

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Albarr Abdullah, #191449,

Appellant,

vs.

South Carolina Department of Probation
Parole and Pardon Services,

Respondent.

Docket No. 12-ALJ-15-0042-AP

ORDER

This matter is before the Administrative Law Court (ALC) pursuant to the appeal of ~~Albarr Abdullah (Appellant) an inmate incarcerated with the South Carolina Department of~~ Corrections filed on December 10, 2012, alleging the Department of Probation, Parole, and Pardon Services (Department) failed to schedule his parole review hearing within two (2) years from the date of his previous parole hearing. On December 18, 2012, the Department notified Appellant that his next Parole Board hearing would be held on January 30, 2013. Appellant filed his initial brief alleging that the Department extended the time he was to serve by failing to hold a parole review hearing two (2) years from the date of his previous parole review hearing pursuant to S.C. Code Ann. § 24-21-645 (Supp. 2012).

The Appellant was convicted of committing the offenses of armed robbery, attempted armed robbery, and assault and battery with intent to kill, each classified as violent offenses. Due to the classification as violent offenses, Appellant appears before the Board every two years pursuant to S.C. Code Ann. § 24-21-645 (Supp. 2013). Appellant appeared before the Board on February 16, 2000, August 20, 2002, August 24, 2004, August 23, 2006, October 8, 2008, October 20, 2010, and most recently on January 30, 2013. The issues presented in this case are:

1. Does the handling of Appellant's parole hearing schedule constitute an *ex post facto* violation?
2. Was the 102-day delay in providing a parole hearing from October 20, 2012 to January 30, 2013 a material violation of S.C. Code Ann § 24-21-645(D)?
3. If so, what is the appropriate remedy?

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SC ADMIN. LAW COURT

Ex Post Facto

Appellant argues that the delay in holding his parole review hearing constitutes an *ex post facto* violation. This argument is without merit. *Ex post facto* violations occur when a change in the law retroactively alters the definition of a crime or increases the punishment for a crime. Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891 (1997). In this case, Appellant was convicted of his offenses on November 11, 1992. At that time, S.C. Code Ann. § 24-21-645 required that “upon a negative determination of parole, prisoners in confinement for a violent crime...must have their cases reviewed every two years for the purpose of determination of parole.” There has been no change in the law after Appellant’s conviction which has increased the punishment for the crimes for which Appellant was convicted.

Timeliness of Parole Hearing

Appellant argues that the Department wrongfully extended his parole reconsideration dates. “It is axiomatic that any period of incarceration implicates a sufficient liberty interest to trigger due process requirements.” Steele v. Benjamin, 362 S.C. 66, 72, 606 S.E.2d 499, 503 (Ct. App. 2004). A delay in an inmate’s parole review hearing produces a sufficient risk of prolonging incarceration to trigger due process requirements. *Id.* Although inmates have a liberty interest in parole eligibility, there is no liberty interest in parole itself. Furtick v. S. Carolina Dept. of Prob., Parole & Pardon Servs., 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003). Because the failure to hold a timely parole hearing can implicate a liberty interest, Appellant is entitled to a review to determine if his due process rights were met by the Department’s procedures in this case.

At the outset, the precise meaning of the statute creating the right to a hearing must be considered. Where a statute sets forth a mandatory time requirement but is silent as to how the time limit is to be enforced, a court must examine the statutory scheme and its purpose using the principles of statutory construction to discover the likely legislative intent. See Johnston v. S. Carolina Dept. of Labor, Licensing, & Regulation, S. Carolina Real Estate Appraisers Bd., 365 S.C. 293, 298, 617 S.E.2d 363, 365 (2005).

In South Carolina the cardinal rule of statutory interpretation requires the trier of fact to ascertain the intent of the legislature. State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002). In doing so, the court must give a reasonable and practical construction to the statute that is consistent with the purpose and policy expressed in the statute. Davis v. NationsCredit Fin.

Servs. Corp., 326 S.C. 83, 484 S.E.2d 471 (1997). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002). The determination of legislative intent is a matter of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995).

Our Supreme Court has held that where “the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 581 (2000). “Where a statute is ambiguous, the Court must construe the terms of the statute.” Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. Adams v. Texfi Industries, 320 S.C. 213, 464 S.E.2d 109 (1995). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

S.C. Code Ann § 24-21-645 provides: “upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 *must have their cases reviewed every two years* for the purpose of a determination of parole.” S.C. Code Ann. § 24-21-645(D) (emphasis added). The question presented here is whether a hearing approximately three months after the two-year anniversary of the negative determination of parole will suffice to comply with the statute. South Carolina courts have held that where the language of a statute requires a hearing “within” a certain time, that time period is mandatory. Starnes v. S. Carolina Dept. of Pub. Safety, 342 S.C. 216, 220, 535 S.E.2d 665, 667 (Ct. App. 2000). The statutory language at issue does not require that the parole review must occur “within” two years of the previous parole decision, but it does include mandatory language stating that the review must occur every two years. Because the legislature declined to use the word “within” in the statute¹, I

¹ Compare the language of S.C. Code Ann. § 24-21-645(D) (“must have their cases reviewed every two years”) to § 13-7-200 (“shall be afforded a hearing within thirty days”); § 38-73-130 (“shall hear the party or parties within twenty days after receipt of the request”); § 46-27-230 (“shall schedule a hearing within thirty days after receipt”); § 1-23-660 (“within thirty days after receipt”).

conclude that the hearing must be held within a reasonable time at or about the two year anniversary of the previous denial of parole.

The Department contends that to warrant a reversal of its decision denying Appellant's grievance, Appellant must show both error of the ruling and resulting prejudice. Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002). I agree that showing of prejudice is required to establish that a delay was unreasonable. This result comports with decisions in other jurisdictions requiring that a due process violation in a parole revocation hearing² occurs "only when [the petitioner] establishes that the Commission's delay in holding a revocation hearing was both unreasonable and prejudicial." McNeal v. United States, 553 F.2d 66, 68 (10th Cir. 1977); Camacho v. White, 918 F.2d 74, 79 (9th Cir. 1990) (internal citations omitted); Thomas v. U.S. Parole Comm'n, CIV. A. 92-590(CRR), 1992 WL 193695 (D.D.C. Aug. 4, 1992); Harris v. Day, 649 F.2d 755, 762 (10th Cir. 1981).

In Marietta Garage, the South Carolina Court of Appeals determined that in a situation involving an agency's failure to provide a timely hearing as mandated by statute there was no meaningful relief that the courts could give where the hearing had been held and action had been taken belatedly as required by the statute in question and the APA. Marietta Garage, 352 S.C. at 98. Courts in other jurisdictions held that a due process claim is moot when hearing has been received since a fair hearing is the only remedy to which a petitioner is entitled. Vongsengchanh v. United States, 7:12CV00444, 2013 WL 1352606 (W.D. Va. Apr. 3, 2013); McNeal 553 F.2d at 68.

In this case, Appellant received a hearing on January 30, 2013. There is nothing to indicate that hearing did not comply with the requirements of due process. Moreover, Appellant experienced no prejudice or injury as a result of the delay in the scheduling of his parole hearing because he was again denied parole. Therefore, while I do not condone the Department's three-month delay in affording Appellant the parole review hearing he was entitled to, I conclude that Appellant has failed to show that he was prejudiced by the delayed hearing because he has now received the hearing (which is the only relief this Court could grant him) and because his parole was denied in the subsequent hearing.

² Time limitations for parole revocation hearings are established by statute, much like the deadline considered in this case. McNeal, 553 F.2d at 68.

Remedy

Appellant requests immediate release from prison and money damages as the remedy for the failure to provide him with a timely parole hearing, but provides no legal support for those remedies. Generally, an agency does not lose jurisdiction to act for failing to comply with statutory time limit unless statute expressly sets time limit *and* specifies a consequence. Johnston, 365 S.C. at 298; Brock v. Pierce County, 476 U.S. 253, 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986). The assessment of civil penalties against an agency found to be in violation of the Administrative Procedures Act may not be granted absent an express provision recognizing such a claim. Marietta Garage, 352 S.C. at 100. Starnes, 342 S.C. at 220 (failure to hold a timely hearing on drivers license suspension warranted reinstatement of the motorist's license). As discussed above, the remedy this Court can offer is to require a hearing that meets the requirements of due process. As that has been accomplished in this case, no further remedy is available.

IT IS THEREFORE ORDERED that Appellant's request for relief is **DENIED** and the denial of the grievance is **AFFIRMED**.

AND IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

June 25, 2014
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 25th day of June 2014
By: R. E. Cole
Judicial Law Clerk