

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Perry Gilmore, #344879,

Docket No. 18-ALJ-15-0013-AP

Appellant,

vs.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

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ORDER
OCT 10 2018
SC Court of Appeals

STATEMENT OF THE CASE

This case is before the Administrative Law Court (ALC or court) pursuant to the appeal of Perry Gilmore (Appellant), an individual incarcerated with the South Carolina Department of Corrections. On August 23, 2017, the Appellant was sentenced to three years for Assault and Battery in the second degree, three years for Indecent Exposure and one year for Hit and Run. All sentences were to run concurrently. On March 9, 2018, 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 April 11, 2018, the Appellant filed an appeal with this court challenging the Board's decision on the grounds that he has been unconstitutionally denied the opportunity to participate in the parole program and has been denied due process. After review of the arguments of the parties, the court affirms the decision of the Department.

ISSUES ON APPEAL

Whether the Department unconstitutionally or improperly denied the Appellant parole.

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 Cor.*, 360 S.C. 121, 587 S.E.2d 360 (2003).

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SC ADMIN. LAW COURT

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 court 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) (Supp. 2016).

In this case, the Appellant challenges the sufficiency of the Board's decision by alleging that the Board did not apply the correct criteria for granting or denial of parole as required by Cooper.¹ In Furtick, the South Carolina Supreme Court held that while parole is a privilege and not a right, inmates still have a liberty interest in parole eligibility. 352 S.C. at 598, 576 S.E.2d at 149. If the Board fails to consider the criteria set forth in S.C. Code Ann. § 24-21-640, the inmate is denied his liberty interest in parole eligibility. Cooper, 377 S.C. 489, 661 S.E.2d 106 (2008). However, provided the Board considers all of the factors required by statute, it has protected the inmate's liberty interest in parole eligibility and it has the discretion to deny parole based on any of the factors found in § 24-21-640 or its own criteria. Id. The Board's decision reflects that it considered all the appropriate factors before making its decision to deny the Appellant parole. 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 published in Department Form 1212 (Criteria for Parole Consideration) 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.

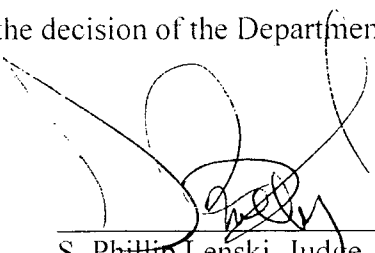
Cooper, 377 S.C. at 500, 661 S.E.2d at 112; *Compton*, 385 S.C. at 479, 685 S.E.2d at 177. The record reflects that the Board routinely denied the Appellant parole after complying with the necessary procedure. Therefore, the court cannot grant relief to the Appellant.

¹ Although the Appellant cited statutes and legal authority in his Notice of Appeal to support his grounds for appeal, in his initial brief, the Appellant states that his grounds and arguments for appeal in his Notice of Appeal are "incorporated by reference." The court is not aware of a rule under either the South Carolina Administrative Law Court Rules of Procedure (ALC Rule) or the South Carolina Appellate Court Rules that allows for legal argument to be set forth in an appellate brief via incorporation by reference to the Notice of Appeal. Instead, a valid brief should properly follow the dictates of ALC Rule 60, which includes, among other requirements, that a party's brief must contain argument supported by legal authority.

The Appellant argues that the Board violated his rights by considering his prior disciplinary history. However, the Board is well within its discretion to consider the Appellant's institutional record. The evidentiary standard in a criminal proceeding is proof beyond a reasonable doubt. It is a much higher than the standard employed 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 Department is **AFFIRMED**.
AND IT IS SO ORDERED.²



S. Phillip Lenski, Judge
Administrative Law Court

September 25, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served the order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States Mail, postage paid, or in the interagency mail service addressed to the party(ies) or their attorney(s).
on the 25th day of September 2018

Judicial Law Clerk

² All other pending motions not explicitly addressed in this Order are denied.