

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Michael Moore, #219515,

Appellant,

vs.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

Docket No. 23-ALJ-15-0002-AP

FINAL ORDER

RECEIVED
AUG 14 2023
SC Court of Appeals

STATEMENT OF THE CASE

This matter is pending before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to an appeal by Michael Moore (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. A South Carolina court convicted Appellant of murder and sentenced him to life imprisonment with the possibility of parole on March 29, 1995. At that time, someone serving a life sentence for murder was required to serve at least twenty years' imprisonment before being parole eligible.

Appellant first appeared before the South Carolina Parole Board (the Parole Board) on April 9, 2014. The Parole Board denied Appellant parole based on the nature and seriousness of his offense. Appellant receives a hearing before the Parole Board every other year.

Appellant has now received parole hearings on four other occasions and was denied by letters dated: May 19, 2016; August 29, 2018; January 14, 2021; and most recently on March 2, 2023. On each of those occasions, the Parole Board voted to deny parole, citing the nature and seriousness of the current offense in its findings of fact.¹ The decision to deny parole on January 14, 2021, was a 3-3 vote, but the Parole Board's most recent decision to deny parole was unanimous. The Parole Board denied parole on the most recent occasion again due to: (1) the nature and seriousness of the current offense, (2) indication of violence in this or previous offense, and (3) use of a deadly weapon in this or previous offense.

¹ The 2014 and 2016 decisions also included the indication of violence in this or previous offense as one of the bases to deny parole.



On March 17, 2023, Appellant filed a notice of appeal with the Court. Appellant argues the Parole Board denied him a realistic opportunity to participate in parole because it denied his parole based on the same criteria on which the Parole Board previously based its denial—criteria that will never change. This matter was assigned to the undersigned on March 30, 2023. On April 11, 2023, the Department filed the record on appeal. On April 12, 2023, Appellant filed his brief and appendix, and on May 26, 2023, the Department filed its brief. Appellant filed his reply brief on June 13, 2023, and a prior order from the ALC involving another individual.

ISSUE

The single issue on appeal, as stated by Appellant, is as follows:

When the [P]arole [B]oard denied Appellant for the fifth time using the exact same justification (FINDINGS OF FACT) in a rote fashion, which the [P]arole [B]oard knows cannot and will never change, the [P]arole [B]oard engaged in a gross abuse of its discretion and denied Appellant parole, not as a routine denial of parole, but arbitrarily and capriciously in violation of the Legislative intent of chapter 21 of the South Carolina (S.C.) Penal code § 24 effectively subjecting Appellant to permanent denial of his parole eligibility.

(App. Br. 1). The Court construes this statement to mean that Appellant argues on appeal that the Parole Board abused its discretion in denying him parole.²

JURISDICTION

The Court generally has jurisdiction to hear inmate appeals from the South Carolina Department of Corrections. *See Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 170, 886 S.E.2d 671, 674 (2023); *see also Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000); S.C. Code Ann. § 1-23-600 (Supp. 2022). In *Al-Shabazz*, our supreme court held an inmate may seek review of a final agency decision in an administrative matter under the APA. *Al-Shabazz*, 338 S.C. at 369, 527 S.E.2d at 750. Our supreme court emphasized that its decision was not without limitation. *Id.* at 370, 527 S.E.2d at 750. Significantly, the court noted that the requirements of

² Appellant's statement of issues on appeal combines alleged error and jurisdictional argument. Appellant's statement that the Parole Board's actions amount to a permanent denial of parole eligibility relates not to the error ascribed to the Parole Board by the Appellant but to the existence of the Court's jurisdiction to entertain Appellant's argument.

procedural due process would be applicable when an inmate was deprived of a protected liberty interest under the Fourteenth Amendment to ensure that a "state-created right was not arbitrarily abrogated." *Id.*

The Court's jurisdiction to review parole decisions is, however, more limited. Section 1-23-600(D) of the South Carolina Code (Supp. 2022) specifically provides an administrative law judge shall not hear "an appeal involving the denial of parole to a potentially eligible inmate by the Department." However, our supreme court has explained that while a parole eligible inmate does not have a right of review after a decision denying parole, "an inmate has a right of review by the [ALC] after a *final* decision that he is *ineligible* for parole." *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 497-98, 661 S.E.2d 106, 111 (2008) (quoting *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 124 n.4 (2003), *abrogated on other grounds* by *Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 886 S.E.2d 671 (2023)), *abrogated on other grounds* by *Allen*, 439 S.C. 164, 886 S.E.2d 671.

Moreover, even if the Parole Board's decision does not amount to a permanent denial of parole, the Court may still review whether the Parole Board followed the proper procedure in making its parole determination. *Id.* at 499-500, 661 S.E.2d at 112; *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) ("[I]f the Parole Board deviates from or renders its decision without consideration of the appropriate criteria, it essentially abrogates an inmate's right to parole eligibility and infringes on a state-created liberty interest, warranting minimal due process protection.").

STANDARD OF REVIEW

In situations when an appellant challenges the Parole Board's decision on the grounds that there is a permanent denial of parole eligibility, the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-300 *et seq.* (2005 & Supp. 2022), establishes the standard of review the Court must apply when reviewing an agency's decision. Specifically, section 1-23-380(5) provides the following:

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

because 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.

"When appealing an agency's decision, the burden rests squarely on the appellant to prove that substantive rights were prejudiced based on one of six statutory criteria listed above." *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 259-60, 659 S.E.2d 233, 235 (Ct. App. 2008); *see also Pressley v. Lancaster County*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001) ("The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary."); *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) ("The burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence.").

DISCUSSION

Appellant argues the Parole Board abused its discretion when it denied him parole based upon the existence of three criteria: (1) the nature and seriousness of his offense, (2) the indication of violence for this or a previous offense, and (3) the use of a deadly weapon in the commission of this or pervious offense. According to Appellant, because these criteria will never change, he can never receive parole and is effectively ineligible for parole. Appellant additionally contends the Parole Board's purported failure to discuss the other criteria for which it stated it carefully considered means he "met all other criteria for release on parole, but the [P]arole [B]oard chose to ignore this fact."

The Department makes two primary arguments in response. First, it argues that the Parole Board's action amounts to a routine denial of parole rather than a determination that Appellant is

no longer eligible for parole. Second, it argues that the procedure the Parole Board followed in denying parole complied with our supreme court's decision in *Cooper* and *Compton* and Appellant is not entitled to any further findings or guidance from the Parole Board.

For the reasons set forth herein, the Court agrees with the Department.

I. Routine Denial of Parole

The Department argues the Parole Board's decision is a routine denial of parole. Appellant counters that he has permanently been denied eligibility for parole because he continues to be denied parole based upon immutable criteria. Appellant also notes that nowhere in the denial letter did the Parole Board indicate that Appellant had failed to satisfy or meet any of the other criteria for parole. According to Appellant, the Parole Board's failure to do so, or to explain its decision in detail, amounts to an abuse of discretion. After careful consideration of the arguments of the parties, the Court agrees with the Department.

Appellant's argument misses the point. The Court is tasked with determining whether the Parole Board's actions amount to a routine denial of parole or a permanent denial of parole eligibility. If the Court concludes that the Parole Board's action was a routine denial of parole, then the Parole Board's decision is *not* reviewable for an abuse of discretion. *See* § 1-23-600(D) (stating an administrative law judge shall not hear "an appeal involving the denial of parole to a potentially eligible inmate by the Department").

Here, the facts indicate that the Parole Board did not permanently deny Appellant eligibility for parole. Appellant has received all parole hearings to which he was entitled to date. Moreover, the notice of rejection sent to Appellant in this case does not contain any language indicating Appellant is no longer parole eligible, and the notice in fact states "[y]ou will be notified 30 days prior to your next scheduled parole consideration date." This statement alone indicates the Parole Board continues to view Appellant as parole eligible. Additionally, the record indicates votes on whether to grant Appellant parole have not always been unanimous. The vote to deny parole on January 13, 2021, was a 3-3 vote; furthermore, the reasons for denial of parole have varied over time. These facts indicate that the Parole Board, as constituted on various occasions, is undertaking review rather than ministerially denying parole. The Court therefore concludes the Parole Board's action in this case amounted to a routine denial of parole.³

³ Because the Court concludes the Parole Board's decision was a routine denial of parole, the Court disagrees with Appellant that he has been permanently denied parole. Thus, Appellant's arguments

II. The Parole Board's Procedure

The Court's conclusion that the Parole Board's decision does not constitute a permanent denial of parole eligibility does not end the inquiry. The Court may still review whether Appellant received the *process* to which he was entitled from the Parole Board at his parole hearing. See *Cooper*, 377 S.C. at 497-99, 661 S.E.2d at 111. If the Parole Board deviates from or renders its decision without consideration of the appropriate criteria, it essentially abrogates an inmate's right to parole eligibility and infringes on a state-created liberty interest. *Compton*, 385 S.C. at 479, 685 S.E.2d at 177. This inquiry, however, is limited:

[I]f the Parole 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.

Id. If, therefore, the Parole Board's denial letter itself states that the Parole Board considered all of the necessary factors, then the Court's review ends.

The March 2, 2023 notice of rejection letter in this case states the following:

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 [s]ection 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to [s]ection 24-21-10 (F) (1) of the South Carolina Code of Laws. The Parole Board concludes that parole must be denied.

*—> This language indicates that the Parole Board considered the necessary factors, both those mentioned in Form 1212 and in section 24-21-640. Moreover, Appellant has not pointed to any specific procedural error in the Parole Board's review. See *Mitchell*, 377 S.C. at 259-60, 659 S.E.2d at 235. Accordingly, the Court is constrained to conclude Appellant received the process to which he was entitled and that the Parole Board's action constitutes a routine denial of parole.⁴

pertaining to a purported due process violation based on the Parole Board's continued denials is meritless.

*—> ⁴ The Court is cognizant that the denial letter's mere recitation that the Parole Board considered all appropriate factors is not conclusive evidence that all such factors were in fact considered.

Therefore, the Court dismisses this appeal.

ORDER

IT IS THEREFORE ORDERED that this appeal is **DISMISSED WITH PREJUDICE.**⁵

AND IT IS SO ORDERED.



Robert L. Reibold
Administrative Law Judge

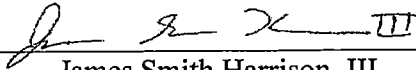
June 21, 2023
Columbia, South Carolina

However, as discussed above, the votes of the members of the Parole Board have varied over time as have the specific reasons for why parole has been denied. This variance indicates that the Parole Board has in fact been considering the facts of Appellant's case. Moreover, and in any event, our supreme court's instructions in *Compton* are clear. The Court may not look beyond the wording of the denial letter. *See Compton*, 385 S.C. at 479, 685 S.E.2d at 177 ("[T]he Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212, which is sufficient . . .").

⁵ To the extent Appellant raises new arguments in his reply brief that could have been raised in his principal brief, those arguments are not properly before the Court. *See Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) ("[A]n appellant cannot make new arguments for reversal in a reply brief."); 4 C.J.S. *Appeal and Error* § 735 (May 2023 Update) ("A point raised for the first time in the reply brief will not be considered by the appellate court.").

CERTIFICATE OF SERVICE

I, James Smith Harrison, III, 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, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



James Smith Harrison, III
Judicial Law Clerk

June 21, 2023
Columbia, South Carolina

July 24, 2023

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SC Court of Appeals

Michael Moore, #219515
Perry Correctional Inst., Q1B-222
430 Oaklawn Road
Pelzer, S.C. 29669

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

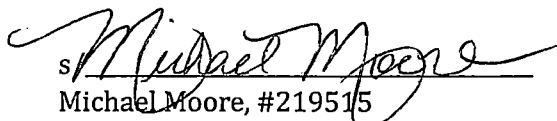
RE: Michael Moore, #219515 v. SCDPPPS
23-ALJ-15-0002

Dear Clerk:

I am enclosing herein the original Notice of Appeal and Motion to Proceed in Forma Pauperis with financial statement showing my inability to pay filing fees. Please file the enclosed pursuant to Barnes v. State, 433s.c. 399, 859 SE2d. 260, June 3, 2021, and return a file-stamped copy to me.

With kindest regards, I remain,

Very truly yours,


s/ Michael Moore
Michael Moore, #219515
Pro Se Litigant

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