

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
Hon. John D. McLeod, Admin. Law Judge
C/A NO.16-ALJ-0018-AP

C/A No.2016-002131

Johnny Burton -- Respondent

-vs-

South Carolina Department of Probation,
Parole and Pardon Services -- Appellant,

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities,i
Statement of Issue on Appeal,ii
Statement of the Case,1

Arguments:

(1). The ALJ correctly found Respondent was denied due process in not being notified of the COMPAS assessment prior to the hearing,3

(2). The ALJ correctly made an order that can be accomplished through the Appellant's exercise of due diligence, ..7

Conclusion,8

TABLE OF AUTHORITIES

Cooper v. S.C. Dept. of Parole, Pardon Servs. 377 S.C. 489, 661 S.E.2d 106 (2008),.....3,6

Furtick v. S.C. Dept. of Parole, Pardon Servs., 352 S.C. 594, 576 S.E.2d 146 (2003),.....3

Franklin v. Shields, 399 F.Supp. 209 (W.D.Va. 1975),.....6

James v. S.C. Dept. of Parole, Pardon Servs., 377 S.C. 564, 660 S.E.2d 288 (Ct.App.2008),.....6

S.C. Police Offcrrs. Ret. Sys. v. Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990),.....4

S.C. Dept. of Highway & Pub. Trans. v. Dickson, 288 S.C. 189, 341 S.E.2d 135,.....4

State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1989),.....3

Sullivan v. S.C. Dept. of Corr. 355 S.C. 437, 586 S.E.2d 127 (20-03).....3

STATUTES

S.C. Code Ann. §1-23-380(5)(2015),.....3,4

S.C. Code Ann. §1-23-610 (2005 & Supp. 2014),..6

S.C. Code Ann. §24-21-10(F)(1)(Supp.2015),.....4,6

S.C. Code Ann. §24-21-221,.....7

S.C. Code Ann. §24-21-620,.....3

S.C. Code Ann. §24-21-640,.....4,5

STATEMENT OF ISSUE ON APPEAL

(1). The ALJ correctly found Respondent was denied due process in not being notified of the COMPAS assessment prior to the hearing.

STATEMENT OF THE CASE

On January 22, 1994, Respondent who was a "juvenile" (17-years) of age, shot the decedent several times. A few days later the decedent died as a result of the gunshot wounds. Respondent was charged with murder and possession of a weapon during the commission of a violent crime.

Respondent proceeded to trial by a judge and jury and was ultimately convicted as charged. The Judge sentence Respondent to a period of incarceration for the remainder of his natural life for the murder and five years for the weapons offense.

On February 19, 2014 Respondent made his initial appearance in which the Parole denied Respondent parole. Respondent appeared again before the Parole Board on April 20, 2016. The Parole Board again denied Respondent parole by stating: (1) the nature and seriousness of the current offense; (2) indication of violence in this or previous offense; and (3) use of a deadly weapon in this or previous offense.

After being notified of the Board's denial Respondent appealed that decision to the Administrative Law Court (ALC). Within the appeal Respondent raised two (2) grounds: (1) he was being denied due process because he was not put on notice of COMPAS risk assessment tool as a criteria for parole consideration and (2) he was being denied due process in violation of the Eighth Amendment cruel and unusual punishment in the boiler plate parole denials as Respondent was a "juvenile" when he committed the underlying offenses.

On October 12, 2016, the Honorable John D. McLeod, Administrative Law Court Judge issued an order concluding that due to the

"failure" to notify Respondent of the risk assessment [requirement] [the Board violated Respondent's due process rights. The ALC reversed the Parole Board's denial and remanded for another hearing to be held within 30-days of the remand. The court also [ordered] that Respondent must be made aware of the COMPAS assessment prior to the new hearing. The ALC determined that since the case was reversed on the COMPAS claim the court did not address the remaining claim.

Following the ALC's order the Appellant filed the instant appeal and is attempting to argue Respondent was not denied due process in not notifying him of the COMPAS requirement. The Appellant is further arguing that it is not feasible for an inmate to be allowed to appear before the Board within a thirty day time period due to the mandatory thirty day notice that is to be given to the victim's family, solicitor and law enforcement pursuant to South Carolina Law. The Appellant claims that the ALC is ordering the Board to accomplish something that cannot be done without violating South Carolina law.

Respondent will show that the ALC correctly determined that the failure to notify Respondent of the COMPAS denied him due process and further that failure to comply with the ALC's order to conduct another parole hearing within 30-days would prejudice the Respondent as Respondent would have to wait two (2) years for the Board to conduct another hearing as South Carolina law provides that inmates receive parole hearing every two (2) years.

ARGUMENT

- (1). The ALJ correctly found Respondent was denied due process in not being notified of the COMPAS assessment prior to the hearing.

The Administrative Law Court Judge ("ALJ") found that an individual has a right to ALC review of a final decision of the Board when that decision affects the liberty interest for which due process is required. citing Furtick v. S.C. Dept. of Prob., Parole and Pardon Servs., 352 S.C. 594, 576 S.E.2d 146, 149-50 (2003); see also Sullivan v. S.C. Dept. of Corr., 355 S.C. 437, 586 S.E.2d 124, 127 (2003)(explaining the nature of the right to ALC review). In Furtick, Our Supreme Court held: "that although an inmate has a liberty interest in parole eligibility pursuant to S.C. Code Ann. §24-21-620, stating the statute does not create a liberty interest in the granting of parole itself. Furtick, supra, 352 S.C. at 598, 576 S.E.2d at 149 n.4.

Therefore, only claims that the Board "failed" to consider the appropriate criteria amount to an abrogation of parole eligibility are reviewable. Cooper v. S.C. Dept. of Prob., Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008). 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 ALJ must apply the criteria of S.C. Code Ann. §1-23-380(5)(Supp.2015), which states:

The court may not substitute it's 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 procedures;
- (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.

Respondent contended that he was denied due process because he was not given notice of the COMPAS assessment [prior] to his most recent [April 20, 2016] 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 the determining parole "must be made available to all prisoners at the time of their incarceration and the general public."

The word "shall" is considered mandatory. See e.g. S.C. Police Officers. Ret. Sys. v. Spartanburg, 301 S.C. 188, 391 S.C. 239 (1990)("shall" is considered mandatory under the principles of statutory interpretation); see also S.C. Dept. of Highways & Pub. Trans. v. Dickson, 288 S.C. 189, 191, 341 S.E.2d 135.

The ALJ correctly found that the record [is] "silent" before court to substantiate that Respondent was aware of the COMPAS assessment. The ALJ noted that Appellants [PPPS] argued conclusory unsupported statements that Respondent should have been aware of the COMPAS since it was to have been applied to him in his 2014 parole hearing. The ALJ found these conclusory statements unavailing and not supported by the record. In addition the Criteria for Parole Consideration §24-21-640 in the record before the ALJ does not inform the inmate [Respondent] of the COMPAS assessment and as a result Respondent was denied due process.

The Appellant again, now before this Court are attempting to "mislead" this Court by stating that "Respondent should have been aware of the assessment since it was applied to him [Respondent] prior to his 2014 hearing. See Appellant's Brief at 2.

The 2014 parole rejection states verbatim:

NOTICE OF REJECTION dated February 20, 2014:

The Board hereby makes the following CONCLUSION OF LAW: After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record and/ or prior criminal record, as described in the findings of fact below: (2) factors published in Department Form 1212 (Criteria for Parole Consideration) and (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, the Parole Board concludes that parole must be denied.

As is seen in the above verbatim notice of rejection any reference to §24-21-10(F)(1) is "missing" from the Boards conclusion of law and therefore the Appellant's misleading conclusory unsupported assertion should be rejected by this Court as it was by the ALJ. Furthermore, the Appellants admittedly conceded in their

brief before the ALJ that "many inmates have raised this on appeal and due to the failure to reveal if the risk assessment was considered, it resulted in several remand." (Appellant's brief before the ALJ at 6). The Appellant now contends that because the risk assessment was plac[ed] in the 2016 denial that Respondent was or should have been aware of this criteria. Respondent submits that the ALJ correctly determined that Respondent was denied due process because he was not put on [notice] of this criteria [prior] to the hearing. The Due Process Clause requires the Board to make their parole criteria readily available to all inmates. *Franklin v. Shields*, 399 F.Supp. 209 (W.D.Va. 1975). Here there is simply no evidence in the record that Respondent was ever put notice that the Board was using this criteria and the ALJ correctly found such. The ALJ's decision was not guided by error of law or abuse of discretion and therefore the ALJ's decision should be upheld.

Respondent submits his substantive rights have been prejudiced as the Board's findings, conclusion and decision [is] affected by other error of law. See *James v. S.C. Dept. of Prob., Parole & Services*, 377 S.C. 564, 566, 660 S.E.2d 288, 290 (Ct.App.)(Section §1-23-610 S.C. Code Ann. (2005 & Supp 2014) sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALJ on an appeal from an administrative agency), see also *Cooper*, supra (holding an inmate has state-created liberty interest in requiring the Parole Board to adhere to statutory criteria in rendering a decision). While 24-21-10(F)(1) is cited in the 2016 rejection there is no evidence in the record that Respondent was ever put on notice and therefore he has been

denied due process. The record is clear that the Board did not consider the COMPAS in the 2014 hearing and therefore since it appears that the COMPAS was consider in the 2016 rejection Respondent was denied due process because of the failure to put Respondent on notice as correctly determined by the ALJ. Here the Respondent would respectfully remind this Honorable Court that he is pro-se in this action and would ask this Court to liberally construe his pleadings consistent with that of the ALJ.

(2). The ALJ correctly made an order that can be accomplished through the Appellant's exercise of due diligence.

Accordingly the ALJ reversed the Board's decision rejecting parole and remanding for a new parole hearing within 30-days. The Appellant argues that this cannot be accomplished since South Carolina Law requires the director to give a thirty-day written notice of any hearing during which the Board will consider parole for a prisoner to the following persons: (1) any victim of the crime who suffered damage to his person as a result thereof, or if such victim is deceased, to members of his immediate family to the extent practicable; (2) the solicitor who prosecuted the prisoner or his successor in the jurisdiction in which the crime was prosecuted; and (3) the law enforcement agency that was responsible for the arrest of the prisoner concerned, citing S.C. Code Ann. §24-21-221 (Supp.1991).

While the Appellant argues this is not feasible for the Department to schedule a hearing and give "proper notice" to the individuals as required by South Carolina law with the thirty-day time period ordered by the ALJ. Respondent would submit that since

the Appellant's have appealed the ALJ's order the Appellant's have plenty of time to put the parties on "notice" for such a hearing should this Court uphold the ALJ's order and therefore there is no reason for this Court to remand for the ALJ to create another order that can be followed by the Appellants. Respondent would submit that South Carolina law also requir[es] that prisoners be given the opportunity for parole every 24-months and since the Respondent was deprived of due process by not being put on notice of the COMPAS that cause initially has caused the remand it would be unfair to Respondent o have to wait another 24-months for a new parole hearing. Nonetheless, Respondent would respectfully leave this decision to this Court in the interest of justice.

CONCLUSION

Based on the foregoing reasons and the ALJ's Order, Respondent submits the ALJ correctly determined Respondent was denied due process and the ALJ's reversal should be upheld.

Respectfully Submitted,

/s/ Johnny S. Burton

Johnny Burton

Respondent, pro-se

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-vs-

South Carolina Department of Probation,
Parole and Pardon Services -- Appellant,

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed Initial Brief of Respondent on Tommy Evans, Jr. Assistant General Counsel, South Carolina Department of Probation, Parole and Pardon Services, P.O. Box 50666, Columbia, SC. 29250, by placing the aforesaid in a properly addressed, first-class postage affixed envelope and placed in the U.S. Mail this 30th day of 11/16, 2016.

Respectfully Submitted,

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