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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Administrative Law Judge
Case No. 15-ALJ-15-0046-AP

Appellate case No.: 2016-000296

KENNETH GREEN, #116020.....RESPONDENT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,.....APPELLANT

INITIAL BRIEF OF APPELLANT

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1. **Did the Court err in deciding that the Board's decision not to ratify the previous Parole Board decision was arbitrary and capricious?**

STATEMENT OF THE CASE

On October 24, 1982, the Respondent along with his co-defendant were seated at a bar in Summerville, South Carolina, they observed the victim reveal a large amount of cash to pay for his drink. He then left the bar and proceed to the parking lot, the Respondent and co-defendant followed. The victim left in his vehicle, and was followed by the Respondent and his co-defendant. They forced the victim off the road along highway 165. The Respondent exited his vehicle, approached the victim armed with a shotgun, and shot the victim in the head killing him instantly. The Respondent took twenty dollars in cash, and another shotgun out of the victim's vehicle. The next day the victim's family members found his body on the side of the road.

At the conclusion of their investigation, the authorities arrested the Respondent and his co-defendant charging them with the offense of murder. On March 9, 1983, the Respondent appeared before the Honorable John Hamilton Smith for this offense. Upon conclusion of this appearance, the Court sentenced the Respondent to a term of incarceration for the remainder of his natural life. At the time the Respondent committed this offense South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of twenty years.

The Respondent made his initial appearance on November 18, 1998. Upon the conclusion of this hearing the Board decided to deny parole. Since this initial denial the Respondent has appeared before the Board an additional fourteen times each resulting in a denial of parole. His most recent appearance occurred on March 11, 2015, parole was denied due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) a use of deadly weapon in this or a previous offense.

The Respondent notified the Appellant alleging that he received four affirmative votes, which pursuant to the South Carolina Supreme Court decision of *Barton v. S.C. Dept. of Probation,*

Parole and Pardon Services, 404 S.C. 395, 745 S.E.2d 110 (2013) would award parole. The Respondent petitioned the Board to be allowed to appear before them for a *Barton* hearing. He was allowed to appear before the Board in an attempt to prove that his prior decision should be ratified. On July 22, 2015, the Respondent appeared before the Board for a hearing pursuant to the *Barton* decision. During this hearing the Respondent provided affidavits from former Board members Bishop Sanco Rembert, Marlene T. McClain, and June Shissias. He also provided affidavits of his father and brother. Each of these affidavits proclaim that the Respondent received four votes upon the conclusion of the November 2000 parole hearing.

At the conclusion of this hearing the Board decided that the Appellant failed to reveal he received the required votes to be released on parole. The Board decided to deny the Respondent's request for a ratification of the previous Board decision. Upon being notified of this denial the Respondent decided to file a notice of appeal before the Adiminstrative Law Court (ALC). Within this appeal the Respondent argued that the decision of the Board was arbitrary and capricious, or characterized by abuse or discretion, or a clearly unwarranted exercise of discretion. The Respondent also argued that it was unlawful for the Board to allow victim testimony.

The Appellant argued that this determination is left solely to the Parole Board, and the Respondent failed to present evidence that the decision was arbitrary and capricious. The Appellant further argued that pursuant to the South Carolina law and the victim's bill of rights, a victim must be notified as to any post-conviction hearing. The notification given to the victim was mandatory pursuant to South Carolina law.

Upon reviewing the briefs and arguments submitted by both parties, the Honorable Ralph King Anderson, III issued his decision on February 11, 2016. Within this order Judge Anderson concluded that the Board failing to ratify the previous decision was contradictory to it's own

policy, thereby, the decision was arbitrary. The ALC determined that the Board erred in failing to ratify the previous Board's four to two vote in favor of granting the Respondent parole. The lower Court decided that the case must be remanded back to the Board for it to proceed as if a provisional parole order had been issued.[1] Upon receiving this order the Appellant decided to file a notice of appeal before the South Carolina Court of Appeals. The initial brief supporting the Appellant's arguments follows.

ARGUMENTS

1. **The lower court erred in deciding that the final decision of the Board in not ratifying the previous decision was arbitrary.**

The Respondent argued and the ALC agreed that upon the conclusion of this 2000 hearing he received the majority votes needed to be granted parole. At the time the Respondent committed this offense South Carolina law 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 Judge 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). In *Barton,* the Supreme Court decided that requiring an inmate convicted prior to 1986 a two-thirds vote to be granted parole is a violation of ex post facto.

In *Barton* the Appellant Thalma Barton was serving a life sentence for the offense of murder. She appeared before the Parole Board on January 8, 2012, of the six members present,

[1] Because the prior issue was dispositive the ALC decided to decline to address the second issue pursuant to *Young v. Charleston Cty. Sch. Dist.*, 397 S.C. 303, 311, 725 S.E.2d 107, 111 (2012).

four votes were made in the affirmative. *Barton,* at 399. The existing laws required a two-thirds vote of all seven members, so the Board determined Ms. Barton failed to receive the required number of votes to be released on parole. Upon receiving the order of denial, Ms. Barton appealed. The South Carolina Supreme Court decided that since the law existing at the time of the offense allowed a majority, it was unlawful to deny parole.

Due to this decision the Respondent is of the opinion that he should have been granted parole. Unlike the Appellant in *Barton*, the Board believed the Respondent failed to prove he received four votes in the affirmative. Within his reply brief the Respondent argued that the only evidence presented was by him. The Board is not required to present any evidence that he failed to receive four votes, that is due to the fact the burden of proof lies with the Respondent in this case. In administrative proceedings the general rule is that an Appellant for relief, or a privilege has the burden of proof and the burden of proof test rest upon who files a claim with an administrative agency to establish that required conditions of eligibility have been met. *Leventis v. South Carolina Department of Health and Environmental Control,* 340 S.C. 118, 530 S.E.2d 643 (2000). This determination is left up to the Board which cannot be remanded by the Court. The Appellant's argues that procedure was followed, and the Board made the decision that he failed to prove he received the votes needed to be allowed parole.

The ALC decided that the evidence presented to the Board should have been accepted as the Respondent receiving four affirmative votes, and failing to make this decision must be considered contradictory to Department policy, thereby, making the decision arbitrary. The Appellant argues that this decision is solely factual and has no law pertaining to it. The General Assembly has always left parole decisions completely up to the Parole Board. Pursuant to South

Carolina law the court shall not substitute its judgment for that of the agency as to the weight on the evidence on questions of fact. S.C. Code Ann. §1-23-380(Supp. 2015).

The lower Court decided that the decision was arbitrary so it has the ability to remand the case back to the Parole Board.[2] The Appellant previously argued that the decision is left totally up to the Board, and if the Board decides the affidavits were done in error, or the prior board members were mistaken they have the right not accept the evidence presented and deny ratification. The Court decided this decision was contrary to the Board policy, and if they made this decision then they would have to refuse all *Barton* requests. The Appellant disagrees, there have been individuals who have presented what the Board feels is sufficient evidence, not conjecture from fifteen year memories of Board members, and allowed a ratification of a previous Board decision. Parole is not a guaranteed right so ratifications have not occurred often, but they have occurred only with the Board's decision, not the Courts.

The ALC must follow the rules of the Administrative Procedures Act which follows the substantial evidence rule. "Substantial evidence" sufficient to support a finding of the administrative law court is evidence which considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached. *Risher v. South Carolina Dept. of Health and Environmental Control,* 393 S.C. 198, 712 S.E.2d 428 (2011). The ALC is of the opinion that the Board failed to make a reasonable decision in the denial to ratify parole. This decision must be considered reasonable considering the time elapsed between hearing and petition. If there exists any doubt that he was given the four votes, it is reasonable for the Board to not allow the Respondent parole. The possibility of drawing two inconsistent conclusions

[2] The Court may reverse or modify the decision if substantial right of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are: arbitrary or capricious or characterized by abuse or discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-380(6)(f)(Supp. 2015)

from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Jervey v. Martint Environmental, Inc.,* 396 S.C. 442, 721 S.E.2d 469 (S.C. App. 2012)

The ALC came to the conclusion that the Board must have made the decision due to the affidavits submitted; however, this is not the only information the Board used in making this consideration. The Respondent appeared before the Board a total of twelve times after his 2000 hearing. There has been no evidence presented that he ever received the four votes again. If the Appellant received four votes in 2000, it should be safe to assume he received it in a subsequent hearing, which was never presented to the Board. The matter of prior and subsequent hearings must be considered while the Board is making a determination there was sufficient votes given to the Respondent. Substantial evidence to support an administrative agency decision is not a mere scintilla of evidence, nor 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 the administrative agency reached. *Bentley v. Spartanburg County,* 398 S.C. 418, 730 S.E.2d 296 (2012).

The ALC within its order found that there was "uncontracted 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." The Respondent argues that this is a matter of fact that can only be decided by the Board. Pursuant to *Cooper,* the Respondent is only required a hearing where the Board will consider all of the evidence presented. The ALC is only allowed to determine if the Respondent was allowed a hearing and if the procedure created by the Board was followed. The ALC is not in the position to determine the findings the Board should make.

The ALC determined that the Board contradicted its own policy by not finding that the Respondent failed to prove that it received four votes in the affirmative. Pursuant to Department policy an inmate challenging a prior denial of parole pursuant to *Barton*, would be required to go through a three pronged procedure to determine whether or not he has received the required votes. First, the office of parole support services staff will investigate to verify if the offender possibly received these votes; second, the results of this investigation will be forwarded to the office of legal services to verify that it qualifies under *Barton*; and, third, a during a full board day the Board will hold a *Barton* hearing. Only upon the conclusion of this hearing will the Board make a determination whether or not sufficient evidence was revealed to support the allegations. This decision is solely the Board's and cannot be reversed or determined by the Courts. The Court is only in a position to determine as to the procedure and if it was followed. But the Courts do not have the ability to award parole. Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole. *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services,* 377 S.C. 489, 661 S.E.2d 106 (2008). If the Board realized sufficient evidence was presented to make a Parole determination they would have granted the Respondent's parole; however, they failed to make this finding, which cannot be reversed by a decision of the Courts. An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections 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).

2. The Court erred in ordering that the Board create an order ratifying the previous decision, this can only be determined by the Parole Board.

Within his order the ALC made the determination to remand the case back to the Board for only the purpose of further proceedings to ratify the previous decision, and establish a conditional parole pursuant to Section 24-21-645. The Board is allowed to issue a provisional parole order

which shall include the terms and conditions, if any, to be met by the prisoner during the provisional period and terms and conditions to be met upon parole. S.C. Code Ann. §24-21-645(Supp. 2015). However, this statute also states that "the Board may issue an order authorizing the parole which much be signed either by a majority of its members or by all three members meeting as a parole panel." S.C. Code Ann. §24-21-645(Supp. 2015). The General Assembly only gives the authority to issue a parole order to the Board. The ALC was never given the authority to order the issuance of Parole Board orders. Parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board or Probation, Parole, and Pardon. *Brown v. State,* 306 S.C. 381, 412 S.E.2d 399 (1991). Of course the ALC and the Respondent's positon is that the Court is not authorizing the Board to grant parole, but that parole was already granted at a previous hearing; however, that determination must be left entirely to the current Board. The Board is the party that will sign the final order releasing the Respondent on parole, so they are responsible for his release and any actions he may make in the future. The Board shall issue an order authorizing the parole which must be signed by at least a majority of its members with terms and conditions. S.C. Code Ann. §24-21-650 (Supp. 2015). The General Assembly never gave the authority to the Courts to grant parole that remains totally the authority of the Parole Board.

It is the Appellant's position that the ALC was only authorized to examine the procedure that was followed by the Board, not the final decision. If the Board failed to allow the hearing thereby violating policy, that decision could be remanded back to the Board for an order of a hearing to be conducted on the Respondent's behalf. However, that was not the decision of the ALC. The decision of the ALC was to totally force the Board to make a decision granting an individual parole. This is not the authority given to the ALC. The ALC is of the position that there was sufficient evidence to reveal that the Respondent received four votes: however, that was not

the decision of the Board who was present at the hearing and reviewed evidence not only that was presented by the Respondent, but past information available of previous hearings. Pursuant to the *Al-Shabbaz, and Furtick* decisions, the ALC sits only as an appellant court regarding the decisions of the Board.[3] They are only responsible to make decisions regarding policy and any error of law, not regarding the decisions of the Board. The Appellate Court sits to review errors in law only. *State v. Wilson,* 345 S.C. 1, 545 S.E.2d 827 (2001). The Respondent raised no objections regarding the procedure that was followed by the Board; therefore, the ALC had not authority under the law to reverse the Board's final decision. The actions of the ALC would equate the Court of Appeals reversing a jury decision, simply because they thought the decision was incorrect, and not relating to any error of law. That is not the function of an appellate court, so the decision of the ALC should be reversed.

[3] An inmate may seek review of the final decision in an administrative manner under the Administrative Procedures Act. Placing review of these cases within the ambit of the APA will ensure that an inmate receives due process, which consists of notice, a hearing, and judicial review. *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services,* 352 S.C. 594, 576 S.E.2d 146 (2003, *quoting, Al-Shabbaz v. State,* 338 S.C. 354, 527 S.E.2d 742 (1999).

CONCLUSION

Based on the foregoing reasons the ALC incorrectly remanded the final decision of the Parole Board; therefore the Appellant respectfully requests the final decision of the Administrative Law Court be reversed.

Respectfully submitted,

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