

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Court Judge

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

RECEIVED
MAR 14 2018
SC Court of Appeals

DAVID ROSE, #91858.....RESPONDENT

v.

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

RESPONSE TO PETITION FOR REHEARING

Comes now the Appellant the South Carolina Department of Probation, Parole and Pardon Services submits this response to the Respondent's petition for rehearing. Pursuant to rule 221(a) of the South Carolina Appellate Court rules, the Respondent must show this Court that there exist points that have been overlooked or misapprehended. *See*, Rule 221 (a) SCACR. The Appellant would submit there exist no points overlooked or misapprehended prior to the final decision. The Appellant would respectfully request this Court to deny the Respondent's petition for rehearing.

1. This Court did not misapprehend or overlook the standard of review.

The Respondent argues this Court should rehear this appeal due to the Administrative Law Court decision that the evidence submitted supported the Respondent's assertion. This Court made the correct decision that the Appellant did not find the affidavit Mr. Carlos Bell credible. This was the only information submitted in an attempt to prove that four affirmative votes were made at the 2001 parole hearing. This Court correctly decided that the ALC erred in substituting its own judgment as to Mr. Bell's credibility. This decision went beyond the ability of the ALC in deciding questions of fact. Questions of fact should only be decided by the agency. The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380 (2017). This Court made the correct decision regarding the standard of review. The Respondent is not entitled a rehearing.

2. The Court's decision did not misapprehend or overlook the relevant record.

The Respondent argues that this Court should not have considered the testimony of long-time Department employee Roosevelt Hicks. In the record was the transcript of the deposition of Mr. Hicks, a twenty-five year department employee. Mr. Hicks testified that it was highly unlikely for the Board to release someone just one year after the revocation of parole; that it is highly unlikely that any employee would tell the Respondent the final vote count; and, the Respondent failed to receive one vote at any hearing since 2001. The Respondent argues that this Court misapprehended or overlooked the standard of review when it comes to weighing facts. This Court ruled that the ALC's determination was not supported based on the record as a whole. The ALC erred in reversing the decision of a Departmental agency where there did not exist substantial evidence. The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Peake v. S.C. Dept. of Motor Vehicles*, 375 S.C. 589, 594,

654 S.E.2d 284, 287 (Ct. App. 2007). Reasonable minds could come to the identical conclusion as the Department regarding the lack of evidence submitted. Substantial evidence 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 that the administrative agency reached or must have reached in order to justify its action. *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). No other individual was presented to verify Mr. Bell's affidavit. The Respondent requested the Board to release the Respondent on parole just from the word of his cousin. No other corroborating evidence was introduced, so it is reasonable that the Board would not find this credible.


The Bell affidavit stated that an unknown, unidentified employee of the Parole Board informed the Respondent's attorney the vote count, who in turn informed them. This is clearly hearsay which is not admissible unless it falls under an exception, which it does not. Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute. Rule 802 SCRE. The rules of evidence apply in ALC proceedings as well as any other court proceeding. Except in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed. S.C Code Ann. §1-23-330 (2005). This affidavit by Mr. Bell should have been deemed inadmissible due to it being hearsay.

The Respondent argues that the Court's opinion misapprehends or overlooks the relevant record. He argues that the information used by the Court in making its decision was not considered by the Board. This Court determined that the Appellant was correct in their determination that the affidavit of Mr. Bell is not credible. The ALC can only remand the decision of the Parole Board if it is unsupported by substantial evidence. The information in the record revealed that substantial

evidence exists revealing that the affidavit of Mr. Bell is not credible, and without additional corroboration not enough to determine the 2001 vote count. This was the only information submitted by the Respondent. The Appellant did not find it credible, so they were well within their right to deny the Respondent's request. The decision of this court reversing the decision of the ALC was lawful. There exist no grounds for a rehearing.

The Appellant revealed substantial evidence that the decision of the Board was not arbitrary but was due to the fact of the lack of evidence submitted. Since the Department did not find the affidavit of Mr. Bell credible, they had the right to deny ratification. The ALC was incorrect in making the burden of proof all on the Appellant instead of the Respondent. The Respondent initially brought suit before the ALC so it was up to them to prove that substantial evidence was presented. In administrative hearings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon on who flies a claim with an administrative agency to establish that required conditions of eligibility have been met. *Leventis v. S.C. Dept. of Health and Environmental Control*, 340 S.C. 118, 132, 530 S.E.2d 643, 651 (2000). Since insufficient evidence was provided revealing that he indeed received four affirmative votes the decision of the Appellant was correct, and incorrectly reversed by the ALC. This reversal of the decision of the ALC was correct, so the request for a rehearing should be subject to dismissal.

Respectfully submitted,



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Columbia, South Carolina
March 12, 2018

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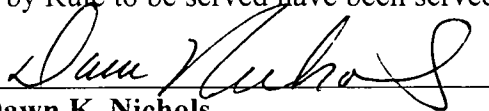
S.C. DEPARTMENT OF PROBATION, PAROLE
AND PARDON SERVICES, APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within
Return to Petition for Rehearing dated March 12, 2018, on Respondent this 12th day of March,
2018, by depositing a copy of the same in the United States mail, postage prepaid, addressed to
his attorney of record:

Travis Dayhuff, Esquire
Nelson Mullins Riley & Scarborough LLP
1320 Main Street, 17th Floor
Columbia, South Carolina 29201

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



Dawn K. Nichols
Executive Assistant

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

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March 12, 2018

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

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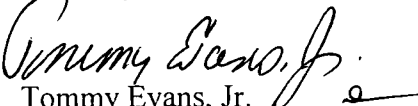
RE: David Rose v. SCDPPPS

Dear Ms. Kitchings:

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

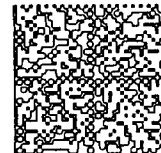
Thank you for your assistance in this matter.

Sincerely,

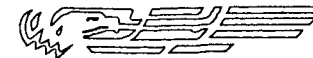

Tommy Evans, Jr.
Assistant General Counsel

TE:dn
Enclosures

cc: Travis Dayhuff, Esquire



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State of South Carolina

Department of Probation, Parole, and Pardon Services

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