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Jun 06 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Joseph Kelsey, #217218, )  
)  
Appellant, )  
)  
v. )  
)  
South Carolina Department of Probation, )  
Parole and Pardon Services, )  
)  
Respondent. )  
\_\_\_\_\_ )

Docket No. 22-ALJ-15-0004-AP

**ORDER**

This matter is before the South Carolina Administrative Law Court (Court or ALC) pursuant to the appeal of Joseph Kelsey (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. By letter dated November 10, 2021, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Appellant that the South Carolina Parole Board (Board) denied him parole.

The Department filed the Record on Appeal (Record) on April 13, 2022. The Record on Appeal consists of two documents: (1) the November 10, 2021, agency decision denying parole eligibility and (2) an affidavit from a Department employee attesting to the circumstances surrounding the mailing of the November 10, 2021, decision.

On May 16, 2022, Appellant filed a Motion to Supplement the Record on Appeal (Motion) pursuant to Rule 212(b) of the South Carolina Appellate Court Rules (SCACR) and Rule 68 of the Rules of Procedure for the Administrative Law Court (SCALC Rules). Specifically, Appellant moves to supplement the following in the Record: (1) documents received by the agency and Parole Board Members prior to the parole hearing; (2) prior notices of Parole Board denials; (3) letters from Appellant requesting parole memorandum and other related documents; (4) transcript of codefendant Geoffrey Payne’s parole hearing; (5) transcript of Appellant’s parole hearing and subsequent reconsideration requests; and (7) selections of transcripts from Appellant’s trial and waiver hearing. The Department filed a Response to the Motion (Response) on May 20, 2022, asserting the documents Appellant seeks to include go beyond this Court’s authority to review.



## DISCUSSION

Appellant has moved to supplement the Record with multiple documents pursuant to Rule 212(b), SCACR, and SCALC Rule 68. SCALC Rule 68 provides that an Administrative Law Judge **may** apply South Carolina Appellate Court Rules to resolve questions not addressed by the SCALC's rules. The SCALC Rules address the composition of the Record of Appeal in matters like this one; however, the SCALC Rules do not address supplementation of the Record on Appeal. Rule 212(b) discusses the procedures for supplementing a record. Specifically, Rule 212(b) provides that, "[w]ith the written consent of all attorneys of record, a party may supplement the Record on Appeal at any time before argument commences." However, without that consent, "a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so." *Id.* Respondent has not consented to supplement the Record in this case; therefore, the Court must consider the matter.

In his Motion, Appellant argues that he intends to raise issues related to "error in method and procedure" in the Board's decision-making process, and he cannot adequately brief and argue these issues without the supplemental documents he has requested to be included in the Record. Appellant concedes that SCALC Rule 61 governs the contents of the Record on Appeal in "Special Appeals" from the Department and the South Carolina Department of Corrections and states:

The record on appeal shall consist of the transcript of the proceedings before the agency, if any, and the record of the contested case as described by Rule 58. **In appeals from decisions of the Probation, Pardon and Parole Board, the Department need only provide a copy of the agency decision, and where applicable, the decision following a motion for reconsideration.**

(emphasis added). Despite the limited nature of the Record in Department cases, Appellant nevertheless argues SCALC Rule 58, subsections (A) and (F), should also apply to require the record to include "all evidence received or considered" and "any transcript taken of the testimony during the proceeding."<sup>1</sup> Appellant argues the supplemental documents he has requested fall within the scope of SCALC Rule 58.

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<sup>1</sup> SCALC Rule 58 provides that, "[w]here applicable, the record of the contested case shall consist of: A. All documents filed; B. All evidence received or considered, including copies of all relevant sentencing sheets in sentence calculation matters, and copies of specific policies relied upon by the agency; C. A statement of matters judicially noticed; D. All proffers of proof of excluded evidence; E. The final order or decision which is subject to administrative review; F. Any transcript taken of the testimony during the proceeding."

Appellant’s argument is misplaced. As the clear language of SCALC Rule 61 demonstrates, appeals from the Department are treated differently from other Special Appeals that must comply with Rule 58. SCALC Rule 61 provides the Department “need only” provide a copy of the agency decision and, where applicable, the decision following a motion for reconsideration, in contrast to the record for other appeals that must comply with SCALC Rule 58. Therefore, because SCALC Rule 58 does not apply to this case, even if the documents Appellant seeks to include fall within the scope of SCALC Rule 58, Appellant cannot simply rely on SCALC Rule 58’s application in this case for his Motion to succeed. Appellant must show more.

Regardless of the application of SCALC Rule 58, Appellant maintains he needs the supplemental documents to adequately brief and argue his case that the Department’s decision-making process was tainted by errors in method and procedure. He contends that “[w]ithout the additional materials [Appellant] has proposed including in the [Supplemental Record on Appeal], this Court will have no basis from which to evaluate his appellate claims, and the Court of Appeals will therefore become the *de facto* reviewing court for decisions from the Parole Board.” To understand why Appellant needs these materials for this Court to review his issues on appeal, it is necessary to clarify what those issues are. Although Appellant has yet to file a brief in this case, his Notice of Appeal contains a detailed list of eight issues, many with numerous subparts, that he intends to raise to this Court. The majority of these issues relate to Appellant’s contention that the Board’s decision to deny him parole was a violation of due process because the decision-making process was arbitrary and capricious. Appellant’s arguments fail to raise an issue that would fall within this Court’s limited jurisdiction in cases like this one that involve the routine denial of parole.

The Court’s jurisdiction to hear appeals from the Department is very narrow. “An 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.” S.C. Code Ann. § 1-23-600(D) (Supp. 2020). Nevertheless, in *Furtick v. South Carolina Department of Probation, Parole & Pardon Services*, the South Carolina Supreme Court held that “the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process.” 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003). Importantly, “[a]lthough [section 24-21-620] creates a liberty interest in parole eligibility, it does not create a liberty interest in parole.” *Id.* at 598 n. 4, 576 S.E.2d at 149 n. 4. “In simple terms, this means that an inmate has a right of review

by the [ALC] 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. . . .” *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 n. 4 (2003). Therefore, while the permanent denial of parole eligibility constitutes a liberty interest that is reviewable by this Court, the routine denial of parole is, generally, not a liberty interest subject to review.

The South Carolina Supreme Court has nonetheless recognized that review of the Department’s routine denial of parole can rise to a reviewable liberty interest but only if, in denying parole, the Department fails to follow the statutorily required parole criteria, and this failure renders its decision tantamount to a permanent denial of parole eligibility.<sup>2</sup> *See Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 502, 661 S.E.2d 106, 113 (2008) (“If a Parole Board fails to consider and apply the statutorily-created parole criteria, it has the effect of rendering an inmate parole ineligible, which under *Furtick* warrants review by the ALC.”). Further, in *Compton v. South Carolina Department or Probation, Parole & Pardon Services*, the South Carolina Supreme Court noted that its decision in *Cooper* was being misinterpreted and clarified that if “the Parole Board clearly [states] in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212,” its decision is sufficient under *Cooper*. *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009). In sum, this Court’s review is limited to ascertaining whether the Board “followed proper procedure” by considering the statutory criteria and the criteria set forth in Form 1212. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112.<sup>3</sup>

This case involves the routine denial of parole. Therefore, for this Court to have jurisdiction, Appellant must show the Department’s denial was tantamount to the permanent denial

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<sup>2</sup> Notably, following the South Carolina Supreme Court’s decision in *Cooper*, the General Assembly amended section 1-23-600(D) of the South Carolina Code to provide 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.” 2008 S.C. Acts No. 334, § 7 (effective June 16, 2008) (emphasis added).

<sup>3</sup> Additionally, after *Cooper*, the Department established a “validated actuarial risk and needs assessment tool” to be used when evaluating parole. S.C. Code Ann. § 24-21-10(F) (Supp. 2021). This risk assessment tool, which is known as COMPAS, has been incorporated into the Board’s written criteria and must be considered by the Board in addition to the other aforementioned statutory criteria. *See Cooper*, 377 S.C. at 499, 661 S.E.2d at 112 (holding “the apparent failure by the Parole Board to consider the requisite statutory criteria in rendering its decision constitutes an infringement of a state-created liberty interest and, thus, warrants minimal due process procedures.”); *see also Ruff v. S.C. Dep't of Prob.*, No. 2015-UP-309 (S.C. Ct. App. dated June 24, 2015) (holding the actuarial risk and needs assessment is one of the statutory criteria to which the Board must adhere).

of parole eligibility because the Board failed to consider the statutory criteria and/or the criteria set forth in Form 1212. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112. In his Notice of Appeal, Appellant does not allege the Board failed to consider the statutory criteria and the criteria set forth in Form 1212. Rather, he argues, in several ways, that the Board’s application of the statutory criteria, etc., was arbitrary and capricious. For example, in his Notice of Appeal, Appellant alleges “[o]ne member of the Board who voted to parole [Appellant] in 2019 changed their vote at [Appellant’s] most recent hearing, despite the fact that [Appellant’s] record in 2021 was better than his record in 2019.” This argument concerns an individual Board member’s allegedly inconsistent vote rather than the Board’s consideration of the requisite criteria. Similarly, Appellant also alleges that “[t]he letter formally providing [Appellant] written notice of his parole denial, which arrived three months after [Appellant’s] hearing, described different—but still unsupported—reasons for the parole denial than those at [Appellant’s] hearing.” Therefore, these allegations attack the Board’s reasoning for its denial, not whether it considered the requisite criteria in deciding to deny parole.

Because the Court’s authority to review these cases is limited to ascertaining **if** the Board considered the requisite criteria, not how it **applied** the criteria, the Court does not have the jurisdictional authority to determine whether, after the Board reviewed the requisite criteria, the Board’s decision was reasonable, arbitrary, or capricious. In fact, the General Assembly set forth the ALC does not have jurisdiction to hear appeals involving the denial of parole to potentially eligible inmates. *See* § 1-23-600(D). Moreover, the Board “is the sole authority with respect to decisions regarding the grant or denial of parole.” *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111.

Here, the supplemental documents Appellant seeks do not relate to whether the Board considered the statutory criteria, but rather seek to attack the Board’s decision-making in reviewing the criteria. Thus, the documents are not relevant to this Court’s review because they are only relevant to proving claims outside the narrow scope of this Court’s jurisdiction. *See also* Rule 209(b), SCACR (providing a party shall not designate any matter to be included in the record which is not relevant). Indeed, returning to SCALC Rule 61, the reason that this rule specifically restricts the Record on Appeal in Department cases like this one is because the only document necessary to show whether the Department considered the required statutory criteria is the agency decision. In his Notice of Appeal, Appellant nonetheless alleges “[n]one of the members who voted to deny him parole in 2021 engaged in any fact-finding or ‘offered an explanation [or]

indicated that [they] had considered the statutory criteria of section 24-21-640” as required by *Cooper v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008).” Thus, although, the agency decision indicates the Board complied with section 24-21-640 and *Cooper*, Appellant questions the subjective thoughts and individual actions of each Board member. This Court does not have the authority to engage in such a review and, therefore, any documents tending to show the thoughts and actions of individual Board members’ decision-making processes are not relevant to this Court’s limited review of whether the Board, as a whole, considered the requisite criteria. *See Cooper*; § 1-23-600(D).

Appellant also argues that his Motion should be granted because he has the burden to present a sufficient record for appellate review, and the current record is insufficient for meaningful appellate review. I find Appellant has failed to show the current record is insufficient for Appellate review. Although it is conceivable the Record could be supplemented with documents other than the agency decision and, if applicable, the decision on a motion for reconsideration, those documents would have to indicate the Board failed to consider the requisite criteria. Here again, Appellant does not seek to supplement the Record with documents to show the Board failed to consider the requisite criteria, but rather to show that when those criteria were considered, they were subjectively applied in an arbitrary and capricious manner that was inconsistent with due process. However, this Court’s jurisdiction, as limited by *Cooper* and section 1-23-600(D), does not allow it to consider the subjective analysis of the Department’s decision-making process.

Because none of the supplemental documents requested by Appellant are relevant to this Court’s limited review of whether the Board considered the requisite criteria, I find Appellant’s Motion must be denied.

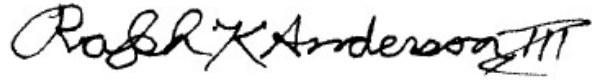
Finally, in the last sentence of his Motion, Appellant requested this Court suspend the deadline for filing his initial brief in consideration of this pending Motion. Since the Court denies the Motion to Supplement, the Court also denies the motion to suspend the deadline to file briefs.

### **ORDER**

**IT IS THEREFORE ORDERED** that Appellant’s Motion to Supplement Record is **DENIED**.

**IT IS FURTHER ORDERED** that the Appellant's motion to suspend the briefing deadline is **DENIED**.

**AND IT IS SO ORDERED.**

A handwritten signature in black ink, reading "Ralph K. Anderson, III". The signature is written in a cursive style with a horizontal line underneath it.

Ralph K. Anderson, III  
Chief Administrative Law Judge

June 3, 2022  
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have this date served this Order upon all parties to this cause 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).



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Stephanie Perez  
Judicial Law Clerk

June 3, 2022  
Columbia, South Carolina