STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Jerome McDaniel, #166436, Appellant, v. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	)	Docket No. 19-ALJ-15-0017-AP **ORDER**

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*, Jerome McDaniel (McDaniel) seeks judicial review of a decision issued by the South Carolina Parole Board (Board). Specifically, on February 27, 2019, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified McDaniel 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 Department's decision.

BACKGROUND

On or about August 1, 1992, McDaniel entered the victim's apartment under false pretenses, demanded money, and assaulted the victim and her sister. McDaniel then forced the victim from the apartment and into a car, threatening to kill her. While he was driving away, McDaniel forced the victim to perform oral sex. Subsequently, he stopped the car, raped the victim, and took some of her jewelry. Following his arrest, McDaniel was charged with: assault and battery of a high and aggravated nature (ABHAN); strong-armed robbery; kidnapping; criminal sexual conduct-first degree; and burglary first degree. McDaniel was later convicted on all charges.

McDaniel appealed his conviction. In *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995), the South Carolina Court of Appeals reversed his conviction and remanded the matter for a new trial. In his second jury trial, McDaniel was convicted on all of the charges and sentenced to the following: ten years on the ABHAN conviction; ten years on the strong-armed robbery

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conviction; thirty years on the kidnapping conviction; thirty years on the first-degree criminal sexual conduct conviction; and thirty years on the first-degree burglary conviction. Each of these convictions were to be served consecutively.

After becoming parole eligible, McDaniel last appeared before the Board on February 27, 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 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, on March 11, 2019, McDaniel submitted a letter to the Board essentially asking the Board to reconsider its decision to deny him parole. On March 19, 2019, General Counsel for the Department responded to McDaniel's submission and noted that the decision to grant or deny parole is within the sole purview of the Board, and the Board acted "well within its authority to reject [him] for the same reasons as in the past." McDaniel filed his Notice of Appeal with the Court on April 10, 2019. This matter was assigned to the undersigned on April 17, 2019. McDaniel filed his brief on April 23, 2019. The Department filed the Record on May 29, 2019, and its brief on July 22, 2019. McDaniel filed a reply brief on July 29, 2019.

ISSUE ON APPEAL

1. Whether the Department followed proper procedure in denying McDaniel's parole?

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

[1] According to the Department, McDaniel made his initial appearance before the Board approximately fifteen years earlier, on April 27, 2004. *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, McDaniel has appeared before the Board on seven occasions. On each occasion, the Board has rejected McDaniel's parole.

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or administrative matters[2] 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 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)[3] 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;

[2] 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.

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

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> (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.

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

McDaniel argues that because the Board denied his parole for the "same reasons,"[4] the Board has rendered him parole ineligible and, in turn, violated his due process rights. To that point, McDaniel insists the Department's continued reliance on the identical reasons he was previously rejected for parole has denied him a realistic opportunity to participate in the parole program.[5] The Court disagrees.

In terms of securing the ALC's jurisdiction to review parole decisions, in *Furtick v. South Carolina Department of Probation, Parole & Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003), the South Carolina Supreme Court examined the appealability ramifications of a decision by the parole board denying parole versus a determination that an inmate is parole ineligible. In that regard, the court answered the question—whether the inmate had a liberty interest in gaining access to the parole board—in the affirmative by holding that "the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process." *Id.* at 598, 576 S.E.2d at 149. "In reaching this conclusion, the [*Furtick* court] emphasized the finality of the Department's decision, and distinguished the *final* determination of parole eligibility from the *temporary* granting or denial of parole to an eligible inmate." *Sullivan v. S.C. Dep't of Corr.* 355 S.C. 437, 443, 586 S.E.2d 124, 127 (citing *Furtick*, 352 S.C. at 598 n.4, 576 S.E.2d at 149 n.4). As such, *Furtick* establishes "that an inmate has a right of review by the AL[C] after a *final*

[4] While McDaniel fails to identify the "same reasons" he complains of, the Court assumes these reasons are the three factual findings relied on by the Board: (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.

[5] Based on this position, McDaniel appears to analogize his situation to the inmate in *Furtick v. South Carolina Department of Probation, Parole & Pardon Services*, 352 S.C. 594, 5766 S.E.2d 146 (2003). As will be explored in greater depth *infra*, a similar argument was advanced by the inmate in *Cooper v. S.C. Department of Probation, Parole & Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

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decision that he is *ineligible* for parole but that a parole-eligible inmate does not have the same right of review after a decision denying parole[.]" *Id.* at 443 n.4, 586 S.E.2d at 127 n.4. In other words, this difference arises from the fact that parole is a privilege, not a right. *Id.*; *see also Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.").

In this instance, McDaniel, unlike the inmate in *Furtick*, is obviously eligible for parole and most recently appeared before the Board on February 27, 2019. Nevertheless, the Court's inquiry cannot end there as the thrust of McDaniel's contention is that the rationale the Board employed in reaching its decision—utilizing the identical reasons it had in the past to reject his parole—is improper as he claims it rendered him parole ineligible.

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.* [6]

Here, in denying McDaniel's parole on February 27, 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.[7] 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. Crucially, *Cooper* does not prohibit the Board from relying, in part, on the identical factual reasons or nature of McDaniel's crime in denying parole. Instead, in rendering a decision, the Board is required to consider the statutory criteria found in section 24-21-640 and the fifteen criteria listed on the parole form when rendering a decision. *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 and the criteria set forth in Form 1212 . . . ."). It follows, therefore, that the Board followed proper procedure in denying McDaniel's parole, and his mere frustration with the Board's continued reliance on said reasons is simply not sufficient to render him parole ineligible.

In summary, given the nature of the Court's circumscribed review in determining whether the Board followed proper procedure, the Court finds no error in the Department's decision as it amounts to a routine denial of parole in accordance with the procedure outlined in *Cooper* and *Compton*. Accordingly, summary dismissal is appropriate in this instance.

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[6] 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).

[7] Notably, the Board also considered and evaluated McDaniel'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)).

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ORDER

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

AND IT IS SO ORDERED.

October 25, 2019
Columbia, SC

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: _____
Judicial Law Clerk