

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Bernard Bagley, #175851,)
)
Appellant,)
)
v.)
)
South Carolina Department of Probation,)
Parole, and Pardon Services,)
)
Respondent.)
_____)

Docket No. 21-ALJ-15-0016-AP

ORDER OF DISMISSAL

RECEIVED
APR 29 2024
SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (“ALC” or “Court”) pursuant to a Notice of Appeal filed on June 28, 2021, by Bernard Bagley (“Appellant”), an inmate incarcerated with the South Carolina Department of Corrections. Appellant challenges the denial of his request for parole by the Parole Board (“Board”) of the South Carolina Department of Probation, Parole, and Pardon Services (“Department”), on June 16, 2021. Appellant argues that the Board deprived him of a state-created liberty interest by failing to conduct an individualized risk assessment as required under subsection 24-21-10(F)(1) of the South Carolina Code (Supp. 2023).¹

¹ Appellant additionally filed various motions during the pendency of his appeal, including a “Motion for Temporary Restraining Order” and a “Motion for Permanent Injunction”, in which he requests to be “considered for clemency under §24-21-920” due to coronavirus. These two motions seek relief that this Court lacks authority to grant and are thus denied.

Appellant additionally filed a “Motion for Writ of Mandamus”, in which he requested to receive a “risk assessment” under subsection 24-21-10(F) of the South Carolina Code (Supp. 2023). This statute pertains to the COMPAS risk assessment factors used by the Board when making parole determinations. As stated in this Order, Appellant misinterprets this statute as conferring a legal right to receive a “risk assessment” upon request. The Record indicates that the Board considered the COMPAS risk assessment factors in reaching its decision to deny parole as required by subsection 24-21-10(F). Because Appellant seeks a legal right to which he is not entitled, his request is denied. *Midlands Util., Inc. v. S.C. Dep’t of Health & Envtl. Control*, 301 S.C. 224, 227-28, 391 S.E.2d 535, 537 (1989) (citing *Wiblen v. Long*, 262 S.C. 480, 205 S.E.2d 174 (1974)) (indicating that a writ of mandamus is “issued only to enforce a legal right requiring the performance of only ministerial duties...for which...[the applicant] has no other remedy.”)

Appellant has also filed what is couched as a “Proportionality Parole Release Motion.” Therein, he argues that the Court’s delays in deciding this case, coupled with his health issues and age, warrant relief under section 24-21-715 of the South Carolina Code (Supp. 2023). This motion is denied. Because the Appellant

COPY

FILED
MAR 26 2024
The State of South Carolina
Administrative Law Court
pk

On April 10, 1991, Appellant was found guilty in state court for murder and burglary in the first degree² for crimes committed in Richland County, South Carolina. Appellant was sentenced to two consecutive life sentences for his convictions. At the time of Appellant's offense, parole eligibility for murder could begin after the service of twenty years of imprisonment. Appellant has since served thirty-three years of his sentence.

Appellant became parole-eligible on August 23, 2010, and received his first parole hearing on September 8, 2010, at which time parole was denied. Since that time, Appellant has appeared before the Parole Board five additional times and was denied each time. The denial at issue in the instant appeal occurred on June 16, 2021. The Board's decision letter states as follows:

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 has 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

Use of Deadly Weapon in This or Previous Offense

Vote Count: Unanimous to Reject

ISSUES ON APPEAL

Appellant argues that the Parole Board failed to follow statutory procedure in reaching its determination by not providing him a risk assessment, and that this failure amounted to a deprivation of a state-created liberty interest to which Appellant was entitled.³

is subject to regular, periodic parole reviews – all of which would take into account his health and age -, he has not been prejudiced.

² Appellant's burglary conviction was later expunged.

³ In total, Appellant outlines eight issues on Appeal in his Brief. From what the Court can discern, two of these issues (itemized as Issues Nos. 1 and 2 in Appellant's Brief) pertain to Appellant's primary argument that the Board failed to "provide" him with an individualized risk assessment, or alternatively, failed to consider information pertinent to his eligibility for parole. Appellant's remaining issues, which are summarized in the last paragraph of this Order, are not reviewable by the ALC for the reasons stated therein.

JURISDICTION & STANDARD OF REVIEW

The Court's jurisdiction to hear this case is very narrow. Initially, the Court derived its jurisdiction to hear administrative appeals from inmates in *Al-Shabazz v. State*, which conferred jurisdiction on this Court to hear cases that arose in two ways: "(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 Court was charged with ensuring that the minimal constitutional requirements of due process were met in cases where a state-created liberty or property interest was at issue. *Id.* at 369-79, 527 S.E.2d at 750.

Thereafter, the South Carolina Supreme Court expanded the ALC's jurisdiction to hear cases where an inmate is permanently denied parole eligibility. *Furtick v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146, 149, 150 (2003) (holding that the permanent denial of parole eligibility implicates a liberty interest sufficient to require at least minimal due process). The Court's decision in *Furtick*, however, did not find that the parole statute (section 24-21-620 of the South Carolina Code) conferred a liberty interest in the granting of parole itself. *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003) ("[a]lthough the Court [in *Furtick*] found S.C. Code Ann. § 24-21-620 created a liberty interest in the one-time determination of parole eligibility, it was quick to note that the statute did not create a liberty interest in parole.").

Accordingly, parole is a privilege, not a right. As such, the routine denial or granting of parole is generally not appealable. However, inmates are entitled to minimal due process procedures upon the Board's consideration of the requisite statutory criteria in rendering its decision to grant or deny parole. *See Cooper v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 377 S.C. 489, 495-96, 661 S.E.2d 106, 110 (2008) (holding that if the Board "deviates from or renders its decision without consideration of the appropriate criteria", then it "essentially abrogates an inmate's right to parole eligibility and thus, infringes on a state-created liberty interest." *Id.* at 499, 661 S.E.2d at 111. The required statutory criteria referenced in *Cooper* include "the factors outlined in section 24-21-640 and the fifteen factors published in [the Board's] parole form". *Id.* Additionally, after *Cooper*, the South Carolina General Assembly enacted legislation requiring the Department to establish and utilize a validated risk and needs assessment tool when evaluating an inmate for parole. *See S.C. Code Ann. § 24-21-10(F)* (Supp. 2023). This risk assessment tool,

known as COMPAS, has been incorporated into the Board's written criteria and must be considered by the Board in addition to the other aforementioned statutory criteria. If the Board clearly states in its order denying parole that it followed these procedures, the decision constitutes a routine denial of parole and the ALC has limited authority to review the decision to determine whether the Board followed proper procedure. *Cooper*, 377 S.C. 489, 661 S.E.2d 106 (2008). Therefore, claims arising from the Board's decision denying parole will generally not be disturbed by the ALC unless the Board's failure to consider the appropriate criteria is tantamount to an abrogation of parole eligibility.

Review of such appeals are governed by the South Carolina Administrative Procedures Act. *See* S.C. Code Ann. § 1-23-600(E) (2005 & Supp. 2023) (directing the ALC to conduct appellate review of a final decision in a contested case in the same manner as prescribed in section 1-23-380). Pursuant to this standard of review, the Court "may not substitute the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (2005 & Supp. 2023). Furthermore, the ALC may not reverse or modify an agency's decision unless the record reflects that that substantial rights of the appellant have been prejudiced because the 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.

When appealing an agency's decision, the burden rests squarely on the appellant to prove that substantive rights were prejudiced. *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 260, 659 S.E.2d 233, 235 (Ct. App. 2008).

DISCUSSION

Appellant cites subsection 24-21-10(F)(1) of the South Carolina Code (Supp. 2023), which refers to the actuarial risk assessment that the Board is required to consider when making parole eligibility determinations. This provision states:

- (F) The department must develop a plan that includes the following:

(1) establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, which the parole board shall use in making parole decisions, including additional objective criteria that may be used in parole decisions;

(2) establishment of procedures for the department on the use of the validated assessment tool to guide the department, parole board, and agents of the department in determining supervision management and strategies for all offenders under the department's supervision, including offender risk classification, and case planning and treatment decisions to address criminal risk factors and reduce offender risk of recidivism ...

Id.

*Individualized Risk Assessment*⁴

Appellant argues that the COMPAS program, which the state has developed as the actuarial risk and needs assessment tool required by subsection 24-21-10(F)(1) (Supp. 2023), was not used by the Board when considering his parole request because, according to Appellant, he was never interviewed by a parole examiner prior to his parole hearing. Appellant contends that because of this failure, the Board overlooked factors such as his mental health condition and his ability to adapt to life outside of prison in its determination. Respondent argues that Appellant's contention regarding the Board's failure to consider the requisite eligibility criteria is unsupported by the Record.

Subsection 24-21-10(F)(1) of the South Carolina Code (Supp. 2023) requires the Board to use a risk assessment tool when deciding whether to grant or deny parole. The risk assessment is a separate requirement that the Board must consider along with "the written, specific criteria" for granting parole referenced in section 24-21-640 ("[t]he board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records."). It is the Department's policy not to release the results of any inmate's COMPAS score and there is no statute or rule requiring such release. *See* S.C. Code Ann. § 24-21-640 (2007 & Supp. 2023) (only requiring the Board to disclose the *criteria* used when rendering parole determinations).

Here, the Record indicates that the Board disclosed to Appellant the criteria it used when rendering its parole determination, including the statutory factors found under section 24-21-640. The Board's determination additionally indicates that the Board gave credence to these factors and

⁴ Identified in Issue Nos. 1 and 2 of Appellant's Brief.

to its actuarial risk assessment of Appellant, per subsection 24-21-10(F)(2). Because the Board was not required to outline the results of Appellant's risk assessment during its review of Appellant's request for parole, and because the Department properly notified Appellant of the criteria to be considered as required by section 24-21-640, no statutory or due process violation occurred. *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 15 (1979) (“[W]e find nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular ‘evidence’ in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release.”); *id.* at 15-16 (“To require the parole authority to provide a summary of the evidence would tend to convert the process into an adversary proceeding and to equate the Board's parole-release determination with a guilt determination.”). Accordingly, the Court finds that the Board implemented the proper procedure when it declined to grant Appellant parole.

Appellant additionally contends that the Board permanently denied him parole because he was not assessed by a parole examiner prior to his hearing. The Board acknowledges in its Brief that Appellant was not interviewed by a parole examiner prior to the date of his parole hearing because Appellant's institution was on lockdown at the time due to the pandemic. However, this fact does not support Appellant's conclusion that the Board was somehow precluded from considering its findings from prior assessments in the instant proceeding, and the Court has found no statute that prohibits the Board from considering this information. To the contrary, the current criteria for parole consideration includes historical factors such as the inmate's history of violence and the nature of the inmate's underlying offense, among other considerations, and the Board maintains discretion in determining how these factors are weighed. *See* S.C. Code Ann. § 24-21-640 (2007 & Supp. 2023) (“The board must carefully consider the record of the prisoner before, during, and after imprisonment”); *see also* South Carolina Department of Probation, Parole, and Pardon Services, *Criteria for Parole Consideration*, <https://www.dppps.sc.gov/content/download/200476/4681336/file/Criteria+for+Parole+Consideration.pdf> (last accessed March 20, 2024) (“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 inmate under review.”). Moreover, Appellant does not contend that his institution's temporary lockdown denied him access to the Parole Board.

Failure to Receive a Mental Health Report per S.C. Code Ann. § 24-21-610⁵

Appellant argues that the Board permanently denied him parole because the Board did not receive a “report as to his mental health condition” per section 24-21-610 of the South Carolina Code (2007). This statute 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.” *Id.* In other words, the statute outlines additional procedures that must be taken by the Department prior to releasing inmates who have been found conditionally qualified for parole. Since Appellant was denied parole, this provision does not pertain to him.

Appellant's Remaining Issues on Appeal⁶

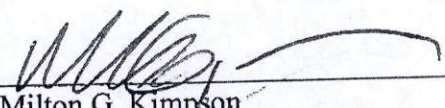
Appellant makes several arguments that require this Court evaluate the substantive reasons for the Board's decision. In its appellate capacity, the Court cannot undertake such an exercise. *See* S.C. Code Ann. § 1-23-600(D) (2005 & Supp. 2023) (“An administrative law judge shall not hear... an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services.”). Consequently, Appellant's remaining issues (Issue Nos. 5-8), which pertain to the Board's rationale for denying Appellant parole, do not identify cognizable liberty interests reviewable by this Court. *See Cooper*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008) (“[T]he [p]arole [b]oard is the sole authority with respect to decisions regarding the grant or denial of parole.”); *id.* at 500, 661 S.E.2d at 112 (holding the parole board's decision would “constitute a routine denial of parole and the ALC would have limited authority to review the decision” if the parole board “states in its order denying parole that it considered the factors outlined in section 24-21-640 [of the South Carolina Code of Laws] and the fifteen factors published in its parole form”). Here, the Board's decision states that it considered “(1) the characteristics of Appellant's current offense(s), prior offense(s), prior supervision history, prison disciplinary records, and/or prior criminal record”; (2) the factors published in Department Form 1212; (3) the factors outlined under section 24-21-640; and (4) the actuarial risk needs assessment factors under section 24-21-10(F)(1). The Board outlined three findings of fact, which consisted of: “(1) Nature and Seriousness of Current Offense; (2) Indication of Violence in This Or Previous Offense; [and] (3) Use of Deadly Weapon in This or Previous Offense.”

⁵ Identified in Issue Nos. 3 and 4 of Appellant's Brief.

⁶ Identified in Issues No. 5-8 of Appellant's Brief.

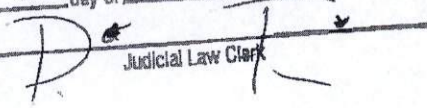
The Board's decision thus satisfies the minimal due process requirements outlined in *Cooper*. Because the Board's decision is in conformity with these requirements, the Court finds that the Board followed proper procedure and the ALC has limited authority to review the Board's decision on appeal. *Id.*

Because Appellant has not identified a cognizable liberty interest demonstrating a denial of due process, **IT IS THEREFORE ORDERED** that this case is **DISMISSED** with prejudice. **AND IT IS SO ORDERED.**



Milton G. Kimpson
Administrative Law Judge

March 22, 2024
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).
This 22 day of MARCH 2024
By:  _____
Judicial Law Clerk

The State of South Carolina
FILED
MAR 20 2024
22
RL
Administrative Law Court

COPY