

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Blackwell, Larry, #176790,)
)
 Appellant,)
)
 vs.)
)
 South Carolina Department of Probation,)
 Parole and Pardon Services,)
)
 Respondent.)
 _____)

Docket No. 21-ALJ-15-0011-AP

**ORDER DENYING MOTION
TO SUPPLEMENT THE
RECORD ON APPEAL
AND
ORDER OF DISMISSAL**

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SC Court of Appeals

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the appeal of Larry Blackwell (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. Appellant seeks review of a decision denying him parole issued on April 22, 2021, by the Parole Board (Board) of the South Carolina Department of Probation, Parole and Pardon Services (Respondent or Department).

The case was assigned on May 20, 2021, and Respondent filed the Record on Appeal on June 21, 2021. On August 3, 2021, Appellant filed an Unopposed Motion to Exceed Brief Page Limit and a Motion to Supplement the Record on Appeal. On August 6, 2021, Respondent filed a response in opposition to Appellant's Motion to Supplement the Record. Appellant filed a Reply on August 16, 2021.

ISSUES RAISED BY APPELLANT'S MOTION

Appellant seeks to supplement the Record on Appeal by adding documents received by the Board prior to the parole hearing, a transcript of the parole hearing, a report submitted by the State Law Enforcement Division (SLED), and written communications exchanged between Appellant's parole attorney and the Department's attorney.

The Record on Appeal contains two documents. The first is a Form 1212 (Rev. 5/16/2017), a list of Criteria for Parole Consideration. Other than the inmate's name and Department of Corrections



number and confirmation that a copy of the form has been delivered to the inmate, no discussion of nor findings relating to the criteria are included.

The second document is a Notice of Rejection in the form of a letter. It begins with a Conclusion of Law indicating that the Board has considered four factors:

- (1) The characteristics of your current offense(s), prior offense(s), prior supervision history, prior 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.

Except for five phrases listed as Findings of Fact and the vote count, the Board does not disclose any facts that would explain or justify its decision.¹

Appellant contends that the Department's Record on Appeal "is insufficient to allow for meaningful appellate review." In fact, Appellant argues, neither the ALC nor any other reviewing court would have a "basis from which to evaluate [Appellant's] claims."

Furthermore, in reply, Appellant asserts that if SCALC Rule 61, as amended, prohibits [the ALC] from considering *any* information other than "a copy of the agency decision and the decision following a motion for reconsideration," the rule would effectively eliminate judicial review of Board decisions or any challenge to the Board's process.

Respondent agrees with this reading of SCALC Rule 61 and asserts that Appellant is asking for documents "outside the scope of the limited authority of the ALC."

CONCLUSION OF LAW: JURISDICTION

The ALC's jurisdictional authority in Parole Board cases is very restricted. *Furtick v. S.C. Dep't of Probation, Parole, and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003). In *Furtick*, the Supreme Court discussed two ways these liberty issues could arise:

- (1) when an inmate is disciplined and punishment is imposed and

¹ Appellant also argues that, by denying him access to the full record (or even a redacted copy), he cannot determine whether improper consideration of his "race, ethnicity, gender, or religion" affected the Board's decision. Appellant cites *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017) in support of this argument.

(2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status.

Furtick, 352 S.C. at 598, 576 S.E.2d at 148-49 (quoting *Al-Shabazz*, 338 S.C. at 369, 527 S.E. 2d at 750.)

The Supreme Court concluded that *Furtick* raised an issue arising in the second manner. Specifically, the Board determined that he was not eligible for parole consideration. In short, the Supreme Court decided that “the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process.” *Id.* at 598, 576 S.E.2d at 149. If the Department determined that an applicant was ineligible for parole, the applicant would have “the same right to review as the inmate in *Al-Shabazz*.” *Id.* at 599, 576 S.E.2d at 149. The Supreme Court stated that the procedures outlined in *Al-Shabazz* “apply equally to inmates affected by final decisions of the [Board] that affect liberty interests, such as the decision in [*Furtick*].” *Id.*

In *Cooper v. S.C. Dep’t of Probation, Parole and Pardon Services*, Cooper argued that he was challenging “the procedure employed by the Parole Board in denying his request,” not the denial of parole. *Cooper*, 377 S.C. 489, 494, 661 S.E.2d 106, 109 (2008). In deciding this case, the Supreme Court focused on the determination of whether the Parole Board’s decision was a routine denial of parole, in which case the ALC was without jurisdiction, or a reviewable decision if the Parole Board rendered Cooper ineligible for parole because its decision was “based on three ‘immutable’ or fixed criteria.” *Id.* at 495, 496, 661 S.E.2d at 109, 110.

Cooper argued that the Parole Board did not utilize the procedure mandated by statute, S.C. Code Ann. § 24-21-640, or the criteria established by the Board as provided by that statute. The Supreme Court held,

If a Parole Board deviates from or renders its decision without consideration of the appropriate criteria, we believe it essentially abrogates an inmate’s right to parole eligibility and, thus, infringes on a state-created liberty interest.

Id. at 499, 661 S.E.2d at 111.

The Supreme Court also observed that,

[T]he Legislature created the Board to operate within certain parameters. We do not believe the Legislature established the Board and intended for it to render decisions without any means of accountability.

Id.

The Supreme Court continued its discussion of orders issued by the Board as follows:

Because the limited appeal of parole decisions is governed by the [Administrative Procedures Act], the Parole Board and the ALC must comply with its provisions. Pursuant to the terms of the APA, a final decision in an agency adjudication of a contested case ‘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. at 500, 661 S.E.2d at 112.

Because the Board “only considered the nature of Cooper’s crime” and did not offer an explanation or show that it considered the statutory criteria, the Supreme Court concluded “that the Parole Board’s decision was arbitrary and capricious.” *Id.*

Subsequently, the Supreme Court determined that its opinion in *Cooper* was being misinterpreted. In a clarifying order, the Supreme Court addressed an ALC decision stating that although the Parole Board included a statement that it complied with its own factors and with S.C. Code Ann. § 24-21-640, it did not “include any ‘findings of fact and conclusions of law, separately stated,’ as required by *Cooper*.” *Compton v. S.C. Dep’t of Probation, Parole and Pardon Servs.* 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009). The Supreme Court held that the Parole Board could avoid this result,

if the Parole 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 Form 1212,² and that if the Parole Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC will have limited authority to review the decision.

In the instant case, the Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212, which is sufficient under *Cooper*.

Id.

Thus, if the Board states in its parole rejection that it considered the statutory criteria and the factors described on the form, it need not explain why or on what basis it reached the decision.

² Form 1212 contains sixteen (16) factors if the offense occurred on or after January 1, 2011.

The legislature created the ALC as an executive branch court. As such, the jurisdiction of the ALC is limited to that granted to it by statute. *See* S.C. Code Ann. § 1-23-600 (Supp. 2020) and *S.C. Dep't of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 186-87, 700 S.E.2d 468,470 (Ct. App. 2010). (The ALC has no “authority to exceed [its] statutorily granted powers.”) *Furtick* makes it clear, however, that the ALC’s jurisdictional reach extends only to determining whether an inmate has been erroneously considered to be ineligible for parole consideration.

This limitation is consistent with the General Assembly’s clear restriction on the ALC:

An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections . . . involving the denial of parole to a **potentially eligible inmate** by the Department of Probation, Parole and Pardon Services (emphasis added).

S.C. Code Ann. § 1-23-600(D) (Supp. 2020).³

According to the statute, the ALC cannot entertain appeals of routine parole denials by inmates who are eligible to apply for parole.

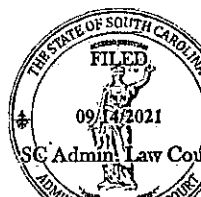
Appellant in this case remains potentially eligible for parole. The Notice of Rejection in the Record on Appeal clearly informs him that he will be notified of his “next scheduled parole consideration date.” (ROA, 2.) Consequently, the ALC has no jurisdiction to entertain this appeal from “a potentially eligible inmate.” Appellant’s Motion to Supplement the Record is **DENIED**, and the appeal is **DISMISSED**.

AND IT IS SO ORDERED.

Columbia, South Carolina
September 14, 2021


H. W. Funderburk, Jr.
Administrative Law Judge

³ This subsection was amended to add this provision by Act No. 334 2008, which went into effect June 16, 2008.



CERTIFICATE OF SERVICE

I, Elizabeth A. Perkins, hereby certify that I have this date served this **Order Denying Motion to Supplement the Record and Order of Dismissal** upon all parties to this case 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).

Hannah Freedman, Esquire
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
Counsel for Appellant

John H. Blume, Esquire
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853
Counsel for Appellant

Jon Ozmint, Esquire
The Ozmint Firm
5205 Forest Drive, Suite 1
Columbia, SC 29206
Counsel for Appellant

Matthew Buchanan, Esquire
S.C. Dep't of Probation, Parole & Pardon Services
P.O. Box 207
Columbia, SC 29202
Counsel for Respondent

September 14, 2021
Columbia, South Carolina

Elizabeth A. Perkins

Elizabeth A. Perkins
Judicial Law Clerk

