

DISTRICT COURT, LOGAN COUNTY,
COLORADO

PO Box 71
110 Riverview Rd.
Sterling, CO 800751

DANIEL IMMEL, and THOMAS WILLSEY,

Plaintiffs,

v.

BILL OWENS, Governor - State of Colorado;
ALLAN STANLEY, Chairman – Colorado State
Parole Board; BOARD MEMBERS - Colorado State
Parole Board; JOE ORTIZ, Executive Director –
Colorado Department of Corrections; CASE
MANAGERS - Colorado Department of Corrections,

Defendants.

▲ COURT USE ONLY ▲

JOHN W. SUTHERS, Attorney General
JOSEPH SANCHEZ, Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
(303) 866-4308
Registration Number: 20975

Case No.: 05CV216

MOTION TO DISMISS COMPLAINT

Defendants, through counsel, the Colorado Attorney General, move to dismiss the complaint pursuant to C.R.C.P. 12(b)(1) and 12(b)(5). As grounds, Defendants state as follows:

I. Factual Background

According to the Complaint, Plaintiffs are seeking declaratory relief pursuant to C.R.C.P. 57. They allege that the Defendants are abusing their authority and denying them substantive and procedural due process when considering inmates for parole suitability. (Complaint p. 9, ¶46). Specifically, they argue that the Defendants are not following the guidelines in C.R.S. § 17-22.5-404 when making decisions on whether or not to grant parole, or if the Defendants are using C.R.S. § 17-22.5-404, the statute must be faulty in such a way as to allow the Board to abuse the statute's intended fairness and efficacy. (Complaint p. 8, ¶ 40). In their Complaint, Plaintiffs seek to certify this action as a class action because the issues and questions raised in their Complaint apply to hundreds of inmates who are eligible for parole but have been denied discretionary parole.¹

II. Motion to Dismiss

A. Standard of Review

A complaint may be dismissed where it fails to state a claim for which relief may be granted. Colo. R. Civ. P. 12(b)(5). "The purpose of a motion under C.R.C.P. 12(b)(5)

¹ Plaintiffs are not represented by counsel and cannot adequately represent the class. See Fymbo v. State Farm Fire and Cas. Co., 213 F.3d 1320, 1321 (10th Cir. 2000) (A pro se litigant is not qualified to represent a class because he lacks the requisite competence); see also McGrew v. Texas Bd. of Pardons and Paroles, 47 F.3d 158, 162 (5th Cir. 1995) (pro se inmate's ability to adequately represent the class was "dubious"); Lile v. Simmons, 143 F. Supp. 2d 1267, 1277 (D. Kan. 2001) (finding pro se prisoner could not adequately represent the class because he could not represent other prisoners in federal court).

to dismiss a complaint for failure to state a claim upon which relief can be granted is to test the formal sufficiency of the complaint. " Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996) (cite omitted). When evaluating a motion to dismiss under Rule 12(b)(5), "all averments of material fact must be accepted as true, and the allegations of the complaint must be viewed in the light most favorable to the plaintiff." McInerney v. Public Employees' Retirement Ass'n, 976 P.2d 348, 352 (Colo. App. 1998) (cite omitted). However, "[i]n evaluating a Rule 12(b)(5) motion, courts may consider 'only those matters stated in the complaint. '" Coors Brewing Co. v. Floyd, 978 P.2d 663, 665 (Colo. 1999) (cite omitted).

B. Argument

1. The Court lacks jurisdiction to review the parole decisions.

The Parole Board's decision to deny parole, its rationale, and the information it considered relevant in making its decision to grant or deny discretionary parole are not subject to judicial review by this Court. White v. People, 866 P.2d 1371, 1373-74 (Colo. 1994); In re Question Concerning State Judicial Review of Parole Board Decisions, 199 Colo. 463, 610 P.2d 1340 (1980).

The Board's decision to deny parole is a **subjective** prediction of the applicant's ability to comply with Society's rules upon release based on the Board's experience. White v. People, 866 P.2d 1371 (Colo. 1994). "The determination of how to monitor an offender's progress and what, if any, weight the Parole Board chooses to place on the

evidence before it are matters solely for the Parole Board's consideration and discretion."

Id. Because the parole decision is so dependent upon the purely subjective appraisals of the Board's members, its review "is plenary and is not subject to judicial review." Id.

2. The Due Process Clause imposes no procedural requirements on the Parole Board.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution proscribes state deprivation of life, liberty, or property without due process of law. Templeman v. Gunter, 16 F.3d 367, 369 (10th Cir. 1994). "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." Dowling v. United States, 493 U.S. 342, 352, 110 S.Ct. 668, 674 (1990). The interests protected by the Due Process Clause are those found within the United States Constitution itself, or those created by federal or state law. Sandin v. Conner, 515 U.S. 472, 483-84, 115 S. Ct. 2293, 2300 (1995). There is no legitimate claim unless the claim arises from one of those sources. Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989). A person must have more than a mere "need," "desire" or "hope" in order to have a "liberty interest" protected by the Due Process Clause. Id. He must demonstrate that he has a "legitimate claim of entitlement" to the right asserted in the complaint. Id.

There is no provision in the Constitution, or in any federal statute or precedent in this circuit which gives inmates a right to have a hearing prior to consideration of parole.

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7-12, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979):

That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained. To that extent, the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope that is not protected by due process.

Id., 442 U.S. at 11 [citations omitted].

Where there are no standards governing the exercise of discretion, there is no entitlement. Olim v. Wakinekona, 461 U.S. at 249-50. An inmate's due process rights are implicated only if the State's actions impinge on an entitlement. Stephens v. Thomas, 19 F.3d 498 (10th Cir. 1994). If no entitlement is at issue, no process is required prior to deprivation of the privilege. Templeman v. Gunter, 16 F.3d 367 (10th Cir. 1994). If there is no legitimate claim of entitlement, there is no right to procedural due process prior to denial of the non-entitlement. Meachum v. Fano, 427 U.S. at 223-27; Olim v. Wakinekona, 461 U.S. at 250-51; Montayne v. Haymes, 427 U.S. 236, 242-43, 96 S. Ct. 2543, 49 L. Ed. 2d 466 (1976) (even if the action involves "substantially burdensome consequences." Id., 427 U.S. at 242.

There is no provision in federal law that entitles an inmate to any particular procedures when a state parole board decides to consider a parole application. Shirley v. Chestnut, 603 F.2d 805 (10th Cir. 1979). No process is required when a parole statute

holds out nothing more than a hope of parole. Wright v. Trammell, 810 F.2d 589, 590 (6th Cir. 1987) (no right to submit evidence in support of parole, and no right to written statement of reasons for denial of parole application). The procedures to be used in consideration of a parole application are left to state law to prescribe. Greenholtz v. Nebraska Penal Inmates, 442 U.S. at 12.

In order to create a federally protected right, a state law must place substantive limitations on official discretion. Kentucky Department of Corrections v. Thompson, 490 U.S. at 461-62. This only occurs when the state mandates the decision that the official must reach if certain criteria or "substantive predicates" are met. Id., 490 U.S. at 462-63. If, on the other hand, the state law or regulation gives prison officials discretion to deny the inmate's request "for any constitutionally permissible reason or for no reason at all . . . the State has not created a constitutionally protected liberty interest." Olim v. Wakinekona, 461 U.S. 238, 249, 103 S. Ct. 1741 (1983). See also Meachum v. Fano, 427 U.S. 215, 225-28, 96 S. Ct. 2543, 49 L. Ed. 2d 451 (1976); Milligan v. Colorado Department of Corrections, 751 P.2d 75 (Colo. App. 1988).

Because the only procedural protections afforded to parole applicants are those provided by Colorado law, the statute that governs parole controls this case. Plaintiffs argue that it is a violation of their due process protections to allow the Parole Board to determine that there are aggravating factors to their offenses. They also argue that it is an

abuse of discretion to use those aggravating factors as a reason for denying parole applications.

Colorado's parole statute, which governs the procedures used for parole applications merely states that one or more Parole Board members shall conduct a parole "interview":

Whenever an inmate initially applies for parole, the board shall conduct an interview with the inmate. At such interview at least one member of the board shall be present. Any final action on an application shall not be required to be made in the presence of the inmate or parolee, and any such action shall require the concurrence of at least two members of the board. When the two members do not concur, a third member shall review the record and, if deemed necessary, interview the applicant and cast the deciding vote. The board in accordance with the provisions of section 17-2-201 (4)(a) shall consider and subsequent application for parole.

§ 17-2-201 (9)(a)(I), C.R.S. (emphasis added). The statute requires no formal hearing.

The Complaint admits that a parole interview has been held for both Plaintiffs. No other statutory duties are imposed. The Board members met, considered the applications and voted to deny them. The Board members gave their written reasons why they do not believe Plaintiffs are fitting candidates for parole. Nothing else is required.

3. Plaintiffs have failed to allege facts which support their claim that Defendants abused their discretion or failed to perform a duty required by law.

The criteria that the Parole Board must examine in deciding whether to grant or deny an application for parole are listed in C.R.S. § 17-22.5-404. The statute identifies

the criteria in three subsections: 404(2), 404(3) and 404(4). Subsection 404(2) establishes criteria to review in determining whether or not parole should be granted, and subsections 404(3) and 404(4) address conditions to be imposed if parole is granted.

The ultimate weight the Parole Board shall give to each factor is solely the Board's decision. While the Parole Board must consider the factors in subsection 404(2) in making the determination of whether it is appropriate to grant parole, it is not limited to those factors. § 17-22.5-404 (2)(a). It may consider any factors it believes necessary to prevent recidivism. § 17-2-201 (5)(f)(I)(I), C.R.S.; 17-22.5-404 (2)(a), C.R.S. "The determination of how to monitor an offender's progress and what, if any, weight the Parole Board chooses to place on the evidence before it are matters solely for the Parole Board's consideration and discretion." White v. People, 866 P.2d at 1373. Because the parole decision is so dependent upon the purely subjective appraisals of the Board's members, its review "is plenary and is not subject to judicial review." Id.

The Plaintiffs have not provided any grounds that support their allegations that the Parole Board failed to perform a duty required by law. The Plaintiffs' assertions that the Parole Board failed to consider all the guidelines because inmates have consistently been denied discretionary parole based on "aggravating circumstances", "public risk" and "needs more time"; or that their interview lasted only a short period of time; or even because they consider themselves excellent candidates, but have not been granted parole, are not evidence. The Complaint is speculation and conjecture. The Plaintiffs must do

more than hypothesize that the Board "must not" be doing its job because "few" inmates are granted parole. They cannot indirectly attempt to have a court review the soundness of parole decisions.

Factors that may be considered by a parole board include the nature of the crime(s) committed, the amount of time served, and the risk to others. See Schuemann v. Colorado State Board of Parole, 624 F.2d 172, 173-74 (10th Cir. 1980). The Board's belief that the inmate has not served enough time in prison in light of the seriousness of the crime is, by itself, sufficient to justify denial of parole. Id. In addition, the amount of time devoted to the actual interview is also immaterial. Nothing precludes the Parole Board member from considering the factors outside the presence of the inmate. In fact, C.R.S. § 17-2-201(9)(a)(I) specifically states "Any final action on an application shall not be required to be made in the presence of the inmate or parolee..."

CONCLUSION

The Parole Board's decision to deny parole, its rationale, and the information it considered relevant in making its decision are not subject to judicial review by this Court.

Respectfully submitted this 28th day of October, 2005.

JOHN W. SUTHERS
Attorney General

/s/ Joseph P. Sanchez
JOSEPH P. SANCHEZ
Assistant Attorney General
Civil and Employment Law Litigation Section
Corrections Unit
Attorneys for Defendants

CERTIFICATE OF SERVICE

This is to certify that this Motion to Dismiss was served upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 28th day of October 2005, addressed as follows:

Daniel Immel, DOC #57862
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

Cathie Holst
CDOC

Allan Stanley
Parole Board

Thomas Willsey, DOC #63529
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

/s/ Darlene Hill

