

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Phillips A. Brown, #118100)
)
 Appellant,)
)
 vs.)
)
 South Carolina Department of Probation,)
 Parole and Pardon Services,)
)
 Respondent.)
 _____)

Docket No. 14-ALJ-15-0041-AP

ORDER **FILED**

May 18, 2015

SC ADMIN. LAW COURT

This matter is before the South Carolina Administrative Law Court (Court or ALC) upon Phillips A. Brown's (Appellant) appeal from the decision issued September 8, 2010 by the South Carolina Department of Probation, Parole and Pardon Services (Department). By letter dated September 22, 2014, the Department informed Appellant that he was not eligible for parole under the *Barton v. S.C. Dept. of Probation, Parole and Pardon Services*.¹

FACTUAL/PROCEDURAL BACKGROUND

In 1983, Appellant was convicted of murder, burglary, and armed robbery committed in 1982. In 1984, Appellant received an additional sentence of ten years for unauthorized use of a motor vehicle; ten years for vehicle theft; and two years for escape, all relating to escape from his incarceration. Because of the law at the time Appellant committed these offenses, Appellant, though serving a life sentence for murder, became parole eligible upon service of twenty years.

Beginning with his first parole hearing, on February 7, 2001, the Department denied Appellant parole at each of the parole hearings leading up to his last hearing in April 2010. Following the April 2010 parole hearing, on April 14, 2010, five of the seven members of the Parole Board (Board) voted to grant Appellant a conditional parole.² However, it was thereafter discovered that the requisite notice had not been given to the victims of Appellant's crimes and/or their families,

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

² The Department states in its Respondent's Brief that Appellant received six votes. However, the Order of Parole, which was later rescinded on September 8, 2010, bears five signatures. Regardless, because the 1982 version of S.C. Code Ann. § 24-21-645 applies to Appellant, only a majority of the Parole Board members present is required for Appellant to be granted parole; thus either five or six votes would have been sufficient to constitute a majority of the seven-member Board.

the solicitor's office, and law enforcement as required under S.C. Code Ann. § 24-21-610 (2007). Because this required notice was not sent to proper parties for the April 2010 parole hearing, the Board held a second hearing during which the victims and/or their families, law enforcement, and the Fifth Circuit Solicitor were allowed to testify, though Appellant was not present at this hearing. Upon conclusion of the rehearing, the Board denied Appellant parole for the reasons set forth in the September 9, 2010 letter it sent him.

Appellant appealed the 2010 decision to the ALC. On October 14, 2011, Judge McLeod issued an order dismissing Appellant's appeal with prejudice. Appellant did not appeal Judge McLeod's order. Then, on October 9, 2014, Appellant filed a Notice of Appeal with the ALC, arguing that in light of a recent South Carolina Supreme Court decision, *Barton v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013), the Parole Board should have granted him parole based on receiving a majority of votes of the Parole Board present. He also argued that the Board's denial of parole following the April 14, 2010 grant of parole was arbitrary and capricious, and violated his due process and equal protection rights.

The Notice of Assignment was filed on October 16, 2014, and the Record on Appeal was filed on November 18, 2014. Appellant filed his Brief on December 10, 2014, The Department filed its Brief on February 9, 2015, and Appellant filed a Reply Brief on February 19, 2015.

ISSUE

Whether, in light of the *Barton* decision, the Parole Board violated Appellant's due process and equal protection rights by arbitrarily and capriciously rescinding its decision to grant Appellant parole and, following a second hearing, denying Appellant parole after a majority of the members of the Parole Board attending the April 14, 2010 had voted in favor of parole eligibility.³

³ Both Appellant and Respondent list essentially the same three Issues on Appeal. However, these issues can be summed up in the sole issue as set forth above. Indeed, Appellant incorporates the latter two issues at the end of his first issue discussion. Moreover, were this Court to consider the latter two issues as separate issues, as Appellant has separately stated them, the Court would have to dismiss them, because the arguments, though both citing *Barton* and S.C. Code Ann. § 24-21-645 (Supp. 1984) (he should have cited to the 1982 version, as that was the year of his crime, not the year of his sentencing), his arguments still amount to one-sentence conclusory statements. See *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 549, 730 S.E.2d 340, 351 (Ct. App. 2012) (noting that while the appellants cited a case to support a claim, the argument was nevertheless considered "largely conclusory" and still considered abandoned on appeal); *State v. Hill*, 394 S.C. 280, 297, 715 S.E.2d 368, 377 (Ct. App. 2011) (considering a citation to a case "without any analysis whatsoever as to how or why [it] applies" insufficient to preserve an issue on appeal, and thus rendering that issue abandoned on appeal).

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) and *Furtick v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003). When reviewing the Department's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Id.* at 377; 527 S.E.2d at 754; *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2014) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380(A)(5) states:

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. 2014).

Consequently, an Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." *Id.* Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless the Record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence, arbitrary or affected by an error of law. *Id.*; *see also Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998). "Substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d

304, 306 (1981) (quoting *Law v. Richland County Sch. Dist. No. 1*, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)). Accordingly, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

DISCUSSION

Appellant argues that in light of the South Carolina Supreme Court's 2013 decision in *Barton* and pursuant to the requirement under the version of S.C. Code Ann. 24-21-645 applicable at the time of his crime (1982), only a majority of votes of the Parole Board's members was required to grant parole. Appellant thus argues that the five votes in favor of parole that he received at his April 14, 2010 parole eligibility hearing, which constituted a majority of the Parole Board, should have resulted in his parole. He argues that it was arbitrary and capricious, and violative of his due process rights for the Department to ignore the statutory requirements of Section 21-24-645 and *Barton*.

However, from the outset, the premise underlying Appellant's argument – that *Barton* retroactively applies to past parole decisions – is in error. In South Carolina, “[t]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively.” *Lord v. D&J Enters., Inc.*, 407 S.C. 544 554, 757 S.E.2d 695, 699 (2014); *see also, e.g., Truesdale v. Aiken*, 289 S.C. 488, 347 S.E.2d 101 (1986) (limiting the retroactive effect of a recently decided case on a death sentence to **cases pending on direct appeal** and holding that the case did not apply on collateral attack) (emphasis added). Therefore, *Barton* does not apply to parole cases already finally decided and no longer on appeal.

Also, though Appellant's April 2010 hearing and his first subsequent appeal to the ALC occurred prior to the decision in *Barton*, Appellant could have raised the argument that approval from only a majority of the Parole Board was required to grant him parole pursuant to the version of Section 24-21-645 applicable at the time of his crimes. Because Appellant could have raised this argument in his appeal before Judge McLeod, he was procedurally barred by res judicata from doing so in his Petition for Release below. *See Catawba Indian Nation v. State*, 407 S.C. 526, 537, 756 S.E.2d 900, 906-07 (2014) (“Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action

between those parties. Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” (internal quotation marks, brackets, citations omitted)). Therefore, this Court cannot entertain this argument.

Moreover, even if *Barton* applied retroactively and even if the Court considered Appellant’s Section 24-21-645 argument, it would not make a difference in the outcome of this case because this case is distinguishable from *Barton* in several respects. First, *Barton* involved a question of which version of the law would apply in determining whether the number of votes in favor of parole was sufficient to grant parole and whether that number was determined based upon the whole board or upon a quorum participating in the hearing. These questions were not at issue in the instant case. Indeed, unlike in *Barton*, the Board initially granted parole in this case; there was no dispute that Appellant received the number of favorable votes required for parole. But the number of votes that Appellant received had nothing to do with why his parole was rescinded and subsequently denied following the second hearing.

Also, the Parole Board, unlike in *Barton*, rescinded Appellant’s parole, which it was able to do since that parole was conditional. Pursuant to Section 24-21-645 (1982) and *Barton*, a majority of the Board (i.e., a majority of those members participating in the hearing where there is a quorum) is all that is required to sign the parole order,⁴ even for violent offenses. However, Section 24-21-650 (1982) requires “the director, or one lawfully acting for him, [to] issue a parole order, which, if accepted by the prisoner, provides for his release from custody.” In this case, neither the director nor anyone acting on his behalf issued the parole order. Also, the Board received information after it made its initial decision that the victims and/or their families, the solicitor’s office, and law enforcement had not been given the required notice. Because this notice is required by S.C. Code Ann. § 24-21-610 (2007), the Board reasonably considered this information to be so important that it decided that rescission and reconsideration of the case was necessary. The Board had the authority to make this decision pursuant to the South Carolina Board Operations Manual. Therefore, the Board’s rehearing and subsequent denial of parole for Appellant was proper and not capricious or arbitrary.

⁴ Section 24-21-645 (1982) also allows, as an alternative requirement to signatures from a majority of the Board, the signatures of all three members of a parole panel.

Another distinction, as alluded to above, is that unlike *Barton*, this case involves a procedural error in the hearing process. Section 24-21-610 requires notice to be given to the solicitor (and judge) who participated in the trial, the victim(s) and/or their families, and the sheriff of the county where the prisoner resides or will reside. In this case, no notice had been given to the victims and/or their families or to law enforcement. Judge McLeod addressed this issue in his October 14, 2011 Order, finding that the first hearing was not complete because the requirements of Section 24-21-610 had not been met.⁵ And because Appellant failed to appeal Judge McLeod's opinion, Judge McLeod's Order became the law of the case. Furthermore, this case involves the same parties and the issue has already been ruled on by McLeod and was necessary to his judgment, and thus Appellant was procedurally barred from relitigating it based on collateral estoppel. *See* Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim."); *see also, e.g., S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (adopting the general rule for the offensive use of collateral estoppel as set forth in Restatement (Second) of Judgments § 27), *cited in Kunst v. Loree*, 404 S.C. 649, 657, 746 S.E.2d 360, 363 (Ct. App. 2013)).⁶

As to Appellant's due process and equal protection claims, Judge McLeod already decided that an inmate does not have a right to parole, based on *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979), and that Appellant had not been released on parole and therefore did not have the minimal due process rights afforded under *Morrissey v. Brewer*, 408 U.S. 471 (1972) to a person facing parole revocation. Appellant nevertheless contends that the Department failed to correctly apply *Barton* and Section 24-21-645, which "arbitrarily and capriciously" denied him parole in "contravention of due process." However, as discussed earlier, *Barton* does not apply retroactively. But even if *Barton* does so apply, though Appellant received after his first eligibility hearing the majority of votes required by 24-21-645 (1982), as "majority" is defined in *Barton*, the director (or someone on his behalf) never issued a final parole order

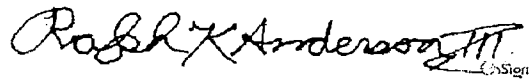
⁵ Even had the Board not rescinded its parole order, the order would still have been void *ab initio* had it been issued, because it denied procedural due process to the State by depriving it of statutorily required notice. Thus, the Board's April 14, 2010 decision would still have been invalid had it not been rescinded.

⁶ In Restatement (Second) of Judgments § 28 (1982), there are five (5) exceptions to the general rule in § 27. However, Appellant's case meets none of these exceptions.

pursuant to Section 24-21-650. In addition, Judge McLeod already found that Appellant was never released on parole because the requirements of Section 24-21-610 had not been met, and thus due process rights did not attach. Furthermore, the conditional parole granted to Appellant was properly rescinded because of the aforementioned procedural defect, which made the conditional parole void *ab initio*.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **AFFIRMED**.
AND IT IS SO ORDERED.

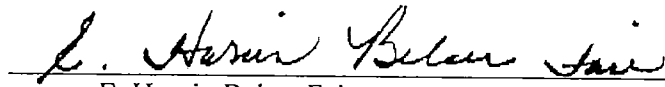
Handwritten signature of Ralph King Anderson, III in cursive script. The signature is written in black ink and includes the name "Ralph King Anderson, III" with a small "CSign" mark at the end.

Ralph King Anderson, III
Chief Administrative Law Judge

May 18, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

May 18, 2015
Columbia, South Carolina

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