STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kenneth Green, #116020, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	Docket No. 15-ALJ-15-0046-AP **ORDER**

This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant to the appeal of Kenneth Green (Appellant) from a decision of the South Carolina Department of Probation, Parole and Pardon Services (Department) denying him parole. Appellant filed this appeal with the Court on August 21, 2015.

FACTUAL/PROCEDURAL HISTORY

Appellant is in the custody of the South Carolina Department of Corrections after being sentenced to life imprisonment on March 9, 1983 for the offense of murder. At the time of Appellant's offenses, October 24, 1982, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of twenty years. Thus, Appellant had an initial parole hearing on November 18, 1998. The Parole Board (Board) denied Appellant parole, then and after each of his subsequent appearances, based on the following reasons: (1) nature and seriousness of current offense; (2) indication of violence in this or previous offense; and (3) use of deadly weapon in this or previous offense. However, it was the Board's rejection of Appellant's parole on November 29, 2000 that is it at issue in this case.

The law at the time of Appellant's offenses required only a simple majority of the Board members present to be granted parole. Based on the South Carolina Supreme Court's decision in *Barton v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013), if a quorum of the Parole Board is present at the hearing, then only a simple majority of the Board members present is required for Appellant to be granted parole. At Appellant's parole hearing on

November 29, 2000, he received a vote of four to two. The pertinent part of the transcript reads as follows: "Kenneth William Green is rejected by a vote of four to two. Number 1, 2, 3 and 4."

A "*Barton* hearing" was held on July 22, 2015 to allow Appellant to present evidence that he received four favorable votes at the November 29, 2000 parole hearing. The Board also allowed victims to speak at this hearing.[1] Following the hearing, the Board "decided not to ratify the vote count from [Appellant's] hearing on November 29, 2000." Appellant filed a Notice of Appeal with the ALC on August 21, 2015.

ISSUES

I. Whether the Board erred by not ratifying the vote count from Appellant's November 29, 2000 parole hearing; and

II. Whether the Board erred in allowing a victims to make statements at the July 22, 2015 *Barton* hearing.

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Furtick v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003) and *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008).[2] 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. 2015) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). 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.* 1-23-380(5) (Supp. 2015). 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 arbitrary or affected by an error of law. *see 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,

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[1] Appellant and his father were also present at the hearing, via teleconference.

[2] Though neither *Furtick* nor *Cooper* conferred jurisdiction to this Court to review determinations from *Barton* hearings, conference of that jurisdiction would seem to be a logical extension of the Supreme Court's determination in both *Furtick* and *Cooper*. In both cases, the Supreme Court ordered the extension of this Court's jurisdiction where, as at issue here, the Department failed to follow its own procedures. Moreover, it would be rather quizzical for this Court to have jurisdiction in *Barton* but not have jurisdiction to review hearings established based upon that very case.

166, 503 S.E.2d 490, 492 (Ct. App. 1998). Finally, "when appealing an agency's decision, the burden rests squarely on the appellant to prove that substantive rights were prejudiced . . . ." *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 260, 659 S.E.2d 233, 235 (Ct. App. 2008).

DISCUSSION

I. Whether the Board erred by not ratifying the vote count from Appellant's November 29, 2000 parole hearing.

Appellant argues that the only evidence before the Board at the *Barton* hearing was that Appellant received four (4) votes in favor of parole out of the six members present and voting at the November 29, 2000 hearing. Therefore, Appellant argues that he was entitled to parole.

Prior to *Barton*, the Board's policy had been to require five (five) affirmative votes in order to authorize parole, reflecting the two-thirds requirement of the current version of S.C. Code Ann. § 24-21-645 and applying it to the full seven-member Board. In *Barton, supra*, the South Carolina Supreme Court held that the version of Section 24-21-645 existing at the time of an inmate's offenses is what is applicable at an inmate's parole hearings, and that "members of the Board" under the statute means those members participating in the hearing where there is a quorum, not the full Board. Following *Barton*, the Department began holding *Barton* hearings.[3] The purpose of these hearings, according to Section 10 of the Department's January 2014 Operations Manual and its July 22, 2015 rejection letter to Appellant, is to determine whether an inmate received the proper number of votes pursuant to *Barton*. The Department even notes in its brief that the Board, upon conclusion of the *Barton* hearing, will "make a determination whether or not sufficient evidence was revealed to support the allegations [that the inmate received the required number of votes]." The Department adds that "[i]f the Appellant has successfully revealed he received the required number of votes, the Board will ratify the previous Board's decision. If the Board decides insufficient evidence was provided[,] they will deny the Appellant's motion and he will not be granted parole. . . ."

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[3] It is noteworthy that this Court has previously held that *Barton* does not apply retroactively to past parole decisions. 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). Nevertheless, the Department, following what it believed the Supreme Court required in *Barton*, established a Departmental policy requiring these *Barton* hearings, and therefore it must comply with the standards of process due these hearings.

Here, the 1982 version of Section 24-21-645 was the law at the time of Appellant's offenses and predates the Omnibus Criminal Justice Improvement Act of 1986, thus requiring only a simple majority of Board (i.e., a majority of those members participating in the hearing where there is a quorum), even for violent offenses.[4] At Appellant's November 29, 2000 hearing, there were six Board members present and voting, and therefore only four (4) of them was required to authorize parole. The question then becomes whether the Board's decision not to ratify the prior Board's decision was contrary to its own procedure. In this case, Appellant provided affidavits from Bishop Sanco Rembert, Marlene T. McClain, and June Shissias, all of whom were Board members at the November 29, 2000 hearing and who attest that they voted in favor of Appellant's parole. Ms. McClain also attested to the fact that J.P. Hodges, who has since died, also voted in favor of Appellant being granted parole.[5]

The Department argues that "it is clearly reasonable for the Appellant to be denied parole" because the present Board could have decided that because the hearing occurred over fifteen years ago, the affiant Board members could have been mistaken in their recollection of that hearing. However, Rembert and Shissias attested to the fact that they listened to the recording of the November 29, 2000 hearing, which refreshed their "recollection that [they] voted in favor of [Appellant] being granted parole at that hearing." Rembert and Shissias also specifically explained that the Board had a "tradition at that time" that "the Board took the yes votes first." Thus, the vote count of four to two meant that there were four affirmative votes in favor of parole. McClain adds in her affidavit that "[t]he Department of Probation, Parole and Pardon [Services] had previously instructed the Board that the statute required an affirmative vote of 5 members (2/3) regardless of whether there were 6 or 7 members present. In this case, the Parole of Kenneth Green was rejected because he failed to get 5 or [sic] the 6 votes." McClain further addresses the ambiguity in the transcript of the hearings, which concludes with "Kenneth Green is rejected by a vote of four to two. Number 1, 2, 3 and 4." According to McClain, "[t]his announcement is not a

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[4] The Omnibus Criminal Justice Improvement Act of 1986 changed the requirement of a majority to a two-thirds requirement of the members of the Board to authorize parole for persons convicted of violent crimes as defined in Section 16-1-60.

[5] Appellant also provided an affidavit from his father, James M. Green, Sr., and from his brother, James M. Green, Jr., both of whom were present at the hearing and who attest that Appellant received a vote of 4-2 in favor of parole was rejected for parole because he did not get the fifth vote required at the time. However, their statements concerning the vote count are based on hearsay and, therefore, could not be considered by the Board.

tally of the votes for or against parole, but is instead a numerical listing of the reasons parole was denied, which would have appeared in the notice to Mr. Green."

The Court cannot not hear "an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." S.C. Code Ann. § 1-23-600 (D) (Supp. 2015). Nevertheless, as expressed in *Furtick* and *Cooper*, the Board cannot abuse its discretion by rendering an arbitrary or capricious decision disregarding whether a previous Board cast a sufficient number of favorable votes (subsections 1-23-380(A)(5)(e), (f)). The transcript of the November 29, 2000 hearing was ambiguous as to the number of affirmative votes that Appellant received, which required further evidence in order for the Board to be able to determine how many votes Appellant received. Appellant provided affidavits from voting board members as well as other attendees, the contents of which are described above, and this was evidence upon which a reasonable person could conclude that Appellant received four affirmative votes in favor of parole. Furthermore, there is nothing in the record that suggests that these affidavits are not credible.

The Department argues that it "should be reasonable to determine that affidavits from former Board members regarding one hearing out of the hundreds is insufficient to release someone on parole." However, under that theory, the Board could reject parole in all of the Department's *Barton* hearings, since each case would involve a parole hearing that predates *Barton* and thus would have occurred more than two years ago and among the many other hearings that occurred during that time. Thus, if the Board can reject all affidavits concerning past parole hearings based merely on the fact that the parole hearings happened years ago, then the *Barton* hearings would have no meaning, instead being subject to the whim and caprice of the Board.

According to the Department's Policy Manual, and as the Department even states in its brief, if the Board finds that an inmate has successfully demonstrated that he received the required number of votes, the Board will ratify the previous Board's decision, subject to any conditions that the Board feels necessary. Because I find that there was uncontradicted evidence in the record to support the prior Board's finding of four favorable votes, and that number was the required number of favorable votes for parole, I find that the current Board's decision not to ratify the previous Board's four-to-two decision contradicted its own policy and was therefore arbitrary.

However, as the Department correctly argues, this Court has not authority to enter judgments granting or denying parole (*see State v. Dingle*, 376 S.C. 643, 659 S.E.2d 101 (2008)

(finding that under S.C. Code Ann. § 24-21-640, only the Parole Board, and not the courts, may determine parole eligibility), nor can the Court review appeals involving the denial of parole. *See* S.C. Code Ann. § 1-23-600(D) (Supp. 2015). According to Section 10 of the Department's Operations Manual, when the current Parole Board ratifies the votes of the previous Board that would have granted conditional parole, it does so by signing and issuing a "special Barton Order of Parole." After the Board issues a special *Barton* Order of Parole, "[t]he offender is then treated as any other offender granted conditional parole, and will have to comply with the conditions in order to receive parole." This order would thus seem to constitute the provisional parole order referred to in S.C. Code Ann. 24-21-645(A) (Supp. 2015), which requires the inclusion of terms and conditions that must be met for parole. Therefore, notwithstanding ratification of the previous Board's four votes in favor of parole, the Board still must set conditions of parole, which are required in provisional parole orders pursuant to subsections 24-21-645(A), (B) and by Section 10 of the Department's Operations Manual.[6] Moreover, as the Department also correctly argues, the granting of parole further 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." Section 24-21-650.

II. Whether the Board erred in allowing a victims to make statements at the July 22, 2015 Barton hearing.

Because the prior issue was dispositive of this appeal, the Court declines to address this remaining issue. *See Young v. Charleston Cty. Sch. Dist.*, 397 S.C. 303, 311, 725 S.E.3d 107, 111 (2012) (declining to address additional remaining issue when the disposition of a prior issue was dispositive of the appeal).

Conclusion

The Board erred in failing to ratify the previous Board's four-to-two vote in favor of granting Appellant parole, following Appellant's *Barton* hearing. Therefore, the Court

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[6] The Department seems to suggest in its brief that the current Board would issue another order – presumably the one under subsection 24-21-645(A) – in addition to the special *Barton* order. However, because the members of the Board would sign the *Barton* order ratifying the requisite number of votes from the previous Board, it would seem illogical to require another signed order to impose the same conditions that are already required after the *Barton* order is issued. Indeed, it would make no sense for the Department to state in Section 10 of its Manual that "[t]he offender is then treated as any other offender granted conditional parole" following the issuance of the signed *Barton* Order, if the Board is supposed to sign another Order imposing the same conditions.

must remand the case to the Board for it to proceed as if a provisional parole order had been issued pursuant to Section 24-21-645(A).

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

Ralph King Anderson, III
Chief Administrative Law Judge

February 11, 2016
Columbia, South Carolina

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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

February 11, 2016
Columbia, South Carolina