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. 2018-001641

David Rose, #91858, ... Petitioner,

v.

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

REPLY BRIEF OF PETITIONER DAVID ROSE

Travis Dayhuff
NELSON MULLINS RILEY & SCARBOROUGH, LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorney for Petitioner Rose

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ARGUMENT IN REPLY

Petitioner David Rose submits this reply to the brief filed by Respondent Department of Probation, Parole, and Pardon Services ("DPPPS").[1]

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

DPPPS appears to argue that the Court of Appeals' opinion should not be reversed because the Court of Appeals correctly concluded that the ALC's decision was not supported by substantial evidence. DPPPS Br. at 4-6. 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 Br. *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 denying Rose's assertion that he received four votes only after the issuance of the *Barton* case). On the

[1] The description of Rose's 1978 offense in DPPPS's brief is inaccurate, incomplete, and devoid of citations to the record. DPPPS Br. 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 Br. *Argument* at § I.

other hand, there is no evidence in the agency record that supports DPPPS's final agency decision that Rose did not receive four votes. As the ALC's decision is supported by substantial evidence, the Court of Appeals' opinion should be reversed.

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 the Court of Appeals' opinion should not be reversed because the Court of Appeals correctly recognized that 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 Br. at 6-7. The Court of Appeals' 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 the Parole Board has "not awarded the Appellant a single vote in any hearing since 2001." DPPPS Br. at 6. DPPPS claims that "[t]he recording [of Rose's 2001 Parole Hearing] revealed no deliberation, which is customary in a split vote." *Id.* DPPPS also notes that "it was testified that individuals are never awarded parole on the first attempt after being revoked."[2] *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 supposition 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*

[2] Here DPPPS references (and inaccurately paraphrases) an unverifiable and unreliable supposition that DPPPS elicited from an employee in September 2015 in hopes of creating *post hoc* evidentiary support for Director Patton's February 2015 decision. App. at 70, L. 6 - 71, L. 20.

before issuing his decision was the Bell affidavit and the hearing ledger. Rose Br. *Argument* at § II.[3] 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.[4]

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 Br. *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 the Court of Appeals' opinion should not be reversed 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 Br. at 9. 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.

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[3] Obviously, Director Patton could not have considered the alleged lack of deliberation by the 2001 Parole Board because DPPPS destroyed the audio recording of this hearing well before Director Patton's 2015 investigation and decision. DPPPS Br. at 3 ("During this investigation [DPPPS] discovered that the recording of the 2001 parole hearing had been destroyed.").

[4] DPPPS's claim about the votes Rose received at subsequent hearings is also not credible in light of DPPPS's admission that it 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").

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).

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 Br. 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.

IV. DPPPS'S ARGUMENT REGARDING THE "TWO-THIRDS RULE" SHOULD BE REJECTED

DPPPS claims that the Court of Appeals' opinion should not be reversed because the ALC failed to appreciate that the *Barton* case's "two-thirds rule" does not apply retroactively to Rose. DPPPS Br. at 10-13. Though it is unclear, DPPPS appears to be using "two-thirds rule" to refer to the Supreme Court's holding in *Barton* correcting the way DPPPS calculated whether an inmate had achieved a two-thirds majority (or a simple majority) vote for parole. The *Barton* case made clear that DPPPS violated the Parole Statute when it calculated these percentages without regard to the number of Parole Board members actually present and voting at the hearing. *Barton*, 404 S.C. at 414-19, 745 S.E.2d at 120-23.

The Supreme Court in *Barton* also held that DPPPS's retroactive application of the two-thirds majority vote requirement in section 24-21-645(A) violated *ex post facto*. *Id.* at 114-20 & 402-14. DPPPS does not contend that this holding does not apply to Rose. Pursuant to *Barton* then S.C. Code Ann. § 55-613 (1962) and its simple majority vote requirement applies to Rose -- not section 24-21-645(A)'s and its two-thirds majority vote requirement. Therefore, even if the *Barton* case's holding regarding the calculation of the required percentages does not apply to Rose, which is denied, not applying this holding to Rose would be of no moment as four votes is a majority of both six or seven.

DPPPS argues that the Supreme Court's silence regarding retroactivity in *Barton* "implies" that the "two-thirds rule" should apply prospectively only. DPPPS Br. at 9. DPPPS's argument ignores the inconvenient fact that the Supreme Court in *Barton* applied its

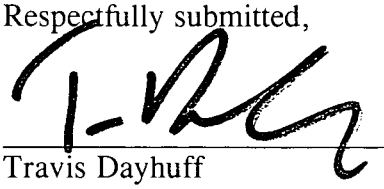
holdings retroactively to Barton's previous hearing resulting in her parole. *Barton*, 404 S.C. at 419, 745 S.E.2d at 123 ("Appellant received the requisite number of votes from the Parole Board, and thus, should be granted parole. Thus, we remand for proceedings consistent with this opinion."). For this additional reason, DPPPS's argument regarding the retroactive application of the "two-thirds rule" should be rejected.

Finally, this argument should also be rejected because DPPPS's reliance on *Talley v. State*, 640 S.E.2d 878, 371 S.C. 535 (2007) is misplaced. The *Talley* case addresses the standards to determine whether a new rule of federal constitutional law should apply retroactively. Simply put, the *Barton* case did not announce a new rule of federal constitutional law.

CONCLUSION

For the reasons set forth above and in Rose's brief, Rose requests that the Court reverse the opinion of the Court of Appeals.

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

Attorney for David Rose

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PROOF OF SERVICE

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

Pleadings: **REPLY BRIEF OF PETITIONER DAVID ROSE**

Counsel Served:

Matthew C. Buchanan, Esquire
Tommy Evans, Jr., Esquire
S.C. Department of Probation, Parole and Pardon Services
2221 Devine Street
P.O. Box 50666
Columbia, SC 29250

Jane M. Heinzelman

Jane M. Heinzelman
Senior Administrative Assistant

January 22, 2019