

UNITED STATES DISTRICT COURT  
FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

NICK LOGAN,  
Plaintiff

v.

J.J. OGERSHOK, ET AL.,  
Defendants

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

CIVIL NO. 4:CV-03-2328  
  
(Judge McClure)

**MEMORANDUM AND ORDER**

November 18, 2004

**Background**

This pro se civil rights complaint pursuant to 42 U.S.C. § 1983 was filed by Nick Logan, an inmate presently confined at the State Correctional Institution, Huntingdon, Pennsylvania (SCI-Huntingdon). Service of Logan's amended complaint (Record document no. 6) was previously ordered. Named as Defendants are the following SCI-Huntingdon officials: Unit Manager J.J. Ogershok; Counselor Joe Dinardi; Program Manager Raymond Lawler; Warden Kenneth Kyler; and Parole Supervisors Linda Thompson and Cindy Johnson. The Plaintiff is also proceeding against Secretary Kathleen Zwierzyna and Chairman Benjamin A. Martinez of the Pennsylvania Board of Probation and Parole (Parole

Board).

Logan states that while being interviewed by Parole Supervisors Thompson and Johnson on June 20, 2003, he discovered that "his institutional file was incomplete." Record document no. 6, p. 7. His file purportedly did not contain certificates awarded to the Plaintiff for successful completion of institutional programs. A copy of his sentencing transcript was also missing. The amended complaint adds that Counselor Dinardi failed to act on his subsequent request slips which requested that a copy of the transcripts be obtained and put into his file.

On August 25, 2003, Plaintiff states that his parole application was denied. He indicates that the adverse determination constituted a denial of due process by the Defendants because they allowed a decision to be made based upon a review of his incomplete institutional file. Logan is also apparently claiming that because the sentencing court never directed him to complete institutional programs, Defendants Ogershok and Dinardi acted improperly by recommending that he complete certain programs in order to obtain favorable parole consideration. Plaintiff's remaining contention is that he was subjected to verbal abuse by Unit Manager Ogershok. His complaint seeks injunctive relief and monetary damages.

Defendants have submitted a motion seeking dismissal of the amended complaint. See Record document no. 12. The motion has been fully briefed and

is ripe for consideration. For the reasons outlined below, Defendants' motion will be granted.

### **Discussion**

Defendants argue that they are entitled to an entry of dismissal on the grounds that: (1) Plaintiff's request for monetary damages is barred under the principles announced in Heck v. Humphrey, 512 U.S. 477 (1994); (2) Logan's claim that the denial of his parole application was based on an incomplete file fails to assert a viable due process claim; and (3) the allegations of verbal abuse are insufficient for purposes of § 1983.

### **Standard of Review**

In rendering a decision on a motion to dismiss, a court must accept the veracity of the plaintiff's allegations. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); White v. Napoleon, 897 F.2d 103, 106 (3d Cir. 1990). In Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996), the United States Court of Appeals for the Third Circuit has added that when considering a motion to dismiss based on a failure to state a claim argument, a court should "not inquire whether the plaintiffs will ultimately prevail, only whether they are entitled to offer evidence to support their claims."

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his

claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "The test in reviewing a motion to dismiss for failure to state a claim is whether, under any reasonable reading of the pleadings, plaintiff may be entitled to relief." Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993) (citation omitted). Finally, pro se complaints must be liberally construed. Haines v. Kerner, 404 U.S. 519, 520 (1972).

### Heck

Logan's amended complaint contends that because sentencing transcripts and certificates of program achievement were missing from his institutional file, the denial of his parole application violated due process. Defendants argue that because Plaintiff has not yet successfully challenged his adverse parole determination, his request for monetary damages is premature under Heck. Plaintiff counters that Heck is inapplicable, because even if successful, his present claim would not affect the validity of his conviction and sentence.

With respect to Logan's request for monetary damages, in Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court ruled that a constitutional cause of action for damages does not accrue "for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," until the Plaintiff

proves that the "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Id. at 486-87.

It is apparent to this Court that Logan's allegations that he was denied due process during parole review proceedings, if successful, would imply that said decision was invalid and could ultimately warrant the Plaintiff's release. Thus, Logan's request for damages is premature under Heck because he cannot maintain a cause of action for unlawful denial of parole until the basis for that denial is rendered invalid. The Plaintiff, if he so chooses, may reassert his denial of due process claim or any other constitutional challenge to the denial of his parole via a properly filed federal habeas corpus petition. Furthermore, if the denial of his parole application is successfully challenged, he may then seek an award of monetary damages via a properly filed § 1983 action.

It is equally well-settled that inmates may not use civil rights actions to challenge the fact or duration of their confinement or to seek earlier or speedier release. Preiser v. Rodriguez, 411 U.S. 475 (1975). The United States Supreme Court in Edwards v. Balisok, 520 U.S. 641, 646 (1997), concluded that a civil rights claim for declaratory relief "based on allegations ... that necessarily imply the

invalidity of the punishment imposed, is not cognizable" in a § 1983 civil rights action. Id. at 646. Pursuant to Edwards, Plaintiff's present requests for injunctive relief which likewise imply the invalidity of the denial of his parole application are also not properly raised in a civil rights complaint.

### **Due Process**

Defendants' second argument contends that Logan enjoys no constitutional right to parole, and the denial of his parole application did not deprive him of a liberty interest under the Fourteenth Amendment or Pennsylvania state law. Logan counters that a liberty interest in his participation in a parole release program was created via his plea agreement. See Record document no. 14, p. 6.

It is well-settled that "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7 (1979). Furthermore, it has been held that the Pennsylvania parole statute does not create a liberty interest in the right to be paroled. Rodgers v. Parole Agent SCI-Frackville, Wech, 916 F. Supp. 474, 476-77 (E.D. Pa. 1996); McCrary v. Mark, 823 F. Supp. 288, 294 (E.D. Pa. 1993).

However, the United States Court of Appeals for the Third Circuit has also held that:

[E]ven if a state statute does not give rise to a liberty interest in parole release under Greenholtz, once a state institutes a parole system all prisoners have a liberty interest flowing directly from the due process clause in not being denied parole for arbitrary or constitutionally impermissible reasons.

Block v. Potter, 631 F.2d 233, 236 (3d Cir. 1980). Accordingly, even where a state statute grants discretion to the state parole board to condition or completely deny parole, it may not permit "totally arbitrary parole decisions founded on impermissible criteria." Id.

Consequently, a federal court may review a decision by a state parole board for an abuse of discretion. Id. Upon such review, relief will only be available if an applicant can show that parole was arbitrarily denied based on some impermissible reason such as "race, religion, or political beliefs," or that the parole board made its determination based on "frivolous criteria with no rational relationship to the purpose of parole . . . ." Id. at 236 n.2.

In Morrissey v. Brewer, 408 U.S. 471 (1972), the United States Supreme Court addressed a habeas petition filed by a state inmate who alleged that he had not received due process during parole revocation procedures. The Court recognized that a federal court should not upset a decision of a state parole board unless the determination is based on constitutionally impermissible reasons such as race, religion, or ethnicity or rendered in the absence of the following due process

protections:

(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 factfinder as to the evidence relied on and reasons for revoking parole.

Id. at 488-89.

In the present action, Logan clearly maintains that he was subjected to unfavorable parole consideration because the adverse determination was based on a review of his incomplete institutional file. The amended complaint does not allege that Logan was denied parole on the basis of his race, religion or ethnicity. A liberal reading of his amended complaint could conceivably assert that he was denied parole for arbitrary and capricious reasons.

However, there is also no indication that the Parole Board applied inappropriate criteria. Plaintiff also offers no facts to support his apparent contention that consideration of documents not included in his institutional file would have resulted in a favorable parole decision. While evidence of successful completion of institutional programming is clearly beneficial, Logan fails to show

what impact, if any, the purportedly missing documents would have had on the Parole Board's decision, i.e., would completion of the prison programs at issue have warranted Logan's release. Furthermore, there is no claim that non-relevant factors were the basis of the denial of parole. See Santo v. Pennsylvania Bd. of Probation and Parole, Civ. No. 00-1021, slip op. at p. 5 (M.D. Pa. July 17, 2001)(Kosik, J.). Based on the Plaintiff's allegations, it cannot be concluded that the decision to deny parole was based on constitutionally impermissible reasons or that his parole proceedings violated any due process protections which Logan was entitled to under state law.

Additionally, the United States Supreme Court in Sandin v. Conner, 515 U.S. 472, 480-84 (1995), held that a liberty interest is not created merely because a regulation limits the discretion of prison officials. Rather, courts should focus on the nature of the deprivation itself and the relevant inquiry is whether the purported misconduct was "the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Id. at 486; see also Griffin v. Vaughn, 112 F.3d 703 (3d Cir. 1997). As noted earlier, it has been repeatedly recognized that Pennsylvania state law does not confer its inmates with a legally protected interest in parole eligibility. Rodgers, 916 F. Supp. At 476-77; McCrery, 523 F. Supp. at 294.

It is apparent to this Court that the denial of parole to a Pennsylvania state inmate is not the type of significant and atypical hardship contemplated by the Supreme Court in Sandin. Consequently, since Logan's claims regarding the rejection of his application by the Parole Board does not rise to the level of a constitutional violation, Sandin supports the conclusion that the Defendants are entitled to an entry of dismissal.

### **Verbal Harassment**

It has been held that the use of words generally cannot constitute an assault actionable under § 1983. Johnson v. Glick, 481 F.2d 1028, 1033 n.7 (2d Cir.), cert. denied, 414 U.S. 1033 (1973); Murray v. Woodburn, 809 F. Supp. 383, 384 (E.D. Pa. 1993) ("Mean harassment . . . is insufficient to state a constitutional deprivation."); Prisoners' Legal Ass'n v. Roberson, 822 F. Supp. 185, 189 (D.N.J. 1993) ("[V]erbal harassment does not give rise to a constitutional violation enforceable under § 1983.").

Mere threatening language and gestures of a custodial officer do not, even if true, amount to constitutional violations. Fisher v. Woodson, 373 F. Supp. 970, 973 (E.D. Va. 1973); see also Balliet v. Whitmire, 626 F. Supp. 219, 228-29 (M.D. Pa.) ("[v]erbal abuse is not a civil rights violation . . ."), aff'd, 800 F.2d 1130 (3d Cir. 1986) (Mem.); Collins v. Cundy, 603 F.2d 825, 826 (10th Cir. 1979) (finding

that allegations that sheriff laughed at prisoner and threatened to harm him did not state a claim for constitutional violation). Further, it has also been held that a constitutional claim based only on verbal threats will fail regardless of whether it is asserted under the Eighth Amendment's cruel and unusual punishment clause, see Prisoners' Legal Ass'n, 822 F. Supp. at 189, or under the Fifth Amendment's substantive due process clause, see Pittsley v. Warish, 927 F.2d 3, 7 (1st Cir.), cert. denied, 502 U.S. 879 (1991).

Verbal harassment can only rise to a constitutional level in a situation where fulfillment of the threat was conditioned on the inmate's exercising some constitutionally protected right. Bieros v. Nicola, 860 F. Supp. 226, 233 (E.D. Pa. 1994). Such a claim is not asserted in the present matter. An application of the above standards to Plaintiff's claims of verbal harassment establishes that they do not rise to the level of a viable constitutional violation.

**IT IS HEREBY ORDERED THAT:**

1. Defendants' motion to dismiss (Record document no. 12) is granted.
2. The Defendants' motion to stay discovery (Record document no. 20) is denied as moot.
3. The Clerk of Court is directed to close the case.

4. Any appeal from this Order will be deemed frivolous, without probable cause and not taken in good faith.

s/ James F. McClure, Jr.  
JAMES F. McCLURE, JR.  
United States District Judge