

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal from the Administrative Law Court
The Honorable Harold W. Funderburk, Jr., Administrative Law Judge
Docket Number 21-ALJ-15-0010-AP

JAN 28 2022

SC Court of Appeals

Appellate Case No.: 2021-001149

RUSSELL MAWYER, #139176.....APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Did the ALC err when it determined the Board properly consider all of the mandatory criteria as set forth in Cooper thereby making Appellant's denial of parole routine?

STATEMENT OF THE CASE

On September 27, 1986, in Easley, S.C., Appellant entered without consent the dwelling of Victim 1, his wife, and Victim 2 while armed with a shotgun. While inside, Appellant shot and killed Victim 3, and shot at Victim 1 but missed. Appellant was later charged and arrested for Murder, Burglary 1st Degree, and Assault with Intent to Kill. On January 19, 1987, Appellant entered a plea of guilty before the Honorable Victor C. Pyle Jr., who sentenced him to life imprisonment for the murder and burglary charges, and ten years for the assault. Because of the aggravating factor of burglary, the Appellant was required to serve thirty years before becoming parole eligible.

Appellant became parole eligible in September, 2016. Since that time, Appellant has appeared before the Board three times with Appellant's most recent review being held April 14, 2021. Following Appellant's most recent appearance, the Board voted unanimously to deny Appellant's parole based on the nature and seriousness of Appellant's offense, use of a deadly weapon, and an indication of violence. (R.p. 132).

Upon being informed of his denial of parole, Appellant submitted a request for a rehearing to the Board, which was denied on April 29, 2021. (R.p.133-p.136). Subsequently, he filed a notice of appeal before the Administrative Law Court (ALC). In his appeal, Appellant alleged the Board abused its discretion in denying Appellant parole a third time using the same grounds for denial as his previous denials. The Honorable H. W. Funderburk, Jr., dismissed the appeal, determining that the ALC has no authority to review or reverse a routine denial of parole to an otherwise parole-eligible inmate. (R.p. 122- p.125).

The Appellant now appeals Judge Funderburk's decision, arguing that the ALC erred when it failed to address or rule upon the claim that the Parole Board abused its discretion when there

was evidence that Appellant met the criteria for parole consideration. The Respondent would respectfully submit that the ALC did not err, and followed the requirements set forth by the South Carolina Supreme Court in Cooper and Compton. This brief follows.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. When reviewing a case involving the permanent denial of parole, the ALC sits in an appellate capacity. Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs., 352 S.C. 594, 576 S.E.2d 146 (2004). Under the appellate standard of the Administrative Procedures Act, the ALC's review is limited to the record, absent irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4). Additionally, the court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5). Furthermore, the ALC may not hear an appeal involving the denial of parole to an otherwise parole-eligible inmate. S.C. Code Ann. §1-23-600(D).

In an appeal from an ALC decision, the Administrative Procedures Act provides the standard of review. S.C. Code Ann. §1-23-610(B). This Court may only reverse the decision of the ALC if that decision is:

- (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. “The [C]ourt may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact.” *Id.* In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. Hill v. S.C. Dep't of Health and Env'tl. Control, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

ARGUMENTS

1. **The ALC did not err in dismissing the appeal because the Board properly considered the criteria set forth in Cooper in reaching its decision, thereby making this a routine denial of parole.**

Appellant argues that the ALC did not address the issue he raised on appeal, that the Board abused its discretion when it denied parole for the third time using the same reason as it did in the previous denials. He also alleges that he satisfied the criteria of parole consideration in S.C. Code § 24-21-640.

The Respondent submits the ALC properly dismissed the appeal because it determined that the procedures followed by the Board in evaluating Appellant's request for parole, and the criteria considered by the Board were proper and conformed with the South Carolina Supreme Court's holding in Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008).

The notice of rejection from the Board shows the Board properly considered all of the statutorily required criteria and followed the proper procedure as set forth in Cooper in arriving at their decision to deny Appellant parole, thereby making Appellant's denial of parole routine. (R.p.132). An inmate does not have a right to parole, only parole consideration,¹ and the Board grants or denies parole in its absolute discretion.² The ALC determined the Board followed the requirements in Cooper, and therefore properly dismissed the appeal.

In Cooper, the Board denied Cooper's parole based on the following three reasons: "1) the nature and seriousness of the current offense; 2) an indication of violence in this or previous offense; and 3) the use of a deadly weapon in this or a previous offense." Cooper, 377 S.C. at 499, 661 S.E.2d at 111. The Court found the Board, "failed to consider the requisite statutory criteria in rendering its decision" and "only considered the nature of Cooper's crime when it rejected his request based on three limited reasons." Id. at 500, 661 S.E.2d at 112. However, the Court went on to state:

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.

Id.

Here, on April 15, 2021, the Board issued a rejection letter enumerating the following factors it carefully considered in arriving at their decision to deny Appellant parole: 1) the

¹ Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 443 n. 4, 586 S.E.2d 124, 127 N. 4 (2003).

² "[N]o such prisoner may be paroled until it appears to the satisfaction of the board..." S.C. Code 24-21-640.

characteristics of your current offense(s), prior offenses(s), prior supervision history, prison disciplinary record, and/or criminal record, as described in the findings of facts below; 2) the factors published in Department Form 1212 (R.p.131); 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. (R.p.132).

The rejection letter then listed the Board's findings of fact, which were the nature and seriousness of the offense, use of a deadly weapon, and indication of violence in this or previous offense. The vote to deny parole was unanimous. (R.132).

Appellant argues that the Board's findings operate as a permanent denial of parole because they cannot be changed. As the ALC properly determined, the Board considered Appellant for parole and will consider him again. (R.p.122-p.125). This being correct, the ALC did not err in dismissing the appeal.

2. The ALC did not err in concluding the Board's denial of parole was routine.

Appellant also alleges that the Board denied his parole "in rote fashion."³ However, this is in direct contradiction to the Board's statement – and the requirement of Cooper – that the Board carefully considered all of the mandatory criteria, including the factors in Form 1212 (Criteria for Parole Consideration) (R.p.131), those found in Section 24-21-640, and the actuarial risk and needs assessment. As Cooper held, the information in the parole rejection letter is all that must be provided for this Court to affirm the decision of the Board. Since the Board's order clearly states

³ Appellant's Brief, P. 7.

a lawful reason for denial, the criteria within the statute, and that mandatory policies were considered prior to the denial, no further action by the ALC is necessary.⁴

Further, the Board reviews all of the information presented to make a determination as to whether an inmate will be granted parole. The Board's decision to deny parole based on the nature and seriousness of the offense, indication of violence, and use of a deadly weapon is not unlawful, nor does it preclude Appellant from successfully obtaining parole in the future as that is only one factor among many other issues considered by the Board in their evaluation. The Board citing the circumstances surrounding Appellant's offense as justification, in part, for denying Appellant parole, is proper and cannot be considered an error of law; especially since the Board considered all the factors as set forth in Cooper in reaching their unanimous decision.

"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 §1-23-380(5) (2008). It is clear by the letter of rejection that the Board considered all of the mandatory criteria as set forth in Cooper and placed their reasons for denial in writing. Thus, the ALC properly dismissed the appeal pursuant to Cooper and Compton. Since the Board's order clearly stated a lawful reason for denial, the criteria within the statute, and that mandatory policies were considered prior to the denial, no further action by the ALC was necessary. Therefore, this Court should affirm the decision of the ALC.

CONCLUSION

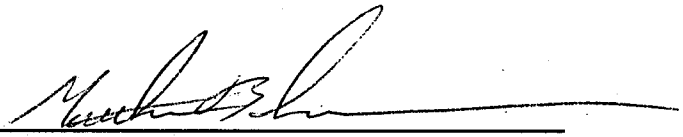
Appellant's claim that the Board acted arbitrarily is meritless when it followed the requirements set forth in Cooper. It is clear from the notice of rejection that the Board's decision

⁴ The Parole Board stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Department Form 1212 which is sufficient under Cooper. Compton v. S.C. Dept. of Probation, Parole and Pardon Services, 385 S.C. 476, 685 S.E.2d 175 (2009).

properly complied with the South Carolina Supreme Court's holding in Cooper, thereby creating a routine denial of parole. The ALC did not err when it dismissed his appeal as being a routine denial of parole.

Based on the above reasons the Respondent respectfully requests the ALC's ruling be affirmed and the Appellant's appeal be dismissed.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.



Matthew C. Buchanan
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January 13, 2022