

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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LEWIS ALTMAN, JR.,

Petitioner,

v.

MATTHEW J. FRANK,

Respondent.  
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ORDER

06-C-100-C

This is a proposed civil action for declaratory and injunctive relief under 42 U.S.C. § 1983. Petitioner Lewis Altman, an inmate at the Stanley Correctional Institution in Stanley, Wisconsin, alleges that respondent Matthew Frank violated his constitutional rights under the ex post facto clause and the First and Fourteenth Amendments of the United States Constitution. Petitioner requests leave to proceed in forma pauperis, as authorized by 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has made the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). When the litigant is a prisoner, the

court must examine the prisoner's claims, interpreting them broadly, and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a respondent who is immune from such relief. 28 U.S.C. § 1915A. Because none of petitioner's allegations states a claim upon which relief may be granted, his request to proceed in forma pauperis will be denied.

In his complaint, petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

Petitioner is a prisoner incarcerated at the Stanley Correctional Institution in Stanley, Wisconsin. Respondent Matthew J. Frank is Secretary of the Wisconsin Department of Corrections.

On December 20, 1993, petitioner was sentenced to 40 years' imprisonment. At the time petitioner was sentenced, Wisconsin law directed the state parole commission to grant parole to otherwise eligible inmates who completed their high school equivalency degrees while incarcerated, unless "there [were] overriding considerations not to do so." The law was repealed in 1995.

On May 4, 2005, petitioner was interviewed by Wisconsin Parole Commissioner James Hart. Although Hart knew that petitioner had received his high school equivalency diploma, he recommended that petitioner's parole be deferred for a period of 24 months.

Hart did not identify any “overriding considerations” that justified denying petitioner’s parole. Parole Commission Chairman Lenard Wells approved Hart’s recommendation. When deciding to deny petitioner’s parole application, the commission applied current law, instead of the provisions in effect at the time petitioner was sentenced.

## DISCUSSION

Petitioner contends that respondent is violating his constitutional rights by considering him for parole under laws not applicable at the time he was sentenced. As a preliminary matter, I note that petitioner has named a single defendant: Matthew Frank, the secretary of the Wisconsin Department of Corrections. Because respondent Frank is not responsible for parole decisions under Wisconsin law, petitioner’s complaint could be dismissed for this reason alone. Nevertheless, I will address the merits of petitioner’s claims in order to spare him the fruitless effort of amending his complaint.

Petitioner characterizes his claims as arising under the ex post facto clause of the United States Constitution; however, his allegations raise a potential claim under the due process clause as well. I will address each potential claim in turn.

### A. Due Process

The Fourteenth Amendment prohibits a state from depriving “any person of life,

liberty or property without due process of law.” U.S. Const. Amend. XIV. However, in the absence of a protected liberty or property interest, individuals are not entitled to due process protection. Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001). In the context of incarceration, protected liberty interests are generally restricted to freedom from restraints that impose on prisoners atypical and significant hardships outside those normally associated with prison life. Sandin v. Conner, 515 U.S. 472, 484 (1995).

Petitioner contends that he has a protected liberty interest in obtaining parole under Wis. Stat. § 304.06(1r) (1989-90), which provided:

The parole commission shall grant release on parole, unless there are overriding considerations not to do so, to any inmate who is eligible for parole under sub. (1) and meets either of the following conditions:

\* \* \* \*

2. The inmate did not have a high school diploma, a high school equivalency diploma or a certificate of general educational development at the time of his or her admission to state prison and the inmate thereafter obtained a high school equivalency diploma or a certificate of general educational development while incarcerated in state prison.

Section 304.06(1r) took effect on January 1, 1990 and was repealed beginning July 9, 1996.

1989 Wis. Act 31, § 3203(23); 1995 Wis. Act 444; State ex rel. Britt v. Gamble, 2002 WI App 238, ¶ 7, 257 Wis. 2d 689, 653 N.W.2d 143. Therefore, although the law was in effect at the time petitioner was sentenced, by the time he became eligible for parole it no longer existed.

Petitioner has no constitutional right to parole. Heidelberg v. Ill. Prisoner Review Bd., 163 F.3d 1025, 1026 (7th Cir. 1998). Nevertheless, 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. Id. 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." Id. at 1027. When a state's highest court has not ruled on an issue, decisions of the state appellate court control unless there are "persuasive reasons" to believe the state supreme court would reach a different result on the same question. Allen v. Transamerica Ins. Co., 128 F.3d 462, 466 (7th Cir. 1997).

In Gamble, 2002 WI App 238, ¶ 18, the Wisconsin Court of Appeals considered whether Wis. Stat. § 304.06(1r) created a protected liberty interest for prisoners like petitioner, who were sentenced during the time the statute was in effect, but were not eligible for parole during that time period. After examining the legislative history of § 304.06(1r), the court concluded that the Wisconsin legislature did not intend "the presumption created by § 304.06(1r) (1989-90) [to] continue for inmates who were sentenced during the dates when the statute was in effect." Id. Furthermore, the court held that "§ 304.06(1r) did not create a due process liberty interest in parole release *even when* it was in effect at the time of an inmate's parole consideration." Id., ¶ 20. Under §

304.06(1r), members of the parole board “retained discretion” to grant parole release or to deny it when the board determined that “overriding considerations” rebutted the presumption in favor of parole. Id., ¶ 21. The court held that because “discretionary acts cannot create a legitimate expectation of release,” prisoners did not have a protected liberty interest in obtaining parole under § 304.06(1r). Id.

In the absence of a protected liberty interest, “the state is free to use any procedures it chooses, or no procedures at all.” Montgomery, 262 F.3d at 644. Because petitioner had no liberty interest at stake in receiving parole under Wis. Stat. § 304.06(1r), his due process rights were not violated when he was not considered for parole under that statute. Therefore, he will be denied leave to proceed on this claim.

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B. Ex Post Facto Application of Law

The ex post facto clause of the United States Constitution prohibits states from enacting laws that, by retroactive operation, increase the punishment for a crime after its commission. U.S. Const., Art. I, § 10, cl. 1.; Collins v. Youngblood, 497 U.S. 37 (1990). In some cases, retroactive changes to laws governing the parole of prisoners may violate this precept. Garner v. Jones, 529 U.S. 244, 250 (2000). In order to state a claim that he has been subjected to the ex post facto application of a new law, a petitioner must demonstrate that a retroactive procedural change created a significant risk of prolonging his incarceration.

Garner, 529 U.S. at 251.

Before the court can consider whether a change in procedure increased the risk that petitioner would remain incarcerated for a longer period of time, petitioner must first establish that he was subjected to a retroactive procedural change. Petitioner contends that because he was sentenced when § 304.06(1r) was in effect, he was entitled to parole consideration under that statute. He is mistaken.

Petitioner alleges that he began to serve his 40-year sentence in 1993. Under Wisconsin law, prisoners cannot be considered for parole until they have served at least 25% of their sentences. Wis. Stat. § 304.06(1)(b) (1993-94). Therefore, the earliest time at which petitioner would have been eligible for parole consideration was 2003. As discussed above, Wisconsin courts have held that § 304.06(1r) applied only to prisoners considered for parole from 1990-1996; it did not apply to prisoners who were merely sentenced during the time the statute was in effect. Gamble, 2002 WI App 238, ¶ 18. Because § 304.06(1r) did not apply to petitioner at the time he was sentenced, the fact that he is not being considered for parole under its provisions is proper. Because petitioner has not shown that he is being subject to any retroactive procedural change, he will be denied leave to proceed on his ex post facto claim.

ORDER

IT IS ORDERED that

1. Petitioner's request to proceed in forma pauperis is DENIED and this case is DISMISSED for failure to state a claim upon which relief may be granted;
2. The unpaid balance of petitioner's filing fee is \$240.07; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2);
3. A strike will be recorded against petitioner pursuant to 28 U.S.C. § 1915(g);
4. The clerk of court is directed to close the file.

Entered this 15th day of March, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge