STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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Unpublished Opinion No.: 2017-UP-082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
Appellate Case Number 2016-000296

Kenneth Green, #116020, RESPONDENT

v.

South Carolina Department of Probation, Parole and Pardon Services PETITIONER

APPENDIX

TOMMY EVANS, JR.
Assistant General Counsel

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

ATTORNEY FOR THE PETITIONER

Other Counsel of Record:

Tommy Thomas, Esquire
Post Office Box 88
Irmo, S.C. 29063

ATTORNEY FOR RESPONDENT

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
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KENNETH GREEN, #116020.....RESPONDENT

v.

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

RECORD ON APPEAL

Tommy Thomas, Esquire
Post Office Box 88
Irmo, S.C. 29063
(803) 732-5507

ATTORNEY FOR RESPONDENT

Tommy Evans, Jr.
Assistant General Counsel

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

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STATE OF SOUTH CAROLINA
In The Administrative Law Court
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APPEAL OF FINAL DECISION
Department of Probation, Parole, and Pardon Services

KENNETH GREEN, #116020 ..... APPELLANT

v.

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

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ATTORNEY FOR RESPONDENT

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BARTON HEARING FOR
KENNETH GREEN #116020
July 22, 2015

Affidavits:	Bishop Sanco Rembert Marlene T. McClain June Shissias James M. Green, Sr. – father of Kenneth Green James M. Green, Sr. – brother of Kenneth Green
Transcript:	November 29, 2000 Parole Hearing
Residence:	With father – James M. Green, Sr. 120 Owens Circle Summerville, SC 843-871-0429
Employment:	Jim Thorpe Painting Co. Inc. 843-871-0837 562 Hill Branch Rd. Ridgeville, SC 29472

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT OF Bishop Sanco Rembert

PERSONALLY APPEARED BEFORE ME, Bishop Sanco Rembert, being duly sworn, deposes and states as follows:

1. My name is Bishop Sanco Rembert and I have personal knowledge of the facts set forth in my affidavit.
2. I served on the South Carolina Parole Board and was present at Kenneth Green's parole hearing on November 29, 2000.
3. I have had the opportunity to listen to the recording of Mr. Green's November 29, 2000 hearing and it is my recollection that I voted in favor of Mr. Green being granted parole at that hearing.
4. According to the recording, the vote count was 4 to 2. According to tradition at that time, the Board took the yes votes first. I believe that at Mr. Green's hearing, four votes were cast in favor of granting parole and two votes were cast against parole.

FURTHER AFFIANT SAYETH NOT.

Bishop Sanco Rembert

Sworn to before me this 5 day
of May, 2015

Notary Public for South Carolina
My commission expires: 3-April 2017

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF MARLENE T. MCCLAIN
COUNTY OF ANDERSON)

PERSONALLY APPEARED BEFORE ME, Marlene T. McClain, being duly sworn, deposes and states as follows:

1. My name is Marlene T. McClain and I have personal knowledge of the facts set forth in my affidavit.
2. From August, 1999 until May, 2006, I served on the South Carolina Parole Board.
3. I was present at Kenneth Green's parole hearing on November 29, 2000.
4. I have had the opportunity to listen to the recording of Mr. Green's November 29, 2000 hearing and it is my recollection that I voted in favor of Mr. Green being granted parole at that hearing. I also recalled that J.P. Hodges voted in favor of Mr. Green being granted parole.
5. At the time of this hearing, there were only 6 of the 7 Parole Board members present. The Department of Probation, Parole and Pardon had previously instructed the Board that the statute required an affirmative vote of 5 members (2/3) regardless of whether there were 6 or 7 members present. In this case, the Parole of Kenneth Green was rejected because he failed to get 5 or the 6 votes.

6. It is my understanding that there is some confusion regarding the announcement that can be heard on the recording that "parole is rejected 1, 2, 3 and 4". This announcement is not a tally of the votes for or against parole, but is instead a numerical listing of the reasons parole was denied, which would have appeared in the notice to Mr. Green.

FURTHER AFFIANT SAYETH NOT.

Marlene T. McClain

Marlene T. McClain

April 27, 2015

Sworn to me this 27 day
of April, 2015

Notary Public for South Carolina
My commission expires: 10/6/19

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF JUNE SHISSIAS
COUNTY OF RICHLAND)

PERSONALLY APPEARED BEFORE ME, June Shissias, being duly sworn, deposes and states as follows:

1. My name is June Shissias and I have personal knowledge of the facts set forth in my affidavit.
2. I served on the South Carolina Parole Board and was present at Kenneth Green's parole hearing on November 29, 2000.
3. I have had the opportunity to listen to the recording of Mr. Green's November 29, 2000 hearing and it is my recollection that I voted in favor of Mr. Green being granted parole at that hearing.
4. According to the recording, the vote count was 4 to 2. According to tradition at that time, the Board took the yes votes first. I believe that at Mr. Green's hearing, four votes were cast in favor of granting parole and two votes were cast against parole.

FURTHER AFFIANT SAYETH NOT.

June Shissias

June Shissias

April 24 2015

Sworn to before me this 24 day
of April, 2015

Notary Public for South Carolina
My commission expires

DAVID L. BERNIER
Notary Public, State of South Carolina
My Commission Expires 11/8/2022

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

AFFIDAVIT OF JAMES M. GREEN, SR.

Personally appeared before me James M. Green, Sr., who deposes and says:

1) I am the father of Kenneth W. Green (SCDC# 116020).

2) That Kenneth Green appeared before the South Carolina Board of Paroles, via teleconference, from Lieber Correctional Institution on November 29, 2000.

3) That present in support of Kenneth Green that day were myself, James M. Green, Jr. (my eldest son), Attorney Tommy Thomas (Kenneth's attorney) and Tina Green (Kenneth's sister-in-law).

4) That following the hearing before the Parole Board, Cindy Smith, Parole Examiner for the South Carolina Department of Probation, Parole, and Pardon Services, approached Kenneth and the individuals named in # 3, above, seated together. Ms. Smith stated, "Rejected, you got four (4) votes, you missed it by one (1)."

5) That upon my return home, Senator William Branton called me on the phone and said "I'm sorry Jim, he only got four votes, he missed it by one."

The Affiant says the above is true and correct to the best of her knowledge.

James M. Green, Sr.

SWORN TO AND SUBSCRIBED before me
This 18th day of November, 2013
Latoya B Elmore
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 8/13/18

LATOYA B. ELMORE
NOTARY PUBLIC
SOUTH CAROLINA
My Comm. Exp.
08-13-2018

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

AFFIDAVIT OF JAMES M. GREEN, JR.

Personally appeared before me James M. Green, Jr., who deposes and says:

1) I am the brother of Kenneth W. Green (SCDC# 116020).

2) That Kenneth Green appeared before the South Carolina Board of Paroles, via teleconference, from Lieber Correctional Institution on November 29, 2000.

3) That present in support of Kenneth Green, that day were myself, James M. Green, Sr. (Kenneth's father), Attorney Tommy Thomas (Kenneth's attorney) and Tina Green (Kenneth's sister-in-law).

4) That following the hearing before the Parole Board, Cindy Smith, Parole Examiner for the South Carolina Department of Probation, Parole, and Pardon Services, approached Kenneth and the individuals named in # 3, above, seated together. Ms. Smith stated, "Rejected, you got four (4) votes, you missed it by one (1)."

The Affiant says the above is true and correct to the best of her knowledge.

James M. Green, Jr.

SWORN TO AND SUBSCRIBED before me
This 18th day of November, 2013

LaVern C. Polk
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: Nov. 27, 2017

LaVern C. Polk
Notary Public, South Carolina, State at Large
My Commission Expires November 27, 2017

November 29, 2000 Parole Hearing of Kenneth Green, #116020

Board Members Present: Chairman, David Baxter; JP Hodges; Orton Bellamy; Jay Elliott; Sanco Rembert; June Shissas; and Marlene McClain

Gwen Bright (Board Liaison) – Good morning Susan, Case Number 37, Kenneth Green, we have opposition in this case, the victim's son.

Chairman- Kenneth Green.

Mr. Green- Yes, sir.

Chairman- Other than your attorney, who came in with you please.

Mr. Green- My father, James M. Green, Sr., my brother, James M. Green, Jr., and his wife Tina Green.

Chairman- Would you like for Mr. Thomas to go ahead and present your case?

Mr. Green- Yes sir, if you don't mind.

Chairman- Go ahead

Attorney Tommy Thomas- All right, Mr. Baxter, members of the Board, good morning. This is Kenneth Green. Kenneth is 40 and he is serving for a murder charge. He has a life sentence received at trial. This is the first time that he has ever been in prison that I am aware of. He has served eighteen years and one month. He had a minor prior record, I think he had a forgery charge and a driving under suspension. He's had 2 disciplinaries that I know of since he's been in the system. One in 87 and one in 88. He is in minimum custody. He has worked outside of the fence from 1987 to 1999 for ten years and the only reason they moved him, of course, was when Mr. Moore came in and changed the policy it was not for disciplinary reasons. He got his GED in the system and was a ninth grade graduate prior to that. He has worked on an associate arts degree. He has a job with a lumber company and would be living with his dad in Summerville. It is my understanding that the co- defendant that he had in this case was released on parole in 1994. He has a tremendous amount of support in the community. Numerous petitions from folks. Also letters from a lot of different people in the area. Kenneth was not the individual in this case..... um the victim in the case was shot and killed. Kenneth had some knowledge that the co-defendant was going to rob this gentleman and what he thought was that he was going to get some money out of this and he was 21 years old at the time. The police couldn't really determine who was the shooter. They cut a deal with the co-defendant. The co-defendant for preferential treatment testified against Kenneth and that's why they had the trial with Kenneth saying he was the person who killed this gentleman. He was involved because he knew there was going to be a robbery but he was not the person who was the one who actually pulled the trigger. Um ... Kenneth's family is here. I knew they wanted to speak on his behalf and then Kenneth would like to address the Board.

Chairman- Ok, go ahead please.

James M. Green, Sr. - I'm Kenneth Green's dad. Since Ken's been incarcerated, he's told me many a times that he feels great remorse for this. He's taken a lot of the courses and everything that you people have had to offer him. He graduated out of Clemson through the Horticulture Class that he had and all these other courses. If he should make parole, which I hope he does, I've talked with Sheriff Nash and he said he has no problem what so ever with him coming back to the county. Also his Sunday school teacher which is William ....., US Senator. He used to teach him in Sunday school and he said he would more than welcome him back in the community. I thank you.

Chairman- Anybody else?

James M. Green Jr., - Yes sir. I'm James M. Green, Jr., Kenneth's brother. Uh.. the years my brother's been incarcerated, he had showed remorse. That was a very grave and saddening thing happen. He has.... the way I feel honestly in my heart .... He's taken all the courses everything the institutes have gave to offer him. He would be a tremendous support back to the community and my father and myself as well. Uh... the victims... the victim's son I've talked with. They've showed me that they at the time wouldn't have any problem with Ken coming back into the community. They might have changed a little bit over that .... You have a petition in front of you that we filled out. At the time, they said they weren't going to do it but I believe they've put one out now. I just hope Ken makes parole this time and is able to come home sir.

Chairman- OK. All right one more person.

Tina Green- Hi, I'm Tina Green. I'm Mike's wife. I just want to say I've only known Ken for a short time. I didn't know him prior. I met him the last three years being married to Mike and I have seen remorse he... um.... is respectful to his father, his brother, he loves them very much. I have lived in the Charleston surrounding area all my life. My family is in Charleston and we would welcome him back into the community with open arms.

Chairman-OK. All right. Kenneth, what do you want to tell us today, sir.

Kenneth Green- Ladies and Gentleman, first and for most, I would like to apologize sincerely to the family and friends of the victim and also to the family .. my family and friends for all the hardship and pain and sorrow this crime has caused but since my incarceration, I've tried to do everything. Tried to stay out of trouble. I've kept numerous jobs. The classes they've offered, I've taken every one of them some of them I've taken twice and three times to try to improve the quality of my life to try understand or have a better understanding of how the world works. I have plenty of community support if I were am released which I'm hoping for. I've had numerous jobs with Clemson University. I got a degree their the Horticulture Program Master Gardner Program where I served 40 hours community service hours on the street. They had A custody for numerous years until like my lawyer said, they took that away from us. But I've hardly been in any trouble since I've been in. I would really like to make parole. I just appreciate all the concern ..... consideration y'all would give me to go home.

Chairman- All right. Thank you so much for your comments.

Board member- you actually have a degree in Horticulture?

Kenneth Green- Yes sir. I have a degree in Master Gardening from Clemson Extension University.

Chairman- OK. Step outside sir we'll let you know something.

Tommy Thomas- Thank you very much.

Chairman-Let's see your votes. I don't see any we might want to hear from the victims.

Gwen Bright- We do have a petition. Several hundred names opposing parole.

Chairman- You all are here to oppose the parole of Kenneth Green?

(Victims) Yes sir.

Chairman- Ok, can you state your names for the record.

(Victims)- John Cattles, Shirley Cattles Ward.

Chairman- We haven't made a final decision on this case yet so we're wondering if anyone would like to make a statement please.

John Cattles- Yes, I would. My name is John Cattles. I'm the oldest son and I'm here to just .....

Board Member- Speak a little louder please.

John Cattles- I'm here to deny parole of Kenneth Green I speak for my several brothers and sisters. At the sentence, I was there and the Judge said he wouldn't be eligible for 20 years there's some kind of litigation that allows him to come up before then. Kenneth Green shot my father in cold blood through the windshield of the car with a double buck shot gun...that's cold blood for just a few dollars. My father was a good man just as I am. He would have given the man whatever assistance he needed. Then he left him there on the side of the road and Kenneth Green and no time has contacted anybody in the family to express any remorse. I also fear for my family if he's released cause we live on the same proximity and my brother has talked to Kenneth's father and his brother and they don't want him up cause he's always been a bad boy, a trouble maker so what I ask is to keep him in prison where he belongs cause I see a volatile situation if he's released.

Chairman- All right, mam, would you like to say something?

Shirley Cattles Ward- Yes, we just recently lost our mother in January and you know how your life goes before you well she was still calling for daddy when she died and I agree with my brother, I don't think he should be out.

Chairman- OK, we thank you so much for your comments. If you will step outside, we will let you know something.

Board member- Have you voted yet?

Chairman- OK, let's see our votes please. OK. Kenneth William Green is rejected by a vote of four to two. Number 1, 2, 3 and 4.

Hearing Concluded.

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
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

July 22, 2015

Kenneth Green, #116020
Lieber Correctional Institution
PO Box 205
Ridgeville, South Carolina

Dear Mr. Green:

The purpose of the Barton hearing held today was to allow you, through your attorney, an opportunity to present the evidence that you feel shows that you did receive four favorable votes for parole at your hearing on Nov. 29, 2000.

After careful consideration, the Parole Board has decided not to ratify the vote count from your November 29, 2000, hearing. Your next parole consideration hearing will be on or about March 11, 2016.

Sincerely,

Larry Patton, Jr.
Director of Board Support Services

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 15-ALJ-15-0046

APPEAL OF FINAL DECISION
Department of Probation, Parole, and Pardon Services

KENNETH GREEN, #116020 ..... APPELLANT

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal complies with Rule 61 of the Rules of Procedure for the Administrative Law Court and contains all material proposed to be included in the Record on Appeal by all of the parties and not any other material.

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

September 30, 2015

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

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

FACTUAL/PROCEDURAL HISTORY

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

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

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

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

ISSUES

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

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

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Furtick v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003) and *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008).[2] When reviewing the Department's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Id.* at 377; 527 S.E.2d at 754; *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2015) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Consequently, an Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." *Id.* 1-23-380(5) (Supp. 2015). Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless the Record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly arbitrary or affected by an error of law. *see Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162,

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

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

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

DISCUSSION

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

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

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

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[3] It is noteworthy that this Court has previously held that *Barton* does not apply retroactively to past parole decisions. In South Carolina, "[t]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." *Lord v. D&J Enters., Inc* , 407 S.C. 544 554, 757 S.E.2d 695, 699 (2014); *see also, e.g., Truesdale v. Aiken*, 289 S.C. 488, 347 S.E.2d 101 (1986) (limiting the retroactive effect of a recently decided case on a death sentence to **cases pending on direct appeal** and holding that the case did not apply on collateral attack) (emphasis added). Nevertheless, the Department, following what it believed the Supreme Court required in *Barton*, established a Departmental policy requiring these *Barton* hearings, and therefore it must comply with the standards of process due these hearings.

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

ORDER

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

Ralph King Anderson, III
Chief Administrative Law Judge

February 11, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

APPELLATE CASE No.: 2016-000296

KENNETH GREEN, #116020

RESPONDENT.

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES,

APPELLANT.

MOTION TO SUPPLEMENT THE RECORD ON APPEAL PURSUANT TO RULE 212

That it appears that relevant portions of the South Carolina Board of Paroles and Pardons Operations Manual were omitted from the Record on Appeal. This policy is part of the Lower Court's decision and referenced in both parties Briefs and the Lower Court's Order. That the Respondent would respectfully move to Supplement the record with South Carolina Board of Paroles and Pardons Operation Manual, January 2014, Pages 35 and 46.

Respectfully submitted,

TOMMY A. THOMAS
P.O. Box 88
Irmo, SC 29063
(803) 732-5507
ATTORNEY FOR RESPONDENT

June 13 2016

The South Carolina Court of Appeals

Kenneth Green #116020, Respondent,

v.

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

Appellate Case No. 2016-000296

The Honorable Ralph King Anderson, III
Trial Court Case No. 2015ALJ150046AP

ORDER

The respondent has filed a motion to supplement the record on appeal. The motion is hereby Granted. The supplement to the record on appeal has been received and is accepted as filed.

FOR THE COURT

BY V. Elaine Allen, Deputy
CLERK

FILED
6-14-16

Columbia, South Carolina

cc:
Tommy Evans, Jr., Esquire
Tommy Arthur Thomas, Esquire

THE STATE OF SOUTH CAROLINA
Administrative Law Court
15-ALJ-15-0046

APPEAL OF FINAL DECISION
Department of Probation, Parole and Pardon Services

Kenneth Green #116020,

Appellant,

vs.

South Carolina Department of Probation, Parole and Pardon Services,

Respondent.

SUPPLEMENTAL RECORD ON APPEAL

Tommy A. Thomas
Attorney for Appellant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Tommy Evans, Jr.
Attorney for Respondent
Assistant General Counsel
S.C. Department of Probation
Parole and Pardon Services
P.O. Box 50666
Columbia, SC 29250
(803) 734-9220

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9. POSTPONED CASES

After hearing any parole case, the Board or panel may, where it seems appropriate under the circumstances to do so, postpone giving its final decision for up to one year in order to allow an offender to complete a treatment program, vocational training course, or other similar worthwhile endeavor.

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 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.

RE-HEARINGS OF PAROLE CASES

This section considers re-hearings of parole cases: the various reasons why the Board may want to conduct a re-hearing in any given case and the possible decisions that may come out of any such re-hearing. In general, there are three possible outcomes of any re-hearing: rescission of parole, grant of parole and no change in the original decision.

REASONS FOR CONDUCTING A RE-HEARING

After the Board or the panel has decided any given parole case, the Board or panel may in certain cases want to re-consider its decision and re-hear the case. There are, generally speaking, five reasons why the Board or panel might want to do this. These reasons are given below:

A. **Subsequent Misconduct by the Prisoner.** In those cases where the Board has granted parole conditioned on the satisfaction of some pre-release requirement, and the prisoner has committed some violation of prison rules before the actual release from prison, the case will be presented to the Board or panel in order to deal with the subsequent misconduct.

B. **New Criminal Charges Against the Prisoner.** This is similar to the situation just described above - subsequent misconduct by the prisoner; only the misconduct here is more serious than the violation of a prison disciplinary rule. Here, the misconduct rises to the level of being a violation of the criminal law.

C. **After-Acquired Information About the Prisoner.** In this situation, the Board or panel may have acquired some new material and information after it has made its final decision. The information about the prisoner's case appears, in the Board's or panel's judgment, to be so important as to require an immediate reconsideration of the case. In that event, the case will be presented to the Board or panel to review its decision in light of the new information.

D. **Failure of the Prisoner to Meet Conditions of Release.** Finally, in the case where the Board has granted parole or provisional parole conditioned on the satisfaction of some requirement, and the prisoner has failed to satisfy that requirement, the Board or panel might want to review the matter in order to look into the facts and circumstances surrounding the prisoner's failure to do what was required.

E. **Requested by the inmate or the inmate's attorney.** In these cases, the inmate or the inmate's attorney must submit in writing, within 30 days of the notice of rejection letter, a letter stating why he/she feels that the Board should re-hear this case. The Board will review this information and decide whether or not to grant a re-hearing. A letter will be sent to the inmate or the inmate's attorney notifying them of the Board's decision.

2. POSSIBLE RESULTS AFTER A RE-HEARING

For any of the foregoing reasons, the Board or panel might want to re-hear a case in order to reconsider its original parole decision. Any such re-hearing may result in one of four decisions. These decisions are rescission of parole, grant of parole, no change in the original decision and an amendment.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate case No. 2016-000296

KENNETH GREEN, #116020 ..... RESPONDENT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
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FINAL BRIEF OF APPELLANT

Tommy Evans, Jr.
Assistant General Counsel

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

ATTORNEY FOR THE APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

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

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

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

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

Parole and Pardon Services, 404 S.C. 395, 745 S.E.2d 110 (2013) would award parole. The Respondent petitioned the Board to be allowed to appear before them for a *Barton* hearing. He was allowed to appear before the Board in an attempt to prove that his prior decision should be ratified. On July 22, 2015, the Respondent appeared before the Board for a hearing pursuant to the *Barton* decision. During this hearing the Respondent provided affidavits from former Board members Bishop Sanco Rembert, Marlene T. McClain, and June Shissias. (R.p.2-p.5). He also provided affidavits of his father and brother. (R.p.6-p.7). Each of these affidavits proclaim that the Respondent received four votes upon the conclusion of the November 2000 parole hearing.

At the conclusion of this hearing the Board decided that the Appellant failed to reveal he received the required votes to be released on parole. The Board decided to deny the Respondent's request for a ratification of the previous Board decision.(R.p.11). Upon being notified of this denial the Respondent decided to file a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Respondent argued that the decision of the Board was arbitrary and capricious, or characterized by abuse or discretion, or a clearly unwarranted exercise of discretion. The Respondent also argued that it was unlawful for the Board to allow victim testimony.

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

Upon reviewing the briefs and arguments submitted by both parties, the Honorable Ralph King Anderson, III issued his decision on February 11, 2016.(R.p.13-p.19). Within this order Judge Anderson concluded that the Board failing to ratify the previous decision was contradictory to its

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

ARGUMENTS

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

The Respondent argued and the ALC agreed that upon the conclusion of this 2000 hearing he received the majority votes needed to be granted parole. At the time the Respondent committed this offense South Carolina law stated:

> The Board may issue an order authorizing the parole which shall be signed either by a majority of its members or by all three members meeting as a parole panel on the case, ninety days prior to the effective date of the parole.

S.C. Code Ann. §24-21-645(Supp. 1984)

As part of the Omnibus Criminal Judge Improvement Act of 1986 additional language was added to state, "at least two-thirds of the members of the board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60." S.C. Code Ann. §24-21-645 (Supp. 2012). In *Barton,* the Supreme Court decided that requiring an inmate convicted prior to 1986 a two-thirds vote to be granted parole is a violation of ex post facto.

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

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

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

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

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

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

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

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

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

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

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

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

The ALC determined that the Board contradicted its own policy by not finding that the Respondent failed to prove that it received four votes in the affirmative. Pursuant to Department policy an inmate challenging a prior denial of parole pursuant to *Barton*, would be required to go through a three pronged procedure to determine whether or not he has received the required votes. First, the office of parole support services staff will investigate to verify if the offender possibly received these votes; second, the results of this investigation will be forwarded to the office of legal services to verify that it qualifies under *Barton*; and, third, a during a full board day the Board will hold a *Barton* hearing. Only upon the conclusion of this hearing will the Board make a determination whether or not sufficient evidence was revealed to support the allegations. This decision is solely the Board's and cannot be reversed or determined by the Courts. The Court is only in a position to determine as to the procedure and if it was followed. But the Courts do not have the ability to award parole. Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole. *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services,* 377 S.C. 489, 661 S.E.2d 106 (2008). If the Board realized sufficient evidence was presented to make a Parole determination they would have granted the Respondent's parole; however, they failed to make this finding, which cannot be reversed by a decision of the Courts. An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services. S.C. Code Ann. §1-23-600(D)(Supp. 2015).

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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

Columbia, South Carolina
June 3, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
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KENNETH GREEN, #116020.....RESPONDENT

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.

Tommy Evans, Jr.
Assistant General Counsel

June 3, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
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KENNETH GREEN, #116020 — RESPONDENT

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

FINAL BRIEF OF RESPONDENT

TOMMY A. THOMAS
P.O. Box 88
Irmo, S.C. 29063
(803) 732-5507
ATTORNEY FOR RESPONDENT

TOMMY EVANS, JR.
Assistant General Counsel
South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, S.C. 29250
(803) 734-9220
ATTORNEY FOR THE APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

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

STATEMENT OF THE CASE

On November 29, 2000, the Appellant appeared before the Parole Board and was denied parole with a vote of four (4) to two (2). Prior to the South Carolina Supreme Court's decision in 2013 in the case of Barton v. S.C. Department of Probation, Parole and Pardon Services, 404 SC 395, 745 S.E. 2d 110 (2013) the Parole Board required violent offenders to receive a vote of five (5) Board members to be granted parole.

After the Barton decision, the Department developed a procedure to review previous cases to determine if they qualified for release under Barton. (South Carolina Board of Paroles and Pardon, Operations manual, January, 2014)

Pursuant to that procedure, the Office of Parole Support Services would verify that the offender received the proper number of votes and the Office of Legal Services would verify that it qualified under Barton. The Board would then ratify the vote and impose any conditions that it felt necessary. A special order of Parole would be signed by the Board.

The Board met on July 22, 2015 and decided not to ratify the Appellant's vote and notified the Appellant that he would again be heard and considered for parole on or about March 11, 2016.

This matter was appealed to the Administrative Law court filed on August 21, 2015. The Administrative Law Court issued its opinion on February 11, 2016. The Appellant appealed that decision to the Court of Appeals.

The issues presented to the Administrative Law Court were:

1. **That the only evidence before the Parole Board was that the Appellant received four (4) votes on November 29, 2000 in favor of parole. That there is no evidence to support the Board's decision not to ratify the vote of 2000.**

2. **That the Parole Board violated policy by its failure to ratify the previous Board's vote of November 29, 2000 and by taking additional testimony of the victim opposition on July 22, 2015.**

STATEMENT OF THE FACTS

Respondent is serving a life sentence for murder. He received this sentence in 1983 in Dorchester County. He was sentenced to life imprisonment with a twenty (20) year parole eligibility. He has currently served thirty three (33) years on this sentence. He has received three (3) disciplinaries in the thirty three (33) years of incarceration.

On November 29, 2000, the Respondent went up for parole. There were six (6) member of the Parole Board present at the time of the vote. He received a vote of four (4) to two (2) and his parole was rejected. The vote count was not designated as four (4) in favor or four (4) against.

Pursuant to the South Carolina Supreme Court's decision in Barton, the Respondent had to receive a simple majority or a simple majority of the members present. Prior to Barton, Respondent would have needed to obtain five (5) votes to be granted parole.

The Respondent received and submitted sworn Affidavits of three prior members of the Parole Board (ROA pp. 2-7). These prior members stated under oath that they voted in favor of release of the Respondent. One member, Mrs. Marlene McClain remembered that an additional member, Mr. Hodges (now deceased) voted in favor of release (ROA pp 3-4). This makes four (4) votes in favor of release.

By letter dated July 22, 2015, the Board voted not to ratify the previous vote.

ARGUMENT

Did the Court err in deciding that the Board's decision not to ratify the Previous Board's decision was arbitrary and capricious?

The Lower Court's decision provides a step by step analysis of the issues now before this Court.

First the Lower Court found that in Barton, the South Carolina Supreme Court held that the version of §24-21-645 existing at the time of an inmate's offense is what is applicable at an inmate's parole hearing.

Following the Barton decision, the Department began holding Barton hearings. The purpose of these hearings as set forth on page 35, Section 10 of the Department's January, 2014 Operations Manual is to determine whether an inmate received the proper number of votes pursuant to Barton.

In this case, the 1984 version of §24-21-645 was the law at the time of Respondent's offense and predates the Omnibus Criminal Justice Improvement Act of 1986. Thus the Respondent is only required to receive a simple majority of the Board.

In this case, the Respondent provided Affidavits from Bishop Sanco Rembert (ROA p. 2), Marlene T. McClain (ROA p. 3-4) and June Shissias (ROA p. 5) all of whom were Board members at the November 29, 2000 hearing. These members attest that they voted in favor of Respondent's parole. Ms. McClain also attests to the fact that J.P. Hodges, who has since died, also voted in favor of the Respondent being granted parole.

The Court noted that both Rembert and Shissias attested to the fact that they listened to the recording of the November 29, 2000 hearing which refreshed their recollection that they voted in favor of the Respondent being granted parole. Rembert

and Shissias also specifically explained that the Board had a tradition at that time of taking the yes votes first.

The Lower Court then found that there is nothing in the record that suggests that the Affidavits are not credible.

The Court concluded by stating that:

> "I find that there was uncontradicted evidence in the record to support the prior Board's finding of four favorable votes, and that number was the required number of favorable votes for parole, I find that the current Board's decision not to ratify the previous Board's four-to-two decision contradicted its own policy and was therefore arbitrary." (ROA p. 17)
>
> "if the Board can reject all affidavits concerning past parole hearings based merely on the fact that the parole hearings happened years ago, then the Barton hearings would have no meaning, instead being subject to the whim and caprice of the Board." (ROA p. 17)

The Appellant argues in their brief:

a) That the decision to grant parole is left totally up to the Board and "if the Board decides the affidavits were in error, or the prior Board members were mistaken, they have the right not to accept the evidence."

b) That the Administrative Law Court came to the conclusion that the Board in their rejection made this decision solely on the affidavits submitted. "However, this is not the only information the Board used in making this decision... The matter of prior and subsequent hearings must be considered while the Board is making a determination there were sufficient votes given to the Respondent."

c) That the Board's Procedural Policy for Barton hearings gives the Board the authority to accept or deny the request of the Respondent for parole.

Clearly these arguments are inconsistent with the Supreme Court's ruling in Barton and the Department's own established policy.

To quote the Lower Court "if the Board can reject all affidavits concerning past parole hearings based merely on the fact that the Parole hearings happened years ago, then the Barton hearing would have no meaning." (ROA p. 17) The Respondent would go further to argue that this line of thought would render the Barton decision itself without meaning.

Pursuant to the Operations Manual of the South Carolina Board of Paroles and Pardons the Board may convene a Barton hearing. At that hearing the Board may impose any conditions on the offender as it feels necessary. The policy goes further to state that the Board **will** (emphasis added) then sign a special Barton order of parole which ratifies the votes of the previous Board members which would have granted conditional parole.

It is arguable that the operations manual does not provide for or allow the Board to determine the validity of the votes. The Policy states that the office of Parole Support Services staff will investigate to verify that the offender received the proper number of votes and the Department's office of Legal Services will verify that it qualifies under Barton. At that point, the case is sent to the Board for ratification and any conditions of Parole may be imposed.

In addition, the Board may not go back to consider prior or subsequent hearings. This clearly defeats the holding in Barton and transforms the Barton hearing into an ordinary parole hearing, which is directly contrary to Barton and the Board's own procedural policy.

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 of principles." Timmier 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 Board 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. Department of Health & Envtl. Control, 412 S.C. 341, 348, 772 S.E. 2d 177, 181 (Ct. App. 2015). Clearly the Board's decision was arbitrary and capricious.

The Appellant 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. The Appellant's argument should be rejected as it mischaracterizes the ALC's decision.

The Lower Court did not review the Respondent's record while in prison and determine whether he should receive parole. That determination was made by the Board on November 29, 2000. The Lower Court 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. South Carolina Department of Probation, Parole and Pardon Service, 377 S.C. 489, 496, 661 S.E. 2d 106, 110 (2008). The Lower Court reversed the Board's decision because the evidence clearly supports the fact that the Respondent received the necessary votes to be granted parole under Barton.

The Lower Court remanded the Respondent's matter to the Parole Board so that Respondent could proceed to step two in the parole process where Respondent would receive any parole conditions. In short, the ALC ordered Appellant to follow its own policy.

CONCLUSION

That based upon the forgoing reasons, the Court should affirm the decision of the Administrative Law Court.

Respectfully submitted,

Tommy A. Thomas
Attorney for the Appellant

June 13, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth Green, Respondent,

v.

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

Appellate Case No. 2016-000296

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

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

AFFIRMED

Tommy Evans, Jr., of the South Carolina Department of Probation, Parole and Pardon Services, of Columbia, for Appellant.

Tommy Arthur Thomas, of Irmo, for Respondent.

PER CURIAM: The South Carolina Department of Probation, Parole and Pardon Services (the Department) appeals an Administrative Law Court (ALC) order

finding the Parole Board (the Board) erred by failing to ratify a prior vote in favor of granting parole to Kenneth Green after a *Barton*[1] hearing and remanding to the Board with instructions "to proceed as if a provisional parole order had been issued." On appeal, the Department argues the ALC erred by (1) ruling the Board's decision was arbitrary and (2) ordering the Board to enter an order ratifying the prior decision. We affirm[2] pursuant to Rule 220(b), SCACR, and the following authorities:

As to issue 1: S.C. Code Ann. § 1-23-610(B) (Supp. 2016) (providing this court's standard when reviewing an ALC decision); S.C. Code Ann. § 1-23-380(4) (Supp. 2016) ("The [ALC] may reverse or modify the decision [of an administrative agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . (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."); *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008) (holding a Board decision was arbitrary and capricious because the Board failed to follow proper procedure by considering required statutory criteria).

As to issue 2: *Id.* at 499, 661 S.E.2d at 111 ("Undoubtedly, the . . . Board is the sole authority with respect to decisions regarding the grant or denial of parole. However, the Legislature created this Board to operate within certain parameters. We do not believe the Legislature established the Board and intended for it to render decisions without any means of accountability."); *Barton*, 404 S.C. at 419, 745 S.E.2d at 123 (finding the appellant "received the requisite number of votes from the . . . Board, and thus, *should be granted parole*," and "remand[ing] for proceedings consistent with this opinion" (emphasis added)).

AFFIRMED.

HUFF and SHORT, JJ., and MOORE, A.J., concur.

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[1] *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013).

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

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

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 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

The South Carolina Court of Appeals

Kenneth Green, Respondent,

v.

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

Appellate Case No. 2016-000296

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Young J.

Paul E. Short, Jr. J.

James E. Moore J.

Columbia, South Carolina

FILED
May 24, 2017

cc: Tommy Evans, Jr., Esquire
Tommy Arthur Thomas, Esquire
The Honorable Ralph King Anderson, III