

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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DONALD WATKINS,	:	
	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 96-4129
	:	
MARTIN HORN, et al.,	:	
	:	
Defendants.	:	

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**MEMORANDUM**

R.F. KELLY, J.

SEPTEMBER 5, 1997

Before this Court is Defendants' Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Plaintiff Donald Watkins, a state prisoner, filed a pro se complaint, pursuant to 42 U.S.C. § 1983 ("Section 1983") against numerous officials and employees, in their official and individual capacities, at the Department of Corrections and the State Correctional Institution at Graterford, Pennsylvania ("Graterford"), seeking compensatory and punitive damages. Plaintiff alleges he was not fairly considered for reparole. For the reasons that follow, Defendants' Motion will be granted in part and denied in part.

**I. Background**

On April 23, 1991, Plaintiff was sentenced to Graterford for several drug-related crimes. On February 11, 1994, Plaintiff was released on parole subject to certain conditions, as set forth in 37 Pa. Code § 63.4. On July 14, 1994, Plaintiff was arrested and later convicted on charges of terroristic threats and simple assault.

Subsequently, Plaintiff was returned to Graterford as a convicted and technical parole violator. On February 24, 1995, the Pennsylvania Board of Probation and Parole ("the Board") recommitted Plaintiff to prison to serve his original sentence. Plaintiff appealed that order, and, on September 30, 1995, he received notice of the Board's decision to modify the recommitment portion of the Board action of February 24 by removing reference to one technical violation ("condition 2"), "changing approved residence without written permission of parole supervision staff," and adding as an aggravating reason "assaultive offense while on parole." On November 14, 1995, Plaintiff was staffed for reparole consideration. Subsequently, Plaintiff appealed to the Commonwealth Court of Pennsylvania, contending that the Board abused its discretion in adding the aggravating reason and in not reducing backtime due to the elimination of one of the violations for which it was imposed. On October 31, 1996, the commonwealth court ordered that the Board's decision on administrative relief be vacated, and remanded the case for the reversal of backtime imposed for a violation of condition 2.

Plaintiff then filed the instant lawsuit, claiming violations of his substantive due process and equal protection rights, that his parole was rescinded and reparole denied in retaliation for exercising his right to appeal, and violations of the Ex Post Facto Clause, Res Judicata, Double Jeopardy, and the Eighth Amendment. On May 13, 1997, this Court issued a

Memorandum Opinion and Order that granted in part and denied in part a motion filed by Defendants to dismiss Plaintiff's complaint. Defendants' Motion was denied with respect to Plaintiff's substantive due process and equal protection claims, but granted with respect to all other claims. On June 10, 1997, this Court issued another Memorandum Opinion and Order granting Plaintiff's Motion to Alter or Amend the Judgment, thereby reinstating Plaintiff's First Amendment retaliation claim. Defendants now move for judgment on the pleadings based upon qualified immunity. Additionally, Defendants Clymer, Horn, and James move for judgment on the pleadings because plaintiff has not alleged personal involvement on the part of these three defendants.

## **II. Standard**

In a Motion for Judgment on the Pleadings, this Court will accept as true all well-pleaded allegations in the complaint and draw all inferences in favor of the non-moving party.

Pennsylvania Nurses Ass'n v. Pa. State Educ. Ass'n, 90 F.3d 797, 799-800 (3d Cir. 1996). Judgment will not be granted unless the movant clearly establishes that there is no material issue of fact to be resolved and that he is entitled to judgment as a matter of law. Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 290 (3d Cir. 1988).

## **III. Discussion**

Qualified immunity shields government officials performing discretionary functions from civil damages liability

as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. Anderson v. Creighton, 483 U.S. 635, 638 (1987). The Supreme Court has held that an official is entitled to qualified immunity unless he knew or reasonably should have known that the action he took within his sphere of official responsibilities would violate the plaintiff's constitutional rights or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injuries. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). The pleadings do not indicate (and Plaintiff does not argue) that Defendants' alleged actions were taken with the malicious intention to deprive Watkins of his constitutional rights. Therefore, this Court will apply the first standard to determine whether the Defendants knew or reasonably should have known that their alleged actions would violate the Plaintiff's constitutional rights.

This Court must examine whether or not the Plaintiff alleges the violation of a clearly established constitutional right. Siegert v. Gilley, 500 U.S. 226, 231 (1991). The actions must be assessed in light of the legal rules that were clearly established at the time they were taken. Anderson, 483 U.S. at 639. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 640.

#### A. Substantive Due Process

The Supreme Court has held that there is no

constitutional right to parole or early release. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7 (1979). Despite the absence of a constitutionally protected liberty interest, this Court held that the Plaintiff had stated a substantive due process claim because he alleged that the Defendants had acted arbitrarily and capriciously. This holding was based, in part, on Block v. Potter, 631 F.2d 233 (3d Cir. 1980). In Block, the Third Circuit held that, although there is no constitutional right to parole, substantive due process does give prisoners a liberty interest "in not being denied parole for arbitrary or constitutionally impermissible reasons." Block, 631 F.2d at 236. This holding was later reaffirmed by the Third Circuit in Burkett v. Love, 89 F.3d 135 (3d Cir. 1996). These decisions were relied upon by another member of this Court in Jubilee v. Horn, 959 F. Supp. 276 (E.D. Pa. 1997), which involved a Section 1983 claim nearly identical to the one at issue here. The Eleventh Circuit has also held that arbitrary and capricious action in denying a prisoner parole can violate due process. See Monroe v. Thigpen, 932 F.2d 1437 (11th Cir. 1991).

The precise issue before this Court now is whether a reasonable public official would have known that his or her specific conduct violated the Plaintiff's clearly established rights. Grant v. City of Pittsburgh, 98 F.3d 116, 121 (3d Cir. 1996). We agree with Defendants that Block and its progeny do not clearly establish the substantive due process rights that Plaintiff asserts for two reasons. First, other Courts of

Appeals confronting analagous situations have held that such facts do not give rise to a substantive due process claim. See Johnson v. Rodriguez, 110 F.3d 299 (5th Cir. 1997) ("It is therefore axiomatic that because Texas prisoners have no protected liberty interest in parole they cannot mount a challenge against any state parole review procedure on procedural (or substantive) Due Process grounds"); Hill v. Jackson, 64 F.3d 163 (4th Cir. 1995) (holding that Virginia prisoners had no liberty interest in parole release and, therefore, could not challenge parole board policies under the Due Process Clause).

Second, several recent Third Circuit decisions have held in different contexts that a substantive due process claim cannot be maintained in the absence of a constitutionally protected interest. In DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592 (3d Cir. 1995), a case challenging a zoning board decision, the court found that "to state a substantive due process claim, a plaintiff must have been deprived of a particular quality of property interest." DeBlasio, 53 F.3d at 600. See also Indep. Enters., Inc. v. Pittsburgh Water & Sewer Auth., 103 F.3d 1165, 1179 (3d Cir. 1997) (stating that in order to maintain a substantive due process claim grounded in an arbitrary exercise of governmental authority, the plaintiff must have been deprived of a property interest); Homar v. Gilbert, 89 F.3d 1009, 1021 (3d Cir. 1996) (holding that a plaintiff must have been deprived of a property interest in order to state a substantive due process claim).

Thus, there is substantial authority upon which Defendants could reasonably rely in believing that their alleged conduct did not violate Plaintiff's clearly established due process rights. Defendants are entitled to qualified immunity from Plaintiff's substantive due process claim.

#### B. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment directs that similarly situated persons should be treated alike. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Plaintiff alleges that because of Defendants' arbitrary actions in conducting a parole review staffing, Plaintiff has not been afforded the same considerations as other similarly situated parole violators within Graterford's general population. In the Memorandum Opinion and Order issued May 13, 1997, this Court held that Plaintiff had stated a Section 1983 equal protection claim.

In so holding, this Court relied upon Brandon v. District of Columbia Bd. of Parole, 734 F.2d 56 (D.C. Cir. 1984). In Brandon, a prisoner filed a similar pro se complaint seeking declaratory, injunctive, and monetary relief against the District of Columbia Board of Parole and its individual members for alleged violations of Section 1983. The plaintiff claimed, inter alia, that the Board's delay in considering his case, its failure to supply adequate reasons for its parole decisions respecting him, and its failure to reparole him in the same time period in which other similarly situated prisoners were repared violated his equal protection rights. The circuit court reversed the

district court's dismissal of the plaintiff's claim, holding: "The defendants may be able to establish the rationality of treating plaintiff differently. But a court ought not dismiss an equal protection claim on the basis of reasons unrevealed to the court." Brandon, 734 F.2d at 60 (quoting Durson v. Rowe, 579 F.2d 1365, 1372 (7th Cir. 1978)). Brandon was also relied upon in Jubilee, where the court held that the plaintiff's allegations of disparate treatment were sufficient to state an equal protection claim. Jubilee, 959 F. Supp. at 280.

In contrast to Jubilee, this court has rejected equal protection claims by prisoners who claim they were denied privileges absent an allegation of class-based discrimination. See Rowe v. Cuyler, 534 F. Supp. 297 (E.D. Pa. 1982), aff'd, 696 F.2d 985 (3d Cir. 1983). In Rowe, a prisoner brought a Section 1983 action claiming he had been denied participation in a home furlough program while inmates with "deplorable institutional records" had participated in the program. Id. at 301. The prisoner did not allege discrimination based on his membership in a particular class. The court found that the plaintiff failed to state an equal protection claim, reasoning that "it is difficult to believe that any two prisoners could ever be considered 'similarly situated' for the purpose of judicial review on equal protection grounds of broadly discretionary decisions because such decisions may legitimately be informed by a broad variety of an individual's characteristics." Id. Defendants' Memorandum in support of this Motion cites two unpublished decisions following

the reasoning of Rowe. See Carter v. Zimmerman, 1989 WL 64581 (E.D. Pa. June 12, 1989), aff'd, 897 F.2d 521 (3d Cir. 1990); Bradley v. Jeffes, 1986 WL 6865 (E.D. Pa. June 18, 1986).

Based on Rowe and the cases following it, there is authority in this district that could lead Defendants to reasonably believe that their alleged conduct did not violate the Plaintiff's clearly established equal protection rights. Defendants are therefore entitled to qualified immunity from Plaintiff's equal protection claim.

### C. Supplemental Motion

In order to be liable under Section 1983, a defendant must have personal involvement in the alleged wrongs. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). There must be allegations that the defendant directly participated in, or had actual knowledge of and acquiesced in, the constitutional violations. Hodgin v. Roth, 536 F. Supp. 454, 460 (E.D. Pa. 1982). The mere fact that a defendant is in a supervisory position is insufficient to establish liability under Section 1983. Id.

Plaintiff alleges that Defendant Raymond Clymer, the acting Department of Corrections Commissioner, failed to grant his appeal from final review of his grievance. He does not allege that Clymer in any way took part in the parole review process, nor does he allege that Clymer compiled, had access to, or contributed to any of the information used during Plaintiff's parole review process. The extent of Clymer's participation was

that he concurred with the Central Office Review Committee's recommendation. This is not sufficient personal involvement to establish Section 1983 liability.

Plaintiff alleges that Defendant Martin Horn, Department of Corrections Commissioner, ignored Plaintiff's grievance and failed to correct inaccurate information "used in Plaintiff's parole decision process." The Commissioner of the Department of Corrections has authority over state correctional facilities, but does not personally handle the day-to-day management of each state correctional institution. In Rode, the plaintiff named the governor as a defendant when she brought an employment discrimination claim against the state police. The court held that the filing of grievances was not sufficient to show the actual knowledge necessary for a defendant to be personally involved in the alleged unlawful conduct. Rode, 845 F.2d at 1208. Thus, there are not sufficient allegations of Defendant Horn's personal involvement in the constitutional deprivations.

Plaintiff alleges that Defendant Thomas James, Chief of the Department of Corrections Treatment Division, failed to remedy Plaintiff's situation. Plaintiff does not allege that Defendant James had any personal involvement in the alleged constitutional deprivations at issue here. See Payton v. Vaughn, 798 F. Supp. 258, 260 (E.D. Pa. 1992) (holding that prisoner failed to state a cognizable Section 1983 claim where he could not show that supervisory officials were personally involved in

deprivation of rights). Therefore, there are not sufficient allegations of Defendant James's personal involvement to maintain a Section 1983 claim.

#### **IV. Conclusion**

In summary, Defendants are entitled to qualified immunity on Plaintiff's substantive due process and equal protection claims. Despite the authority supporting this Court's decision that Plaintiff's allegations stated a claim upon which relief could be granted, there is sufficient authority which could lead Defendants to reasonably believe that their conduct did not violate Plaintiff's clearly established rights. Defendants' Motion for Judgment on the Pleadings will be granted on Plaintiff's substantive due process and equal protection claims. Defendants' Motion for Judgment on the Pleadings will be denied on Plaintiff's First Amendment retaliation claim. Additionally, the Supplemental Motion for Judgment on the Pleadings by Defendants Clymer, Horn, and James will be granted on all of Plaintiff's claims because Plaintiff has not made sufficient allegations of their personal involvement in the alleged constitutional deprivations.

An appropriate order follows.

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	:	
Defendants.	:	

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ORDER

AND NOW, this 5th day of September, 1997, upon consideration of Defendants' Motion for Judgment on the Pleadings, and all responses thereto, and the Supplemental Motion for Judgment on the Pleadings of Defendants Clymer, Horn, and James, and all responses thereto, it is hereby ORDERED that:

1. Defendants' Motion is GRANTED in part and DENIED in part;
2. Defendants' Motion is GRANTED with respect to Plaintiff's claims that Defendants violated his rights of substantive due process and equal protection;
3. Defendants' Motion is DENIED with respect to Plaintiff's First Amendment Retaliation claim;
4. Supplemental Motion of Defendants Clymer, Horn, and James is GRANTED with respect to all of Plaintiff's claims.

BY THE COURT:

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Robert F. Kelly,

J.