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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable H.W. Funderburk Jr., Administrative Law Judge
Docket No. 19-ALJ-15-0024-AP

Appellant Case No. 2020-001074

James Robert Byrd, #98230, RESPONDENT

v.

South Carolina Department of Probation, Parole and Pardon Services, APPELLANT

PETITION FOR REHEARING

The South Carolina Department of Probation, Parole and Pardon Services (Appellant) respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR. The Appellant hereby seeks rehearing on the grounds that the Court may have misapprehended or overlooked several crucial points in *sua sponte* dismissing this appeal on grounds that " the underlying order is not final" for purposes of judicial review under section 1-23-610(A)(1) of the South Carolina Code of Laws. That underlying order from the Administrative Law Court (ALC) vacated the Parole Board's (Board's) decision to deny Respondent James Robert Byrd (Respondent) parole and remanded to the Board for an entirely new parole hearing, a hearing at which the Board would purportedly be required to: (1) verbally deliberate and discuss the criteria for parole

consideration on the record during the hearing, and (2) verbally make factual findings on the record during the hearing, before rendering its subsequent written decision, both of which, as described in more detail below, are in direct contravention of the procedures clearly established by our Supreme Court in *Compton v. S.C. Dept. of Probation, Parole and Pardon Services,* 385 S.C. 476, 684 S.E.2d 175 (2009) and *Cooper v. South Carolina Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

Appellant respectfully submits that while the July 23, 2020 "Order Remanding for a New Parole Hearing" issued by the ALC appears to leave "some further act which must be done by the [Board] prior to a determination of the rights of the parties," simply because it uses variations of the word "remand," the reality is that the rights of the parties have been fully adjudicated and determined by the Board under existing procedures and precedent of the Supreme Court. Consequently, the ALC's decision must be considered a "final decision" from which an appeal should be allowed. The ALC did not remand for some further act to be done in regard to the parole hearing that was already conducted. Rather, it remanded for an entirely "new parole hearing," despite the fact that a parole hearing already occurred, resulting in the denial of parole.

Furthermore, and highly relevant to the consideration of whether this was a "final decision" of the ALC, Appellant respectfully submits that this Court misapprehended the fact that the ALC committed clear legal error when it remanded a routine denial of parole back for another hearing, as set forth by our Supreme Court in *Compton*. Under this Court's order of dismissal, such an error, even if clear and egregious, will forever evade appellate review and correction if the ALC's decision stands and a "new parole hearing" is allowed to proceed as ordered. Appellant submits that when the Board follows the procedure outlined in *Cooper*, the denial of parole will be considered routine and the ALC **must** dismiss the appeal, even if

deliberations were not conducted in as much detail as the Administrative Law Judge would like. Here, the approved procedure was followed. Furthermore, it is error for the ALC to remand the matter back to the Board for another hearing, per the Supreme Court's holding in *Compton*.

For these reasons, Appellant respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and either: (1) reinstate this appeal and set a briefing schedule on the merits; (2) reinstate this appeal and certify this matter to the Supreme Court pursuant to Rule 204(b), SCACR, because it involves an issue of significant public interest or a legal principle of major importance; or (3) issue an order in compliance with *Compton* reversing the ALC's decision and letting the Board's routine denial of parole stand.

Statement of the Case

Respondent is currently serving a life sentence for kidnapping and criminal sexual conduct in the first degree. At the time of his offenses, South Carolina law allowed for parole eligibility after the service of ten years. Respondent was granted parole in 2003, but that parole was revoked in 2011.

Respondent appeared before the Board on April 24, 2019, for a parole consideration hearing. The Board denied parole, stating that the reasons for denial were based on the nature and seriousness of the offense, criminal record indicates poor community adjustment, and a failure to successfully complete a community supervision program. A letter explaining that the Board considered all of the mandatory criteria and listing the grounds for denial was sent to Respondent shortly after the hearing.

This decision was appealed to the ALC. Despite being presented with a record demonstrating Appellant and the Board's full compliance with the procedures approved in *Cooper* and *Compton*, the ALC granted a motion, over Appellant's objection, to supplement the

record with Respondent's complete parole file. The ALC, while acknowledging that the April 24, 2019, denial letter followed the procedure laid out by the Supreme Court in *Cooper*, determined that the record from the parole consideration hearing contained no deliberation or discussion of the criteria listed in the letter and no factual findings, and therefore "no substantial evidence exists in the record to support the Board's denial of parole." Based primarily on these perceived deficiencies, the ALC vacated the Board's decision. Even more troubling, the ALC committed a factual error when it went on to find that the grounds for rejection did not match up with the criteria for parole consideration. Relying in part on this error and ignoring the holdings in *Cooper* and *Compton*, the ALC remanded the case to the Board for a new parole hearing and ordered the Board to give the inmate "due consideration in compliance with the APA and the procedure and requirements set forth in *Cooper* and *Compton*." (July 23, 2020 "Order Remanding for a New Parole Hearing").[1]

After this decision, Appellant immediately filed a notice of appeal before this Court, and began drafting a brief arguing that the ALC erred in its application of *Cooper* and *Compton*. Before Appellant filed an initial brief, this Court *sua sponte* ruled that the ALC's decision is not a final decision and therefore not appealable, thereby dismissing this appeal. This Petition for Rehearing now follows.

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[1] Appellant maintains the April 24, 2019 parole hearing was conducted "in compliance with the APA and the procedures and requirements set forth in *Cooper* and *Compton*" and intends to continue following those procedures as set forth in the well-established precedent of those cases, absent direction from this Court or our Supreme Court to deviate from this process. The specter of an Administrative Law Judge who is misinterpreting the law and repeatedly remanding Respondent's case following each new parole hearing, even where that hearing continues to comply with *Cooper* and *Compton*, further supports this Court granting rehearing and finding this matter is subject to judicial review under the unique circumstances presented. *See Compton* at 478-79, 685 S.E.2d at 176-77 (granting a writ of certiorari pursuant to Rule 245, SCACR, to review the decision of the ALC and then reversing the ALC for exceeding its authority in reviewing a decision that constituted a routine denial of parole following repeated remands to the parole board); *See also Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 826 S.E.2d 863 (2019) (allowing judicial review of an interlocutory decision after concluding that the unreasonable delay in making a final decision in a workers compensation case left a party without an adequate remedy on appeal from a final decision, and therefore the remand order was immediately appealable despite language in 1-23-380 limiting judicial review to a final decision in a contested case).

Argument

In its order of dismissal, this Court relied on section 1-23-610(A)(1) of the Code and *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), and held: "Because the underlying order is not final, this appeal is dismissed." As noted above, Appellant respectfully submits this conclusion should be reconsidered for two reasons. First, Appellant submits the underlying order is final for purposes of judicial review pursuant to section 1-23-610(A)(1) of the South Carolina Code of Laws, because there is no further act which must be done by the Board prior to a determination of the rights of the parties, distinguishing the unique circumstances of this matter from *Charlotte-Mecklenburg* and its progeny. Second, Appellant submits the consequences of the strict application of this rule, which would preclude judicial review of the ALC's clear legal error, warrants appellate review in the limited circumstances of this case even where the ALC has attempted to avoid such review by "remanding" for further proceedings.[2] Appellant submits this case is nearly identical to *Compton*, which held that when the Board follows the procedure outlined in *Cooper*, the denial of parole will be considered routine and the ALC must dismiss the appeal. Here, the approved procedure was followed. Thus, it is error for the ALC to remand the matter back to the Board for another hearing, per the Supreme Court's holding in *Compton*. Judicial review of this clear legal error should be allowed.

[2] Appellant notes that qualitatively, a remand by the ALC for an entirely new parole hearing is akin to this Court remanding a criminal conviction for an entirely new trial. Such a decision is clearly subject to judicial review by our Supreme Court as a final decision, even though the new trial could be construed as a further act or proceeding to determine the rights of the parties. Appellant respectfully submits the remand order here should likewise be subject to judicial review from this Court.

A. Final Order

The right of appeal arises from and is controlled by statutory law. *Charlotte-Mecklenburg* at 266, 692 S.E.2d at 894; *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). South Carolina Code Ann. § 1-23-610(A)(1) provides that judicial review may only be sought from a ***final*** decision of the ALC. If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. *Id.* A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined. *Id.*; *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942).

In *Charlotte-Mecklenburg*, our Supreme Court held the order of the ALC was not immediately appealable because it remanded the matter to DHEC to determine whether any of the applicants were entitled to certificates of need. The Court concluded: "Although the ALC decided questions of law involved in this matter, a final determination as to the certificate of need has not been made. Therefore, the order of the ALC is interlocutory and is not a final decision which is immediately appealable under § 1-23-610." *Id.* at 267, 692 S.E.2d 894, 895. Here, by contrast, a final determination to deny parole was made by the Board, so the whole subject matter of the action was complete, leaving nothing further to be done. The ALC's order did not remand to the Board to make findings of fact about its ruling, or some other specific determination or ruling that was passed over, but instead remanded for an entirely new parole hearing. This is the equivalent of a final decision, not comparable to the remand in Charlotte-

Mecklenburg, where there were still unresolved determinations or rulings that might affect the final decision needed to be addressed.

Similarly, this case is distinguishable from *Spalt v. S.C. Dep't of Motor Vehicles*, 423 S.C. 576, 816 S.E.2d 579 (2018). In *Spalt*, our Supreme Court held the ALC's order reversing the Office of Motor Vehicle Hearing's dismissal of a motorist's appeal and remand for hearing on the merits, was not a final decision of the ALC, as a prerequisite to judicial review. At first glance, *Spalt* would appear to dictate the result reached by this Court to dismiss Appellant's appeal; however, the circumstances in *Spalt* are starkly different. In *Spalt*, "the hearing officer did not conduct a hearing on the merits of the suspension." *Spalt* at 583, 816 S.E.2d at 583. As a result, the remand order from the ALC for a hearing on the merits required an action that had not yet been completed, or even attempted. In this case, the remand order from the ALC for a hearing on the merits attempts to require an action that **has** already been completed – a parole consideration hearing. As in *Chartlotte-Mecklenburg*, this makes the ALC's order in Respondent's case "final." It reverses the whole subject matter of an action that was already complete. Appellant recognizes that in *Spalt*, the Court stated: "finality is determined by the disposition at the ALC, not by the disposition in the agency order on appeal." *Id.* at 584, 816 S.E.2d at 584. However, the disposition at the ALC which remands for an entirely new parole hearing, where the underlying disposition in front of the Board was complete and final, renders the remand order final as well. This finality was determined by the disposition of the ALC. If the order stands, there will be no path to appeal the ALC's substantive decision following the new parole hearing. Therefore, immediate judicial review is appropriate.

Finally, this case is distinguishable from *Ashford v. Prysmian Power Cables & Systems, Inc.*, 427 S.C. 361, 830 S.E.2d 912 (2019). In *Ashford*, this Court held the employer had an

adequate remedy, and thus was not entitled to judicial review of the decision of an Appellate Panel of the Workers Compensation Commission. This is because there were specific claims and issues that had **never** been addressed, and could still be addressed by the Commission on remand. Here, the Board denied parole after carefully considering the characteristics of Respondent's current offenses, prior offenses, prior supervision history, prison disciplinary record, the Department's criteria for parole consideration, the factors outlined in Section 24-21-640 of the Code, actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1) of the Code. Thus, there are no further issues or claims to consider or address. As a result, the ALC's order remanding for a new parole hearing is final.

Ultimately, a comparison with all of these cases reveals both how the current matter is ripe for judicial review, and what must be necessary limitations of our Supreme Court's decision in *Spalt*. It simply cannot be the case that **any** order from the ALC that "remands" for some other action is immune from judicial review. An extreme hypothetical illustrates this point. If the ALC issued an order requiring that the Board conduct a new parole hearing for Respondent where each Board member must dress like a clown and must vote based on the flip of a coin, such an egregious abuse of power must be subject to judicial review. Yet, a strict reading of *Spalt* would leave Appellant and the Board with no appellate remedy. All Appellant asks in the instant matter, is that this Court recognize the finality of the ALC's decision remanding for a new parole hearing, and grant the opportunity for judicial review. Dismissal with no review results in a system where the ALC is given the unchecked authority to dictate agency decisions by allowing it to order endless remands until the desired result is achieved. Here, that desired result appears to be a grant of parole, even though the Board is given the sole authority to determine parole eligibility. *State v. Mckay*, 300 S.C. 113, 115, 386 S.E.2d 623, 623-24 (1989).

B. Failure to Follow Precedent

This matter is strikingly similar to the circumstances found in *Compton*. In *Compton*, the inmate appealed his denial of parole to the Administrative Law Court. The Board filed a motion to dismiss. Instead, the ALC issued an order remanding the matter back to the Parole Board with an order for it to issue its decision in conformity with *Cooper*.

After the remanded hearing in which the inmate was again denied parole, the Board issued an amended notice of rejection which stated that it considered all the factors published within Department Form 1212 (criteria for parole consideration), as well as the factors outlined in S.C. Code § 24-21-640. The notice of rejection also listed the reasons for denial, which were (1) nature and seriousness of the offense, (2) an indication of violence in this or a previous offense, and (3) the use of a deadly weapon in this or a previous offense.

Compton again appealed the denial of parole and also filed a motion for contempt. The Board again filed a motion to dismiss. The ALC denied the motion for contempt, but again remanded the matter back to the Board, instructing the Board to issue an amended decision in conformity with *Cooper*.

The Board appealed the ALC's order, but the Court of Appeals dismissed the appeal stating the order remanding the case for additional proceedings before an administrative agency is not directly appealable. The Supreme Court, however, granted certiorari pursuant to Rule 245, SCACR and Article V, Section 5 of the South Carolina Constitution because the ALC was misinterpreting the *Cooper* opinion.

The Supreme Court held that the Board "clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212, which is sufficient under *Cooper*. Accordingly, the ALC erred in remanding the matter to the Parole Board." *Compton* at

479, 177. In the instant case, Appellant submits that the ALC is again misinterpreting *Cooper*, as well as the even clearer holding in *Compton*.

The Board's notice of rejection clearly states that it considered the statutory criteria and the criteria found within Form 1212 (criteria for parole consideration). It then listed its reasons for denial, which were the nature and seriousness of the offense, a criminal record indicates poor community adjustment, and a failure to successfully complete a community supervision program. Per *Cooper* and *Compton*, this should be enough. As stated in *Cooper*:

> We emphasize that in future parole review hearings the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in its parole form. If the Board complies with this procedure the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure.

Id. at 500, 661 S.E.2d at 112

Clearly, the Board followed this instruction, which was definitively outlined in *Compton* when the ALC was misinterpreting the *Cooper* holding. Yet, the ALC in this case ignored those holdings and instead remanded the matter back to the Board, with instructions to follow "the procedure and requirements set forth in *Cooper* and *Compton*."

For all of these reasons, Appellant respectfully requests this Court to grant this petition for rehearing and withdraw its previous order dismissing this appeal, reinstate this appeal and certify this matter to the Supreme Court pursuant to Rule 204(b), SCACR, or in the alternative make a ruling pursuant to *Compton* to address the clear error of the ALC in remanding a routine denial of parole back for a new hearing.

Conclusion

The Appellant respectfully submits that it already has complied with *Cooper* and *Compton*, yet the ALC has remanded the matter back to the Parole Board anyway. Therefore, the Appellant requests this Court grant this petition for rehearing, reconsider and rehear this matter, and either: (1) reinstate this appeal and set a briefing schedule on the merits; (2) reinstate this appeal and certify this matter to the Supreme Court pursuant to Rule 204(b), SCACR, because it involves an issue of significant public interest or a legal principle of major importance; or (3) issue an order in compliance with *Compton* reversing the ALC's decision and letting the Board's routine denial of parole stand.

Respectfully submitted,

J. BENJAMIN APLIN
Deputy Director for Legal and Policy Management

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James Robert Byrd, #98230, RESPONDENT

v.

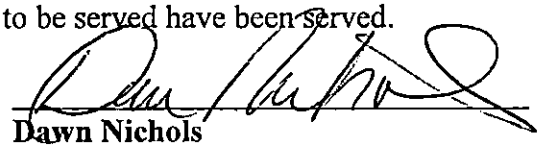
South Carolina Department of Probation, Parole and Pardon Services, APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Appellant, certify that I have served the within Appellant's Petition for Rehearing dated August 21, 2020, on Respondent by depositing a copy of the same in the United States mail, postage prepaid, the 21st day of August, 2020, addressed to:

Amber Hendrick, Esquire
1320 Main Street, 17th Floor
Columbia, S.C. 29201

I further certify that all parties required to be served have been served.



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August 21, 2020

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

RE: **James Byrd v. SCDPPPS**
Appellate Case No.: 2020-001074

Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of the Petition for Rehearing, along with proof of service, in the above captioned case.

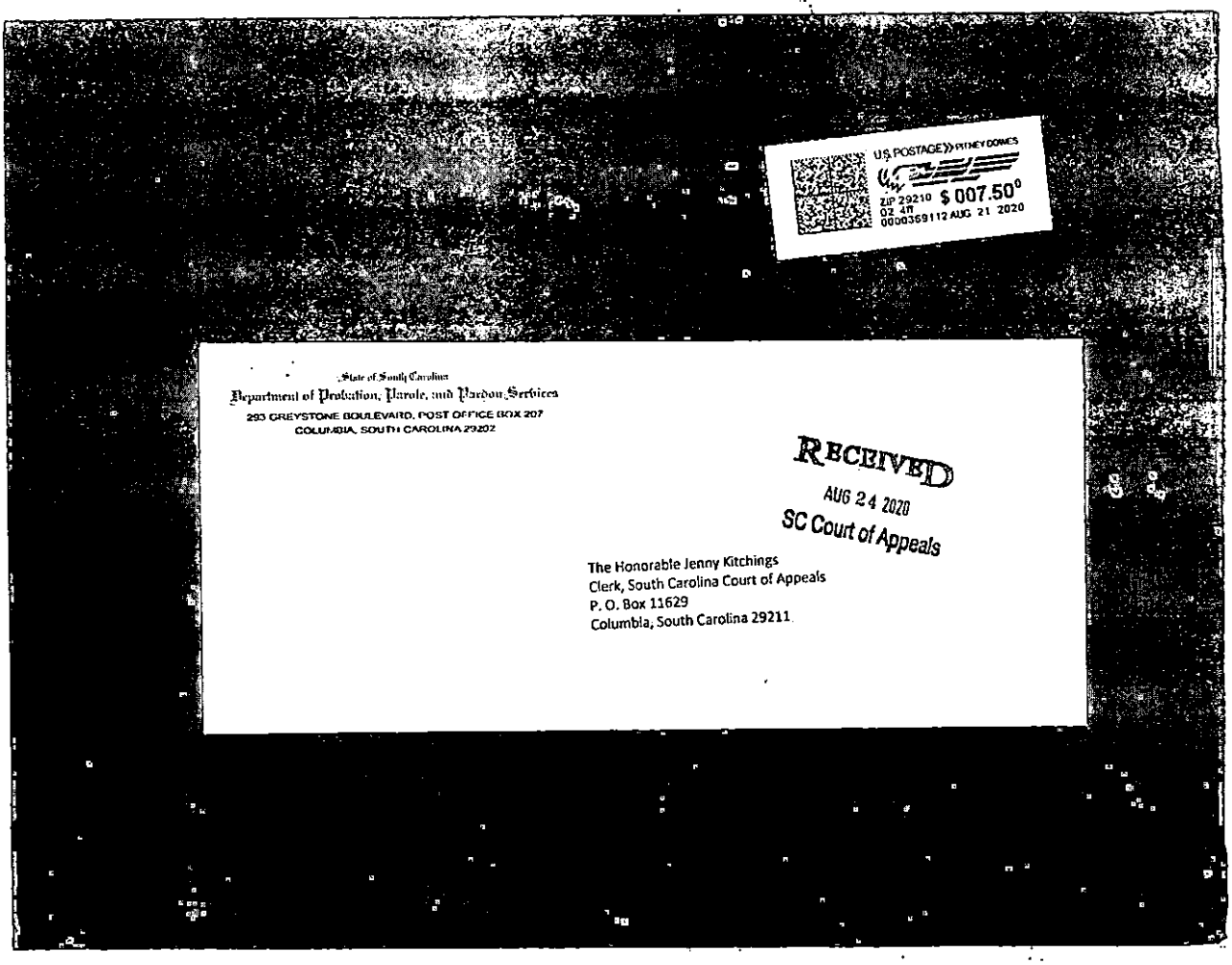
Thank you for your assistance in this matter.

Sincerely,

Matthew C. Buchanan
General Counsel

MCB:dn
Enclosures

cc: Amber M. Hendrick, Esquire



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