STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

David Lee Rose, #91858, Appellant, vs. South Carolina Department of Probation Parole and Pardon Services, Respondent.	Docket No. 15-ALJ-15-0033-AP **ORDER**

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SC Court of Appeals

STATEMENT OF THE CASE

This case is before the Administrative Law Court (ALC or Court) pursuant to the appeal of David Lee Rose (Appellant), an individual re-incarcerated with the South Carolina Department of Corrections in 2000 after violating the terms of the parole he was granted in 1987. On June 20, 2001, the South Carolina Department of Probation, Parole and Pardon Services (Department) Parole Board (Board) held a hearing to determine whether Appellant should be released on parole again. The decision of the board was recorded as denied by the Department. Appellant challenged this denial before both the Circuit Court and the ALC arguing that, because he received four favorable votes to two unfavorable votes, the Board had actually granted him parole. Both cases were dismissed. At that time, the Appellant's challenge was dismissed by the ALC judge, who ruled it was not properly before this Court. See David L. Rose, #91858 v. S.C. Dept. of Prob., Parole & Pardon Servs., 06-ALJ-15-0016-AP (S.C. Admin. Law Ct., May 14, 2007).

However, in 2013, the South Carolina Supreme Court ruled on issues very similar to those raised by Appellant. See Barton v. S.C. Dept. of Prob., Parole & Pardon Servs., 404 S.C. 395, 745 S.E.2d 110 (2013). Subsequent to that case, the Department began holding "Barton Hearings" to apply the holding in Barton to inmates whose prior parole hearing vote count qualified as a release, rather than a denial, under the law as construed by the Supreme Court. Based upon the Barton case, Appellant again filed with the Circuit Court. Following an investigation conducted at the behest of the Circuit Court judge, the Department issued a decision concluding that Appellant is not eligible for release under the Barton holding, citing a lack of evidence of the vote count from the 2001 hearing. The Circuit Court dismissed the case, finding that jurisdiction of the case fell to the ALC. On June 1, 2015, Appellant's counsel filed a Notice of Appeal with the ALC, which the

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Department challenged as untimely. On July 30, 2015, this Court issued an Order ruling the Notice of Appeal timely.

ISSUE ON APPEAL

Whether the Department erred in determining that Appellant did not have enough votes to be eligible for release under the holding in Barton.

STANDARD OF REVIEW

The ALC's jurisdiction to hear this matter is derived from the South Carolina Supreme Court decisions in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), and Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs., 352 S.C. 594, 576 S.E.2d 146 (2003). The Al-Shabazz decision explained that "procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property." Wicker v. S.C. Dept. of Corrs., 360 S.C. 421, 424, 602 S.E.2d 56, 58 (2004) (citation omitted). This Court does not review the routine denial of parole,[1] but does review decisions of the Department to ensure that an inmate's Constitutional rights are not infringed. See Cooper v. S.C. Dept. of Prob., Parole & Pardon Servs., 377 S.C. 489, 499, 661 S.E.2d 106, 112 (2008).

When reviewing a parole case, the ALC sits in an appellate capacity. Furtick, 352 S.C. at 597, 576 S.E.2d at 148; see also Al-Shabazz, 338 S.C. at 377, 527 S.E.2d at 754. Under the appellate standard of the Administrative Procedures Act, the Court's review is limited to the record, absent irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4) (Supp. 2015). Additionally, the Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2015). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

[1] South Carolina Code Section 1-23-600(D) provides, "An administrative law judge shall not hear . . . an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services."

DISCUSSION

Appellant argues that the Department decision is not supported by substantial evidence. The Court agrees. 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 . . . .'" Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (citation omitted). This deferential standard of review does not require the Court to accept the agency's decision at face value where there is no evidence to support the agency's reasoning. See Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 21, 507 S.E.2d, 328, 332 (1998). Furthermore, "[a]n abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Trident Med. Ctr. v. S.C. Dept. of Health & Envtl. Control, 412 S.C. 341, 348, 772 S.E.2d 177, 181 (Ct. App. 2015) (internal quotations and citation omitted).

Appellant asserts that he received four favorable votes out the six votes made at his parole hearing on June 20, 2001. In support, Appellant offered the affidavit of a relative who attended the parole hearing, which corroborated his own previous testimony. According to the affidavit, Appellant's attorney was told the vote count by a member of the Department's staff and conveyed the information to Appellant and his family member.

In addition, Appellant and the Department litigated the issue of the vote count in both the ALC and Circuit Court immediately following the 2001 hearing. At no time in that litigation did the Department take the position that the four-to-two vote count averred by Rose was factually incorrect. While not direct proof of the veracity of Rose's position, the Department's failure to dispute the facts as presented by Rose creates an inference that those facts were accurate. There is evidence that the vote count was four in favor, two against. Thus, there is *no* contradictory evidence of any kind. The transcript of a certified recording of the Board's hearing kept by the Appellant does not contain a vote count. The only record that the Department has maintained of the hearing is a notation of rejection without any information regarding the vote count. At the time of the hearing the Board considered a four to two vote a denial. The South Carolina Supreme Court has since held this to be an incorrect application of the law. Therefore, evidence that the Department concluded that parole was denied, without evidence of the actual vote count, is not probative.

In the Barton decision, the Court held that the Board may not retroactively apply South Carolina Code Section 24-21-645 to inmates seeking parole. Barton, 404 S.C. at 419, 745 S.E.2d at 123. Section 24-21-645 was passed in 1981 and concerns, in part, the number of Board votes required to be granted parole. Section 24-21-645 originally called only for a parole order "signed either by a majority of its members or by all three members meeting as a parole panel on the case." Barton, 404 S.C. at 402, 745 S.E.2d at 114 (citing S.C. Code Ann. § 24-21-645 (Supp. 1984)). The section was amended in 1986 to require that "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(A) (Supp. 2015). The Court reasoned that retroactively applying a rule requiring a higher number of Board votes for those convicted of violent crimes produced "a sufficient risk of increasing the measure of punishment," such that the offender was protected by the *ex post facto* clause of the Constitution. Barton, 404 S.C. at 412, 745 S.E.2d at 119 (citing Jernigan v. State, 340 S.C. 256, 264–65, 531 S.E.2d 507, 511–12 (2000)).

In this case, Appellant pleaded guilty to kidnapping in 1978. Thus, Section 24-21-645 was not yet enacted at the time of Appellant's conviction. Instead, Section 24-21-650, which contains almost identical language, applies to Appellant. The 1962 version of this section, labelled 55-613, required all prisoners to receive two-thirds of the vote. S.C. Code Ann. § 55-613 (1962). In 1977, the section was amended to require only a majority of the Board's members to issue a parole order. 1977 S.C. Act No. 110 § 1. This act took effect on May 24, 1977. Id. at § 2. The section was not amended again until the 1986 Omnibus Criminal Justice Improvement Act that also amended Section 24-21-645. S.C. Code Ann. § 24-21-650 (Supp. 2015); Barton, 404 S.C. at 401–02, 745 S.E.2d at 113–14. Thus, the language in effect at the time of Appellant's conviction required only a majority of the Board to grant parole.[2] The question raised for the Department's decision in this case is whether Appellant received enough votes to be conditionally released. The Department concluded that Appellant did not provide enough evidence in support of his position that the vote count was four in favor of parole to two against parole. However, the Appellant did provide evidence of the vote count. The Department offered nothing contradictory to that evidence. Thus, there is not even a scintilla of evidence supporting the Department's decision. Because the

[2] The court in Barton also concluded that the statutorily required number of votes to grant parole are only out of Board members participating in the hearing and not out of the full seven-member Board. Barton, 404 S.C. at 419, 745 S.E.2d at 123.

Department must provide at least some support for its factual findings, the Court concludes that the Department's decision must be reversed.

The Department argues that the ALC does not have the authority to reverse its decision in this case because the discretion to grant or deny parole falls solely to the Board.[3] The Department misapprehends the posture of this case. By reviewing this case, the Court does not grant or deny Appellant parole, but rather requires the Department to carry out the result of a vote the Board already made. As stated above, it is the responsibility of the ALC to ensure that the Constitutional rights of Appellant are protected in decisions made by the Department. Where the Board fails to properly apply the law to its vote, the Court may conclude that parole has already been granted. See Barton, 404 S.C. at 419, 745 S.E.2d at 123 ("Appellant received the requisite number of votes from the Parole Board, and thus, should be granted parole. Thus, we remand for proceedings consistent with this opinion.").

The Department also argues that the holding in Barton may not be retroactively applied to Appellant on collateral review. However, "*[e]x post facto* claims are non-collateral matters." Steele v. Benjamin, 362 S.C. 66, 71, 606 S.E.2d 499, 502 (Ct. App. 2004) (citing Jernigan v. State, 340 S.C. 256, 260, 531 S.E.2d 507, 509 (2000)). Indeed, if Appellant's claim were cognizable under collateral review he would still be before the Circuit Court, instead of the ALC. See Jernigan, 340 S.C. at 508–09, 531 S.E.2d at 259. Moreover, the Court does not agree that the holding of Barton announced a new rule of Constitutional law. Rather, the Supreme Court found that the actions of the Board violated Barton's existing Constitutional rights and her "substantial personal right to statutorily correct parole review." See Barton, 404 S.C. at 413–14, 745 S.E.2d at 119–20 (citation omitted). Thus, the Department's argument that Appellant is seeking the retroactive application of a new rule on collateral review is erroneous.

Because the conclusion that the Department's decision lacked substantial evidence is dispositive, the Court declines to address Appellant's additional arguments.

ORDER

IT IS THEREFORE ORDERED that the Board's determination that Appellant should be denied parole in this instance is **REVERSED**.

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[3] The Department first argued that Appellant's brief should not be considered past the ten-page mark, pursuant to ALC Rules. However, the Court granted Appellant's motion to exceed the page limit on December 4, 2015.

IT IS FURTHER ORDERED that this matter is **REMANDED** for a hearing before the Board to determine the conditions upon which Appellant will be released.

AND IT IS SO ORDERED.

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

February 1, 2016
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, in the United States mail, postage paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s).
This 1st day of February 2016
By: R. E. L.
Judicial Law Clerk