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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

RECEIVED
JUN 25 2018
SC Court of Appeals

David Rose, #91858, Respondent,

v.

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

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respectfully petitions the Court to grant a rehearing in *Rose v. S.C. Dep't of Probation, Parole and Pardon Servs.*, Unpublished Op.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 filed Feb. 21, 2018, withdrawn, substituted, and refiled June 13, 2018) and/or issue a new opinion affirming the Administrative Law Court ("ALC").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 agency record in this case contains no evidence that supports the decision made by the Department of Probation, Parole and Pardon Services ("DPPPS") 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 254-55, 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.

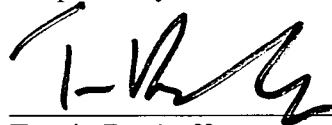
The corollary of the rule that factual findings are affirmed if supported by substantial evidence is the rule that the Court "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Barton*, 404 S.C. at 401, 745 S.E.2d at 113. Said another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

The Court's opinion considers the evidence that supports the ALC's decision, including Rose's testimony and the Bell affidavit, and finds it wanting. After this consideration of the evidence, the Court's opinion concludes 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 that the agency record contains no evidence that supports DPPPS's decision.

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 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. The Court's opinion finds that the ALC's decision must be reversed because it is not supported by substantial evidence "based on the record as a whole." 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 agency 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, therefore, misapprehends or overlooks that the agency record in this case contains no evidence that supports DPPPS's decision.

Respectfully submitted,



Travis Dayhuff
Nelson Mullins Riley & Scarborough LLP
1320 Main Street - 17th Floor (29201)
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

Attorneys for David Rose

June 25, 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.
South Carolina Department of Probation,
Parole, & Pardon Services
2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, SC 29250



Jane M. Heinzelman
Senior Administrative Assistant

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NELSON MULLINS

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

Travis Dayhuff
T 803.255.9525 F 803.255.5506
travis.dayhuff@nelsonmullins.com

1320 Main Street | 17th Floor
Columbia, SC 29201
T 803.799.2000 F 803.256.7500
nelsonmullins.com

June 25, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC 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,

Travis Dayhuff

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

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