THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 15-ALC-15-0033-AP
Appellate Case No. 2016-000225

David Rose, #91858, ... Respondent,

v.

South Carolina Department of Probation, Parole and Pardon Services, ... Appellant.

FINAL BRIEF OF RESPONDENT DAVID ROSE

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1. Should the ALC's determination that Rose received four votes for parole at his 2001 parole hearing be affirmed?

2. Did the ALC have the authority to review DPPPS's decision that Rose did not receive four votes for parole in 2001 and grant Rose relief?

3. Did the ALC correctly reject DPPPS's claim that the *Barton* case's "two-thirds rule" does not apply to Rose?

STATEMENT OF THE CASE

This is an appeal of an Administrative Law Court ("ALC") decision reversing an agency decision of the South Carolina Department of Probation, Parole, and Pardon Services ("DPPPS"). On February 13, 2015, DPPPS determined that David Rose did not receive enough votes at his 2001 parole hearing to obtain parole under *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013). On June 1, 2015, Rose filed a Notice of Appeal with the ALC challenging DPPPS's decision. On February 1, 2016, the ALC reversed DPPPS's decision and determined that Rose did receive enough votes at his 2001 parole hearing to obtain parole pursuant to the *Barton* case. On February 3, 2016, DPPPS appealed the ALC's decision to this Court.

FACTS

When Rose pled guilty to kidnapping[1] and was incarcerated in 1978, South Carolina's parole statute provided that an inmate would receive parole if a simple majority of the Parole Board members voted in favor of parole. S.C. Code Ann. § 55-613 (1962). In 1986, the

[1] DPPPS's description of Rose's 1978 offense is inaccurate, incomplete, and devoid of citations to the Record. As Rose's offense is not relevant to any issues in this appeal, Rose will note only that the 1987 Parole Board and the 2001 Parole Board heard *all the facts* regarding his offense, and Rose *twice* received enough votes from these Boards to obtain parole.

parole statute was amended to provide that an inmate who committed a violent crime[2] would not receive parole unless a two-thirds majority of the Parole Board members voted in favor of parole. Omnibus Criminal Justice Improvements Act of 1986, No. 462 § 31, 1986 S.C. Acts 2955, 2990. The current parole statute retains the two-thirds majority vote requirement for an inmate convicted of a violent crime. S.C. Code Ann. § 24-21-645(A).

In 1987, the Parole Board granted Rose parole. R. at 271. In 2000, Rose's parole was revoked because he failed to report his change of address to his parole agent. R. at 271.

On June 20, 2001, Rose appeared at a hearing before the Parole Board to request parole. Six members of the Parole Board were present at Rose's hearing. Rose was represented at the hearing by counsel and was accompanied by two persons supporting his request for parole. R. at 268, ¶ 1 & 196, ¶ 3. Immediately after the hearing, a female DPPPS employee informed Rose and those with him that Rose's request for parole had been denied. R. at 268, ¶ 2 & 196, ¶ 6. Then, in the presence of Rose and his supporters, Rose's counsel asked the DPPPS employee about the vote count, and she stated that four members voted for parole and two members voted against parole. R. at 268, ¶ 2 & 196, ¶¶ 8-9; *see also* R. at 119 & 264 ("He [Rose] testified that at his last parole hearing, he received four votes in favor of parole, but that parole was denied based on being short by one vote.").

Even though Rose received four favorable votes out of the six votes available at the 2001 hearing, DPPPS denied Rose parole by: (i) retroactively applying the two-thirds majority vote requirement in section 24-21-645(A) to Rose; and (ii) interpreting the two-thirds majority vote requirement in section 24-21-645(A) to require five affirmative votes to obtain parole,

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[2] Kidnapping is defined as a violent crime. S.C. Code Ann. § 16-1-60.

regardless of how many Parole Board members are present and voting at the parole hearing. R. at 271 & Supp. R. at 50, L. 12 – 51, L. 12.

After the 2001 parole hearing, Rose filed actions in Circuit Court and the ALC claiming that DPPPS had unlawfully denied him parole. Rose asserted that he received four votes at his parole hearing and retroactively applying the current parole statute's two-thirds majority vote requirement to him -- rather than the old parole statute's simple majority vote requirement – was an *ex post facto* violation.

In response to Rose's actions, DPPPS did not challenge the fact that Rose had received four votes for parole in 2001. Instead, DPPPS asserted that retroactively applying the two-thirds majority vote requirement in the current parole statute to Rose was not an *ex post facto* violation and therefore Rose needed five votes, not four, to obtain parole in 2001. R. at 271. DPPPS coupled this erroneous legal argument with a strategy of denying Rose a hearing on the merits of his constitutional claim. In 2006, DPPPS obtained the dismissal of Rose's Circuit Court action by arguing that the Administration Law Court should adjudicate Rose's claim. R. at 261-266. Shortly thereafter, DPPPS obtained the summary dismissal of Rose's ALC action. R. at 281-282.

On July 3, 2013, the South Carolina Supreme Court held that DPPPS's retroactive application of the two-thirds majority vote requirement in section 24-21-645(A) violates *ex post facto* and DPPPS requiring five affirmative votes to satisfy the two-thirds majority requirement, regardless of how many members are present and voting at the parole hearing, violates section 24-21-645(A). *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013).

The *Barton* case made clear that DPPPS had been unconstitutionally denying inmates parole by requiring a two-thirds majority vote in favor of parole when inmates needed only a simple majority vote. The *Barton* case also made clear that DPPPS had been unlawfully denying inmates parole by counting absent parole board members as "no" votes.

Granting parole is a two-step process. First, the Parole Board determines whether the inmate should receive parole. Second, if the Parole Board votes in favor of parole, the Parole Board sets the conditions for parole and signs an order for parole. R. at 97, L. 13-23. As DPPPS's Director of Parole Board Support Services, Larry Patton, ("Director Patton") explains below, inmates who were erroneously denied parole because of the violations of law recognized by *Barton* made it through the first step – they received enough votes for parole -- but they did not make it to step two.

Q. . . . And why didn't we have part two in 2001?

A. Because this law ruling [*Barton*] didn't take place back then.

Q. They [Parole Board] didn't know they needed to move to part two?

A. They were going under the current law.

Q. Right. They thought the inmate was rejected so they never got to conditions –

A. Right.

Supp. R. at 35, L. 18 – 36, L. 1.

DPPPS implemented the following policy to rectify the violations of law identified by *Barton*:

10. BARTON HEARINGS

The South Carolina Supreme Court decision in Barton v. SCDPPPS held that the Board is to consider a majority and two-thirds majority to be based on the number of Board members present, rather than based on the full Board

membership. If an offender's old vote is brought to the Department's attention, the Office of Parole Support Services staff will investigate to verify that the offender did receive the proper number of votes, and the Department's Office of Legal Services will verify it qualifies under proper number of votes, and the Department's Office of Legal Services will verify it qualifies under Barton. The Department's Office of Victim Services will contact the victim and explain the Barton decision and the Board's vote. During a full Board day, the Board will hold a Barton hearing on the offender. This hearing will not require the presence of the victim or the offender.

At the Barton Hearing, the Board may impose any conditions on the offender as it feels necessary, including all statutory conditions. The Board will then sign a special Barton Order of Parole, which ratifies the votes of the previous Board members which would have granted conditional parole. The offender is then treated as any other offender granted conditional parole, and will have to comply with the conditions in order to receive parole.

R. at 219 § 10. This policy creates a two-step process. First, DPPPS determines whether the inmate received enough votes at the prior parole hearing to receive parole pursuant to guidance provided by *Barton*. If DPPPS determines the inmate received the requisite number of votes, the current Parole Board convenes a "Barton Hearing" to set conditions for parole and sign the order for parole. Importantly, the current Parole Board does not reconsider the prior Parole Board's decision to grant parole.

Q. . . . So the – in the Barton hearing process, the current parole board is not hearing from the victim witnesses again?

A. Right.

Q. They're not hearing from the offender again?

A. No.

Q. They're not hearing from the offender's attorney again?

A. Right.

Q. Because they don't need to.

A. Right. The decision is made.

Q. The decision was made in 2001.

A. Yes, whenever.

Supp. R. at 36, LL. 13-25.

Q. . . . So under this Barton hearing process, the agency has the power to determine, after the investigation, whether the inmate has got enough votes in the past, right?

A. Right.

Q. The parole board has the power to impose conditions?

A. Right.

Supp. R. at 39, LL. 9-16.

On February 26, 2014, after learning about the *Barton* case, Rose filed an action *pro se* in Circuit Court asserting that the *Barton* case had confirmed what Rose had been claiming for 14 years; that is, that DPPPS had unlawfully denied him parole when he received four votes for parole at his 2001 hearing. DPPPS again moved to dismiss Rose's case arguing that the Circuit Court lacked jurisdiction over Rose's claim and that the ALC was the appropriate forum for Rose's claim. The Circuit Court deferred ruling on DPPPS's motion to dismiss, and instead ordered DPPPS to conduct an investigation to determine whether Rose should be paroled under *Barton*.

Pursuant to the Circuit Court's order and pursuant to the policy for Barton hearings set forth above, DPPPS conducted an investigation to determine whether Rose should receive parole under *Barton*. Director Patton conducted the investigation. R. at 254, no. 1.

During this investigation, Director Patton reviewed an affidavit from Carlos Bell who had attended the 2001 parole hearing. R. at 254, no. 1. Bell's affidavit corroborated Rose's

assertion, and his previous testimony before the Circuit Court, that four Parole Board members voted for Rose to be paroled in 2001.

> A women came out to the common area were [sic] we were waiting the results (I believe she was the secretary or recorder for the Parole Board), she said "I'm sorry but parole has been denied", we were dumb struck. After a moment of figuring what had just happened we asked Mr. Neal [counsel for Rose] if we could find out what the vote was. Mr. Neal then asked the women what was the vote count, she gave this to him, then he in turn turned back to us and repeating what she had told him, the count was 4 yes votes and 2 no votes. I immediately asked Mr. Neal how can parole be denied when David got 4 Yes votes out of 6, was this not a majority. He stated this did not sound right and he would be checking on this.

R. at 269, ¶ 2.

DPPPS reported that no evidence other than Bell's affidavit was considered during the investigation. R. at 254-55, nos. 1 & 2. However, when Director Patton was asked during his deposition whether he had reviewed anything during the investigation that he believed was evidence that Rose had not received four votes, Patton identified a "hearing ledger" in DPPPS's computer that noted Rose had been rejected for parole in 2001. Supp. R. at 48, L. 23 – 49, L. 9. At his deposition, Director Patton conceded that this ledger did not, in fact, contradict Rose's claim that he received four votes as the ledger did not contain the vote tally from Rose's hearing, and the ledger was made when DPPPS "[w]asn't counting votes, right, for today's ruling [*Barton*] . . ." and was retroactively applying the two-thirds majority requirement. Supp. R. at 50, L. 12 – 51, L. 17.

In a letter dated February 13, 2015, DPPPS provided notice to Rose and the Circuit Court that DPPPS had concluded its investigation and decided that Rose was not entitled to receive parole under the *Barton* case. R. at 267. DPPPS's February 13th letter reported that "without any other evidence of the vote count from your June 20, 2001, hearing, the Department, cannot release you to parole." R. at 267. Importantly, DPPPS had no other

evidence to review regarding the vote total at Rose's 2001 hearing because DPPPS had, *for years,* failed to make and keep written records of the votes at parole hearings. R. at 255-56, nos. 4, 5 and 6 ("Prior to 2014 the final vote count was never recorded.") & Supp. R. at 4, L. 20 – P. 5, L. 9 (DPPPS has been making written records of voting for "maybe a year").[3] This failure to make and keep written records violates the parole statute and the Freedom of Information Act. S.C. Code Ann. § 24-21-40; S.C. Code Ann. § 30-4-10 *et seq.*

After the issuance of the February 13th DPPPS decision, the Circuit Court granted DPPPS's motion to dismiss and denied Rose's motion to reconsider in an order filed on May 1, 2015. R. at 245. In the order dismissing Rose's claim, Judge Addy concluded, as DPPPS had argued, that the Circuit Court did not have jurisdiction over Rose's claim, but the ALC did. The Circuit Court's order included the following:

> The court is genuinely troubled by the failure of the Parole Board to maintain any records relating to the parole hearing of June 20, 2001, and the absence of any record documenting the denial of parole, or otherwise signed by the members of the board present at that hearing, is of significant concern to the court. Put another way, if the only evidence in existence is the affidavit of Carlos Bell [affirming that Rose received four (4) out of six (6) votes], and the Parole Board lacks documentation to demonstrate that Plaintiff did not receive the required number of votes, the court is curious as to how a meaningful investigation could have been conducted as required under *Barton v. S.C. Dept. of Probation, Parole, and Pardon Servs,* 404 S.C. 395, 745 S.E.2d 110 (2013). By implication, the Parole Board appears to take the position that, since all records have been destroyed, the vote must have been adverse to Plaintiff's position - ergo, the lack of documentation indicating denial of parole is sufficient to demonstrate that parole was denied. Such circular and perfunctory reasoning is curious and does not take into account the alternative possibility - that the affidavit of Carlos Bell is correct and that the Plaintiff was mistakenly denied parole under the holding in *Barton*. . . .

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[3] Even though Rose's 2001 hearing has been the subject of litigation for the past fourteen years, DPPPS destroyed the audio tape of Rose's 2001 hearing. R. at 255, no. 3. Rose has a copy of the audio recording from his 2001 hearing, but it does not include a tally of the votes. R. at 103-108 & 119.

> Plaintiff is advised to appeal the Board's finding to the ALC. The court would also respectfully suggest that this case may represent one of those rare occasions where the ALC should conduct a full, formal hearing into this matter.

R. at 245-246.

On June 1, 2015, after retaining *pro bono* legal representation, Rose filed an appeal with the ALC asserting that DPPPS had unlawfully denied Rose parole. On February 1, 2016, the ALC issued a decision reversing DPPPS's decision that Rose did not receive enough votes in 2001 to obtain parole. The ALC remanded this matter for a hearing before the Parole Board to determine what conditions, if any, should be imposed upon Rose's parole. In pertinent part, the ALC's decision stated:

> The Department concluded that Appellant [Rose] 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 Department must provide at least some support for its factual findings, the Court concludes that the Department's decision must be reversed.

R. at 153-154.

The ALC also considered, and rejected, DPPPS's argument that the relief requested by Rose was an impermissible usurpation of the Parole Board's authority to grant or deny parole:

> 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.

R. at 154. The ALC further rejected DPPPS's claim that the *Barton* case cannot be applied retroactively to Rose. Specifically, the ALC held that Rose's claim was non-collateral, and that *Barton* protected existing constitutional and statutory rights rather than announcing a new rule. R. at 154.

STANDARD OF REVIEW

The Court will only reverse a decision of the ALC if the decision is: (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 an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610(B); *Barton*, 404 S.C. at 401, 745 S.E.2d at 113.

ARGUMENT

I. THE ALC'S DETERMINATION THAT ROSE RECEIVED FOUR VOTES FOR PAROLE IN 2001 SHOULD BE AFFIRMED

A. The ALC's determination is supported by substantial evidence

When reviewing a decision of the ALC, the Court "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Barton*, 404 S.C. at 401, 745 S.E.2d at 113 (citing S.C. Code Ann. § 1-23-610(B)). "In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached." *Id.*; *Al-Shabazz v. State*, 338 S.C. 354, 380, 527 S.E.2d 742, 756 (2000); *ESA, Servs. v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011).

DPPPS makes the following arguments in support of reversing the ALC's determination that Rose received four votes at his 2001 hearing: (1) the ALC placed "great emphasis" on DPPPS's prior failure to dispute Rose's position that he received four votes; (2) Bell's sworn testimony is unreliable hearsay; (3) Rose did not make a "full faith effort" to provide evidence

that he received four votes; and (4) because the recording from the 2001 hearing does not contain a vote count and the parole board is "usually inclined" to deny after a parole revocation, it is "safe to assume" Rose did not get four votes. DPPPS Br. 4-8.

DPPPS's arguments are flawed for many reasons, but the most fundamental flaw is that all of these arguments fail to address the applicable standard of review. The ALC's determination that Rose received four votes should not be reversed if there is substantial evidence in the record that would allow "reasonable minds" to reach the ALC's conclusion that Rose received four votes.

DPPPS compiled the evidence we have in the record regarding Rose's 2001 vote total pursuant to an investigation ordered by the Circuit Court. Because of DPPPS's abject failure to make and keep even the most basic written records of parole hearings, there was admittedly not much evidence to compile.

The record contains sworn testimony from Carlos Bell who stated that Rose received four votes at the 2001 hearing. R. at 268. Bell's affidavit corroborated testimony Rose had offered in the previous legal actions he filed against DPPPS over the past 14 years. R. at 119 & 264. The record also reveals that Rose consistently asserted in his legal actions against DPPPS that he had received four votes, and DPPPS never disputed this factual assertion. R. at 271.

On the other hand, there is *no evidence in the record* that Rose received three, two, one, or zero votes in 2001. *Supra* Stmt. of Facts at 6-8. As the ALC correctly determined after reviewing the record, "there is not even a scintilla of evidence supporting the Department's decision." R. at 153.

On this record, it is abundantly clear that the ALC's determination that Rose received four votes is supported by substantial evidence. On this record, it is abundantly clear that a reasonable mind could reach the conclusion the ALC reached on Rose's vote count. Because DPPPS's arguments do not apply the substantial evidence rule, much less establish that the ALC's determination is not supported by substantial evidence, these arguments should be rejected, and the Court should affirm the ALC's factual determination that Rose received four votes for parole at his 2001 hearing.

B. DPPPS's arguments fail for additional reasons

1. The ALC's consideration of DPPPS's failure to contest Rose's position on the 2001 vote count was appropriate

DPPPS claims that the ALC's determination that Rose received four votes should be reversed because the ALC placed "great emphasis" on DPPPS's failure in previous litigation to dispute Rose's position that he received four votes in 2001. DPPPS Br. at 4-5. DPPPS does not fairly characterize the ALC's consideration of this evidence. As described above, the primary basis for the ALC's decision was the utter lack of any evidence in the record supporting DPPPS's decision. In addition, the ALC noted DPPPS's prior failure to challenge Rose's position that he had received four votes. Contrary to DPPPS's characterization, the ALC acknowledged that DPPPS's failure to challenge Rose's position is "not direct proof of the veracity of Rose's position," and appropriately found that the failure to challenge Rose's position "creates an inference that those facts were accurate." R. at 152.

DPPPS argues that it never expressly conceded that Rose received four votes; however, DPPPS does not – and cannot – dispute that DPPPS never contested Rose's assertion that he received four votes during the previous litigation. R. at 271 (DPPPS asserting that Rose needed

five, not four, votes to obtain parole in 2001, but not challenging Rose's assertion that he received four votes). The Court should reject DPPPS's argument that the ALC's decision should be overturned merely because it appropriately considered DPPPS's failure to contradict Rose's position that he had received four votes over the course of 15 years.

2. The ALC's consideration of the Bell affidavit was appropriate

DPPPS claims that Bell's sworn testimony is unreliable hearsay. DPPPS Br. at 5. A statement made by a party opponent is "not hearsay." S.C. R. Evid. 801(d)(2). Rose testified in Circuit Court and Bell testified in an affidavit that after the 2001 parole hearing a female DPPPS employee told Rose, Bell, and Rose's counsel that four members of the Parole Board voted in favor of parole and two voted against parole. *Supra* Stmt. of Facts at 2. As the DPPPS employee's statement is an admission by a party opponent, it is not hearsay. Even if this testimony were hearsay, which is denied, this evidence was still properly considered by the ALC because this evidence is in the record, and it was considered during DPPPS's investigation and decision making regarding Rose's vote count.

In a related argument, DPPPS offers that after the 2001 hearing Rose's counsel *may have* misrepresented the vote count to Rose and the others present "only to assure payment." DPPPS Br. at 5. Simply put, speculation unsupported by the record is not a basis for reversing the ALC.

3. DPPPS's claim that Rose did not work hard enough to provide DPPPS evidence of the vote count is absurd

DPPPS's claim that Rose did not "give a full faith effort" to gather evidence on the issue of the vote count is particularly galling as Rose has been litigating this issue with DPPPS, often *pro se*, for most of the last 15 years, and DPPPS's failure to make, much less to preserve, even the most rudimentary records of the vote counts at parole hearings violated the

parole statute. S.C. Code Ann. § 24-21-40 ("The Board shall keep a complete record[4] of all its proceedings and hold it subject to the order of the Governor or the General Assembly."); *see also* S.C. Code Ann. § 24-21-220 (including "maintaining the board's official records, and performing other administrative duties relating to the board's activities" as a duty of the Director of DPPPS).

Moreover, over the years DPPPS has been repeatedly advised by the Attorney General that its failure to keep written records of parole hearings violates the Freedom of Information Act ("FOIA"). *In the matter of the Honorable Glenn F. McConnell*, 2001 W.L. 790250, *4 (Op. Att'y Gen. 2001) ("In short, [FOIA] requires the votes of individual members of the Parole Board to be public information."); *In the matter of Frank B. Sanders*, 1985 W.L. 259229, *1-2 (Op. Att'y Gen. 1985) (holding that a Parole Board is a public body and that "[a]ll public bodies shall keep written minutes of all their public meetings" including "a record . . . of any votes taken"); *In the matter of John E. James, III*, 2012 WL 5266016, *1 (Op. Att'y Gen. 2012) (noting that FOIA should be narrowly construed to ensure public access, including a record of individual votes by the members of a public body). DPPPS's attempt to place the burden of its unlawful failure to keep records on Rose should be rejected, and the ALC's decision upheld.

4. Assuming that Rose did not receive four votes is not appropriate

DPPPS claims that it is "safe to assume" Rose did not receive four votes because the vote count was not announced on the recording of the hearing and because the Parole Board is "usually inclined to deny parole upon a recent revocation." DPPPS Br. at 6-8. This claim

[4] DPPPS acknowledged that a complete record of a parole hearing would include, among other things, a tally of the votes cast and identification of the members who voted for and against the request for parole. Supp. R. at 3, LL. 10-17] (the record should contain "[j]ust essentially the board member and what he or she voted").

should be rejected because illogical and unjustified "assumptions" are not appropriate grounds for reversal of the ALC's factual finding that Rose received four votes.

C. Alternative sustaining grounds support the ALC's decision

1. DPPPS's decision was arbitrary, capricious, and an abuse of discretion

An arbitrary and capricious agency decision "is 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, or is governed by no fixed rules or principles." *Trimmier v. S.C. Dep't of Labor, Licensing & Regulation*, 405 S.C. 239, 246, 746 S.E.2d 491, 495 (Ct. App. 2013)(quoting *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985)). An agency decision is an abuse of discretion when the decision is based upon a factual conclusion that is without evidentiary support. *Trident Med. Ctr. v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 341, 348, 772 S.E.2d 177, 181 (Ct. App. 2015).

It is undisputed that Director Patton had no records, affidavits, or other evidence that supported the notion that Rose received three, two, one, or zero votes at the 2001 hearing. It is also undisputed that Director Patton had evidence that Rose received four votes. Simply put, when DPPPS reached the conclusion that Rose did not receive four votes when the only evidence in the record established otherwise, DPPPS abused its discretion.

DPPPS based its decision that Rose did not receive enough votes in 2001, in part, upon Rose's failure to present DPPPS with records showing the 2001 vote tally. R. at 267 ("Without any other evidence of the vote count from your June 20, 2001, hearing, the Department, cannot release you to parole."). It should go without saying that it is arbitrary, capricious – not to mention inequitable - to penalize Rose for not having written records showing the 2001

vote tally when it was DPPPS that failed to make and keep these records in contravention of the parole statute and FOIA.

The only evidence DPPPS claimed in support of its decision was an entry on a DPPPS hearing ledger noting that Rose's 2001 request for parole was rejected. As DPPPS now correctly acknowledges, this entry provides no probative evidence regarding the number of votes received, and DPPPS relying upon this entry for the February 13th decision is, therefore, arbitrary and capricious.

DPPPS's decision that Rose did not receive four votes was both arbitrary and capricious and an abuse of discretion. For these additional reasons, the ALC's decision should be affirmed.

2. DPPPS's decision violated constitutional and statutory provisions

Rose should receive parole if a majority of the Parole Board members present at a hearing vote in favor of parole. S.C. Code Ann. § 55-613 (1962) (approval by a majority results in parole); *Barton*, 404 S.C. at 419, 745 S.E.2d at 123 (members not present and voting at the hearing are not counted when determining whether an inmate receives the required quantum of votes).

DPPPS's decision denied Rose parole when *the only evidence in the record* is that Rose received four of six votes, a majority, at the 2001 hearing. Denying Rose parole when he received a majority of votes in favor of parole violates section 55-613 of the parole statute.

An agency decision that arbitrarily denies a person life, liberty, or property violates the substantive due process clause. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 300, 737 S.E.2d 601, 611 (2013). "It is axiomatic that any period of incarceration

implicates a sufficient liberty interest to trigger due process requirements." *Steele v. Benjamin*, 362 S.C. 66, 72, 606 S.E.2d 499, 503 (Ct. App. 2004).

DPPPS's decision that Rose did not receive enough votes at his 2001 parole hearing to be granted parole under *Barton* infringes upon Rose's liberty interest. As this agency decision is arbitrary and capricious and is contrary to the evidence in the record this decision violates Rose's substantive due process rights.

DPPPS's decision that Rose did not receive four votes for parole violated both the parole statute and substantive due process. For these additional reasons, the ALC's decision should be affirmed.

II. THE ALC HAD THE AUTHORITY TO REVERSE THE DPPPS DECISION AND GRANT ROSE RELIEF

DPPPS argues that the ALC's decision should be reversed because the ALC "made itself the determining body regarding parole" thereby usurping the authority given the Parole Board by the General Assembly. DPPPS Br. at 8. DPPPS's argument should be rejected as it mischaracterizes the ALC's decision.

The ALC did not review Rose's record while in prison and determine whether he should receive parole. That determination, most assuredly, is one for the Parole Board. S.C. Code Ann. § 24-21-640. The ALC also did not review and reverse a routine denial of parole by the Parole Board, as such a ruling would be contrary to the well-established law that parole is a privilege, not a right. *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008).

What the ALC did was to review the DPPPS determination – made by Director Patton pursuant to DPPPS's "Barton Hearing" policy – that Rose did not receive enough votes at his

2001 hearing to receive parole. The ALC reversed DPPPS's decision because it is not supported by *any evidence*, much less substantial evidence. R. at 154-155 ("Because the Department must provide at least some support for its factual findings, the Court concludes that the Department's decision must be reversed.").

Next the Court remanded Rose's matter to DPPPS and the Parole Board so that Rose can proceed to step two in the parole process where Rose would receive parole conditions, if any, and would receive an order of parole pursuant to DPPPS's Barton Hearing policy. R. at 153-155 & Rose Br. at 15. In short, the ALC ordered DPPPS to follow its own policy. The ALC's authority in this regard cannot seriously be questioned. S.C. Code Ann. § 1-23-380(5); *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013); *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000).

As the ALC noted, the ALC did not grant or deny parole, but instead required the Parole Board to "carry out the result of a vote the Board already made." R. at 154. This is exactly what the Supreme Court did in the *Barton* case. *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."). Just as the Supreme Court did not usurp the Board's authority to "grant" parole in *Barton*, the ALC has not done so here.

III. THE ALC PROPERLY APPLIED *BARTON* TO THE CASE

DPPPS claims that Rose's appeal fails because the *Barton* case's "two-thirds rule" does not apply "retroactively" to Rose. DPPPS Br. at 9-10. Though it is far from clear, DPPPS appears to be using "two-thirds rule" to refer to the Supreme Court's holding in *Barton* correcting the way DPPPS calculated whether an inmate had achieved a two-thirds majority (or

a simple majority) vote for parole. The *Barton* case made clear that DPPPS violated the Parole Statute when it calculated these percentages without regard to the number of Parole Board members actually present and voting at the hearing. *Barton*, 404 S.C. at 414-19, 745 S.E.2d at 120-23.

The Supreme Court in *Barton* also held that DPPPS's retroactive application of the two-thirds majority vote requirement in section 24-21-645(A) violated *ex post facto*. *Id.* at 114-20 & 402-14. DPPPS does not contend that portion of the *Barton* holding does not apply to Rose. Pursuant to *Barton* then, S.C. Code Ann. § 55-613 (1962) and its simple majority vote requirement applies to Rose -- not section 24-21-645(A) and its two-thirds majority vote requirement. Therefore, even if the *Barton* case's "two-thirds rule" does not apply to Rose, which is denied, not applying this rule to Rose would be of no moment as Rose obtained four out of six votes, a majority vote.

The Supreme Court in *Barton* also held that DPPPS's retroactive application of the two-thirds majority vote requirement in section 24-21-645(A) violated *ex post facto*. Id. at 114-20 & 402-14. DPPPS does not contend that this portion of the *Barton* holding does not apply to Rose. Thus, pursuant to *Barton*, S.C. Code Ann. § 55-613 (1962) and its simple majority vote requirement applies to Rose -- not section 24-21-645(A) and its two-thirds majority vote requirement. Therefore, even if the *Barton* case's "two-thirds rule" does not apply to Rose, which is denied, not applying this rule to Rose would be of no moment as Rose also obtained a majority vote.

DPPPS argues that the Supreme Court's silence regarding retroactivity in *Barton* "implies" that the "two-thirds rule" should apply prospectively only. DPPPS Br. at 9. DPPPS's argument ignores the inconvenient fact that the Supreme Court in *Barton* applied its

holdings "retroactively" to Barton's previous hearing resulting in her parole. *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."). DPPPS's argument regarding the retroactive application of the "two-thirds rule" should be rejected, as it is contrary to the Supreme Court's ruling in *Barton*.

DPPPS's reliance on *Talley v. State*, 640 S.E.2d 878, 371 S.C. 535 (2007) is misplaced. The *Talley* case addresses the standards to determine whether a new rule of federal constitutional law should apply retroactively. As the ALC correctly noted, the *Barton* case did not announce a new rule of Constitutional law. R. at 154. Rather, it "found that the actions of the Board violated Barton's existing Constitutional rights and her 'substantial personal right to statutorily correct parole review.'" *Id.* (quoting *Barton*, 404 S.C. at 413-14, 745 S.E.2d at 119-20).

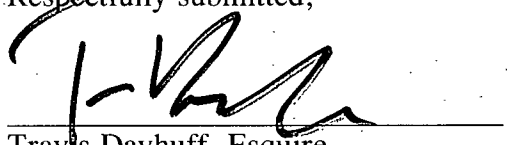
Finally, DPPPS argues that *Barton* should be applied "prospectively only" because allowing inmates to apply *Barton* to their previous parole hearings would "invite countless fraudulent claims for parole." DPPPS Br. at 11. This argument is meritless. First, fraudulent vote count claims can easily be addressed by DPPPS decision making that is supported by thorough fact-gathering and investigation. Second, DPPPS's speculation that it may experience some fraudulent vote count claims is not a legitimate reason to deny inmates redress for DPPPS's statutory and constitutional violations.

CONCLUSION

For the reasons set forth above, Rose respectfully requests that the Court: (1) affirm the ALC's decision; (2) remand this matter back to DPPPS and the Parole Board with instructions to convene a Barton Hearing for Rose for the purpose of imposing appropriate conditions, if

any, to the parole granted Rose by the 2001 Parole Board and for the signing of an order of parole; and (3) afford any other relief that is just and proper.

Respectfully submitted,



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June 2, 2016

Columbia, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 15-ALC-15-0033-AP
Appellate Case No. 2016-000225

David Rose, #91858, ... Respondent,

v.

South Carolina Department of Probation, Parole and Pardon Services, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that the Final Brief of Respondent David Rose complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for David Rose, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by having them hand delivered to the following address(es):

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