STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Bernard Bagley, #175851, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	)	Docket No. 17-ALJ-15-0007-AP **ORDER**

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the appeal filed by Bernard Bagley (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 March 28, 2017.

FACTUAL/PROCEDURAL HISTORY

Appellant is in the custody of the South Carolina Department of Corrections as a result of his April 12, 1991 conviction of murder.[1] He was sentenced to life imprisonment, with parole eligibility upon service of twenty (20) years. Appellant initially appeared before the Parole Board (Board) on September 8, 2010, was denied parole, and has been denied parole following each of his three subsequent appearances before the Board. Appellant's last appearance before the Board occurred on March 15, 2017. Thereafter, Appellant was notified of his denial of parole in a letter dated March 16, 2017. In reaching its decision, the Board considered: (1) the characteristics of Appellant's offense(s), prior offense(s), prior supervision history, prison disciplinary record and/or criminal record; (2) the parole consideration criteria published in the Department Form 1212; the factors outlined in S.C. Code Ann. § 24-21-640; and (4) the actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1). The Board weighed these considerations in light of the following findings of fact: (1) the nature and seriousness of Appellant's current offense; (2) an

[1] Appellant had also been arrested on August 23, 1990 on the charge of burglary 1st degree, but that charge was nol prossed on or about August 22, 1996 and was subsequently expunged from Appellant's record pursuant to an order from the circuit court dated April 4, 2001. The Court only mentions this charge because Appellant has made it an issue in his appeal.

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 with this Court on March 28, 2017, alleging that the Parole Board erred in "consider[ing] information on the sentencing sheet 'other condition consecutive to 90-GS-40-5864' that was officially expunged from [his] criminal record . . ." in denying him parole. He also alleged that the Board had applied a "2 1/3 sentence requirement" as a parole-eligibility factor rather than a "1/3" requirement, and that they were basing his parole eligibility on a consecutive sentencing structure that included his expunged offense. On May 12, 2017, Appellant filed his brief, in which he argued the same assertions. The Department filed the Record on Appeal on May 22, 2017 and its brief on July 17, 2017. Appellant filed a Reply Brief on July 20, 2017.

ISSUE ON APPEAL

Did the Department err in denying Appellant parole by applying an improper review criterion?[2]

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003) and *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008). When reviewing the Department's decisions in inmate parole matters, the ALC sits in an appellate capacity. *Furtick*, 352 S.C. at 599; 576 S.E.2d at 149; *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2016) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Consequently, an Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight

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[2] Appellant lists three issues in his brief, but his first and third issues are essentially the same – that the Parole Board erred in considering his expunged burglary 1st offense in denying him parole. Therefore, the Court will combine these two issues into one. As to the second issue, it, too, falls under the issue as presented above. Though Appellant appears to be arguing in his second issue that the Board applied the incorrect sentencing/parole eligibility structure, the foundation for this argument is that the Board was considering Appellant's sentencing sheet that contained an offense that had subsequently been expunged. Therefore, this second issue can be reduced to the other (combined) one: the Board erred in its decision to deny Appellant parole because it considered an improper review criteria, namely, an offense that had been expunged. Moreover, even were the Court to consider this second issue separately from the other (combined) one, the Court would still consider the resolution of the other issue to be dispositive because this second issue hinges on the same premise – that the Board considered Appellant's expunged offense, a premise that the Court rejects. Nevertheless, the Court will address these arguments in the Discussion, *infra*.

of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2016). Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless the Record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly arbitrary or affected by an error of law. *See Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998). Finally, "when appealing an agency's decision, the burden rests squarely on the appellant to prove that substantive rights were prejudiced . . . ." *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 260, 659 S.E.2d 233, 235 (Ct. App. 2008).

DISCUSSION

Did the Department err in denying Appellant parole by applying an improper review criterion?

Appellant argues that the Board erred in considering an expunged offense from his sentencing sheet in denying him parole. Contrary to Appellant's argument in his Reply Brief, he has the burden of proving his allegation. *See Leventis v. S.C. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (discussing the general rule that in an administrative proceeding, "the burden of proof is on the party asserting the affirmative issue" or seeking "relief, benefits, or a privilege") (quotations altered and citations omitted). Here, Appellant has provided no evidence whatsoever to substantiate his claim that the Board considered the expunged offense. Instead, Appellant points to a statement in the sentencing sheet from 1991 listing the expunged offense as running consecutively with his murder conviction and to a statement in an "SCDC Offender Management System Commitment Application Inquiry from 1999 listing a 2 1/3 (i.e., 2/3) sentencing requirement as a parole-eligibility factor. Because the Board stated in its decision denying Appellant parole that it considered the characteristics of his prior offenses and/or criminal record, Appellant concludes that these aforementioned statements are evidence that the Parole Board must have considered them in reaching its decision to deny him parole.

As an initial matter, the Board, in its determination letter used the phrase "and/or" with regards to the first set of considerations and therefore does not specifically state that the characteristics of Appellant's "prior offense(s)" were actually considered. Also, these first set of considerations are those as described further below, in the Findings of Fact section. Even under

this section, the "Indication of Violence" and "Use of Deadly Weapon" that the Board considered could have been "In This **Or** Previous Offense" (emphasis added). Again, the Board never stated that it considered any of Appellant's previous offenses; and Appellant's "current offense" of murder, which involved a gun, was sufficient to support the Board's findings.

In addition, not only is there no mention whatsoever in the Board's decision that it considered Appellant's expunged offense, the fact that Appellant was required to serve twenty (20) years of his sentence prior to parole eligibility was because of his murder conviction.[3] At the time of Appellant's crime of murder, S.C. Code Ann. § 16-3-20(A)(1990) provided in pertinent part: "A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years . . . ." Thus, Appellant's service of two 1/3 sentences had nothing to do with the expunged burglary 1st offense and everything to do with his murder conviction.

Moreover, Appellant just assumes that the Board ignored the 2001 order from the circuit court expunging the burglary 1st offense, even though it was clearly issued subsequent to the 1991 and 1999 documents that Appellant focuses on. He then makes a further assumptions about what the Board did consider. Without more, Appellant has failed to carry his burden of proving that the Board considered the expunged offense.[4]

Furthermore, the Record reflects that Appellant was afforded due process and equal protection under law, notwithstanding his claim to the contrary. "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Leventis v. S.C. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132, 530 S.E.2d 643, 650 (Ct. App. 2000) (quoting *Ogburn–Matthews v. Loblolly Partners*, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998); *see also* S.C. Const. art. I, § 22. The U.S. Supreme Court has also held that "[t]here

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[3] Appellant argues that under a 2/3 sentence requirement, "although he is parole-eligible he really will not be meaningful [sic] considered for parole until 2 1/3 sentence has been served, i.e. 40 years . . . ." What Appellant fails to sufficiently explain or prove is why the Board would consider an inmate to be parole eligible but not "meaningfully consider" parole for that inmate for an additional amount of time. This is nothing more than unsubstantiated conjecture and utter nonsense.

[4] In the absence of any proof to the contrary, public officers are presumed to have properly discharged the duties of their offices and to have faithfully performed the duties with which they are charged. *S.C. Nat'l Bank v. Florence Sporting Goods, Inc.*, 241 S.C. 110, 115-16, 127 S.E.2d 199, 202 (1962); 30 S.C. Jur. *Evidence* § 29 (2006); *see also Felder v. Johnson*, 127 S.C. 215, 217, 121 S.E. 54, 54 (1924) ("In the absence of evidence to the contrary, courts are bound to presume that public officers have properly discharged their duties and that their acts are in all respects regular."

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).

It is possible for a parole-related decision by the Board to impinge upon a state-created liberty interest. For instance, South Carolina courts have held that a state-created liberty interest is implicated by the Board's failure to follow proper procedure in making its decision to deny parole. *See Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008). For example, Section 24-21-10(F)(1) requires the Board to evaluate an inmate's risk using the Department's adopted assessment tool (COMPAS) in reaching its decision to grant or deny parole.[5]

Here, Appellant was allowed to appear before the Board and present mitigating evidence. Also, the March 16, 2017 letter from the Board to Appellant reflects that in arriving at its decision, the Board considered the parole factors in Department Form 1212, those outlined in Section 24-21-640, and the "actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1)." It also took into count the nature and seriousness of the current offense – murder; the indication of violence in this offense, and the use of a deadly weapon in the commission of this offense. The South Carolina Supreme Court in *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 685 S.E. 2d 175 (2009) upheld a very similar rationale to the one at issue in this case found it "sufficient under *Cooper*" for "a routine denial of parole" that "the Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212 . . . ." 385 S.C. at 478-79, 685 S.E.2d at 176-77. Because this is precisely how the Board rendered its decision in this case, I conclude that the Board followed the proper procedure. Therefore, I find no due process violation.

In addition, this Court cannot substitute its judgment for that of the Board as to its consideration of the above factors in reaching a decision to deny Appellant parole. *See* S.C. Code

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[5] The South Carolina Court of Appeals recently noted this requirement, as Appellant cites, in *Spigner v. S.C. Dep't of Prob., Parole and Pardon Servs.*, No. 2015-UP-204 (April 15, 2015), as well as in several other unpublished opinions.

Ann. § 1-23-380(5) (Supp. 2016); *see also id.* § 1-23-600(D) ("An 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.").

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **AFFIRMED. AND IT IS SO ORDERED.**

Ralph King Anderson, III
Chief Administrative Law Judge

August 15, 2017
Columbia, South Carolina