STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Robert Doby, #229457, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	)	Docket No.: 19-ALJ-15-0052-AP **ORDER OF DISMISSAL**

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to an appeal filed by Robert Doby (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. On October 31, 2019, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Appellant that the South Carolina Parole Board (Board) denied him parole.

On May 21, 1995, Appellant was charged with murder, and, in October 1995, he was sentenced to life imprisonment. On July 22, 2015, Appellant made his initial appearance before the Board. The Board denied Appellant parole. Appellant was denied parole again in 2017. Appellant appeared before the Board again on October 30, 2019. Following his appearance, the Board issued a unanimous notice of rejection on October 31, 2019, in which it made the following conclusions of law and findings of fact:

> CONCLUSION OF LAW:
>
> After careful consideration of: (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. The Parole Board has determined that your parole must be denied.
>
> You will be notified 30 days prior to your next scheduled parole consideration date.
>
> FINDINGS OF FACT:
>
> Nature And Seriousness Of Current Offense

Use of Deadly Weapon

Criminal Record indicates poor community adjustment

Vote Count: Unanimous to Reject

On November 8, 2019, Appellant filed a Notice of Appeal with the Court seeking judicial review of the Board's denial of parole. In his Notice of Appeal, Appellant argues that the "Board used things that can never be changed."

The Notice of Assignment was filed on November 13, 2019. The Record on Appeal was filed on January 2, 2020. The Department filed a document labeled as its "brief" on February 21, 2020, wherein the Department asked the Court to dismiss the appeal because Appellant failed to file his brief. Thus, the Court interprets this "brief" to be a Motion to Dismiss.[1]

Appellant then filed a brief on February 27, 2020, in which he asserts multiple reasons for filing his brief untimely. Specifically, he alleges the Department incorrectly calculated the day his brief was due as there were holidays that occurred during that 90-day period. He further argues the prison suffered multiple back-to-back lockdowns and quarantines as a result of the flu and/or corona virus. He also asserts the prison law library was closed a lot, thus "hindering the access needed to adequately research and prepare an Appellant brief."

Regarding the issues on appeal, Appellant asserts the Board failed to apply the statutory criteria for parole review and thus they violated his constitutional rights. More specifically, he argues "the Board has arbitrarily used criteria and characteristics in reaching its decision to continually deny Appellant parole which cannot and will never be able to change as it is the very circumstances behind that criteria that has resulted in Appellant's incarceration and loss of liberty." He also argues that "for the Board to use such a criteria as grounds to deny parole time and time again raises ex post facto considerations."

Timeliness of Brief

Pursuant to the Rules of Procedure for the ALC (SCALC Rules), Appellant's brief was due ninety days after the Notice of Assignment was filed, or February 11, 2020. SCALC Rule 60(A). Appellant did not file his brief until February 27, 2020, which makes his brief untimely. Pursuant to SCALC Rule 62, an Administrative Law Judge may dismiss an inmate's appeal for failure to

[1] The Court finds it noteworthy to mention this is **not** the first time the Department has incorrectly labeled its documents filed with the Court, which causes procedural irregularities.

comply with the rules of procedure for appeals, including the failure to comply with the time limit to field a brief.

In this case, the Court finds Appellant has not shown sufficient good cause for the Court to deny the Department's presumptive motion to dismiss based on Appellant's failure to timely file a brief. Specifically, Appellant argued that his time to file should have been extended due to holidays. However, SCALC Rule 52 provides that holidays only extend the time for taking action if the time period prescribed is less than seven days. The time period prescribed here is ninety days, which is more than seven days, and renders Rule 52 inapplicable.

Next, Appellant also asserted that Perry Correctional Institution was on quarantine due to the flu and/or corona virus. However, Appellant provided no evidence that, during the timeframe to file his brief, any person in South Carolina was diagnosed with the corona virus. Furthermore, Appellant provided no evidence that any prison in the State has been quarantined as a result of the flu or corona virus. Furthermore, if Appellant was unable to timely file a brief because of prison lockdowns, he should have moved for an extension of time rather than waiting until after the Department filed its "brief" to explain his non-compliance.

Accordingly, I find Appellant has not shown good cause for untimely filing his brief, and the Department's request to dismiss the appeal should be granted pursuant to SCALC Rule 62.

Merits

However, even if the Court denied the Department's request to dismiss Appellant's appeal, the Court lacks subject matter jurisdiction to review this appeal. The Court's jurisdiction to hear these types of cases is very narrow.

In *Al-Shabazz v. State*, the South Carolina Supreme Court held inmates have a right to administrative review in two circumstances implicating a state-created liberty or property interest: "(1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status." *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000). The second circumstance was expanded to include the permanent denial of parole eligibility pursuant to section 24-21-640 of the South Carolina Code. *See Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003) ("[T]the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process." (emphasis

original)). However, the statute creates no such liberty interest in the routine denial or granting of parole. *Id.* at 598 n.4, 576 S.E.2d at 149 n.4. Therefore, while the permanent denial of parole eligibility constitutes a liberty interest that is reviewable by this Court, the routine denial of parole is, generally, not a sufficient liberty interest to grant parole.

However, a routine denial of parole can bestow jurisdiction on this Court only if, in denying parole, the Department fails to follow the statutorily required parole criteria, and this failure renders its decision tantamount to a permanent denial of parole eligibility.[2] *See Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 502, 661 S.E.2d 106, 113 (2008) ("If a Parole Board fails to consider and apply the statutorily-created parole criteria, it has the effect of rendering an inmate parole ineligible, which under *Furtick* warrants review by the ALC."). The "criteria" referenced in *Cooper* are "the factors outlined in section 24-21-640 and the fifteen factors published in [the Department's] parole form." *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112. Under *Cooper*, as long as the Board "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 . . . 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." *Id.*

Additionally, after *Cooper*, the Department established a "validated actuarial risk and needs assessment tool" to be used when evaluating parole. S.C. Code Ann. § 24-21-10(F) (Supp. 2019). This risk assessment tool, which is known as COMPAS, has been incorporated into the Board's written criteria and must be considered by the Board in addition to the other aforementioned statutory criteria. *See Cooper*, 377 S.C. at 499, 661 S.E.2d at 112 (holding "the apparent failure by the Parole Board to consider the requisite statutory criteria in rendering its decision constitutes an infringement of a state-created liberty interest and, thus, warrants minimal due process procedures."); *see also Ruff v. S.C. Dep't of Prob.*, No. 2015-UP-309 (S.C. Ct. App. dated June 24, 2015) (holding the actuarial risk and needs assessment is one of the statutory criteria to which the Board must adhere). Furthermore, in *Compton v. South Carolina Department or Probation, Parole & Pardon Services*, the Supreme Court noted that its decision in *Cooper* was

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[2] Following the *Cooper* decision, the General Assembly amended section 1-23-600(D) of the South Carolina Code to provide 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." 2008 S.C. Acts No. 334, § 7 (effective June 16, 2008). Since *Cooper* remains good law, the ALC follows the Supreme Court's decision in that case.

being misinterpreted and clarified that if "the Parole Board clearly [states] in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212" its decision is sufficient under *Cooper*. *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009). In sum, this Court's review is limited to ascertaining whether the Board "followed proper procedure." *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112.

Here, Appellant argues the Board's routine denial of parole is tantamount to the permanent denial of parole eligibility because the Board has denied his parole based upon immutable factors that cannot change. He identifies these immutable factors as the nature and seriousness of the offense. Part of the issue in *Cooper* was that the Board only considered immutable facts without considering the other factors as required by section 24-21-640 and the Department's fifteen factor form. *See Cooper*, 377 S.C. at 502, 661 S.E.2d at 113 ("In the instant case, the Parole Board apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by any rehabilitation efforts on the part of Cooper."). To remedy this, the supreme court held the Board must show it reviewed considered section 24-21-640, the Department's criteria, and now COMPAS to comply with due process. *Id.* at 500, 661 S.E.2d at 112. In this case, the letter of denial from the Department clearly shows it considered section 24-21-640, the factors published in Department Form 1212 (Criteria for Parole Consideration), and the risk assessment (COMPAS) in addition to the immutable factor of the nature and seriousness of the offense. Additionally, the order contains separate findings of fact and conclusions of law. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112. Therefore, the Board's decision was not solely based on non-changeable, immutable facts and it met the minimum due process requirements of *Cooper*. *See id.*

He also argues that "for the Board to use such a criteria as grounds to deny parole time and time again raises ex post facto considerations." At the outset, Appellant did not raise this issue in his Notice of Appeal and thus this issue was not properly raised. *See* SCALC Rule 59 ("The notice shall . . . contain the following information: . . . (B) a brief factual basis for each expressly and specifically asserted constitutional violation."). Furthermore, "[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." *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000). Appellant has failed to argue how the Department's decision to deny him parole constitutes an ex post facto

violation. Therefore, the Court finds this issue is abandoned. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

Because Appellant did not timely file his brief and, even if he did, the Department's denial considered the requisite criteria, I conclude this matter should be dismissed pursuant to SCALC Rule 62.

ORDER

IT IS THEREFORE ORDERED that Appellant's appeal is **DISMISSED WITH PREJUDICE.**

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

March 11, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

Stephanie Michelle Perez
Judicial Law Clerk

March 11, 2020
Columbia, South Carolina