

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

JIMMIE HOYT COHRON,  
*Petitioner,*

*v.*

BOARD OF PAROLE AND  
POST-PRISON SUPERVISION,  
*Respondent.*

Board of Parole and Post-Prison Supervision  
A162741

Argued and submitted September 7, 2018.

Stephanie J. Hortsch, Deputy Public Defender, argued the cause for petitioner. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Keith L. Kutler, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

LAGESEN, P. J.

Affirmed.

**LAGESEN, P. J.**

Petitioner seeks judicial review of a final order of the Board of Parole and Post-Prison Supervision in which the board reaffirmed its previous decision under ORS 144.120(4) (1985) not to set a parole release date for petitioner. The board contends that, under either *Richards v. Board of Parole*, 339 Or 176, 118 P3d 261 (2005), or *Mastriano v. Board of Parole*, 342 Or 684, 159 P3d 1151 (2007), we lack jurisdiction to review the order. Alternatively, the board contends that petitioner's arguments provide no grounds for displacing the board's order. We reject the board's jurisdictional arguments, but affirm the order on its merits.

Petitioner is serving a life sentence for the murder that he committed in 1985. Upon his commitment to the Department of Corrections (DOC), the board considered whether to set a parole release date for petitioner but declined to do so under the authority of ORS 144.120(4) (1985). That provision specified that the board could decline to set a release date when the "offense included particularly violent or otherwise dangerous criminal conduct." Petitioner has asked the board to reconsider that decision several times and, in 2015, in response to one of petitioner's requests, the board took action. It scheduled an interview under OAR 255-030-0013 to assess petitioner's progress; the board ordered a psychological evaluation of petitioner to evaluate petitioner's current condition. After conducting that interview, the board adhered to its prior decision. It explained in Board Action Form 3:

"Based on all the information the Board is considering, and pursuant to [the relevant version of] ORS 144.120(4) \*\*\*, the Board finds no basis for a change in the terms of confinement (parole denial), and affirms the previous decision not to set a parole release date."

Petitioner sought administrative review, raising a number of issues. The board rejected many of his arguments on the ground that they represented attacks on the board's original order, rather than challenges to the board's current decision not to change the terms of petitioner's confinement. The board rejected on the merits petitioner's assertions that

the board's current decision not to change the terms of petitioner's confinement lacked substantial evidence.

On review, in three assignments of error, petitioner contends that the board erred in denying petitioner's request to change the terms of his confinement by providing him with a parole release date. He argues that the board failed to identify the correct standard or otherwise articulate what standard it was applying. He contends that the citation to ORS 144.120(4) (1985) indicates that the board applied the wrong standard and that ORS 144.050 supplied the correct standard. He argues that the board failed to adequately elaborate upon how it was evaluating petitioner's request under ORS 144.050 and, therefore, the board's decision is not supported by substantial reason and violates due process.

The board responds that, under *Richards* and *Mastriano*, we lack jurisdiction to review the order and that, in all events, petitioner's arguments fail on the merits or are procedurally barred for lack of preservation or exhaustion.

We conclude that we have jurisdiction to review the board's order. ORS 144.335 gives us jurisdiction to review a "final order" of the board on the petition of a person who is "adversely affected or aggrieved" by the order. ORS 144.335(1). Under *Mastriano* and the Supreme Court's prior decision in *Esperum v. Board of Parole*, 296 Or 789, 795-96, 681 P2d 1128 (1984), "a board order denying reopening and reconsideration of an earlier final order is not itself a final order for purposes of judicial review pursuant to ORS 144.335(1)." *Mastriano*, 342 Or at 686. However, a board order "in which the board reexamines a prior order, even if it reaffirms the order in full," is a final order for purposes of ORS 144.335(1). *Id.* at 690; *Esperum*, 296 Or at 795-96 (explaining that board orders that simply deny a request for reconsideration are not final orders, but board orders that allow reconsideration are final orders, even if the board ultimately denies relief). Under *Richards*, a person is "adversely affected or aggrieved" by a board order if the person sought relief before the board and did not receive the relief sought: "Nothing is remarkable about the observation that, if a party did not obtain the relief that it had sought before an

administrative tribunal, such a party is either ‘adversely affected’ or ‘aggrieved’ by the denial of that relief.” 339 Or at 182-83.

The board contends that the order before us simply denied reopening and reconsideration and, therefore, is not a final order under *Mastriano* and *Esperum*. The record, however, does not support that view of the board’s order. The board scheduled a hearing, considered new information about petitioner beyond what was submitted in the request for reconsideration, and ultimately made a current decision, based on that new information, that there was “no basis for a change in the terms of confinement (parole denial),” and it then “affirm[ed] the previous decision not to set a parole release date.” In so doing, the board reexamined its previous decision in view of the new information and, ultimately, decided to reaffirm it in full. As *Mastriano* and *Esperum* make clear, that type of decision is a “final order” under ORS 144.335(1) and is not the same as a simple denial of a request to reopen and reconsider a prior decision.

The board also contends that petitioner is not “adversely affected” or “aggrieved” for the purposes of ORS 144.335. *Richards* requires us to reject that argument. Petitioner sought relief from the board—a change in the terms of his confinement—and was denied that relief. That is what it means to be “adversely affected” or “aggrieved” under *Richards*.

Having concluded that we have jurisdiction to review the board’s order, we must dispose of the merits of petitioner’s arguments. Having considered those arguments, the board’s response to them, and the record as a whole, we reject those arguments on the merits.

Affirmed.