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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

These two cases, *Fletcher v. Board of Parole and Post-Prison Supervision (BOPPS)*, SC S055789, and *Dawson v. BOPPS*, SC S055770, both arise from the Board of Parole and Post-Prison Supervision's ("the board") denial of a request to reopen an earlier decision. This court ordered the cases consolidated for purposes of argument and decision. Because different issues are presented by the factual record, different analytical models are offered in each case. As a result, separate briefs are filed for each.

Question Presented and Proposed Rule of Law

First Question Presented

The board has promulgated rules governing the exercise its discretion in deciding when to reopen past decisions. Is a board decision denying a request to reopen because the petitioner failed to meet the criteria in those rules reviewable as a final order?

First Proposed Rule of Law

Yes. However, in that instance the board's denial of the request to reopen is reviewable solely under an abuse of discretion standard.

Summary of the Argument

In 1998 the board designated petitioner a predatory sex offender without first affording him a hearing, a violation of his federal due process rights. In 2006, petitioner requested the board reopen that designation. Despite having promulgated rules which list a “violation of constitutional or statutory provisions” as a basis for reopening, the board rejected petitioner’s request stating it did not “warrant reopening.” Petitioner sought judicial review of that administrative response and the board moved to dismiss the appeal for lack of jurisdiction.

Subject matter jurisdiction exists in this case to resolve the narrow question of whether the board abused its discretion when it refused to reopen an earlier decision that, per its own rules, may warrant reopening. On that limited issue – whether a constitutional violation “warrants reopening” when weighed against concerns of finality and efficiency – the board decision in this case is a “final order” for purposes of ORS 144.335, and subject to judicial review.

Historical and Procedural Facts

Petitioner Fletcher was released on post-prison supervision on June 12, 1998. At that time, the board designated petitioner a predatory sex offender (PSO) pursuant to ORS 181.585. On November 13, 2006, the board received petitioner’s request to reopen his case and reconsider the PSO designation on grounds that he never received a hearing to determine his predatory status. The board denied petitioner’s reopening request in ARR #2, dated March 26, 2007.

Petitioner Fletcher filed a petition for judicial review in the Court of Appeals on May 31, 2007. The state moved to dismiss the appeal for lack of jurisdiction, arguing that the denial of the reopening request was not a final order for purposes of ORS 144.335. The Court of Appeals agreed, dismissing the appeal in an order of Dismissal dated December 27, 2007, in which the court stated:

“The court determines that the Board’s order merely explains why it is declining to reopen and reconsider the matter formally decided; that explanation does not amount to a reopening and reconsideration of the merits of the matter formerly decided.”

Petitioner filed a petition for review in this court, and this court allowed review in *Fletcher v. Board of Parole*, ___ Or ___, ___ P3d ___ (2008).

ARGUMENT

I. A brief overview of the authority for board reopenings and judicial review.

The board has authority under two promulgated rules to reopen past decisions: OAR 255-080-0012 and OAR 255-075-0050. Division 80 of the board’s rules concerns general procedures for administrative hearings and reopenings. It is the more general of the two reopening provisions and applies to a wide variety of board decisions. It states:

“1) If the Board or its designee determines that the request for review is consistent with the criteria in OAR 255-080-0010 and the limits of 255-080-0011, the Board may open the case for review.

“(2) The Board may open a case for reconsideration of a finding without receiving a request, without regard to time limits, and without opening all findings for review and appeal.

“(3) The Board may conduct the review using the following methods:

“(a) Administrative file pass, with the number of concurring votes required by OAR 255-030-0015; or

“(b) Other administrative action by the Board or its designee, e.g., to correct errors in the history risk score, crime category, credit for time served, inoperative time or adjusted commitment dates; or

“(c) Administrative hearing, in cases where review would cause an adverse result for the prisoner.

* * * *”

OAR 255-080-0012.

Division 75 of the board rules deals with parole revocation and future disposition determinations, as applicable in *Dawson*. That division has a specific provision for reopening of such determinations. It states:

“(1) After the completion of a violation hearing, the Sanction Authority or Hearings Officer may reopen a hearing if substantial new information is discovered which was not known or could not be anticipated at the time of the hearing and which would significantly affect the outcome of the hearing.

(2) The Sanction Authority or Hearings Officer shall send the offender notice of the decision to reopen the hearing and the new information to be considered. The reopened hearing shall conform to the procedures of this Division.”

OAR 255-075-0055.

Under either reopening provision, however, judicial review of the board’s decision is determined by statute, ORS 144.335:

“(1) A person over whom the State Board of Parole and Post-Prison Supervision exercises its jurisdiction may seek judicial review of a final order of the Board as provided in this section if:

“(a) The person is adversely affected or aggrieved by a final order of the Board, and;

“(b) The person has exhausted administrative review as provided by Board rule.”

Under ORS 144.335 a petitioner must meet three criteria for judicial review: (1) a final order of the board that, (2) affected or aggrieved petitioner, and (3) the petitioner properly utilized the review process to exhaust their remedies prior to seeking judicial review. There is no dispute that petitioners *Dawson* and *Fletcher* exhausted their administrative remedies.

Likewise, under *Richards v. Board of Parole*, 339 Or 176, 118 P3d 261 (2005), it is clear that the board’s refusal to reopen the prior proceeding was an action that affected and aggrieved the petitioners:

“* * * [T]he Board considered and rejected petitioner’s argument in ARR 6. Whatever the merits of the argument, he did not receive all the relief that he sought * * * [P]etitioner advanced an argument * * * The Board understood petitioner’s objection * * * [and] rejected that argument in ARR 6 and, in doing so, adversely affected or aggrieved petitioner by denying him the relief that he had sought.”

Richards, 339 Or at 183-84. Here, the petitioners sought specific relief. Dawson sought reopening to recalculate his release date. Fletcher sought reopening to challenge a PSO designation that was imposed without notice and an opportunity to be heard. Neither petitioner received even a portion of the relief sought.

Two of the three criteria for judicial review being met, these cases present solely the question of whether the board’s denial of the request to reopen is a final order. Twice before, in *Esperum v. Board of Parole*, 296 Or 789, 681 P2d 1128

(1984), and *Mastriano v. Board of Parole*, 342 Or 684, 159 P3d 1151 (2007), this court has held that denial of reopening is not always a final order. However, neither *Esperum* nor *Mastriano* presented precisely the question advanced by petitioner in this case. In *Fletcher*, the question is whether the board's exercise of discretion to refuse to reopen an earlier decision, under the reasoning that petitioner has failed to demonstrate the case "warrants reopening", is itself a limited question reviewable under an abuse of discretion standard.

II. The board's conclusion that petitioner Fletcher's claim did not "warrant reopening" is reviewable for an abuse of discretion even though the board did not reach the merits of the claim.

Before turning to the argument in *Fletcher*, petitioner must first make certain acknowledgments and concessions. First, in petitioner Fletcher's *Response to the Motion to Dismiss* filed in the Court of Appeals, petitioner asserted that the board had stated in its ARR that it "evaluated the additional evidence" presented by petitioner. *Response to the Motion to Dismiss* at 6. That is incorrect. The board's response states that it evaluated petitioner's "request." In part derived from that incorrect quotation of the record, petitioner argued that the board had reached the merits of the reopening claim by stating:

"Upon review of the additional evidence that was attached to petitioner's request, but not previously included in the board's motion to dismiss, and combined with the board's response, the record reflects that the board withdrew the 1998 PSO designation based on the Oregon Supreme Court's decision in V.L.Y. App 11. The board has redesignated petitioner as a PSO."

Response to the Motion to Dismiss at 6.

Upon further review, petitioner does not believe that the record fairly can be so characterized. It appears that a single PSO designation has been in effect since 1998, and the board has not subsequently removed, then reinstated, that designation.

Second, in his *Response to the Motion to Dismiss* petitioner Fletcher stated that he was “not raising an issue pertaining to abuse of discretion.” *Id.* However, that is precisely the argument petitioner now makes. Petitioner apologizes to this court for the change in strategy, but makes it only after careful research and review have led to the conclusion that a claim that the board “reached the merits” in *Fletcher* lacks sufficient support in the factual record.

In anticipation that this change in argument may result in the state asserting that the issue is not now properly preserved for appeal, petitioner notes that this case has not yet advanced to the stage of litigation wherein he would articulate his substantial question of law. Thus, he has never taken a position with respect to what the issue on appeal would be. The state moved to dismiss this case for lack of subject matter jurisdiction, shortly after the filing of the petition for judicial review. The issue before this court is whether an Oregon court has jurisdiction to hear petitioner’s case. Issues and arguments of jurisdiction can be raised for the first time at any stage of litigation. *See e.g. Ailes v. Portland Meadows, Inc.*, 312 Or 376, 383, 823 P2d 956 (1991) (lack of subject matter jurisdiction may be raised at any time, including on appeal); *State v. Compton*, 333 Or 274, 295-296, 39 P3d 833, 846(2002) (noting same).

Despite those acknowledgments and concessions, petitioner does contend that the Court of Appeals erred in dismissing *Fletcher* for the following reason. *Fletcher* involves a request to reopen the board's designation of petitioner as a Predatory Sex Offender (PSO). Unlike *Dawson*, where the board explicitly reached the merits of the reopening claim, in *Fletcher* the board's response concluded that petitioner's claim did not "warrant reopening" under the board's rules. That determination – that the agency would not exercise its discretionary authority to reopen because petitioner's claim failed to meet the criteria of board rules – is itself reviewable for abuse of discretion.

But, in evaluating that argument it is first necessary to understand the underlying issue raised by petitioner in his request. For this reason, a brief discussion of due process claims surrounding the imposition of PSO designations follows.

- A. Under this court's decision in *Noble v. Board of Parole*, the board must afford an inmate a hearing prior to designating that inmate as a predatory sex offender.

ORS 181.585 provides:

“(1) For purposes of ORS 181.585 to 181.587, a person is a predatory sex offender if the person exhibits characteristics showing a tendency to victimize or injure others and has been convicted of a sex crime listed in ORS 181.594(2)(a) to (d), has been convicted of attempting to commit one of those crimes or has been found guilty except for insanity of one of those crimes.

“(2) In determining whether a person is a predatory sex offender, an agency shall use a sex offender risk assessment scale

approved by the Department of Corrections or a community corrections agency.”

The sex predator statute, ORS 181.585 *et seq*, permits various state and local government agents to notify a community when it determines the person is a predatory sex offender. The statute defines a sex predator as a person who has been convicted of a listed sex offense or been found guilty but insane of one of those offenses and who exhibits characteristics showing a tendency to victimize or injure others. ORS 181.585(1).

The sex predator statute expressly allows the state agency to broadcast the offender’s home address, current photograph, and vehicle driven as well as a description of the person’s targets and modus operandi. ORS 181.586(3). Notification can be by any means, including flyers, newspaper reports, or television or radio broadcasts. For offenders who are being put on parole, like petitioner, the Board first determines if the offender is a sex predator and the supervising agency then decides the extent of community notification. ORS 181.586(1) and (2).

In *Noble v. Board of Parole*, 327 Or 485, 964 P2d 990 (1998), the Board held no hearing and provided no notice before declaring an offender a sexual predator under ORS 181.585 *et seq*. This court held that action to have violated the due process of law guaranteed by the Fourteenth Amendment to the United

States Constitution and required the Board to hold an evidentiary hearing before declaring the offender a PSO.¹

Noble applied the *Mathews* test to determine what procedures are due before the Board may declare a person a predatory sex offender. *See Mathews v. Eldridge*, 424 US 319, 335, 96 S Ct 893, 902-03, 47 L Ed2d 18, 33 (1976). First, this court declared that “the Board’s decision to designate a person as a predatory sex offender under ORS 181.585 implicates a due process interest in liberty.” *Noble*, 327 Or at 496. This court noted that the *Mathews* test determines the specific requirements of due process by considering three factors:

“(1) the private interest that will be affected by the governmental action; (2) the risk of an erroneous decision inherent in the procedure employed, along with the probable value of any additional or different procedural safeguard; and (3) the government’s interest, including any fiscal and administrative burdens involved in providing additional or substituted procedures. *Mathews v. Eldridge*, 424 US 319, 334-35, 96 S Ct 893, 902-03, 47 L Ed2d 18, 33 (1976).”

Noble, 327 Or at 496. This Court went on to hold that under the first factor the private interests affected by the statute are “significant”:

“[T]here is no question that a person who is identified as a predatory sex offender under the statute is put at risk of serious consequences: social ostracism, loss of job prospects, and significantly increased likelihood of verbal and even physical harassment. Those consequences flow predictably from the government's decision and must be taken into account in the analysis.”

¹ In part, the Fourteenth Amendment to the United States Constitution says:

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”

Id. 496-497.

Second, this court acknowledged that although the approved risk assessment scale was partly based on an objective analysis of the offender's criminal history, it was also based on "subjective" aspects, such as whether the offender exhibits predatory behavior. This court specifically noted that the imposition of a PSO designation was a not situation where an evidentiary hearing was unnecessary because only objective factors "within the personal knowledge of an impartial government official" were being considered. *Id.* at 497 (citing *Mackey v. Montrym*, 443 US 1, 13, 99 S Ct 2612, 2618, 61 L Ed 2d 321, 331 (1979)). This court noted that in petitioner Noble's case:

"[T]he Board considered, in addition to the risk assessment scale, police reports of petitioner's crime and 'confidential communications between agency officials.' The content of the 'confidential communications' is unknown to petitioner. * * * Moreover, with respect to that unknown or 'confidential' information, there is not even the comfort of knowing that the source of the information is reliable and impartial. Further, the ultimate question, whether petitioner 'exhibits characteristics showing a tendency to injure others,' inherently is subjective. The risk of error involved in the Board's abbreviated process substantially is greater than the risk involved in a typical administrative decision."

Id. at 497-498.

Lastly, this court considered the Board's interests and held,

"We conclude that requiring the state to afford a predeprivation hearing in this circumstance would not impose a significant procedural burden on the state."

Id. at 498. This court concluded that due process required both notice and an “evidentiary hearing” prior to the Board designating a person as a predatory sex offender.

In *Fletcher*, the record is considerably undeveloped because the board moved to dismiss the petition for judicial review before the agency record was settled. Thus, petitioner’s entire parole record is not before this court. However, the limited record contains no indication that petitioner was ever afforded a hearing prior to his PSO designation. Likewise, the board has not argued below that it provided petitioner such a hearing. By designating petitioner as a PSO without a pre-designation hearing, the board aggrieved petitioner and acted unconstitutionally.

B. The board has promulgated rules governing the exercise of its discretion to reopen past decisions that favor reopening for constitutional violations.

Oregon courts have repeatedly held that administrative agencies, such as the board, are constrained by both statute and promulgated rule:

“It is, of course, axiomatic that an agency must follow its own rules. *Moore v. OSP*, 16 Or App 536, 519 P2d 389 (1974); *see also Aetna Casualty & Surety Co. v. Sue A. Blanton, D.C.*, 139 Or App 283, 287, 911 P2d 363 (1996). Even if an agency is not required to adopt a rule, once it has done so it must follow what it adopted. *Harsh Investment Corp. v. State Housing Division*, 88 Or App 151, 744 P2d 588 (1987), *rev. den.* 305 Or 273, 752 P2d 1219 (1988).”

Peek v. Thompson, 160 Or App 260, 265, 980 P2d 178 (1999) (*en banc* decision), *review dismissed* 329 Or 553, 994 P2d 130 (1999).

Even when the agency has broad discretionary authority to act in multiple ways, its use of that authority must comport with its own guidelines. *Wyers v. Dressler*, 42 Or App 799, 807, 601 P2d 1268 (1979), *rev den* 288 Or 527 (1980), *overruled on other grounds*, *Mendieta v. Division of State Lands*, 148 Or App 586, 941 P2d 582 (1997), *rev. dismissed* 328 Or 331 (1999). (“An agency which is vested with discretion by statute may limit its own discretion in its regulations.”).

Fletcher involved a reopening request under Division 80. The board has broad authority to reopen past decisions:

“(2) The Board may open a case for reconsideration of a finding without receiving a request, without regard to time limits, and without opening all findings for review and appeal.”

OAR 255-080-0012(2).

Although reopening is discretionary, the board has promulgated rules to guide it in the exercise of that discretion. Weighing against reopening, the board has directed that the following situation may be denied further review:

“All administrative review requests will be screened by a Board member or a Board designee who may deny further review of the following matters:

- (1) Findings of aggravation when the Board has set the prison term within or below the matrix range;
- (2) Findings of aggravation when the Board has not overridden a judicial minimum and the prison term has been set equal to the judicial minimum;
- (3) Matters which have previously been appealed and decided on the merits by either the Board or the appellate court(s);
- (4) Administrative review requests considered untimely pursuant to rule 255-080-0005;

- (5) Subject matter of a hearing or review and/or Board order other than the Board order being appealed;
- (6) Matters that will not change the parole release date or conditions or length of supervision;
- (7) Board orders that are not final;
- (8) Errors previously corrected;
- (9) Order which sustains a minimum term and the inmate/offender does not contest the crime severity rating and history risk score;
- (10) Order which denies, grants or grants in part an inmate/offender's request for a prison term reduction based upon outstanding reformation under ORS 144.122;
- (11) Order which refers an inmate/offender for psychological evaluation;
- (12) Order which postpones an inmate/offender's release date because of:
 - (a) A Board finding of dangerousness under ORS 144.125(3) and OAR 255-060-0012;
 - (b) An inmate/offender's refusal to submit to a psychological evaluation;
- (13) Order which postpones an inmate/offender's release date because of serious misconduct during confinement; or
- (14) Order which denies an inmate/offender's request under ORS 144.228(1) for an early parole consideration hearing.
- (15) Order which sets an initial release date under ORS 144.120, except if inmate/offender contests the crime severity rating, the history risk score or aggravating factors found by the Board under Board rules;
- (16) Order which sets a date for a parole consideration hearing under ORS 144.228;
- (17) Order which sets a release date or declines to set a release date after a parole consideration hearing under ORS 144.228.”

OAR 255-080-0011.

In contrast, weighing in favor of reopening, the board has directed itself to consider the following criteria with favor:

“The criteria for granting a review are:

- (1) The Board action is not supported by evidence in the record; or
- (2) Pertinent information was available at the time of the hearing which, through no fault of the offender, was not considered; or
- (3) Pertinent information was not available at the time of the hearing, e.g., information concerning convictions from other jurisdictions; or
- (4) The action of the Board is inconsistent with its rules or policies and the inconsistency is not explained; or
- (5) The action of the Board is in *violation of constitutional or statutory provisions* or is a misinterpretation of those provisions.
- (6) The action of the Board is outside its statutory grant of discretion.”

OAR 255-080-0010.

Outside the context of a reopening decision, this court has held that discretionary agency action must be subject to meaningful review for abuse of discretion.

“The agency's choice, among the range of choices available to it, must be a choice that a reasonable decision-maker would make, given the facts of the case, the interests of the parties appearing before the agency, and the policy or policies of the law that the agency's choice is intended to further. Responsibility for policy refinement under the statutes is delegated to the agency, not to the court. The court, for its part, is responsible for reviewing the agency's decision to see that it is within the range of discretion granted to the agency.

Schoch v. Leupold & Stevens, 325 Or 112, 118, 934 P2d 410, 413 (1997).

Petitioner asserts that meaningful review of the board's refusal to reopen is no less appropriate. Petitioner has asserted a constitutional deprivation that the board has not denied and the record does not contradict. That constitutional deprivation is an express criterion for reopening, as per OAR 255-080-0010(5). In response, the board has stated that:

“Interests of administrative efficiency and finality of board orders militate against reopening and reconsidering a final board order * * *.”

Fletcher, ARR # 2.

Petitioner acknowledges that OAR 255-080-0011 does contain criteria weighing against reopening that are applicable in this case. But, likewise, criteria exist in promulgated board rules that support reopening. In its ARR the board offers little analysis explaining how or why one criterion is prioritized over another. How the board is utilizing its own promulgated rules to exercise discretion is an appropriate subject for judicial review.

Neither *Esperum* nor *Mastriano* foreclose the proposition that a “denial of a request outright” might be subject to appellate review solely to answer the question of whether the board abused its discretion in applying its own reopening rules. That precise argument was not advanced in either case. Likewise, petitioner is aware of no legislative history indicating that ORS 144.335 precludes such a limited review.

For purposes of both *Dawson* and *Fletcher*, as discussed earlier, the issue is whether the board's denial of the reopening request is a “final order” under ORS

144.335. The order in *Fletcher*, concluding that petitioner’s claim did not “warrant reopening” due to concerns of “efficiency and finality” has all the hallmarks of finality. The board even indicated so much when it stated at the end of its response:

“You may petition the Court of Appeals for judicial review of this order within 60 days of the mailing date of this order, per ORS 144.335.”

Fletcher, ARR #2. That *limited* issue –how a constitutional error (OAR 255 080-0010) is weighed against efficiency and finality (OAR 255-080-0011) in determining the exercise of discretionary agency action – in a “final order” and should be subjected to meaningful review.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays this court reverse the decision of the Court of Appeals granting the state’s motion to dismiss.

Respectfully submitted,

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ENDER

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on January 7, 2009.

I further certify that I directed the Petitioner's Brief on the Merits to be served upon Mary H. Williams, attorney for Plaintiff-Respondent, on January 7, 2009, by having the document personally delivered to:

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