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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The Administrative Law Court
Honorable H.W. Funderburk, Jr., Administrative Law Judge

Appellate Case No. 2020-001473

JOSEPH KELSEY, # 217218 .....APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICES .....RESPONDENT.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The Agency's Actions Are Subject to Judicial Review and Must Be Reversed When They Are Arbitrary or Capricious.

The Department of Probation, Pardon and Parole Services ("PPP") is an executive agency. *See* S.C. Code Ann. § 24-21-10(A); *see also id.* § 1-23-10(1) (defining "Agency" and "State agency"). Like decisions rendered by any other agency, PPP's decisions are subject to the provisions of the South Carolina Administrative Procedures Act ("APA), including review by the Administrative Law Court ("ALC"), this Court and the South Carolina Supreme Court. *See id.* § 1-23-610; *see also Al-Shabaaz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000) (holding that the APA applies to parole appeals and inmate disciplinary proceedings, so long as the person seeking administrative relief can show that the interest they have asserted is "encompassed by the Fourteenth Amendment's protection of liberty [or] property" (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972)).

PPP has taken the position that its actions, unlike those of all other agencies, are immune from review by the ALC or other courts because "a decision to grant parole is not a ruling in favor of one party or another." Br. of Resp't at 8-9. According to PPP, the ALC's review is "extremely limited," restricted to the denial letter PPP sends a putative parolee (and no other information), and available "only when the limited liberty interest to parole hearings is interrupted [by PPP]." Br. of Resp't at 8, 11-12.

PPP's interpretation of its own powers is not only breathtaking but reflects a fundamental misunderstanding of the role of the ALC, the purpose of judicial review, and Supreme Court precedents. Under PPP's reading, parole decisions are categorically exempt from APA review simply because "[p]arole is a privilege, not a right." Br. of Resp't at 11. But there is no statutory or decisional law to support this unprecedented assertion. Because PPP is an agency, and because

parole determinations constitute agency action, parole denials are subject to APA review. *E.g.*, *Rose v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 429 S.C. 136, 142, 838 S.E.2d 505, 509 (2020) (applying the APA to an appeal from a final decision by PPP); *Al-Shabaaz*, 338 S.C. at 369, 527 S.E.2d at 750. This is reinforced by the fact that in all of the Supreme Court's decisions on the scope of the ALC's power to review PPP's actions, the Court has relied on opinions interpreting the scope of the ALC's power to review actions of *other* agencies—PPP, in other words, is not subject to a special set of rules simply because its expertise lies in parole decisions. *E.g. Rose*, 429 S.C. at 143, 838 S.E.2d at 509 (citing *Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 665 S.E.2d 231 (2008), a case involving a prisoner's non-wage deposits, and *Leventis v. S.C. Dep't of Health & Envtl. Conrol*, 340 S.C. 118, 530 S.E.2d 653 (Ct. App. 2000), a case involving conditions imposed by hazardous waste permits); *Barton v. S.C. Dep't of Probation Parole & Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013) (citing *Hill v. S.C. Dep't of Health & Envt'l Control*, 389 S.C. 1, 698 S.E.2d 612 (2010), a case involving coast zone management permit violations by a property owner).

The Supreme Court's decisions regarding the scope of judicial review of parole determinations are not to the contrary. PPP attempts to narrow the applicability and persuasive power of *Rose* by painting it as a case involving nothing more than a "remedial grant of parole based on evidence of a favorable vote count." Br. of Resp't at 8. In *Rose*, the Supreme Court expressly held that where the agency has violated a putative parolee's substantive rights—just as it did in Joe's case—and where the remedy the putative parolee seeks requires the agency to grant him parole, the ALC is not granting or denying parole but is acting within its delegated authority to correct unlawful agency action. *Rose*, 429 S.C. at 144, n.5, 838 S.E.2d at 510, n.5. Joe has not asked for anything more than was granted to the inmate in *Rose*. Moreover, as *Cooper* made clear,

the ALC—and therefore this Court—have jurisdiction to review "the method and procedure" PPP uses when reaching a parole decision because improper decision making (as opposed to a parole outcome) implicates "a sufficient liberty interest to trigger due process requirements." *Cooper v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 377 S.C. 489, 502, 661 S.E.2d 106, 113 (2008). In response,

At any rate, PPP fails to address the underlying fact that the ALC held that PPP's decision to deny Joe parole based on the nature of the offense "effectively denies Appellant's eligibility for parole"—a determination that, under any reading of the case law, confers jurisdiction on the ALC and on this Court. *See Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 19-ALJ-15-0061-AP, slip op. at *7 (Admin. L. Ct. Oct. 7, 2020) (citing *Cooper*, 377 S.C. at 502, 661 S.E.2d at 113). The ALC had, and this Court has, jurisdiction to consider Joe's case, and the ALC had, and this Court has, the power to grant Joe the relief he has requested.

II. Joe Is Not Asking the Courts to Grant Him Parole, But Rather to Act Within Their Lawful Authority and Grant Him a Parole Hearing at Which PPP and the Board Comply with the Law.

PPP misunderstands the relief Joe seeks. He has not requested that this Court—or any court—order him released directly on parole. He simply desires a parole hearing that complies with the APA's prohibition on arbitrary and capricious decisions and that is free from the other significant defects the ALC identified.

The fact that such a parole hearing can on the facts of this case produce only one legally sound result—a grant of parole—does not deprive the ALC or the judiciary jurisdiction over the case. By granting parole to Joe's significantly more culpable codefendant, the Board left itself only one option at Joe's hearing, given that "[b]oth [men] have compiled extraordinary records as model prisoners." *See Kelsey*, No. 19-ALJ-15-0061-AP, at *8. This outcome does not, as PPP insists,

"invite[] constant scrutiny in endless appeals by inmates with co-defendants." Br. of Resp't at 11-12. To the contrary, this outcome merely holds the Board and PPP accountable and requires that they meet standards of basic fairness that reinforce the Agency's ultimate goal: "prepare offenders under [their] supervision toward becoming productive members of the community." S.C. Dep't of Probation, Parole & Pardon Servs., *About PPP*, https://www.dppps.sc.gov/About-PPP (last visited Jan. 28, 2021). If parole-eligible inmates are led to believe, by force of arbitrary parole decisions, that their conduct while they are incarcerated plays no role in their eligibility for release, any incentive to "becom[e] productive members of the community" goes away.

PPP attempts to avoid its constitutional and statutory obligations by describing Joe's appeal as a demand that the ALC "summarily grant parole to an inmate who has been routinely denied parole." Br. of Resp't at 7. That argument is both conclusory and wrong because one question before the ALC was whether Joe's parole denial was a routine denial, and the ALC found that it was not. *See Kelsey*, No. 19-ALJ-15-0061-AP, at *7. As explained above and in Joe's opening brief, the ALC had jurisdiction to remedy PPP's unlawful action, and this Court should remedy that harm now.

III. Joe Is Not Asking for His Entire Parole File, Just the Factual Summary.

PPP asserts that Joe is seeking access to the entire parole file prepared by the agency and provided to the Board. Br. of Resp't at 14. That is not true. As Joe's opening brief made clear, what he maintains that he has a right to see and review, and what the ALC concluded that he had a right to see and review, is the factual summary about the underlying offense prepared by PPP and provided to the Board for review prior to an inmate's parole hearing. If a person seeking parole is not provided access to that memorandum, there is a possibility, or in Joe's case a certainty, that

parole will be denied due to the Board receiving, and acting on, a materially inaccurate version of the underlying offense leading to incarceration.

PPP's assertion that inmates do not "get to rehash facts of the offense they may dispute," Br. of Resp't at 15, is especially disingenuous in the context of this case. It is PPP and the Board that have done the rehashing. As noted previously, the South Carolina Supreme Court on two separate occasions made unambiguous factual and legal determinations as to who was the most culpable party; and it was Payne not Kelsey. PPP has no right to prepare a memorandum telling the Board otherwise. And it certainly has no right to do so without letting the person seeking parole know about (and contest) such glaring inaccuracies. *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 15, n.7 (noting the constitutionally relevant "serious risks of error" when an inmate is denied access to his parole files and the ability to challenge them: the inmate may be denied parole on the basis of "adverse factual information in the inmate's file [that] is wholly inaccurate").

PPP's reliance on S.C. Code section 24-21-290 is also misplaced. That statutory provision is intended to protect information obtained by probation agents during the discharge of their duties, i.e., information they obtain from interviews in assessing the inmate's suitability for parole. But, that type of information is rarely if ever utilized in preparing the memorandum's description of the underlying offense. The memorandum should, in the vast majority of cases, be compiled by reviewing objective documents in the court file, including indictments, transcripts, and the like. If, however, the memorandum is compiled based on subjective documents, like statements from victims or codefendants, PPP has no valid legal basis for withholding that information. No other agency in this State is permitted to act under such a shroud of secrecy. In order to prevent inmates being arbitrarily and capriciously denied parole based on materially inaccurate assessments of their

role in the underlying offense, the Court should hold that an inmate has, at a minimum, the right to review the memorandum describing their criminal conduct.

CONCLUSION

For the reasons set forth above, as well as for the reasons presented in Joe's Opening Brief, this Court should reverse the judgment of the ALC and order the Board to conduct a procedurally sound and substantively fair parole hearing.

Respectfully submitted,

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January 29, 2021

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JOSEPH KELSEY, # 217218 ..... APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICES ..... RESPONDENT.

PROOF OF SERVICE

I, Hannah L. Freedman, counsel for the Appellant, certify that I have served a copy of the Initial Reply Brief of Appellant by email, as authorized by Supreme Court Order No. 2020-000447, section (c)(13) (Dec. 16, 2020), on Respondent's attorney of record, Matthew C. Buchanan, S.C. Department of Probation, Parole and Pardon services, at matthew.buchanan@ppp.sc.gov.

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

This 29th day of January, 2021.

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January 29, 2021

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RE: *Joseph Kelsey v. S.C. Dep't of Probation, Parole & Pardon Servs.*

Dear Ms. Kitchings:

Please find enclosed a copy of the Initial Reply Brief of Appellant, along with certificate of service.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Hannah L. Freedman

Enclosure

cc: John H. Blume
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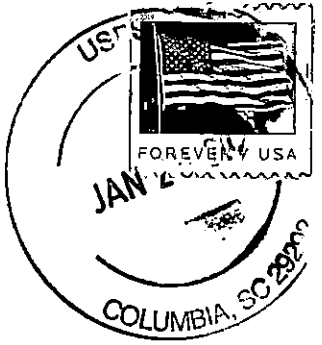

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