

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

Unpublished Opinion No.: 2017-UP-082
Submitted January 1, 2017-Filed February 15, 2017

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FEB 27 2017

SC Court of Appeals

South Carolina Department of Probation, Parole and
Pardon Services,

APPELLANT

v.

Kenneth Green, #116020

RESPONDENT

PETITION FOR REHEARING

The Appellant, the South Carolina Department of Probation, Parole and Pardon Services respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR. The Respondent hereby seeks a rehearing on the grounds that this Court may have misapprehended or overlooked several crucial points in concluding that the Administrative Law Court (ALC) was correct in determining that the Appellant erred in failing to ratify in favor of granting the Respondent's parole.

Specifically, the Appellant submits that they may have misapprehended that the Board erred in considering the Respondent failed to prove that he received the sufficient votes to be granted parole at the conclusion of his November 29, 2000 hearing. The Appellant will put before this Court that the Board did not arbitrarily fail to ratify the decision of the Respondent. This Court,

and the ALC has come to the decision that the Board in not considering the affidavits of the prior Board members was arbitrary; therefore, subject to reversal. The Appellant wishes this Court to once again review the decision of the ALC. The decision of the ALC should be based on an error of law and not a determination on a question of the evidence presented.

The Appellant requests this Court consider not only the affidavits, but all of the hearings where the Respondent never once again received four votes. The Appellant also wishes for this Court to consider that the Board is the only entity that exists who has been given the authority to grant or deny parole. Although this Court was correct that the decision of the Board must be made within certain parameters, the Appellant will present to the Court that these parameters were met. The Appellant requests that this Court reverse the lower Court's decision regarding this cause of action.

The Respondent is currently serving a life sentence for the offense of murder. Pursuant to South Carolina law he became eligible for parole upon the service of twenty years incarceration. The hearing at issue occurred on November 29, 2000. 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), the Respondent notified the Appellant that he too received four affirmative votes. It was his request that like the Appellant in *Barton*, he too should be released on parole.

The Respondent petitioned the Board to be allowed to appear for a *Barton* hearing. He was allowed to appear before the Board to argue that he did in fact received four affirmative votes, so the previous Board 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 from his father and brother.¹ 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 Respondent failed to reveal sufficient evidence proving that he received the required votes to be awarded parole. Upon being notified of this decision the Respondent decided to file a notice of appeal before the Administrative Law Court (ALC). On February 11, 2016, the Honorable Ralph King Anderson, III Chief Administrative Law Judge issued his decision. In this decision Judge Anderson determined that the Board failing to accept the affidavits of the prior Board members, resulted in an arbitrary decision. The ALC determined the Board erred in failing to ratify the previous Board's decision. The Court ordered the Department's decision be reversed and remanded for further proceedings consistent with the order.

After this decision the Appellant filed a notice of appeal before the South Carolina Court of Appeals. Upon review of the submitted briefs and evidence within the record this Court filed a decision on February 14, 2017, affirming the ALC's decision. The Appellant is of the opinion that this Court misapprehended or overlooked certain factors prior to making their decision.

The Appellant respectfully request this Court to grant this petition for rehearing and issue an opinion reversing the decision of the lower court. The Appellant also requests that this Court determine that the decision of the Board was not done in error since the Board has the ability to rescind any parole decision pursuant to statutory law.

¹ The ALC determined that the affidavit from the Respondent father and brother was hearsay and could not be considered by the Board.

ARGUMENT

The Appellant did not err in deciding that the Respondent failed to present sufficient evidence to have his parole ratified.

A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the Court. Rule 221(a)SCRAP. Within this petition the Appellant will reveal what they believe are factors that this Court possibly overlooked or misapprehended prior to making their final decision.

Pursuant to South Carolina law the Parole Board is the only entity with the ability to determine if an inmate should be allowed to be released on parole. The Parole Board has 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). This power also extends to the ability to rescind a prior awarded parole. The South Carolina Code of Laws specifically state:

A provisional parole order shall include the terms and conditions, if any, to be met by the prisoner during the provisional period and terms and conditions, if any, to be met upon parole. Upon satisfactory completion of the provisional period, the director or one lawfully acting for him must issue an order which if accepted by the prisoner, shall provide for his release from custody. However upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole.

S.C. Code Ann. §24-21-645 (Supp. 1981).

This is what gives the Board the ability to hold a *Barton* hearing to make the determination that the inmate has presented sufficient evidence revealing they received four votes at a previous hearing. If ratified, 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. Then the director or one lawfully

acting for him must issue a parole order which if accepted by the prisoner, provides for his release from custody. S.C. Code Ann. §24-21-650 (1962). Nothing exists in statute nor case law that allows the ALC or this Court to order a release of a prisoner on parole. The ALC reversing the Board's decision made an order granting the Respondent's parole.

The ALC and this Court decided that the decision of the Parole Board must be considered arbitrary which allows the Court to reverse the decision of the Board, which the Appellant disagrees. The ALC ruled that pursuant to South^s Carolina law they are allowed to reverse a decision of the Board if that decision is arbitrary. The South Carolina Code of Laws does 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: arbitrary or capricious or characterized by abuse or discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(5)(f)(Supp. 2015)

The Appellant argues that the ALC and this court only reviewed one aspect of the case the affidavits submitted by the Parole Board. However, there are other aspects of this case that were used in making the final determination.² The Board should have the ability to decide on the merits of the evidence brought before them, and that decision should not be reversed by the Courts when it comes to releasing a person on parole.

² The Appellate court can reverse or modify the decision of the Appellate panel of the Workers' Compensation Commission only if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Sanders v. Wal-Mart Stores Inc.* 379 S.C. 554, 666 S.E.2d 297 (S.C. App. 2008).

The Appellant argues that the determination on whether or not a person is released on parole is totally left up to the Parole Board. This includes as to how much weight or reliability to give evidence given to the Board. If the Board decides the affidavits were done in error, or the prior board members were mistaken they have the right to not accept the evidence presented and deny any ratification. The Board also has the right to consider all other hearings that was held prior to and after this 2000 hearing. The Respondent failed to receive four votes at any of the eleven hearings held since the November 2000 hearing.

The ALC also ruled that this decision was contrary to Board policy, and that if they made this decision then they would to refuse all *Barton* requests.³ The Appellant disagrees. There have been individuals who have provided evidence that the Board believed revealed a four vote count allowing parole. However, if the Board believes that the fifteen year memories of Board members are insufficient to determine definitely that four votes were received, they have the right to deny a prisoner to be released on parole.

The ALC decided that the Board should have believed the affidavits of the prior Board members. The ALC did not attend the hearing so they did not have the ability to make a conclusion as to the information presented. The ALC making a determination as to the veracity of the prior affidavits presented is identical to this Court concluding that a jury erred in not believing a witness and overturning a verdict for only that reason. The Courts have never been given the authority to reverse a verdict due to the failure of the jury not to consider the weight of a witness's testimony. The ALC only sits in a appellant capacity so they do not have the ability to rule on a question of fact. The appeal court in a law case has only authority to consider alleged errors of law and has no right to order an original judgment for plaintiff. *Smith v. Grant*, 15 S.C. 136 (1881).

³ Due to the determination in this case that the *Barton* decision does not apply retroactively the Board removed the ability for a *Barton* review hearing from policy.

There have been no allegations regarding any error of law committed by the Parole Board. The Appellant did conduct a hearing to allow the Respondent to present any evidence in an attempt to convince the Board to ratify a previous decision. The decision of the Board was legal and should have been affirmed by the ALC. In its decision the ALC actually replaced the decision of the Board with his decision as to the weight of the evidence presented, concluding that the final decision was arbitrary. Arbitrary is defined as "Determined by chance, whim or impulse." AMERICAN HERITAGE COLLEGE DICTIONARY 69 (3rd ed. 1997) There was nothing in the decision made by the Board that reveals this decision was a result of a whim, or impulse. The Board gave the Respondent the full opportunity to present all of the evidence he wished, and made a timely final decision that was presented in writing. This reveals that this decision was not arbitrary, the Board considered all of the evidence presented, and made a final decision that pursuant to South Carolina law is their ability to make.

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. *Richer v. South Carolina Dept. of Health and Environmental Control*, 393 S.C. 198, 712 S.E.2d 428 (2011). This Court and the ALC is of the opinion that the Board failed to make a reasonable decision in the denial to ratify parole. This was based on the Board not accepting the affidavits submitted by the prior Board members. Due to the time elapsed between the affidavit and hearing it was reasonable for the Board not to accept these affidavits. Although the Board members revealed that they did vote in the affirmative, it was a fifteen year period, and many hearings that have elapsed since the hearing and the affidavit. The fact the Board failed to ratify should be considered reasonable. The

hearing was held fifteen years prior to the final decision of the Board there has to exist doubt that this actually occurred, so the denial of ratification was a reasonable 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. *Jervey v. Martini Environmental, Inc.*, 396 S.C. 442, 721 S.E.2d 469 (S.C. App. 2012).

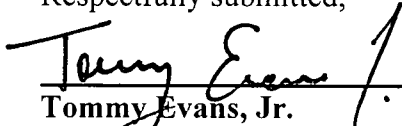
The ALC determined that there existed "uncontradicted evidence in the record to support the prior Board's finding of four favorable votes, and that number was the required number of favorable votes for parole." The Appellant argues that basing his final decision on the evidence presented and not on any error of law is unlawful. The Appellant is required to judge all of the facts presented and make a reasonable conclusion as to what occurred at the previous hearing. This decision cannot be reversed solely based on a question of fact. Pursuant to *Cooper* the Respondent is only required a hearing where the Board will consider all of the evidence presented. The ALC is then only allowed to determine if the hearing was just, and if the procedure created by the Board was followed. There has not been any evidence presented that will reveal the Board failed to follow the procedures regarding any ratification of a previous decision. It is just the opinion of the ALC that the evidence must be truthful and that the fact the Board failed to follow this evidence in the affirmative was arbitrary so it must be subject to reversal. The decision of the Board is reasonable and should have been upheld. 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).

It is clear by the record the Respondent was given a fair hearing in which the Board was not convinced he received the four votes as he proclaimed. They decided not to ratify the decision of the previous Board, which was certainly within their right to do. The Appellant argues that this Court has overlooked certain matters that should have been addressed prior to the final decision; therefore, the Appellant respectfully request this court rehear this case.

CONCLUSION

In conclusion the Appellant respectfully request this Court grant this Petition for Rehearing an issue an opinion reversing the decision of the lower court.

Respectfully submitted,



Tommy Evans, Jr.
Assistant 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 Appellant

Columbia, South Carolina
February 23, 2017

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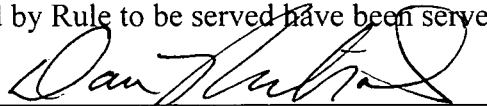
RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, certify that I have served the
within *Petition for Rehearing*, dated February 23, 2017, on Respondent by depositing a copy of
the same in the United States mail, postage prepaid, this 23rd day of February, 2017, addressed to
his attorney of record:

Tommy Thomas, Esquire
PO Box 88
Irmo, S.C. 29063

I further certify that all parties required by Rule to be served have been served.



Dawn K. Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666

Columbia, South Carolina 29250
(803) 734-9220

State of South Carolina
Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor



JERRY B. ADGER
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.state.sc.us/ppp

February 23, 2017

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals


RE: Kenneth Green v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the *Petition for Rehearing*, dated February 23, 2017, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

Enclosures

cc: Tommy Thomas, Esquire