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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Court Judge

Appellate Case No. 2021-000533

RICKY BROWN #211789, ... APPELLANT

v.

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

INITIAL BRIEF OF APPELLANT

Ricky Brown #211789

Broad River Correctional Inst.
4460 Broad River Rd.
Columbia, S.C. 29210

ISSUES PRESENTED

I. THE ALC ERRED IN ITS DECISION THAT THE RESPONDENT DID NOT VIOLATE THE FOURTEENTH AMENDMENT OF S.C. CONSTITUTION BY ARBITRARILY RENDERING ITS FINAL DECISION WITHOUT RULING ON EACH PROPOSED FINDING OF FACT SUBMITTED BY APPELLANT, IN VIOLATION OF THE MANDATORY REQUIREMENTS OF S.C. CODE ANN. § 1-23-350.

STATEMENT OF THE CASE

Appellant first became eligible for parole This matter is before the appellate court pursuant to a Notice of Appeal filed by Ricky Brown, SCDC #211789 ("Appellant") on May 17, 2021 in response to the April 23, 2021 final decision of the Administrative Law Court. Appellant was convicted on May 4, 1994 in the Darlington County Court of General Sessions and is presently incarcerated at the Broad River Correctional Institution serving a term of life for the offense of First Degree Burglary (93-GS-16-2320), and a term of twelve (12) years for the offense of Criminal Sexual Conduct (93-GS-16-2319), pursuant to orders of commitment from the Darlington County Clerk of Court. At the time of these offenses o November 21, 1993, S.C. Code Ann. §§ 16-3-652 (Supp. 1993) and 16-11-311 (Supp. 1993) afforded Appellant an opportunity to seek the privilege of parole after the completion of ten (10) years.

Appellant first became eligible for parole on January 9, 2002, and was denied on January 23, 2002. Appellant sought parole and was subsequently denied on or about every two (2) years thereafter, and was denied each time for the following reasons:

Nature and Seriousness of Current Offense

Indication of Violence in This or Previous Offense

Criminal Record Indicates Poor Community Adjustment

Failure to Successfully Complete a Community Supervision Program

STANDARD OF REVIEW

In an appeal from an ALC decision, the Administrative Procedures Act provides the appropriate standard of review. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). Section 1-23-610 of the South Carolina Code (Supp. 2020) sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency. S.C. Dep't of Corrections v. Mitchell, 377 S.C. 256, 258, 659 S.E.2d 233, 234 (Ct.App. 2008). The review of the ALC's order must be confined to the record. S.C. Code Ann. § 1-23-610(B) (Supp. 2020). The court of appeals may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact. *Id.* In determining whether the ALC's decision was supported by substantial evidence, the court need only find evidence from which reasonable minds could reach the same conclusion as the ALC. Kiawah, 411 S.C. at 28, 766 S.E.2d at 715. However, when the issue on review raises a question of law, this court "may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." *Id.* Statutory interpretation is a question of law. Chapman v. S.C. Dep't of Social Services, 420 S.C. 184, 188, 801 S.E.2d 401, 403 (Ct.App. 2017) (quoting S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010)). "Unless there is a compelling reason to the contrary, appellate courts 'defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations.'" *Id.* at 188, 801 S.E.2d at 403 (quoting Kiawah, 411 S.C. at 34, 766 S.E.2d at 718); see also Kiawah, 411 S.C. at 34-35, 766 S.E.2d at 718 ("We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, L.Ed.2d 694 (1984))).

ARGUMENTS

I. The ALC erred in its decision that the Respondent did not violate the Fourteenth amendment of S.C. Constitution by arbitrarily rendering its final decision without ruling on each proposed finding of fact submitted by Appellant, in violation of the mandatory requirements of S.C. Code Ann. § 1-23-350.

In an appeal to this Court from an ALC decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. Braxton v. South Carolina Department of Corrections, 430 S.C. 637, 846 S.E.2d 383 (2020); see also Sanders v. South Carolina Dept. of Corrections, 379 S.C. 411, 417, 665 S.E.2d 231, 234 (Ct. App. 2008) (citing S.C. Code Ann. § 1-23-610 (Supp. 2020). This Court will only reverse the decision if that final agency decision is:

a) in violation of constitutional or statutory provisions;

b) in excess of the statutory authority of the agency;

c) made upon unlawful procedure;

d) affected by other error of law;

e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

f) arbitrarily or capriciously characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

a. In Violation of Constitutional or Statutory Provisions

The court of appeals can reverse an agency's decision if, for example, the agency's decision was contrary to a constitutional or statutory provision or otherwise affected by an error of law. See S.C. Code Ann. § 1-23-610 (B) (a) (Supp. 2020); see also Fulbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 278, 802 S.E.2d 749, 801 (2017). Here, Appellant alleges the Respondent's final decision violated the mandatory provisions of S.C. Code Ann. § 1-23-350 because the decision failed to "include a ruling upon each proposed finding of fact" proffered by Appellant, in accordance with agency rules promulgated in S.C. Code Ann. § 21-24-640 and its own Form 1212, "Criteria for Parole Consideration," and is therefore defective by established standards of the Administrative Procedures Act.

The issue of interpretation of a statute is a question of law for the court. Bruning v. SCDHEC, 418 S.C. 537, 544, 795 S.E.2d 290, 294 (2016). The cardinal rule of statutory

interpretation is to ascertain and effectuate the legislature's intent. Original Blue Ribbon Taxi Corp. v. South Carolina Dept. of Motor Vehicles, 380 S.C. 600, 607, 670 S.E.2d 674, 677 (2008). Legislative intent must prevail if it can be reasonably discovered in the language employed and that language must be construed in the light of the intended purpose of the statute. *Id.* 380 S.C. at 607, 670 S.E.2d at 678. The plain language of the statute is the principal guidepost in discerning the General Assembly's intent. *Id.* Words in the statute should be given their plain and ordinary meaning without resorting to forced or subtle construction.

The statute at issue in this appeal, S.C. Code Ann. § 1-23-350, is as follows:

> A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

Appellant asserts the General Assembly's use of the phrase "in accordance with agency rules" in S.C. Code Ann. § 1-23-350 provides clear guidance to this Court with respect to Appellant's right to submit evidence in support of his petition for parole. The South Carolina Supreme Court has recognized that the plain and ordinary meaning of the word "rule" is generally defined as "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation." Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 535, 787 S.E.2d 485, 495 (2016).

In the instant case, the established and authoritative standard or principle is S.C. Code Ann. § 24-21-640, which grants rule-making authority to the Respondent to create its own "written, specific criteria," commonly referred to as Form 1212, "Criteria for Parole Consideration." According to the Respondent's own "agency rules" in Form 1212, "Criteria for Parole Consideration," a parole-eligible inmate "has the right to present witnesses and *evidence* on his/her behalf..." (emphasis added). Appellant contends this specific language contained in the Respondent's "written, specific criteria," mandated explicitly by S.C. Code Ann. § 24-21-640, grants Appellant the right to submit proposed findings of fact in the form of evidence and, as such,

Respondent is required by S.C. Code Ann. § 1-23-350 to "include a ruling upon each finding of fact" in its final decision.

Appellant alleges the transcript of the October 28, 2020 parole hearing will sufficiently reflect the fact Respondent acknowledged receipt of Appellant's parole package containing Appellant's proposed findings of facts (evidence) to be considered. In Cooper v. South Carolina Department of Probation, Parole, and Pardon Services, 377 S.C. 489, 499, 661 S.E.2d 106, 112 (2008), the Supreme Court held that parole-eligible inmates "have a right to require the Board to adhere to the statutory requirements in rendering a decision." Appellant asserts the Respondent satisfied the following mandatory language of §1-23-350:

> A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision *shall* include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, *shall* be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

However, Appellant further asserts the Respondent failed to comply with the other mandatory language included, beginning with the very next sentence, in § 1-23-350:

> If, in accordance with agency rules, a party submitted proposed findings of fact, the decision *shall* include a ruling upon each proposed finding.

Appellant submitted proposed findings of fact in his formal parole package, in accordance with the established and authoritative standard or principle expressed in S.C. Code Ann. § 24-21-640, and within the Respondent's own "written, specific criteria" in their Form 1212, "Criteria for Parole Consideration." However, the Respondent failed to adhere to the statutory requirements of S.C. Code Ann. § 1-23-350 by failing to "include a ruling upon each proposed finding of fact" proffered by Appellant. Appellant asserts that the specific language in S.C. Code Ann. § 1-23-350 mandates that the Respondent comply with its provisions.

b. In Excess of the Statutory Authority of the Agency

The ALC may reverse or modify the agency's decision if it is "in excess of the statutory authority of the agency." See S.C. Code Ann. § 1-23-610 (B) (b) (Supp. 2020). See also Forman v. South Carolina Department of Labor, 419 S.C. 64.69.796 S.E.2d 138, 141 (Ct. App. 2016). In Cooper, the Supreme Court noted that, "If a Parole Board deviates from or renders its decision

without consideration of the appropriate criteria, we believe it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest." Id. 377 S.C.at 499, 661 S.E.2d at 111.

Accordingly, Appellant contends that the Respondent's final decision was made in excess of its statutory authorities in S.C. Code Ann. §§ 1-23-350 and 24-21-640 because the Respondent specifically failed to consider and apply the mandate to "include a ruling upon each proposed finding of fact" proffered by Appellant. The Respondent's October 28, 2020 final decision gave no specific "careful consideration" of the evidence (Appellant's proposed findings of facts submitted in the parole package before the Parole Board) to be ruled upon by the Respondent. When the Respondent fails to render its decisions within the statutory limitations of their authority mandated in S.C. Code Ann. §§ 1-23-350 and 24-21-640, it does so in excess of their authority. cf. Barton v. South Carolina Dept. of Probation, Parole, and Pardon Services, 404 S.C.395, 401, 745 S.E.2d 110, 113 (2013); see also Lambries v. Saluda County Council, 409 S.C. 1, 17, 760 S.E.2d 785,793 (2014) ("The simple use of the word 'Shall'... generally signals a command."); S.C. Code Ann. § 1-23-350 ("If, in accordance with agency rules, a party submitted proposed findings of fact, the decision *shall* include a ruling upon each proposed finding.") (emphasis added).

c. Made Upon Unlawful Procedure

The ALC may reverse or modify the agency's decision if it is "made upon unlawful procedure." See S.C. code Ann. § 1-23-610 (B) (c) (Supp. 2020); see also Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control, 424 S.C. 80,86,817 S.E.2d 633, 636 (Ct. App. 2018).

Appellant is not appealing the denial of parole. Instead, Appellant is challenging through this appeal the Respondent's failure to utilize the procedures promulgated by the Legislature in S.C. Code Ann. §§ 1-23-350, 24-21-640, and as established by the Respondent's own "written, specific criteria" authorized by § 24-21-640. Thus, one of the questions before this Court is whether Appellant's claim raises a sufficient state-created liberty interest to trigger due process requirements. If the Respondent deviates from or renders its decision without consideration of the

appropriate criteria, it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest.

In this appeal, Appellant alleges the Respondent denied Appellant parole without giving credence to the statutory procedures promulgated by S.C. Code Ann. §§ 1-23-350, 24-21-640, and as established by the Respondent's own "written, specific criteria" authorized by § 24-21-640. Appellant has a right to require the Respondent to adhere to all statutory requirements in rendering a decision. The South Carolina Supreme Court in Cooper v. S.C. Department of Probation, Parole and Pardon Services, 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008), affirmed that, "[p]ursuant to the terms of the APA, a final decision in an agency adjudication of a contested case 'shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.'" See also S.C. Code Ann. § 1-23-350.

Here, the Respondent neither offered an explanation nor indicated that it had considered the proposed findings of fact presented as evidence by Appellant in his parole package, in accordance with agency rules in S.C. Code Ann. §24-21-640, and its own "written, specific criteria" in Form 1212, "Criteria for Parole Consideration." Therefore, pursuant to the statutory requirements of S.C. Code Ann. § 1-23-350, the order was defective, and this Court, like the Court in Cooper, must conclude that the Respondent's decision was arbitrary and capricious. Cooper, 377 S.C. at 500, 661 S.E.2d at 112.

In Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct.App. 2006), this Court addressed the application of S.C. Code Ann. § 1-23-350 in an appeal where a party submitted proposed findings of fact, and alleged the governing agency failed to include a ruling on those findings in its final decision. The appellate panel in Smith adopted the commissioner's order in its entirety, and made sufficient findings of fact regarding the proximate cause of Smith's mental injury in its agency decision. Thus, this Court determined the final decision complied with S.C. Code Ann. § 1-23-350. In the instant case, however, the Respondent's final decision makes no mention of, nor renders any specific rulings upon, any of the proposed findings of fact submitted by Appellant during the October 28, 2020 parole hearing in the parole package. Accordingly, Appellant contends the Respondent's final decision was made upon unlawful procedure.

Both *Black's Law Dictionary* (5th Ed., West Publishing Co., 1979) at 1233 and *Webster's Dictionary* clearly state that the word "shall" is mandatory. *Black's*, in particular, states that when the word "shall" is used in statutes, it "must be given a compulsory meaning; as denoting obligation." While *Black's* also states that the word "shall" may be construed as permissive "in cases where no right or benefit to anyone depends on it being taken in the imperative sense," this is clearly not the case here since an inmate's substantive and procedural rights of parole eligibility are affected by the issuance and contents of the Respondent's decision as articulated by 1-23-350. cf. Cooper, 377 S.C.at 499, 661 S.E.2d at 111.

Appellant asserts the Respondent may avoid rendering defective orders in future parole review hearings if it clearly includes in its order "a ruling upon ***each*** proposed finding" as mandated by the Legislature in § 1-23-350 (emphasis added). If the Respondent complies with this mandate in the overall procedural statute when an inmate submits its own proposed findings of fact in accordance with established agency rules articulated in Form 1212, "Criteria for Parole Consideration," the decision will then constitute a routine denial of parole. The Respondent is required to satisfy the entire procedural mandate in § 1-23-350, not just the parts of it addressed directly by our Supreme Court in Cooper.

d. Affected by Other Error of Law

The ALC may reverse or modify the agency's decision if it is "affected by other error of law." See S.C. Code Ann. §1-23-610 (B) (d) (Supp. 2020); see also Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006) ("pursuant to the APA, this [c]ourt's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law.").

Appellant contends Rule 58 of the South Carolina Administrative Law Court mandated that "the record of the contested case shall consist of (a) all documents filed, (b) all evidence received or considered..., (c) a statement of matters judicially noted, (d) all proffers of proof of excluded evidence, (e) the final order or decision..., and (f) any transcript taken of the testimony during the proceeding." S.C.R. Admin. Law. Ct. 58. Respondent filed its *Record on Appeal* on February 5, 2021, which was comprised solely of a *Certificate of Service*, a copy of the October 28, 2020 *Notice of Rejection,* a copy of Appellant's *Petition for Rehearing,* dated November 9, 2020, a copy of Respondent's November 17, 2020 letter stating "there is no rehearing/appeal

process for the routine denial of parole", a copy of Respondent's *Criteria for Parole Consideration* form 1212, and a *Certificate of Counsel.* Appellant asserts the *Record on appeal* contains no "substantial evidence" to support Respondent's final decision. Specifically, the Respondent's *Record on Appeal* fails to comply with the basic requirements of Administrative Law Court Rule 6, in that it doesn't include any factual evidence at all; it simply includes copies of relevant procedural criterion the agency is mandated to follow while making its final decisions. Rule 6(B)(1) specifically allows a party to file redacted evidentiary documents in support of its final decision. Despite the proposed findings of fact submitted by Appellant prior to, and verbally declared during, the parole hearing, the Respondent's *Record on Appeal* contains absolutely no evidence of its existence – or of any other evidence to support its final decision. The Respondent voluntarily submitted its *Record on Appeal*, as discussed above, but failed to include the transcript of the proceedings as mandated by Rule 58, SCALC. Therefore, Respondent's final decision was affected by their violation of Administrative Law Court rules.

e. Clearly Erroneous in View of the Reliable, Probative, and Substantial Evidence on the Whole Record

The ALC may reverse or modify the agency's decision if it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." See S.C. Code Ann. § 1-23-610 (B) (e) (Supp. 2020); see also Crane v. Raber's Discount Tire Rack, 429 S.C. 636, 642, 842 S.E.2d 349, 352 (2020) ("The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the... findings... are... (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.")

Again, Appellant contends the Respondent's own *Record on Appeal* is absolutely silent regarding any "reliable, probative, and substantial evidence." In addition, Respondent has failed to maintain adequate records of Appellant's prior considerations for parole pursuant to their own mandatory requirements in S.C. Code Ann. § 24-21-40. This failure has been openly acknowledged by the respondent in other cases in addition to Appellant's, and has been recognized and reported by our South Carolina Supreme Court in its recent decision in Rose v. S.C. Department of Probation, Parole, and Pardon Services, 429 S.C. 324, 141, 838 S.E.2d 505, 508 (2020) (SCDPPPS admitted they had "destroyed all of its other records prior to the *Barton* investigation.") In addition, a May 22, 2001 Attorney General Opinion affirmed the Parole Board's

mandate to "keep a complete record of all its proceedings." See S.C.A.G. 2001 WL 790250 at 2; also S.C. Code Ann. § 24-21-40

f. Arbitrary or Capricious or Characterized by Abuse of Discretion or Clearly Unwarranted Exercise of Discretion

The ALC may reverse or modify the agency's decision if it is arbitrary. See S.C. Code Ann. § 1-23-610 (B) (f) (Supp. 2020). A decision is "arbitrary" if it is "without a rational basis. Daufuski Island Utility Company, Inc. v. South Carolina Office of Regulatory Staff, 427 S.C. 458, 464, 832 S.E.2d 572,575 (2019).

In the Appellant's October, 2018 parole hearing, there were 6 board members present. In the Parole Board's final decision, the Appellant received 3 votes to reject, and 3 votes to grant parole. In the Appellant's October, 2020 parole hearing, there were still 6 board members present, with one replacement. In the Parole Boards October 28, 2020 final decision, the Appellant received a "unanimous vote to reject." Appellant contends this action shows an arbitrary nature to Parole Board decisions, that in the two year span between October, 2018 and October, 2020, the Appellant's record did not sustain any violations or infractions that would negatively affect his prison record. In fact, the Appellants record has continued to improve by way of additional self-improvement courses of instruction, sustained consistency in employment, work performance and disciplinary abandonment. Appellant also contends that if the Board member replacement was a member whom had previously given him a vote to grant, he should still have received 2 votes to grant parole if there were no additional votes to grant parole. Had the Respondent maintained adequate records, the Board would have been able to review any previous decision and why any specific votes to grant or deny were made.

CONCLUSION

When an administrative agency acts without first making proper factual findings required by law, the proper procedure is to remand the case and allow the agency the opportunity to make those findings. Fox v. Newberry County Memorial Hospital, 319 S.C. 278, 282, 461 S.E.2d 392, 395 (1995). In this appeal, Respondent's own final decision demonstrates its failure to comply with the mandate in S.C. Code Ann. § 1-23-350 to "include a ruling upon each proposed finding of fact" proffered by Appellant. Moreover, the Respondent's *Record on Appeal* lacks any evidence to support its findings, and is otherwise incomplete as it lacks the inclusion of the transcript of the proceedings required by Rule 58, SCALC. Therefore, Appellant prays this Court will find the Respondent's final decision violates S.C. Code Ann. § 1-23-350, and remand this case for further proceedings consistent with its order.

Respectfully submitted,

Ricky Brown 7/26/21

Ricky Brown #211789
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4460 Broad River Rd.
Columbia, S.C. 29210

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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Shirley C. Robinson, Administrative Law Court Judge

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RICKY BROWN #211789, ... APPELLANT

v.

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

CERTIFICATE OF SERVICE

The undersigned certifies that this *Initial Brief of Appellant* complies with Rule 208, SCACR.

Ricky Brown 7/26/21

Ricky Brown #211789
Broad River Correctional Inst.
4460 Broad River Rd.
Columbia, S.C. 29210

July 22, 2021

Jenny A. Kitchings, Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

RE: RICKY N. BROWN v. SCDPPPS,
CASE NO. 2021-000533

Dear Mrs. Kitchings:

Enclosed for filing, please find one (1) original and one (1) copy of the Initial Brief of Appellant, with attached Certificate of Service.

Please stamp-clock and file the original, and stamp-clock and return the enclosed copy for my records.

In closing, I thank you for your attention to these matters.

Sincerely,

Ricky N. Brown 7/26/21
Ricky N. Brown #211789
Broad River Correctional Institution
4460 Broad River Rd.
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cc: Janell H. Gregory, Legal Counsel for Respondent

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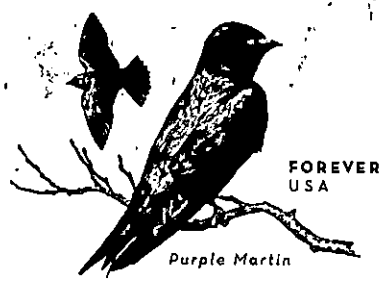

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