

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Jeremiah DiCapua, 105096,

The Appellant,

vs.

South Carolina Department of Probation,  
Parole and Pardon Services,

Respondent.

Docket No. 13-ALJ-15-0025-AP

ORDER

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MAY 22 2014

SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to the appeal of Jeremiah DiCapua ("The Appellant"), an inmate incarcerated with the South Carolina Department of Corrections. On April 3, 2013, the South Carolina Department of Probation, Parole and Pardon Services ("Department") notified the Appellant that the South Carolina Parole Board ("Board") rejected him for parole. The Appellant filed a Motion for Rehearing which was denied by a letter dated June 7, 2013. On July 1, 2013 the Appellant filed a Notice of Appeal with the ALC seeking review of the Board's denial of parole. On July 3, 2013, Tommy A. Thomas, Esquire, filed a duplicate Notice of Appeal. The court consolidated the two Notices of Appeal into the present case.

The Appellant has a unique parole history which is the basis of his appeal. The Appellant was sentenced to life in prison for the offense of murder in 1980. At the time, South Carolina law allowed an individual parole eligibility upon the service of ten (10) years. The Appellant was granted parole on August 9, 2000. In 2005, the Appellant was arrested and convicted on drug charges. This conviction was set aside by the Honorable Michael Baxley. The State appealed Judge Baxley's decision before the Court of Appeals. The Court of Appeals reversed Judge Baxley's decision. State v. DiCapua, 373 S.C. 452, 646 S.E.2d 150 (Ct. App. 2007). The Supreme Court of South Carolina granted a Writ of Certiorari and proceeded to reverse the decision of the Court of Appeals, ruling that Judge Baxley has the authority to sua sponte order a new trial. State v. DiCapua, 383, S.C. 394, 680 S.E.2d 292 (2009).

Page 1 of 3

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SC ADMIN. LAW COURT

During the appeal process, the Appellant served a two year sentence for the drug charges. Upon the conclusion of his sentence in 2007, the Department revoked his parole because of the new conviction. The Appellant appeared before the Department for parole hearings on March 16, 2011 and April 3, 2013 and brought the 2009 reversal of his drug charges to the attention of the Department on both occasions. On both occasions, the Department declined to grant the Appellant parole. The Appellant now argues that the Department has deprived him of a state created liberty interest by failing to re-instate his parole. The Appellant further argues that the Department erred in its most recent denial of parole because the basis for its denial, (1) the nature and seriousness of his current offense and (2) his that his prior criminal record indicates poor community adjustment, no longer exist because the conviction for drug charges has been reversed.

### DISCUSSION

An individual has a right to ALC review of a final decision of the Board only when that decision affects a liberty interest for which due process is required. See Furtick v. S.C. Dep't of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146, 149, 150 (2003); see also Sullivan v. South Carolina Dep't of Corrections, 355 S.C. 437, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review). In Furtick, the South Carolina Supreme Court held that although an inmate has a liberty interest in parole *eligibility* pursuant to S.C. Code Ann. § 24-21-620, the statute creates no such liberty interest in the granting of parole itself. Furtick, 352 S.C. at 598, 576 S.E.2d at 149 n.4. Therefore, claims arising from the Board's decision denying parole are not appealable to the ALC, only claims that the Board failed to consider the appropriate criteria so as to be tantamount to an abrogation of parole eligibility. Cóoper v. S.C. Dep't. of Probation, 377 S.C. 489, 661 S.E.2d 106 (2008).

The Appellant challenges the sufficiency of the Board's decision on two factors. First, the Appellant alleges that the Department is depriving him of a vested liberty interest in the parole that was originally revoked in 2007. The Appellant claims that when parole was granted, it created a vested liberty interest. The Appellant argues that, when the conviction for which his parole was revoked in 2007 was reversed in 2009, his parole should have been reinstated. The Department's failure to reinstate his parole, the Appellant argues, is a deprivation of the Appellant's state created liberty interest in that parole. Next, the Appellant alleges that the

Department based its decision to deny parole on criteria that no longer exists since his conviction for drug charges was reversed. The Department based its decision to deny the Appellant parole on the basis of (1) the nature of seriousness of the current offense and (2) that his prior criminal record indicates poor community adjustment. The Appellant argues that, because his conviction for drug charges was reversed, the "current offense" no longer exists. The Appellant also argues that the Department based its finding of poor community adjustment on the parole revocation which, according to the Appellant, the Department should no longer consider since the conviction for which the revocation was based has been reversed.

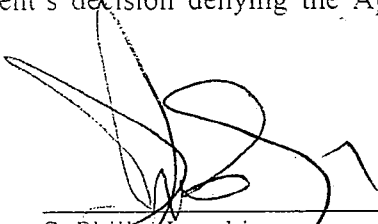
As outlined in Furtick and Cooper, this court only has jurisdiction over claims that an appellant was denied eligibility for parole and claims that the Board failed to consider the appropriate criteria so as to be tantamount to a denial of parole eligibility. Therefore, this court may not consider the Appellant's argument regarding the reinstatement of his original parole. Further, this court may not consider whether the Department's decision to deny parole was based on sufficient findings of fact. This court may only address whether the Board failed to consider the appropriate criteria in making its decision. The court in Furtick established that, although parole is a privilege and not a right, inmates still have a liberty interest in parole eligibility. 352 S.C. at 598, 576 S.E.2d at 149 n. If the Board fails to consider the criteria set forth in S.C. Code Ann. § 24-21-640, the inmate is denied his liberty interest in parole eligibility. Cooper, 377 S.C. 489, 661 S.E.2d 106 (2008). However, as long as the Board considers all of the factors required by statute, it has protected the inmate's liberty interest in parole eligibility and it has the discretion to deny parole based on any of the factors found in § 24-21-640 or its own criteria. Id. The Board's decision indicates that it considered all the appropriate factors before making its decision to deny the Appellate parole. Therefore, the court cannot grant relief to the Appellate.

#### ORDER

For the foregoing reasons, the Department's decision denying the Appellant parole is **AFFIRMED.**

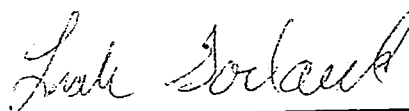
**AND IT IS SO ORDERED.**

April 16, 2014  
Columbia, South Carolina

  
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S. Phillip Lenski  
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Leah E. Garland, 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).



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Leah E. Garland  
Judicial Law Clerk

April 16, 2014  
Columbia, South Carolina

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SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA  
**Administrative Law Court**  
EDGAR A. BROWN BUILDING  
1205 PENDLETON STREET, SUITE 224  
COLUMBIA, SOUTH CAROLINA 29201

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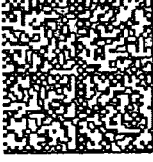
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JEREMIAH DICAPUA, 105096  
MCCORMICK CORRECTIONAL INSTITUTION  
RT. 2, BOX 100  
386 REDEMPTION WAY  
MCCORMICK, SC 29899



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