

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Emiah Anderson, #173165,

Docket No. 19-ALJ-15-0015-AP

Appellant,

v.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

ORDER

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SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) in its appellate capacity pursuant to subsection 1-23-600(D) of the South Carolina Code (Supp. 2018). In the case *sub judice*, Emiah Anderson (Anderson) seeks judicial review of a decision issued by the South Carolina Parole Board (Board). Specifically, on March 21, 2019, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Anderson that the Board denied him parole. After careful consideration of the Record on Appeal (Record), arguments raised in the parties' briefs, and the applicable law, the Court affirms the Board's decision.

BACKGROUND

On or about February 8, 1990, Anderson committed various offenses that led to his arrest. Anderson was charged with the offenses of murder and criminal sexual conduct in the second degree. Thereafter, on or about November 28, 1990, Anderson was convicted and sentenced to incarceration for the remainder of his natural life for murder and twenty years incarcerations for criminal sexual conduct in the second degree.

After becoming parole-eligible, Anderson last appeared before the Board on March 21, 2019,¹ when the Board voted unanimously to deny his parole. In reaching this determination, the Board provided the following factual reasons for rejection: (1) the nature and seriousness of the

¹ According to the Department, Anderson made his initial appearance before the Board approximately nine years earlier, on May 12, 2010. See SCALC Rule 60(B)(2) ("Any matters stated or alleged in a party's statement [of the case] shall be binding on that party."). Following his initial appearance, Anderson has appeared before the Board on four occasions. On each occasion, the Board has rejected Anderson's parole.

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current offense; (2) an indication of violence in this or a previous offense; and (3) the use of a deadly weapon in this or a previous offense. The Board also stated it carefully considered "(1) the characteristics of [his] current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record" Additionally, the Board specified that it reviewed the criteria outlined in section 24-21-640 of the South Carolina Code, the factors published in Department Form 1212, and the actuarial risk and needs assessment factors pursuant to subsection 24-21-10(F)(1) of the South Carolina Code.

Thereafter, Anderson filed his Notice of Appeal with the Court on April 3, 2019. This matter was assigned to the undersigned on April 10, 2019. The Department filed the Record on May 17, 2019, and its brief on July 18, 2019. Anderson filed his brief on July 26, 2019.²

ISSUE ON APPEAL

- I. Whether the Board's decision to deny Anderson's parole was made upon unlawful procedure?
- II. Whether the Board's criteria for parole consideration violated the *ex post facto* clauses of the United States and South Carolina Constitutions?

JURISDICTION/STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). In *Al-Shabazz*, the court held that the ALC's jurisdiction in inmate appeals is limited to non-collateral or administrative matters³ typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result

² While the Court recognizes that, as argued by the Department, Anderson failed to file his brief in accordance with the time designation set forth in SCALC Rule 60(A), the Court finds that he made a good faith effort to file his brief within the applicable time limit. Furthermore, although the Court certainly does not condone noncompliance with the SCALC Rules, the Court is bestowed with discretion in determining whether to dismiss an appeal or resolve the appeal adversely to the offending party for, *inter alia*, failure to comply with the time frames set forth in SCALC Rule 60(A). See SCALC Rule 62 ("Upon motion of any party, or on its own motion, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section (V)"). Accordingly, the Court will accept Anderson's brief despite it being untimely by some seventeen days and declines to dismiss his appeal on this basis pursuant to SCALC Rule 62(A).

³ A non-collateral or administrative matter is "one in which an inmate does not challenge the validity of a conviction or sentence." *Al-Shabazz*, 338 S.C. at 368, 527 S.E.2d at 749.

of a serious rule violation. *Id.* at 369, 527 S.E.2d at 750. Importantly, the court stressed the caveat that not all provisions of the Administrative Procedures Act (APA)⁴ apply to the internal prison disciplinary or decision-making process. *Id.* Rather, procedural due process is guaranteed only when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property. *See id.* (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548, 556 (1972)).

Following *Al-Shabazz*, South Carolina jurisprudence has found that a matter is reviewable by the ALC where an inmate's appeal implicates a state-created liberty or property interest. *See, e.g., Howard v. S.C. Dep't of Corr.*, 399 S.C. 618, 630, 733 S.E.2d 211, 218 (2012); *see also Wicker v. S.C. Dep't. of Corr.*, 360 S.C. 421, 602 S.E.2d 56 (2004) (recognizing another limited ALC jurisdictional exception where inmate claims deprivation of a property interest).

When reviewing the Department's final decision in a non-collateral or administrative matter, the Court sits in an appellate capacity. *Al-Shabazz*, 338 S.C. at 376-77, 527 S.E.2d at 754. The Court's standard of review, after an exhaustion of administrative remedies, is governed by section 1-23-380 of the South Carolina Code (Supp. 2018). *See* S.C. Code Ann. § 1-23-600(E) (Supp. 2018) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 1-23-380). Pursuant to this standard, the Court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2018). Although the Court may affirm the agency's decision or remand for additional proceedings, the Court's review in determining whether to reverse or modify an agency decision is circumscribed to the following:

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.

⁴ The APA is found at S.C. Code Ann. §§ 1-23-10 to 680 (2005 & Supp. 2018).

S.C. Code Ann. § 1-23-380(5)(a)-(f) (Supp. 2018). When reviewing, the Court is generally confined to the record presented and, as such, will not consider any fact that does not appear in the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2018).

DISCUSSION

While Anderson's contentions are largely conclusory, two principle assignments of error can be gleaned in support of his argument that the Board's decision was in error: (1) the Board's decision to deny parole was made upon an unlawful procedure; and (2) the Board's criteria for parole consideration constituted a violation of the prohibition against *ex post facto* laws as set forth in Article I, § 4 of the South Carolina Constitution and Article I, § 10 of the United States Constitution. The Court finds each argument unavailing.

I. Unlawful Procedure

In *Cooper v. South Carolina Department of Probation, Parole & Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008), the South Carolina Supreme Court was tasked with determining whether the inmate's claim raised a sufficient state-created liberty interest warranting minimal due process requirements when the inmate was not challenging the denial of his parole but, instead, the method and procedure employed by the parole board in denying his request. Accordingly, the question became whether the parole board's decision, which failed to give credence to the factors in Department Form 1212 and the criteria the General Assembly established in section 24-21-640, amounted to a routine denial of parole or was tantamount to rendering the inmate ineligible for parole. *See id.* at 494-95, 661 S.E.2d at 109-10. In answering the latter query in the affirmative, the court observed: "If a [p]arole [b]oard deviates from or renders its decision without consideration of the appropriate criteria, we believe it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest." *Id.* at 499, 661 S.E.2d at 111. Notwithstanding, while mindful of its previous observation that the General Assembly did not intend for the parole board to issue decisions with unfettered discretion, the court underscored that if the parole board plainly 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, then such a decision will constitute a routine denial of parole. *Id.* at 500, 661 S.E.2d at 112. Thus, if the parole board conforms to said procedure, the ALC would then have restricted authority in reviewing to determine whether the parole board followed proper procedure. *Id.* In such an instance, the Court

can summarily dismiss the inmate's appeal as it constitutes a routine denial of parole. *Id.*⁵

Here, in denying Anderson's parole on April 3, 2019, the Board provided, *inter alia*, that it carefully considered the factors published in Department Form 1212 and the criteria outlined in section 24-21-640.⁶ The Board further gave the following three factual findings in reaching its decision: (1) the nature and seriousness of the current offense; (2) an indication of violence in this or a previous offense; and (3) the use of deadly weapon in this or a previous offense. It follows, therefore, that the Board followed proper procedure in denying Anderson's parole. *See Cooper*, 377 S.C. at 499 n.5, 661 S.E.2d at 111 n.5 (observing that the following reasons—(1) the nature and seriousness of the current offense; (2) an indication of violence in this or a previous offense; and (3) the use of a deadly weapon in this or a previous offense—"would be sufficient to deny parole in the Board's discretion, if the Board's decision evinced consideration of section 24-21-640 and its own criteria."); *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) (holding parole board's decision sufficient under *Cooper* when "the [p]arole [b]oard clearly stated in its notice of rejection that it considered the statutory criteria [of section 24-21-640] and the criteria set forth in Form 1212 . . ."). Consequently, given the nature of the Court's circumscribed review in determining whether the Board followed proper procedure, the Court finds no error in the Board's decision as it amounts to a routine denial of parole in accordance with the procedure outlined in *Cooper* and *Compton*.

II. *Ex Post Facto* Violation

"The United States and South Carolina Constitutions specifically prohibit the passage of *ex post facto* laws." *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 403, 745 S.E.2d 110, 114 (2013) (citing U.S. Const. art. I, §§ 9, 10; S.C. Const. art. 1, § 4). It is well-recognized that "[a]n *ex post facto* violation occurs when a change in the law retroactively alters the definition of a crime or increases the punishment for a crime." *E.g., State v. Gaster*, 349 S.C.

⁵ Furthermore, S.C. Code Ann. 1-23-600(D) provides, in pertinent part, that "[a]n administrative law judge shall not hear an appeal . . . involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." *See*, 2008 Act No. 334§7 (effective June 16, 2008)

⁶ Notably, the Board also considered and evaluated Anderson's risk using the Department's adopted assessment tool in reaching its decision to deny his parole. *See* S.C. Code Ann. § 24-21-10(F)(1) (Supp. 2018) (requiring the Department to develop a plan for the "establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, which the parole board shall use in making parole decisions" (emphasis added)).

545, 550, 564 S.E.2d 87, 90 (2002) (citing *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000)). For a law to fall within the ambit of *ex post facto* prohibitions, two crucial elements must exist: "First, the law must be retroactive so as to apply to events occurring before its enactment. Second, the law must disadvantage the offender affected by it." *State v. Walls*, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002) (citation omitted). "The law existing at the time of the offense determines whether an increase of punishment constitutes an *ex post facto* violation." *Jernigan*, 340 S.C. at 260 n.3, 531 S.E.2d 509 n.3 (emphasis added) (citation omitted). Concerning the issue of increase of punishment, the pertinent question is "whether the legislative amendment 'produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Id.* at 261, 531 S.E.2d at 509 (quoting *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1999)). If the amendment produces only a "speculative and attenuated possibility" of increasing an inmate's punishment, then there is no *ex post facto* violation. *Id.* (citation omitted).

In *Cooper*, the inmate advanced a similar *ex post facto* claim as Anderson has in this instance. Specifically, the inmate argued that by creating the factors on the parole form, the parole board changed the law and violated the *ex post facto* clause of the South Carolina Constitution as they "effectively changed the standards for granting parole and retroactively applied it to [his] offenses which were committed before the establishment of these factors." 377 S.C. at 501, 661 S.E.2d at 112 (alteration in original). The court found *no ex post facto* violation. *Id.* at 501, 661 S.E.2d at 112-13. To that end, the court recognized that section 24-21-640, which had not been substantively amended since the inmate's 1985 conviction, authorized the parole board to establish the criteria on the parole form and, therefore, did not change the law in violation of the *ex post facto* clause. *Id.*

Here, Anderson, like the inmate in *Cooper*, contends that the Department's criteria for parole consideration constituted a violation of the prohibition against *ex post facto* laws as set forth in Article I, § 4 of the South Carolina Constitution and Article I, § 10 of the United States Constitution. Again, much like *Cooper*, the specific statute authorizing the Board to establish written criteria—section 24-21-640—has not been substantively amended since he was convicted.⁷

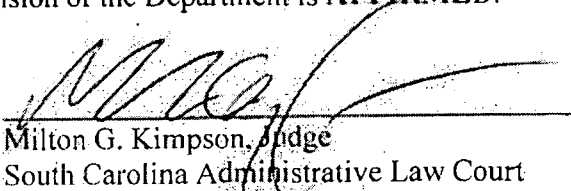
⁷ Section 24-21-640, which was in effect at the time of Anderson's conviction, required the parole board to develop specific criteria to be examined and applied in determining whether to grant or deny parole. The statute was amended in 1990—1990 Act No. 510, § 1—to add, *inter alia*, that "[t]his criteria must reflect all of the aspects of this section and include a review of prisoner's disciplinary and other records." In light

As such, given that there has not been a change in the substance of section 24-21-640 from the time when Anderson's committed his offenses, there is simply no *ex post facto* issue present here. In the absence of such, Anderson's claim is without merit.

ORDER

IT IS HEREBY ORDERED that the decision of the Department is **AFFIRMED**.
AND IT IS SO ORDERED.

October 25, 2019
Columbia, S.C.


Milton G. Kimpson, Judge
South Carolina Administrative Law Court

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 25 day of October, 2019
By: A. Sullivan
Judicial Law Clerk

of this statutory directive, the Board promulgated the criteria forth in Department Form 1212 to be considered in determining whether to grant or deny parole.