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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

SC Court of Appeals

Cavanaugh Alvin, #141090,)
)
 Appellant,)
)
 vs.)
)
 South Carolina Department of Probation,)
 Parole and Pardon Services.)
)
 Respondent.)
 _____)

Docket No. 19-ALJ-15-0056-AP

FINAL ORDER

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the Notice of Appeal filed by Cavanaugh Alvin (Appellant), an inmate in the custody of the South Carolina Department of Corrections (SCDC). Appellant seeks review of a decision of the South Carolina Department of Probation, Parole and Pardon Services (Department or Respondent) Parole Board (Board), which denied Appellant's parole application based on its "conclusion of law" and its "findings of fact."

The Record on Appeal was filed on February 3, 2020, consisting of Form 1212, "Criteria for Parole Consideration," signed by Appellant on July 10, 2019, and the Board's Notice of Rejection letter to Appellant dated November 15, 2019. Appellant submitted his brief on February 25, 2020. Respondent filed its brief on March 23, 2020.

On April 3, 2020, Appellant filed a Motion for Enlargement of Time requesting a twenty (20) day extension in which to file a reply brief due to delays attributable to the COVID-19 Pandemic. Before the Court was able to grant or deny his motion, Appellant filed his reply brief on April 9, 2020. Respondent did not file a response to Appellant's Motion for Enlargement of Time. The Court retroactively grants Appellant's motion and considers his reply brief timely.

BACKGROUND

On June 9, 1987, Appellant appeared before the Honorable William T. Howell on charges of murder and kidnapping in Dorchester County, South Carolina. He was sentenced to life in prison. At the time of sentencing, South Carolina law allowed a person serving a sentence for murder

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parole eligibility after the service of thirty years in cases where kidnapping is an aggravating factor. Appellant first appeared before the Board on August 23, 2017, at which time he was denied parole. The Appellant's second and most recent Board hearing occurred on November 13, 2019, when the Board declined to grant him parole. Appellant was denied parole on the basis of a single sentence "CONCLUSION OF LAW" and subsequent "FINDINGS OF FACT." Those "findings" include the following: "Nature [a]nd Seriousness [o]f Current Offense." A report of the vote reflects that three parole board members voted in opposition of parole and two voted in favor of parole. The Department provided Appellant with its Notice of Rejection of parole on or about November 15, 2019.

Appellant filed his Notice of Appeal to the ALC on November 21, 2019. Appellant argues that the Board denied him a fair and full hearing when there was a technical interruption during his testimony to the Board, although he was allowed to speak after the problem was corrected. He also argues the Board failed to consider all mandatory parole factors, thereby denying him due process by basing its decision solely on the nature and seriousness of the crime he committed.

ISSUES ON APPEAL

- I. Did the Board deny Appellant a full hearing when there was a minor technical glitch during the hearing but the Appellant was still able to speak to the Board?
- II. Did the Board consider the mandatory factors as required in *Cooper*, therefore making this a routine denial of parole.

STANDARD OF REVIEW

An individual has a right for the ALC to review a final decision of the Board only 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. *Furtick*, 352 S.C. at 598, 576 S.E.2d at 149 n.4.

Therefore, in appeals arising from the Board's decision denying parole, the ALC can only consider claims that the Board failed to consider the appropriate criteria or rendered a decision that would

be tantamount to an abrogation of parole eligibility. *Cooper v. S.C. Dep't of Prob., Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008); S.C. Code Ann. § 1-23-600(D) (Supp. 2016). 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(5) (Supp. 2016), which reads:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. 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.

As noted in *Cooper*, an inmate "has no right to be paroled; however, [an inmate] does have a right to require the [Parole] Board to adhere to statutory requirements in rendering a decision." *Cooper* at 499, 661 S.E.2d at 112. The Parole Board must issue "orders that are sufficiently detailed for the ALC to conduct appellate review, limited to the Board's adherence to section 24-21-640, of decisions denying parole." *Id.* at 500, 661 S.E.2d at 112.

The Board has the exclusive authority to grant or deny applications for parole. *Cooper* at 496, 661 S.E.2d at 110. The ALC's role is limited by statute and the rulings of the South Carolina Supreme Court to assuring that the Board carries out, to the letter of the law, its statutorily mandated duties. To this end, the South Carolina Supreme Court has determined that the ALC has limited jurisdiction to review the Board's decisions that implicate "a liberty interest sufficient to require at least minimal due process." *Furtick* at 598, 576 S.E.2d at 149.

Likewise, the South Carolina Supreme Court has observed that the Legislature created the Board “to operate within certain parameters” but did not intend “for it to render decisions without any means of accountability.”¹ *Cooper* at 499, 661 S.E.2d at 111. Accordingly, the Supreme Court in *Cooper* advised the Board to issue “orders that are sufficiently detailed for the ALC to conduct appellate review, limited to the Board’s adherence to section 24-21-640, of decisions denying parole.” *Id.* at 500, 661 S.E.2d at 112. It also required the Board and the ALC to comply with the Administrative Procedures Act and specifies that an agency adjudication, as directed by S.C. Code Ann. § 1-23-350 (Supp. 2016), “shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.” *Id.*

Subsequently, the South Carolina Supreme Court, observing that *Cooper* was being misinterpreted, reiterated that if the Board stated “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 v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009).

DISCUSSION

Appellant argues that his right to a full parole hearing was violated because a technical problem interrupted one of his answers to a question by the Board as to what he would say to the victim’s family if they were present. His response was interrupted by the monitor going black for five to eight minutes. However, as he states in his brief, Appellant was afforded an open-ended opportunity to speak on his behalf after all communication was restored, which he did.

Furtick requires only minimal due process in Board determination of parole eligibility. The Court agrees with Respondent that the interruption during Appellant’s hearing did not deprive him of a full hearing because he was allowed to speak on his behalf once communication was restored. Appellant has not demonstrated that he did not receive the minimal due process required by law.

¹ Article I, Section 22 of the South Carolina Constitution states:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and **he shall have in all such instances the right to judicial review.** [Emphasis added].

As a second issue in his appeal, Appellant contends the Board failed to consider all mandatory factors in reaching its decision. The findings of fact are limited to the nature and seriousness of the current offense.² However, the Board's decision includes the required recitation of the statutory requirements pursuant to *Compton*.

Specifically, the conclusion in the Notice of Rejection states that

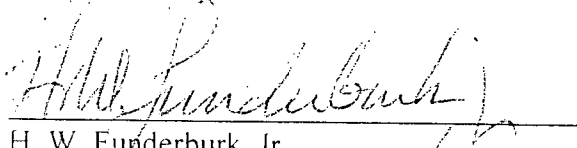
[a]fter careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record. . . ; (2) **the factors published in Department Form 1212** (Criteria for Parole Consideration); (3) **the factors 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. (Emphasis added).

This Notice of Rejection constitutes a routine denial of parole. Because the Board claims that it considered the mandatory criteria of fifteen factors published in Form 1212, the factors outlined in S.C. Code Ann. § 24-21-640, and the risk assessment required under S.C. Code Ann. § 24-21-10(F)(1) (Supp. 2016), the ALC must affirm the decision. It is therefore,

ORDERED that the decision of the Parole Board is **AFFIRMED**.

AND IT IS SO ORDERED.

Columbia, South Carolina
June 19, 2020


H. W. Funderburk, Jr.
Administrative Law Judge

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² The "nature and seriousness" is a category and makes no finding that the crime was in fact serious. In addition, the Board's rejection does not base its factual finding(s) on evidence considered and connect its finding(s) to conclusions of law. However, form aside, *Compton* appears to give the ALC limited latitude to conduct meaningful review.