

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Joseph Kelsey, #217218,)
)
 Appellant,)
)
 v.)
)
 South Carolina Department of Probation,)
 Parole and Pardon Services,)
)
 Respondent.)
 _____)

Docket No. 22-ALJ-15-0004-AP

ORDER RECEIVED
JUL 12 2022
SC Court of Appeals

This matter is before the South Carolina Administrative Law Court (Court or ALC) pursuant to a Motion to Dismiss (Motion) filed the South Carolina Department of Probation, Parole and Pardon Services (Department). The Department moves to dismiss the appeal of by Joseph Kelsey (Appellant), an inmate incarcerated with the South Carolina Department of Corrections, because Appellant failed to timely file his brief and the Court does not have jurisdiction over this appeal. Appellant filed a Response to the Motion (Response) in which he asks the Court to issue a final order clarifying that the Court’s previous order denying Appellant’s motion to supplement the Record on Appeal, dated June 3, 2022, dismissed his appeal for lack of jurisdiction. In the June 3 Order, the Court also denied Appellant’s request to suspend the time to file his initial brief. Based on Appellant’s interpretation of the Court’s June 3, 2022 Order, Appellant argues that “[b]y denying both of these motions, the Court established that [Appellant] would be able to neither file a timely opening brief nor prove any of his claims with citations to a supplemented record. Thus, this Court has already denied [Appellant’s] appeal by its June 3 order.”

PROCEDURAL BACKGROUND

The case was assigned on March 2, 2022. On April 13, 2022, the Department filed the Record on Appeal. On May 16, 2022, Appellant filed a Motion to Supplement the Record on Appeal pursuant to Rule 212(b) of the South Carolina Appellate Court Rules (SCACR) and Rule 68 of the Rules of Procedure for the Administrative Law Court (SCALC Rules). On June 3, 2022, the Court issued an Order denying Appellant’s Motion to Supplement the Record. The Court denied Appellant’s motion because Appellant sought to supplement documents (1) outside the scope of the documents required to be included in the Record pursuant to SCALC Rule 61 and (2)



irrelevant to the Court's very narrow jurisdiction to review a routine denial of parole under *Cooper*. *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."); *see also Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009) (clarifying that if "the Parole Board clearly [states] in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212," its decision is sufficient under *Cooper*). In his Motion to Supplement the Record, Appellant had also requested that this Court suspend the deadline for filing his initial brief, which this Court also denied since the Court did not find the Record should be supplemented.

On May 31, 2022, the day Appellant's brief was due and just prior to issuance of this Court's order addressing his first motion, Appellant filed a Motion to Compel Respondent to Complete the Record on Appeal. Unlike his previous motion, Appellant did not request a suspension of briefing. On June 22, 2022, this Court issued an Order denying Appellant's Motion to Compel for many of the same reasons it denied Appellant's Motion to Supplement the Record on Appeal.

DISCUSSION

The Department now moves this Court to dismiss this case because (1) Appellant has not timely filed his brief pursuant to SCALC Rule 60(A) and (2) this Court does not have jurisdiction to hear this appeal. In his Response, Appellant merely argues that this Court has already dismissed his appeal and, because it has dismissed it and denied his motions to supplement the Record, the Court established that Appellant could neither timely file a brief nor prove his claims. The Court will address Appellant's Response first.

Initially, the Court clarifies that it did **not** dismiss Appellant's appeal for lack of jurisdiction in its June 3, 2022 Order. Indeed, the Court was careful in its Order to only deny Appellant's motions and not to dismiss the appeal on jurisdictional grounds because neither party squarely raised jurisdiction as an issue at that time. Nevertheless, the Court's analysis of Appellant's Motion to Supplement the Record, and his subsequent Motion to Compel, necessitated a contextual consideration of this Court's jurisdiction to evaluate the relevancy of the documents that Appellant sought to have supplemented and/or compelled to be included in the Record. As the Court noted in its June 3rd Order, because Appellant had not yet filed his brief, the Court resorted to evaluating

the motion and the relevancy of the documents he sought to include in the Record based upon the issues he raised in his Notice of Appeal. Based upon the issues raised in his Notice of Appeal, it did not appear that Appellant was going to raise an issue that fell within this Court's very narrow jurisdiction in routine denials of parole like this one, but the Court only applied this analysis to the motion before it, which concerned supplementing the record. The Court expected that its discussion of jurisdiction in the June 3rd Order would be followed by a thorough discussion of the issue of this Court's jurisdiction in the parties' briefs.

Unsurprisingly, the Department filed this Motion to Dismiss, alleging, in part, that this Court lacks jurisdiction. However, despite having an opportunity to address the jurisdictional argument in response to the Department's Motion, Appellant has chosen to forgo an argument on the merits and instead rely on its interpretation that the Court's June 3rd Order dismissed his appeal for lack of jurisdiction. That decision was injudicious because the Court has not resolved the jurisdictional issue and would have preferred to decide such a determinative issue after hearing both parties' arguments on the merits. But here, Appellant has not only chosen not to respond to the Department's Motion on the merits, Appellant has also not timely filed a brief. Although Appellant filed a Notice of Appeal, the Notice of Appeal is intended to give the Court "a brief factual basis for each expressly and specifically asserted constitutional violation"; in contrast, Appellant's brief is intended to give the Court an official statement of the issues on appeal accompanied by argument, discussion, and citations to authority for each issue. SCALC Rule 59(B); SCALC Rule 60(B). In other words, while the Notice of Appeal provides some guidance to the Court, the Court prefers to decide issues after receipt of the parties' briefs to allow for a full presentation and discussion of the issues raised.

Appellant complains that because this Court denied his motion to suspend his briefing deadline in its June 3rd Order, which was issued after the deadline for his brief already passed, he was unable to timely file a brief. Indeed, Appellant's brief was due on May 31, 2022, a few days before the Court issued its order. However, SCALC Rule 63 expressly states that "the filing of a motion does not toll any time limits imposed by these Rules"¹; therefore, the filing of Appellant's motions did not automatically toll the time to file Appellant's brief and Appellant remained

¹ The only exception to this rule is the filing of a motion to dismiss. In that case, "[i]f the agency files a motion to dismiss the appeal prior to filing the record, such a motion shall stay the time for the agency to prepare the transcript and file the record pending resolution of the motion. The time for filing briefs shall likewise be stayed by the filing of a motion to dismiss." SCALC Rule 59; *see also* SCALC Rule 63.

responsible for timely filing his brief regardless of the outcome of his motions.² Interestingly, instead of timely filing his brief on May 31, 2022, Appellant filed a Motion to Compel Respondent to Complete the Record.³

Turning to the Court's jurisdiction, as stated in both its June 3rd Order and its subsequent Order issued on June 22nd, it does not appear that Appellant intended to raise an issue that falls within this Court's narrow jurisdiction under *Cooper* as clarified by *Compton*.⁴ *Cooper*, 377 S.C. at 502, 661 S.E.2d at 113 ("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."); *Compton*, 385 S.C. at 479, 685 S.E.2d at 177 (clarifying that if "the Parole Board clearly [states] in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212," its decision is sufficient under *Cooper*).⁵ However, the Court's assessment of its jurisdiction was based upon the issues raised in Appellants' Notice of Appeal, which were not as fleshed out as they would have been in a brief. Accordingly, a response to the Department's Motion that squarely addressed the jurisdictional issue, or the submission of

² Indeed, Appellant should have been prepared in case the Court denied his motion, as it did in this case. As explained above, once the Court determined Appellant's Motion to Supplement the Record should be denied, it logically followed that the time to file the briefs did not need to be extended because the Record did not need to be supplemented. Therefore, Appellant's Motion to Suspend Briefing was also denied. See SCALC Rule 60(A) (providing motions to extend the time for filing brief "will only be granted in exceptional circumstances"). Notably, Appellant could have timely filed his brief and then moved to file an amended brief had the Court granted his Motion to Supplement. See SCALC Rule 60(D); SCALC Rule 63.

³ Remarkably, Appellant also never requested to belatedly file a brief.

⁴ The South Carolina Supreme Court has recognized that review of the Department's routine denial of parole can rise to a reviewable liberty interest 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*, 377 S.C. 489, 502, 661 S.E.2d 106, 113 ("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."); see also *Furtick v. S.C. Dep't of Probation, Parole & Pardon Services*, 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003) (holding "the permanent denial of parole eligibility implicates a liberty interest sufficient to require at least minimal due process" (emphasis added)). Based upon this Court's review of Appellant's Notice of Appeal, it does not appear that Appellant alleges the Parole Board failed to consider the requisite criteria; rather he contends that the Board considered the requisite criteria but then issued a decision based on the criteria that was arbitrary and capricious for numerous reasons—the Court cannot reach these issues at this time unless its jurisdiction is expanded.

⁵ Following the South Carolina Supreme Court's decision in *Cooper*, the General Assembly amended section 1-23-600(D) of the South Carolina Code to provide that "[a]n administrative law judge shall not hear an appeal . . . involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." 2008 S.C. Acts No. 334, § 7 (effective June 16, 2008) (emphasis added).

Appellant's brief, would have assisted the Court in a full and fair evaluation of the issue.⁶ Nevertheless, Appellant chose to do neither.

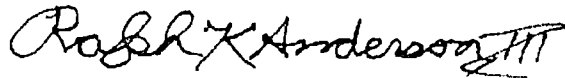
Pursuant to SCALC Rule 62, this Court may dismiss an appeal "for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section (V)." While the Court disfavors dismissing cases based upon a party's failure to meet a procedural deadline; in this case, Appellant's failure to file a brief has materially impacted this Court's ability to address the merits of the case, including the jurisdictional issue.

Therefore, because Appellant failed to timely file a brief under SCALC Rule 60(A), I find his appeal should be dismissed pursuant to SCALC Rule 62.

ORDER

IT IS THEREFORE ORDERED that the Department's Motion to Dismiss is **GRANTED**, and this appeal is therefore **DISMISSED WITH PREJUDICE**.

AND IT IS SO ORDERED.



Ralph K. Anderson, III
Chief Administrative Law Judge

July 8, 2022
Columbia, South Carolina

⁶ While the Court determined none of the issues raised by Appellant in his Notice of Appeal appeared to fall within this Court's narrow jurisdiction under *Cooper*, the Court was prepared to consider Appellant's arguments to the contrary. For example, one of the issues Appellant raised in his Notice of Appeal is the Department's failure to provide a "a concise and explicit statement of the underlying facts supporting the [Board's] findings' and not timely providing written notice of the reasons for denying parole, *Cooper*, 377 S.C. 489, 661 S.E.2d 106." This would appear to raise an issue under *Cooper*; however, the Record in this case, which was sufficient without supplementation to address this issue, includes the Board's denial letter that lists the "findings of fact" supporting its decision to deny parole, which is consistent with innumerable other routine denials of parole appealed to this Court that historically have been determined sufficient under *Cooper*. See also *Compton*, 385 S.C. at 479, 685 S.E.2d at 177 (clarifying that if "the Parole Board clearly [states] in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212," its decision is sufficient under *Cooper*). Nevertheless, in his brief, or in response to the Motion, Appellant could have expanded upon his argument about why the Department's routine way of handling its findings of fact should invoke this Court's jurisdiction under *Cooper*, and this Court could have entertained the argument.

CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Stephanie Perez
Judicial Law Clerk

July 8, 2022
Columbia, South Carolina