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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 15-ALC-15-0033-AP
Appellate Case No. 2018-001641

David Rose, #91858, Petitioner,

v.

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

**REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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ARGUMENT IN REPLY

Petitioner David Rose submits this reply to the return to Rose's petition for writ of certiorari filed by Respondent Department of Probation, Parole, and Pardon Services ("DPPPS").¹

I. THE ALC'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

DPPPS contends that a writ of certiorari should not be issued because the Court of Appeals correctly concluded that the ALC's decision is not supported by substantial evidence. DPPPS Ret. at 3-6. DPPPS is mistaken.

ALC decisions are reviewed under the substantial evidence standard. S.C. Code Ann. § 1-23-610. If the agency record contains more than a scintilla of evidence that would allow a reasonable person to reach the same conclusion reached by the ALC, the ALC's decision should be affirmed, regardless of whether it is possible to draw inconsistent conclusions from the evidence. *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 400, 745 S.E.2d 110, 113 (2013); *Kan Enters., Inc. v. S.C. Dep't of Revenue*, 420 S.C. 596, 603, 803 S.E.2d 882, 886 (Ct. App. 2017); *Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 417, 665 S.E.2d 231, 234 (Ct. App. 2008).

Simply put, there is substantial evidence in the record that supports the ALC's conclusion that Rose received four votes for parole in 2001. Rose Pet. for Cert. *Argument* at § I (describing Rose's claims and testimony over many years in two Circuit Court cases, the 2014 affidavit of Mr. Bell, the 2015 testimony of Mr. Bell in Circuit Court, and DPPPS

¹ The description of Rose's 1978 offense in DPPPS's return is inaccurate, incomplete, and devoid of citations to the record. DPPPS Ret. at 1 & n. 1. As Rose's offense is not relevant to the issues in this appeal, Rose will note only that the Parole Board heard *all the facts* regarding this offense and paroled Rose's co-defendant in 1986, paroled Rose in 1987, and cast four votes in favor of paroling Rose at his 2001 hearing. *Id.* & Rose Pet. for Cert. *Argument* at § I.

denying Rose's assertion that he received four votes only after the issuance of the *Barton* case). On the other hand, there is no evidence in the agency record that supports DPPPS's final agency decision that Rose did not receive four votes. The ALC's decision should, therefore, be affirmed.

II. THE ALC DID NOT IGNORE EVIDENCE IN THE RECORD THAT SUPPORTS DPPPS'S CLAIM THAT ROSE DID NOT RECEIVE FOUR VOTES

DPPPS argues that a writ of certiorari should not be issued because the ALC "ignored substantial evidence in the record" that supports DPPPS's decision that Rose did not receive four votes for parole in 2001. DPPPS Ret. at 6. The Court of Appeals appears to agree with DPPPS as its opinion cryptically notes that the ALC mistakenly "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." *Id.*

DPPPS does identify this "contradictory evidence." DPPPS claims that Rose received "no votes at that hearing [Rose's 2003 hearing] and every hearing thereafter." DPPPS Ret. at 6. DPPPS also claims that the "Board is usually inclined to deny parole upon a hearing held that close to a previous revocation." *Id.*

DPPPS's claim (and the Court of Appeals' apparent finding) that the ALC should have considered this supposedly contradictory evidence should be rejected because it is undisputed that Director Patton did not consider this evidence before he made DPPPS's final agency decision in this matter. Director Patton testified that *the only evidence he considered* before issuing his decision was the Bell affidavit and the hearing ledger. Rose Pet. for Cert. *Argument* at § II. Because Director Patton did not consider this supposedly contradictory evidence before

he made the agency decision in this matter, this evidence is not part of the agency record, and the ALC did not err.²

This argument also obscures the appropriate standard of review that the Court of Appeals should have applied to the ALC's decision. The question before the Court of Appeals was not whether there is any evidence in the record that supports DPPPS's decision. The question before the Court of Appeals was whether there is substantial evidence in the record that supports *the ALC's decision*. Rose Pet. for Cert. *Argument* at § I. For this additional reason, DPPPS's claim should be rejected.

III. THE ALC HAS THE AUTHORITY TO REVERSE DPPPS'S DECISION AND GRANT ROSE RELIEF

DPPPS argues that a writ of certiorari should not be issued because with its decision "the ALC made itself the determining body regarding parole" thereby usurping the authority given the Parole Board by the General Assembly. DPPPS Ret. at 7. DPPPS's argument should be rejected because it mischaracterizes the ALC's decision.

The ALC did not review Rose's record while in prison and determine whether he should receive parole. That determination, most assuredly, is one for the Parole Board. S.C. Code Ann. § 24-21-640. The ALC 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. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008).

² DPPPS's claim about the votes Rose received in his 2003 hearing and at subsequent hearings is not credible in light of DPPPS conceding during discovery that DPPPS did not start making and keeping records of vote totals at parole hearings until 2014. 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").

What the ALC did was review the DPPPS determination – made by Director Patton pursuant to DPPPS’s “Barton Hearing” policy – that Rose did not receive enough votes at his 2001 hearing to receive parole. The ALC reversed DPPPS’s decision because it is not supported by *any evidence*, much less substantial evidence. App. at 156-157 (“Because the Department must provide at least some support for its factual findings, the Court concludes that the Department’s decision must be reversed.”).

Next the Court remanded Rose’s matter to DPPPS and the Parole Board so that Rose could proceed to step two in the parole process where Rose would receive parole conditions, if any, and would receive an order of parole pursuant to DPPPS’s Barton Hearing policy. App. at 158 & Rose Pet. for Cert. at 11. In short, the ALC ordered DPPPS to follow its own policy. The ALC’s authority in this regard cannot seriously be questioned. *Barton v. S.C. Dep’t of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013); *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000).

As the ALC noted, the ALC did not grant or deny parole, but instead required the Parole Board to “carry out the result of a vote the Board already made.” App. at 157. This is exactly what the Supreme Court did in the *Barton* case. *Barton*, 404 S.C. at 419, 745 S.E.2d at 123 (“Appellant received the requisite number of votes from the Parole Board, and thus, should be granted parole. Thus, we remand for proceedings consistent with this opinion.”). Just as the Supreme Court did not usurp the Parole Board’s authority to grant parole in *Barton*, the ALC did not usurp the Board’s authority in this case.

CONCLUSION

For the reasons set forth above and in Rose's petition for a writ of certiorari, Rose requests that the Court issue a writ of certiorari and reverse the opinion of the Court of Appeals.

Respectfully submitted,



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October 3, 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: **REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

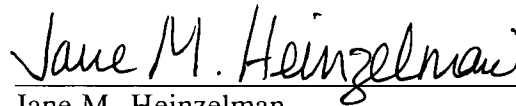
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