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SC Court of Appeals

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Jeffery Feltner, #84361,)
)
 Appellant,)
)
 v.)
)
 South Carolina Department of Probation,)
 Parole and Pardon Services,)
)
 Respondent.)
)
 _____)

Docket No. 15-ALJ-15-0052-AP

ORDER OF REMAND

FILED

FEB 23 2016

SC ADMIN. LAW COURT

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("ALC") pursuant to the appeal of Jeffrey Feltner ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections. Following a conviction for murder in 1976, he was sentenced to life in prison with a minimum service of twenty (20) years before parole eligibility. Appellant is appealing the decision of the South Carolina Department of Probation, Parole and Pardon Services ("Department") Parole Board ("Board") to rescind his conditional parole on the basis the mental evaluation was not conducted by a duly qualified psychologist or psychiatrist.

BACKGROUND

Appellant appeared before the Board for a parole hearing on February 18, 2015, which he was subsequently denied. Upon learning he received four (4) votes to grant and three (3) votes to reject, Appellant petitioned the Department for release pursuant to *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.* 404 S.C. 395, 745 S.E.2d 110 (2013). *Barton* only requires a simple majority to authorize parole for violent crimes committed prior to 1987. *Id.*

The Department, by letter dated June 11, 2015, informed Appellant it had determined he did receive the necessary favorable votes and thus would go before the full Board to be placed on conditional parole. Prior to his case going before the full Board on August 12, 2015, for ratification of the conditional parole, Appellant underwent a mental evaluation with Kevin

Chadbourne Downs (“Downs”), a Licensed Professional Counselor.

On August 13, 2015, Appellant was informed the Board decided to rescind the grant of conditional parole. An Order of Parole Rescission was issued by the board on October 28, 2015, on the basis that Appellant had an unfavorable report from his mental evaluation. This appeal followed.

ISSUE

Whether the mental evaluation report, considered by the Board, was proper because it was conducted by a Licensed Professional Counselor instead of a psychiatrist or psychologist.

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 Prob., Parole and Pardon Services*, 352 S.C. 594, 598-99, 576 S.E.2d 146, 149-50 (2003); *see also Sullivan v. S.C. Dep’t of Corrections*, 355 S.C. 437, 443, 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 (2007), the statute does not create a 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. *Cooper v. S.C. Dep’t of Prob., Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). Here, Appellant “is not appealing the denial of parole, but rather, is challenging the method and procedure employed by the Parole Board in reaching its decision.” *Cooper*, 377 S.C. at 502, 661 S.E.2d at 113. A sufficient liberty interest is involved to warrant due process review by this Court. *Id.*

When acting in an appellate capacity, the ALC must apply the criteria of S.C. Code Ann. § 1-23-380(5) (Supp. 2015), which reads:

The court may not substitute its judgment for the judgment of the agency as to the

weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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.

Appellant argues he is entitled to a reexamination of his mental condition followed by a rehearing on the basis the Department did not comply with the statute because the evaluation was not conducted by an appropriate person. S.C. Code Ann. § 24-21-610 (2007) states:

Notwithstanding any other provision of this section or of law, 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**. [Emphasis added].

Downs evaluated Appellant after the determination that Appellant had the necessary number of votes for granting conditional parole but before the Board hearing that was to ratify the vote. Downs is a Licensed Professional Counselor and holds a Master's degree in psychology. At issue is whether Downs, based on his education and credentials, is a duly qualified psychologist for purposes of S.C. Code Ann. § 24-21-610.

In its brief, Respondent refers to Downs as a "non-licensed psychologist." S.C. Code Ann. 40-55-55 (2011) requires a license to engage in the practice of psychology. In order to obtain a license, the applicant must have a doctoral degree in psychology among other requirements such as examinations and supervised experience. S.C. Code Ann. § 40-55-80 (2011). Downs is not a psychologist that simply lacks licensure status, without a doctoral degree in psychology he is not

eligible for a license. Exemptions or exclusions from the licensure requirement are permitted for rendering services that may be similar to, or contain characteristics of, services which are considered psychological in nature. S.C. Code Ann. § 40-55-90 (2011). The statute specifically includes a licensed member of another profession under the regulation of the South Carolina Department of Labor, Licensing and Regulation. S.C. Code Ann. § 40-55-90(A)(1). However, among other things, this exclusion stipulates that the practitioner “does not represent himself to be a psychologist or his services to be psychological.” *Id.*

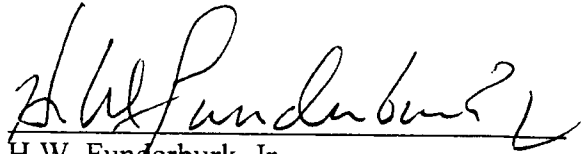
Although Respondent, in its brief, refers to Downs as a “non-licensed psychologist,” nothing in Downs’s curriculum vitae or website indicates that Downs holds himself out as a psychologist or provides psychological services. If he were, he would be in violation of S.C. Code Ann. § 40-55-55 by practicing psychology without a license. Downs cannot, and does not, hold himself out as a qualified psychologist. Likewise, the Board cannot hold Downs to be a qualified psychiatrist or psychologist as required by S.C. Code Ann. § 24-21-610.

Respondent states the evaluation merely caused a re-hearing but was neither the basis for the denial nor was Appellant prejudiced by it. The record contradicts this position as the “Order of Parole Rescission” plainly states the conditional parole was rescinded because Appellant did not receive a favorable evaluation. Further, the issue in the present case is only concerned with whether the evaluation meets the statutory requirements.

Appellant received the necessary number of votes under *Barton* to be granted parole. Before an Order was issued ratifying the Board’s grant of parole, a mental evaluation was conducted which resulted in the Board rescinding its earlier grant of parole. Appellant “does have a right to require the Board to adhere to statutory requirements in rendering a decision” and the Board’s decision is in violation of statutory provisions. As this evaluation did not conform with the statutory requirements of S.C. Code Ann. § 24-21-610, Appellant is entitled to a new mental health evaluation conducted by a psychiatrist or, in the alternative, a psychologist, as contemplated under S.C. Code Ann. § 40-55-10 et seq (2011 & Supp. 2015). After receipt of the report from the new evaluation, a re-hearing shall be held to consider Appellant’s parole.

IT IS THEREFORE ORDERED that this matter is **REVERSED** and **REMANDED** to the Department to conduct a mental evaluation by a psychiatrist or psychologist, and Appellant shall have a re-hearing regarding his parole.

AND IT IS SO ORDERED.



H.W. Funderburk, Jr.
Administrative Law Judge

February 23, 2016
Columbia, South Carolina

FILED

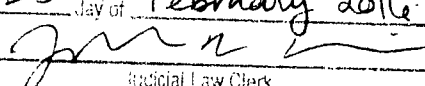
FEB 23 2016

SC ADMIN. LAW COURT

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 23 day of February 2016

By: 
Judicial Law Clerk