

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable H.W. Funderburk, Jr. Administrative Law Judge
Case No.: 16-ALJ-15-00010

RECEIVED

MAY 11 2018

SC Court of Appeals

Appellant Case No. 2018-000660

MELISSA BURRIS, #212040.....RESPONDENT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....APPELLANT

INITIAL BRIEF OF APPELLANT

Tommy Evans, Jr.
Assistant General Counsel

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ATTORNEY FOR THE APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. **Did the ALJ err in his determination that Dr. Robin Lyn Moody was not qualified to conduct a mental health examination to determine the fitness of the Respondent to conduct herself in society; thereby, reversing the decision of the Parole Board?**

STATEMENT OF THE CASE

On September 11, 1993, an officer with the Anderson police department responded to a call at the Respondent's residence. Upon arriving he witnessed the victim sitting in a chair unresponsive with several gunshot wounds. The officer requested the Respondent to provide him with the weapon used to commit this crime. She gave him the weapon which he secured, he then contacted Emergency Medical Services. Upon their arrival they determined the victim to be deceased. The cause of death were due to multiple gunshot wounds. The Respondent was taken into custody and charged with the offense of murder, and possession of a weapon during the commission of a violent offense. During a lawful interrogation, the Respondent was informed of her *Miranda* rights, and as a result of this interrogation she gave a full confession.

On January 5, 1994, the Respondent appeared before the Honorable H. Hall for the offenses of murder and possession of a weapon in the commission of a violent crime. The Court sentenced the Respondent to a period of incarceration for the remainder of her natural life for murder, and five years for possession of a weapon during the commission of a violent crime.¹ At the time the Respondent committed this offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of twenty years.

On November 6, 2013, the Respondent made her initial appearance before the Parole Board. Upon the conclusion of this hearing the Board denied the Respondent parole. The Respondent re-appeared before the Board on January 13, 2016. At the conclusion of this hearing the Board granted conditional parole. Due to the length of time the Respondent was incarcerated, it was mandatory that prior to any release she be evaluated as to her ability to conduct herself in society. She was examined and evaluated by Dr. Robin Lyn Moody, Ph.D. Dr. Moody determined

¹ The Appellant completed the sentence for the weapons offense on September 13, 1998.

that the Respondent would not be able to conduct herself in society. Upon receiving these results, the Board decided to rescind the Respondent's conditional parole and reexamine their previous decision. After this reexamination the Board decided to deny parole due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) a use of a deadly weapon in this or a previous offense.

Upon receiving this denial the Respondent filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Respondent argued that the decision of the Parole Board was arbitrary and capricious; that she was denied due process by not being provided the results of the psychological evaluation; and, the final decision failed to reveal the findings of facts and conclusion of law separately stated. The Appellant argued that the denial of parole was lawful, and that every statutory and Department criteria was considered. The Appellant further argued that the Board was well within their rights to rescind parole pursuant to Department policy.

During litigation the Honorable H. W. Funderburk, Administrative Law Court Judge (ALJ), ordered that a redacted copy of the evaluation report and Dr. Moody's professional vita be included in the record. Judge Funderburk issued his decision on December 6, 2016. Within this decision he determined that due to the fact Dr. Moody is not a licensed psychologist, per statute she is not qualified to issue a determination as to Respondent's prior mental state and ability to function in society. He ordered that the case be remanded so a licensed psychologist can examine the Respondent to make the determination as to her ability to function outside of prison. The ALJ also ordered that upon the completion of this new evaluation another hearing be held to determine if the Respondent is to be granted parole.

Upon receiving the decision of the ALJ, the Appellant filed a notice of appeal before this Court. Within this appeal the Appellant argued that the ALJ erred in determining that Dr. Robin Lyn Moody was not qualified to conduct this evaluation.

On May 4, 2017, this Court decided that the ALJ's order was not a final decision; therefore, not immediately appealable. The initial appeal was dismissed. After receiving this decision the Appellant filed a petition for rehearing. This petition was denied on August 9, 2017. The Appellant then filed a petition for writ of certiorari before the South Carolina Supreme Court. The Supreme Court dismissed this petition on September 15, 2017.

The Respondent was later evaluated by another licensed psychologist who determined her to have the mental ability to conduct herself in society. The Respondent later appeared before the Board on April 10, 2018. Upon the conclusion of this hearing the Board decided to grant conditional parole.

The Appellant now files this notice of appeal so this Court can answer this sole question. Can Dr. Moody be considered duly qualified to make an opinion regarding the ability of an inmate to function in society? The Appellant is not seeking a reversal of the Board's decision to grant the Respondent's parole. Since the decision has been made regarding parole, ALJ's decision is now final. Therefore, this Court has jurisdiction to hear this matter and make a determination as to the Dr. Moody's qualifications. The brief supporting the above referenced argument follows.

ARGUMENT

- 1. The lower Court erred in determining that Dr. Robin Lyn Moody, Ph. D. was not qualified to conduct an evaluation to determine the Respondent's ability to function outside of prison because she is not a licensed psychologist.**

The Respondent was conditionally granted parole. Due to the amount of time she was incarcerated, she could not be released until a mental health evaluation was completed to determine

her ability to function outside of prison.² The mental health evaluation was conducted by Dr. Robin Lyn Moody, Ph. D. She determined that the Respondent was not fit mentally to handle the rigors of society. Upon being informed of Dr. Moody's findings, the Board reevaluated her case and made a determination to rescind the Respondent's conditional parole.

The ALJ determined that because Dr. Moody was not a licensed psychologist, she was not qualified under the statute to conduct the evaluation. The Appellant argues that the statute does not require the evaluator to be a licensed psychologist. The examiner just needs to be **duly qualified** to make this determination. Dr. Robin Lyn Moody possesses a doctorate in psychology, clinical psychology, and industrial organized psychology. She conducts clinical evaluations for attorneys, governmental agencies, and physicians. She also teaches undergraduate and graduate courses in counseling and psychology. She instructs students who will become licensed psychologists. Therefore, she should be capable of making the determination as to a person's ability to conduct themselves in society. Nothing in the statute requires that the evaluator be licensed. Instead, the individual who conducts this evaluation must be "duly-qualified." The above referenced qualifications reveals that Dr. Moody is duly qualified to conduct these evaluations.

The ALJ determined that in order to be able to make these evaluations the person must be licensed psychologist; however, that is not stated within the statute. This evaluation falls under one of the exceptions which does not require a license. Pursuant to South Carolina law, a licensed member of another profession who is regulated by the Department of Labor Licensing and Regulation, and who is rendering services of a psychological nature and does not represent himself to be a psychologist or his services to be psychological is not required to obtain a license. S.C.

² 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 of prison from a duly qualified psychiatrist or psychologist. S.C. Code Ann. §24-21-610 (1986).

Code Ann. §40-55-90(A)(1)(c)(2017). The South Carolina Code of Laws also states that a person is exempt from requiring a license if:

A person employed by any entity whose professional employment is funded through an agency of the State and who provides services of a psychological nature within the scope of employment if the person does not describe himself or his services by any title or description which states or implies that the person holds a license or otherwise required by this chapter.

S.C. Code Ann. §44-55-90(A)(13)(2017).

Dr. Moody has never held herself out to be a psychologist, but she is a National Certified Counselor, and a Licensed Professional Counselor. She has a doctorate in clinical, industrial, and organizational psychology. She also has a doctorate in Christian Psychology Counseling. Black's Law Dictionary defines "Duly qualified" in a proper manner in accordance with legal requirements as, possessing the necessary qualifications, a person trained and prepared to perform tasks to fulfill an office. BLACK'S LAW DICTIONARY (2nd Ed.). It should be clear to this Court that Dr. Moody is duly qualified to make any determination as to the ability of an inmate to conduct themselves in society. This is the only requirement listed within the statute. The lower Court erred in determining that the evaluator must be a licensed psychologist when it does not state that within the statute. If having a license in the field of psychology or psychiatry was a condition it would have been listed within the statute. The General Assembly's only qualification was that the person be "duly qualified."

Pursuant to *Sims v. Colvin*, 2014 WL 793065 (2014), the United States District Court of South Carolina determined that examiners are qualified if they are "currently licensed" in the State and have the training and experience to perform the type of examination or test required. In *Sims*, the U.S. District Court Judge upheld the ALJ's decision to consider the examiner's assessment because the Plaintiff failed to show that the consultative examiner did not have the training and

experience to perform the psychological examination. Ultimately, the District Court ruled against the Plaintiff by determining that the ALC did not err in relying on the licensed professional counselor's exam in lieu of the one performed by a licensed psychologist.

In her appeal of this recession of parole to the ALJ, the Respondent never presented any evidence revealing that Dr. Moody did not have the requisite training or experience to perform the pre-parole mental health assessment. The Respondent never made the argument regarding Dr. Moody not being a licensed psychologist thereby not being qualified to make this evaluation. When they initially presented their argument before the ALJ. The Respondent actually used the findings of Dr. Moody to support their position. The Respondent never made any arguments as to Dr. Moody's qualifications to make this evaluation until it was raised by the ALJ.

The one-time mental health evaluation is not a treatment device that might require the Board to give a licensed psychologist more weight than a duly qualified consultative examiner. When the nature and length of the treatment relationship by a licensed psychologist indicates the evaluation an issue was not conducted primarily for medical treatment, the opinion of the licensed psychologist should not be given controlling weight. *Caudill v. Astrue*, 2010 WL 148806 (2010). The use of a licensed psychologist or psychiatrist for non-treatment is not necessary. The Court erred in ruling that a licensed psychologist or psychiatrist is necessary to obtain a report needed in the present case. There was no medical treatment administered by Dr. Moody. All that was provided is a report as to the Respondent ability to conduct herself in society. The Board only considered the result of this report as one factor among several in making the decision to deny parole.

The Appellant also argues that the determination of a person's qualifications to make this evaluation is completely in the control of the deciding body. The Parole Board is the body which

must make the determination as to the qualifications of an expert providing an opinion. The Board was made aware of the qualifications of Dr. Moody. They determined she is duly qualified to give her opinion regarding the Respondent's ability to succeed outside of prison. Dr. Moody has a doctorate in Psychology, is a national certified counselor and a licensed professional counselor, conducts mental exams for attorneys and governmental agencies, and teaches undergraduate and graduate courses in counseling and psychology. She has actually taught many of the licensed psychologists who the ALJ has ruled more qualified to give this opinion. The Appellant's position is that if the pupil is qualified so is the teacher. Pursuant to the rules, Dr. Moody is duly qualified to conduct an evaluation and provide the results to the Parole Board. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. Rule 702 SCRE.

The authority to decide if Dr. Moody is qualified belongs with the deciding body - the Parole Board. All expert testimony must satisfy criteria of the rules of evidence governing testimony of experts, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration. *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). Dr. Moody conducted the initial evaluation. She has a doctorate in psychology, which makes her more qualified than an average person to make an opinion regarding the Appellant's ability to function outside of prison. An "expert witness" is one who, because of the possession of knowledge not within ordinary reach, is specifically qualified to speak upon the subject to which his attention is called. *Potter v. Glosser Bros. Department Store, Inc.*, 146 Pa. Super. 129, 22 A2d 28 (1941).

Dr. Moody not only has more training and knowledge than the average person, she uses psychological testing as part of this evaluation. Within her report Dr. Moody revealed the instruments used in her evaluation included, the mini-mental state examination 2nd edition, the Minnesota Multiphasic Personality Inventory 2nd edition, and a clinical interview.

Dr. Moody, who has a doctorate in Psychology, has revealed substantial evidence that she is duly qualified to give her opinion regarding the Respondent's ability to function outside of prison. The ALJ cannot remand the decision of the Board without finding any evidence of wrongdoing. The findings of an administrative agency are presumed correct and will be set aside only if supported by substantial evidence. *Summersell v. South Carolina Department of Public Safety*, 334 S.C. 357, 513 S.E.2d 619 (1999). Substantial evidence is evidence which considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981). It should be considered reasonable that the qualifications presented by Dr. Moody reveals that she is more than qualified to give an examination and opinion as to the Respondent's ability to function outside of prison.

The ALJ ruled that the evaluation completed by Dr. Moody is unlawful due to the fact she is not a licensed psychologist. Nothing in the statute states that the person should be licensed to conduct this evaluation. The statute only stated that the person must be "duly qualified." If the General Assembly wished the person who conducted this evaluation be a licensed psychologist or psychiatrist the statute would have specifically stated this. There exist other statutes that requires only a licensed psychologist or physician be used. (Ex. Section 24-21-715, parole for a terminally

ill inmate³; Section 62-8-109, when a power of attorney is effective⁴.) It is clear that the General Assembly wished a licensed physician or psychologist to determine the illness or incapacity. This is a mental health evaluation, it is not designed to diagnose nor treat any physical or mental illness. A licensed psychologist or psychiatrist is not stated within the statute. It only states “duly qualified” which Dr. Moody clearly is. This should have been followed by the ALJ. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statutes operation. *Rowe v. Hyatt*, 321 S.C. 366, 468 S.E.2d 649 (1996). Court should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 16, 492 S.E.2d 777, 779 (1997). A law must be interpreted reasonably and practically consistent with the purpose and policy of the General Assembly. *Abell v. Bell*, 229 S.C. 1, 4, 91 S.E.2d 548, 550 (1956).

The Board decided to use Dr. Moody due to the fact she is duly qualified to form an opinion on the ability of the Respondent to live a life outside of prison. There are a limited number of licensed psychologists willing to conduct these evaluations. In order to expedite these evaluations the Appellant sought another duly qualified individual. The General Assembly did not intend this to be a medical diagnosis. This evaluation is done on a prisoner who has spent at least ten years in prison. It is designed to determine his or her ability to adjust to the changes in society, and his or

³“Terminally ill” means an inmate who, as determined by a **licensed physician**, has an incurable condition caused by illness or disease that was unknown at the time of sentencing or, since the time of sentencing has progressed to render the inmate terminally ill, and that will likely produce death within two years, and that is so debilitating that the inmate does not pose a public safety risk. S.C. Code Ann. §24-21-715(A)(1)(2017)(emphasis added)

⁴If a power of attorney becomes effective upon the principal’s incapacity and the principal has not authorized a person to determine whether the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination the power of attorney becomes effective upon a determination in a writing or other record by:

(A) a physician or **licensed psychologist** that the principal is incapacitated within the meaning of Section 62-8-102(5)(A). S.C. Code Ann. §62-2-109(a)(2)(A)(2017)(emphasis added).

her ability to handle these changes. This is done in order to determine the likelihood of an inmate reoffending. The duty of the Parole Board is to release those individuals who would be successful on supervision. This evaluation aids in making that determination.

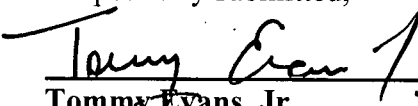
Dr. Moody is a nationally-certified and licensed professional counselor who has conducted mental evaluations for many inmates. Many which were determined to have the ability to be successful if released. Although the Board did not release or deny parole solely for that reason, her opinion was taken into consideration. If this Court rules with the ALJ, the question must be asked, should the Board rescind all individuals Dr. Moody has determined will successfully handle themselves in society, including those granted parole? Since the ALJ determined that the Board erred in his case, if the Court accepts this determination that decision would apply to each case Dr. Moody considered while under contract with the Department.

It should be clear that Dr. Moody is more than “duly qualified” to state an opinion as to the Respondent’s ability to function outside of prison. The statute clearly states “duly qualified,” not “licensed.” Since Dr. Moody was duly qualified at the time she performed the evaluation, the decision of the ALJ as to Dr. Moody’s qualifications should be corrected.

CONCLUSION

Based on the foregoing reasons the ALJ incorrectly determined that Dr. Robin Lyn Moody was not qualified pursuant to South Carolina law. The Appellant respectfully requests the final decision of the Administrative Law Court be reversed solely on this ground. The Appellant does not wish for the Respondent's parole to be remanded, just a decision from this Court pertaining to the qualifications of Dr. Moody.

Respectfully submitted,



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Columbia, South Carolina
May 9, 2018

STATE OF SOUTH CAROLINA
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Appeal from the Administrative Law Court
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v.

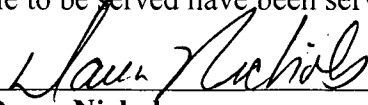
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Appellant, certify that I have served the within Initial Brief and Designation of Matter dated May 9, 2018, on respondent this 9th day of May, 2018, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Tommy A. Thomas, Esquire
P.O. Box 88
Irmo, S.C. 29063

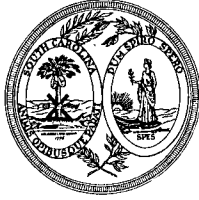
I further certify that all parties required by Rule to be served have been served.



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May 9, 2018

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
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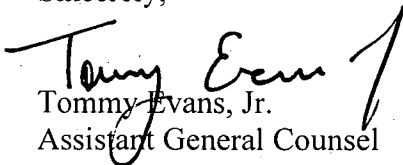
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Re: SCDPPPS v Melissa Burris

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Appellant and Designation of Matter dated May 9, 2018, along with proof of service in the above referenced case.

Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

TE:dn

Enclosures

cc: Tommy Thomas, Esquire

State of South Carolina

Department of Probation, Parole, and Pardon Services

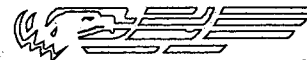
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