

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Carolyn Matthews, Administrative Law Judge
13-ALJ-15-0042

Case No. 14-00773

KENNETH GREEN, #116020.....APPELLANT,

v.

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

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of authorities.....ii

Statement of issue on appeal.....iii

Statement of the case.....1

Arguments

 1. The ALC did not err in deciding that sufficient evidence was not presented to reverse the decision of the Respondent.....3

 2. Though the ALC misinterpreted the record, the Courts reasoning to affirm the decision of the Respondent was lawful.....6

 3. The ALC was lawful in the denial of the Appellant’s motion to add additional irrelevant or non-existent items in the record.....7

Conclusion.....10

TABLE OF AUTHORITIES

CASES

<i>Barton v. S.C. Dept. of Probation, Parole and Pardon Services</i> , 404 S.C. 395, 745 S.E.2d 110 (2013).....	2,4
<i>Furtick v. S.C. Dept. of Probation, Parole and Pardon Services</i> , 352 S.C. 594, 576 S.E.2d 146 (2003).....	8
<i>Lark v. Bi-Lo</i> , 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981).....	5
<i>Law v. Richland County School Dist. No. 1</i> , 270 S.C. 492, 243 S.E.2d 192 (1978).....	5
<i>Leventis v. South Carolina Department of Health and Environmental Control</i> , 340 S.C. 118, 530 S.E.2d 643 (2000).....	4
<i>McCraw v. Mary Black Hospital</i> , 350 S.C. 229, 235, 565 S.E.2d 286, 289 (2002).....	5
<i>State v. Dunbar</i> , 356 S.C. 138, 587 S.E.2d 691 (2003).....	8

STATUTES

<i>S.C. Code Ann. §1-23-380(3)(Supp. 2012)</i>	8
<i>S.C. Code Ann. §1-23-380(4)(Supp. 2012)</i>	9
<i>S.C. Code Ann. §24-21-645(Supp. 1984)</i>	3
<i>S.C. Code Ann. §24-21-645(Supp. 2012)</i>	3

STATEMENT OF ISSUE ON APPEAL

1. **Has the Administrative Law Court erred affirming the Appellant's failure to prove the South Carolina Department of Probation, Parole and Pardon Services unlawfully denied his parole on November 29, 2000?**

2. **Has the Administrative Law Court erred in ruling that the Appellant failed to provide substantial evidence proving he was granted parole; regardless of the Courts misinterpretation of statements made by the chairman at the conclusion of the Board hearing?**

3. **Has the Administrative Law Court exercised clearly unwarranted discretion in failing to admit evidence submitted by the Appellant?**

STATEMENT OF THE CASE

On October 24, 1982, the Appellant along with his co-defendant were drinking in a bar in Summerville. While there, they observed the victim reveal a lot of cash to pay for his drink prior to leaving. The victim got into his truck, and was followed by both defendants. They proceeded to force the victim off the road along highway 165. After making the victim stop, the Appellant while armed with a shotgun, shot the victim in the head killing him instantly. The Appellant then proceed to remove twenty (\$20.00) in cash and another shotgun from the victims truck. They dumped the body on the side of the road where it was found by the victim's family the next day.

At the conclusion of their investigation, the authorities arrested the Appellant and his co-defendant charging them both with the offense of murder. On March 9, 1983, the Appellant appeared before the Honorable John Hamilton Smith for this offense. Upon conclusion of this appearance, the Court sentenced the Appellant to a term of incarceration for the remainder of his natural life. At the time the Appellant committed this offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of twenty (20) years.

The Appellant made his initial appearance before the Board on November 18, 1998.¹ Upon the conclusion of this hearing the Board decided to deny parole. Since this initial denial the Appellant has appeared before the Board an additional twelve (12) times, each resulting in a denial of parole. His most recent hearing occurred on March 5, 2014. Parole was denied due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) a use of a deadly weapon in this or a previous offense.

The Appellant decided to file a notice of appeal before the Administrative Law Court (ALC) regarding the rejection occurring on November 29, 2000. In that appeal the Appellant

¹ Due to good time credits the Appellant became parole eligible upon the service of fifteen (15) years.

alleges he received four (4) affirmative votes, which pursuant to the South Carolina Supreme Court decision of *Barton v. S.C. Dept. of Probation, Parole, and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013), would be sufficient to be granted parole. While this appeal was pending, the Appellant filed a motion to expand the record. (R.p.60-p.61). Within this motion, the Appellant requested the affidavits of Senator Doug Jennings and former Board member Marlene T. McClain, as well as a certified transcript of the parole hearing, be made a part of the record. The ALC denied the Appellant's motion due to the information not being related to the Appellant's parole hearing. (R.p.7). The ALC did however, order a transcript of the November 29, 2000 hearing be included in the record. Despite there being no court reporter at the hearing, the Respondent did transcribed the hearing from the available audio tape, and provided it to the Court. (R.p.93-p.95).

Upon review of the briefs submitted by each party, the ALC issued its order on March 21, 2014. (R.p.1-p.5). Within this order, the ALC decided that the burden of proof rests upon the party challenging the decision of the agency. She ruled that the Appellant failed to provide sufficient evidence that four votes were made in favor of parole at his November, 2000 hearing. Since the Appellant failed to reveal sufficient evidence supporting the allegation of him receiving four affirmative votes, the ALC affirmed the decision of the Department. Upon receiving this decision, the Appellant filed a notice of appeal before the South Carolina Court of Appeals. Within this appeal, the Appellant alleges that the ALC misinterpreted the record in finding the Appellant failed to receive four affirmative votes; and, erred in not allowing the Appellant to expand the record.

In response, the Respondent will argue that the ALC was correct in affirming the decision of the Department. This is due to the fact Appellant failed to introduce sufficient evidence proving he received the four votes needed to be granted parole. The Respondent will also argue that even though the ALC was mistaken as to what the Chairman meant when he mentioned the numbers

that correlate to the reasons for denial, and not Board votes; the reason for affirming the decision of the Department was correct pursuant to South Carolina law. Lastly, the Respondent would argue that the decision of the ALC not to expand the record was correct, because the requested items were either unavailable or not relevant. The Final Brief of the Respondent defending the above referenced positions follows.

ARGUMENTS

1. The ALC did not err in deciding that sufficient evidence was not presented to reverse the decision of the Respondent.

The Appellant argues that he received four affirmative votes at the conclusion of his November, 2000, hearing; therefore, he should have been granted parole pursuant to the *Barton* decision. At the time the Appellant committed this offense South Carolina law stated:

The Board may issue an order authorizing the parole which shall be signed either by a majority of its members or by all three members meeting as a parole panel on the case, ninety days prior to the effective date of the parole.

S.C. Code Ann. §24-21-645(Supp. 1984).

As part of the Omnibus Criminal Justice Improvement Act of 1986 additional language was added to state, “at least two-thirds of the members of the board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60.” *S.C. Code Ann.* §24-21-645 (Supp. 2012). In *Barton*, the South Carolina Supreme Court decided that requiring an inmate convicted prior to 1986 a two-thirds vote in order to be granted parole is a violation of ex post facto. *Barton*, at 419. The Appellant alleges that due to the *Barton* decision, the Board violated the law by requiring a two-thirds vote for his release. He maintains that he received the required majority allowed under *Barton*; therefore, he should be awarded parole.

In *Barton*, the Appellant, Thalma Barton, was serving a life sentence for the offense of murder. She appeared before the Parole Board on January 8, 2012, and of the six members present, four voted in the affirmative to release Ms. Barton on parole. *Id.*, at 399. The existing laws required a two-thirds vote of all seven (7) members, so the Board determined Ms. Barton failed to receive the required number of votes to be released on parole. Upon receiving the order of denial Ms. Barton appealed. The South Carolina Supreme Court decided that since the law existing at the time of the offense required a majority, to deny parole with a majority in favor of parole would be a violation of ex post facto. A measure is an ex post facto law, when it retroactively alters the definition of a crime or increases the punishment for a crime. *Barton*, at 403

Unlike *Barton*, the Appellant never provided sufficient evidence revealing he received the required number of votes to be released on parole. The burden is upon the Appellant to prove this fact. In administrative proceedings the general rule is that an Appellant for relief, or privilege has the burden of proof and the burden of proof rests upon who files a claim with an administrative agency to establish that required conditions of eligibility have been met. *Leventis v. South Carolina Department of Health and Environmental Control*, 340 S.C. 118, 530 S.E.2d 643 (2000).

The Appellant revealed to the ALC two affidavits, one from his father, the other his brother. (R.p.26-p.27). These affidavits stated that the parole examiner stated to them, the Appellant received four affirmative votes. These affidavits were signed on November of 2013, some thirteen (13) years after the hearing occurred. The Appellant does not reveal a statement from any Board member supporting this assumption, or a statement from parole examiner Cindy Smith, who still currently works for the Department. Within his brief the Appellant accuses the Respondent of not proving he has received four affirmative votes. The Appellant argues that the Respondent fails to garner an affidavit from parole examiner Cindy Smith. The burden of proof falls upon the

Appellant to reveal he received four affirmative votes. As long as the Appellant cannot present sufficient substantial evidence revealing that he had received the required number of votes, the correct decision of the ALC is to affirm the decision of the Respondent. The findings of the administrative agency are presumed correct and will be set aside only if supported by substantial evidence. *McCraw v. Mary Black Hospital*, 350 S.C. 229, 235, 565 S.E.2d 286, 289 (2002).

The Appellant argues that he has proven he received four votes in the affirmative. The evidence he has revealed is either not substantial, or not relevant. The Appellant presented two affidavits signed thirteen years after the hearing from his father and brother, two individuals with an obvious bias. In reviewing the entire record, this cannot be considered substantial evidence. Substantial evidence is not a mere scintilla of evidence nor the 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. *Law v. Richland County School Dist. No. 1*, 270 S.C. 492, 243 S.E.2d 192 (1978). The Appellant wishes the Court to look at the evidence from his side only. This should not occur; the evidence must be looked at as a whole. In reviewing the entire record, the evidence has not revealed the Appellant received four affirmative votes. Since he failed to meet his burden of proving that he received four votes for parole, the ALC was correct affirming the decision of the Respondent.

The Respondent feels that the Appellant has failed to show he has received four votes in the affirmative so he is not entitled to Parole. This is a question of fact and the Court cannot substitute its judgment for that of the agency as to the weight of evidence on questions of fact. *Lark v. Bi-Lo*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981).

2. Though the ALC misinterpreted the record, the Court's reasoning to affirm the decision of the Respondent is lawful.

The Appellant argues that the ALC based their ruling on a misinterpretation of the vote. The ALC interpreted the reasons for denial as vote counts; however, the reasoning for affirming the Respondent's decision was correct. Within the order it was determined by the ALC that the Appellant has the burden of proving he received four votes in the affirmative. He has not shown any substantial evidence, nor has any been revealed, that the four to two vote was him receiving four affirmative votes. According to the ALC they cannot reverse or modify an agency decision unless substantial rights of the Appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence on the whole record, arbitrary, or affected by an error of law. *S.C. Code Ann.* §1-23-380(5)(Supp. 2012).

The Court ruled that the substantial evidence provided in the record does not reveal the Appellant received four affirmative votes. The fact the Appellant received four votes in the affirmative was never mentioned by the chairman. Actually the record reveals that the decision was made prior to the victims making their statements. If the Appellant was one vote away from being granted parole, it is reasonable to assume that some deliberation between Board members would have been conducted. In reviewing the transcript this was never done. The board acted as though the vote was four to two against instead of in favor of parole. The chairman announced the final decision with no Board deliberations. A reasonable person could determine that the four votes were for denial not affirmation. Since the record has not revealed sufficient substantial evidence that he received the votes necessary to be released on parole, the ALC made the proper decision affirming the decision of the Respondent.

The Appellant argues that the ALC erred in relying on a questionable and potentially inaccurate record. The Appellant never revealed to the Court what was questionable or inaccurate within the transcript. Due to the fact court reporters are never present at parole hearings, this cannot be considered an official transcript. The Court was made aware of this, and still ordered a transcript be made a part of the record. Since no court reporter was present at the Appellant's hearing, the only way the Court's order could be honored is by someone transcribing the statements from the recording. That transcript was provided, and stated each word spoken during the hearing. The Appellant has never raised an objection as to what was placed in the transcript. He disputes that an "official transcript" was never provided, which could not be done because one does not exist.

3. The ALC was lawful in the denial of the Appellants motion to add additional irrelevant or non-existent items in the record.

The Appellant argues that the ALC exercised clearly unwarranted discretion in failing to allow the Appellant to add additional requested evidence into the record. Prior to the final order being released on this matter, the Appellant filed a motion to expand the record. Within this motion the Appellant requested affidavits of South Carolina State Senator Douglas Jennings and former Parole Board member Marlene T. McClain be included in the record. (R.p.60-p.65). These affidavits were written relating to the Parole Hearing of Gene Ray Richardson, not the Appellant. The Appellant also requested that an official transcript and the Board Secretary's hearing notes also be made a part of the record. It was later explained to the ALC that since a court reporter is never present at a parole hearing, an "official transcript" does not exist. Hearing notes from the Board secretary also does not exist. The ALC later determined that the affidavits were irrelevant and cannot be made a part of the record; however, she did order a transcript be made part of the record. The Respondent followed the order of the Court and provided a transcript, although it was not an official transcript of the hearing.

The Appellant argues that the ALC violated South Carolina law by not allowing these items to be made a part of the record. According to the South Carolina Code of Laws:

If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court.

S.C. Code Ann. §1-23-380(3)(Supp. 2013)

The Appellant made this application and the ALC took it into consideration; however, most of the evidence the Appellant asked to be placed in the record was either irrelevant or did not exist. The Appellant made the request, and pursuant to the statute the Court “may” order the additional evidence be taken; however, the inclusion of this evidence is not mandatory. It still remains up to the Court to determine if this information is relevant. The denial by the ALC to include the evidence was lawful pursuant to South Carolina law.

The ALC sits as an Appellate Court in matters regarding a decision by the Department relating to an inmate’s parole. The Administrative Law Court has jurisdiction to hear a defendant’s appeal from the Department of Probation, Parole, and Pardon Services. *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003). The ALC cannot review items that were never made a part of the record in the initial hearing. In order for an issue to be preserved for appellate review, it must have been raised and ruled upon by the trial judge; issues not raised and ruled upon in the trial court will not be considered on appeal. *State v. Dunbar*, 352 S.C. 594, 576 S.E.2d 146 (2003). The affidavits and the Board minutes were never a part of his initial appearance before the Board; therefore, the ALC was correct in denying the Appellants motion to expand the record. The review must be conducted by the court and must be confined to the record. The ALC found that these items are not relevant; however, the Court did order a

transcript of the audio recording be made and included in the record. This order was followed; and the transcript was made part of the record. The contents of the transcript were never subject to objection by the Appellant. This action by the ALC was perfectly legal pursuant to South Carolina law. In cases of alleged irregularities in procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate. *S.C. Code Ann. §1-23-380(4)(Supp. 2013)*.


The Appellant wishes to make an offer of proof to be able to include items on the record that have been previously determined not admissible. An offer of proof should be made at the initial hearing and not at the appellate level. Since this information was not brought before the Board or is relevant to his case, it could not be made a part of the record.

The Appellant failed to reveal to the ALC sufficient substantial evidence that provides the four affirmative votes needed to be granted parole was received by the Appellant. Even though they misinterpreted the language of the Chairman, the decision of the ALC did follow South Carolina law. Due to the Appellant's inability to prove that he received four affirmative votes the Respondent will respectfully request the decision of the ALC be affirmed.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the decision of the Administrative Law Court affirming the decision of the Department be upheld.

Respectfully submitted,



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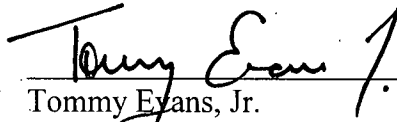
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.



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October 24, 2014