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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.

RECORD ON APPEAL

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

State of South Carolina

Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor

JERRY B. ADGER
Director

293 Greystone Boulevard
Post Office Box 207
Columbia, South Carolina 29202
Telephone: (803) 734-9220
Fax: (803) 734-9440
www.dppps.sc.gov

October 28, 2020

Mr. Ricky Brown #00211789
Broad River Correctional Institution
4460 Broad River Rd.
Columbia, SC 29210

RE: NOTICE OF REJECTION

Dear Mr. Brown:

It is my responsibility to inform you, on behalf of the South Carolina Parole Board, that the Board has reached a decision regarding your parole hearing. The Board hereby makes the following CONCLUSION OF LAW:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10 (F) (1) of the South Carolina Code of Laws. The Parole Board had determined that your parole must be denied.

You will be notified 30 days prior to your next scheduled parole consideration date.

FINDINGS OF FACT:

Nature And Seriousness Of Current Offense
Indication Of Violence In This Or Previous Offense
Criminal Record Indicates Poor Community Adjustment
Vote Count: Unanimous To Reject

Sincerely,

Nettie C. Jacobs
Board Support Services

10/28/2020

RECEIVED
NOV 17 2020
Board Support Services

The State of South Carolina

Department of Probation, Parole, & Pardons

South Carolina DPPPS — Respondent

Ricky Brown — Appellant

Petition for Rehearing

Appellant appeared before the SCDPPPS on Oct. 28th 2020 and was denied. Appellant received notice of rejection on Nov. 9th 2020 citing the following findings of fact.

Nature and seriousness of offense

Indication of violence in this or previous offense

Criminal record indicates poor community adjustment

In this petition for rehearing, appellant recognizes and makes no claim against the DPPPS authority to grant or deny parole to the appellant. It is clear, that according to the guidelines set forth in 24-21-640, It is the duty of the SCDPPPS to factor the above findings of fact, and as also provided for in items 2, and 3, of form 1213 Criteria for parole consideration. However, because it is beyond the ability of the appellant or any governing body, state agency within or without SCDC to alter or amend the above findings, in effect, makes them of no practical relevance.

As well, the appellant contends there appears to be an arbitrary denial of parole as evidenced by his receiving a split decision (3 reject, 3 parole) in his 2018 appearance, and a unanimous vote to reject in 2020, even while there has been no significant change in parole board personel. Appellant also maintains that since his 2018 parole appearance his prison record has continued to improve, with no disciplinary actions and continued participation in availible programs and requests a consideration for rehearing based on the matters of fact that have been addressed, changed and improved.

That the appellants attitude toward his family, the victim and all authority is one of love, concern, and respect as evidenced by his continued participation in programing that addresses the thinking and concern for others and their right to be free of harm or detriment, provided to the board.

That the appellant has made positive and consistent adjustments to himself while incarcerated as evidenced by program participation, provided to the board, that address decision making and response to stimulus.

That the appellant has addressed and overcome his substance abuse issues, as provided to the board.

That the appellant has maintained consistent employment, as evidenced by the record.

That the appellant does understand the cause of his past criminal conduct and has addressed those issues through the programing provided and offered as evidence to the board.

That the appellant has, according to the record, shown a disposition to reform and as a parolee he would obey the law and lead a correct life.

That the appellant has a feasible parole plan, a plan for accountability, solid job offeres and residence.

That the appellant does not pose a threat to any community he should be released to and prays this honorable board would acknowledge his efforts and understand that the real change desired to be witnessed by the board, must begin on the inside of an individual in order to have any real or lasting benefit to that individual or their circle of influence. Addressing the character traits desired to be seen by society was not done as a way to gain favor with the board or any other agency, but is a result of the appellants consistent and continuing growth within himself.

Conclusion

Due to the criteria established in form 1212, the applicant also prays this honorable board would see his accomplishments as those deserving a lessoning of the rigors of incarceration, and by his established disposition to reform himself, the interests of society will not be impaired by his release on parole, and his willingness to comply with the terms of parole is reflected in his record during incarceration. For these, and the forgoing reason, the appellant respectfully requests a rehearing for parole consideration.

Sincerely: Ricky Brown

11/9/20

Ricky Brown 211789 appellant

v

South Carolina DPPPS Respondent

Notice of Intent to appeal

It is the desire of the appellant, Ricky Brown 211789, to appeal the final decision of the SCDPPPS. The appellant appeared before the board on Oct. 28th, 2020 and was denied. appellant received his notice of rejection on Nov. 9th 2020 and filed his petition for rehearing on Nov. 9th 2020. appellant received the final judgement on Nov. 20th 2020.

The appellant respectfully requests an application, rules for filing an appeal, and a case number

Ricky Brown

11/20/20

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

_____,

Appellant,

vs.

South Carolina Department of Probation, Parole and Pardon Services.

NOTICE OF APPEAL

DOCKET NO 20 -ALJ-15- 0045- AP

Notice is hereby given that Ricky Brown does hereby appeal the final decision of the South Carolina Department of Probation, Parole and Pardon Services dated Oct. 28, 2020 and received on November 9, 2020, a copy of which is attached. A **general** statement of the grounds for appeal is (See S.C. Code Ann. § 1-23-380(A)(6)):

It is the desire of the appellant, Ricky Brown 211789, to appeal the final decision of the SCDPPPS. The appellant appeared before the board on Oct. 28, 2020 and was denied. Appellant received his notice of ejection on November 9, 2020 and filed his petition for rehearing on Nov. 9, 2020. Appellant received the final judgement on Nov. 20, 2020. The appellant respectfully requests an application, rules for filing an appeal, and a case number

Ricky Brown 211789
Appellant's Name

Ricky Brown
Signed

BRCI 4460 Broad River Rd Grn 2081
Mailing Address

11/20/20
Dated

Columbia, SC 29210
City, State, Zip Code

CERTIFICATE OF SERVICE

I hereby certify that I, Ricky Brown (your name), on the 20 day of November, 2020 in Columbia (city), South Carolina, served a copy of the foregoing Notice of Appeal on all parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows:

Name of person/Agency served: South Carolina Dept. Probation, Parole, Pardons Service

Address: 293 Greystone Blvd. PO Box 207

City, State, Zip Code: Columbia, SC 29202

Ricky Brown
Print your name

Ricky Brown
Sign your name

(See reverse side for instructions)

Certificate of Service

I hereby certify that on this 23rd day of Nov. 2020 I Ricky Brown, did, by U.S. Postage, serve a copy of this notice of intent to appeal to the parties listed below.

Clerks Office
Administrative Law Court
Edgar A. Brown Bldg.
1205 Pendleton St. Suite 224
Columbia, SC 29201

SCDPPPS Legal Counsel
293 Greystone Blvd
PO Box 207
Columbia, SC 29202

Ricky Brown
11/20/20

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 20-ALJ-15-0045

APPEAL OF FINAL DECISION
Department of Probation, Parole, and Pardon Services

RICKY BROWN, #211789 .....APPELLANT

v.

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

RECORD ON APPEAL

Janell H. Gregory
Legal Counsel

South Carolina Department of Probation, Parole and Pardon Services
P. O. Box 207
Columbia, South Carolina 29202
(803) 734-9220

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 20-ALJ-15-0045

APPEAL OF FINAL DECISION
Department of Probation, Parole, and Pardon Services

RICKY BROWN, #211789 ..... APPELLANT

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal complies with Rule 61of the Rules of Procedure for the Administrative Law Court and contains all material proposed to be included in the Record on Appeal by all of the parties and not any other material.

Janell H. Gregory
Legal Counsel

South Carolina Department of
Probation, Parole and Pardon Services
P. O. Box 207
Columbia, South Carolina 29202
(803) 734-9220

February 5, 2021

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 20-ALJ-15-0045

APPEAL OF FINAL DECISION
Department of Probation, Parole, and Pardon Services

RICKY BROWN, #211789 .....APPELLANT

v.

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

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within *Record on Appeal*, dated February 5, 2021, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, the 5th day of February, 2021, addressed to:

Ricky Brown, #211789
Broad River Correctional Institution
4460 Broad River Road
Columbia, S.C. 29210

I further certify that all parties required by Rule 61 to be served have been served.

Dawn Nichols

Dawn Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 207
Columbia, South Carolina 29202

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State of South Carolina

Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor

JERRY B. ADGER
Director

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October 28, 2020

Mr. Ricky Brown #00211789
Broad River Correctional Institution
4460 Broad River Rd.
Columbia, SC 29210

RE: NOTICE OF REJECTION

Dear Mr. Brown:

It is my responsibility to inform you, on behalf of the South Carolina Parole Board, that the Board has reached a decision regarding your parole hearing. The Board hereby makes the following CONCLUSION OF LAW:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10 (F) (1) of the South Carolina Code of Laws. The Parole Board had determined that your parole must be denied.

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Vote Count: Unanimous To Reject

Sincerely,

Nettie C. Jacobs
Board Support Services

10/28/2020

RECEIVED
NOV 17 2020
Board Support Services

The State of South Carolina
Department of Probation, Parole, & Pardons

South Carolina DPPPS — Respondent
Ricky Brown — Appellant

Petition for Rehearing

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In this petition for rehearing, appellant recognizes and makes no claim against the DPPPS authority to grant or deny parole to the appellant. It is clear, that according to the guidelines set forth in 24-21-640, It is the duty of the SCDPPPS to factor the above findings of fact, and as also provided for in items 2, and 3, of form 1212. Criteria for parole consideration. However, because it is beyond the ability of the appellant or any governing body, state agency within or without SCDC to alter or amend the above findings in effect, makes them of no practical relevance.

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Due to the criteria established in form 1212, the appellant also prays this honorable board would see his accomplishments as those deserving a lessoning of the rigors of incarceration, and by his established disposition to reform himself, the interests of society will not be impaired by his release on parole, and his willingness to comply with the terms of parole is reflected in his record during incarceration. For these, and the forgoing reason, the appellant respectfully requests a rehearing for parole consideration.

Sincerely: Ricky Brown

11/9/20

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

HENRY McMASTER
Governor

JERRY B. ADGER
Director

293 GREYSTONE BOULEVARD
COLUMBIA, SOUTH CAROLINA 29210
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.dppps.sc.gov
MAILING ADDRESS: P.O. BOX 207
COLUMBIA, SOUTH CAROLINA 29202

November 17, 2020

Mr. Ricky Nathaniel Brown 00211789
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

Dear Mr. Brown:

Our office is in receipt of your letter requesting a rehearing dated November 9, 2020. The information provided as well as your file has been reviewed as requested.

Please be advised that there is no rehearing/appeal process for the routine denial of parole; therefore, no action will be taken on your request.

Sincerely,

Nettie C. Jacobs
Board Support Services

Inmate Name	SCDC#
BROWN, RICKY N.	00211789

SC Board of Probation, Parole and Pardon Services
P.O. Box 207
Columbia, SC 29202

Criteria for Parole Consideration

The South Carolina parole law creates no right to be released on parole. Parole in South Carolina is strictly a matter of privilege or grace. The South Carolina Board of Probation, Parole and Pardon Services has absolute discretion to grant or deny parole. As such, the publication of these parole criteria in no way creates a expectancy of release; nor does it bind the Parole Board in any way to favorable parole decision or establish any presumptions of entitlement to parole.

In deciding whether or not to grant parole, the Parole Board considers, among other things, the inmate's record before incarceration as well as during incarceration. The record itself is prepared through investigations conducted for the Parole Board, and it becomes a part of the inmate's parole file. The files are maintained by the Department of Probation, Parole and Pardon Services and are, by the statute, privileged and confidential. The confidentiality of the parole file is far reaching; inmates themselves have no right to inspect the contents of their files. If the inmate thinks his/her file is somehow incomplete or contains some errors or other inaccuracy, he/she must notify the Board of the specific error or inaccuracy. The Board will investigate the inquiry and notify the inmate of the action taken.

Inmates do, however, enjoy certain rights in the parole process. The inmate has the right to appear at his parole hearing. If the inmate fails to appear, the Board may decide his/her case in absence. The inmate has the right to be represented by an attorney; however, he/she has no right to have an attorney appointed if he/she cannot afford one. At the hearing, the inmate has the right to present witnesses and evidence on his/her own behalf, but an inmate does not have a right to confront witnesses.

In deciding whether or not an inmate should be granted parole, the Board or Panel of the Board exercises its absolute discretion to the limits allowed by state and federal law. The discretion of the Board or panel aims at protecting the best interest of both society and the inmate being considered for parole. In its concern for the protection of society's and the inmate's best interests, the Board or Panel deliberates upon the "reasonable probability" that an inmate will not again violate the law, if parole is granted. When deliberating that an inmate will not again violate the law, the Board or Panel weighs the factors listed below. The Board or Panel, in its absolute discretion, also considers any other factors not listed below which it considers relevant in a particular case.

1. The risk the inmate poses to the community;
2. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it;
3. The inmate's prior criminal records and his/her adjustment under any previous programs or supervision;
4. The inmate's attitude toward his/her family, the victim, and authority in general;
5. The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself;
6. The inmate's employment history, including his/her job training and skills and his/her stability in the work place;
7. The inmate's physical, mental and emotional health;
8. The inmate's understanding of the cause of his/her past criminal conduct;
9. The inmate's efforts to solve his/her problems such as seeking treatment for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of corrections has made available to inmates to help with their problems;
10. The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for gainful employment;
11. The willingness of the Community into which the inmate will be released to receive the inmate;
12. The willingness of the inmate's family to allow his/her to return to the family circle;
13. The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole;
14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate
15. The actuarial risk and needs assessment outlined in section 24-21-10 (F)(1) of the S.C. Code of laws; which evaluates based on Criminal Involvement, Relationships/Lifestyle, Personality/Attitudes, Family, Social Exclusion and Mental Health.
16. Other factors considered relevant in a particular case by the Board.

Reservation of Discretionary Power of the Parole Board

These criteria in no way limit the absolute discretion of the Parole Board or Panel to make parole decisions on a case-by case basis and to grant or deny parole as it determines to be in the best interest of society and the intimate under review.
In some cases, the Board may decide that the inmate should be granted parole if the inmate completes one or more stated conditions. When this is the case, the Board may grant a parole that becomes effective when the inmate completes one or more stated conditions. Should the inmate fail to complete any one of these conditions or disobey any rule or regulation of the South Carolina Department of Corrections before satisfying the stated conditions to make his parole effective, the Board may rescind the inmate's parole and treat the case as though parole had been rejected. In other cases, the Board may feel it needs more time to form its decision. In such cases, the Board may simply take the parole consideration under advisement and reschedule it at a later date. Similarly, the Board may postpone a parole hearing in order to dispose of detainers or pending charges. If the Board rejects an inmate for parole, the inmate will be given written notice of rejection stating the reasons for rejection. Decisions of the Board have no precedential effect whatever and in no way limit the Board's absolute discretion at later parole hearings.

After rejection for parole, the procedure of scheduling of rehearing is as follows:

1. An individual serving time for a violent offense defined in §16-1-60 of the South Carolina Code of Laws 1976 will be reheard for parole two years following the date of parole rejections. Applicable legal exceptions may allow for a one year hearing.
2. An individual serving time for a nonviolent offense defined in §16-1-70 of the South Carolina Code of Laws 1976 will be reheard for parole one year following the date of parole rejections.

I certify that the above material has been explained to me, and I have received a copy.

Inmate's Signature:	***No signature required due to COVID-19 Pandemic***	Date: 1/1/0001
Witness Signature:	[signature]	Date: 7/13/2020

Form 1212 (Stock) Revised 05-16-2017

Distribution: Parole Services and Inmate

STATE OF SOUTH CAROLINA

IN THE ADMINISTRATIVE LAW COURT

Docket Number 20-ALJ-15-0045

APPEAL OF FINAL DECISION

DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES

RICKY BROWN #211789, ... APPELLANT

v.

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

Brief of Appellant

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

ISSUES PRESENTED

I. THE SCDPPPS VIOLATED 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

This matter is before this court pursuant to a Notice of Appeal filed by Ricky Brown, SCDC #211789 ("Appellant") on November 20, 2020 in response to the October 28, 2020 final decision of the South Carolina Department of Probation, Parole, and Pardon Services ("Respondent") denying Appellant the privilege of parole. 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 First Degree Criminal Sexual Conduct (93-GS-16-2019), pursuant to orders of commitment from the Darlington County Clerk of Court. At the time of these offenses on 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

The court's jurisdiction to hear this matter is derived entirely from the decision of the South Carolina Supreme Court in Al-Shabazz V. State, 338 S.C. 354, 527 S.E.2d 742 (2000). The Court's appellate jurisdiction in inmate appeals is limited to state created liberty interests typically involving: (1) cases in which in inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status: and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. However, the South Carolina Supreme Court recognizes an Administrative Law Court's jurisdictional exception where the procedures employed by the parole board in denying an inmate parole deprived inmate of a state created liberty interest and triggered due process requirements. See Cooper v. South Carolina Dept. of Probation, Parole, and Pardon Services, 377 S.C. 489, 498-99, 661 S.E.2d 106, 111 (2008) ("Because the limited appeal of parole decisions is govern by the [Administrative Procedures Act (APA)], the parole board [(the Board)] and the [Administrative Law Court (ALC)] must comply with its provisions."); also S.C. Code Ann. § 1-23-350 (2005) (providing that under the APA, [i]f, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding."). This case involves an inmate claiming a due process violation in the procedures employed by the respondent in rendering its final decision. Therefore, the Court has jurisdiction over this appeal.

ARGUMENTS

I. THE SCDPPPS VIOLATED 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.

The Administrative Law Court ("ALC") may not substitute his judgement for that of an agency "as to the weight if the evidence on questions of fact." S.C. Code Ann §1-23-380 (A) (6) (Supp. 2003). Furthermore, an Administrative Law Judge may not reverse or modify an agency's 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. See Section 1-23-380 (A) (6); See also Marietta Garage, Inc. v. South Carolina Dept. of Public Safety, 337 S.C. 133, 522 S.E.2d 605 S.E.2nd 490 (Ct. App. 1998). "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." Lark v. BI-LO, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Accordingly, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995).

In an appeal to this Court from a final agency decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. Barton v. South Carolina Dept. of Probation, Parole, and Pardon Services, 404 S.C. 395, 400, 745 S.E.2d 110, 113 (2013); 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. § 1-23-380 (2005). 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) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Barton, 404 S.C. at 401, 745 S.E.2d at 113 (quoting S.C. Code Ann. § 1-23-380 (2005).

a) In Violation Of Constitutional Or Statutory Provisions

The ALC 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. § 1-23-380(5)(a) (Supp. 2016); see also Fullbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 278, 802 S.E.2d 794, 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. § 24-21-640 and its own Form 1212, "Criteria for Parole Consideration," and is therefore defective by established standards of the Administrative Procedures Act.

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 express right 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 witnesses and *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. During the Appellant's October 28, 2020 parole hearing, the Parole Board acknowledged receipt of Appellant's parole package containing Appellant's proposed findings of facts to be considered. In Cooper v South Carolina Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 499, 661 S.E.2d 106, 112 (2008), the Supreme Court in held that parole-eligible inmates "have a right to require the Board to adhere to statutory requirements in rendering a decision." 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.

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. § 1-23-380(5)(b) (Supp. 2016); 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 the Respondent's final decision was made in excess of the 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) ("[T]he 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. § 1-23-380(5)(c) (Supp. 2016); 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).

In Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct.App. 2006), the 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, the 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. Accordingly, Appellant contends the Respondent's final decision was made upon unlawful procedure.

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. § 1-23-380(5)(b) (Supp. 2016); 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 mandates 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 noticed, (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 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. 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. § 1-23-380(5)(e) (Supp. 2016); 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 An 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. § 1-23-380(5)(f) (Supp. 2016). A decision is "arbitrary" if it is "without a rational basis." Daufuskie 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 Board's 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 Appellant's record has continued to improve in the 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 have still received 2 votes to grant parole if there were no additional votes to grant parole. Had the Respondent maintained

adequate records, they 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 the proper factual findings required by law, the proper procedure for the ALC 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. 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.

Submitted by,

Ridley Brown

2/22/20

STATE OF SOUTH CAROLINA

IN THE ADMINISTRATIVE LAW COURT

Docket Number 20-ALJ-15-0045

APPEAL OF FINAL DECISION

DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES

RICKY BROWN #211789, ... APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND

PARDON SERVICES, ... RESPONDENT

Certificate of Service

I, Ricky Brown, hereby certify that on this 22nd day of February 2021, did by U.S. Postage, serve a copy of this Brief of Appeal to all parties listed below.

Ricky Brown 2/22/21

Judge Robinson

Administrative Law Court

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March 25, 2021

The Honorable Shirley Robinson
Judge, Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, S.C. 29201

RE: Ricky Brown, #211789 v. S.C. Department of Probation, Parole and Pardon Services

Dear Judge Robinson:

Please find enclosed for filing the *Brief* dated March 25, 2021, along with proof of service in the above referenced case.

Thank you.

Sincerely,

Janell H. Gregory
Legal Counsel

cc: Ricky Brown, #211789

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 20-ALJ-15-0045

APPEAL OF FINAL DECISION
Department of Probation, Parole, and Pardon Services

RICKY BROWN, #211789 ..... APPELLANT

v.

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

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within *Brief*, dated March 25, 2021, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, the 25th day of March, 2021, addressed to:

Ricky Brown, #211789
Broad River Correctional Institution
4460 Broad River Road
Columbia, S.C. 29210

I further certify that all parties required by Rule 54 to be served have been served.

Dawn Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 207
Columbia, South Carolina 29202

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 20-ALJ-15-0045

APPEAL OF FINAL DECISION
Department of Probation, Parole and Pardon Services

RICKY BROWN, #211789.....APPELLANT

v.

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

BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

Did the Board properly considered all of the mandatory criteria as set forth in Cooper thereby making Appellant's denial of parole routine?

STATEMENT OF THE CASE

On November 20, 1993, Victim, an elderly woman living on her own in Darlington County, was away from her residence when Appellant broke one of her windows and entered her home. Appellant stayed in Victim's residence waiting for her to return. When Victim came home, Appellant grabbed her from behind and beat her in the face and head with an instrument. During the assault, Appellant told Victim if she did not comply he would kill her. Appellant then raped and robbed Victim taking money, jewelry, and blank checks from her residence. After the incident, Victim contacted police and identified Appellant as her assailant stating she knew it was him by his voice. Victim reported Appellant had done some work for her in the past, and had been at her house earlier that day looking for work. During the investigation, DNA tests were performed on several items including Victim's pantyhose and underwear, and all DNA results matched Appellant's DNA. On November 21, 1993, Appellant was arrested and one of Victim's blank checks was found on his person along with a letter to Victim, which contained her name and phone number. Jewelry belonging to Victim was also recovered at Appellant's residence.

On May 4, 1994, Appellant pled guilty as indicted before the Honorable Paul M. Burch. Appellant was sentenced to two consecutive life sentences for his offenses. Appellant became eligible for parole in December 2001. Since that time, Appellant has had ten parole hearings with the most recent review taking place on October 28, 2020. Following Appellant's appearance, the Board unanimously rejected his request for parole citing the nature and seriousness of the offense, indication of violence in this or previous offense, and criminal record indicates poor community adjustment as the reasons for their rejection.

Upon being informed of his denial of parole, Appellant filed a notice of appeal before the Administrative Law Court (ALC). In his appeal, Appellant alleges the Board violated his

Fourteenth Amendment rights by failing to provide a ruling on each fact submitted by Appellant during his hearing. Appellant also argues the Board violated S.C. Code Ann. §1-23-380(5) and asks this Court to reverse the decision of the Board. This brief follows.

ARGUMENT

The Board properly considered the criteria set forth in Cooper in reaching their decision, thereby making this a routine denial of parole.[1]

Appellant argues the Board violated the Fourteenth Amendment of the South Carolina Constitution by failing to rule on each proposed finding of fact Appellant submitted during his parole hearing. Appellant further argues, the Board's failure to provide a ruling on each of the facts he presented violates S.C. Code Ann. §1-23-380. Respondent would submit the procedures followed by the Board in evaluating Appellant's request for parole, and the criteria considered by the Board, were proper and conformed with the South Carolina Supreme Court's holding in Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008). Further, the Board's order rejecting Appellant's request for parole complied with Cooper and met the statutory requirements, so Appellant's argument that his rights were prejudiced by the Board's failure to provide a ruling on each of the facts he raised during his parole hearing is meritless. As such, the Board's decision to deny Appellant parole should be affirmed.

Appellant's argument that this Court should reverse the decision of the Board stems from his claim that the Board's decision and order denying him parole violates §1-23-380(5) of the South Carolina Code of Laws. S.C. Code Ann. §1-23-380(5) states:

> The court may not substitute its judgment for the judgement of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because

[1] This argument will address all of the allegations Appellant set forth in his brief.

the administrative findings, inferences, conclusions, or decisions are:

(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) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(5) (2008).

Appellant specifically uses each of the violations enumerated in the subsections above to support his argument that he was prejudiced by the Board's decision. However, the Board's evaluation of Appellant's request for parole properly complied with statutory requirements and the criteria set forth by the South Carolina Supreme Court in Cooper.

In Cooper, the Board denied Cooper's parole based on the following three reasons: "1) the nature and seriousness of the current offense; 2) an indication of violence in this or previous offense; and 3) the use of a deadly weapon in this or a previous offense." Cooper, 377 S.C. at 499, 661 S.E.2d at 111. The Court found the Board, "failed to consider the requisite statutory criteria in rendering its decision" and "only considered the nature of Cooper's crime when it rejected his request based on three limited reasons." Id. at 500, 661 S.E.2d at 112. However, the Court went on to state:

> 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.

Here, on October 28, 2020, the Board issued a rejection letter enumerating the following factors it carefully considered in arriving at their unanimous decision to deny Appellant parole: 1) the characteristics of your current offense(s), prior offenses(s), prior supervision history, prison disciplinary record, and/or criminal record, as described in the findings of facts below; 2) the factors published in Department Form 1212 (Criteria for Parole Consideration); 3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws; and 4) actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1) of the South Carolina Code of Laws.

Appellant claims the Board violated §1-23-380(5)(a), (b), and (c) by failing to provide a ruling on each proposed finding of fact Appellant presented during his hearing in violation of S.C. Code Ann. §1-23-350. These claims are meritless because §1-23-350 applies to final decisions or orders from contested cases and Appellant's parole hearing is not a contested case. The Board is under no obligation to draft their order rejecting Appellant's parole in compliance §1-23-350. Rather, as the Court stated in Cooper, the Board's order denying parole must clearly state the Board considered all of the statutory criteria set forth in §24-21-640 and the fifteen factors on the parole form. Cooper, 377 S.C. at 499, 661 S.E.2d at 111 Here, the Board's order rejecting Appellant's parole conforms with the Court's holding in Cooper and does not violate any constitutional or statutory provisions, does not exceed its authority, and it was not made upon unlawful procedure.

Appellant also argues the Board violated §1-23-380(5)(d) and (e) for failing to provide this Court a proper record on appeal as required by Rule 58, SCRALC. Rule 58 states:

> Where applicable, the record of the contested case shall consist of:
> A. All documents filed;
> B. All evidence received or considered, including copies of all relevant sentencing sheets in sentence calculation matter, and copies of specific policies relied upon by the agency;
> C. A statement of matters judicially noticed;
> D. All proffers of proof of excluded evidence;

E. The final order or decision which is subject to administrative review;
F. Any transcript taken of the testimony during the proceeding.

Rule 58, SCALC (2014).

Here, the record on appeal properly includes the Board's notice of rejection, Appellant's petition for rehearing, the Board's letter informing Appellant no action would be taken on his petition, and Form 1212. Although Appellant feels "factual evidence" is missing from the record before this court, importantly, Rule 58 starts by stating the list of items detailed in the rule are only required "where applicable," and the current record on appeal contains all of the material documents this Court needs to conduct a review of the decision of the Board. Respectfully, this Court has limited power of review, and the documents provided in the current record on appeal are the material documents this Court needs to ensure the proper procedure was followed and the mandatory criteria was considered by the Board prior to making their final decision to deny Appellant parole. Once it has been shown that the Board has considered all of the mandatory criteria, and have given reasons as to why parole was denied, this Court does not need to consider any other documentation or evidence. Appellant's claim that the record before this Court fails to include evidence supporting the Board's decision and is therefore a violation of §1-23-380(d) is meritless as the record includes the material documents required for a proper review of the Board's decision.

Appellant further claims the Board violated §1-23-380(5)(e) for failing to maintain adequate records of Appellant's past parole considerations, which Appellant contends is also in violation of §24-21-40. Section 24-21-40 simply states, "The Board shall keep a complete record of all its proceedings and hold it subject to the order of the Governor or the General Assembly." S.C. Code Ann. §24-21-40 (1976). Appellant wholly fails to provide this Court with any evidence

to substantiate his conclusion that the Board has failed to keep accurate records from his nine prior parole hearings. Further, the prior parole hearing files are immaterial to Appellant's current denial of parole.

Finally, Appellant argues the Board's decision violated §1-23-380(5)(f) because the Board's decision was arbitrary because it was without a rational basis. Appellant claims the Board's decision was arbitrary because when his parole was denied in October 2018 the Board's vote was split down the middle – three votes for parole, and three votes denying parole – and, his current denial of parole was based on a unanimous vote from the Board to deny parole. Appellant points out there has only been one Board member replaced during the two year span and his record has not changed. Appellant contends the Board's inconsistent vote is proof, not only of an arbitrary decision, but that the Board fails to maintain proper records. However, the Board's process as set forth in S.C. Code Ann. §24-21-640 does not require or allow for the Board to compare an inmate's prior parole hearing(s) to their current parole hearing. The goal of a parole hearing is not to assess what was done during prior parole hearings; rather, the Board evaluates the inmate's request for parole based on the statutorily mandated criteria using the process in compliance with the Court's holding in Cooper. Here, it is evident from Appellant's letter of rejection that the Board properly considered all of the mandatory criteria set forth in Cooper prior to denying Appellant's request for parole.

As the Board properly considered all of the mandatory criteria in reaching their decision, respectfully, this Court may not overturn that decision for any reason. Although Appellant feels the Board's decision was improper, parole is a privilege, not a right and the Board has the sole authority to grant or deny parole. Cooper, 377 S.C. at 496 -499, 661 S.E.2d at 110-111. As the Court in Cooper emphasized, this Court can only review Appellant's case to determine if the Board

followed proper procedure. Id. Since Appellant has failed establish the Board did not follow the proper procedure in denying his parole, this Court should affirm the Board's decision to deny Appellant parole.

CONCLUSION

Appellant has failed to show a valid reason this Court should grant him a new parole hearing. Appellant's claim that the Board's decision violates §1-23-350 and §1-23-380(5) is meritless. It is clear from the Board's notice of rejection that the Board's decision properly complied with the South Carolina Supreme Court's holding in Cooper, thereby creating a routine denial of parole. Therefore, based on the foregoing reasons, this Court should affirm the final decision of the Board.

Respectfully submitted,

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Columbia, South Carolina
March 25, 2021

STATE OF SOUTH CAROLINA

IN THE ADMINISTRATIVE LAW COURT

Docket Number 20-ALJ-15-0045

APPEAL OF FINAL DECISION

DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES

RICKY BROWN # 211789, ... APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE, AND

PARDON SERVICES, ... RESPONDENT

APPELLANT'S REPLY BRIEF

Ricky Brown #211789

Broad River Correctional Inst.

4460 Broad River Rd.

Columbia, S.C. 29210

ISSUES PRESENTED

I. THE SCDPPPS VIOLATED THE FOURTEENTH AMENDMENT OF THE 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.

This appeal arose by the assignment of Administrative Law Court Judge Shirley Robinson on December 17, 2020. Appellant, having received and reviewed Respondent's *Brief of Respondent* (hereinafter "BOR") on March 31, 2021, now submits a timely Reply Brief pursuant to Administrative Law Court, Rule 60 ("A reply brief may be filed within one hundred twenty (120) days after the date of assignment"). Incorporated by reference herein are the facts presented in the *Statement of the Case*, as articulated in the Brief of Appellant.

a. Respondent's Statement of the Case is in Error

Respondent, in its statement of the case, claims Appellant was sentenced to two life sentences (BOR, p. 1). This claim is factually incorrect. Appellant was sentenced to one life sentence for Burglary, and 12 years for Criminal Sexual Conduct. Appellant's sentence was later adjusted to a 10 year to Life term of imprisonment, which granted Appellant parole review after service of 10 years. On its face, this may appear to be a mere clerical error. However, Appellant argues this error is evidence of the Respondent's failure to maintain reliable records, pursuant to their own mandatory requirement in S.C. Code Ann. §24-21-40. It is no great leap to speculate this was part of the Attorney General's reasoning in his opinion affirming 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. Appellant contends the Parole Board has absolutely no capability of conducting a fair and complete review of Appellant if its records are in error.

Although Respondent claims no evidence was provided by Appellant to substantiate the conclusion that the Board failed to keep accurate records of prior parole hearings, its own brief contradicts this very fact.

b. Respondent Not Required to Comply With §1-23-350

Respondent claimed it met the statutory requirements articulated in Cooper v. South Carolina Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008), and did not have to provide a ruling on each of the facts Appellant raised during the parole hearing (BOR, p. 2). However, South Carolina Code §1-23-350 (2005) provides, in relevant part, that "[i]f... a party submitted proposed findings of fact, [an agency] decision shall include a ruling upon each proposed finding." The proposed findings of fact submitted by the Appellant were presented *prior* to the parole hearing, and took the form of a parole package that included specific evidence of Appellant's compliance with the criteria identified in § 24-21-640, as well as the Respondent's Form 1212. The legislature's use of the term "shall" in §1-23-350 (2005) mandates that the Respondent is required to comply with the statute by including a ruling upon each proposed finding of fact in its final decision. Frame v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct.App.2004). The findings of the Respondent are presumed correct and will be set aside only if unsupported by substantial evidence. Kearse v. State Health & Human Servs. Fin Comm'n, 318 S.C. 198,200,456 S.E.2d 892, 893 (1995). Without a ruling by Respondent upon each proposed finding of fact, and without the ALC's finding that Respondent must comply with §1-23-350 (2005) as urged by Appellant, the final decision itself would constitute a rubber stamp of an agency decision that is void of substantial evidence.

c. Respondent Under No Obligation to Comply With APA

Respondent argued the South Carolina Supreme Court in Cooper, supra, held that Respondent "is under no obligation to draft their order rejecting Appellant's parole in compliance [with] §1-23-350" (BOR, p. 4). However, Appellant would remind this Court that Cooper actually held that, "Because the limited appeal of parole decisions is governed by the APA, the Parole Board and the ALC *must comply* with its provisions." Cooper, 377 S.C. at 500. This includes the "proposed findings of facts" provision argued by Appellant. Therefore, the Respondent's application of Cooper is without merit.

d. Appellant's Appeal Not a Contested Case

Respondent argues "Appellant's parole hearing is not a contested case" (BOR, p. 4), and that "the current record on appeal contains all the material documents this Court needs to conduct a review of the decision of the Board" (BOR, p. 5). Respondent's defense is without merit. Appellant concedes the fact that the parole hearing itself is not a contested case, but the appeal of the Respondent's final decision becomes a contested case. Appellant is contesting the *final decision* of the board, not the hearing itself. Appellant would point out that a "contested case" means "a proceeding...in which the legal rights, duties, or *privileges* of a party are required by law to be determined by an agency after an opportunity for hearing" (emphasis added). See S.C. Code Ann. § 1-23-310(3) (Supp.1999); also Al-Shabazz v. State, 338 S.C. 354, 375, 527 S.E.2d 742, 753 (2000). Respondent afforded Appellant a hearing to determine his suitability for the privilege of parole, but then failed to comply with the procedural mandates of § 1-23-350 when rendering its final decision. To suggest Appellant has no right to contest the Respondent's failure to comply with the provisions of the APA when rendering its final decisions is to suggest it is above the law. And, because Respondent has failed to comply with 1-23-350, the record on

appeal does not contain all the material documents this Court needs to conduct a full review of the decision of the Respondent.

e. Prior Parole Hearing is Immaterial to Appellant's Current Denial of Parole

Respondent argues "prior parole hearing files are immaterial to Appellant's current denial of parole" (BOR, p. 6). Respondent states its process is set forth according to S.C. Code Ann. §24-21-640 and it "does not require or allow for the Board to compare an inmate's prior hearing(s) to their current parole hearing." However, in the very first sentence of S.C. Code Ann. § 24-21-640, as well as the Parole Board's own Criteria for Parole Consideration form 1212, it is clearly stated, "In deciding whether or not to grant parole, the board considers, among other things, the inmate's record *prior* to incarceration as well as during incarceration" (emphasis added). Appellants' prior record is fixed and known; it will never change. Therefore, it is now only for the Parole Board to consider an inmate's record during incarceration, which reasonably includes any prior parole hearing decisions. Respondent is not justified by claiming Appellant's prior parole hearing files are immaterial to Appellant's current parole decision. This file, which is required to be complete and accurate, will give the Respondent a fair point of reference to compare any improvement or decline in an inmate's disciplinary behavior, education, and any other such information that would be useful to making an informed decision. While Respondent claims "the goal of a hearing is not to assess what was done during a parole hearing," Appellant maintains that the record created during a hearing is extremely important to any future parole hearing, if needed. Here, it is evident that the Respondent did not present a good faith showing that it faithfully considered the criteria set forth in its own consideration, or that it complied with all of the statutory provisions of the APA.

CONCLUSION

When an administrative agency acts without first making the proper factual findings required by law, the proper procedure for the ALC 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, Respondents 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. 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.

Submitted by,

Ricky N. Bowers

4/7/21

STATE OF SOUTH CAROLINA

IN THE ADMINISTRATIVE LAW COURT

Docket Number 20-ALJ-15-0045

APPEAL OF FINAL DECISION

DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES

RICKY BROWN # 211789, ... APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE, AND

PARDON SERVICES, ... RESPONDENT

CERTIFICATE OF SERVICE

I, Ricky Brown, hereby certify that of this ____ day of _____ 2021, I did by U.S. Postage, serve a copy of this Appellant's Reply Brief to all parties listed below.

Ricky D. Brown

4/9/21

Judge Robinson

Administrative Law Court

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Ricky Brown, 211789,	)	Docket No.: 20-ALJ-15-0045-AP
	)	
Appellant,	)	
	)	
vs.	)	
	)	**ORDER**
South Carolina Department of Probation, Parole and Pardon Services.	)	
	)	
Respondent.	)	

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to an appeal filed by Ricky Brown (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. On October 28, 2020, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Appellant that the South Carolina Parole Board (Board) denied him parole. Appellant subsequently appealed the denial on November 9, 2020. On November 17, 2020, the Department's Board Support Services notified Appellant that no further action would be taken because there is no appeal process for the routine denial of parole. Appellant received the letter on November 20, 2020. On December 8, 2020, Appellant filed a Notice of Appeal with the ALC seeking judicial review of the Board's denial of parole. Upon careful consideration of the record on appeal and briefs of the parties, the Department's decision is affirmed.

STANDARD OF REVIEW

The court's jurisdiction to hear this matter is derived from the South Carolina Supreme Court decisions in *Al-Shabazz v. State* and *Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs. See Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) (establishing an administrative review process for inmate appeals); *See also Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs.* 352 S.C. 594, 576 S.E.2d 146 (2003) (incorporating final decisions of the Department into that review process). When reviewing a decision of the Department, the ALC sits in an appellate capacity. *See Al-Shabazz*, 338 S.C. at 377, 527 S.E.2d at 754; *see also Furtick*, 352 S.C. at 599, 576 S.E.2d at 149. Under the appellate standard of the Administrative Procedures Act, the court's review is limited to the record. S.C. Code Ann. § 1-23-380(4). The court may modify or reverse

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SC ADMIN. LAW COURT

the decision of the agency when substantial rights of Appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5). Substantial rights of Appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.*

DISCUSSION

In *Al-Shabazz v. State*, the South Carolina Supreme Court held inmates have a right to administrative review in the following instances: "(1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status." *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000). The second factor includes the permanent denial of parole eligibility pursuant to section 24-21-640 of the South Carolina Code. *See Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003) ("[T]the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process."). However, the statute creates no such liberty interest in the routine denial or granting of parole. *Id.* at 598 n.4, 576 S.E.2d at 149 n.4. Therefore, while the permanent denial of parole eligibility constitutes a liberty interest that is reviewable by this Court, the routine denial of parole is, generally, not a sufficient liberty interest to warrant review.

Nonetheless, a routine denial of parole can bestow jurisdiction on this Court if, in denying parole, the Department fails to follow the statutorily required parole criteria, and this failure renders its decision tantamount to a permanent denial of parole eligibility. *See Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 502, 661 S.E.2d 106, 113 (2008) ("If a Parole Board fails to consider and apply the statutorily-created parole criteria, it has the effect of rendering an inmate parole ineligible, which under *Furtick* warrants review by the ALC."). The "criteria" referenced in *Cooper* are "the factors outlined in section 24-21-640 and the fifteen factors published in [the Department's] parole form." 377 S.C. at 500, 661 S.E.2d at 112. Since the *Cooper* decision, the General Assembly added an additional requirement that the Department develop a plan that includes the adoption of a validated actuarial risk and needs assessment tool which the Board must use when making parole decisions.

Appellant contends the Board arbitrarily rendered its final decision without ruling on each proposed finding of fact submitted at the parole hearing in violation of the Fourteenth Amendment of the South Carolina Constitution and S.C. Code Ann. § 1-23-350.[1] Thus, Appellant contends his substantial rights have been prejudiced because the Board's decision violates constitutional or statutory provisions, exceeds its authority, and was not made upon lawful procedure. *See* S.C. Code Ann. § 1-23-380(5) (a-c).

However, in *Cooper* our Supreme Court held that it is only necessary that the Board "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 . . . 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." *See Cooper*, 377 S.C. at 500, 661 S.E.2d at 112. Subsequently, in *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, the Court clarified *Cooper* and reiterated that if the "Board clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in Form 1212, and that if the Parole Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC will have limited authority to review the decision." 385 S.C. 476, 478, 685 S.E.2d 175, 176 (2009) (reversing and remanding an ALC decision that found the Board failed to include any findings of fact and conclusions of law, even though the Board indicated it complied with its own factors and statutory requirements).

In this instance, the Board's decision states that it considered: (1) the factors published in Department Form 1212 (Criteria for Parole Consideration); (2) factors outlined in Section 24-21-640 of the South Carolina Code of Laws; and (3) the actuarial risk and needs assessment factors required by Section 24-21-10(F)(1) of the South Carolina Code of Laws. The decision further states that the Board carefully considered "the characteristics of (Appellant's) current offense(s), prior offense(s) ... and/or prior criminal record..." Because the Board's decision is consistent with the requirements stated in *Cooper* and reiterated in *Compton*, I find the decision constitutes a routine denial of parole and this Court has limited authority to review the decision. *See Cooper*, 377 S.C. at 500, 661 S.E.2d at 112; *See also Compton*, 385 S.C. at 478, 685 S.E.2d at 176.

Additionally, Appellant contends the Board's decision is affected by other errors of law in violation of his substantial rights because it failed to provide this Court with a proper record on

[1] This only applies to final decisions or orders in contested cases.

appeal as required by SCALC Rule 58. *See* S.C. Code Ann. § 1-23-380(5) (d). Specifically, Appellant contends the record fails to include any factual evidence to support its parole denial. However, as Appellant acknowledged, the record includes the Board's notice of rejection, Appellant's petition for rehearing, the Board's letter informing Appellant no action would be taken on his petition, and Form 1212, which is all the relevant procedural criterion the agency is mandated to follow while making its final decision. In this instance, this Court has limited authority to review the decision.

Next, Appellant contends that the Board's decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record because the Board failed to maintain adequate records of his prior consideration of parole pursuant to S.C. Code Ann. § 24-21-40. *See* S.C. Code Ann. § 1-23-380(5) (e). In this instance, Appellant has presented no evidence that the Board failed to maintain adequate records of his prior considerations for parole. Also, Appellant's prior denials of parole are irrelevant to his denial presently before this court.

Lastly, Appellant contends the Board's decision is arbitrary because his October 2018 parole hearing resulted in a 3 to 3 vote and this parole hearing resulted in a unanimous vote to reject even though only one board member has been replaced since October 2018. *See* S.C. Code Ann. § 1-23-380(5) (f). Appellant explains that between October 2018 and October 2020 he did not receive any violations or infractions that would negatively affect his prison record and because only one board member was replaced, he should have received at least 2 votes to grant parole. However, the substantive decision of whether Appellant should be granted parole does not fall to this Court, but rather is the province of the Parole Board. *See James v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 376 S.C. 392, 395-396, 656 S.E.2d 399, 401-402 (Ct. App. 2008) (explaining the ALC only reviews inmate cases implicating a liberty interest; and because parole is a privilege, not a right, the grant or denial of parole does not implicate a liberty interest).

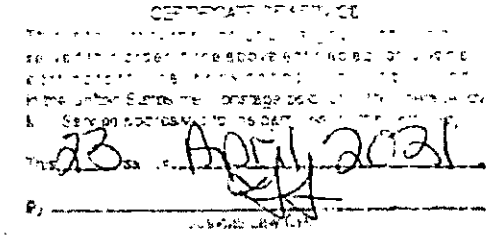
ORDER

Based upon the foregoing, IT IS HERRBY ORDERED that the Board's decision is **AFFIRMED.**

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

April 23rd, 2021
Columbia, South Carolina



THE STATE OF SOUTH CAROLINA

COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Administrative Law Court

Administrative Law Judge Shirley C. Robinson

Docket No.: 20-ALJ-15-0045-AP

Ricky Brown #211789 — Appellant

v.

South Carolina Administrative Law Court — Respondent

NOTICE OF APPEAL

Ricky Brown #211789, an inmate in the South Carolina Department of Corrections, appeals the April 23rd, 2021 order of Administrative Law Judge Shirley C. Robinson. Affirming the South Carolina Department of Probation, Parole and Pardon Services decision of October 28th, 2020 denying the Appellant parole. The Appellant received notice of Judge Robinson's order on April 29th, 2021.

S/ Ricky N. Brown

5/17/21

CERTIFICATE OF SERVICE

I, Ricky Brown, do hereby certify that on this 17th, day of May 2021, I did by U.S. postage, serve a copy of this notice of Intent to appeal to the parties listed below.

S/ Ricky D. Brown
5/17/21

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

Supreme Court of South Carolina
Daniel Shearhouse, Clerk of Court
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Judge Shirley C. Robinson
Administrative law Court
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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,

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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.

CERTIFICATE OF SERVICE

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

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CERTIFICATE OF COUNSEL

I, Ricky Brown #211789, certify that this *Record on Appeal* contains all the material proposed to be included, and contains nothing irrelevant.

October 4, 2021

s/ Ricky Brown
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