Ellis v. District of Columbia

United States District Court for the District of Columbia
March 30, 1995, Decided ; March 30, 1995, FILED
C.A. No. 91-3041 (WBB)

Reporter: 1995 U.S. Dist. LEXIS 21092
MICHAEL ELLIS, et al., Plaintiffs, v. DISTRICT OF COLUMBIA, et al., Defendants.

Counsel: [*1] For MICHAEL ELLIS, MICHAEL GILLIS, MICHAEL BUTLER, CAROLYN LANIER, RUDOLPH DAVIS, plaintiffs: Terrence Charles Sheehy, Edwin H. Wheeler, HOWREY & SIMON, Washington, DC. MICHAEL GILLIS, plaintiff, [PRO SE], LORTON REFORMATORY, Central Facility, Lorton, VA. For JEFFREY KING-BEY, RENEE GARVIN, individually and on behalf of all others similarly situated, plaintiffs: Edwin H. Wheeler, HOWREY & SIMON, Washington, DC.

For DISTRICT OF COLUMBIA, WALTER B. RIDLEY, in his capacity as Director, D.C. Department of Corrections, ERIAS A. HYMAN, in his capacity as Chairman, ENRIQUE RIVERA-TORRES, in his capacity as Member, WILLIE HASSON, in his capacity as Member, MARGARET QUICK, in her capacity as Member, defendants: Metcalfe C King, Michael Edward Zielinski, OFFICE OF CORPORATION COUNSEL, D.C., Washington, DC.

Judges: William B. Bryant, Senior United States District Judge

Opinion by: William B. Bryant

Opinion

MEMORANDUM

This class action alleging violations of *42 U.S.C. § 1983* presents the following questions: First, do Plaintiffs, who are inmates of the Defendant District of Columbia's Department of Corrections ("DOC"), have a liberty interest in being given parole, and, if so, what procedure does [*2] the *Due Process Clause of the Fifth Amendment* require that the Defendants -- the District of Columbia, DOC Director Walter B. Ridley, and District of Columbia Board of Parole members Erias A. Hyman, Enrique Rivera-Torres, Willie Hasson, Margaret Quick, and Polly J. Nelson -- use to protect that interest? Second, do District of Columbia parolees have a liberty interest in remaining on parole, and what procedure does due process require that the Board of Parole ("the Board") use to revoke parole?

Before the Court are Plaintiffs' Motions for Summary Judgment and for Sanctions and Defendants' Motion to Dismiss the Complaint or in the Alternative for Summary Judgment. For the reasons discussed below, the Court grants the Plaintiffs' Motion for Summary Judgment in part and denies it in part. Specifically, the Court holds that certain DOC inmates do have a constitutionally protected liberty interest in parole, which requires the Board to make timely initial parole determinations and provide adequate notice of those decisions. In addition, parolees have a liberty interest in remaining on parole, and so the Defendants must provide parolees with prompt preliminary hearings and timely parole [*3] revocation hearings.

I. INTRODUCTION

Plaintiffs filed their Complaint on November 22, 1991, and filed an Amended Complaint and a Motion for Class Certification on February 20, 1992. By Order on May 14, 1992 ("Order"), the Court certified three classes.

Class I Plaintiffs are "all prisoners in D.C. correctional institutions for whom a parole determination has not or will not be made by the District of Columbia Board of Parole at least ten days prior to the inmate's parole eligibility date." (Order P I.) Plaintiffs allege in Count I of their Amended Complaint that Michael Gillis, Michael Butler, and all Class I Plaintiffs "have a constitutionally protected liberty interest in an initial parole determination not less than ten days prior to their parole eligibility dates." (Am. Compl. P 40).

Class II Plaintiffs are "all prisoners in D.C. correctional institutions who have been or will be denied parole contrary to District of Columbia Municipal Regulations §§ 204.19 and 204.20." (Order P II.) Plaintiffs allege in Count II of the Amended Complaint that Michael Ellis, Jeffrey King-Bey, Carolyn Lanier, and the other Class II Plaintiffs have "constitutionally protected liberty [*4] interest[s]" in "parole determination[s] in accordance with the numerically determined guidelines" in the District of Columbia's regulations on parole and in "written notices of reasons for denial of parole as required by" the District of Columbia's parole regulations. (Am. Compl. PP 45 & 46.)

Class III Plaintiffs are "all prisoners in D.C. correctional institutions who have been or will be taken into custody on

a warrant issued by the Board of Parole for alleged violation of a condition of parole and have not or will not receive a timely preliminary interview and/or parole revocation hearing." (Order P III.) Plaintiffs allege in Count III of the Amended Complaint that Renee Garvin and the other Class III Plaintiffs "have a constitutionally protected liberty interest in a prompt preliminary interview and parole revocation hearing." (Am. Compl. P 51.)

Finally, Plaintiffs allege in Count IV, over which the Court has pendent jurisdiction pursuant to 28 U.S.C. § 1367, that each Plaintiff Class has "an interest in the Defendant's compliance with [the District of Columbia's parole] regulations." *(Id.* P 55.) Plaintiffs seek declaratory and injunctive relief against the Defendants [*5] on all four counts of their Amended Complaint. [1]

[*6] **II. THE STANDARD FOR SUMMARY JUDGMENT**

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. " *Fed. R. Civ. P. 56(c)*. If the moving party has demonstrated the absence of a genuine issue as to the material facts, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*; *Celotex Corporation v. Catrett,* 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The Court must view the inferences drawn from the presented facts "in the light most favorable to the party opposing the motion." *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 158-59, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970) (quotations omitted). The Court's "function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

[*7] **III. FACTS NOT IN DISPUTE**

A. The Timing of Parole Determinations

Felons confined in the District of Columbia's correctional facilities are statutorily eligible for parole after they serve their minimum sentences, D.C. Code Ann. § 24-203(a) (1989 Replacement), and misdemeanants whose sentences exceed 180 days are statutorily eligible for parole when they have served one-third of their sentences, *id.* § 24-208. Hereafter the Court shall use the phrase "parole eligibility date" to refer to the date on which an inmate is statutorily eligible for parole. [2]

[*8] In *Campbell v. McGruder,*[3] in order to reduce overcrowding at the District of Columbia Jail, the Court adopted by order a stipulation of the parties that requires the DOC to hold parole hearings at least ten days before an

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[1] The individual Defendants argue that they enjoy absolute and/or qualified immunity from suit for their good faith discretionary actions administering parole, for which they cite *Harlow v. Fitzgerald,* 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). The Supreme Court in *Harlow* held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. It explicitly noted that it "expressed no view as to the conditions in which injunctive or declaratory relief might be available." *Id.* at 819 n.34. However, the Supreme Court has also noted that "immunity from damages does not ordinarily bar equitable relief as well." *Wood v. Strickland,* 420 U.S. 308, 315 n.6, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975).

In this case, Plaintiffs seek no damages, but rather declaratory relief about their constitutional rights, as well as prospective enforcement of those rights. Defendants therefore cannot enjoy the *Harlow* qualified immunity, since the very purpose of this suit is to establish clearly Plaintiffs' constitutional rights. Nor do the Board members, who it might be argued enjoy an absolute "adjudicative" immunity to suits for damages, *Butz v. Economou,* 438 U.S. 478, 512-14, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978), enjoy an absolute immunity to suits for injunctive and declaratory relief. *Pulliam v. Allen,* 466 U.S. 522, 536-42, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984) (holding that judges may be sued for injunctive and declaratory relief under *42 U.S.C. § 1983*).

[2] The Court notes that the parole regulations require the Board to conduct an "initial hearing," D.C. Mun. Regs. tit. 28, § 200.2 (1987), at which it determines the date on which an inmate is to be eligible for parole, *id.* § 200.3, which "ordinarily, . . . shall not . . . exceed one-third (1/3) of the maximum sentence imposed," *id.* § 200.4. By Policy Guideline adopted May 31, 1989, the Board indicated that, for inmates whose minimum sentence equals or exceeds three years, this parole eligibility date is "the date on which service of the minimum sentence is complete," (Defs.' Mot. to Dismiss or Alt. for Summ. J. [Defs.' Mot.] Ex. 9, Policy Guideline at 1), that is, the statutory parole eligibility date.

[3] *Campbell v. McGruder* and *Inmates of D.C. Jail v. Jackson,* collectively *Campbell v. McGruder* or *Campbell,* are cases before the Court that involve the conditions of confinement of pre-trial detainees and post-conviction inmates at the District of Columbia Jail. *See, e.g., Campbell v. McGruder,* 416 F. Supp. 111 (D.D.C. 1976), *remanded,* 580 F.2d 521 (D.C. Cir. 1978). The Court has required the defendants in *Campbell* to submit bi-weekly (now monthly) reports that include statistics about whether the Board provides inmates with parole hearings at least ten days prior to an inmate's parole eligibility date.

inmate's parole eligibility date. [4] In order to enable it to comply with the *Campbell* Stipulation, the DOC adopted a policy, effective April 5, 1987, under which it is to complete a parole progress report and send it and supporting material to the Board at least 45 days before the inmate's parole eligibility date, so that the Board can make an initial parole determination for the inmate at least 10 days before that date. (Am. Compl. Attach. B & Pls.' App. Ex. 1, DOC Department Order No. 4360.2 at 1.) The DOC sometimes fails to meet this 45 day deadline. (Pls.' App., Ridley Dep. at 72 & 78.) [*9]

Only after the Board has received the parole progress report and other material from the DOC can a parole analyst prepare the Parole Determination Record, which contains analysis and comments by the analyst and/or the hearing officer as well as work sheets for calculating the inmate's "salient factor score" and "total point score." (Pls.' App., Reid Dep. at 126; Pls.' App., Gaskins Dep. at 19-20, 32-34.)

At the parole hearing, which according to Board policy is to be conducted about five weeks before the parole eligibility date, (Defs.' Mot. Ex. 9, Policy Guideline at 1), a Board member or a hearing officer must complete the Parole Determination Record [*10] and make a recommendation about parole. According to the District of Columbia's parole regulations, D.C. Mun. Regs. tit. 28, §§ 200-21 (1987), *(see* Am. Compl. Attach. A), the Board is required to grant parole to adult inmates who receive a total point score of zero, one, or two ("low total point scores"), unless it finds "unusual circumstances." The Board then reviews the Parole Determination Record, which becomes effective when three Board members sign it, and issues a Notice of Board Action. (Pls.' App., Reid Dep. at 32-36 & 41-43.)

The Board fails to hold parole hearings ten days before the parole eligibility dates of a significant minority of parole-eligible inmates. Indeed, between December 1, 1990, and August 15, 1992, the Board failed to provide such timely parole hearings to 1,125 of 2,728 parole-eligible inmates, (Pls.' App. Ex. 5), and to at least 340 of 679 parole-eligible inmates between August 16, 1992, and March 15, 1993, (Pls.' Status Report Ex. 2). In other words, over the course of those twenty-seven months, the Defendants failed to conduct such timely parole hearings for 43% of inmates eligible for parole. Many of these inmates, among them named Plaintiffs Michael [*11] Gillis and Michael Butler, (Pls.' App. Exs. 12 & 13; Defs.' Mot. Exs. 2 & 3), had low total point scores, including at least 159 between May 1, 1991, and April 30, 1992, and at least 558 between May 1, 1992, and September 1994, [5] (Pls.' Supp'l Mem. in Supp. of Mot. for Summ. J. ["Pls.' Supp'l Mem."] at 2 & Exs. 35 & 36).

[*12] The majority of the Board's late parole decisions fall within a month of the parole eligibility dates, but the Board makes many decisions months after the eligibility dates. So, for the year between May 1, 1991, and April 30, 1992, the Board made parole decisions for at least 346 [6] inmates *after* their parole eligibility dates: 210 within the first month after parole eligibility, an additional 80 between the first and second months after eligibility, 30 between the second and third months, 12 between the third and fourth months, and 13 after the fourth month, including three parole decisions over six months after the parole eligibility dates. *(See* Pls.' App. Ex. 6.)

[*13] The Board grants parole to many inmates for whom it makes late decisions, most of whom have low total point scores. For example, between May 1, 1991, and April 30, 1992, the Board ultimately granted parole to at least 138 of the 346 whose parole decisions were late, 126 of whom had low total point scores of 0, 1, or 2. (Pls.' Supp'l Mem. at 2 & Ex. 35.) And between May 1, 1992, and September 1994, the Board granted parole late to at least 479 of the 1193 who received late hearings, 423 of whom had low total point scores. *(Id.* at 2 & Ex. 36.) In other words, over

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[4] Paragraph (4) of the "Stipulation of the Parties to Reduce the Population at the D.C. Jail" *("Campbell* Stipulation") states in part that "henceforth, a parole determination shall be made by the Parole Board no later than ten days prior to a residents' [sic] parole eligibility." *Campbell v. McGruder,* No. 1462-71, Order at 3 (D.D.C. Aug. 22, 1985). (Am. Compl. Attach. C & App. to Mot. of Pls. for Summ. J. ["Pls.' App."] Ex. 2.)

[5] The Defendants point out that 360 of 1193 untimely parole decisions were "due to reasons not attributable to" the Board or DOC, including 352 due to the Prison Overcrowding Emergency Powers Act of 1987 ("EPA"), D.C. Code Ann. §§ 24-901-05 (1989 Replacement), which reduces certain inmates' minimum sentences and -- because inmates are eligible for parole when they have served their minimum sentences -- advances parole eligibility dates to, as the Defendants argue, "earlier date[s] than could reasonably have been foreseen." (Response to Pls.' Supp'l Mem. in Supp. of Mot. for Summ. J. at 1.) Even assuming that all of these 360 inmates had low total point scores, 198 inmates with low total point scores would have been denied timely decisions. For a further discussion of the EPA and the timing of parole decisions, see note 23 *infra.*

[6] This number does not include all inmates who received parole hearings after their parole eligibility date because Defendants had not produced all of the relevant underlying documents to the Plaintiffs. (Pls.' App. Ex. 6 at 1.) Nor does it include four inmates for whom the Board made parole decisions fewer than ten days before their parole eligibility dates. (Pls.' App. Ex. 6 at 2, 4, 8 & 13.)

the course of more than three years, the Board granted parole late to 549 inmates with low total point scores.

Once the Board has made its decision to grant parole, it may be a matter of days to a couple of months before the Board prepares a parole plan and the DOC can release the inmate. (Pls.' App., Hyman Dep. at 132-34.)

B. Notice of the Board's Parole Decisions

Before Plaintiffs filed this lawsuit, the Board denied parole to some inmates with low total point scores of zero, one, or two and did not always provide them with written notice of its reasons for doing so. (Pls.' App., Hyman Dep. at 20 & 60.) Michael [*14] Ellis, Jeffrey King-Bey, and Carolyn Lanier each had total point scores of one, but the Board denied them parole and provided them with no written explanation until after the commencement of this lawsuit. (Pls.' App. Exs. 11, 14 & 15; Defs.' Mot. Exs. 1, 6 & 4.) Since Plaintiffs filed this lawsuit, the Board has provided inmates with notice of its reasons for denying parole by attaching to its order an "Addendum to Board Order" ("Addendum") on which it checks the reason(s) that the Board found applied in the inmate's case. [7] The ten listed reasons are the limited factors used by the Board to find "unusual circumstances" and deny parole when a low total point score otherwise requires parole. (Pls.' App., Hyman Dep. at 25-26, 32-33 & 46-47.) In December 1991, the Board adopted a "Policy Guideline" that defines the ten reasons for deviation. (Pls.' App. Ex. 9; *see also* note 27 *infra.)* The Board adopted the Policy Guideline in order to make findings of "unusual circumstances" more uniform; the Board does not provide the Policy Guideline's definitions of the ten factors to an inmate when it gives notice that it has denied parole. (Pls.' App., Hyman Dep. at 54-58, 62).

[*15] In addition, Defendants have denied parole to inmates with low total point scores and have then explained the denial using reasons on the Addendum for which, given the reasons' definitions in the Policy Guideline, there was contradictory evidence in the

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[7] The Addendum lists the ten countervailing factors for denying parole despite a low total point score as follows:

> The Board of Parole has determined that the Parole Guidelines recommendation to grant parole in the above-referenced case is not appropriate due to the countervailing factor(s) checked below.
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> |---|---|
> | 50 | The offender has had repeated failures under parole supervision. |
> | 51 | The instant offense(s) involve(s) on-going criminal behavior. |
> | 52 | The offender has a lengthy history of criminally-related alcohol abuse. |
> | 53 | The offender has a history of repetitive, sophisticated criminal behavior. |
> | 54 | The offender has an unusually extensive or serious prior record, including at least five felony convictions. |
> | 55 | The instant offense(s) involve(s) unusual cruelty to victim(s). |
> | 56 | The offender has engaged in repeated or extremely serious negative institutional behavior. |
> | 57 | The offender has a lengthy history of criminally-related substance abuse. |
> | 58 | The offender had the opportunity, but made little or no effort toward rehabilitation or preparation for remaining crime-free if released to the community. |
> | 59 | The offender needs program and/or rehabilitation services to minimize risk to the community when actually released to parole. |

(Pls.' App. Ex. 7, Addendum to Board Order.)

inmate's file. [8] For example, the Board denied parole to Sandra White, whose total point score was two, because of "repeated or extremely serious negative institutional adjustment and behavior," even though her Parole Determination Record indicated that "none of the countervailing factors [in the Addendum] apply in this case" and that she had received only one disciplinary report. [9] (Pls.' App. Ex. 21; *see also* Pls.' App. Exs. 22 & 23.)

[*16] **C. Revocation of Parole**

The Board may issue parole violation warrants for criminal or non-criminal violations of parole up to the maximum term of the parolee's sentence. D.C. Mun. Regs. tit. 24, §§ 217.1-.7. The Board enters warrants on a computer system, the Washington Area Law Enforcement System ("WALES"), and hand-delivers a copy to the DOC Warrant Squad. If the Warrant Squad determines that the parolee is in custody, it sends the warrant to the D.C. Jail to be forwarded to the institution in which the parolee is incarcerated; if not, it assigns the case to an investigator. (Pls.' App., Hargrave Dep. at 75, 22-26 & 40-41.) The investigator attempts to find, arrest, and transport him or her to the D.C. Jail, at which point the investigator can finish executing the warrant by filling in the parolee's name and DOC number, as well as the date and time of arrest. *(Id.* at 42-43.)

The Warrant Squad is required to fax or send a photocopy of an executed warrant to the Board, (Pls.' App. Ex. 28, DOC Department Order 8010.3B § VI.F.2 at 4), but the Warrant Squad never does so, (Pls.' App., Hargrave Dep. at 42-43). Instead, the Board may learn that one of its warrants has been [*17] executed either in several other ways, including from a daily printout from WALES, on which the Warrant Squad enters information about executed warrants, or from lists of daily admittees to the D.C. Jail that indicate whether a person was committed exclusively on a warrant. Sometimes, however, the Board does not receive timely notice that one of its warrants has
been executed. (Pls.' App., Reid Dep. at 165-68; Pls.' App., Hyman Dep. at 137; Defs.' Mot. Ex. 15, Sequence of Events for Scheduling Revocation Hearings *with* prior Detention for Alleged D.C. Parole Violators.)

Once a warrant has been executed and the alleged parole violator is in custody, the Board is required by regulation to provide a "preliminary interview conducted by the Board, a member of the Board, an examiner or an official designee at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay." D.C. Mun. Regs. tit. 28, § 219.1. Unless the parolee waives her rights, the Board must hold a revocation hearing within sixty days of the preliminary interview, *id.* § 219.3, and the Board attempts to hold the revocation hearing within thirty days of the notice of the execution [*18] of the warrant, (Pls.' App., Hyman Dep. at 135).

Despite their regulations to the contrary, the Defendants do not provide preliminary interviews to any inmates who are incarcerated for violations of parole, although it does inform the parolee of her rights with respect to the revocation hearing. (Pls.' App., Hyman Dep. at 163-64; *see also* Defs.' Mot. Ex. 5, Notice of Hearing and Rights.) Although the Board intends to schedule parole revocation hearings within thirty days of notice of the execution of a warrant, the Board fails to hold revocation hearings for some parolees within sixty days of execution of the warrant. Indeed, for warrants executed during the seven and one-half months between April 1, 1991, and November 14, 1991, the Board failed to hold a revocation hearing within sixty days of the date of execution of the warrant on 46 warrants; the Board failed to conduct a revocation hearing on at least 22 of these warrants within 90 days; the Board had not provided revocation hearings to six of these parolees within six months of the date of execution of the warrant, and, as of January 20, 1992, the Board had not provided seventeen of these parolees any revocation hearing [*19] at all. (Pls.' App. Ex. 26; Attach. to Defs.' Mem. in Opp'n to Pls.' Mot for Summ. J.)

IV. Inmates' Liberty Interest in Being Paroled

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[8] For a discussion of the definitions in the Policy Guideline, see note 27 *infra.*

[9] It is unclear how extensive this Board practice is, because, despite a direct order of the Court, the Defendants did not produce the documents that the Plaintiffs had requested to substantiate their claims that the Board denies parole even when there are no "unusual circumstances." As of September 25, 1992, the Defendants *had* produced documentation identifying 62 inmates who were denied parole despite low total point scores, including 28 in December 1991 and 27 in February 1992. (Pls.' Mem. in Supp. Mot. for Summ. J. at 38.) If these two figures are typical, the Defendants deny parole to over 300 inmates yearly despite low total point scores. The record also shows that, of those inmates for whom the Board made *late* parole decisions, the Board denied parole to 33 inmates with low total point scores from May 1, 1991, to April 30, 1992, and to 135 inmates with low total point scores from May 1, 1992, through September 1994. (Pls.' Supp'l Mem. at 2 & Exs. 35 & 36.)

Because the Defendants failed to supply the requested documents, Plaintiffs have moved for sanctions, and asked that the Court find the evidence they have presented sufficient to prove their claims. However, because the Court denies both Plaintiffs' claims to enforcement of the substance of the parole regulations as a due process right under Count II and directly under Count IV, the Court will deny Plaintiffs' Motion for Sanctions.

Due process, which protects interests in liberty and property, applies to a parole determination if a prison inmate has a liberty interest in parole. *Greenholtz v. Inmates of Neb. Penal and Correctional Complex,* 442 U.S. 1, 7, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979). The Supreme Court has held that "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* Nor does the *"possibility* of parole" that exists when a state has a parole system create a liberty interest protected by due process. *Id.* at 11 (emphasis in original). Nevertheless, the Supreme Court has held that a state's parole statute may create an "expectation of parole" that creates a liberty interest protected by due process. *Id*; *Board of Pardons v. Allen,* 482 U.S. 369, 376-81, 96 L. Ed. 2d 303, 107 S. Ct. 2415 (1987).

In *Greenholtz,* statutory language clearly stating that the Nebraska Board of Parole *shall* grant a parole-eligible inmate parole *unless* it finds [*20] one or more of four designated reasons present created the requisite "expectancy of release." *Greenholtz,* 442 U.S. at 11-12. In *Allen,* statutory language that the Montana Board of Pardons *shall* grant a parole-eligible inmate parole *when* it makes certain findings created this "expectancy," *Allen,* 482 U.S. at 377-78, and the Supreme Court "rejected the argument that a statute that mandates release 'unless' certain findings are made is different from a statute that mandates release 'if,' 'when,' or 'subject to' such findings being made. Any such statute 'creates a presumption that parole release will be granted,'" *id.* at 378 (quoting *Greenholtz,* 442 U.S. at 12).

The Supreme Court emphasized that both statutes vested "very broad" discretion in each board, *id.* at 381, *Greenholtz,* 442 U.S. at 13, although this discretion was not that exercised by an official doing whatever he or she wishes but rather discretion in the sense of using "judgment applying the standards set . . . by authority," *Allen,* 482 U.S. at 375 (quoting Ronald Dworkin, *Taking Rights Seriously* 32 (1977)). "The presence of official discretion in this [latter] sense is not incompatible [*21] with the existence of a liberty interest in parole release when release is *required* after the Board determines (in its broad discretion) that the necessary prerequisites exist." [10]*Id.* at 376 (emphasis in original).

The District [*22] of Columbia Parole statute does not meet the *Greenholtz* test for establishing a liberty interest in being granted parole because it permits the Board to grant parole but uses no mandatory language that creates an expectation of release. [11]*Brandon v. District of Columbia Bd. of Parole,* 631 F. Supp. 435, 439 (D.D.C. 1986), *aff'd,*262 U.S. App. D.C. 236, 823 F.2d 644 (D.C. Cir 1987); *White v. Hyman,* 647 A.2d 1175, 1179-80 (D.C. 1994). Inmates nevertheless have a liberty interest in parole because the District of Columbia's *regulations* on parole use mandatory language like that in the statutes in *Greenholtz* and *Allen,* thus creating an expectation of release.

[*23] The District of Columbia's regulations on parole allow the Board "to release a prisoner on parole in its discretion" after he or she has served a minimum term and certain conditions are met. [12] D.C. Mun. Regs. tit. 28, § 200.1. The regulations then detail a "formula" for

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[10] The dissent in *Allen* argued that *Greenholtz* should be "limited strictly" to its facts. *Allen,* 482 U.S. at 385 (O'Connor, J., dissenting). For a parole statute to create a liberty interest, the dissent would have required it to create an entitlement to, and not merely an expectation of, release. *id.* at 382, which it could do by delineating "particularized" substantive standards that "*meaningfully* constrain the discretion of state officials." *id.* at 384 (emphasis in original). *See also, e.g.,Hewitt v. Helms,* 459 U.S. 460, 472, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983) ("use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest").

[11] The District of Columbia's statutory provision on parole provides that:

> (a) Whenever it shall appear to the Board of Parole that there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his release is not incompatible with the welfare of society, and that he has served the minimum sentence imposed or the prescribed portion of his sentence, as the case may be, the Board *may* authorize his release on parole upon such terms and conditions as the Board shall from time to time prescribe. While on parole, a prisoner shall remain in the legal custody and under the control of the Attorney General of the United States or his authorized representative until the expiration of the maximum of the term or terms specified in his sentence without regard to good time allowance.
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> (b) Notwithstanding the provisions of subsection (a) of this section, the Council of the District of Columbia may promulgate rules and regulations under which the Board of Parole, in its discretion, may discharge a parolee from supervision prior to the expiration of the maximum term or terms for which he was sentenced.D.C. Code Ann. § 24-204 (1989 Replacement) (emphasis added).

[12] This subsection of the regulations reads in full:

determining parole eligibility. First, the Board assigns a salient factor score ("SFS") to an individual that it uses "to assess the degree of risk posed by a parolee" and to assign a degree of risk value of zero (low risk), one (fair risk), two (moderate risk), or three (high risk). [13]*Id.* §§ 204.2-.3 & Appendix 2-1. Second, the Board modifies the degree of risk value by adding or subtracting a point each for three "pre and post incarceration factors," one being added if the inmate's current conviction involved violence against a person, the use of a dangerous weapon, or drug distribution, or if the inmate has two or more previous convictions for these types of crimes; one being added if the Board finds that the inmate has serious or repetitive disciplinary infractions; and one being subtracted if the Board finds that the inmate has substantial program participation while incarcerated. *Id.* § 204.18 & [*24] Appendix 2-1. This manipulation of the degree of risk value and the pre and post incarceration factors yields the "total point score." *Id.* §§ 204.19-.20 & Appendix 2-1. This total point score effectively determines the parole decision [14]: the regulations state that, at their initial parole hearing, adults with point scores of zero, one, and two and youth offenders with point scores of zero "*shall be granted*" parole; adults with point scores of three to five and youth offenders with point scores of one to five "*shall be denied*" parole. *Id.* (emphasis added). Similarly, at parole rehearings, adult and youth offenders with point scores of zero to three "*shall be granted*" parole and adult and youth offenders with point scores of four or five "*shall be denied*" parole. *Id.* § 204.21 (emphasis added). [*25]

[*26] The regulations also provide that the Board "may, in unusual circumstances," deviate from the outcome suggested by the total point score. [15]*Id.* § 204.22. Appendix 2-1 of the regulations lists six reasons for denying parole despite a low total point score (and others for granting parole despite a high score): "Repeated failure under parole supervision," "Current offense involves on-going criminal behavior," "Lengthy history of criminally related alcohol abuse," "History of repetitive sophisticated criminal behavior," "Unusually extensive and serious prior record (at least five felony convictions),"

> In accordance with D.C. Code. § 24-204 the Board shall be authorized to release a prisoner on parole in its discretion after he or she has served the minimum term or terms of the sentence imposed or after he or she has served one-third (1/3) of the term or terms for which he or she was sentenced, as the case may be, if the following criteria are met:
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> (a) The prisoner has observed substantially the rules of the institution;
>
> (b) There is reasonable probability that the prisoner will live and remain at liberty without violating the law; and
>
> (c) In the opinion of the Board, the release is not incompatible with the welfare of society.D.C. Mun. Regs. tit. 28, § 200.1.

[13] To calculate the SFS. the Board assigns a "numerical value" of between 0-3. 0-2. or 0-1 to six categories. D.C. Mun. Regs. tit. 28. § 204.4 & Appendix 2-1. The regulations provide detailed directions to the Board for assigning numerical values to each of the six categories: the inmate's prior convictions and adjudications. *id.* §§ 204.5-.6: his or her prior commitments of more than thirty days. *id.* §§ 204.7-.11: his or her age at the time of the commission of the current offense. *id.* § 204.12: his or her recent commitment-free period. *id.* § 204.13: the status of the prisoner at the time of commission of the current offense. *id.* § 204.14: and his or her history of heroin or opiate dependence. *id.* §§ 204.15-.16. The Board adds these numerical values to determine the SFS. and an SFS of 9-10 equals a "risk category" of low risk, 6-8 equals fair risk, 4-5 equals moderate risk, and 0-3 equals high risk. *Id.* § 204.17 & Appendix 2-1.

[14] As an analysis of the parole regulations stated. the total point score "determines whether or not parole is granted." even while the Board may override the total point score. (Defs.' Mot. Ex. 11. Report on the Development of Paroling Policy Guidelines for the District of Columbia Board of Parole. Executive Summary. Statement of Policy and Procedures at 2: *see also* Defs.' Mot. Ex. 12. Report on the Development of Paroling Policy Guidelines for the District of Columbia Board of Parole, Statement of Policy and Procedures at 6.)

[15] This subchapter reads in full:

> The Board may. in unusual circumstances. waive the SFS and the pre and post incarceration factors set forth in this chapter to grant or deny parole to a parole candidate. In that case. the Board shall specify in writing those factors which it used to depart from the strict application of the provisions of this chapter.D.C. Mun. Regs. tit. 28, § 204.22.

and "Unusual cruelty to victims." [16]*Id.* Appendix 2-1. These six reasons are apparently not exhaustive, however, but rather are "examples of circumstances that, when supported by specific documenting information, could constitute reason for going outside of the guidelines." (Defs.' Mot. Ex. 12, Report on the Development of Paroling Policy Guidelines for the District of Columbia Board of Parole, Statement of Policy and Procedures at 22.) [*27]

These regulations are not structured precisely like the parole statutes in either *Greenholtz* or *Allen.* One might understand the regulations to say that the Board *shall* grant parole to inmates on the initial parole date *unless* they have total point scores of three, four, or five, *cf.* *Greenholtz,* 442 U.S. at 11-12, or, alternatively, that the Board *shall* grant parole to inmates *when* they have total point scores of zero, one, or two, *cf.* *Allen,* 482 U.S. at 377-78. However, besides obscuring the fact that an inmate's total point score does not control the Board's decision if it finds unusual circumstances, both of these interpretations mean that the regulations create a liberty interest in parole for *every* inmate. Yet the regulations clearly give no inmate [*28] with a total point score of three, four, or five an expectation of release; rather, such inmates can only presume that the Board will deny them parole, and must pin their hopes on the possibility that the Board will find unusual circumstances and so be required to depart from the guidelines of the total point score to grant them parole.

However, the discretion that the Board exercises under the regulations *is* similar to that exercised under the statutes in *Greenholtz* and *Allen;* that is, the Board has discretion in the findings that it makes, but, given those findings, they determine whether the Board is required by the regulations to grant or deny parole. *Allen,* 482 U.S. at 376. The regulations make determination of an inmate's SFS and total point score mechanical. Indeed, the Board's determination of four factors in the SFS (prior commitments of more than thirty days, age at the time of the commission of the current offense, recent commitment-free period, the inmate's status at the time of commission of the current offense) is entirely mechanical. *(See* Defs.' Mot. Ex. 12, Report on the Development of Paroling Policy Guidelines for the District of Columbia Board [*29] of Parole, Statement of Policy and Procedures, Annex E, Salient Factor Scoring Manual.) The Board does have some discretion to override two components of the SFS: the scores for "prior convictions /adjudications" (because of a history of serious or repeated military offenses, because of invalid convictions that are "supported by persuasive information that the offender committed the criminal act[s]," or because of convictions involving, for example, the "repetition of particularly serious acts" that occurred more than ten years previously) and for "history of heroin/opiate dependence" (because of serious abuse of some other drug). *(Id.* at 2-4 & 10.) It has further discretion with respect to its findings regarding the post incarceration factors, that is, whether an inmate has serious or repetitive disciplinary infractions or substantial program participation while incarcerated. Whatever findings the Board makes, however, its manipulation of the numbers to arrive at the SFS and the total point score is determined by the regulations. Finally, the Board has broad discretion in finding whether there are other "unusual circumstances"; if it finds unusual circumstances, however, the [*30] Board's decision is determined by the regulations.

The Defendants argue for the approach apparently adopted by the District of Columbia Court of Appeals in *White,* which is to say that the regulations create no liberty interest because they vest broad discretion in the Board. In *White,* an inmate contended that the Board had denied him timely reconsideration for parole, and the court held that "the District's parole statutes and regulations . . . do not create a protected liberty interest in being reconsidered for parole at any specific time." *White,* 647 A.2d at 1176-77. The inmate argued that the District of Columbia's parole statute and parole regulations created a liberty interest in parole reconsideration, but the court disagreed. *Id.* at 1179-80. With respect to the parole regulations, the court stated that they

> reflect [a] discretionary approach. Decisions regarding parole shall be "in [the Board's] discretion." Although a numerical scoring system is created to guide the Board in making the decision whether to grant or deny parole, the purpose of the system is "to enable the Board to exercise its discretion." Where the Board, in the exercise of that [*31] discretion, departs from the numerical system, it shall "specify in writing those factors which it used." Departures must be explained, but they are not proscribed.
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> . . .
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> Because the statute and Regulation vest in the Board substantial discretion in granting or

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[16] In December 1991, the Board issued a Policy Guideline in which it defined ten "unusual circumstances" in which it will deny parole despite low total point scores, the first six of which repeat these six reasons from Appendix 2-1. *(See* note 7 and text accompanying note 7 *supra* and note 27 *infra.)*

> denying parole . . . , they lack the mandatory character which the Supreme Court has found essential to a claim that a regime of parole gives rise to a liberty interest.*Id.* (second alteration in original) (citations omitted). It appears to the Court that this "holding" was not necessary to determine whether there are due process limits on how the Board schedules parole hearings at the reconsideration stage.

However, assuming that the court in *White* did reach and decide the issue of whether the parole regulations create a liberty interest in parole, the Court respectfully disagrees with, and declines to follow, its analysis of the constitutional question. *See* *M. A. S., Inc. v. Van Curler Broadcasting Corp.*, 357 F. Supp. 686, 691 (D.D.C. 1973). The Supreme Court has clearly stated that parole statutes that give the parole board very broad discretion may nevertheless, as a matter of constitutional law, [*32] create an expectancy of release and, consequently, a liberty interest in parole. *Allen,* 482 U.S. at 375-76. The court in *White* therefore overstates the constitutional import of the broad discretion it finds that the regulations give to the Board.

Indeed, the discretion given the Board cannot be characterized as a "completely unfettered" grant of discretion. *Olim v. Wakinekona,* 461 U.S. 238, 249, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983). Instead, as in *Allen* and *Greenholtz,* that discretion "is not incompatible with the existence of a liberty interest in parole release [because] release is *required* after the Board determines (in its broad discretion)" what the SFS and post incarceration factors are, and hence that the total point score is low, and that there are no unusual circumstances. *Allen,* 482 U.S. at 376 (emphasis in original). In other words, even though the regulations do not mandate parole for inmates with low total point scores because the Board must deny parole to an inmate if, in its discretion, it finds unusual circumstances, the regulations do use "explicitly mandatory language" and "specific substantive predicates," *Hewitt,* 459 U.S. at [*33] 472, to identify a subclass of inmates -- those with low total point scores -- to whom the Board *shall* grant parole. This "mandatory language," *Allen,* 482 U.S. at 374, in the regulations "creates a presumption that parole release will be granted," *id.* at 377-78 (quoting *Greenholtz,* 442 U.S. at 12), to inmates with low total point scores, thereby creating for those inmates an expectation of release. Under *Allen* and *Greenholtz,* the regulations therefore create a liberty interest in parole for inmates with low total point scores. [17]

The Defendants also argue that the parole regulations cannot create a liberty interest because they are merely regulations. [*34] The Court does not agree. First, as just discussed, regulations with mandatory language directed at substantive predicates meaningfully limit decisionmakers' discretion, no less than do statutes with similar language, and they may therefore create a legitimate expectation of release. Second, the Supreme Court has found that statutes and regulations have together created a liberty interest, [18] and it has suggested that regulations alone can. [19] Third, the United States Court of Appeals for the District of Columbia has suggested that even regulations particular to a penal institution, and not merely statewide regulations, can create a liberty interest. [20] Fourth, other circuits have found that, even when a statute itself does not create a liberty interest in parole, as is the case here, the parole regulations can create a liberty

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[17] Indeed, the parole regulations meet the requirements described by the dissent in *Allen. See* note 10 *supra.* They use "explicitly mandatory language in connection with requiring specific substantive predicates," which "demands a conclusion that the State has created a protected liberty interest." *Hewitt,* 459 U.S. at 472.

[18] *E.g., Allen,* 482 U.S. at 378 n.9 (noting that 14 factors in Nebraska parole statute considered in *Greenholtz* were absent from Montana parole statute but were in Montana's parole regulations, and stating: "This Court, and the Courts of Appeals, . . . have recognized the relevance of regulations to a determination of whether a certain scheme gives rise to a liberty interest."); *see also* *Hewitt,* 459 U.S. at 470-71 (statutes and regulations created "liberty interest in remaining in the general prison population").

[19] *E.g., Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454, 461, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989) (interpreting previous cases as having held that "certain regulations granted inmates a protected interest"); *Connecticut Bd. of Pardons v. Dumschat,* 452 U.S. 458, 467, 69 L. Ed. 2d 158, 101 S. Ct. 2460 (1981) (Brennan, J., concurring) (inmates "must show -- by reference to statute, regulation, administrative practice, contractual arrangement or other mutual understanding -- that particularized standards or criteria guide the State's decisionmakers"); *Vitek v. Jones,* 445 U.S. 480, 489, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980) ("objective expectation, firmly rooted in state law and official Penal Complex practice" may create liberty interest).

[20] *Lucas v. Hodges,* 235 U.S. App. D.C. 63, 730 F.2d 1493, 1504 (D.C. Cir.), *vacated as moot,* 738 F.2d 1392 (D.C. Cir. 1984) ("a prisoner may acquire a protected liberty interest by virtue of official policy statements or regulations promulgated by administrators of the particular institution at which the prisoner is confined"); *see also id.* at 1501-04; *id.* at 1507 (Starr, J., dissenting) (suggesting "state statute or regulation implementing a statutory directive" can create liberty interest).

interest in parole. [21] [*35] [*36]

For the foregoing reasons, the Court holds that, at the initial parole determination, the District of Columbia parole regulations create a legitimate "expectation of release" for adult prisoners with a total point score of zero, one, or two, and for youth offenders with a total point score of zero, and that the Defendants may thus only deny this expectation of conditional liberty in a manner consistent with the Constitution's Due Process Clause.

V. THE PROCESS DUE INMATES' LIBERTY INTEREST IN BEING PAROLED

Having determined that inmates with low total [*37] point scores have a liberty interest in being paroled, the Court must consider what due process requires to protect that interest. It therefore examines the timing and notice required of the Board's parole decisions.

A. The Timing of Parole Hearings and Decisions

Plaintiffs claim in Count I of the Amended Complaint that the *Campbell* Stipulation and the DOC's Department Order No. 4360.2 [22] together create a liberty interest for Class I plaintiffs "in an initial parole determination not less than ten days prior to their parole eligibility dates." (Am. Compl. P 40.)

As the undisputed facts show, the Defendants have failed to hold parole hearings at least ten days before their parole eligibility dates for scores of inmates. Yet there is no constitutional due process right to have a state follow its own mandated procedures, because "process is not an end in itself" and state-mandated procedures do not create "an independent substantive right." *Olim,* [*38] 461 U.S. at 250-51; *see also Hewitt,* 459 U.S. at 471. So, for example, state regulations that require a hearing before the state transfers a prisoner to another state do not create a liberty interest, *Olim,* 461 U.S. at 248-51, and "procedures adopted by the state to guide its parole release determinations are not themselves liberty interests entitled to constitutional due process protection," *Brandon v. District of Columbia Bd. of Parole,* 262 U.S. App. D.C. 236, 823 F.2d 644, 649 (D.C. Cir. 1987).

Plaintiffs argue that the *Campbell* Stipulation and the Department Order limit the Defendants' discretion, which is of course true: they limit the procedures and timing that Defendants may use to make parole decisions. But, as discussed, to create a liberty interest state law must limit discretion over the *substance* of decisions, not the timing and other procedural aspects of decisions. Therefore, even assuming that the *Campbell* Stipulation and the Department Order could create a liberty interest, they do not create a liberty interest in the timing of a parole hearing.

As discussed in Part IV, however, the District of Columbia's parole regulations create a liberty [*39] interest in parole for inmates with low total point scores. Due process may therefore require timely parole decisions. Although the *Campbell* Stipulation and the Department Order require parole decisions at least ten days before the date of parole eligibility, when the Supreme Court has held that state law creates a liberty interest, it has not merely adopted the process required under state law. Rather, it has conducted an independent inquiry of what due process requires, *e.g., Hewitt,* 459 U.S. at 472-77, and has sometimes found that the process due is less than the process that the state has required, *id.* at 496 (Stevens, J., dissenting), and sometimes that the process due is more, *Vitek v. Jones,* 445 U.S. 480, 491, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980) (collecting cases). The question is "what process is due *under the Constitution." Id.* (emphasis added).

The Supreme Court did not directly address the timing of parole hearings when it considered what process is due regarding parole determinations. *See Greenholtz,* 442 U.S. at 14 (stating that *repeated* hearings are not required). However, it has employed the test described in *Mathews v. Eldridge,* [*40] 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), to determine what process is due prisoners with liberty interests. *See, e.g., Hewitt,* 459 U.S. at 473; *Greenholtz,* 442 U.S. at 14. The *Mathews* test requires the Court to consider "three distinct factors" to determine what process is due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

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[21] *E.g., Maves v. Trammell,* 751 F.2d 175, 177-79 (6th Cir. 1984) (Tennessee parole statute does not create liberty interest, but implementing rules adopted by parole board do); *Parker v. Corrothers,* 750 F.2d 653, 661 (8th Cir. 1984) (Arkansas parole statutes do not create liberty interest, but regulations promulgated by parole board do); *see also Rodi v. Ventetuolo,* 941 F.2d 22, 26-28 (1st Cir. 1991) (rules promulgated as consequence of consent decree create liberty interest in remaining in general prison population).

[22] *See* text accompanying note 4 *supra.*

requirement would entail. *Mathews,* 424 U.S. at 335.

When does due process require that the Board conduct a parole hearing and make its parole decision? In particular, must the Defendants make the parole decision long enough before the parole eligibility date in order to insure that the inmate will be released on that date if the Board grants him parole? As the undisputed facts show, between May 1, 1991, and September 1994, the Defendants failed to make parole eligibility [*41] determinations for scores of inmates with low total point scores before their parole eligibility dates [23]; for the inmates to whom the Board ultimately granted parole, the late decision delayed their enjoyment of the liberty of parole.

[*42] In many instances in a prison, the government's interests are pressing and the event precipitating the government's actions are unplanned and unpredictable. In these emergency cases, the Supreme Court has allowed hearings after the government has acted. For example, in *Hewitt,* the Supreme Court held that -- because the administration believed that the inmate "would pose a threat to the safety of other inmates and prison officials and to the security of the institution" and because officials believed it was important to isolate the inmate from the general population to insulate possible witnesses from harm or coercion -- due process did not require a hearing before the prison administration segregated an inmate after a prison riot. *Hewitt,* 459 U.S. at 473. Due process instead required a hearing "within a reasonable time after confining [the inmate] to administrative segregation." *Id.* at 472. In the context of revoking parole, due process requires that the government conduct a preliminary hearing "as promptly as convenient after arrest." *Morrissey v. Brewer,* 408 U.S. 471, 485, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972).

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[23] The Defendants argue that the Board and DOC are not responsible for late parole decisions attributable to the EPA. *See* note 5 *supra.* The Court does not agree. Pursuant to the EPA, the DOC is required to request that the Mayor of the District of Columbia "declare a state of emergency in the prisons whenever the population of the prison system exceeds the rated design capacity for 30 consecutive days." D.C. Code Ann. § 24-902(a). Unless the Mayor finds "that [DOC] acted in error," the EPA requires that the Mayor "declare a state of emergency in the prison system" within 15 days of the DOC request, as well as "reduce by 90 days the minimum sentences of all prisoners who have established minimum prison terms." *id.* § 24-902(b), who are not serving sentences for violent felonies, *id.* § 24-902(f)(2), and for whom 180 or fewer days remain on their minimum sentences. *id.* § 24-902(e). If the population of the prison system is not reduced "to 95% of the rated design capacity within 90 days of the date of the declaration of the state of emergency," the EPA states that "the Mayor shall again reduce by 90 days the minimum sentences of all prisoners who have established minimum prison terms." *Id.* § 24-902(c). The EPA requires DOC to request that the Mayor terminate the state of emergency when "the population of the prison system is reduced to 95% of the rated design capacity." *Id. § 24-903(a).*

When the Mayor declares a state of emergency pursuant to the EPA, those inmates with 90 or fewer days left to serve on their minimum sentences become eligible for parole immediately; inmates with 91 to 180 days left on their minimum sentences will immediately be eligible for parole from 1 to 90 days thereafter.

However, that the EPA advances these inmates' parole eligibility should come as no surprise to the Defendants. Indeed, DOC knows daily whether, in 30 days, it may be required by the EPA to request that the Mayor declare a state of emergency. Consequently, DOC may identify those inmates who, 30 days hence, will have 180 or fewer days left on their minimum sentences, and who thereby may immediately become eligible for parole or may have their parole eligibility dates advanced by the EPA. During a state of emergency, DOC can also identify the inmates whose minimum sentences will be reduced if the prison population is not reduced in 90 days.

Moreover, from February 1992 through September 1994, the EPA appeared to be implemented cyclically: that is, the Board made parole decisions for inmates with EPA-reduced minimum sentences for several consecutive months (during what the Court can only presume was a "state of emergency" involving one reduction of sentences and, occasionally, a second reduction in sentences after 90 days), followed by periods of a couple months duration during which it made no parole decisions for inmates whose sentences were reduced by the EPA, only to have the cycle start again with a batch of EPA-reduced parole eligible inmates, presumably following the declaration of a state of emergency. *(See* Notice of Filing (filed September 23, 1994), Statistical Data Sheets for Adult Residents Requiring Initial Parole Decisions from 2/1/92 through 9/15/94 from *Campbell v. McGruder.)*

After EPA-induced sentence reductions, some inmates will appear to have been eligible for parole before they actually were *(e.g.,* inmates with 60 days left on their minimum sentences when the Mayor declares a state of emergency may appear to have been eligible for parole 30 days before they actually were), and there is no due process violation if the Defendants have failed to make parole decisions before the dates that inmates *appear* to have been eligible for parole. However, given both the structure of the EPA and the predictable cyclical pattern of the EPA-induced parole case load, the Defendants can anticipate EPA reductions, identify the affected inmates, and plan accordingly to provide them with timely parole decisions, so that, if the Board grants an inmate parole, he can be released on the date he is actually eligible for parole. Otherwise, there is a due process violation. *See* discussion *infra.*

Still, due process may require a hearing before [*43] the government acts in the prison context. For example, the government must provide a hearing before it finds that an inmate is mentally ill and transfers him to a mental hospital. *Vitek,* 445 U.S. at 494-96; *see also Wolff v. McDonnell,* 418 U.S. 539, 563, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974) (holding that, if inmate has state-law-based liberty interest in good-time credits, due process requires "advance written notice" of charges before officials may revoke them).

It appears to the Court that a hearing and decision before the parole eligibility date comports best with due process. Applying the *Mathews* test confirms this view. The inmate's private interest in parole release as affected by a late determination of parole eligibility is large. A parolee is able "to do a wide range of things open to persons who have never been convicted of any crime," including being "gainfully employed and [being] free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey,* 408 U.S. at 482. It is true that "there is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that [*44] one desires," and so an inmate's interest in parole release is less than the interest of a person whose parole is revoked. *Greenholtz,* 442 U.S. at 9. But the inmate's interest in parole release is nevertheless a conditional interest in the same liberty the parolee enjoys -- a liberty interest that "includes many of the core values of unqualified liberty." *Morrissey,* 408 U.S. at 482. It is also true that a late parole decision "does not then and there work any change in the conditions of [an inmate's] liberty," *Wolff,* 418 U.S. at 561 (referring to loss of good-time), but it may immediately postpone a positive change in the conditions of the inmate's liberty, one that "radically transform[s] the nature of the custody to which the inmate [is] subject," *Hewitt,* 459 U.S. at 470.

Because, by presumption, process is only due to inmates whose total point scores are low, and to whom the Board will grant parole barring unusual circumstances, late parole determinations make the risk of an "erroneous deprivation" of an inmate's conditional liberty interest very high. Likewise, the "probable value" of timely parole hearings is very high.

Finally, the Defendants' interest [*45] in insuring the security of their correctional institutions and the safety of inmates and prison officials, *Hewitt,* 459 U.S. at 473, does not weigh against timely parole decisions. Instead, the Defendants' have a substantial interest in timely parole determinations, one that implicates their interest in security and safety. Timely parole decisions will help reduce the prison population because parolees who will not be reincarcerated count as net reductions in the prison population, and because the prison population is reduced for the weeks, months, or years before those paroled individuals who will be reincarcerated are reincarcerated, [24] and prison population affects prison safety and security.

[*46] In addition, the Defendants' have an interest in treating inmates fairly, that is, as due process requires. Inmates learn from unfair treatment in prison how to treat others; they also learn how they can expect to be treated by others. Neither lesson is one that the Defendants have an interest in teaching people whose safety it must guard while they are incarcerated and whom they will one day release to the community and expect to live as law-abiding and productive members of society. *See Morrissey,* 408 U.S. at 484 ("fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness").

The "fiscal and administrative burdens" of timely parole hearings for inmates with low total point scores would not be large. Of course, the Defendants may have to expend resources to clear up the backlog of parole determinations for inmates with low total point scores, that is, to catch up, but once they have done so, it appears that the Defendants would be able to conduct timely parole hearings with no burden beyond those that the parole hearing system already imposes.

In summary, the Court holds that due process requires that the Board hold [*47] a hearing sufficiently prior to the initial parole eligibility date of an inmate with a low total point score so that it can make its decision before and, if its decision is to grant parole, the inmate can be released on that date. [25]

[*48] **B. The Notice Required**

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[24] Put another way, assuming that a person will cycle in and out of the penal system, prompt parole will reduce on average the time over ten years that he or she will be incarcerated, and this reduction translates into a reduction in the average prison population.

To be sure, the reincarceration rate indicates a cost of releasing inmates, namely, the cost of the crime that some released inmates commit. This cost, which both the government and victims of crime bear, can and should be addressed by the *substance* of parole decisions and does not play a role in calculating the procedural costs under the *Mathews* test.

[25] The undisputed facts show that it may be some time after the Board's parole decision before it can develop a parole plan for an inmate and he can be released. Although unexpected difficulties in the development of such plans will be unavoidable, the Board should make its parole decision long enough before an inmate's initial parole eligibility date so that, if the Board grants

Plaintiffs claim in Count II of the Amended Complaint that Class II Plaintiffs have a liberty interest in parole decisions that are consistent with the parole regulations. In particular, they claim a liberty interest in receiving parole when total point scores are low and in receiving written justifications of denials of parole despite low total point scores that explain "those factors which [the Board] used to depart from the strict application of the provisions of this chapter." D.C. Mun. Regs. tit. 28, § 204.22.

As discussed above, inmates with low total point scores have a liberty interest in parole. However, that the parole regulations give inmates a constitutionally protected liberty interest in parole does not mean that the Defendants must grant them parole, nor that they have a right to automatic federal court review of the substance of the Board's parole decisions; it only means that, in order to protect that liberty interest, the Defendants must follow procedures as required by due process in making parole decisions. In terms of the notice required if the Board denies an inmate parole, the specific written factors required by the parole [*49] regulations are themselves procedural, and as the discussion of *Olim* and *Brandon* in the previous section shows, a procedural rule does not create a liberty interest entitled to due process protections, nor does a person have a liberty interest in the procedural rule itself.

If inmates have a liberty interest in parole, the Supreme Court has held that due process requires only that the procedure must "afford[] an opportunity to be heard, and when parole is denied it [must] inform[] the inmate in what respects he falls short of qualifying for parole." *Greenholtz,* 442 U.S. at 16. Plaintiffs argue that the "respects" in which an inmate "falls short of qualifying for parole" include the evidence on which the Board bases its decision. [26] However, in *Greenholtz* the Supreme Court found

> nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular "evidence" in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release. . . . To require the parole authority to provide a summary of the evidence would tend to convert the [*50] process into an adversary proceeding and to equate the Board's parole-release determination with a guilt determination.*Id.* at 15-16 (citation omitted). Accordingly, due process does not require a written summary of the *evidence* relied upon, even if the parole regulations themselves were to require a written statement of evidence.

[*51] Due process requires that the Board provide an inmate with the reasons for denying parole "as a guide to the inmate for his future behavior." *Id.* at 15. Providing reasons also "'enable[s] a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all.'" *Scott,* 669 F.2d at 1190 (quoting *Johnson,* 500 F.2d at 934). The Court finds that informing an inmate of one or more of the reasons in the

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the inmate parole, his release will not be unnecessarily delayed past that date. The Court notes that in *Cosgrove v. Thornburgh*, C. A. No. 80-0516, 1992 U.S. Dist. LEXIS 12483 (D.D.C. Aug. 14, 1992), the court ordered the United States Parole Commission to provide District of Columbia parole hearings four months before their initial D.C. parole eligibility dates to federal inmates serving time for D.C. offenses. *Id.* at *17. The Board's own policy requires parole hearings approximately five weeks before the parole eligibility date. (Defs.' Mot. Ex. 9, Policy Guideline at 3.)

[26] The Plaintiffs rely on three cases to support their argument that the Board must provide facts in its parole decisions: *United States ex rel. Scott v. Illinois Parole and Pardon Bd.*, 669 F.2d 1185 (7th Cir. 1982), *cert. denied sub nom., McCombs v. Scott*, 459 U.S. 1048, 74 L. Ed. 2d 617, 103 S. Ct. 468 (1982); *United States ex rel. Johnson v. Chairman, New York State Bd. of Parole*, 500 F.2d 925 (2d Cir. 1974), *vacated as moot sub nom., Regan v. Johnson*, 419 U.S. 1015, 42 L. Ed. 2d 289, 95 S. Ct. 488 (1974), and *overruled byBoothe v. Hammock*, 605 F.2d 661 (2d Cir. 1979); and *Childs v. United States Bd. of Parole,* 371 F. Supp. 1246 (D.D.C. 1973), *aff'd in relevant part, vacated in part and remanded,*511 F.2d 1270 (D.C. Cir. 1974).

The court in *Johnson* held that a parole board must provide an inmate with the "essential facts" on which it based its decision. *Johnson*, 500 F.2d at 934. The Second Circuit overruled *Johnson* in *Boothe* because of *Greenholtz*. *Boothe*, 605 F.2d at 664. In *Childs*, this Court held that the federal parole board should give "narrative written statements of reasons based upon salient facts or factors" on which it based its decision. *Childs*, 371 F. Supp. at 1247. Given *Greenholtz*, the Court must read *Johnson* and *Childs* narrowly. *See Scott*, 669 F.2d at 1191*(Johnson*, in light of *Greenholtz*, means "only that the inmate be told why his request for parole has been denied. This can be accomplished simply by informing him of what in his record was felt by the Board to warrant his denial and why.").

Addendum, along with their definitions in the Policy Guideline, satisfies both these rationales. [27]

[*52] First, if the Board denies parole based on past institutional behavior, the applicable reason, with its definition, provides the notice required to allow the inmate to change his or her future institutional behavior. Second, the reasons in the Addendum, when accompanied by their definitions in the Policy Guideline, allow for review of the parole decision; in particular, they would allow an inmate to compare the reason(s) with his record and notice a discrepancy, about which he may wish to seek legal assistance and/or judicial review. [28]

In short, the Court holds that the reasons in the Addendum that the Board provides for its parole decisions, *if accompanied by the Policy Guideline definitions,* [*53] comport with the requirements of due process as delineated in *Greenholtz.*

VI. REVOCATIONS OF PAROLE AND DUE PROCESS

In Count III of the Amended Complaint, Plaintiffs claim that Defendants must provide Class III Plaintiffs with preliminary interviews and timely revocation hearings when brought in on parole violator warrants, and that they fail to do so.

The undisputed facts show that the Defendants do not offer preliminary hearings to *any* alleged parole violators, and that they deny revocation hearings to a significant number of alleged parole violators within 60 days and even within 90 days of execution of the parole warrant. As a consequence, the Defendants have held alleged parole violators for several months without having provided them *any* opportunity to explain themselves or to question the information on which the Board based its decision to issue the warrant revoking parole.

In *Morrissey,* the Supreme Court held that revocation of parole involves a significant liberty interest that "includes many of the core values of unqualified liberty and [whose] termination inflicts a 'grievous loss' on the parolee and often on others" and to which due process [*54] protections apply. *Morrissey,* 408 U.S. at 482. The Supreme Court also determined the minimal procedures that due process requires if a state is to revoke parole. First, the state must provide the parolee with a preliminary hearing "conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available" in order "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." *Id.* at 485. The parolee must be given notice of the alleged parole violations, and at the preliminary hearing, the parolee may speak, present information, and question adverse witnesses. *Id.* at 486-87.

Although the Defendants offer several reasons why they may dispense with preliminary hearings, the Court is not convinced that they may avoid providing the preliminary hearings required by *Morrissey.* Since the Defendants do not offer preliminary hearings to any alleged parole violators, they are in clear violation of the requirements of *Morrissey.*

Second, the Supreme Court [*55] has held that the Board must hold a revocation hearing, if the parolee wishes one, within a reasonable time after the parolee's arrest, stating that "[a] lapse of two months . . . would not appear to be

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[27] Without the definitions in the Policy Guideline, the reasons in the Addendum are not specific enough to meet the requirements of these rationales. For example, the Addendum lists as one reason that "the offender has had repeated failures under parole supervision." (Pls.' App. Ex. 7, Addendum to Board Order), which the Policy Guideline defines to be "two (2) or more revocations of parole on the current sentence, OR three (3) or more revocations of parole on any sentence within the preceding five years," (Pls.' App. Ex. 9, Policy Guideline at 6).

The Policy Guideline defines "lengthy history" of criminally-related alcohol abuse to mean "at least five convictions" committed while under the influence of alcohol and it defines "lengthy history" of criminally-related substance abuse to mean "at least five convictions" either committed while under the influence of an illegal substance, or while using a controlled substance illegally, or "involving the illegal sale, distribution, purchase or possession" of any controlled substances. *(Id.* at 6 & 8-9.)

The Policy Guideline includes a three part definition of the phrase "on-going criminal behavior," a two part definition of "repetitive, sophisticated criminal behavior," a seven part definition of "unusually extensive or serious prior record," a two part definition of "unusual cruelty to victim(s)," and a six part definition of "repeated or extremely serious negative institutional behavior." *(Id.* at 6-8.)

No person could discern these definitions merely from the reasons given on the Addendum, each of which is only two or three lines in length. *(See* note 7 *supra.)*

[28] Indeed, Plaintiffs' counsel, who have access to the Policy Guideline definitions and to their clients' records, find inconsistencies between the reasons the Board has given for its decisions and individual inmates' records. (Pls.' Mem. in Supp. of Mot. for Summ. J. at 36-38 and text accompanying note 8 *supra.)*

unreasonable." *Id.* at 487-88. With regard to this revocation hearing, the parolee must receive:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.*Id.* at 489.

The undisputed evidence shows that the Defendants also deny revocation hearings within 60 and even 90 days to a small but significant number of alleged parole violators, in clear violation of *Morrissey*. Several of these parolees later faced new charges (although [*56] not revocation for a criminal violation of parole), but this fact is irrelevant, since a revocation hearing is required within a reasonable time of "execution of the warrant and custody under that warrant," *Moody v. Daggett,* 429 U.S. 78, 87, 50 L. Ed. 2d 236, 97 S. Ct. 274 (1976), even if parole is being revoked because the parolee was convicted of another crime, *see Morrissey,* 408 U.S. at 490; *see also Moody,* 429 U.S. at 86 n.7 (no preliminary hearing required if parolee "has already been convicted of and incarcerated on a subsequent offense"). In other cases, it may be that the Board did not receive prompt notice that its warrant had been executed, but the Defendants must develop a system that allows the Board to be informed promptly when revocation warrants are executed.

The Court concludes that, as *Morrissey* clearly requires, the Defendants must offer *prompt* preliminary hearings once a parole warrant is executed and that they must provide revocation hearings within *at most* ninety days thereafter to parolees who wish one.

VII. THE DOC'S COMPLIANCE WITH REGULATIONS

In Count IV of their Amended Complaint, Plaintiffs allege that the Defendants have [*57] systematically failed to comply with the parole regulations -- in particular, those that require the Board to grant parole to inmates with specified "low" total point scores and to provide written specification of the factors that it uses when it does not, D.C. Mun. Regs. tit. 28, §§ 204.1, 204.19, 204.21 & 204.22, and those that require the Board to provide preliminary interviews and, within 60 days, revocation hearings, as well as written decisions addressing certain criteria within 21 days of the revocation hearing, *id.* §§ 219.1, 219.3, 219.8 & 219.12 -- and with DOC Department Order Number 4360.2, which requires DOC to process parole progress reports so that the Board may conduct parole hearings at least 10 days before an inmate's parole eligibility date.

Although the undisputed facts show that the Defendants are in substantial noncompliance with the procedural regulations [29] and the Department Order, the Court declines to order the Defendants to follow them. To the extent the violations implicate Plaintiffs' federal constitutional due process rights, the relief afforded Plaintiffs under Counts I, II, and III suffices. Otherwise, "such state procedural requirements must be [*58] enforced in state courts under state law," *Brandon,* 823 F.2d at 649; *see also id.* at 651, as should the state substantive requirements. The Court will therefore grant summary judgment to the Defendants on Count IV.

VIII. Conclusion

For the foregoing reasons, as to Counts I, II, and III, the Court will grant Plaintiffs' Motion for Summary Judgment and it will deny Defendants' Motion to Dismiss or in the Alternative for Summary Judgment. As to Count IV, the Court will grant Defendants' Motion to Dismiss or in the Alternative for Summary Judgment and it will deny Plaintiffs' Motion for Summary Judgment. The Court will also deny Plaintiffs' Motion for Sanctions. A separate Order shall issue this date with this Memorandum.

William B. Bryant

Senior United States District Judge

Date: March 30, 1995

ORDER

Having considered the Plaintiffs' [*59] Motion for Summary Judgment, their Motion for Sanctions, and Defendants' Motion to Dismiss Or, in the Alternative, for Summary Judgment, the responses thereto, the entire record in this case, and having heard the parties argue these motions, it is, for the reasons set forth in the

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[29] There is no evidence in the record regarding the notice that the Defendants give to parolees of its decisions after parole revocation hearings.

accompanying memorandum, this 30th day of March, 1995,

ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED as to Counts I, II, and III, and the Defendants' Motion to Dismiss or in the Alternative for Summary Judgment is DENIED as to those counts; it is

FURTHER ORDERED that Defendants' Motion to Dismiss or in the Alternative for Summary Judgment is GRANTED as to Count IV and Plaintiffs' Motion for Summary Judgment is DENIED as to that count; it is

FURTHER ORDERED Plaintiffs' Motion for Sanctions is DENIED; it is

FURTHER ORDERED that, within sixty days, for adult offenders with total point scores of zero, one, and two and for youth offenders with point scores of zero, as determined according to D.C. Mun. Regs. tit. 28, § 204 and Appendix 2-1 thereto, who are in the custody of the District of Columbia Department of Corrections ("DOC"), the members of the District of Columbia Board of Parole [*60] ("Board") must provide parole hearings and decisions sufficiently before their initial parole eligibility dates so that, if the Board grants parole, inmates will be released on their parole eligibility date; it is

FURTHER ORDERED that, when the Board initially denies parole to an adult offender with a total point score of zero, one, or two, to a youth offender with a point score of zero, and, at the rehearing stage, to an adult or youth offender with a point score of zero to three, as determined according to D.C. Mun. Regs. tit. 28, § 204 and Appendix 2-1 thereto, who are in the custody of the DOC, the Board must provide the inmate with the reasons for that denial as listed on an Addendum to Board Order and with the definitions of those reasons as found in the Policy Guideline, Subject: Definitions of Terms Used in Parole Guidelines, adopted by the Board on December 16, 1991; it is

FURTHER ORDERED that the Board must provide a prompt preliminary interview when a warrant issued by the Board has been executed against a parolee for a parole violation and, if the parolee wishes it, a revocation hearing within a reasonable period of time, not to exceed 90 days, after execution of the [*61] warrant; it is

FURTHER ORDERED that the Director of the DOC shall see to it that the DOC delivers completed Parole Progress Reports to the Board sufficiently in advance of parole eligibility dates and promptly notifies the Board that it has executed a warrant that the Board has issued; it is

FURTHER ORDERED that the Defendants shall take whatever other steps are necessary to enable the Board and the DOC to comply with the requirements of this Order; and it is

FURTHER ORDERED that the Court shall retain jurisdiction of this case to monitor the Defendants' compliance with this Order.

It is so ordered.

William B. Bryant

Senior United States District Judge