STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No. 15-ALC-0033-AP

Appellate Case No. 2016-000225

DAVID ROSE, #91858,.....APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE
AND PARDON SERVICES,.....RESPONDENT

INITIAL REPLY BRIEF OF APPELLANT

Matthew Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

Table of authorities.....ii

Statement of issue on appeal.....iii

Statement of the case.....1

Arguments

1. The ALC determination is not supported by substantial evidence.....3

2. The Respondent has not revealed that the decision of the Appellant was arbitrary and capricious; therefore, the ALC decision was in error. 11

Conclusion.....17

TABLE OF AUTHORITIES

CASES

Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 501, 661 S.E.2d 106, 113 (2008).....4

Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003).....4, 13

Grant v. South Carolina Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).....14

Green v. S.C. Dept. of Probation, Parole and Pardon Services, 2015 WL 2169555.....16

Lark v. Bi-Lo, 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981).....4,15

Leventis v. South Carolina Department of Health and Environmental Control, 340 S.C. 118, 133, 530 S.E.2d 651 (2000).....6

Palmetto Alliance, Inc. v. South Carolina Public Services Com'n, 282 S.C. 430, 319 S.E.2d 695 (1984).....14

Patton v. South Carolina Public Services Com'n, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984)..6

Summersell v. South Carolina Department of Public Safety, 334 S.C. 357, 363, 513 S.E.2d 619, 622 (1999).....3

Trimmer v. S.C. Dept. of Labor Licensing & Regulations, 405 S.C. 239, 246, 746 S.E.2d 491, 495 (Ct. App. 2013).....12

White v. Charleston & W.C. Ry. Co., 121 S.C. 215, 114 S.E.2d 324 (1022).....10

Williams v. David Strafford Drywall, 402 S.C. 173, 739 S.E.2d 892 (Ct. App. 2013).....13

RULES

Rule 801(c) SCRE.....13

STATUTES

S.C. Code Ann. §1-23-380(Supp. 2015).....11-17

STATEMENT OF ISSUES ON APPEAL

1. **Can the ALC determine there was sufficient evidence revealing that Rose received four votes at his 2001 hearing; thereby allow him to be released on parole?**

2. **Can the ALC review the decision of the Appellant that there was insufficient evidence that he received four votes?**

STATEMENT OF THE CASE

The Respondent is currently serving a sentence of incarceration for the remainder of his natural life for the offense of kidnapping. At the time the Respondent committed this offense South Carolina law allowed an individual serving a life sentence for kidnapping parole eligibility upon the service of ten years.

The Respondent was paroled in 1987, but after a lengthy period where he failed to report an arrest warrant was issued, and he was placed in absconder status. He was not discovered until 2000 residing in Florida. He was extradited to South Carolina to appear before the Parole Board. On June 14, 2000, the Parole Board decided to revoke parole. His first appearance after this revocation occurred on June 20, 2001, where the Board decided to deny the Respondent's parole.

The Respondent filed a petition for post-conviction relief against his Public Defender Michael Turner and his parole hearing attorney Alvin Neal. The Appellant Department of Probation, Parole and Pardon Services was never notified of this hearing to testify, or to present evidence for either side. The Attorney General defended the case, arguing that it should be brought before the Administrative Law Court, (ALC) due to the Circuit Court not having jurisdiction. On March 3, 2006, the Honorable Wyatt T. Saunders ordered this PCR dismissed without prejudice in order to be appealed to the ALC. He also ordered that if the ALC decides not to hear the case the Respondent can refile before the Circuit Court. The case was presented by the Attorney General before the ALC. The Respondent again was never made aware of this appeal. There was never a request for information made to the Appellant nor was the Appellant requested to present evidence for either party. The Honorable John D. Geathers, Administrative Law Court judge issued an order dismissing the appeal. It was his opinion that the ALC did not have jurisdiction over this cause of action.

On February 26, 2014, the Respondent filed a summons and complaint against the Appellant in Circuit Court. This was the first time the Appellant was ever made aware of this Respondent or his allegations. Upon receiving this complaint the Appellant filed a motion for summary judgment. The Appellant argued that since this case pertains to parole eligibility, jurisdiction was never given to the Circuit Court so pursuant to State v. Furtick this case should be heard by the ALC. The Appellant requested this case be dismissed so the Respondent can file an appeal in the proper forum. A hearing was conducted before the Honorable Frank R. Addy who ordered that the Appellant conduct an investigation to determine if the Respondent had received four votes at the conclusion of his 2001 hearing.

The Respondent was made well aware of this investigation; however, the only evidence submitted to the Board was an affidavit signed by his cousin Mr. Carlos Bell. Within this affidavit Mr. Bell stated that the Respondent's lawyer spoke to an unidentified Department employee in the common area who informed him that the Respondent received four votes. His lawyer then informed Mr. Bell and the Respondent of this vote count. There was nothing else submitted, and there was nothing within the Department's records revealing the Respondent received four affirmative votes. Since the Department cannot only rely on the word of the inmate and one family member without more corroborating evidence, the Department determined that insufficient evidence was provided proving he received the adequate amount of votes to be granted parole. Upon being notified of this denial the Respondent filed a notice of appeal before the Administrative Law Court.

Administrative Law Court Judge Deborah Brooks Durden reversed the decision of the Appellant. She decided that the Appellant failed to produce a scintilla of evidence proving that the Respondent failed to receive four votes.

The Appellant now responds to the argument of the Respondent that the ALC had the ability to reverse a decision of the Department based on the weight on a question of fact; that the ALC had the authority to reverse the decision of the Department regarding the denial of parole, thereby granting the Respondent parole. The Appellant alleges that the argument of the Respondent has no merit. The ALC erred in making a determination that reversed the burden of proof from the proper party and placed it on the Appellant. The ALC also erred in reversing a decision of the Department basing it on her interpretation of the weight of evidence based on a question of fact. The Appellant's response to the Respondent's initial brief follows.

ARGUMENTS

1. The ALC determination is not supported by substantial evidence.

The Respondent argued that the determination made by the ALC is supported by substantial evidence. The Appellant argues that the ALC must presume any decision made by the Department correct and any reversal must be supported by substantial evidence. The findings of an administrative agency are presumed correct and will be set aside only if supported by substantial evidence. Summersell v. South Carolina Department of Public Safety, 334 S.C. 357, 363, 513 S.E.2d 619, 622 (1999). The Appellant argues that there does not exist substantial evidence to allow reasonable minds to come to the ALC's conclusion that the Respondent received four affirmative votes. The ALC erred in her determination, due to the fact she decided that substantial evidence was provided that would reveal it reasonable that the Respondent received four votes. Pursuant to South Carolina law it is the responsibility of the ALC to determine if substantial evidence was provided to support the decision of the Administrative agency, not the opinion of the requesting party. 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, 134, 276 S.E.2d 304, 306 (1981). The ALC made the interpretation that not one scintilla of evidence was provided by the Appellant proving that the Respondent failed to receive four affirmative votes. It is not the duty of the Department to present evidence supporting their conclusion, all the Department must show is that their decision was reasonable due to the lack of evidence produced by the Respondent, and that a reasonable mind would have made the identical conclusion.

Pursuant to the South Carolina Supreme Court decision of Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, the South Carolina Supreme Court determined that if a Parole Board fails to consider and apply the statutorily-created parole criteria, it has the effect of rendering an inmate parole ineligible, which under Furtick warrants review by the ALC.[1] Cooper v. S.C. Dept. of Probation, Parole, and Pardon Services, 377 S.C. 489, 501, 661 S.E.2d 106, 113 (2008). In Cooper, the Supreme Court gave the responsibility of the ALC to make the determination that the Board followed procedures prior to a decision. The ability of the ALC does not go beyond a determination if the procedures were followed. After Barton a procedure was established by the Parole Board. This procedure is three fold, first, the office of Board Support Services would investigate to verify that the offender did receive the proper number of votes; second, the Department's Office of Legal Services will verify if it qualifies under Barton; and, third, during a full board day the Board will hold a Barton hearing for the offender. There was never any argument raised by the Respondent that the Appellant failed to follow procedures. The

[1] Administrative Law Judge Division had jurisdiction to hear defendant's appeal from the Department of Probation, Parole and Pardon Services decision that as a violent offender, defendant was not parole eligible; defendant had a liberty interest in gaining access to the parole board. Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003).

Respondent accepts there was an investigation made by the Office of Board Support, they just dispute the findings. This makes this case decision not reviewable by the ALC.

The Respondent argues that there was substantial evidence revealing he received four votes in the affirmative. The Appellant disagrees, and this is not what the ALC must determine. The ALC should determine if substantial evidence exists revealing if the decision of the Department was reasonable. The Appellant submits that the decision of the Department was reasonable due to the lack of unbiased evidence presented by the Respondent.

In order to examine the determination of the ALC and to refute the argument of the Respondent the Appellant would ask this Court to fully examine the only evidence submitted by the Respondent supporting his allegations. The only evidence presented was the affidavit of Mr. Carlos Bell, cousin of the Respondent. Within this affidavit Mr. Bell explained that he attended the 2001 hearing of the Respondent. Also present was the Respondent's attorney Mr. Alvin Neal, and the Respondent's sister Ms. Kathy Todd. They all spoke on the Respondent's behalf to the Board.[2] Mr. Bell alleges while awaiting the outcome a woman came out to the common area "believe[s] she was the secretary or recorder" but Mr. Bell was not even certain if she was employed by the agency. She expressed to all of them that "she was sorry but parole was denied." They then asked Mr. Neal what the vote was, he asked the woman then he turned back to them repeating what she said that the count was four yes and two no votes.

There were no other affidavits submitted, not one from Mr. Neal, nor Ms. Todd verifying this story. There was never a name nor description given of this woman who may or may not have been an employee of the Department. The ALC places the onus on the Department to present evidence supporting its decision; however, it is not the duty of the Department to prove he failed

[2] Only six members were present not the usual seven.

to receive parole, it is the duty of the inmate to prove he has received parole. 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 rests 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, 133, 530 S.E.2d 651 (2000). The burden of proof is on the party challenging an order of the commission to show that it is unsupported by substantial evidence and that the decision is clearly erroneous in view of the substantial evidence on the whole record. Patton v. South Carolina Public Service Com'n, 280 S.C. 288, 291, 312 S.E.2d 257, 259. The Appellant presents to this Court that the ALC erred in their decision reversing the burden to the Department regarding their decision to go no further in the Barton process.

In reviewing the entire record there is, however, plenty of evidence that supports the Appellant's conclusion. First, the only evidence presented was an affidavit from the Respondent's cousin. There were three other people present yet none offered any evidence to verify this statement. Second, it was testified by Roosevelt Hicks, Program Coordinator for the Office of Board Support Services a twenty-seven year veteran of the Department, that he listened to all of the subsequent hearings of the Respondent, and he failed to receive one affirmative vote. Mr. Hicks deposition p. 69 lines 11-16. The Department validly took that into consideration. How can an individual get four votes one year, and none all the remaining years without any change in circumstances? The Department also considered that the department employee was never named or described to the Department, so there was no evidence presented that this was an employee, or that this statement was ever made. Mr. Hicks testified that it is unusual that any employee would know the final vote counts. His deposition specifically states,

Q: In the affidavit Mr. Bell stated that Mr. Neal, his attorney, informed him that someone told Mr. Neal that he received four votes. Are you aware of that being possible for that to happen at a hearing?

A: No

Q: Why not?

A: Because doing the sites, the employee who's working on that has a list of inmates, that he doesn't have time to do that because he got to coordinate the next inmate into the room.

Q: Okay. All right.

A: And at that time the board would not have even told – on the site they would not have told them the vote count because we didn't keep vote count. They would have said so and so rejected, one, two, and three.

Mr. Hicks deposition p. 59 lines 8-23

There was also the matter of any person at the parole hearing even seeing the final vote count to be aware what vote was even if it was not recorded by the Board Chairman. Mr. Hicks also testified at his deposition:

A: Right, Even if the tape was found it wouldn't say – it wouldn't say the vote count because they didn't keep the vote count. It would probably say "David Rose rejected 1, 2, and 3."

Q: And that would be the chairman that say that?

A: That would be the chairman.

Q: Okay. In your experience have you ever seen a person tell anyone what the final count was at a hearing? Like a lawyer or a friend, anybody like that?

A: No

Q: Okay.

A: Because they're sitting at – they're sitting at the other end. They wouldn't see the vote count. They wouldn't see the lights because the lights is only seen by the Chair.

Q: At the time, the lights were only seen by the Chair?

A: Yes.

Q: So—

A: At that time they only – at that time the board only used lights.

Mr. Hicks deposition p. 58 lines 2-23.

So the Department had knowledge that at the time there could not have been a person who told them the final vote count, because it was not recorded and no one told anyone. The final count was seen only by the Board Chairman and the Chairman would announce that this person was rejected. So according to the Department the statement of Mr. Bell is not possible and not believable. Furthermore, it is reasonable that a person would come up with a false story in order to release a family member from incarceration.

The Respondent argues that it was the fault of the Appellant for not preserving evidence so that he could not prove he received the four votes. The preservation of records for sixteen years, with the limited space and funding of the Department is not feasible. The Respondent apparently expects the Department maintain all of the records of every hearing for 16 years. There is an average of three thousand five hundred and ninety-eight (3,598) hearings held each year. So in a sixteen-year period there could be as many as fifty-seven thousand (57,000) hearings held. The Appellant just does not have the space or funding to keep records for each hearing for that amount of time. If the Appellant was ever notified that there was litigation regarding the count, it would have preserved these records, however, the Appellant was not notified until 2014, some 13 years after the hearing. By this time the records and recording were destroyed. The Appellant never destroyed records to conceal evidence, as Respondent implies. These recordings were destroyed due to the numerous hearings and denials heard since the 2001 hearing. At the time this hearing was held the Board had the final decision; there existed no right to appeal. If the Appellant was

ever notified there was litigation between the Respondent and the Attorney General's office, and a request for the preservation of these records was made the records would never been destroyed; however, no request was ever made.

Other inmates have been able to present sufficient substantial evidence to prove their vote count. As stated in the deposition of Mr. Larry J. Patton, Thalma Barton, Gene Richardson, James Plyer, Francis Campbell, Charles Sink, Robert Miller, and Shariah Muhammad has been released on parole pursuant to the Supreme Court decision of Barton v. S.C. Dept. of Probation, Parole and Pardon Services. Mr. Patton's disposition p. 60 lines 22-24. This is due to sufficient substantial evidence presented to the Appellant proving they received the required majority votes from the Board to be granted parole. The denial of the Respondent was not arbitrary nor capricious but due to his failure to provide sufficient substantial evidence revealing he received the required number of votes. The Court cannot expect the Department to release someone on parole just because he and his cousin said so. There must be more corroborative, independent, unbiased evidence revealing he received a majority of affirmative votes during this particular parole hearing. Other individuals had records removed due to the length of time between the request and the actual hearing; however, they decided to conduct a more thorough investigation in order to provide the Department with sufficient evidence to convince them that the required amount of votes were made to award the inmate parole. If Respondent could have provided similar information, including statements from his lawyer and sister that this Department employee made these statements, the Department's decision may have been different. A name or a description of this employee so she could have been found by the Department and interviewed, or board members who actually voted during his hearing that could have remembered this particular hearing and could had informed the Department he did in fact received the four affirmative votes. None of this was supplied by the

Respondent. He just relied on his word and the word of his cousin. It should have been reasonable to the ALC that the Department made the proper decision. The Department cannot be expected to release someone from incarceration, especially a person being incarcerated for a violent offense such as kidnapping, based on only his word and the word of a relative.

The ALC placed a lot of weight on the fact the Respondent initially raised the fact he received four votes at his post-conviction relief hearing. She made her final decision based on the fact this was never challenged by the Appellant. The Appellant was unaware of this post-conviction relief application. This application had absolutely nothing to do with the Parole Board or the Department of Probation, Parole and Pardon Services. The Respondent only challenged the effectiveness of his attorneys. The matter of the vote count was irrelevant for post-conviction relief because the Respondent's attorneys had no involvement of the vote count of the Board. The fact the Respondent made this argument is not relevant.

There are many individuals currently incarcerated who maintain their innocence through their entire sentence. There exists a process to be able to receive a new trial based on after discovered evidence. If a Circuit Court judge is not convinced that the inmate has provided sufficient evidence to achieve a positive result, the Court has the duty to deny. That decision is not subject to reversal due to the weight of the evidence based on a question of fact. Where in an action at law, the exceptions to an order granting a new trial for after-discovered evidence do not claim that there was an erroneous exercise of discretion or an abuse of discretion, the Supreme Court will not reverse unless there is a clear showing of abuse of discretion, or unless the discretion was based on an error of law, and not where there is a conflict of evidence and a question of fact. White v. Charleston & W.C. Ry. Co., 121 S.C. 215, 114 S.E.2d 324 (1922). This also applies to the ALC. There *must* be a showing that the decision made by the Department was an abuse of discretion.

This has not been shown since it was revealed on the record that there exists a Parole Board policy when allegations are raised by an inmate. This policy was followed and other inmates have been released under this policy. The Department has shown that if sufficient substantial evidence has been presented that inmate would be released; however, the evidence revealed by the Respondent was minimal at best, and it is not the duty of the Department to object to any allegations raised by the Respondent, or to prove he failed to receive to acquired votes. It is the duty of the person seeking relief to prove with the presentation of substantial evidence that he received a majority of votes. He has failed to meet this burden; therefore, the decision of the Department was legal and not subject to reversal by the ALC.

2. The Respondent has not revealed that the decision of the Appellant was arbitrary and capricious; therefore, the ALC decision was in error.

The Respondent argues that the Department abused its discretion and the decision to deny him parole was arbitrary and capricious, thereby, allowing the ALC to reverse the decision of the Board and allow him to be released on parole. The South Carolina Code of Laws specifically state:

> 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)(a-f)(Supp. 2015)

Within his brief the Respondent cites the case of Trimmier v. S.C. Dept. of Labor Licensing & Regulations which defines arbitrary and capricious. In Trimmier, the Supreme Court decided that an arbitrary and capricious decision is one without rational basis, is based only on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles. Trimmier v. S.C. Dept. of Labor Licensing & Regulations, 405 S.C. 239, 246, 746 S.E.2d 491, 495 (Ct. App. 2013). The Respondent comes to the conclusion that since the Department had no records that supported the notion that he did not receive the four votes; the decision was arbitrary. However, it is not the duty of the Department to prove he failed to receive the four votes – it is the duty of the Respondent to prove he did receive these votes. Through his brief the Respondent continues to frame his argument as if it is a fact he received these votes, but has failed to produce any sufficient, unbiased, objective, concrete evidence to prove this fact. It was only his and his cousin's word that he received four votes. Although other persons were supposedly present, these individuals never testified or revealed any statements that supported his and his cousin's claims.

This decision was not based on the will of the Department, or made at pleasure of the Department, nor made without determining principles. It is rational for the Board not to release someone convicted of kidnapping to society just because he says so. Part of the mission statement of the Department is to protect the public trust and safety. That cannot be accomplished if the Department just releases an inmate because of what he says without any objective proof. There is also a fixed policy; there was never any allegation raised by the Respondent nor found by the ALC that this policy was not followed.

The Appellant also argues that the only evidence provided to the Department was full of hearsay testimony and should not be considered. Within his brief the Respondent argues that the

statement is made by a party opponent so it cannot be considered hearsay. There was never any evidence provided to the Department nor the ALC that this statement was actually made, or that it was made by an employee of the Department. Within his affidavit Mr. Bell just stated that "a women [sic] came to the common area, (I believe she was the secretary or recorder for the Parole Board.)" There was never a name nor a description of this person; Mr. Bell was not even sure what she did. And within the disposition of a known department employee Mr. Roosevelt Hicks, this was not possible due to employees not being present at the location of the Board and not informed of the final vote. The Respondent only asked Mr. Hicks if he has any idea who was in the room on 2001, no further questions were asked regarding who this Department employee could possibly be.

In the rules of evidence hearsay is defined as a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted. Rule 801(c) SCRE. The Respondent argues that this is a statement made by a party opponent so it falls under a statement which is not hearsay. However, there has not been any corroborating evidence made that reveals that this statement was ever made, or the person who made it worked for the Department. There was never a signed statement, affidavit, or deposition made by this "Department employee." The Respondent only expects the Department, and this Court, to believe his word. This should not be good enough without any evidence to prove this statement was made and made by a Department employee. The statement must be considered hearsay evidence and not admissible.

The Respondent admits the only evidence in the record is the statement from his cousin that this employee stated that there was four votes given. The ALC admits that during a hearing in this matter they sit in an appellate capacity. Furtick v. S.C. Dept. of Probation, Parole and Pardon

Services, 352 S.C. 594, 576 S.E.2d 146 (2003). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Williams v. David Strafford Drywall, 402 S.C. 173, 739 S.E.2d 892 (Ct. App. 2013). The ALC relies in error on a post-conviction relief hearing that was not between the Appellant and the Respondent but between the Respondent and the Attorney General's office. The Appellant was never a party to this proceeding, and never had any knowledge of these proceedings. To rely on this as proof that the Respondent received four votes is clearly an error of law made by the ALC. This is due to the fact this proceeding had nothing to do with the vote count. To place responsibility upon the Appellant to not take a position regarding the vote count when the Appellant was not a party, and never aware of the hearing is clearly an error of law.

The ALC also clearly erred in reversing the burden from the Respondent to the Appellant. The ALC stated that the Department offered nothing contradictory to the evidence presented by the Respondent. It is not the duty of the Department to prove he was not granted parole. The ALC makes the presumption that he was given the four votes totally ignoring the reasoning why the Appellant made its decision. 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. South Carolina Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995), *quoting,* Palmetto Alliance, Inc. v. South Carolina Public Services Com'n, 282 S.C. 430, 319 S.E.2d 695 (1984). The lack of objective, unbiased evidence provided by the Respondent is a very viable reason for the denial of parole. It is not unreasonable to believe that the Respondent's cousin told a fabrication in order for the Respondent to be released from incarceration. That is why there is a procedure created by the Department, and it is up to the Department, not the courts, to make a

determination as to whether sufficient evidence has been presented proving the vote count was established for the Respondent. If there was a failure to prove this by substantial evidence the Department is well within its rights to deny the Barton hearing, and this factual determination cannot be overruled by the courts.

The ALC has also ruled that they are not making a decision as to the parole determination but has ordered the Department carry out the previous order of the Parole Board. The Appellant argues that this determination goes beyond the authority of the ALC. This is due to the fact the Department has already decided that insufficient evidence has been presented. That determination cannot be reversed by the Court unless it was shown to be made arbitrarily and capriciously, or violated the Constitutional rights of the Respondent. The ALC determined that the Department failed to apply the law that is not true. The Department applied the procedures found in the Parole Board's procedure manual. Upon the conclusion of this procedure the lone decision to grant parole still remains with the Board, after an investigation of the facts by the Department. In order to grant the Respondent parole the evidence has to reliably show he received sufficient votes for parole at his 2001 hearing. The Appellant argues that it is not reasonable to just accept the word of the Respondent in making this determination. If that is the case any person currently incarcerated who has received a parole hearing prior to 2001 can simply say they received four votes and be automatically released on parole. That determination is not logical. The Parole Board did not award everyone parole during this period; there were obviously individuals who were denied parole, and unless the inmate can prove with substantial evidence he was awarded four or more votes the Department has the right and the duty to deny him release on parole – a decision that is not subject to reversal by the ALC.

It is the position of the Appellant that substantial evidence was not presented to the Department showing the Board voted in favor of parole, and this decision is not subject to reversal. The substantial evidence test must not be only applied by the ALC but by the administrative agency. Substantial evidence is not a mere scintilla; rather it is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion of the agency. Lark, at 276 S.C. 135-36, 276 S.E.2d 306-07. In looking at the complete record it must be reasonable to conclude that the Respondent failed to receive the four votes he proclaims he received. There is only one bit of evidence submitted – the hearsay testimony of his cousin. Although other witnesses were present, no other testimony was ever submitted. No board member who heard the case was ever contacted to submit their recollection of the hearing. There was supposedly an unknown employee of the department who informed the Respondent of his vote count; however, this employee's name or description was never given. There was also testimony given by a twenty-seven year employee of the agency who testified agency employees did not disclose the vote counts at the time. The Respondent also never received a single affirmative vote since this 2001 hearing. If he received four votes as he claims, there should have been votes in his favor at subsequent hearings since there was no change in circumstances. That presents more substantial evidence that this vote never occurred than it has. However, the ALC erred in reversing and placing the burden of proof on the Department instead of placing the burden on the party that initiated the proceedings, which the burden falls upon pursuant to South Carolina case law.

Lastly, the present case is almost identical to the South Carolina Court of Appeals case of Green v. S.C. Dept. of Probation, Parole and Pardon Services, 2015 WL 2169555. In Green, the Appellant Kenneth Green, like the Respondent in this case, submitted that he received four affirmative votes. The only proof submitted were two affidavits signed by his brother and father.

Within these affidavits appellant Green also argued that they were told by a parole examiner that he received four votes. As in the present case the Department determined that there existed insufficient evidence to prove he received the required votes to be awarded parole.

At the conclusion of this case the Honorable Carolyn C. Matthews Administrative Law Court Judge decided to affirm the decision of the Parole Board. Appellant Green appealed this decision, which the Court of Appeals affirmed, deciding without oral argument that pursuant to Leventis the burden of proof lies upon the person who files the claim. The Court of Appeals decided to affirm the decision of the ALC who decided that insufficient evidence was presented to reverse the decision of the Parole Board.[3]

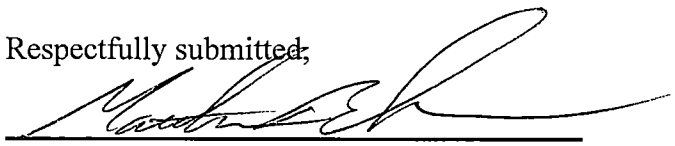
The Appellant argues that insufficient evidence was presented by the Respondent so the denial of parole was lawful. The ALC was in error in switching the burden to the Department regarding this case. Since there was insufficient substantial evidence presented by the Respondent that he has received four votes the denial of parole was rightfully made. For the ALC to reverse this decision it resulted in her injecting her opinion over a question of fact. The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380 (Supp. 2015). The final decision of the ALC was an error in law and should be subject to reversal.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the decision of the ALC be reversed, and the decision of the Board denying parole be reinstated.

[3] The Appellant Kenneth Green has since filed for another Barton decision this time offering affidavits of actual board members who have voted in his hearing. The current Board decided to deny his release on parole. This decision was reversed by the ALC, it is currently being appealed by the Department.

Respectfully submitted,



Matthew Buchanan
General Counsel

South Carolina Department of Probation
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Attorney for the Respondent

Columbia, South Carolina
May 18, 2016