

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from the Administrative Law Court
The Honorable Crystal M. Rookard, Administrative Law Judge
Docket Number 23-ALJ-15-0021-AP

Appellate Case No.: 2024-000110

BERNARD BAGLEY, #175851,APPELLANT

v.

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

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the ALC erred when it dismissed Appellant's appeal because the Board followed the requirements outlined in *Cooper* and *Compton*.

STATEMENT OF THE CASE

On August 23, 1990, upon getting into an argument with his wife the day before, the Appellant discovered she resigned from her job; withdrew money from their bank account; and took their daughter to her mother's house in Eastover, South Carolina. The Appellant traveled from Raleigh, North Carolina to Eastover to confront her. Upon arrival he kicked in the front door of his mother-in-law's home and inquired to his wife about a possible affair. During the ensuing argument the Appellant shot her twice causing her death. The Appellant was eventually arrested and charged with the offense of murder.

During the October 1990 term, the Richland County Grand Jury indicted Appellant for murder (90-GS-40-5849) and first-degree burglary (90-GS-40-5864). On April 10, 1991, Appellant proceed to a jury trial before the Honorable Dan F. Laney, Jr. Appellant was found guilty as charged and sentenced to two consecutive life sentences for his convictions. At the time of his offense, parole eligibility for murder was allowed after the service of twenty years.

Appellant became parole eligible on August 23, 2010, and had his first parole hearing on September 8, 2010. The Parole Board (the Board) denied Appellant's request for parole. Since that time, Appellant has appeared before the Board seven additional times, including one opportunity for medical parole. His most recent appearance was on June 21, 2023, at which time the Board unanimously rejected him for parole, citing the nature and seriousness of the offense and the use of a deadly weapon.

Appellant filed a notice of appeal before the Administrative Law Court on June 29, 2023. Within his appeal, Appellant argues that his parole eligibility has been abrogated by the Board because he was not seen by a duly qualified psychologist or psychiatrist, and that the denial of parole raises a sufficient state-created liberty interest.

The Honorable Crystal M. Rookard, administrative law judge, dismissed the appeal because it found it had limited authority to hear the matter because the Board followed the requirements of *Cooper* and *Compton*. Appellant now brings this appeal, arguing that the ALC erred and that the Board should have received a psychological report pursuant to Section 24-21-610 before it denied him parole.

In response, Respondent will argue that the ALC was correct in its determination that the ALC was constrained to dismiss the appeal, and that the psychological report is not one of the requisite factors of parole consideration. Respondent's brief follows.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. When reviewing a parole case, the ALC sits in an appellate capacity. *Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2004). Under the appellate standard of the Administrative Procedures Act, the ALC's review is limited to the record, absent irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4). Additionally, the court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5). However, "an 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." S.C. Code Ann. § 1-23-600(D).

In an appeal from an ALC decision, the Administrative Procedures Act provides the standard of review. S.C. Code Ann. §1-23-610(B). This Court may only reverse the decision of the ALC if that 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 abuse of discretion or clearly unwarranted exercise of discretion.

Id.

“The [C]ourt 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, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. *Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

ARGUMENTS

1. The ALC does not have the authority to hear a routine denial of parole.

Respondent respectfully submits that the ALC lacks the authority to review a routine denial of parole.

“An 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.” S.C. Code § 1-23-600(D). Only when the Department determines an inmate is permanently ineligible for parole does the ALC have full jurisdiction to review that decision. *Furtick*, 352 S.C. at 598,

576 S.E.2d at 149. In *Furtick*, the Supreme Court extended *Al-Shabazz*¹ to parole eligibility decisions while emphasizing the difference between a final decision of parole eligibility and the routine granting or denial of parole by the Parole Board of parole-eligible inmates.

“Parole is a privilege, not a right.” *Cooper v. S.C. Dep’t of Probation, Parole and Pardon Services*, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (citing *Sullivan v. S.C. Dep’t of Corr.*, 355 S.C. 437, 443 n. 4, 586 S.E.2d 124, 127 n. 4 (2003)). “[N]o such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him.” S.C. Code § 24-21-640. “Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole.” *Cooper*, 377 S.C. at 499, 661 S.E.2d at 11.

So constrained, the ALC can only review the Board’s procedures and not its decision-making authority. The Board, being the sole body empowered to grant or deny parole, elected to deny parole to Appellant after carefully considering the required factors. The Board clearly stated that it did so in the letter of rejection to Appellant. R.* The ALC would thus be required to dismiss the appeal per the instructions of the Supreme Court in *Compton v. S.C. Dep’t of Prob., Parole and Pardon Servs.*, 385 S.C. 476, 684 S.E.2d 175 (2009). “We emphasized that ... if 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.*, 385 S.C. at 479, 684 S.E.2d at 177.

¹ *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000).

2. The psychological report mandated in 24-21-610 is not one of the requisite factors of parole consideration.²

Appellant argues that his due process rights were denied because the Respondent did not present a report to the Board regarding his mental condition as required by S.C. Code 24-21-610. However, that law states that “no prisoner who has served a total of ten consecutive years or more in prison may be paroled until the Board has first received a report as to his mental condition and his ability to adjust to life outside the prison from a duly qualified psychiatrist or psychologist.” A qualifying inmate who is *provisionally* paroled by the Board is assessed by the psychiatrist or psychologist pursuant to the statute, and the report is submitted to the Board prior to the final parole order is signed, effecting release.

As discussed in Part 1, the statutory factors required to be considered for parole consideration are defined in Cooper to include the statutory language of Section 24-21-640 and the Board’s own published parole consideration criteria, as well as the actuarial risk and needs assessment tool required by Section 24-21-10(F)(1) per Spigner v. S.C. Dep’t of Probation, Parole and Pardon Services, 2015 WL 1681270 (Ct. App 2015). The psychological report required in Section 24-21-610 is not a required parole consideration factor – only a factor that must be considered by the Board prior to *release* to parole.

Respondent also submits that there is a practical consideration why this interpretation of Section 24-21-610 should be upheld. Psychological reports are expensive. These reports require a duly qualified psychologist or psychiatrist to enter the institution in which the offender is housed, conduct the necessary interview and inquiry as to the inmate’s mental state, and furnish a report

² Respondent will address all four of Appellant’s arguments because they each relate to Section 24-21-610 and the psychological report requirement.

“as to his mental condition and his ability to adjust to life outside the prison.” The cost to the Department is currently \$680.00 per psychological report. Were the Respondent required to obtain a psychological report for the hundreds of inmates who had served ten or more years to the Board regardless of the Board’s inclination to parole the inmate, the expense to Respondent would be severely impactful and an unnecessary expense.

Instead, Respondent only obtains the psychological report for those inmates granted provisional parole by the Board. “A provisional parole order shall include the terms and conditions, if any, to be met by the prisoner during the provisional period and terms and conditions, if any, to be met upon parole.” S.C. Code Section 24-21-645(A). The completed report is submitted to the Board, which will then “provide for his release from custody.” Section 24-21-645(D).

Respondent also urges this Court to consider a more recent addition to the Board’s required factors which it must utilize, that of the “validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, which the board shall use in making parole decisions.” Section 24-21-10(F)(1). Adopted by the General Assembly as part of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the requirement of Section 24-21-10(F)(1) provides for much of the same analysis that would be addressed by the psychological report of “his mental condition and his ability to adjust to life outside the prison” in Section 24-21-610.

In the instant case, Appellant was rejected for parole by the Board after consideration of the requisite factors mandated by *Cooper* and *Compton* as well as the risk and needs assessment tool required by Section 24-21-10(F)(1). R.*. The Board did not vote for Appellant to be released to parole, thus obviating the psychological report required by Section 24-21-610. Therefore, Respondent submits his due process rights were not violated.

CONCLUSION

Appellant appealed a routine denial of parole. Thus, the ALC had limited authority to hear the appeal, and only to review whether the Board followed proper procedure. Because the record clearly shows the Board followed the procedure outlined in *Cooper*, the ALC properly dismissed the appeal. Furthermore, the requirement of the psychological report is only necessary when the Board votes to grant parole, after which the report will be obtained and submitted to the Board for review. The ALC's decision should therefore be upheld.

Respectfully submitted,



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March 26, 2024

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v.

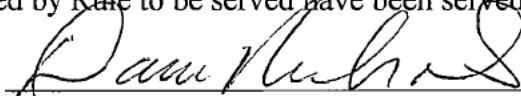
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within
Initial Brief and Designation of Matter on Appellant this 26th day of March, 2024, by depositing
a copy of the same in the United States mail, postage prepaid, addressed to:

Bernard Bagley, #175851
Kershaw Correctional Institution
4848 Goldmine Highway
Kershaw, S.C. 29067

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



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March 26, 2024

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
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RE: **Bernard Bagley, #175851 v. SCDPPPS**
Case No.: 24-000110

Dear Ms. Kitchings:

Please find enclosed the Respondent's Initial Brief and Designation of Matter dated March 26, 2024.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew C. Buchanan".

Matthew C. Buchanan
General Counsel

MCB:dn
Enclosures

cc: Bernard Bagley, #175851

State of South Carolina

Department of Probation, Parole, and Pardon Services

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