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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

SC Court of Appeals

Buddy Newsome, #220855,)
)
Appellant,)
)
vs.)
)
South Carolina Department of Probation,)
Parole and Pardon Services,)
)
Respondent.)
_____)

Docket No.: 19-ALJ-15-0053-AP

ORDER

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to an appeal filed by Buddy Newsome (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. On September 30, 2019,¹ the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Appellant that the South Carolina Parole Board (Board) denied him parole.

BACKGROUND

On November 15, 1994, an Easley Police Department investigator was dispatched to Baptist Medical Center due to a report of suspected child abuse. The investigator was informed that a child was brought in with bruises on his head, chest, back, arms and legs and he was now on a respirator. Once the child was taken off the respirator, he died. An autopsy revealed the child died due to a head wound and abdominal injuries resulting from blunt force trauma. Appellant, the child's stepfather, was later charged with homicide by child abuse. On July 19, 1995, Appellant pled guilty to homicide by child abuse before the Honorable Frank Eppes. Appellant was sentenced to one hundred years of incarceration.

¹ In his Notice of Appeal, Appellant attached the Notice of Rejection dated September 30, 2019. The Department's motion refers to the Notice of Rejection dated September 26, 2018. In addition, the Department included that letter in the Record on Appeal. Because both Board decisions utilized the same factors for denying Appellant parole, the Court's review is the same for the Board's decisions issued on September 26, 2018 and September 30, 2019.

FILED
March 17, 2020

On June 18, 2003, Appellant made his initial appearance before the Board. The Board denied Appellant parole. Appellant has since been denied parole sixteen times since his initial appearance. At his recent hearing, Appellant presented mitigating evidence and evidence of his rehabilitation to the Board. However, following his appearance, the Board issued a unanimous notice of rejection on September 30, 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

Indication Of Violence In This Or Previous Offense

Vote Count: Unanimous to Reject

On November 12, 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 alleges that the Board "has acted to permanently deny parole to Appellant by relying solely upon the offense committed to determine his current danger to society" and that the Board "has acted as a sentencing court by arbitrarily denying parole and upon personal bias and prejudice." On November 21, 2019, Appellant filed his brief and on January 14, 2020, Appellant filed a Motion for Incamera Review which was denied on February 11, 2020. On February 28, 2020, the Department filed its brief. Appellant then filed a document on March 9, 2020, which although labeled as a "Final Brief of Appellant," serves as a Reply Brief.²

² In this document, Appellant generally argues the issues he raised in his Initial Brief. However, to the extent that it may be argued that Appellant has raised any new issue, it is notable that those issues cannot be raised in a Reply Brief. See *Hunter v. Staples*, 335 S.C. 93, 103, 515 S.E.2d 261, 267 (Ct. App.1999) (finding that appellant was precluded from asserting an argument for the first time in its reply brief).

ISSUE

Whether the Board permanently denied parole to Appellant by repeatedly denying parole based upon the nature and seriousness of the offense?

STANDARD OF REVIEW

The ALC reviews the Department's decisions in inmate parole matters in its appellate capacity. *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 599, 576 S.E.2d 149 (2003); *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2019) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 1-23-380 of the South Carolina Code). Consequently, an Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2019). Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless the record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly arbitrary or affected by an error of law. *See Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998). Finally, "when appealing an agency's decision, the burden rests squarely on the appellant to prove that substantive rights were prejudiced . . ." *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 260, 659 S.E.2d 233, 235 (Ct. App. 2008).

DISCUSSION

Jurisdiction

The Court's jurisdiction to hear this case 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]he 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.³ *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*

³ 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.

Probation, Parole & Pardon Services, the Supreme Court noted that its decision in *Cooper* was 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.

Cooper Analysis

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. Specifically, he argues that a State must impose a sentence that provides “some meaningful opportunity for release,” and that the Board denied him that meaningful opportunity for release by denying him parole. Appellant cites to case law that deals primarily with juvenile offenders and although he states that his age at the time of the crime doesn’t qualify him as a juvenile, he asserts that the “logic and reasoning in *Graham [v. Florida]*, 560 U.S. 48 (2010)] and the succession of cases” applies to him. Appellant also refers to himself as a “youth” at the time of his arrest and wants the Court to consider that in making its decision. However, he was convicted as an adult and not as a juvenile or youthful offender.

In addition, the Department’s continued denial of parole does not constitute the permanent denial of parole eligibility. Appellant was sentenced to one hundred years with the possibility of parole after ten years. Although Appellant faces a lengthy sentence, he has not been denied the opportunity to appear before the Board. In fact, consistent with this State’s law, since 2003 he has appeared numerous times before Board for the purpose of considering whether to grant him parole. Moreover, Appellant listed his accomplishments and achievements earned during his incarceration and concluded that he has “merited a lessening of the rigors of his imprisonment.” S.C. Code Ann. § 24-21-610 (Supp. 2019). However, his belief that he merits parole is immaterial. “[N]o such prisoner may be paroled until it appears to **the satisfaction of the board**: . . . That by his conduct he has merited a lessening of the rigors of his imprisonment.” § 24-21-610 (emphasis added).

Rather, the Department’s denial of parole eligibility for the last seventeen years relates to the Board’s exercise of its discretion. Clearly, the Board “is the sole authority with respect to decisions regarding the grant or denial of parole.” *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111.

Appellant nevertheless argues that “there is no additional rationale, other than the Board’s opinion of the crime committed, and unexplained belief Appellant poses a risk to the welfare of society, that can be found for the denial of parole release.” He goes on to say that “[t]here is nothing in the record to suggest Appellant had any type of violence leading up to the instant offense, nor any propensity to commit violent behavior.” However, this is not required. 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 Board’s letter denying Appellant parole clearly states that it considered the factors outlined in § 24-21-640, the Department’s Form 1212 (the written criteria), and the actuarial risk and needs assessment. *See Cooper*, 377 S.C. at 500, 661 S.E.2d at 112 (holding the Board can meet the requirement of due process if it “clearly states in its order denying parole that it considered the factors outline in section 24-21-640 and the fifteen factors published in its parole form”). Additionally, the Board’s order contains separate findings of fact and conclusions of law consistent with the Supreme Court’s edict in *Cooper*. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112; § 1-23-350. Therefore, the Board met the minimum constitutional due process requirements outlined in *Cooper*.

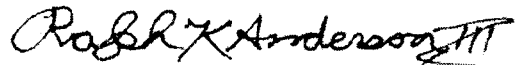
Notably, *Cooper* does not prohibit the Board from relying on immutable factors in its findings of fact, it merely requires the Board to consider all the statutory criteria in its decision making. *See Cooper*, 377 S.C. at 499 n.5, 661 S.E.2d at 112 n.5 (noting “[t]hese reasons [the nature and seriousness of the current offense; an indication of violence in this or a previous offense; and 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”). Additionally, *Cooper* does not require the Board to explain its reasoning for its decision in detail, and this Court is not empowered to engage in a substantive review of the Board’s

decision beyond determining the Board followed proper procedure.⁴ *Id.* at 500, 661 S.E.2d at 112 (“If the Board complies with this 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.”). All *Cooper* and § 1-23-350 require is that the findings of fact and conclusions of law be separately stated, as they were here.

Therefore, based on the Record, the Court finds the Department’s decision is consistent with *Cooper* and thus this Court may summarily dismiss Appellant’s appeal. *See id.* (“If the Board complies with this 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.”).

Based upon the foregoing, the decision of the Department is **AFFIRMED**.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

March 17, 2020
Columbia, South Carolina

⁴ Even if the Court could engage in a more thorough review, it could not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact. *See* § 1-23-380(5).

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).

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Stephanie Michelle Perez
Judicial Law Clerk

March 17, 2020
Columbia, South Carolina