

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Leroy Smalls, 211241,

Docket No. 17-ALJ-15-0025-AP

Appellant,

RECEIVED

vs.

ORDER

FEB 21 2018

South Carolina Department of Probation,
Parole and Pardon Services,

SC Court of Appeals

Respondent.

STATEMENT OF THE CASE

This case is before the Administrative Law Court (ALC or court) pursuant to the appeal of Leroy Smalls (Appellant), an individual incarcerated with the South Carolina Department of Corrections. On May 25, 2017, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified the Appellant that the South Carolina Parole Board (Board) had unanimously rejected him for parole. On June 7, 2017, the Department sent a letter to the Appellant noting that there is no appeals process for the routine denial of parole. On June 22, 2017, the Appellant filed an appeal with the ALC challenging the Board's decision on the grounds that he has been unconstitutionally denied the opportunity to participate in the parole program and that the Board considered immutable facts. After review of the arguments of the parties, the court affirms the decision of the Department.

BACKGROUND

According to the Department, the Appellant was convicted in 1992 of a murder he committed at the age of sixteen. The Appellant became eligible for parole in 2013, after serving twenty years of his life sentence. In 2014, the Appellant was convicted in a Department of Corrections disciplinary hearing of homicide. *See Leroy Smalls, #211241 v. S.C. Dep't of Corrs., Docket No. 14-ALJ-04-1127-AP (S.C. Admin. L. Ct. filed Jan. 12, 2015) (dismissing the Appellant's appeal for lack of jurisdiction).* The Appellant points out that he was found not guilty of the charge of murder in the Court of General Sessions in 2014. In denying the Appellant parole, the Board noted his unfavorable institutional record.

ISSUES ON APPEAL

Whether the Department unconstitutionally or improperly denied the Appellant parole.

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SC ADMIN. LAW COURT

STANDARD OF REVIEW

The court's jurisdiction to review this matter is derived from the South Carolina Supreme Court decisions in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) (establishing an administrative review process for inmate appeals), and *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003) (incorporating final decisions of the Department into that review process). The *Al-Shabazz* decision explained that "procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property." *Wicker v. S.C. Dep't of Corrs.*, 360 S.C. 421, 424, 602 S.E.2d 56, 58 (2004) (citation omitted). Because parole is a privilege and not a right, the routine denial of parole does not constitute such a liberty interest. *See Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008) (citation omitted). However, where the Department "deviates from or renders its decision without consideration of the appropriate [statutory] criteria, . . . it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest." *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111. Therefore, the court reviews this matter only for violations of statutory procedure or procedural due process and does not review the Board's substantive decision to deny the Appellant parole.

When reviewing a decision of the Department, the ALC sits in an appellate capacity. *See id.*, 377 S.C. at 497, 661 S.E.2d at 110; *Al-Shabazz*, 338 S.C. at 377, 527 S.E.2d at 754. Under the appellate standard of the Administrative Procedures Act, the court's review is limited to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2017). The court may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2017). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.*

DISCUSSION

Parole is a privilege, not a right. *State v. Dingle*, 376 S.C. 643, 649, 659 S.E.2d 101, 104 (2008) (citing *Sullivan v. S.C. Dep't of Corrs.*, 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 127 n.4

(2003)). The discretion to grant parole lies solely with the Board. *Id.*, 376 S.C. at 649, 659 S.E.2d at 104–05 (citing *State v. McKay*, 300 S.C. 113, 115, 386 S.E.2d 623, 623–24 (1989)). If, in denying parole, the Board follows proper procedure and issues a routine denial, then summary dismissal of the case is appropriate. See *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008); see also *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009).

The proper procedure includes considering the factors outlined in South Carolina Code Section 24-21-640 and the factors listed in the Department's parole form. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112. Additionally, the Board must utilize an actuarial risk and needs assessment tool, known as COMPAS, as prescribed in South Carolina Code Section 24-21-10(F).

In this case, the Appellant challenges the denial of parole on the basis that he cannot change the factors the Board found as fact in its decision and that because these facts are immutable, the Board has essentially stymied his efforts at rehabilitation. As noted, when the Board exercises its sole discretion in denying parole, this court only has jurisdiction to review the matter for compliance with statutory procedural requirements and procedural due process. If, as in this case, the Board states that it has considered the factors in Form 1212 and Section 24-21-640 and has utilized the risk assessment tool, then the court has limited ability to further review the Department's decision.

We emphasize that in 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.

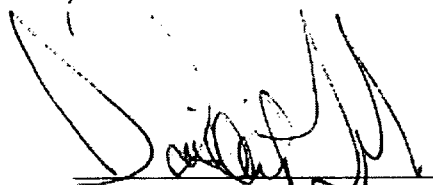
Cooper, 377 S.C. at 500, 661 S.E.2d at 112; *Compton*, 385 S.C. at 479, 685 S.E.2d at 177. The record reflects that the Board routinely denied the Appellant parole after complying with the necessary procedure.

The Appellant argues that the Board denied him the right of cross-examination by using his prior disciplinary conviction for homicide against him without understanding all the facts. The Board is well within its discretion to consider the Appellant's institutional record. The evidentiary standard in a criminal proceeding is proof a reasonable doubt. It is a much higher than the standard than that used in a disciplinary or administrative proceeding, which is proof to a preponderance of

the evidence. See *Anonymous (M-156-90) v. State Bd. of Med. Examiners*, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (citation and internal quotation marks omitted) (“ . . . the standard of proof in administrative hearings is generally a preponderance of the evidence . . . Utilization of a higher level of proof is ordinarily reserved for situations where particularly important individual interests or rights are at stake, such as the potential deprivation of individual liberty, citizenship, or parental rights.”). The Board was within its rights as the fact-finder in this matter to give weight to the Appellant’s institutional record. Assessing the weight and credibility of the evidence is a task for the fact-finder, and the appellate court will not disturb those findings, absent error of law. See S.C. Code Ann. § 1-23-380(5) (Supp. 2017); see also *Houston v. Deloach & Deloach*, 378 S.C. 543, 551–52, 663 S.E.2d 85, 89 (Ct. App. 2008). This is particularly true in a parole case where this Court only reviews Board decisions for compliance with procedural standards and does not review the substantive decision to grant or deny parole.

ORDER

IT IS THEREFORE ORDERED that the decision of the agency is **AFFIRMED**.
AND IT IS SO ORDERED.



S. Phillip Lenski, Judge
S.C. Administrative Law Court

December 20, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the manner entitled herein upon all parties to this cause by electronic e-mail, by first class mail in the United States (the postage paid), or by the emergency Mail Carrier, addressed to the party(ies) or their attorney(s).

This 20th day of Dec, 2017

Judicial Law Clerk