STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Roger Curtis, # 143635,	)	Docket No. 19-ALJ-15-0026-AP
Appellant,	)	
v.	)	**FINAL ORDER**
South Carolina Department of Probation, Parole and Pardon Services,	)	
Respondent.	)	

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to an appeal filed on June 12, 2019, by Roger Curtis (Appellant), an inmate in the custody of the South Carolina Department of Corrections (SCDC). After a biannual parole hearing, the South Carolina Department of Probation, Parole and Pardon Services (Department or Respondent) denied Appellant parole by letter dated May 15, 2019. Appellant timely requested a rehearing in the matter and received a letter from the Department's General Counsel denying reconsideration on May 29, 2019. Pursuant to S.C. Code Ann. § 1-23-600(D) (Supp. 2018), Appellant now seeks the Court's review of the Parole Board's (Board) decision denying him parole.

STATEMENT OF THE CASE

On July 22, 1987, Appellant pled guilty before the Honorable Dan Laney, Jr., to one count of Kidnapping and one count of Criminal Sexual Conduct, First Degree (CSC 1st), in Spartanburg County, South Carolina. Appellant received a life sentence for the Kidnapping offense and a consecutive thirty-year sentence for the CSC 1st offense. Subsequently, on November 2, 1987, Appellant appeared before Judge Laney a second time and pled guilty to Kidnapping and CSC 1st, stemming from a separate incident that occurred near the same time involving a different victim. Again, Appellant received a life sentence for the Kidnapping offense and a thirty-year sentence for the CSC 1st offense to run consecutive to the accompanying life sentence for Kidnapping. These sentences were to run concurrently with the sentences Appellant was already serving on previous guilty pleas. (ROA, p. 5-10).

Appellant was initially denied parole on September 29, 2010, and has been denied on four

subsequent occasions, the last being the subject of this appeal.[1] By letter dated May 15, 2019, the Board unanimously denied Appellant's parole application:

> The Board hereby makes the following 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 ha[s] 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

(ROA, p. 1).

While a copy of Appellant's request for reconsideration has not been provided to the Court as part of the Record on Appeal, the May 29, 2019, letter from the Department's General Counsel in response to that request notes that Appellant's rights have not been violated:

> Please be aware that the Legislature did not change Kidnapping retroactively when it changed the possible punishment from life with parole eligibility after ten years to a no-parole offense that carries up to thirty years.
>
> The fact that the General Assembly changed Kidnapping to a max of thirty years subsequent to your offense and conviction does not have any impact on your sentence. The Parole Board, as you know, is an independent body that has absolute discretion in its power to grant parole. You have a right to parole hearings, but not a right to parole.

(ROA, p. 3).

Thereafter, Appellant filed his Notice of Appeal with the ALC on June 12, 2019, citing two issues

[1] In his brief, Appellant states he has had thirteen parole hearings all resulting in denials due to Nature and Seriousness of Current Offense and Indication of Violence in This or Previous Offense. (App. Brief, p. 2). The Department asserts that due to consecutive sentencing, Appellant had to complete his thirty-year sentence for CSC 1st before becoming parole eligible for the Kidnapping offenses ten years later. Thus, the Department reports Appellant has been before the Parole Board a total of five times. (Resp. Brief, p. 2).

as grounds for appeal.

ISSUES ON APPEAL

I. Does the Board's reliance upon the nature and seriousness of the offense to solely reject parole deny Appellant due process when the Board has not made a determination of "current dangerousness?"

II. Does the Board's continuance of Appellant's hearing date to determine parole eligibility violate a liberty interest?

STANDARD OF REVIEW

An individual has a right to ALC review of a final decision of the Board when that decision affects a liberty interest for which due process is required. *See Furtick v. S.C. Dep't of Prob., Parole and Pardon Services*, 352 S.C. 594, 598-99, 576 S.E.2d 146, 149-50 (2003); *see also Sullivan v. S.C. Dep't of Corrections*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review). In *Furtick*, the South Carolina Supreme Court held that although an inmate has a liberty interest in parole eligibility pursuant to S.C. Code Ann. § 24-21-620 (2007), the statute does not create a liberty interest in the granting of parole itself. *See Furtick*, at 598, 576 S.E.2d at 149. The permanent denial of parole eligibility implicates a liberty interest sufficient to require at least minimal due process and, therefore, review by the ALC. *Id.* However, a parole-eligible inmate does not have the same right of review after a decision denying parole. *See Sullivan,* at 443 n. 4, 586 S.E.2d at 124 n. 4. The distinction stems from the fact that parole itself is a privilege, whereas an inmate's review or consideration for parole is a right granted by statute. *Id.; see also Steele v. Benjamin,* 362 S.C. 66, 72, 606 S.E.2d 499, 502 (Ct. App. 2004).

However, in certain circumstances, a sufficient liberty interest may be implicated to trigger due process requirements even though the Board's decision does not constitute a permanent denial of parole eligibility. While the Board is the sole authority with respect to decisions granting or denying parole, the Legislature created the Board to operate within certain parameters and did not intend that decisions be rendered without any means of accountability. *See Cooper v. S.C. Dep't of Prob., Parole and Pardon Services*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008). If the Board deviates from or renders its decision without consideration of the appropriate criteria, it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest. *Id.* In such cases, the ALC has subject matter jurisdiction over non-collateral matters.

When acting in an appellate capacity, the ALC must apply the criteria of S.C. Code Ann. § 1-23-380 (Supp. 2018), as directed by S.C. Code Ann. § 1-23-600(E) (Supp. 2018). 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 ALC may affirm the agency's decision or remand for additional proceedings, the ALC's review in determining whether to reverse or modify an agency decision is limited:

> 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.

Id. In its review, the Court is generally confined to the record presented and, as such, cannot consider any fact that does not appear in the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2018).

DISCUSSION

Appellant argues that the aim of parole and, thus, decisions rendered by the Board can be found on Form 1212 entitled "Criteria for Parole Consideration" in the following language:

> The discretion of the Board or [P]anel aims at protecting the best interest of both society and the inmate being considered for parole. In its concern for the protection of society's and the inmate's best interests, the Board or Panel deliberates upon the 'reasonable probability' that an inmate will not again violate the law, if parole is granted.

App. Brief, p. 3 (citing Department Form 1212 (outlining fifteen factors, along with any other factor the Board considers relevant, to be weighed when deliberating upon the reasonable probability that an inmate will not violate the law again)); *see also* ROA, p. 2. Appellant argues that this language and the fifteen factors establish that public safety is the fundamental consideration in parole decisions. (App. Brief, p. 3). Appellant further argues that the Board must

assess what he terms "current" or "future dangerousness" as part of this overall public safety consideration in determining parole. *Id.* at p. 4.

In addition, Appellant argues that because the General Assembly decreased the maximum sentence for Kidnapping from life, which he received in 1987, to thirty years in 1991, the Board must also consider the Legislature's intent behind the decreased maximum sentence as an additional factor when deciding his parole.[2,3] Essentially, Appellant argues that the amended maximum sentence is demonstrative of the Legislature's intent to pronounce that an individual convicted of Kidnapping is no longer a threat to public safety after the service of thirty years. *Id.* "Although the Board may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, it cannot substitute its decision for Legislature's Intent, where the enactment to reduce the punishment for kidnapping establishes that 'public safety' was no longer impaired by one who serves thirty years under the New Law. Essentially redefining the Nature of the Crime for Kidnapping. It is also evidence of Petitioner's 'Future' dangerousness to the public, in an Administrative setting as evidence of mitigation." *(sic). Id.*

At the outset, the Court notes that the Board is not tasked with a duty to determine legislative intent when considering parole. If the General Assembly intended to proclaim that all offenders convicted of Kidnapping no longer pose a threat to public safety after the service of thirty years, a decreased sentence could have been fashioned to apply retroactively.[4]

Second, as noted in *Cooper*, while an inmate has no right to be paroled, he does have a right to require the Board to adhere to statutory requirements in rendering a decision. *See Cooper* at 499, 661 S.E.2d at 112. Accordingly, the Board must issue orders that are sufficiently detailed for the ALC to conduct appellate review of decisions denying parole. *Id.* at 500, 661 S.E.2d at 112. If the Board plainly states in its denial order that it considered the factors outlined in § 24-21-640 and the factors published in Form 1212, then the decision will constitute a routine denial of parole. *Id.*

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[2] *See* S.C. Code Ann. § 16-3-910; 1991 Act No. 117, § 1.

[3] Correctly, Appellant does not argue that the reduced sentence should be applied retroactively in his case.

[4] A defendant convicted of kidnapping and sentenced to life imprisonment was not entitled to resentencing pursuant to a legislative amendment reducing the maximum penalty for kidnapping to 30 years imprisonment where the amendment did not become effective until after his sentence had been pronounced, and there was no language in the act which would require its retroactive application. *State v. Varner,* 310 S.C. 264, 423 S.E.2d 133 (1992), rehearing denied; *See also Hercules, Inc. v. S.C. tax Comm'n,* 274 S.C. 137, 262 S.E.2d 45 (1980) (absent a specific provision or clear legislative intent to the contrary, prospective application is presumed).

Thus, when the denial order includes the necessary language, the ALC has restricted authority in its review to determine whether the Board followed proper procedure. *Id.*

In such an instance, *Cooper* has directed the ALC to summarily dismiss an inmate's appeal because the Board's decision constitutes a routine denial of parole. *Id.* Subsequently, to correct misinterpretations of *Cooper*, the South Carolina Supreme Court stated in *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.* that if the Board states "that it considered the factors outlined in section 24-21-640 and the fifteen factors published in Form 1212, and that if the Board complies with this procedure, the decision will constitute a routine denial of parole . . .." *Compton*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009).

In this instance, the denial letter reports that the Board carefully considered the factors published in Department Form 1212, the criteria outlined in § 24-21-640, and the actuarial risk and needs assessment factors pursuant to S.C. Code § 24-21-10 (F). Outlined in § 24-21-10 (F), the actuarial risk and needs assessment consists of the consideration of factors related to criminal behavior, offender risk classification, and case planning and treatment decisions to address criminal risk factors and to reduce offender recidivism. (Supp. 2019). As such, in combination with many of the fifteen factors outlined in Department Form 1212, including the risk an inmate poses to the community, it is evident that what Appellant terms as "current" or "future dangerousness" is, in fact, regularly considered by the Board as part of its deliberations and was considered in this instance.

Further, in providing the factual findings made in deciding to deny parole (the nature and seriousness of the current offense and an indication of violence in this or a previous offense), the Board followed the procedure laid out by the Supreme Court. *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 the Board's decision sufficient under *Cooper* when "the Parole Board clearly stated in its notice of rejection that it considered the statutory criteria [of § 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 and requirements set forth in *Cooper* and *Compton*.

As a second issue in his appeal, Appellant contends that the Board's continuance of his parole hearing date violates a liberty interest. (App. Brief, p. 2). Because Appellant has been convicted of Kidnapping, a violent crime pursuant to S.C. Code Ann. § 16-1-60 (2018), his case must be reviewed by the Board biannually to determine parole. *See* S.C. Code Ann. § 24-21-645 (2010). In this case, Appellant claims he was sent notice on March 6, 2019, that his hearing would be continued because the Board needed more time to investigate.[5] The hearing was conducted approximately nine weeks later on May 15, 2019. Appellant argues that this delay added time to his sentence, resulting in an unlawful increase in punishment and a denial of parole eligibility implicating a liberty interest sufficient to require at least minimal due process and ALC review pursuant to *Furtick*. *See Furtick v. S.C. Dep't of Prob., Parole and Pardon Services*, 352 S.C. 594, 598-99, 576 S.E.2d 146, 149-50 (2003).

First, the Court notes that *Furtick* determined that in inmate has a liberty interest in gaining access to the Board when there is a *permanent* denial of parole *eligibility*. *Id.* at 598, 576 S.E.2d 149. In this case, a nine-week delay to complete an investigation does not amount to a *permanent* denial of eligibility. Moreover, after his hearing, Appellant was denied parole and, therefore, will continue to serve his lawful sentence. Appellant was never released from custody nor has he been held in custody past the expiration of his sentence. The delay did not increase Appellant's term of confinement and did not hinder his opportunity to present mitigating evidence at the hearing. There has been no harm for which this Court could fashion a remedy.

Second, as discussed, parole is a privilege, not a right. While § 24-21-645 does afford Appellant the right to a biannual parole hearing, the Board must conduct the hearing every two years providing sufficient notice and an opportunity to present mitigating evidence. There is nothing in the statute requiring the Board to conduct biannual hearings every other year precisely to the day. In theory, the procedural adherence to such a rule would be impossible; in reality, such strict application has never been the practice of the Board. Appellant was afforded the biannual hearing

[5] Although a copy of this letter has not been provided as part of the Record on Appeal to substantiate this assertion, the Court will address the claim as Appellant's second issue on appeal.

as prescribed by statute. Even if there was a delay, no prejudice resulted. This issue is moot. *See Mathis v. S.C. State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) ("[An issue] becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. This is true when some event occurs making it impossible for a reviewing court to grant effectual relief.").

Because the denial letter represents that the Board considered the factors published in Department Form 1212, the criteria outlined in § 24-21-640, and the risk assessment factors pursuant to § 24-21-10 (F) in accordance with the procedure set forth in *Cooper* and *Compton*, and given the nature of the Court's limited review in determining whether the Board followed proper procedure, the Court must affirm the Board's decision in this matter as a routine denial of parole.

IT IS THEREFORE ORDERED that the decision of the Board is **AFFIRMED.**

AND IT IS SO ORDERED.

June 22, 2020
Columbia, South Carolina

H.W. Funderburk, Jr.
Administrative Law Judge

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 22nd day of June, 2020
By: Elizabeth A. Pulver
Judicial Law Clerk

FILED
JUN 22 2020
SC ADMIN. LAW COURT