determined by the court, the agency may modify its findings and decision by reason of the additional evidence and any modifications, new findings, or decisions with the court. See S.C. Code Ann. § 1-23-380 (A) (4).

Appellant here made the appropriate motion(s), **ROA**, which complied with all prerequisites of the statute. In all cases of alleged irregularities in procedure before the agency,

[11] Page 16, §

not shown in the record, proof thereon may be taken, See S.C. Code Ann. § 1-23-380 (A) (5); *Ross v. Medical Univ. of S.C.,* 317 S.C. 377, 453 S.E.2d 880 (1994).

Appellant submits the motions in the **ROA** were specifically directed toward addressing and resolving the alleged irregularities with the Board's procedures.

When a trial court excludes evidence, the party seeking its admission generally must proffer such evidence in order to preserve the issue of its admissibility for appellate review, *Ellis v. Oliver,* 323 S.C. 121, 423 S.E.2d 793 (1996). The purpose of a proffer is to adequately develop the record in order to allow the appellate court a chance to determine whether the Appellant was prejudiced by the trial court's refusal to admit the evidence, *see State v. Anderson,* 304 S.C. 551, 406 S.E.2d 152 (1991).

Appellant submits that the affidavit of Senator Douglas Jennings, Jr., was presented to Respondents, who argued against inclusion, **ROA**, and the Court, and is thus preserved.

Appellant properly filed motions for Respondents to provide the Secretary's Board Minutes (re: voting procedures), **ROA**, and written records of the Board for November 29, 2000.

The ALC's October 23, 2013 Order held that Respondents were "not required to provide further documents for addition to the current record on appeal," **ROA**. The ALC failed to issue a ruling on the March 11, 2014 Motions, **ROA**.

This Court has previously held that generally, where a party raises an issue, but the issue is never ruled upon by the trial court, and the party fails to file a motion to alter or amendm the issue is not preserved, *see South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group,* 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001).

Once a final order on the merits is issued, the prior discovery order [October 23, 2013] becomes appealable, see *Hamm v. S.C. Pub. Serv. Comm'n.*, 312 S.C. 238, 439 S.E.2d 852 (1994).

Appellant suggests that a post-trial motion made in the ALC, in light of Rule 65, ALJDRP, would be a futile effort where Rule 65 bars any motion for reconsideration[12], and thus the elements of the motion in the Appellant's Brief(s), **ROA**, and [their] inclusion in the ROA preserve the matter(s) for review. Further final, orders, as in the instant March 21, 2014 order, are appealed to this Court pursuant to S.C. Code Ann. § 1-23-610 (Supp. 2011).

SUMMARY

Appellant's substantial rights have been prejudiced where the November 29, 2000 parole hearing and August 27, 2013 *Barton* Petition decisions by Respondents were clearly erroneous in view of the substantial evidence on the whole record and was arbitrary and capricious. Appellant was further prejudiced where the ALC failed to reverse or modify either decision.

In light of the fact that Appellant lawfully met the requisites (four votes in favor) to be granted parole on November 29, 2000 and has remained incarcerated an additional thirteen (13) years, Appellant's August 13, 2013 *Barton* Petition should be granted immediately to avoid further injury or injustice.

[12] Rule 65, ALJDRP reads in part: "The decision of the Administrative Law Judge is a final decision and motions for reconsideration will *not* be considered." (emphasis added).

CONCLUSION

For the reasons stated, this Court should reverse the November 29, 2000 and August 27, 2013 decisions of the South Carolina Department of Probation, Parole and Pardon Services and the March 21, 2014 judgment of the Administrative Law Court.

Respectfully submitted,

June 10, 2014

KENNETH WILLIAM GREEN
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APPELLANT, *pro se*

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Carolyn C. Matthews, Administrative Law Court Judge
[Administrative Law Court Docket No. 13-ALJ-15-042-AP]

Appellate Case No. 2014-000773

Kenneth William Green, #116020 ..... Appellant

v.

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

PROOF OF SERVICE

The undersigned hereby certifies that he has served a true and correct copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on counsel for Respondent, by placing a copy in the U.S. Mail, first-class postage affixed thereto, this 11th day of June, 2014, addressed as follows:

Tommy Evans, Esq.
General Counsel
S. C. Department of Probation, Parole, and Pardon Services
2221 Devine Street, Suite 600
P.O. Box 50666
Columbia, SC 29501

Kenneth W. Green

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APPELLANT, *Pro se*

William Kenneth Green
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June 10, 2014

The Honorable V. Claire Allen
Deputy Clerk
Court of Appeals of South Carolina
Post Office Box 11629
Columbia, South Carolina 29211

Re: *William Kenneth Green v. SCDPPPS*
Appellate Case No. 2014-000773

Dear Ms. Allen:

Please find enclosed for filing in the above-referenced appeal the Appellant's Initial Brief , pursuant to Rule 208(a), SCACR, and the Designation of Matter to be Included in the Record on Appeal, pursuant to Rule 209(a), and proof of service on counsel for Respondents.

If this filing does not comport with Appellate Court Rules, please advise me immediately so I may correct any deficiency.

Your assistance in this matter is sincerely appreciated.

With kindest regards, I remain,

Sincerely,

Kenneth W. Green

William Kenneth Green
APPELLANT, *pro se*

Cc: Tommy Evans, Esq.

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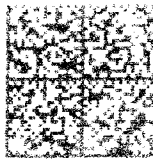
FIRST CLASS



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The Honorable V. Claire Allen
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