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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah B. Durden, Administrative Law Judge

Case No. 21-ALJ-15-0023-AP

Appellate Case No. 2022-001585

Matthew Williams, #215077, Appellant,

v.

South Carolina Department of
Probation, Parole and Pardon Services Respondent.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The South Carolina General Assembly created the Parole Board "to operate within certain parameters"—not "to render decisions without any means of accountability." *Cooper v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008). So fundamental is administrative accountability that the South Carolina Constitution itself demands it: "No person shall . . . be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in *all* such instances the right to judicial review." S.C. Const. art. I, § 22 (emphasis added).

Respondent's Brief contests these settled principles—insisting that "[t]he Board's decision-making may not be appealed." (Resp.'s Br. p. 8.) Yet, Respondent offers no rationale (much less *authority*) for subverting the South Carolina Supreme Court's opposite conclusion: When a prisoner "is not appealing the denial of parole, but rather, is challenging the method and procedure employed by the Parole Board in reaching its decision, [the prisoner]'s claim raises a sufficient liberty interest to trigger due process requirements of judicial review." *See Cooper*, 377 S.C. at 502, 661 S.E.2d at 113.

Respondent's Brief fails to rebut Appellant's demonstration that this Court should reverse the ALJ's errant affirmation of the Board's decision denying him parole. First, Respondent improperly seeks to challenge conclusions of the ALJ which it did not appeal and cannot now contest. Next, Respondent does not rebut *Cooper*'s conclusion that the ALJ must review parole denials to determine the Board's compliance with statutory decision-making requirements. Finally, Respondent fails to rebut Appellant's right to review under Article I, Section 22 of the South Carolina Constitution.

REPLY

I. Respondent's Argument Improperly Seeks to Challenge Conclusions of the ALJ Which It Did Not Appeal and Cannot Contest Now.

Respondent's repeated objections to the ALJ's conclusions are forceless and improper. Respondent is not an appellant or cross-appellant; Appellant alone brings this appeal. Respondent never objected to the ALJ's rulings, never preserved any objections, and never appealed any portions of the ALJ's decision. Yet, for the first time, Respondent repeatedly challenges the ALJ's conduct in its Brief.

For example, Respondent claims that the ALJ "ma[de] serval findings that are not supported in the record that are immaterial to the ultimate decision and contrary to well-established jurisprudence." (Resp.'s Br. pp. 2–3.) Having foregone appeal of those findings, Respondent cannot now challenge them. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (S.C. 1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *cf. Turner v. MUSC*, 430 S.C. 569, 588 n.7, 846 S.E.2d 1, 11 n.7 (Ct. App. 2020) (implying that litigants "cannot bootstrap an issue for appeal by way of" their counterparties' conduct).

Similarly, Respondent laments the ALJ's conclusion that Respondent "conceded that no consideration took place at all" of Appellant's record—a finding which Respondent now "vehemently does *not* concede." (Resp.'s Br. p. 5.) But again, having foregone appeal of the ALJ's conclusion, Respondent cannot now challenge it. Finally, Respondent implicitly questions the ALJ's application of ALC rules. (*Id.* at 6.) Once more, though, Respondent cannot challenge the ALJ's conclusion having foregone appeal of it.

Remarkably, Respondent's central counterargument merely contests these ALJ findings—recast, however, as *arguments* of Appellant. (*See id.* at 9–10.) As explained in Appellant's Brief, "the ALJ found that no record evidence suggested that the Board 'carefully considered' Williams's record and that the Board apparently conceded that it did not discuss Williams's case at his parole hearing[.]" (App.'s Br. pp. 3–4.) Appellant included block quotations from the ALJ's order declaring those findings. (*See id.*) Curiously, Respondent now reframes those ALJ findings as Appellant's *arguments* in a strained attempt to challenge them despite foregoing its right to do so months ago. Respondent first states the following:

> Appellant claims that the Board's denial of his parole was not routine, and argues that two facts make it so "(1) no indication in the record suggests that the Board carefully considered Williams's record in compliance with its obligation to do so under section 24-21-640 of the South Carolina Code; and (2) the Board apparently conceded that it did not discuss his case at his parole hearing."

(Resp.'s Br. p. 9 (citation sentence omitted).) Then, Respondent contends that "the first purported fact is incorrect" and "[t]he second purported fact . . . is also incorrect." (*Id.*) But, as noted above, these facts are ALJ findings which Respondent never appealed and cannot challenge now. Thus, rather than rebut Appellant's claim that his denial was not "routine" (or that *Cooper* requires ALJ review of procedural compliance for even "routine" decisions), Respondent merely laments ALJ findings which are not on appeal here.

This Court is not tasked with reviewing the two ALJ findings contested by Respondent, because Respondent never appealed those findings. The issue presented in this appeal is whether, given those two findings, the ALJ erred when concluding that she could not require the Board to conduct another parole hearing compliant with the statutory decision-making procedures. For the reasons detailed in Appellant's Brief, the ALJ erred when so concluding—

whether this Court deems Respondent's denial of Appellant's parole "routine" or not. (*See* App.'s Br. pp. 6–18.)

II. Respondent Does Not Rebut *Cooper*'s Conclusion That the ALJ Must Review Parole Denials to Determine Compliance with Statutory Decision-Making Requirements.

Respondent does not rebut *Cooper*'s conclusion that the ALJ must review parole denials to determine the Board's compliance with statutory decision-making requirements. Despite referencing a "clear and straightforward procedure outlined in *Cooper* and further clarified in *Compton*" (Resp.'s Br. p. 5), Respondent offers no interpretation of *Cooper* at all. Respondent much less offers an interpretation more compelling than the obvious one: When a prisoner "is not appealing the denial of parole, but rather, is challenging the method and procedure employed by the Parole Board in reaching its decision, [the prisoner]'s claim raises a sufficient liberty interest to trigger due process requirements of judicial review." *See Cooper*, 377 S.C. at 502, 661 S.E.2d at 113.

A. Respondent Ignores the South Carolina Supreme Court's Limitation of S.C. Code Ann. § 1-23-600(D).

"Under § 1-23-600(D)," Respondent claims, "an ALC judge may not hear an appeal" of "a routine denial of parole." (Resp's Br. p. 8.) Yet, as demonstrated in Appellant's Brief, Respondent's denial of parole to Appellant was not "routine" in any meaningful sense of that term. (App.'s Br. pp. 12–18.) Moreover, assuming *arguendo* that Respondent's denial was routine, "the ALJ has jurisdiction over routine parole denials to review the Board's adherence to statutorily-required decision-making procedures." (*Id.* at 7–12.)

Section 1-23-600(D) of the South Carolina Code does not shield Respondent's decisions from judicial review where—as here—deviations from statutory decision-making procedures animated those decisions. Under *Cooper*, such deviations transform an ordinary parole denial

into a deprivation of a state-created liberty interest. *See Cooper*, 377 S.C. at 499, 661 S.E.2d at 111 ("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."). Thus, under *Howard v. South Carolina Department of Corrections*, 399 S.C. 618, 733 S.E.2d 211 (2012), that deprivation renders Section 1-23-600(D) inapplicable.

Among other things, Section 1-23-600(D) prohibits an ALJ from hearing prisoner appeals (1) "involving the loss of the opportunity to earn sentence-related credits" or (2) "involving the denial of parole to a potentially eligible inmate." S.C. Code Ann. § 1-23-600(D). In *Howard*, a prisoner challenged the first prohibition after the South Carolina Department of Corrections declined to award him monthly good-time credits for his violation of an institutional policy. *See Howard*, 399 S.C. at 623–24, 733 S.E.2d at 214. The "plain terms" of Section 1-23-600(D), the Supreme Court noted, "preclude[d] the ALC from hearing *all* inmate appeals involving the loss of the opportunity to earn sentence-related credits." *Id.* at 626–27, 733 S.E.2d at 216. Ostensibly, then, the Court's resolution should have been simple. *See id.* Yet, because Section 1-23-600(D) "also tangentially implicates state-created liberty interests," the Supreme Court found discussion beyond its plain meaning necessary. *See id.* at 627, 733 S.E.2d at 216. Indeed, despite holding that an inmate's "loss of the opportunity to earn sentence-related credits *does not* implicate a state-created liberty interest," the Supreme Court rebuked interpretations of Section 1-23-600(D) that "completely eviscerate[] all judicial review of an inmate's grievance." *See id.* at 630, 733 S.E.2d at 217 (emphasis added). After all, even the South Carolina Department of Corrections refused to pursue "a literal reading" of Section 1-23-600(D), for "a literal reading would not be permissible under the rules of construction." *Id.* at 630, 733 S.E.2d at 217–18.

Accordingly, the Supreme Court clarified that "a matter is reviewable by the ALC where an inmate's appeal also implicates a state-created liberty or property interest"—notwithstanding the sweeping language of Section 1-23-600(D). *See id.* at 630, 733 S.E.2d at 218 (original emphasis omitted).

Respondent here offers an impermissible "literal reading" of Section 1-23-600(D). In Respondent's view, Section 1-23-600(D) prohibits judicial review of a parole denial even when judicial findings reveal that Respondent deviated from its statutory decision-making procedures in reaching that denial. Contradicting *Cooper*'s conclusion that "the apparent failure by the Parole Board to consider the requisite statutory criteria in rendering its decision constitutes an infringement of a state-created liberty interest," *Cooper*, 377 S.C. at 499, 661 S.E.2d at 112, Respondent rejects *Howard*'s application here "[b]ecause the right to parole is not a state-created liberty interest." (Resp.'s Br. p. 12.)

To be sure, Respondent concedes an apparent limit on Section 1-23-600(D): Respondent stresses that the Section prohibits ALJ review only "if the denial of parole is *routine*." (*Id.* at 10 (emphasis added).) But that limitation is meaningless if it does not apply here—when the unchallenged findings of an ALJ reveal (1) that no record evidence suggests that the Board "carefully considered" the prisoner's record and (2) that the Board apparently conceded that it did not discuss the prisoner's case at his parole hearing. (*See* App.'s Br. pp. 3–4.)

Accordingly, this Court should reject Respondent's impermissibly "literal" reading of Section 1-23-600(D) under *Howard*, recognize Respondent's violation of Appellant's state-created liberty interest under *Cooper*, and require a new parole hearing compliant with the South Carolina Code's statutory decision-making procedures.

B. Respondent Fails to Rebut *Cooper*'s Conclusion Authorizing Review of Routine Denials to Determine Compliance with Statutory Decision-Making Requirements.

Respondent contends that "the Supreme Court's decisions in *Cooper* and *Compton* have only required Respondent to provide the rejection letter which stated that the Board considered [the statutorily prescribed] factors." (Resp.'s Br. p. 8.) Yet, Respondent cites nothing from *Cooper* or *Compton* absolving its obligation to follow statutory decision-making procedures in *reaching* its decisions. Indeed, Respondent's Brief barely discusses *Cooper* and *Compton* at all.

Appellant's Brief details the holdings and harmony of *Cooper* and *Compton*. (App.'s Br. pp 16–18.) *Cooper* held that "the apparent failure by the Parole Board to consider the requisite statutory criteria in rendering its decision constitutes an infringement of a state-created liberty interest and, thus, warrants minimal due process procedures"; in such circumstances, an appeal is "appropriate for disposition under the APA" and should be "reviewed by the AL[J]." *Cooper*, 377 S.C. at 499, 661 S.E.2d at 112. *Compton*—a roughly two-page *per curiam* opinion—then clarified the formal requirements of letters communicating denial of parole to prisoners; it confirmed the necessity of a clear statement of compliance with procedural obligations but rejected any requirement that Respondent separately state findings of fact and conclusions of law. *Compton v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009) (per curiam).

Respondent has not offered a competing analysis of *Cooper* and *Compton*. Instead, Respondent simply contests the supplemental discussion of this Court's unpublished opinions in Appellant's Brief. (Resp's. Br. pp. 9–10.) Respondent misconstrues the purpose of that discussion. Appellant presented those unpublished opinions not as precedent but as cogent analyses by careful legal thinkers—just as Appellant might have presented the insightful reflections of other non-precedential authorities (*e.g.*, a North Carolina Court of Appeals opinion,

a South Carolina Law Review article, or a treatise). No arguments in Appellant's Brief "derive" from those unpublished decisions, which themselves simply acknowledge and apply South Carolina Supreme Court precedent. As detailed above, Appellant's arguments derive instead from *Cooper* and *Compton*—published and precedential South Carolina Supreme Court decisions. As Appellant's Brief states, "under Supreme Court precedent *as recognized by* this Court in *Tinsley*, the ALJ has jurisdiction to review a denial of parole by the Board when the Board 'deviates from or renders its decision without consideration of the appropriate criteria.' *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111." (App.'s Br. p. 15 (first emphasis added); *id.* at 14 ("Two other unpublished opinions of this Court *apply* the same Supreme Court precedent and *acknowledge* the same rule." (emphasis added)).) Thus, this Court should reject Respondent's misguided request to disregard "Appellant's references to the unpublished cases and strike any relevant arguments derived from same."[1] (Resp.'s Br. pp. 9–10.)

C. Respondent's Public Policy Arguments Were Raised and Rejected by *Cooper*.

Respondent insists that Appellant's position would "invite countless appeals from routine denials of parole." (Resp.'s Br. p. 4.) Without question, a balance must be struck between prisoners' meaningful right to review and economy in Respondent's parole process. But this balance has already been struck—by the South Carolina Supreme Court itself:

[1] Appellant's counsel gratefully acknowledges Respondent's clarification on the subsequent history of *Tinsley*. (*See* Resp.'s Br. p. 10 n.3.) Appellant's counsel has further discovered that the *Spigner* opinion referenced in Appellant's Brief appears to have likewise been withdrawn after that prisoner's receipt of another parole hearing. *See* No. 2013-001380 (S.C. Ct. App.). Nevertheless, both unpublished opinions still serve the same purpose for which Appellant originally presented them—illustrations of prior cogent analysis. Their subsequent histories in no way minimize that function. On the contrary, they highlight an unsettling factor potentially preventing publication of an opinion acknowledging *Cooper*'s holding: For the subset of procedurally deficient denials that *are* formally challenged by prisoners, Respondent can voluntarily correct the deficiencies at a subsequent parole hearing during the appeal and moot the prisoner's claims before a court *requires* it to correct them.

> We recognize the Department's concern that a decision . . . remanding to the ALC will create an overabundance of appeals from denials of parole. However, we believe this concern will be alleviated if the Parole Board issues orders that are sufficiently detailed *for the ALC to conduct appellate review, limited to the Board's adherence to section 24-21-640*, of decisions denying parole.

Cooper, 377 S.C. at 499–500, 661 S.E.2d at 112 (emphasis added).

To a point, this case follows *Cooper*'s balanced plan for review. Respondent denied Appellant parole and issued a letter reporting its compliance with statutory decision-making requirements. Appellant then challenged his denial. The ALJ undertook "appellate review, limited to the Board's adherence to section 24-21-640," as instructed by *Cooper*. *See Cooper*, 377 S.C. at 500, 661 S.E.2d at 112. The ALJ's review ultimately suggested that the Board *did not*, in fact, adhere to its statutory decision-making procedures. Yet, upon reaching that conclusion, the ALJ did not require the Board to conduct a proper hearing compliant with the South Carolina Code. Instead, she found herself powerless to act. Precisely there she erred. Under *Cooper*, her conclusion that the Board deviated from its statutory decision-making procedures required her to order a new parole hearing.

This Court need not engage Respondent's concerns about "an overabundance of appeals from denials of parole." The South Carolina Supreme Court weighed that concern when reaching its conclusion in *Cooper*. Yet, the Supreme Court deemed the ALJ's role in reviewing Respondent's decision-making process too important to forsake on economy's account. Accordingly, this Court should enforce the Supreme Court's careful balance of policy concerns in *Cooper* and require ALJ review.

III. Respondent Fails to Rebut Appellant's Rights under Article I, Section 22 of the South Carolina Constitution.

As detailed in Appellant's Brief, "Article I, Section 22 of the South Carolina Constitution requires that the ALJ have jurisdiction to review [Respondent]'s decision-making process for

statutory and constitutional compliance when reaching parole denial decisions." (App.'s Br. p. 18.) Respondent fails to rebut this straightforward application of South Carolina law.

A. Appellant Properly Preserved His Reliance on Article I, Section 22 of the South Carolina Constitution.

Respondent notes on the first substantive page of its Brief that Appellant has claimed that his parole denial violated constitutional provisions from the beginning of this case. (Resp's. Br. p. 1.) Respondent then admits that Appellant raised this argument—with direct citation to Article I, Section 22 of the South Carolina Constitution—in opposition to Respondent's motion to dismiss. (*Id.* at 10.) Further still, Respondent does not contest that Appellant reasserted his constitutional claim to the ALJ by motion for rehearing under Rule 59(e). (App.'s Br. p. 18–19 n.6.)

Despite these direct or implicit concessions, Respondent suggests that Appellant failed to preserve his constitutional argument because—"[m]ost importantly"—"this issue was not ruled upon by the ALC." (Resp.'s Br. p. 10.) Respondent's position contradicts hornbook preservation law: "Once [an] issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." *See Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999) (quoting JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 475 (2d ed. 1996)), *cited in* JEAN H. TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 188 (3d ed. 2016).

Accordingly, the ALJ's failure to address this issue in her order denying Appellant's Rule 59(e) motion is immaterial. Appellant raised his constitutional argument to the ALJ; raised it again under Rule 59(e); and then appealed on that ground. Appellant properly preserved this issue.

B. Respondent Fails to Show That Its Decision-Making Process Satisfied Either South Carolina Constitutional Requirements or the Procedure Envisioned by *Cooper*.

First, Respondent insists that Appellant "received hearings 'on due notice and an opportunity to be heard' with 'the right to judicial review.'" (Resp.'s Br. p. 11.) This statement is either false or meaningless. Elsewhere, Respondent all but concedes that the Board decided Appellant's fate before the merely performative hearing—after all, "deliberation was unnecessary." (*See* Resp.'s Br. p. 7.) And Respondent's own explanation of the Parole Board's process either belies its claim or proves telepathy: Since no deliberation occurred—and all six panelists just said "Deny"—how did the Parole Board Chairman know that grounds "one, two and three" were the bases of their denials?[2] (*See* App.'s Br. p. 2; *see id.* at 21–22 n.7.) And how can Appellant's Notice of Rejection reciting these phantom bases satisfy the "procedure" envisioned by *Cooper* and *Compton*?

Next, Respondent insists that "Appellant does not have 'a liberty interest in ensuring that the Board considers his parole within the appropriate legal parameters.'" (Resp.'s Br. p. 12.) This statement contradicts *Cooper*'s holding: "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." *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111.

[2] Appellant again notes that this precise set of bases for denial is found in both the *Cooper* and *Compton* decisions. *See Cooper*, 377 S.C. at 492–93, 661 S.E.2d at 108 ("[T]he Parole Board rejected Cooper's parole for the following reasons: (1) the nature and seriousness of the current offense; (2) an indication of violence in this or a previous offense; and (3) the use of a deadly weapon in this or a previous offense."); *Compton*, 385 S.C. at 478, 685 S.E.2d at 176 ("The Parole Board denied respondent parole due to: (1) the nature and seriousness of the current offense; (2) an indication of violence in this or a previous offense; and (3) the use of a deadly weapon in this or a previous offense.").

Accordingly, Respondent fails to show that its decision-making process satisfied either South Carolina constitutional requirements or the procedure envisioned by *Cooper*.

CONCLUSION

Respondent's Brief fails to rebut the arguments presented in Appellant's, and this Court should reverse the decision of the ALJ and remand the case for a rehearing compliant with the Board's statutory decision-making procedures.

Respectfully submitted,

January 23, 2022

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PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for Appellant Matthew Williams, do hereby certify that I have served all counsel in this action with a copy of the document(s) hereinbelow specified by emailing a copy of the same to the following lawyer(s) at his or her primary e-mail address listed in the Attorney Information System:

Document:	Reply Brief of Appellant
Counsel Served:	Matthew C. Buchanan, General Counsel South Carolina Department of Probation, Parole and Pardon Services

January 23, 2022

s/ Kelli S. Eargle
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