

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Judge
Appellant Case No. 2019-002102

BERNARD BAGLEY, #175851.....APPELLANT

v.

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S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

RESPONDENT'S FINAL BRIEF

Matthew C. Buchanan
General Counsel

**South Carolina Department of Probation,
Parole and Pardon Services**
P.O. Box 207
Columbia, South Carolina 29202

ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Parole Board follow procedure giving consideration to the criminogenic factors outlined in §24-21-10(f)(1), §24-21-640, and the fifteen factors published in its parole form?
2. Did the Board properly deny the Appellant's parole when it stated its reasons for denial being the nature and seriousness of the offense, the indication of violence in his current or previous offense, and his use of a deadly weapon?
3. Whether the Board properly allowed the Appellant to appear bi-annually?
4. Whether the Administrative Law Court had jurisdiction to consider the Appellant's twenty-five issues in his appeal from his routine denial of parole?

STATEMENT OF THE CASE

On August 23, 1990, the day after he was in an argument with his wife, the Appellant discovered that his wife resigned from her job, withdrew money from their bank account, and left with their daughter to her mother's house in Eastover, South Carolina. The Appellant traveled from Raleigh, North Carolina to Eastover. He arrived at her mother's residence, kicked in the front door, and inquired to his wife regarding a possible affair. An altercation ensued resulting in the Appellant shooting his wife twice, causing her death.

The Appellant was indicted by the Richland County Grand Jury for the offense of murder. On April 12, 1991, he appeared before the Honorable Dan Laney. Upon his conviction for murder, the Appellant received a term of incarceration for the remainder of his natural life. At the time the Appellant committed this offense South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

The Appellant made his initial appearance before the Parole Board on September 8, 2010. The Board denied parole. Since this initial denial the Appellant has appeared before the Board an additional four times, each resulting in a denial of parole. His most recent appearance occurred on June 19, 2019. At the conclusion of this appearance, the Board unanimously denied parole due to: 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. (R.p.5).

After this notification, the Appellant filed a notice of appeal with the Administrative Law Court (ALC). His appeal contained twenty-seven points alleging, generally, that the Board acted arbitrarily and capriciously in denying him parole.

The Honorable S. Phillip Lenski issued his order on January 3, 2020, affirming the Board's decision to deny parole. (R.p.1-p. 4). This appeal follows.

ARGUMENTS

1. The order of denial revealed that the Board considered all of the mandatory criteria; therefore the denial of parole was lawful.

After the Board's most recent denial of the Appellant's parole, the Department sent him written notice of his denial, the reasons for the denial, and a statement that it considered the mandatory criteria when considering the Appellant's request for parole. A final decision shall include findings of fact and conclusions of law separately stated. S.C. Code Ann. §1-23-350 (2018).

This order followed South Carolina law and the mandates proscribed in the South Carolina Supreme Court decision of *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

The Appellant argues that the Board's decision, after following the requirements in *Cooper*, was arbitrary and capricious. He seems to be of the opinion that had the Board considered all the factors, he would have been awarded parole. However, while his opinion may be that he is deserving of parole, the Board obviously felt otherwise.

In *Cooper*, the Supreme Court established that the ALC has a very narrow ability to review the process conducted by the Parole Board. If it is shown that the Board followed the mandatory criteria, the ALC does not have any further ability to review the final decision.

The Court in *Cooper* found that though the Board's denial of parole included its findings of fact, the Board, "offered no explanation nor indicated that it considered the statutory criteria of section 24-21-640, and the fifteen criteria listed on the parole form." *Id.*, at 500. The Supreme Court ruled that if the Parole Board fails to consider and apply the statutory-related criteria, it has the effect of rendering an inmate parole ineligible which warrants review by the ALC. *Id.*, at 502.

The Supreme Court then established what a future order of denial should consist of. "We emphasize that in future parole review hearings the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors published in its parole form. If the Board complies with the procedure, 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.*

In the present case, the order of denial included its findings of fact which were the reasons for denial; and a statement that the mandatory criteria and risk assessment were considered prior to the final decision. The Appellant still argues that, even after the Board followed the proper procedure outlined in *Cooper*, that he received a permanent denial of parole and therefore sought review by the ALC. The ALC disagreed, determining that it was a routine denial of parole and therefore its authority to conduct a further review was limited.

The Department respectfully submits that the ALC properly followed *Cooper* and declined to review what was simply a routine denial of parole. This Court should therefore uphold the decision of the ALC.

- 2. The Board's reasons for denial were proper when it stated its reasons for denial being the nature and seriousness of the offense, the indication of violence in his current or previous offense, and his use of a deadly weapon.**

The Appellant argues that the Board's denial of parole was improper because the Board's stated reasons for rejection were based on unchangeable events in the past. However, the Board is not only allowed, but mandated to consider the facts of the offense when considering an inmate for parole.

The South Carolina General Assembly as well as the Department has created mandatory criteria that must be considered. The South Carolina Code of Laws specifically state:

The board must carefully consider the record of the prisoner before, during and after imprisonment and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that, in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that, the interest of society will not be impaired thereby; and, that suitable employment has been secured for him.

S.C. Code Ann. §24-21-640 (2018)

The General Assembly has also made the Board responsible for the establishment of written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records. *Id.* This criteria includes, "the nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it." So the actual events that occurred must be considered as part of the mandatory criteria considered by the Parole Board.

At no point has the appellate courts of South Carolina prohibited the Board's consideration or use of the facts and circumstances of the offense – which are always unchangeable events in the past – in its denials of parole. Furthermore, the Department respectfully submits that the Courts would not be able do so, in light of the statutory language mandating that the Board carefully consider the inmate's record. To rule otherwise – that the Board must carefully consider the inmate's record but somehow may not rely upon that record when it declines to award parole – would impose an impossible mental exercise upon the members of the Board.

The decision of the ALC should again be upheld.

3. The Appellant is being allowed to appear before the Board bi-annually.

The Appellant challenges the method of scheduling his parole hearings. He alleges that because his parole hearings were not held precisely every two years, he is roughly nine months behind on his parole hearings.

The ALC determined this argument to be moot, because it cannot rule on a case or controversy that has not happened yet – being his next parole hearing. The ALC cited *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

The offense the Appellant has been convicted of committing is classified as violent.¹ Upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purposes of a determination of parole. S.C. Code Ann. §24-21-645 (1986). The Appellant has appeared before the Parole Board on September 8, 2010, October 10, 2012, January 14, 2015, March 15, 2017, and June 19, 2019.

The above referenced dates reveal that the Appellant has been allowed to appear before the Board every two years. The only delay was in 2014 in which he was heard in January of 2015 and parole was denied. He was heard and denied every two years thereafter, so the delay has not caused any prejudice, this case should not be subject to reversal due to that reason. To warrant reversal the Appellant must show both error of the ruling and resulting prejudice. *Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002).

The Appellant expects his hearings to be held exactly every two years. That is an impossible task due to the large amount of hearings the Board must conduct on a weekly basis.

¹ For purposes of definition under South Carolina law a violent crime includes the offense of murder (Section 16-3-10) S.C. Code Ann. §16-1-60 (1986).

There are also instances beyond the Board's control that could cause an individual to go slightly beyond the two year period. For each prisoner, victims, law enforcement and the prosecuting solicitor must be notified prior to each hearing. Accommodations must also be made to allow them be present if they wish to present their opinion to the Board. These are circumstances out of the Board control which can cause a delay or rescheduling. The Appellant has been allowed to appear before the Board bi-annually so this case should not be subject to reversal.

4. **The ALC properly declined to consider the Appellant's twenty-five additional issues when they were all related to the Board's decision-making, which were outside the ALC's scope of review.**

The Appellant argues that the ALC should have considered his twenty-five additional claims that the Board acted arbitrarily and capriciously in denying his parole. The Department submits that the ALC acted properly and within its limited scope of review when it declined to consider those claims, as they related to mitigating evidence he felt that the Board should have given more weight or regarding evidence he wished to submit during a reconsideration.

The Supreme Court in *Cooper* only allowed the ALC to make a determination regarding if the proper procedure was followed by the Board prior to denial. Most of the claims the ALC declined to review did not relate to procedure, but the facts of his case. Pursuant to South Carolina law the weight of a question of fact can only be determined by the Board, and not the ALC. 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 (2018).

The appeal court has only the authority to consider alleged errors of law and has no right to order an original judgment for the plaintiff. *Smith v. Grant*, 15 S.C. 136 (1881).

The ALC properly conducted itself in its limited appellate capacity when it determined if the Board applied the mandatory criteria. It then declined to consider the Appellant's remaining claims that went toward the weight of the evidence and the Board's determination of the facts of the case. The ALC's decision should therefore be upheld.

CONCLUSION

Based on the foregoing reasons, the Department submits that the ALC correctly concluded that the Board followed its procedures under *Cooper* which resulted in a routine denial of parole. Therefore, it correctly declined to rule on anything outside its limited scope. The Department would respectfully request this Court affirm the decision of the ALC.

Respectfully submitted,



Matthew C. Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Columbia, South Carolina
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.



Matthew C. Buchanan
General Counsel

April 10, 2020