STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

George Tomlin, #166361,	)	Docket No. 14-ALJ-15-0037-AP
	)	
Appellant,	)	
	)	
vs.	)	**ORDER**
	)	
South Carolina Department of Probation, Parole and Pardon Services,	)	
	)	
Respondent.	)	
	)	

FILED
March 3, 2015
SC ADMIN. LAW COURT

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the appeal filed by George Tomlin (Appellant) from a decision of the South Carolina Department of Probation, Parole and Pardon Services (Department) denying him parole. Appellant filed this appeal with the Court on September 9, 2014.

BACKGROUND

Appellant is in the custody of the South Carolina Department of Corrections after pleading guilty to voluntary manslaughter, criminal sexual conduct 2nd, and possession of a weapon during the commission of a violent crime on February 8, 1990.[1] Appellant was sentenced to fifty-five years incarceration for voluntary manslaughter, twenty years for criminal sexual conduct, and five years for the weapons offense. According to the Department, Appellant has completed service for the criminal sexual conduct and weapons offense. Pursuant to the law that existed at the time he committed the offenses, a person convicted of committing a violent offense is eligible for parole upon the service of one-third of his or her sentence. Appellant initially appeared before the Parole Board (Board) on March 17, 2010. The Board denied Appellant parole. Since the initial hearing, Appellant has appeared before the Board an additional two times and has been denied parole each time. Appellant's most recent parole hearing occurred on August 6, 2014, at which time he was denied parole for the following

[1] The Department did not include the documents showing why Appellant was in prison or sentencing sheets in the Record on Appeal. However, Appellant admitted in his brief why he was in jail and the length of his sentence.

reasons: (1) the nature and seriousness of the current offense; (2) the indication of violence in this or a previous offense; and (3) the use of a deadly weapon in this or a previous offense.

Appellant filed a Notice of Appeal on September 9, 2014, stating that the Department's decision is arbitrary, capricious, and whimsical because (1) the Department failed to set forth the risk assessment analysis, evaluation, and/or decision, contrary to the due process clause; and (2) the reasons for rejection for parole are fixed and contrary to the ten-year rule of evidence and therefore violate due process.

The Department filed the Record on Appeal on October 9, 2014. Appellant filed a Brief on October 20, 2014. The Department filed a Supplemental Record on Appeal as well as its Brief on December 11, 2014. Appellant did not file a Reply Brief.

JURISDICTION

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) and *Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003). The Court is authorized to dismiss inmate appeals that do not implicate a state-created liberty or property interest. *See Skipper v. S.C. Dep't of Corr.*, 370 S.C. 267, 279 n.5, 633 S.E.2d 910, 917 n.5 (Ct. App. 2006).

DISCUSSION

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Liberty interests protected by the Fourteenth Amendment may arise from the Constitution itself or from an expectation or interest created by state laws or policies. *Id.*; *Hewitt v. Helms*, 459 U.S. 460, 466 (1983), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

The U.S. Supreme Court has held that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 7 (1979). In other words, "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Meachum v. Fano*, 427 U.S. 215, 224 (1976). Thus, if Appellant has a liberty interest in parole, then it must emanate from state law. *See Ellis v. Dist. of Columbia*, 84 F.3d 1413, 1415 (D.C. Cir. 1996).

A state statute may create a liberty interest in parole where it uses mandatory language. *See, e.g., Bd. of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz, supra.*[2] In interpreting our parole statutes, South Carolina courts have generally held that the temporary denial of parole to a parole-eligible inmate does not, **on its own**, implicate a state-created liberty interest. *See, e.g., Furtick*, 352 S.C. at 598 n.4, 576 S.E.2d at 149 n.4; *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003); *James v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 376 S.C. 392, 656 S.E.2d 399 (Ct. App. 2008). However, this does not mean that the Board's parole-related decisions can never impinge upon a state-created liberty interest. For instance, South Carolina courts have held that a state-created liberty interest is implicated by the permanent denial of parole eligibility, by a change in the time frame in which the Board reviews parole, and by the Board's failure to follow proper procedure in making its decision to deny parole. *See Furtick, supra* (denial of parole eligibility); *Steele v. Benjamin*, 362 S.C. 66, 606 S.E.2d 499 (Ct. App. 2004) (change in time frame for reviewing parole); *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008) (failure to follow proper procedure).

Compliance with Statutory Criteria Governing Parole

In his Brief, Appellant contends that the Board's decision was defective because it failed to address the "Effective Risk Assessment Tools" in the letter denying him parole. S.C. Code Ann. § 24-21-10(F)(1) (Supp. 2014) requires:

> 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.

The Department refers to this assessment as "COMPAS" (Correctional Offender Management Profiling for Alternative Sanctions). An affidavit filed with the Supplemental Record on Appeal shows that Appellant completed a COMPAS risk assessment prior to appearing before the Board in August 2014 and that the Board had the results of the COMPAS risk assessment at the time of Appellant's hearing. Appellant argues that because the COMPAS

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[2] As explained in *Brown v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 05-ALJ-15-00013-AP (Nov. 17, 2006), it is the Court's view that the correct methodology to apply in determining whether state law creates a liberty interest **with respect to parole matters** is the methodology used in *Greenholtz* and *Allen*, not that used in *Sandin v. Conner*, 515 U.S. 472 (1995).

risk assessment was not mentioned in the denial of parole letter, the Department did not consider it.

The South Carolina Supreme Court provided guidance for this issue in *Cooper v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008). The Court emphasized:

> [I]n future parole review hearings the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24–21–640 and the fifteen factors published in its parole form. If the Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure. Under that scenario, the ALC can summarily dismiss the inmate's appeal.

Indeed, S.C. Code Ann. § 1-23-600(D) (Supp. 2014) states in pertinent part that "[a]n administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving . . . the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." Thus, this Court is concerned only with the mandatory procedural requirements as set forth in S.C. Code Ann. § 24-21-640 (Supp. 2014) and the fifteen (15) factors found in the Department's parole form. Section 24-21-640 mandates in pertinent part the following:

> The board must carefully consider the record of the prisoner before, during, and after imprisonment, and no 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.

The Department's fifteen (15) factors are set forth in its Form 1212, a copy of which Appellant received on March 19, 2014, during his pre-parole investigation and prior to his August 6, 2014 parole hearing. The Court notes that the first factor on the list on Form 1212 is "The risk the inmate poses to the community," which is a factor in the COMPAS assessment.[3] Thus, it appears that the Board did take the COMPAS assessment into consideration.[4]

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[3] Rather than relying upon the submission of an affidavit, it appears more practicable for the Department to simply note on FORM 1212 or by a separate document in the Record that the COMPAS risk assessment was performed and considered in making a parole determination. This would clarify from the outset that the COMPAS risk assessment was performed.

[4] In addition, Appellant failed to file a Reply Brief to dispute that a COMPAS assessment was performed and submitted to the Board for consideration at the parole hearing.

Whether the use of Appellant's prior offense as a reason for denial of parole violates the South Carolina Rules of Evidence or South Carolina Law

Appellant argues that the use of his prior offense is in violation of Rule 609(b) of the South Carolina Rules of Evidence (SCRE). The Court notes that the South Carolina Rules of Evidence "govern proceedings in the courts of South Carolina." *See* Rule 101, SCRE. Rule 609, SCRE exists "[f]or the purpose of attacking the credibility of a witness" at a trial. A parole hearing is not a trial. Additionally, Rule 609(b), SCRE conflicts with the mandatory procedural requirements as set forth in S.C. Code Ann. § 24-21-640 (Supp. 2014) and the fifteen (15) factors found in the Department's parole form. Section 24-21-640 mandates in pertinent part the following:

> The board must carefully consider the record of the prisoner **before**, during, and after imprisonment, and no 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 Ann. § 24-21-640 (Supp. 2014) (emphasis added).

Here, in its parole denial letter, the Board expressly stated that it considered "all of the factors published within Department Form 1212 (criteria for parole consideration), as well as the factors outlined in Section 24-21-640 of the South Carolina Code of Laws" in reaching its decision. The Board stated that its decision was based on the following three factors: (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 offence. All of these factors fall within the scope of the criteria set forth in Section 24-21-640 and the Board's parole form.[5] Appellant nevertheless

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[5] The Board's parole form lists the following non-inclusive criteria: (1) The risk the inmate poses to the community; (2) The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it; (3) The inmate's prior criminal records and his/her adjustment under any previous programs or supervision; (4) The inmate's attitude toward his/her family, the victim, and authority in general; (5) The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself; (6) The inmate's employment history, including his/her job training and skills and his/her stability in the work place; (7) The inmate's physical, mental and emotional health; (8) The inmate's understanding of the cause of his/her past criminal conduct; (9) The inmate's efforts to solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational educational courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems; (10) The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for

claims that the Board decision was erroneous because some of its reasons are based upon the facts of his criminal offense and cannot be changed by his actions while incarcerated. However, the Board may not grant parole unless it is satisfied that **all** of the criteria set forth in Section 24-21-640 (with limited exceptions not applicable in this case) are met, including that "the interests of society will not be impaired thereby." S.C. Code Ann. § 24-21-640. Accordingly, the Court concludes that the Board followed the proper procedure in denying parole to Appellant, and that the ALC may therefore dismiss Appellant's appeal.

ORDER

IT IS THEREFORE ORDERED that this appeal is **DISMISSED WITH PREJUDICE.**

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

March 3, 2015
Columbia, South Carolina

gainful employment; (11) The willingness of the community into which the inmate will be released to receive the inmate; (12) The willingness of the inmate's family to allow him/her to return to the family circle; (13) The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole; (14) The feelings of the victim's family, and any witnesses to the crime about the release of the inmate; and (15) Other factors considered relevant in a particular case by the Board. *See Cooper*, 377 S.C. at 494 n.2, 661 S.E.2d at 109 n.2.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, 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).

E. Harvin Belser Fair
Judicial Law Clerk

March 3, 2015
Columbia, South Carolina

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