

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 Ralph K. Anderson, III, Chief Administrative Law Judge
Docket Number 23-ALJ-15-0031-AP

Appellate Case No.: 2024-000295

MICHAEL PETTINATO, #218405,APPELLANT

v.

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

BRIEF OF RESPONDENT

Matthew C. Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
Columbia, South Carolina 29202
Matthew.Buchanan@ppp.sc.gov
(803) 734-9283
SC Bar No 73740
Attorney for Respondent

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STATEMENT OF ISSUES ON APPEAL

1. Did the ALC properly dismiss the appeal when the notice of appeal was clearly filed outside of the limit required by SCALC Rule 59, and that the prior notice was in the improper format required by SCALC Rule 57?

STATEMENT OF THE CASE

On April 9, 1994, Appellant shot his ex-wife, Sandra Dee Pettinato, several times with a pistol causing her death between 7:30 and 8:00 a.m. This happened at the Woodside Apartments parking lot located on Fernwood Glendale Road in Spartanburg, South Carolina. Appellant was eventually arrested and charged with the offenses of murder and possession of a firearm during a commission of a violent crime.

Appellant pled guilty to murder on November 30, 1994, before the Honorable J. Durham Cole and to possession of a firearm during a commission of a violent crime. The court sentenced him to a term of incarceration for the remainder of his natural life with a concurrent five year sentence for the secondary offense. At the time the Appellant committed this offense, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

Appellant made his initial appearance before the Parole Board on June 11, 2014. On that date and on subsequent appearances, the Board denied him parole. Appellant's last hearing before the Parole Board occurred on April 12, 2023. Respondent sent a letter to Appellant dated March 8, 2023, informing him of his hearing. R.*. Appellant sent a letter to Respondent asking for his hearing to be rescheduled because he claimed he received his letter on March 20, 2023. R.*. His request was denied. Though Appellant was given an opportunity to appear before the Board on April 12, 2023, he refused to appear so the hearing was conducted in his absence. At the conclusion of the hearing the Board denied parole unanimously due to: 1) the nature and seriousness of the current offense and 3) use of a deadly weapon in this or previous offense.

Upon receiving the notice of rejection, dated April 12, 2023, Appellant filed a "motion to vacate, or rehearing, or reconsideration" with Respondent. Respondent replied in a letter dated

June 12, 2023, denying his request. On September 26, 2023, Appellant filed a notice of appeal to the Administrative Law Court, arguing he did not receive adequate notice of the hearing and that the Board made him permanently ineligible for parole by relying on unchangeable factors when denying parole. Respondent's brief follows.

In an order filed February 6, 2024, the ALC dismissed Appellant's appeal due to the fact that he filed the notice of appeal out of the time allowed by ALC rules. Appellant now brings this appeal.

In reply, Respondent will argue that the ALC properly dismissed the appeal. This 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).

ARGUMENT

1. The Administrative Law Court properly dismissed the appeal because SCALC Rule 59 requires notice of appeal within thirty days of receipt of the final decision.

Appellant argues that he filed his notice of appeal within the designated time frame as required by SCALC Rule 59, which requires the notice of appeal to be served within thirty days of receipt of the final decision. However, his prior attempt was not in the proper format as required by SCALC Rule 57.

As Judge Anderson stated in his order, the filing of proper notice within the prescribed timeframe is a jurisdictional requirement, and courts may not extend the deadlines. *Hill v. S.C.*

Dep't of Health & Env't Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010).

Appellant argues that he filed and served a notice of appeal on July 5, 2023, albeit with the incorrect form. However, submitting notice using the proper forms is also a mandatory requirement. SCALC Rule 57. “The Court shall prescribe the content and format of forms required by these rules. The use of required forms as prescribed is mandatory.”

2. The Department provided adequate notice of the date of Appellant’s parole hearing.

Respondent submits that the above analysis of the ALC’s decision in dismissing the appeal for a fatal procedure is correct and all that should be considered in this appeal. However, if this Court wishes to take up the substance of Appellant’s appeal to the ALC, Respondent will address Appellant’s arguments.

Appellant claimed that he received notice of his parole hearing twenty-three days before the date of his hearing instead of the customary thirty, and asserted that the seven-day delay in his notice violated his due process rights. Respondent would submit that Appellant failed to describe how his due process rights were violated, nor how he was prejudiced by receiving notice twenty-three days before the hearing instead of thirty. Furthermore, Respondent delivered the notice of hearing to the Department of Corrections on March 8, 2023; Appellant claims he received the document on March 20, 2023. Respondent submits that any perceived delay was outside its control.

Appellant relies on S.C. Code § 1-23-320(A) when he states that he is entitled to thirty days’ notice of his parole hearing. However, he errs when he claims that parole hearings are contested cases. Contested cases are defined in S.C. Code § 1-23-310(3), which states contested cases are proceedings “including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.”

Clearly, a parole hearing is not related to “ratemaking, price fixing, and licensing.” Furthermore, inmates clearly do not have the right to receive parole,¹ so parole consideration hearings are not hearings wherein “legal rights, duties or privileges” are determined by the Board. See *Furtick v. South Carolina Dep’t of Probation, Parole and Pardon Services*, 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003) “the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process.” (Emphasis in original).

The Parole Board does not deny eligibility when it denies an inmate parole. In fact, the letter of denial informs Appellant that he will be notified before his next scheduled parole date. R. *. When the Board follows the procedures outlined in *Cooper*,² its denial of parole would be considered routine and this Court would have limited authority to consider the case further.

Appellant misconstrued *Cooper* when he cited to it as support that parole consideration hearings are contested cases. The Supreme Court in *Cooper* does refer to the APA in the context appeals to the Administrative Law Court, but with the clear caveat that the Court is “cognizant of the unique status accorded parole and our precedent of limited appellate review notwithstanding the APA.” *Id.* at 500 n. 6, 661 S.E.2d at 112 n. 6. If the Supreme Court wished to determine parole consideration hearings as contested cases, it could have chosen to do so. Instead, it made it clear that parole hearings are unique.

Because of the limited due process rights provided to inmates who are being considered for parole and not parole eligibility, Respondent submits that Appellant has not provided any support for his position that his due process rights were violated by receiving twenty-three days

¹ “[P]arole is a privilege, not a right.” *Sullivan v. South Carolina Dep’t of Corrections*, 355 S.C. 437, 443 n. 4, 586 S.E.2d 124, 127 n. 4 (2003).

² *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

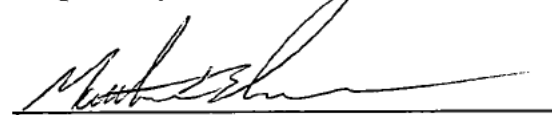
notice instead of thirty. Due process rights are minimal in the parole context,³ but even when due process rights are at their strongest criminal defendants still must bear the burden of proving actual prejudice. See *State v. Brazell*, 325 S.C. 65, 72, 480 S.E.2d 64, 68 (1997) (The defendant bears the burden to prove pre-indictment delay caused actual prejudice to his right to a fair trial.)

Respondent submits that Appellant failed to show how the twenty-three day notice adversely affected his limited due process rights to a hearing. Therefore, this Court should dismiss the appeal.

CONCLUSION

The ALC properly dismissed the appeal because notice of the appeal was untimely. The ALC was constrained to dismiss the appeal in light of the clear jurisdictional limitations when notice of the appeal is not filed within the proscribed time limit. Therefore, Respondent respectfully requests this Court to affirm and dismiss this appeal.

Respectfully submitted,



Matthew C. Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
Columbia, South Carolina 29202
Matthew.Buchanan@ppp.sc.gov
(803) 734-9283
SC Bar No 73740
Attorney for Respondent

Columbia, South Carolina
August 6, 2024

³ The United States Supreme Court has held that inmates eligible for parole are only afforded a hope of release, a far cry from the due process considerations when parole has already been granted and the State is seeking a revocation. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 10-11 (1979). “That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained.”

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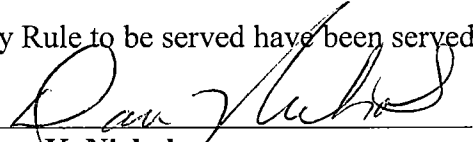
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,RESPONDENT

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 6th day of August, 2024, by depositing a
copy of the same in the United States mail, postage prepaid, addressed to:

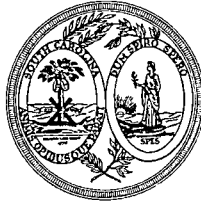
Michael Pettinato, #218405
Allendale Correctional Institution
1057 Revolutionary Trail
Fairfax, SC 29827

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


Dawn K. Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 207
Columbia, South Carolina 29202

State of South Carolina
Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor



JODI GALLMAN
Acting Director

293 GREYSTONE BLVD
POST OFFICE BOX 207
COLUMBIA, SOUTH CAROLINA 29202
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.dppps.sc.gov/

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

**Re: Michael Pettinato, #218405 v. SCDPPPS
24-000295**

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter, along with proof of service in the above referenced case.

Sincerely,

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

Matthew C. Buchanan
General Counsel

MCB:dn

Enclosures

cc: Michael Pettinato, #218405

State of South Carolina
Department of Probation, Parole, and Pardon Services
293 GREYSTONE BOULEVARD, POST OFFICE BOX 207
COLUMBIA, SOUTH CAROLINA 29202

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SC Court of Appeals

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



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