STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

James Robert Byrd, #98230,
Appellant,

vs.

South Carolina Department of Probation, Parole and Pardon Services,

Respondent.

Docket No. 19-ALJ-15-0024-AP

ORDER REMANDING FOR A NEW PAROLE HEARING

This matter is before the South Carolina Administrative Law Court (ALC) pursuant to a Notice of Appeal filed June 7, 2019, by James Robert Byrd (Appellant), an inmate in the custody of the South Carolina Department of Corrections (SCDC). Appellant was denied parole on April 24, 2019, by the South Carolina Department of Probation, Parole, and Pardon Services (Department). Counsel for Appellant subsequently submitted written correspondence to the Department requesting the notes from Appellant's pre-hearing interview along with the results of the risk assessment submitted to the Parole Board (Board) prior to the hearing. The Department denied the request on May 31, 2019, and this appeal followed.

STATEMENT OF THE CASE

Appellant was convicted of Kidnapping and Criminal Sexual Conduct in 1981 and received a life sentence. On November 21, 2003, Appellant was granted parole and released from the custody of SCDC. In May 2011, Appellant was arrested for Criminal Domestic Violence (CDV 1st) for allegedly hitting his girlfriend during an argument. Subsequently, on August 2, 2011, Appellant's parole was revoked citing the existence of probable cause that he had committed the offense of CDV 1st, had allegedly failed to refrain from the use of alcohol, and had not followed the advice and instructions of a supervising agent issued on five prior occasions from 2006 through 2011. (ROA, p. 10). Upon this revocation, Appellant was returned to the custody of SCDC.

On March 7, 2013, a Greenville County magistrate found Appellant not guilty of the 2011 CDV 1st charge and ordered his release from custody.[1] Appellant was not released from SCDC and has been denied parole by the Board every year since his reincarceration. On April 24, 2019, the Board again denied parole by a vote of four to three. Appellant requested an audio recording of the hearing, including the Board's deliberations, which was then converted into a written transcript by his attorney.[2]

During the deliberations that took place outside the presence of Appellant and his attorney, but immediately prior to holding the vote on whether to grant or deny parole, a member of the Board asked for clarification as to the number of Appellant's convictions for Criminal Sexual Conduct before giving his vote. According to the transcript, it seems that at least one Board member confused Appellant's 2011 charge of CDV 1st, of which he was later found not guilty, as a second offense of Criminal Sexual Conduct. (ROA, p. 3-4). Although the transcript does not provide clarity as to how or whether this issue was eventually resolved, it is clear that this brief discussion concerning Appellant's conviction(s) for Criminal Sexual Conduct was the only discussion by the Board concerning Appellant or his fitness for parole.

Without further discussion or deliberation, the Board voted four to three to deny parole and the Chairman cited the numbers for rejection as one, four, and five. (ROA, p. 7). Presumably, these numbers refer to the corresponding numbers outlined on the "Criteria for Parole Consideration" form, also known as Department Form 1212 (Form 1212). (ROA, p. 2). Thus, in citing those numbers, the Board claimed the vote to deny Appellant parole was based on three specific criteria: "(1) the risk the inmate poses to the community; (4) the inmate's attitude toward his/her family, the victim, and authority in general; and (5) the inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself[.]" *Id.*

However, in a letter dated April 24, 2019, the Department officially informed Appellant that his

[1] The 2013 Discharge Order pronounces Appellant to have been found not guilty and further states, "[t]hese are, therefore, to authorize and require that if the said James Robert Byrd do remain in jail for no other cause, then you forbear to detain him any longer, but suffer him to go at large, and that upon the pain that will fall therein." (App. Supplemental Brief, Ex. A, Tab 2).

[2] While there is no official transcript of any Parole Board hearing, since the Department submitted the transcript prepared by Appellant's counsel as part of the Record on Appeal (ROA), and because both parties refer to the transcript in their respective briefs, the Court will consider this transcript as part of the Record.

parole was not granted and listed as "findings of fact" different items from the reasons for rejection orally given by the Board Chairman after the vote resulting in denial was taken. The letter states the following:

> "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.
>
> ...
>
> FINDINGS OF FACT:
>
> Nature and Seriousness of Current Offense
> Criminal Record Indicates Poor Community Adjustment
> Failure to Successfully Complete a Community Supervision Program
> Vote Count: 4 Rejected – 3 Parole"

(ROA, p. 1).

Upon learning from the transcript that the Board's deliberations focused on only one issue – whether or not Appellant's record consisted of one or two Criminal Sexual Conduct charges – and that the reasons cited for denial in the audio recording of the Board's vote did not comport with the findings of fact listed as the basis for denial in the April 24, 2019, rejection letter, Appellant filed a Notice of Appeal.

ISSUES ON APPEAL

1. Did the Board violate Appellant's right to due process when it gave a basis for denial of parole on the record different from the basis for denial given to Appellant in his letter of rejection?

2. Did the Board violate the Administrative Procedures Act (APA) and abuse its discretion in denying parole without substantial evidence to support its decision?

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. However, the permanent denial of parole eligibility does implicate a liberty interest sufficient to require at least minimal due process and, therefore, review by the ALC. *Id.* Conversely, a parole-eligible inmate does not have the same right of review after a routine 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).

While the Board is the sole authority to make decisions to grant or deny parole, the Legislature created the Board to operate within certain parameters and did not intend that such 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 this case, Appellant "is not appealing the denial of parole, but rather, is challenging the method and procedure employed by the Parole Board in reaching its decision." *Id.* at 502, 661 S.E.2d at 113. Therefore, a liberty interest is involved sufficient to warrant due process review by the ALC.

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). Because the Court can only consider the record created before the agency in its review, "[t]he findings of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). In Appellant's case, the record is devoid of factual findings to support the conclusion reached by the Board such that the case cannot be reviewed "since the reasons underlying the decision are left to speculation." *Id.*

DISCUSSION

Appellant asserts that: (1) the Board violated his right to due process when it gave a basis for denial of parole on the record different from the basis for denial given to Appellant in his letter of rejection; and, (2) the Board violated the APA and abused its discretion in denying parole without substantial evidence to support its decision.

In *Cooper v. S.C. Dep't of Prob., Parole and Pardon Services*, the South Carolina Supreme Court (Supreme Court) noted that 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. 377 S.C. 489, 499, 661 S.E.2d 106, 112 (2008). 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 order of denial 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.* 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 those

instances where the denial order contains the prescribed language, *Cooper* directs the Court to summarily dismiss the inmate's appeal as it constitutes a routine denial of parole. *Id.* Subsequently, to correct misinterpretations of *Cooper*, in *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, the Supreme Court reiterated its earlier directive ruling that when 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...." 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009).

In this instance, the April 24, 2019, denial letter reports that the Board carefully considered the factors published in 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). Additionally, by including the findings of fact leading to the decision to deny parole (the nature and seriousness of the current offense, a criminal record indicative of poor community adjustment, and failure to successfully complete a community supervision program), the Board purports to have followed the proper 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 . . . ."). Thus, on its face, the letter seems to evince a routine denial by the Board after due consideration in compliance with the procedure and requirements set forth in *Cooper* and *Compton*.

However, while the parole denial letter indicates that the Board's conclusions of law and findings of fact were "carefully considered," the record as a whole – specifically the transcript of the Board's deliberations – contains no discussion of any of the criteria listed in the conclusions of law portion of the letter. In fact, save the unresolved question of the number of Criminal Sexual Conduct charges, the record does not reflect that any discussion of Appellant's suitability for parole took place. Certainly, no factual finding was ever made, or even discussed, that corresponds to the purported reasons for denial cited as "findings of fact" in the letter (the nature and

seriousness of the offense, a criminal record indicative of poor community adjustment, and any failure to successfully complete a community supervision program). As such, no substantial evidence exists in the record to support the Board's written denial of parole based on the findings of fact that were cited in the letter.

Even more troubling, the findings of fact cited in the letter do not correspond with the reasons cited for denial stated on the record during the hearing.[3] After a brief debate of the number of Criminal Sexual Conduct charges, it is clear from the transcript that the Board discussed nothing else and simply took a vote. After a vote of four to three against parole, the Chairman arbitrarily selected numbers one, four, and five as the reasons for denial. In citing these numbers, the Chairman claimed the Board voted to deny Appellant parole based on: (1) the risk Appellant poses to the community; (4) Appellant's attitude toward his family, the victim, and authority in general; and, (5) Appellant's adjustment while in confinement, including his progress in counseling, therapy, and other similar programs designed to encourage self-improvement. *See* "Criteria for Parole Consideration" Department Form 1212 (ROA, p. 2).

In reality, aside from the one question about Appellant's record, no mention, discussion, or deliberation of any sort relating to Appellant's fitness for parole took place. Certainly, no discussion as to Appellant's risk to the community, his attitude toward family, victims, or authority, or his adjustment in prison took place so as to justify the Chairman's picking numbers one, four, and five as the reasons for denial. As such, no substantial evidence exists in the record to support the Board's denial of parole based on the reasons recited orally after the vote.

While the Board is vested with the authority to grant or deny parole, it must render its decisions with accountability and include findings of fact and conclusions of law. Where the findings of fact are stated in "statutory language," they must "be accompanied by a concise and explicit statement of the underlying facts supporting the findings." *Cooper*, 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008). Based on the record as a whole and the lack of deliberation as evidenced by the transcript, these cited findings of fact do not provide, as they must, any insight into the actual facts that

[3] Instead, the findings of fact cited in the letter (the nature and seriousness of the offense, a criminal record indicative of poor community adjustment, and any failure to successfully complete a community supervision program) correlate to numbers two and three on Form 1212, not numbers one, four, and five as stated by the Chairman. *See* Form 1212 ("(2) The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude towards it; (3) The inmate's prior criminal record and his/her adjustment under any previous programs or supervision); (ROA, p. 2).

support the Board's denial of parole as required by the APA and *Cooper*. *Id.* The record provides no explanation as to why the Board members voted to grant or deny parole. Immediately after the vote, the Chairman cited the numbers for rejection although the record reflects that he could not possibly have known why the other members voted to deny parole, nor can Appellant, the Department, or the Court.

Because the record contains no basis from which a reviewing body can conclude whether the agency's findings of fact are supported by substantial evidence, the Court must conclude that the Board did not base its decision on findings of fact supported by substantial evidence. *See Carroll v. Gaddy*, 295 S.C. 426, 428, 368 S.E.2d 909,911 (1988) (finding that the administrative decision to revoke appellant's license was unsupported by the record because there was no substantial evidence that appellant was a continuing danger).

Moreover, aside from the Chairman's randomly citing numbers from Form 1212 as reasons for the denial, it is clear from the record the Board failed to actually identify a single criterion from Section 24-21-640 or the fifteen factors listed on Form 1212 to form any basis for the decision to deny parole. Additionally, the letter listed entirely different findings of fact as the basis for denial. Such mistakes by the Board in Appellant's case lead the Court to conclude that the Board's decision to deny parole was, at best, arbitrary and not based or grounded upon review of the materials or information presented before or during the hearing. Not only does the procedure employed by the Board in this case undermine the parole hearing process and the Court's ability to review the agency's decision under the APA, it violates Appellant's due process rights.

CONCLUSION

It is, therefore,

ORDERED that the decision of the Board is vacated, and the case is **REMANDED** for a new parole hearing in which the Board shall carry out its duties by giving Appellant due consideration in compliance with the APA and the procedure and requirements set forth in *Cooper* and *Compton*.

AND IT IS SO ORDERED.

July 23, 2020
Columbia, South Carolina

H. W. Funderburk, Jr.
Administrative Law Judge

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CERTIFICATE OF SERVICE

I, Emily B. Howard, hereby certify that I have this date served the enclosed **Final Order** upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

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