STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Pervis White, #247460, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	Docket No. 20-ALJ-15-0027-AP **ORDER**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) in its appellate capacity pursuant to subsection 1-23-600(D) of the South Carolina Code of Laws (Supp. 2018). In the case *sub judice*, Pervis White (Appellant) seeks judicial review of a decision issued by the South Carolina Parole Board (Parole Board or Board). Specifically, on June 17, 2019, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Appellant that the Board denied him parole. After careful consideration of the Record on Appeal (Record), arguments raised in the parties' briefs, and the applicable law, the Court affirms the Board's decision.

BACKGROUND

On or about July 12, 1995, Appellant committed various offenses that led to his arrest. He was charged with murder, criminal conspiracy and armed robbery. Upon conviction, Appellant was sentenced to life in prison for murder, four years for conspiracy, and thirty years for armed robbery.[1] After becoming parole eligible, Appellant most recently appeared before the Parole Board on June 17, 2020.[2] The Board voted unanimously to deny his parole. In reaching its determination the Board provided the following factual reason for rejection: "Nature and Seriousness of Current Offense." Additionally, the Board specified that it had reviewed the criteria

[1] According to the Department's Brief, Appellant has satisfied his sentence for armed robbery.

[2] According to the Department's Brief, Appellant became eligible for parole hearings in February 2018. Since then, he has appeared at two hearings. On both occasions, parole was denied.

outlined in Section 24-21-640 of the South Carolina Code of Laws, the factors published in Department Form 1212, and the actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1) of the South Carolina Code of Laws. Subsequently, Appellant filed his Notice of Appeal with the Court on July 21, 2020. The Department filed the Record on Appeal on August 31, 2020. Appellant filed his brief on September 18, 2020, and the Department filed its respondent's brief on November 4, 2020.

ISSUES ON APPEAL [3]

I. **Whether the Parole Board considered the mandatory criteria under *Cooper* when denying Appellant's application for parole?**

JURISDICTION/STANDARD OF REVIEW

The Court's jurisdiction to review parole decisions is derived from the confluence of several decisions of the South Carolina Supreme Court. Initially, in *Al-Shabazz v. State*, our Supreme Court held that the ALC's jurisdiction in inmate appeals is limited to non-collateral or administrative matters[4] typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. *Id.*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000). Importantly, the court stressed the caveat that not all provisions of the Administrative Procedures Act (APA)[5] apply to the internal prison disciplinary or decision-making process. *Id.* Rather, procedural due process is guaranteed only when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property. *See id.* (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701 (1972)).

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[3] Appellant's brief dictates the following Issues on Appeal: 1) Did the [Board] fail to utilize and comply with the statutory provisions of section 24-21-640 of the South Carolina Code of Laws, when considering Appellant for parole?; 2) Was the Appellant denied fundamental fairness and equal protection of law by having his parole denied for reasons outside the scope of the statutory criteria listed in section 24-21-640 of SC Code of Laws?; 3) Are the reasons articulated for denial and published by the [Board] in their notice of rejection arbitrary and capricious?; and 4) Has the [Board] abused their discretionary authority in the application of their duties and by repeatedly denying appellant parole based on the impractical and unreasonable findings of fact listed in their notice of rejection? The Court will address all issues under one section.

[4] A non-collateral or administrative matter is "one in which an inmate does not challenge the validity of a conviction or sentence." *Al-Shabazz*, 338 S.C. at 368, 527 S.E.2d at 749.

[5] The APA is found at S.C. Code Ann. §§ 1-23-10 to 680 (2005 & Supp. 2019).

Following *Al-Shabazz* and its progeny, South Carolina jurisprudence has found that the ALC's jurisdiction is properly vested where an inmate's appeal implicates a state-created liberty or property interest. *See e.g.*, *Howard v. S.C. Dep't of Corr.*, 399 S.C. 618, 630, 733 S.E.2d 211, 218 (2012); *see also Wicker v. S.C. Dep't of Corr.*, 360 S.C. 421, 602 S.E.2d 56 (2004) (recognizing another limited ALC jurisdictional exception where inmate claims deprivation of a property interest). In that regard, a state statute may create a liberty interest in parole where it uses mandatory language. *See e.g.*, *Bd. of Pardons v. Allen*, 482 U.S. 369, 107 S.Ct. 2415 (1987); *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979). Such an instance was found in *Furtick v. South Carolina Department of Probation, Parole & Pardon Services*, where the court held that section 24-21-620 of the South Carolina Code of Laws creates a liberty interest in parole eligibility. *Id.*, 352 S.C. 594, 598 n.4, 576 S.E.2d 146, 149 n.4 (2003). That same statute, however, does not create a liberty interest in parole. *Id.* The court explained "the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process," and, consequently, review by the ALC. *See id.* at 598, 576 S.E.2d at 149. In *Sullivan v. South Carolina Department of Corrections*, the South Carolina Supreme Court succinctly expounded on the distinction it recognized in *Furtick* as it relates to the ALC's jurisdiction:

> In simple terms, [the distinction drawn in *Furtick*] this means that an inmate has a right of review by the AL[C] after a *final decision* that he *is ineligible for parole, but that a parole-eligible inmate does not have the same right of review after a decision denying parole*; the parole board is, however, required to review an inmate's case every twelve months after a negative parole determination. This distinction stems from the fact that parole is a privilege, not a right.

Id., 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 127 n.4 (2003) (citation omitted) (emphasis added).

Still, "[t]he use of the word *permanent* in *Sullivan* and *Furtick* does not mean that there must be a permanent denial of parole eligibility before a sufficient liberty interest is involved. It is merely one of the ways that a sufficient liberty interest may be involved." *Steele v. Benjamin*, 362 S.C. 66, 72, 606 S.E.2d 499, 502 (Ct. App. 2004). That is to say, the Board's parole-related decisions can, even when not permanently denying parole, impinge upon a state-created liberty interest. For instance, the appellate courts of this State have held that a state-created liberty interest is implicated by, *inter alia*, the Board's failure to follow proper procedure in rendering its decision to deny parole. *E.g.*, *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 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 [criteria found in section 24–21–640 and factors established by the Board], we believe it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest."). Notwithstanding, the *Cooper* court provided the Board with guidance in issuing parole decisions:

> 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 outlined in section 24–21–640 and the fifteen factors published in its parole form. 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. Under that scenario, the ALC can summarily dismiss the inmate's appeal.

Id. at 500, 661 S.E.2d at 112; *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 ALC erred in remanding the case to the Board when "the [] Board clearly stated in its notice of rejection that it considered the statutory criteria [outlined in section 24–21–640] and the criteria set forth in Form 1212, which is sufficient under *Cooper*.").

When reviewing the Department's final decision in a non-collateral or administrative matter, the Court sits in an appellate capacity. *Al-Shabazz*, 338 S.C. at 376-77, 527 S.E.2d at 754. The Court's standard of review, after an exhaustion of administrative remedies, is governed by section 1–23–380 of the South Carolina Code of Laws (Supp. 2019). *See* 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). 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." *Id.* § 1-23-380(5) (Supp. 2019). Although the Court may affirm the agency's decision or remand for additional proceedings, the Court's review in determining whether to reverse or modify an agency decision is circumscribed to the following:

> 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:
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> (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. § 1-23-380(5)(a)-(f) (Supp. 2010). Additionally, in reviewing, the Court is generally confined to the record presented. *Id.* § 1-23-380(4) (Supp. 2019).

DISCUSSION

Appellant first argues that the Board failed to utilize and comply with the statutory provisions under Section 24-21-640. As explained *supra*, it is possible for the Board to infringe upon a state-created liberty interest if it failed to follow proper procedure in rendering its decision to deny parole. *E.g., Cooper*, 377 S.C. at 499, 661 S.E.2d at 111. However, the *Cooper* court, while mindful of its previous observation that the General Assembly did not intend for the parole board to issue decisions with unfettered discretion, clearly provides that if the parole board plainly states in the order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in its parole form, then such a decision will constitute a routine denial of parole. *Id.* at 500, 661 S.E.2d at 112. Thus, if the parole board conforms to said procedure, the ALC then has restricted authority in reviewing to determine whether the parole board followed proper procedure. *Id.* In such an instance, the Court can summarily dismiss the inmate's appeal as it constitutes a routine denial of parole. *Id.* [6]

S.C. Code Ann. Section 24-21-640 provides:

> 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.

Furthermore, the Board "must establish 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."[7] S.C. Code Ann. Section 24-21-640 (2010).

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[6] Additionally, S.C. Code Ann. 1-23-600(D) provides, in pertinent part, 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."

[7] The Court notes that Form 1212: Criteria for Parole Consideration meets the requirements under Secti 24-21-640 by providing inmates with a written list of fifteen factors the Board considers for parole. I

Here, in denying Appellant's parole on June 17, 2020, the Board provided, *inter alia*, that it carefully considered the factors published in Department Form 1212 and the criteria outlined in section 24-21-640.[8] The Board further gave the following factual finding in reaching its decision: the nature and seriousness of current offense. Crucially, *Cooper* does not prohibit the Board from relying, in part, on the identical factual reasons or nature of Appellant's crime in denying parole. Instead, in rendering a decision, the Board is required to consider the statutory criteria found in section 24-21-640 and the fifteen criteria listed on the parole form when rendering a decision. *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 parole board's decision sufficient under *Cooper* when "the [p]arole [b]oard clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212 . . . ."). It follows, therefore, that the Board followed proper procedure in denying Appellant's parole, and his mere frustration with the Board's reliance on the nature of Appellant's crime is simply not sufficient to overturn the Board's decision.

Appellant also alleges he was denied fundamental fairness and equal protection by having his parole denied for reasons outside the scope of the criteria listed in Section 24-21-640. Appellant argues that by using the factors listed on the Form 1212, the Board has created its own internal criteria, resulting in an abuse of its discretionary authority.[9] However, under *Cooper*, the Board is required to consider both Section 24-21-640 and the fifteen factors on the parole form. *See Cooper* at 500, 661 S.E.2d at 112 (the board may avoid reversal "if it clearly states in its order denying parole that it considered the factors outlined in section 24–21–640 and the fifteen factors published

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case, Appellant signed the Form 1212, certifying that he received a copy of the Form.

[8] Notably, the Board also considered and evaluated Appellant's risk using the Department's adopted assessment tool in reaching its decision to deny his parole. *See* S.C. Code Ann. § 24–21–10(F)(1) (Supp. 2018) (requiring the Department to develop a plan for the "establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, *which the parole board shall use in making parole decisions . . .*" (emphasis added)).

[9] The Court emphasizes it has no authority to change the factors listed on the Form 1212.

in its parole form [Form 1212]."). Here, the Board clearly considered the mandatory criteria, which includes the fifteen factors listed on the Form 121, as dictated by *Cooper* and *Compton*.

Appellant further contends the reasons for his denial are "arbitrary and capricious." He also argues the Board abused its discretionary authority by denying parole based on impractical and unreasonable findings of fact. However, Appellant did not present any evidence that the Board's decision was arbitrary and capricious or that the findings of fact were impractical or unreasonable. Furthermore, "the nature and seriousness of current offense" falls squarely within the considerations under Section 24-21-40 and Form 1212. Moreover, this Court is not in a position to second guess the factual findings of the Board and is without authority to do so.

In summary, given the nature of the Court's circumscribed review in determining whether the Board followed proper procedure and not as fact finder, the Court finds no error in the Department's decision as it amounts to a routine denial of parole in accordance with the procedure outlined in *Cooper* and *Compton*. Accordingly, summary dismissal is appropriate in this instance. Therefore,

ORDER

IT IS HEREBY ORDERED that, based on the foregoing, the decision of the Department is **AFFIRMED.**

AND IT IS SO ORDERED.

June 28, 2021
Columbia, SC

Milton G. Kimpson, Judge
South Carolina Administrative Law Court

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 28 day of June, 2021

By: _____
Judicial Law Clerk