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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

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

David Rose, #91858, Respondent,

v.

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

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MAR 07 2018
SC Court of Appeals

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Petitioner David Rose respectfully petitions the Court to grant a rehearing in *Rose v. S.C. Dep't of Probation, Parole and Pardon Servs.*, Unpublished Op. No. 2018-UP-087 (S.C. Ct. App. filed Feb. 21, 2018) and/or issue a new opinion affirming the Administrative Law Court ("ALC").

Rehearing and issuance of an opinion affirming the ALC are proper for two reasons. First, the Court's opinion misapprehends or overlooks the standard of review that applies to the Court's review of the ALC's order. Second, the Court's opinion misapprehends or overlooks that the relevant record in this case is the evidence considered by the Department of Probation, Parole and Pardon Services ("DPPPS") when it made the agency decision that Rose is not entitled to parole.

I. The Court's opinion misapprehends or overlooks the standard of review.

Pursuant to a Circuit Court order and in accordance with DPPPS policy, DPPPS conducted an investigation and then made a determination regarding whether Rose should receive parole under *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013). R. at 267. Director Patton conducted the investigation and made the ultimate agency determination that Rose did not receive four votes at his 2001 hearing, and he was, therefore, not entitled to parole under *Barton*. R. at 254, no. 1.

Rose filed a case with the ALC to challenge this DPPPS decision, and the ALC afforded Rose the opportunity to conduct discovery to determine the factual basis for the agency's decision. Discovery revealed that before making this decision, DPPPS considered only two pieces of evidence: (1) an affidavit from Carlos Bell averring that a DPPPS agent announced after the hearing in 2001 that Rose received four votes for parole, which corroborated Rose's previous testimony before the Circuit Court; and (2) a "hearing ledger" in DPPPS's computer that noted Rose had been rejected for parole in 2001, which Director Patton conceded was not probative as the ledger did not contain the vote tally from Rose's hearing. R. at 254-255, nos. 1 & 2; Supp. R. at 48, L. 23-49, L. 9; 50, L. 12-51, L. 17.

The ALC sits in an appellate capacity when it reviews DPPPS agency decisions. S.C. Code Ann. § 1-23-380. Therefore, the ALC's review is limited to the agency record, and the ALC must affirm DPPPS's factual findings, if those findings are supported by substantial evidence. *Id.* The ALC concluded that the DPPPS decision that Rose was not entitled to parole had to be reversed because *all the evidence* the agency considered before making this parole decision supported Rose's assertion that he received four votes and was, therefore, entitled to parole. R. at 153-154.

This Court sits in an appellate capacity when it reviews ALC decisions. S.C. Code Ann. § 1-23-610(B). Therefore, the Court must affirm the ALC's factual findings if they are supported by substantial evidence in the record. *Id.* The record contains substantial evidence supporting the ALC's finding that Rose received four votes. The record contains sworn testimony from Carlos Bell who stated that Rose received four votes at the 2001 hearing. R. at 269, ¶ 2. Bell's affidavit corroborated testimony Rose had offered in the previous legal actions he filed against DPPPS over the past 14 years. R. at 118, L.25-119, L. 4. The record also reveals that Rose consistently asserted in his legal actions against DPPPS that he had received four votes, and DPPPS never disputed this factual assertion. R. at 152, ¶ 3. The Court's opinion, therefore, misapprehends or overlooks the standard of review when it finds that the ALC's decision was not supported by substantial evidence.

The corollary of the rule that factual findings are affirmed if supported by substantial evidence is the rule that the Court "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Barton*, 404 S.C. at 401, 745 S.E.2d at 113. Said another way, the Court does not weigh evidence when reviewing an ALC factual finding.

The Court's opinion considers the Bell affidavit and finds it wanting. *Rose Op* at 3-4. The Court's opinion considers deposition testimony wherein a DPPPS agent offers his opinions that it would be "highly unlikely" that the DPPPS agent who reported the results to Rose in 2001 would have known the vote count, that it would have been "highly unlikely" Rose would have received parole one year after it had been revoked, and that Rose had not received any votes for parole since 2001. *Rose Op.* at 3-4. The Court's opinion weighs the deposition testimony against the Bell affidavit and the other evidence supporting the ALC's finding and

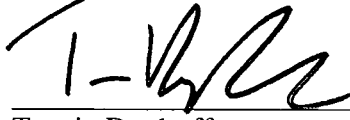
reaches the conclusion that the ALC's factual determination was wrong. *Id.* at 4. The Court's opinion, therefore, misapprehends or overlooks the standard of review when it weighs facts.

II. The Court's opinion misapprehends or overlooks the relevant record.

Even if it were permissible to weigh facts on appeal, which is denied, the opinion's evidence weighing is problematic for a second reason. The deposition information that the Court found more persuasive than the evidence supporting ALC's finding was not considered by DPPPS when it made the decision that Rose was not entitled to parole. It is undisputed that Director Patton considered only the Bell affidavit and the hearing ledger before making DPPPS's decision. As the ALC correctly noted after reviewing the record Director Patton had before him when he made the decision on Rose's parole, "there is not even a scintilla of evidence supporting the Department's decision." R. at 153.

The Court's opinion notes that the ALC mistakenly "believed the Department failed to offer any contradictory evidence" supporting the notion that Rose was not entitled to parole. *Rose Op.* at 3. Review of the record reveals, however, that the deposition information cited favorably by the Court's opinion was not considered by Director Patton and was, in fact, a *post hoc* justification for the Rose decision created well after the investigation and decision. The Court's opinion, therefore, misapprehends or overlooks that the relevant record in this case is the evidence DPPPS actually considered and relied upon to make the Rose decision.

Respectfully submitted,



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March 7, 2018

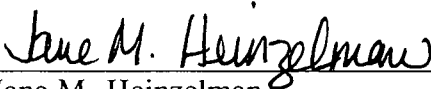
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant David Lee Rose, #91858, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **PETITION FOR REHEARING**

Counsel Served: **Hand Delivery**
Matthew C. Buchanan, Esq.
Tommy Evans, Jr., Esq.
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Jane M. Heinzelman
Senior Administrative Assistant

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SC Court of Appeals

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

RE: David Lee Rose #91858 v. South Carolina Department of Probation,
Parole and Pardon Services
Appellate Case No. 2016-000225
Our File No. 33999/01227

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and 6 copies of Petition for Rehearing. Please return a clocked-in copy of same via the courier.

By copy of this letter to opposing counsel, we are hereby serving them with a copy of this filing.

Very truly yours,

A handwritten signature in black ink, appearing to read 'T. Dayhuff'.

Travis Dayhuff

TD:jh
Enclosures
cc: Matthew C. Buchanan, Esquire
Tommy Evans, Jr., Esquire