IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DANIEL HARR,

Plaintiff,

OPINION AND ORDER

v.

05-C-629-C

LENARD WELLS, in his individual and official capacity

Defendant.

- -

In this civil suit for monetary relief, plaintiff Daniel Harr contends that while he was a prisoner in the custody of the Wisconsin Department of Corrections, defendant Lenard Wells, Chairman of the Wisconsin Parole Commission, violated plaintiff's substantive and procedural due process rights when he arbitrarily deferred plaintiff's parole review hearing for a period of one year. The case is before the court on defendant's motion to dismiss. Defendant contends that plaintiff has failed to state a claim upon which relief can be granted and that he is entitled to absolute immunity from suit. (Plaintiff's complaint was not screened under 28 U.S.C. §1915A because plaintiff was not a prisoner at the time he filed his complaint and thus is not subject to the provisions of the 1996 Prison Litigation Reform

Act.) Because I agree that plaintiff's complaint fails to state a claim under the Fourteenth Amendment, I need not address the question of immunity. Defendant's motion will be granted pursuant to Fed. R. Civ. P. 12(b)(6).

I draw the following facts from the allegations of plaintiff's complaint.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Daniel Harr is a resident of Kingston Springs, Tennessee. At all times relevant to this lawsuit, he was a prison inmate confined under the supervision of the Wisconsin Department of Corrections.

At all times relevant to this lawsuit defendant Lenard Wells has been the chairman of the Wisconsin Parole Commission.

B. Denial of Parole

On June 19, 1996, plaintiff was convicted of solicitation of first degree intentional homicide and was sentenced to ten years in the Wisconsin prison system. He began serving his sentence on August 12, 1997. Plaintiff's sentence was governed by the provisions of Wis. Stat. § 302.11(1g), under which plaintiff had a presumptive mandatory release date of July 27, 2003.

On May 20, 2003, Wisconsin parole commissioner Sharon Williams held a hearing to determine whether plaintiff would be released on his presumptive mandatory release date. Following the hearing, Williams prepared a report in which she stated that plaintiff would be denied parole on his mandatory release date, but that the commission would reconsider his suitability for parole in November 2003. The commission denied plaintiff parole because, as a result of his failure to complete an anger management program, he posed an unacceptable risk to public safety. It was anticipated that plaintiff would complete the anger management program in November 2003, the time for which his next parole review hearing was scheduled.

On June 9, 2003, defendant unilaterally changed the date of plaintiff's scheduled review hearing from November 2003 to November 2004. Defendant's decision was not rationally related to any legitimate governmental interest. Before changing the date of plaintiff's scheduled review hearing, defendant did not provide plaintiff with notice or the opportunity to be heard on the matter. Furthermore, he did not provide an explanation for his decision.

C. State Court Action

On June 13, 2003, shortly after defendant extended plaintiff's parole review date, plaintiff filed a petition for a writ of certiorari in the Circuit Court for Dane County,

Wisconsin. The court issued the writ on July 15, 2003, ordering that the record of plaintiff's parole denial be submitted to the court for review.

Meanwhile, plaintiff began the required anger management program, completing it successfully in August 2003. Upon completion of the program, plaintiff began writing to defendant demanding immediate reconsideration of his parole. Defendant did not respond to plaintiff's letters.

On October 11, 2004, the state court issued a decision in which it characterized defendant's decision to change plaintiff's parole review date as "totally unexplained" and a "classic example of arbitrariness." The court found that the commission's sole concern in denying plaintiff parole on his mandatory release date was plaintiff's failure to complete the anger management program. Therefore, the court held that it was unreasonable to delay review of plaintiff's suitability for parole until November 2004. The court reversed defendant's deferral decision and ordered a new parole review hearing to be held within fifteen days.

Plaintiff was released from custody in November 2004. As a result of the one year delay in his parole consideration, he has suffered financial loss, pain and physical and mental suffering. Had plaintiff been considered for parole in November 2003, as originally recommended by the parole commission, he would have been released from custody at that time.

OPINION

A. Substantive Due Process

Plaintiff has alleged that defendant's decision to defer his parole review hearing until November 2004 violated both his substantive and procedural due process rights under the Fourteenth Amendment. Because it is difficult to place responsible limits on the concept of substantive due process, the Supreme Court has directed the lower courts to analyze claims under more specifically applicable constitutional provisions before engaging in a substantive due process inquiry. Albright v. Oliver, 510 U.S. 266, 273 (1994). "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" Id. (citing Graham v. Connor, 490 U.S. 386, 395 (1989)). In this case, plaintiff alleges specifically that defendant's action violated his procedural due process rights. Therefore, I will analyze plaintiff's claim under the Fourteenth Amendment's procedural due process provisions and will dismiss his substantive due process claim.

B. Procedural Due Process

There is no constitutional right to parole. Heidelberg v. Illinois Prisoner Review Bd., 163 F.3d 1025, 1026 (7th Cir. 1998). A state may create a protected liberty interest in

parole by enacting statutes that require parole release before the completion of a prisoner's term of confinement. Wisconsin has created such an interest for those prisoners subject to mandatory release under the provisions of Wis. Stat. § 302.11(1). Plaintiff, however, is eligible for parole under Wis. Stat. § 302.11(1g), which provides that inmates convicted of certain enumerated felonies are entitled to "presumptive mandatory release." The statute permits the parole commission to deny parole release to otherwise eligible prisoners when, in its discretion, the commission determines the prisoner either poses a risk to the public or refuses to participate in necessary counseling and treatment.

In determining whether a state statute has created a liberty interest protected by the Fourteenth Amendment, federal courts "are bound to follow a state's highest court's interpretation of its own state law." Heidelberg, 163 F.3d at 1027. Because Wis. Stat. § 302.11(1g) vests the parole commission with discretion in deciding whether to release prisoners subject to its provisions, Wisconsin courts have held that the statute does not create a liberty interest in parole for inmates subject to its provisions. State v. Stenklyft, 2005 WI 71, ¶ 70, 281 Wis. 2d 484, 697 N.W.2d 769 (citing State ex rel. Gendrich v. Litscher, 2001 WI App 163, ¶ 10, 246 Wis. 2d 814, 632 N.W.2d 878).

Plaintiff contends that although he had no protected interest in parole release, he did have a protected interest in receiving "regular reviews" of his parole suitability under Wis. Stat. § 302.11(1g)(c), which provides:

> If the parole commission denies presumptive mandatory release to an inmate . . . the parole commission shall schedule regular reviews of the inmate's case to consider whether to parole the inmate . . .

Plaintiff argues that defendant deprived him of his "right" to regular review of his case by deferring reconsideration of his parole for a total period of fifteen months. His argument is unconvincing.

The statute at issue does not define the frequency with which parole review must occur. That parole review may occur less often than once a year is clear under Wisconsin law. Wisconsin Admin. Code § PAC 1.06(2) specifically provides that an inmate's reconsideration for parole may be deferred for a period of more than twelve months with written approval of the chairperson of the parole commission. In this case, defendant authorized deferral of plaintiff's parole review for a period of fifteen months. Plaintiff cites no authority suggesting that a deferral of fifteen months does not amount to "regular review" under the statute. No independent research has uncovered any such requirement. Although it may have made good sense for defendant to provide an explanation for his decision to defer plaintiff's parole consideration for an additional twelve months, defendant acted within his legal authority when he extended the length of plaintiff's deferral without explanation and therefore did not impinge any protected liberty interest plaintiff had under Wisconsin law.

It is well-established that in the absence of a protected liberty interest, a "state is free

to use any procedures it chooses, or no procedures at all." Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001). Because plaintiff had no liberty interest at stake in his parole or in the deferral of his parole reconsideration, plaintiff has failed to state a claim that his procedural due process rights were violated by defendant's decision to defer reconsideration of plaintiff's suitability for parole. Therefore, defendant's motion to dismiss will be granted.

ORDER

IT IS ORDERED that defendant's motion to dismiss is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 10th day of February, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge