

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Joseph Gibbs, # 185709,

) Docket No. 18-ALJ-15-0028-AP  
)

) Appellant,  
)

) **ORDER DISMISSING APPEAL OF**  
) **DENIAL OF FREEDOM OF**  
) **INFORMATION ACT REQUEST**  
) **AND REMANDING FOR RESPONDENT**  
) **TO FILE A COMPLETE RECORD**

v. )

) South Carolina Department of Probation,  
) Parole and Pardon Services,

**RECEIVED**

) Respondent.  
)

**AUG 15 2019**

**SC Court of Appeals**

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to an appeal filed October 2, 2018, by Joseph Gibbs (Appellant), an inmate in the custody of the South Carolina Department of Corrections. Appellant has appealed the decision of the South Carolina Department of Probation, Parole and Pardon Services (Department or Parole Board), which denied him parole pursuant to S.C. Code Ann. § 24-21-640 (Supp. 2018) and a decision letter, dated September 10, 2018, which denied a Freedom of Information Act request filed by Appellant on September 4, 2018.

The ALC has no jurisdiction to decide civil matters, such as cases arising under the Freedom of Information Act. *See S.C. Dep't of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 187, 700 S.E.2d 468, 470 (Ct. App. 2010) (“The ALC has no authority to decide civil matters . . .”) (quoting Randolph R. Lowell, *South Carolina Administrative Practice and Procedure*, 152 (2d ed. 2008)). Furthermore, though “certain cases may be taken from the trial court's original jurisdiction by the General Assembly,” no such action has been taken by the General Assembly concerning this type of case. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002). Hearings seeking disclosure or injunctive relief under the Freedom of Information Act are consigned to the circuit courts of South Carolina. *See*, S.C. Code Ann. §§ 30-4-100 and -110 (Supp. 2018.)

Therefore, the part of the appeal dealing with the denial of Appellant’s Freedom of Information Act request must be **DISMISSED**.

**FILED**

**AUG 18**

The remainder of this case is before the ALC as a Special Appeal pursuant to *Furtick v. S.C. Dep't of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003) and SCALC Rules 51 through 66. 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.

### STANDARD OF REVIEW

An individual has a right to ALC review of a final decision of the Parole 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) require the promulgation of rules "governing practice and procedure before the court." Therefore, the ALC promulgated the rules of the South Carolina Administrative Law Court. Included 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 Parole Board to do so, information about the prisoner's conduct must be included in the parole hearing record.<sup>1</sup>

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<sup>1</sup> 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).

## ISSUES

1. Did the Parole Board effectively deny Appellant's parole eligibility by findings focused solely on Appellant's pre-incarceration history?
2. Did the Parole Board fail to provide information to support its findings as required by SCALC Rules 58 and 61?

## DISCUSSION

The Record on Appeal contains the following items:

1. A letter dated November 13, 2018, informing Appellant that the Department will not respond to his "interrogatories." A copy of Appellant's "Interrogatorys" [sic] is attached;
2. A letter dated September 10, 2018, denying Appellant's Freedom of Information Act request;
3. A letter dated August 16, 2018, notifying Appellant that his parole application has been denied; and
4. A Certificate of Counsel representing that the Record on Appeal complies with SCALC Rule 61 and that the record "contains all material proposed to be included in the Record on Appeal by all of the parties and not any other material."

In its decision letter of August 16, 2018, the Department informed Appellant that he would not be granted parole.<sup>2</sup> 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.

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.

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<sup>2</sup> The letter, although represented in Respondent's brief as an "order of denial," merely transmits what appears to be an oral decision of the Parole Board over the electronic signature of a board employee.

Appellant contends that the Parole Board's decision denying parole is essentially an abrogation of his parole eligibility because the Parole Board has considered only the circumstances associated with the crime for which he was convicted. Therefore, this appeal is properly before the ALC. *Cooper v. S.C. Dep't of Prob., Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). 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*, 377 S.C. at 502, 661 S.E.2d at 113. Accordingly, Appellant's challenge to the method and procedure employed warrants review by this Court. *Id.*

However, the Department did not provide the "evidence received or considered," nor the specific documents assembled by the agency for the hearing. In addition, there is no transcript of the parole hearing. Therefore, the Court finds that the Parole Board has not provided information to support its findings as required by SCALC Rules 58 and 61. The review mandated by *Furtick* cannot be accomplished without an adequate record.

This case is **Remanded** to the Department for a complete record to be assembled, filed, and served. The Court will allow the Department thirty (30) days, or until September 9, 2019, to serve and file the Record. Appellant's brief will be due twenty days thereafter (or not later than September 30, 2019), and Respondent's brief will be due twenty days after the Appellant's brief is served (or not later than October 21, 2019). A Reply brief may be served and filed ten days after Respondent's brief is served (or not later than October 31, 2019).<sup>3</sup>

It is therefore,

**ORDERED** that the appeal from the denial of Appellant's Freedom of Information Act request is **DISMISSED.**

It is also

**ORDERED** that the appeal from the denial of Appellant's parole application is **REMANDED** for the Department to assemble, file, and serve, a Record that complies with SCALC Rue 58 and provides a basis for the findings of fact and conclusions of law in the Parole Board's denial of

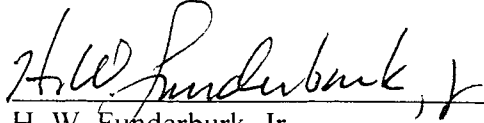
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<sup>3</sup> These dates include adjustments for weekends and holidays.

Appellant's parole.

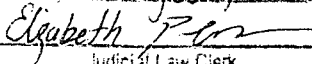
**AND IT IS SO ORDERED.**

August 8, 2019  
Columbia, South Carolina

  
H. W. Funderburk, Jr.  
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this 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).

This 8<sup>th</sup> day of August, 2019  
By:   
Judicial Law Clerk

**FILED**

AUG 08 2019

SC ADMIN. LAW COURT