

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Johnny Burton, #213281, )  
)  
Appellant, )  
)  
vs. )  
)  
South Carolina Department of Probation, )  
Parole and Pardon Services, )  
)  
Respondent. )

Docket No. 16-ALJ-15-0018-AP

**RECEIVED**

OCT 17 2016

ORDER OF REMAND SC Court of Appeals

**FILED**

OCT 17 2016

STATEMENT OF THE CASE

SC ADMIN. LAW COURT

This matter is before the Administrative Law Court ("ALC") pursuant to the appeal of the above named Appellant ("Inmate"), an inmate incarcerated with the South Carolina Department of Corrections. Inmate appeals from a decision of the South Carolina Department of Probation, Parole and Pardon Services ("Department" or "PPPS") Parole Board, which denied his parole. In his brief, Inmate argues that he was denied due process in violation of the Eighth Amendment of the United States Constitution in the denial of parole because he was a juvenile when he committed his offense. In addition, Inmate argues that he was denied due process because he was unaware of the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") risk assessment tool as criteria for parole consideration. For the following reason, the Department's decision is reversed and the matter remanded to the Parole Board for a new hearing.

**BACKGROUND**

On January 22, 1994, Inmate, who was seventeen at the time, shot a victim several times. A few days later, the victim died as a result of the gunshot wounds. Inmate was charged with the offense of murder and possession of a firearm during the commission of a violent offense.

Inmate was convicted of both charges and sentence to a period of incarceration for the remainder of his natural life for the offense of murder; and five years for the possession of a firearm during the commission of a violent offense.

On February 19, 2014, Inmate made his initial appearance before the Parole Board, which denied Inmate an opportunity to be released on parole. Appellant again appeared before the Parole

Board on April 20, 2016. The Parole Board again denied parole because: 1) the 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 offense.

#### 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 Servs., 352 S.C. 594, 576 S.E.2d 146, 149-50 (2003); see also Sullivan v. S.C. Dep't of Corr., 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 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. Claims arising from the Board's decision denying parole are not appealable to the ALC. See S.C. Code Ann. § 1-23-600(D) (Supp. 2015) ("An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Correction...involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services."). Therefore, only claims that the Board failed to consider the appropriate criteria amount to an abrogation of parole eligibility. Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs., 377 S.C. 489, 661 S.E.2d 106 (2008). The Department, specifically the Parole Board, "has the sole authority to determine parole eligibility." Id. at 496, 661 S.E.2d at 110 (citing State v. McKay, 300 S.C. 113, 115, 386 S.E.2d 623, 623-24 (1989)).

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.

Inmate argues that he was denied due process because he was not given notice of the COMPAS assessment prior to his most recent parole hearing. S.C. Code Ann. § 24-21-10(F)(1) (Supp. 2015) mandates “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.” Pursuant to S.C. Code Ann. § 24-21-640, the criteria for determining parole “must be made available to all prisoners at the time of their incarceration and the general public.”

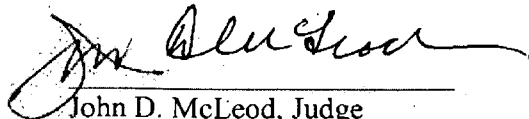
There is nothing in the Record before this Court to substantiate that Inmate was aware of the COMPAS assessment. In its brief, PPS argues that Inmate was informed of the criteria because he was “given a copy of the criteria prior to [his] hearing.” However, conclusory statements in the brief are unavailing. In addition, the Criteria for Parole Consideration, included in the record before this Court, does not inform Inmate of the COMPAS assessment. As a result, Inmate was denied due process because he was not informed of the COMPAS assessment, which is a mandatory criteria for determining parole. Therefore, Inmate is entitled to a new parole hearing. Prior to the hearing, the Parole Board shall inform Inmate of all criteria that will be considered by the Parole Board, including the COMPAS assessment. In addition, the Parole Board shall enter proof into the record that Inmate was informed of the COMPAS assessment.

### ORDER

For the foregoing reasons, the order appealed from is **REVERSED** and this appeal is **REMANDED** to the Parole Board to hold a hearing within thirty (30) days of the date of this Order.<sup>1</sup>

**AND IT IS SO ORDERED**

Columbia, S.C.  
October 12, 2016



John D. McLeod, Judge  
South Carolina Administrative Law Court

#### CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date

<sup>1</sup> Because this case is remanded for a new hearing, the Court will not address the remaining issues raised by Inmate. See Futch v. McAllister Township of Georgetown, Inc., 399 S.E.2d 598, 613, 518 S.E.2d 591, 598 (1999).

in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 12 day of October, 2016

By:   
Judicial Law Clerk