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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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, ... Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Issuance of a writ of certiorari and reversal of the Court of Appeals' opinion is appropriate for both legal and equitable reasons. The primary legal reason a writ should issue is that the Court of Appeals' opinion fails to apply, or misapplies, the substantial evidence standard of review provided by the Administrative Procedures Act for the appellate review of Administrative Law Court ("ALC") decisions. In short, the ALC determined that Rose received four votes for parole at his 2001 parole hearing, and the Court of Appeals' opinion reversed the ALC, even though the ALC's determination is supported by substantial evidence in the record. Rather than applying, or properly applying, the substantial evidence standard of review, the Court of Appeals' opinion weighs evidence and reaches a different factual determination than the ALC.

The equitable reason that a writ should issue is that without it, the Court of Appeals' opinion will unintentionally perpetuate the unfair and unjust treatment that Rose has endured since 2001. As set forth below, the Department of Probation, Parole, and Pardon Services ("DPPPS") retroactively applied the current parole statute to Rose in violation of *ex post facto*, improperly calculated the number of votes Rose needed to obtain parole, failed to keep even the most rudimentary records of his parole hearing, and then subjected Rose, a *pro se* litigant, to more than a decade of Kafkaesque procedural maneuvers that, until recently, prevented him from getting a hearing on his claim that he received four votes for parole in 2001. With the help of the Circuit Court, the ALC remedied the unfairness that DPPPS visited upon Rose, and now Rose respectfully requests that the Supreme Court issue a writ of certiorari, reverse the Court of Appeals' opinion, and restore the ALC's just and appropriate resolution of this case.

RULE 242 CERTIFICATION

The undersigned hereby certifies that Petitioner David Rose filed a petition for rehearing with the Court of Appeals, and the Court of Appeals ruled on Rose's petition with finality on August 16, 2018. App. at 469.

QUESTIONS PRESENTED FOR REVIEW

I. **Does the opinion of the Court of Appeals fail to apply, or misapply, the substantial evidence standard of review to the ALC's decision that Rose received four votes for parole?**

II. **Does the opinion of the Court of Appeals erroneously rely upon the notion that DPPPS had evidence supporting its final agency decision?**

III. **Does the opinion of the Court of Appeals erroneously fail to find that DPPPS's final agency decision is arbitrary, capricious, and an abuse of discretion?**

STATEMENT OF THE CASE

When Rose pled guilty to kidnapping and was incarcerated in 1978, South Carolina's parole statute provided that an inmate would receive parole if a simple majority of the Parole Board members voted in favor of parole. S.C. Code Ann. § 55-613 (1962). In 1986, the parole statute was amended to provide that an inmate who committed a violent crime[1] would not receive parole unless a two-thirds majority of the Parole Board members voted in favor of parole. Omnibus Criminal Justice Improvements Act of 1986, No. 462 § 31, 1986 S.C. Acts 2955, 2990. The current parole statute retains the two-thirds majority vote requirement for an inmate convicted of a violent crime. S.C. Code Ann. § 24-21-645(A).

In 1987, the Parole Board granted Rose parole. App. at 274. In 2000, Rose's parole was revoked because he failed to report his change of address to his parole agent. *Id.*

[1] Kidnapping is defined as a violent crime. S.C. Code Ann. § 16-1-60.

On June 20, 2001, Rose again appeared at a hearing before the Parole Board to request parole. Six members of the Parole Board were present at Rose's hearing. Rose was represented at the hearing by counsel and was accompanied by two persons supporting his request for parole. App. at 107 & 272, ¶ 1. Immediately after the hearing, a female DPPPS employee informed Rose and those with him that Rose's request for parole had been denied. App. at 272, ¶ 2 & 121, L. 25 - 122, L. 2. Then, in the presence of Rose and his supporters, Rose's counsel asked the DPPPS employee about the vote count, and she stated that four members voted for parole and two members voted against parole. App. at 272, ¶ 2 & 122, LL. 3-4; *see also* App. at 267 ("He [Rose] testified that at his last parole hearing, he received four votes in favor of parole, but that parole was denied based on being short by one vote.").

Even though Rose received four favorable votes out of the six votes available at the 2001 hearing, DPPPS denied Rose parole by: (i) retroactively applying the two-thirds majority vote requirement in section 24-21-645(A) to Rose; and (ii) interpreting the two-thirds majority vote requirement in section 24-21-645(A) to require five affirmative votes to obtain parole, regardless of how many Parole Board members are present and voting at the parole hearing. App. at 271 & 340, LL. 4-12.

After the 2001 parole hearing, Rose filed *pro se* actions in Circuit Court and the ALC claiming that DPPPS had unlawfully denied him parole. Rose asserted that he received four votes at his parole hearing and retroactively applying the current parole statute's two-thirds majority vote requirement to him - rather than the old parole statute's simple majority vote requirement - was an *ex post facto* violation.

In response to Rose's actions, DPPPS did not challenge the fact that Rose had received four votes for parole in 2001. Instead, DPPPS asserted that retroactively applying the two-

thirds majority vote requirement in the current parole statute to Rose was not an *ex post facto* violation and therefore Rose needed five votes, not four, to obtain parole in 2001. App. at 271. DPPPS coupled this erroneous legal argument with a strategy of denying Rose a hearing on the merits of his claim. In 2006, DPPPS obtained the dismissal of Rose's Circuit Court action by arguing that the ALC should adjudicate Rose's claim. App. at 267. Shortly thereafter, DPPPS obtained the summary dismissal of Rose's ALC action. App. at 284-285.

On July 3, 2013, the South Carolina Supreme Court held that DPPPS's retroactive application of the two-thirds majority vote requirement in section 24-21-645(A) violates *ex post facto* and that DPPPS requiring five affirmative votes to satisfy the two-thirds majority requirement, regardless of how many members are present and voting at the parole hearing, violates section 24-21-645(A). *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013).

The *Barton* case made clear that DPPPS had been unconstitutionally denying inmates parole by requiring a two-thirds majority vote in favor of parole when inmates needed only a simple majority vote. The *Barton* case also made clear that DPPPS had been unlawfully denying inmates parole by counting absent parole board members as "no" votes.

Granting parole is a two-step process. First, the Parole Board determines whether the inmate should receive parole. Second, if the Parole Board votes in favor of parole, the Parole Board sets the conditions for parole and signs an order for parole. App. at 100, LL. 13-23. As DPPPS's Director of Parole Board Support Services, Larry Patton ("Director Patton"), explains below, inmates who were erroneously denied parole because of the violations of law recognized by *Barton* made it through the first step – they received enough votes for parole – but they did not make it to step two.

Q. . . . And why didn't we have part two in 2001?

A. Because this law ruling [*Barton*] didn't take place back then.

Q. They [Parole Board] didn't know they needed to move to part two?

A. They were going under the current law.

Q. Right. They thought the inmate was rejected so they never got to conditions –

A. Right.

App. at 324, L. 18 – 325, L. 1.

DPPPS implemented the following policy to rectify the violations of law identified by *Barton*:

> 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 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.

App. at 222 § 10. This policy creates a two-step process. First, DPPPS determines whether the inmate received enough votes at the prior parole hearing to receive parole pursuant to guidance provided by *Barton*. If DPPPS determines the inmate received the requisite number

of votes, the current Parole Board convenes a "Barton Hearing" to set conditions for parole and sign the order for parole. Importantly, the current Parole Board does not reconsider the prior Parole Board's decision to grant parole.

Q. . . . So the – in the Barton hearing process, the current parole board is not hearing from the victim witnesses again?

A. Right.

Q. They're not hearing from the offender again?

A. No.

Q. They're not hearing from the offender's attorney again?

A. Right.

Q. Because they don't need to.

A. Right. The decision is made.

Q. The decision was made in 2001.

A. Yes, whenever.

App. at 325, LL. 13-25.

Q. . . . So under this Barton hearing process, the agency has the power to determine, after the investigation, whether the inmate has got enough votes in the past, right?

A. Right.

Q. The parole board has the power to impose conditions?

A. Right.

App. at 328, LL. 9-16.

On February 26, 2014, after learning about the *Barton* case, Rose filed a *pro se* action in Circuit Court asserting that the *Barton* case had confirmed what Rose had been claiming for 14 years; that is, that DPPPS had unlawfully denied him parole when he received four votes

for parole at his 2001 hearing. DPPPS again moved to dismiss Rose's case arguing that the Circuit Court lacked jurisdiction over Rose's claim and that the ALC was the appropriate forum for Rose's claim. The Circuit Court deferred ruling on DPPPS's motion to dismiss, and instead ordered DPPPS to conduct an investigation and make a determination regarding whether Rose received enough votes to be paroled under *Barton*.

Director Patton conducted the investigation. App. at 257, no. 1. Director Patton reviewed an affidavit from Carlos Bell who had attended the 2001 parole hearing. App. at 257, no. 1. Bell's affidavit corroborated Rose's assertion, and Rose's previous testimony before the Circuit Court, that four Parole Board members voted for Rose to be paroled in 2001.

> A women came out to the common area were [sic] we were waiting the results (I believe she was the secretary or recorder for the Parole Board), she said "I'm sorry but parole has been denied", we were dumb struck. After a moment of figuring what had just happened we asked Mr. Neal [counsel for Rose] if we could find out what the vote was. Mr. Neal then asked the women what was the vote count, she gave this to him, then he in turn turned back to us and repeating what she had told him, the count was 4 yes votes and 2 no votes. I immediately asked Mr. Neal how can parole be denied when David got 4 Yes votes out of 6, was this not a majority. He stated this did not sound right and he would be checking on this.

App. at 272, ¶ 2.

DPPPS reported that no evidence other than Bell's affidavit was considered by Director Patton during his investigation. App. at 257-258, nos. 1 & 2. As Rose would later learn, DPPPS's report was inaccurate as Patton had also considered and relied upon a "hearing ledger" in DPPPS's computer that noted Rose had been rejected for parole in 2001. App. at 337, L. 21 - 338, L. 17. At his deposition, Director Patton conceded, however, that this ledger did not, in fact, contradict Rose's claim that he received four votes as the ledger did not contain the vote tally from Rose's hearing, and the ledger was made when DPPPS "[w]asn't

counting votes, right, for today's ruling [*Barton*] . . ." and was retroactively applying the two-thirds majority requirement. App. at 339, L. 12 - P. 340, L. 17.

In a letter dated February 13, 2015, DPPPS provided notice to Rose and the Circuit Court that DPPPS had concluded its investigation and had made the final agency decision that Rose was not entitled to receive parole under the *Barton* case. App. at 270. DPPPS's decision reported that "without any other evidence of the vote count from your June 20, 2001, hearing, the Department cannot release you to parole." App. at 270. DPPPS had no other evidence to review regarding the vote total at Rose's 2001 hearing in large part because DPPPS had, *for years,* failed to make and keep written records of the votes at parole hearings. App. at 258-259, nos. 4, 5 and 6 ("Prior to 2014 the final vote count was never recorded.") & 293, L. 20 - 294, L. 9 (DPPPS has been making written records of voting for "maybe a year").[2]

After the issuance of the February 13, 2015 DPPPS decision, the Circuit Court granted DPPPS's motion to dismiss and denied Rose's motion to reconsider in an order filed on May 1, 2015. App. at 248. In the order dismissing Rose's claim, Judge Addy concluded, as DPPPS had argued, that the Circuit Court did not have jurisdiction over Rose's claim, but the ALC did. The Circuit Court's order included the following:

> The court is genuinely troubled by the failure of the Parole Board to maintain any records relating to the parole hearing of June 20, 2001, and the absence of any record documenting the denial of parole, or otherwise signed by the members of the board present at that hearing, is of significant concern to the court. Put another way, if the only evidence in existence is the affidavit of Carlos Bell [affirming that Rose received four (4) out of six (6) votes], and the Parole Board lacks documentation to demonstrate that Plaintiff did not receive the required number of votes, the court is curious as to how a meaningful investigation could have been conducted as required under *Barton v. S.C. Dept. of Probation, Parole, and Pardon Servs,* 404 S.C. 395, 745 S.E.2d 110 (2013). By implication, the Parole Board appears to take the

[2] This failure to make and keep written records violated the parole statute and the Freedom of Information Act. S.C. Code Ann. § 24-21-40; S.C. Code Ann. § 30-4-10 *et seq.*

> position that, since all records have been destroyed, the vote must have been adverse to Plaintiff's position - ergo, the lack of documentation indicating denial of parole is sufficient to demonstrate that parole was denied. Such circular and perfunctory reasoning is curious and does not take into account the alternative possibility - that the affidavit of Carlos Bell is correct and that the Plaintiff was mistakenly denied parole under the holding in *Barton*. . . .
>
> Plaintiff is advised to appeal the Board's finding to the ALC. The court would also respectfully suggest that this case may represent one of those rare occasions where the ALC should conduct a full, formal hearing into this matter.

App. at 248-249.

On June 1, 2015, after retaining *pro bono* legal representation, Rose filed an appeal with the ALC asserting that DPPPS had unlawfully denied Rose parole. App. at 153. Despite having represented to the Circuit Court that the ALC had jurisdiction over Rose's claim, DPPPS again moved to dismiss Rose's ALC case. App. at 153-154. The ALC denied DPPPS's motion, finding DPPPS was judicially estopped from seeking the dismissal of Rose's case.

On February 1, 2016, the ALC issued a decision reversing DPPPS's February 13, 2015 final agency decision. The ALC reversed DPPPS's decision because the evidence revealed by the discovery ordered by the ALC, including particularly the deposition of Director Patton, made it abundantly clear that DPPPS had no evidence in the agency record supporting its decision that Rose did not receive four votes, and conversely, the only evidence in the agency record indicated that Rose had received four votes for parole in 2001. App. at 153.

In pertinent part, the ALC's decision stated:

> The Department concluded that Appellant [Rose] did not provide enough evidence in support of his position that the vote count was four in favor of parole to two against parole. However, the Appellant did provide evidence of the vote count. The Department offered nothing contradictory to that evidence. Thus, there is not even a scintilla of evidence supporting the Department's decision. Because the Department must provide at least some support for its

> factual findings, the Court concludes that the Department's decision must be reversed.

App. at 156.

The ALC also considered, and rejected, DPPPS's argument that the relief requested by Rose was an impermissible usurpation of the Parole Board's authority to grant or deny parole:

> By reviewing this case, the Court does not grant or deny Appellant parole, but rather requires the Department to carry out the result of a vote the Board already made. As stated above, it is the responsibility of the ALC to ensure that the Constitutional rights of Appellant are protected in decisions made by the Department.

App. at 157. The ALC further rejected DPPPS's claim that the *Barton* case cannot be applied retroactively to Rose. Specifically, the ALC held that Rose's claim was non-collateral and that the *Barton* case protected existing constitutional and statutory rights rather than announcing a new rule. App. at 157. Finally, the ALC remanded this matter for a hearing before the Parole Board to determine what conditions, if any, should be imposed upon Rose's parole, as is appropriate under both the *Barton* case and DPPPS's Barton Hearing policy. App. at 157.

On February 3, 2016, DPPPS appealed the ALC's decision to this Court. On February 21, 2018, the Court of Appeals issued an unpublished opinion reversing the ALC. App. at 448. On March 7, 2018, Rose filed a petition for rehearing asserting that the Court of Appeals' opinion failed to apply the appropriate standard of review and improperly weighed evidence. App. at 453.

On June 13, 2018, the Court of Appeals withdrew its original opinion and issued a second opinion that deleted most of previous opinion's consideration of evidence. App. at 459. On June 25, 2018, Rose filed a second petition for rehearing asserting that the Court of Appeals' opinion failed to apply the appropriate standard of review, improperly weighed evidence, and incorrectly determined that DPPPS had evidence that supported DPPPS's final

agency decision. App. at 464. On August, 16, 2018, the Court of Appeals denied Rose's petition. App. at 469.

Rose comes now respectfully seeking the issuance of writ of certiorari to obtain the review and reversal of *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).

ARGUMENT

I. The opinion of the Court of Appeals should be reversed because it fails to apply, or it misapplies, the substantial evidence standard of review.

The standard of review applied by the Court of Appeals when reviewing ALC decisions regarding final agency decisions is found in the Administrative Procedures Act. S.C. Code Ann. § 1-23-610; *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 400, 745 S.E.2d 110, 113 (2013). The Court of Appeals affirms ALC decisions unless those decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610(B). Simply put, "[t]he decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604-06, 670 S.E.2d 674, 676-77 (Ct. App. 2008).

"In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached." *Barton*, 404 S.C. 395 at 401; 745 S.E.2d at 113. Moreover, "[t]he mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 417, 665 S.E.2d 231, 234 (Ct. App. 2008).

Due to DPPPS's failure to maintain required records regarding parole hearings and DPPPS's failure to undertake anything resembling a robust investigation before issuing its February 13, 2015 final agency decision, the record in this case is admittedly not a large one. That said, the record nonetheless contains substantial evidence supporting the ALC's finding that Rose received four votes for parole at his 2001 hearing.

The record contains claims and testimony that Rose received four votes for parole at his June 20, 2001 hearing offered by Rose over several years in two separate Circuit Court cases (one before Judge Saunders and one before Judge Addy). App. at 267 & 121-122. The record contains the 2014 affidavit of Carlos Bell, who was present at Rose's hearing and the announcement of the hearing result, and who affirmed that Rose received four votes for parole. App. at 272, ¶ 2.

The record also contains testimony Bell provided at a 2015 hearing in Circuit Court that comports with the testimony in his 2014 affidavit. App. at 138, L. 3 - 139, L.7. It should also be noted that during the 2015 hearing Bell was cross examined by DPPPS counsel, and after Bell's testimony, both DPPPS counsel and Judge Addy described Bell's testimony as credible. App. at 140, L. 24 -141, L. 26 & 148, LL. 9-16. Finally, the record includes the fact that

during many years of the Rose/DPPPS litigation, DPPPS did not dispute Rose's assertion that he received four votes in 2001. App. at 155, ¶ 3.[3]

The substantial evidence in the record that supports the ALC's finding that Rose received four votes for parole, described above, stands in stark contrast to the absolute absence of evidence in the record that supports DPPPS's final agency decision that Rose did not receive four votes. *Supra,* Statement of the Case. As recognized by the ALC, DPPPS issued a final agency decision that was not only entirely without evidentiary support, but that was also contradicted by the evidence the agency actually considered. *Id.* Considering the entire record in this matter, it is clear that there is substantial evidence upon which a reasonable mind can reach the decision reached by the ALC in this case.

The corollary of the substantial evidence rule is the rule that the Court of Appeals "may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." S.C. Code Ann. 1-23-8-610(B); *see also Barton*, 404 S.C. at 401, 745 S.E.2d at 113.

The Court of Appeals' opinion scrutinizes Bell's affidavit and finds it wanting.[4] App. 462, 463. The opinion characterizes Bell's sworn testimony that six members of the Parole Board were present at Rose's hearing – a fact that DPPPS does not contest – as an allegation "*[a]ccording* to Bell. . ." App. at 462 (emphasis added). Similarly, the opinion describes Bell's sworn testimony that a DPPPS employee reported Rose's hearing results – an entirely unremarkable fact as inmates are always told the result of their hearings after the hearings by a DPPPS agent – as "Bell *claimed* a woman exited the hearing room. . . ." App. at 462

[3] Only after the *Barton* case was issued in 2013 did DPPPS dispute Rose's assertion that he received four votes in 2001. App. at 155, ¶ 3.

[4] The opinion does not, however, address the other evidence in the record that supports the ALC's decision.

(emphasis added). Finally, the Court of Appeals' opinion makes an almost trial court-like finding that the ALC should not have considered or given weight to Bell's "hearsay-laden[5]-affidavit."[6] App. at 463.

Simply put, the opinion's characterization, description, and criticism of the Bell affidavit is quintessential evidence weighing that does not comport with the substantial evidence standard of review. Because substantial evidence supports the ALC's decision, and because the Court of Appeals' opinion either fails to apply, or misapplies, the substantial evidence standard, and instead weighs evidence, the opinion should be reversed.

II. The opinion of the Court of Appeals should be reversed because it erroneously relies upon the notion that DPPPS had evidence supporting its final agency decision.

The Court of Appeals' opinion appears to find that DPPPS had evidence that supported its February 13, 2015 final agency decision. (noting that that the ALC "believed the Department failed to offer any contradictory evidence [that Rose did not receive four votes for parole in 2001]. . ."). App. at 462. The Court of Appeals' opinion does not identify this "contradictory evidence." The record, however, is very clear that there was no such "contradictory evidence" considered by Director Patton before he issued the February 13, 2015 final agency decision. It is undisputed that Director Patton considered only the Bell affidavit and the hearing ledger before issuing DPPPS's final agency decision that Rose did not receive four votes for parole in 2001. *Supra*, Statement of the Case. Neither of these two

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[5] A statement by a DPPPS employee, a party opponent, is not hearsay. S.C. R. Evid. 801(d)(2).

[6] As noted above, both DPPPS counsel and Judge Addy found Bell's testimony credible. App. at 148, LL. 9-16.

pieces of evidence undermines Rose's claim, or the ALC's finding, that Rose received four votes for parole. *Id.*

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." App. at 156. The Court of Appeals' opinion should, therefore, be reversed for the additional reason that it apparently faults the ALC for not appreciating the existence of "contradictory evidence" that does not exist.

III. The opinion of the Court of Appeals should be reversed because it erroneously fails to find that DPPPS's final agency decision was arbitrary, capricious, and an abuse of discretion.

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 or principles." *Trimmier 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 Bd. 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. Dep't of Health & Envtl. Control*, 412 S.C. 341, 348, 772 S.E.2d 177, 181 (Ct. App. 2015).

It is undisputed that Director Patton had no records, affidavits, or other evidence that supported the notion that Rose received three, two, one, or zero votes at the 2001 hearing. It is also undisputed that Director Patton had evidence that Rose received four votes. Simply put, when DPPPS reached the conclusion that Rose did not receive four votes when the only evidence in the agency record established otherwise, DPPPS abused its discretion.

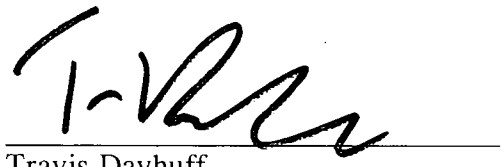
DPPPS based its decision that Rose did not receive enough votes in 2001, in part, upon Rose's failure to present DPPPS with records showing the 2001 vote tally. App. at 270 ("Without any other evidence of the vote count from your June 20, 2001, hearing, the Department, cannot release you to parole."). It should go without saying that it is arbitrary and capricious – not to mention unfair and unjust – to penalize Rose for not having written records showing the 2001 vote tally when it was DPPPS that failed to make and keep these records in contravention of the parole statute and FOIA.

The only evidence DPPPS claimed in support of its decision was an entry on a DPPPS hearing ledger noting that Rose's 2001 request for parole was rejected. As DPPPS now correctly acknowledges, this entry provides no probative evidence regarding the number of votes received, and DPPPS's reliance upon this entry for the February 13th decision is, therefore, arbitrary and capricious.

CONCLUSION

For the reasons set forth above, Rose respectfully requests that the Court issue a writ of certiorari, reverse the opinion of the Court of Appeals, and issue a final decision: (i) affirming the ALC's finding that Rose received four votes for parole in 2001 through application of the appropriate appellate standard of review; and (ii) remanding this matter to DPPPS and the Parole Board with instructions to convene a "Barton Hearing" to set conditions for parole and issue an order of parole for Rose pursuant to the *Barton* case and DPPPS's Barton Hearing policy.

Respectfully submitted,



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September 13, 2018

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 WRIT OF CERTIORARI**

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September 13, 2018