STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

David George Smith, #110951, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	))))))))))	Docket No. 18-ALJ-15-0029-AP **ORDER REMANDING FOR A NEW PAROLE HEARING**

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SC Court of Appeals

This matter is before the South Carolina Administrative Law Court ("ALC") pursuant to a Notice of Appeal filed November 16, 2018, by David George Smith (Appellant), an inmate in the custody of the South Carolina Department of Corrections ("SCDC"). Appellant seeks review of the denial of his parole issued on August 16, 2018, by the South Carolina Department of Probation, Parole, and Pardon Services ("Department" or "Board").

STATEMENT OF THE CASE

Appellant was initially denied parole on September 7, 2011, and has been denied parole on seven occasions (in total), the last being this occasion.

In a letter dated August 16, 2018, the Department informed Appellant that he would not be granted parole.[1] The letter indicated that Appellant's parole was denied based on the following conclusions of law:

(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) the factors published in Department Form 1212 (Criteria for Parole Consideration);
(3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and
(4) actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1) of the South Carolina Code of Laws.

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[1] The letter, although represented in Respondent's brief as an "order of denial," merely transmits what appears to be an oral decision of the board over the (stamped) signature of a board employee.

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Supporting these conclusions of law are the following factual findings:

1. Nature and Seriousness of Current Offense[,]
2. Indication of Violence in This or Previous Offense[,]
3. Use of Deadly Weapon in This or Previous Offense[, and]
4. Criminal Record Indicates Poor Community Adjustment.

By letters dated September 12 and 13, 2018, Appellant also requested that the Board waive its requirement that a reconsideration request be made within fifteen (15) days of the denial and reconsider its denial of parole. As grounds for the waiver, Appellant argued that he could not have known that the Board "may have based its decision on erroneous information" until he received the recording of the Board hearing on September 11, 2018. He requested the disc on August 17, 2018.[2]

By letter dated September 19, 2018, an employee of the Board responded to the request for reconsideration and informed Appellant's counsel "that there is no rehearing/appeal process for the routine denial of parole; therefore, no action will be taken on your request."

Appellant timely appealed the final decision of the Board to this Court on October 16, 2018.

ISSUES

1. Did the Parole Board's decision violate the Administrative Procedures Act when the Record on Appeal does not contain substantial evidence to support the decision denying parole?
2. Did the Parole Board effectively deny Appellant's parole eligibility by findings focused solely on Appellant's pre-incarceration history?

DISCUSSION

The Record on Appeal contains the following items: (1) a transcript of the parole hearing; (2) Respondent's September 19, 2018, letter (denying by ignoring Appellant's request for reconsideration); (3) Appellant's letter dated September 13, 2018 (requesting reconsideration); (4) the Department's Policy and Procedure Manual (cover and p. 40); (5) Criteria for Parole Consideration (Form 1212); and (6) Notice of Rejection.

[2] The Record on Appeal contains an excerpt from the Department's Policy and Procedure Manual containing the quoted language and stating that under that circumstance, "the Board may decide to grant a reconsideration hearing."

The hearing transcript contains a discussion with the inmate about his feelings about the offense for which he is incarcerated. It also contains the Board's deliberations on a single issue: the misconstruction of a statement made by Appellant's attorney. Counsel stated that Appellant had committed only one violent crime, the crime for which he is serving time. The Board believed that counsel said that Appellant committed no previous crimes. Appellant's counsel discovered this error when he obtained a copy of the recording of the hearing.

The Board's determination that what the members thought counsel stated did not comport with the record(s) before the Board shows that the Board had information on which it based its decision. That information was not included in the Record on Appeal.

In addition, the Board found that Appellant had a criminal record characterized by "poor community adjustment." There is no criminal record or documentation of Appellant's behavior in prison in the Record on Appeal. The only information about Appellant's prison behavior is his counsel's representation that Appellant had no major or minor infractions of the rules of the Department of Corrections during his 35 years of confinement. He further represented that Appellant worked while in prison, participated in character and religious programs, had undertaken to turn his life around, and helped other inmates understand the importance of taking responsibility for their actions.

STANDARD OF REVIEW

An individual has a right to ALC review of a final decision of the Board when that decision affects a liberty interest for which due process is required. *See Furtick v. S.C. Dep't of Prob., Parole and Pardon Services*, 352 S.C. 594, 598-99, 576 S.E.2d 146, 149-50 (2003); *see also Sullivan v. S.C. Dep't of Corrections*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review). In *Furtick*, the South Carolina Supreme Court held that although an inmate has a liberty interest in parole eligibility pursuant to S.C. Code Ann. § 24-21-620 (2007), the statute does not create a liberty interest in the granting of parole itself. *Furtick*, 352 S.C. at 598, 576 S.E.2d at 149 n. 4.

The ALC must be able to review a case "within the ambit of the [Administrative Procedures Act]" to ensure "that an inmate receives due process, which consists of notice, a hearing, and judicial review." *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000). In this case, Appellant "is not appealing the denial of parole, but rather, is challenging the method and

procedure employed by the Parole Board in reaching its decision." *Cooper v. S.C. Dep't of Prob., Parole and Pardon Services*, 377 S.C. 489, 502, 661 S.E.2d 106, 113. Appellant has properly brought his Appeal before the ALC.

When acting in an appellate capacity, the ALC must apply the criteria of S.C. Code Ann. § 1-23-380(5) (Supp. 2018), which states:

> The court may not substitute its 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 procedure;
> (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.

These first two provisions require a reviewing court to examine the scope of an agency's authority as revealed by its actions in carrying out its enabling legislation. The last four provisions require a reviewing court to examine the procedures used, how the governing law has been applied, and whether the agency's decision has a basis in fact. For the Court to carry out these statutory duties there must be an adequate record to review.

Furthermore, S.C. Code Ann. § 1-23-650(B) and (C) requires the promulgation of rules "governing practice and procedure before the court." Therefore, the ALC has promulgated the rules of the South Carolina Administrative Law Court. Among them are rules for Special Appeals arising from the South Carolina Supreme Court's decision in *Al-Shabazz*. *See* SCALC Rule 51. These cases, pursuant to *Furtick*, include appeals from the Department.

SCALC Rule 58 requires that the record "shall consist of:"

> A. All documents filed;
> B. All evidence received or considered, including copies of all relevant sentencing sheets in sentence calculation matters, and copies of specific policies relied upon by the agency;
> C. A statement of matters judicially noticed;

D. All proffers of proof of excluded evidence;
E. The final order or decision which is subject to administrative review;
F. Any transcript taken of the testimony during the proceeding.

As provided in S.C. Code Ann. § 24-21-640 (Supp. 2018), "[t]he board must carefully consider the record of the prisoner before, during, and after imprisonment ...." For the board to do so, information about the prisoner's conduct must be included in the parole hearing record.[3]

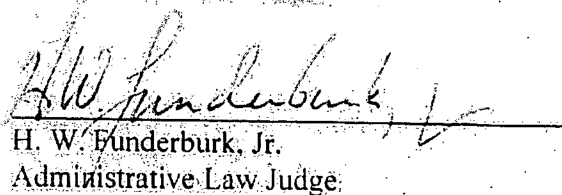
However, the Department did not provide the "evidence received or considered," nor were copies of specific documents assembled by the agency for the hearing. Although a transcript was provided, its salient contribution is to reveal a misconstruction of a statement by Appellant's attorney and the Board's reliance on information not included in the Record on Appeal.

This case is **Remanded** to the Department for a new hearing in which the misunderstanding shall be corrected and all evidence received or considered, including policies relied on by the agency, and any matters judicially noticed will be included in a complete record to be assembled, served, and filed should there be further appeal. The Court will allow the Department sixty (60) days to conduct the new hearing. Any extensions beyond that time require the Court's approval.

It is therefore

ORDERED that the decision of the Board is vacated, and the case is **REMANDED** for a new parole hearing in which the Board must include in its record all evidence, documentary or testimonial, that it receives or considers in making its decision and which would form foundations for its findings of fact and conclusions of law.

AND IT IS SO ORDERED.



H. W. Funderburk, Jr.
Administrative Law Judge

July 24, 2019
Columbia, South Carolina

[3] The inmates record, before, during and after imprisonment must be carefully considered. A summary of this record, "prepared through investigations conducted for the Parole Board" ... "becomes part of the inmate's parole file." Ironically, this file is "privileged and confidential" such so that "inmates themselves have no right to inspect the contents of their files" although they have an obligation to "notify the Board of [any] specific error or inaccuracy" that it contains. *See* South Carolina Department of Probation, Parole and Pardon Services, Criteria For Parole Consideration, Form 1212 (Revised 5/16/2017).

CERTIFICATE OF SERVICE

I, Amye Rushing, hereby certify that I have this date served this Order upon all parties to this case by depositing a copy hereof, in the United States mail, postage paid, inter-agency, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

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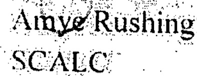

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Amye Rushing
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