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

Richmond Division

SHARON BURNETTE, PAMELA K. BURROUGHS,
FRANK CARTER, JR., EDWARD CONQUEST,
DONALD W. HOFFMAN, MONTY KING, LARRY MACON,
MARVIN MCCLAIN, BENJAMIN PERDUE, JR., HENRY STUMP
And BARBARA TABOR, suing on behalf of themselves and others
similarly situated,

Plaintiffs,

v. Civil Action No. 3:10cv70

HELEN F. FAHEY, in her capacity as Chair of the
Virginia Parole Board; CAROL ANN SIEVERS, in her
capacity as Vice-Chair of the Virginia Parole Board; and
JACKIE T. STUMP, MICHAEL M. HAWES, and
RUDOLPH C. MCCOLLUM, JR., in their capacity as
Members of the Virginia Parole Board,

Defendants.

MEMORANDUM IN SUPPORT

COME NOW the Defendants, Helen F. Fahey, Carol Ann Sievers, Jackie T. Stump, Michael M. Hawes, and Rudolph C. McCollum, Jr. (hereinafter collectively referred to as “The Virginia Parole Board”), by counsel, and in support of their motion to dismiss submit the following.

Plaintiffs, all inmates within the custody of the Virginia Department of Corrections, have filed, by counsel, this action pursuant to 42 U.S.C. § 1983 alleging violation of their constitutional rights with regard to discretionary parole release. Specifically they allege the following Claims:

CLAIM I. The Virginia Parole Board has adopted practices, policies and procedures that deprive Plaintiffs of their "fair or meaningful consideration of parole." Class Action Complaint (hereinafter "Complaint") ¶ 27. Specifically, Plaintiffs contend that the Virginia Parole Board:

a. discontinued the use of a set of Parole Guidelines that contained a risk assessment tool;

b. repealed its laws governing the granting of parole and has never replaced them in violation of Virginia law;

c. has relied primarily, if not exclusively, on the "serious nature and circumstances of the crime;"

d. abandoned the practice of "face to face" interviews with inmates but instead relies on hearing examiners and video conferences;

e. does not regularly meet with its parole hearing examiners but instead accesses the examiners' reports electronically;

f. does not solicit information from prison wardens and other prison employees regarding the suitability of the inmate for release on discretionary parole;

g. does not meet in person regularly to exchange views about the inmate candidates for parole;

h. reduced the frequency of meetings with the inmates' families to once every two years while the VPB diligently attempts to contact the victim prior to any decision; and

i. has exercised its power to defer inmate's parole consideration in an arbitrary manner.

CLAIM II. The changes in attitude and practices of the Virginia Parole Board since the abolition of parole effectively constitute an *ex post facto* enhancement of the Plaintiffs' criminal sentences.

Plaintiffs collectively request that they be certified as a class, and granted declaratory and injunctive relief.

COUNT I (Due Process)

Plaintiffs challenge the procedures used by the Virginia Parole Board in denying their collective releases on parole. They allege that the policies and practices constitute a failure to make informed decisions, exercise discretion, and give fair and meaningful consideration of parole, all in violation of the Plaintiffs' rights to due process.

Plaintiffs have failed to state a claim of due process. The Due Process clause applies when governmental action deprives a person of a legitimate liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). The first step in analyzing a procedural due process claim is to identify whether the alleged conduct affects a protected interest. *Board of Regents v. Roth*, *supra*; *Beverati v. Smith*, 120 F.3d 500, (4th Cir. 1997). There is no constitutional right of a convicted person to be conditionally released before the expiration of a valid sentence. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). In fact, a valid criminal conviction extinguishes that liberty right. *Meachum v. Fano*, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976). However, a liberty interest can be created by a parole system if that parole system mandates an inmate's release upon certain conditions. *Board of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz*, *supra*. If, however, the state holds out only the possibility of parole, that hope is not protected by due process. *Greenholtz* at 11 (*citing Meachum v. Fano*, *supra*).

The relevant statutes are the statutes of parole in effect at the time that the inmate committed his criminal offense. The eleven plaintiffs committed their offenses between

1973 through 1986. With minor changes to the statutes, the essence of the statutes though has remained constant. Va. Code § 53-252 prohibited the release on parole of any person… until the Parole Board "has determined that his release on parole will be compatible with the interests of the prisoner and of society." [1] By 1982, the corresponding statute had changed only slightly to state that the Board should not release on parole any person if it determines that his release on parole "will not be incompatible with the interests of society or of the prisoner." Va. Code § 53.1-155 (1982 Repl. Vol.)[2].

None of Virginia's parole statutes create a presumption that release will be granted but rather prohibit parole unless the Parole Board decides otherwise. *See James v. Robinson*, 863 F. Supp. 275 (E.D. Va. 1994), *aff'd mem.*, 45 F.3d 426 (1994). The Virginia system of discretionary parole does not grant inmates a liberty interest in parole release. *Gaston v. Taylor*, 946 F.2d 340 (4th Cir. 1991)(*en banc*); *Sumner v. Tucker*, 9 F. Supp. 2d 641 (1998). Furthermore, because inmates have no liberty interest in parole release under Virginia law, "neither can they have any liberty interest in the underlying procedures governing parole determination, so long as the procedures themselves satisfy due process." *Hill v. Jackson*, 64 F.3d 163, 171 (4th Cir., 1995). In reviewing specific procedural requirements, the Fourth Circuit rejected the notion that due process requires that the inmate be given access to his prison files, that he be allowed to call witnesses, or that the Parole Board needs to provide any published criteria which govern their decisions. *Franklin v. Shields*, 569 F.2d 784, 800 (4th Cir. 1977)(*en banc*)(*per curiam*). Even where a parole statute establishes a liberty interest, inmates are entitled to no more

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[1] See also Va. Code § 238(2) (1974 Repl. Vol.)(Parole Board shall release on parole only when such persons are found "suitable for parole").
[2] See also Va. Code 53.1-136(2) (1982 Repl. Vol.) (Parole Board shall release on parole only when such persons are found "suitable for parole").

than minimal procedure. At most, due process requires that the Virginia Parole Board furnish the prisoner with a statement of its reasons for the denial of parole. *Vann v. Angelone*, 73 F.3d 519 (4th Cir. 1996); *Franklin v. Shields*, *supra*.

Since becoming eligible for parole consideration, Plaintiffs have been reviewed and have received reasons for the denial of parole release. Plaintiffs do not contest that they have been reviewed timely or that they have received their decisions. See Complaint ¶¶ 6-14, 24. Instead they challenge that the decisions were a product of a lack of fair and meaningful consideration. Since the Plaintiffs have been furnished with statements of the reason(s) for the denial of parole, and this is all the process constitutionally required of the Virginia Parole Board, Plaintiffs have received the process to which they are entitled and this Claim must be dismissed. *Vann v. Angelone*, *supra*, *Franklin v. Shields*, *supra*.

<u>(a) Risk Assessment Guidelines</u>

Plaintiffs allege that the Parole Board has discontinued the use of parole guidelines which contained a risk assessment tool. Since Virginia has a discretionary parole scheme, the procedures for evaluating an inmate for parole "may be changed at the will of the prison officials so long as they afford the process that is due under the *Due Process Clause of the Fourteenth Amendment*." *Hill v. Jackson*, 64 F.3d at 171. Since Defendants have afforded all the process to which Plaintiffs were due, by providing a statement of the reason(s) denying parole, this claim must fail. *See also Bloodgood v. Garraghty*, 783 F.2d 470 (4th Cir. 1986). Furthermore, parole guidelines are "strictly advisory for the Board members to follow at their discretion." *James v. Robinson*, 863 F.

Supp. at 277. Such guidelines never impinged on the "absolute discretion of the Board when acting on parole applications." *James v. Robinson*, 863 F. Supp. at 277.

(b) General Rules Governing the Granting of Parole.

Plaintiffs allege that the Parole Board has not established general rules governing the granting of parole. In support of this assertion, they allege that previously such rules were published in the Virginia Administrative Code but were repealed in 1998. Although Plaintiffs acknowledge that the Parole Board then published a Policy Manual stating the 14 factors considered by the Parole Board in making its parole grant decisions, they state that this violates Virginia law. Complaint ¶ 38. Violations of procedures under state law are insufficient to give rise to any federal due process claim. *See Riccio v. County of Fairfax*, 907 F. 2d 1459 (4th Cir. 1990).[3]

(c) Reasons for Denial of Parole.

Plaintiffs challenge the Parole Board's reliance on the "serious nature and circumstances of the crime" as a basis for denying parole release. The Supreme Court has explained that a parole determination "must include considerations of what the entire record shows up to the time of the sentence, including the gravity of the offense in the particular case." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 15 (1979). Additionally, the Fourth Circuit has held that reliance on the serious nature of the offense is constitutionally valid and therefore is a constitutionally sufficient reason for denying discretionary parole. *Bloodgood v. Garraghty*, 783 F. 2d 470, 475 (4th Cir. 1986); *Smith*

[3] Pursuant to Va. Code § 53.1-136, the Parole Board is to adopt, subject to approval by the Governor, general rules governing the granting of parole and eligibility requirements, which shall be published and posted for public review. Such rules were created, approved and posted accordingly. They, as well as the posting of the decisions of the Parole Board, are available at http://www.vadoc.state.va.us/vpb/. There is a presumption of regularity that government agencies act within the parameters of the law. *United States Postal Service v. Gregory*, 534 U.S. 1, 122 S. Ct. 431, 151 L. Ed. 2d. 323 (2001). "Absent a demonstration to the contrary, we presume the Board follows its statutory commands and internal policies in fulfilling its obligations." *Garner v. Jones*, 529 U.S. 244, 256, 120 S. Ct. 1362, 146 L. Ed. 2d. 236 (2000)

v. Hambrick, 637 F.2d 211 (4th Cir. 1980); see also *Jennings v. Virginia*, 61 F. Supp. 2d 462 (E.D. Alexandria, 1999)("serious nature of the offense" is a constitutionally sufficient reason on which to deny parole).

(d)-(h) Miscellaneous Parole Board Policies and Procedures.

Plaintiffs challenge the lack of face to face interviews with inmates, the use of hearing examiners[4], the use of video conferencing, the failure to solicit input from prison wardens and other officials, the lack of regular meetings, and the reduction of the frequency of meetings with inmates' families while it diligently attempts to contact the victim prior to any decision.[5]

None of these alleged practices or policies implicate any due process violations. None of these practices are prohibited by the Constitution and they would not necessarily inure to the benefit of parole candidates. Plaintiffs cite no legal authority to support the proposition that any of these practices are constitutionally or statutorily required. Furthermore, the law is clear that the Plaintiffs have no liberty interests in the procedures of the Parole Board. "[A]lthough the inmates may have some interest in parole consideration generally, it is clear that there is no 'protected liberty interest in the procedures themselves, only in the subject matter to which they are directed.'" *Hill v. Jackson*, 64 F.3d at 170 (*quoting Ewell v. Murray*, 11 F.3d 482, 488 (4th Cir. 1993).

(i) Deferrals of Parole.

Plaintiffs allege that the Parole Board has deferred parole consideration in an arbitrary manner. Plaintiffs acknowledge that the Parole Board is permitted by statute to

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[4] "In the discretion of the Board, interviews may be conducted by the Board or its representatives and may be either public or private." Va. Code § 53.1-154.

[5] The Parole Board is obligated by statute to attempt to contact the victim prior to any decision. "The Board shall endeavor diligently to contact the victim prior to making any decision to release any inmate on discretionary parole." Va. Code § 53.1-155.

defer parole consideration of inmates meeting certain criteria for up to three years. Complaint ¶ 44; *see* Va. Code § 53.1-154. They state though that "the Board has made use of such three-year denials in a completely arbitrary manner" by alternating three year denials with one year denials "with no apparent basis for the distinction." Complaint ¶ 44.

The Virginia Parole Board's deferral policy does not violate due process. "Because the inmates' 'right' to annual parole review here is a procedural function of Virginia's parole scheme rather than a substantive right unto itself, the Constitution does not afford that 'right' any protection under the Due Process Clause." *Hill v. Jackson*, 64 F.3d at 171. Just because Plaintiffs do not understand the reason for the deferrals and annual reviews does not mean that those decisions were done in an arbitrary and capricious manner. Plaintiffs do not assert that the deferrals were ever misapplied to an inmate whose case did not fit the criteria. Deferrals allow the Parole Board to avoid reviewing cases *pro forma* but to instead set reviews "according to the likelihood that a review will result in meaningful considerations as to whether an inmate is suitable for release." *Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d. 236 (2000). The annual reviews held in between three year deferrals provide an additional opportunity for the Parole Board to evaluate whether there is a change or likelihood of change in the near future to suggest a greater possibility of release on parole. Notwithstanding Plaintiffs' conclusory assertion that the decisions to defer were arbitrary or capricious, Plaintiffs have made no such factual showing. More importantly though, since the inmates have no liberty interest in the procedural functions of the Virginia

parole process, they do not have any liberty interest in the decision to defer the hearing. *Hill v. Jackson*, 64 F.3d 163 (4th Cir., 1995).[6]

Plaintiffs also allege a number of policy characterizations and arguments that do not raise any issues pertaining to due process. Plaintiffs allege the Parole Board has adopted procedures which make it difficult to hold individual Board Members "accountable" (Complaint ¶ 46); that the parole process has become more "opaque" (Complaint ¶ 46); that parole is being denied in spite of "detailed and reliable release plans" (Complaint ¶ 53); that parole is being denied despite inmates' advancing age (Complaint ¶ 54); and that the Parole Board considers sentencing guidelines (Complaint ¶ 59). None of these statements, even if true, support any claim under a due process analysis. Parole procedures may be changed at the will of prison officials so long as they afford the process required by Due Process. *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993). "[A]lthough the inmates may have some interest in parole consideration generally, it is clear that there is no 'protected liberty interest in the procedures themselves, only in the subject matter to which they are directed.'" *Hill v. Jackson*, 64 F.3d at 170 (quoting from *Ewell v. Murray*, 11 F.3d at 488). The Virginia Parole Board is charged with deciding which inmates are suitable for discretionary release on parole. Va. Code §53.1-136 and § 53.1-155. Under Virginia law, the Board has absolute discretion in matters of early parole release. *Garrett v. Commonwealth*, 14 Va. App. 154 (1992). The decision to release an inmate on discretionary parole is not subject to crossing off items on a checklist. The decision to grant parole is dependent upon

[6] Even if there were a liberty interest in the deferral decision, to constitute a due process violation based on an agency acting in an arbitrary and capricious manner, Plaintiffs must show that there is no evidence to support the action. Prison administrators satisfy due process requirements if there is "some evidence" on the record to support their findings. *Superintendent v. Hill*, 472 U.S. 445 (1985).

"subjective evaluations and predictions of future behavior." *Hill v. Jackson*, 64 F.3d 163 (4th Cir. 1995)(quoting from *Gaston v. Taylor*, 946 F.2d 340 (4th Cir. 1991) (*en banc*.)).

Based on Plaintiffs' assertions, it is clear that Defendants have duly considered the Plaintiffs in their attempt to be released on discretionary parole and provided the Plaintiffs with a statement of the reasons that parole was denied. Their complaints about policies and practices notwithstanding, Plaintiffs have received all of the process to which they are constitutionally entitled. *See Vann v. Angelone*, *supra*, *Franklin v. Shields*, *supra*. Having failed to state a claim under due process, Claim I must be dismissed.

COUNT II (Ex Post Facto)

Plaintiffs allege that the "conduct of the Board" constitutes an ex post facto enhancement of their criminal punishments. Complaint ¶ 77. Specifically, they allege that "the Board's actions have increased the punishment for Plaintiffs' crimes beyond the expectations and assumptions that the courts, prosecutors and defense counsel had at the time of sentencing…." (Complaint ¶ 27). Plaintiffs do not specify any additional practices or policies but simply contend that the same practices and policies discussed in Claim I amount to a violation of the Ex Post Facto Clause.

The Constitution prohibits states from passing any "ex post facto Law." *U.S. Const.*, *art. I, § 10, cl. 1; and U.S. Const., art. I § 9, cl. 3.* The Ex Post Facto Clause applies to laws made or changed after the date of the underlying criminal offense. The Ex Post Facto Clause bars enactments, which by retroactive application, increase the punishment for a crime that has already been committed." *Warren v. Baskerville*, 233 F.3d 204, 206 (4th Cir. 2000). In some instances, retroactive changes in laws governing

parole of prisoners may violate the Ex Post Facto Clause. *See Lynce v. Mathis*, 519 U.S. 433 445-446 (1997). The controlling inquiry is whether retroactive application of the changed law created "a substantial risk of increasing the measure of punishment…" *Garner v. Jones*, 529 U.S. 244, 250 (2000) quoting *California Dept. of Corrections v. Morales*, 514 U.S. 499, 509 (1995). The constitutional prohibition against Ex Post Facto laws does not extend to changes in administrative policies unless they have the force and effect of law. *United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992).

Plaintiffs have not identified any change in law that has been retroactively applied to their parole considerations. Instead, they allege that "beginning in 1995[7] the Board began to adopt and implement practices, policies and procedures that had the intent and/or effect of abolishing parole retroactively…" Complaint ¶ 36. Plaintiffs do not contend that law abolishing parole has been applied to them since Plaintiffs admit that they have been duly considered by the Parole Board and have been issued statements providing the reasons for the denial of parole. See Complaint ¶¶ 6-14, 24. Plaintiffs acknowledge that, after the abolition of parole, parole eligible inmates are still being granted parole. Complaint ¶ 47. Furthermore, Plaintiffs acknowledge that even violent offenders are still being granted parole. Complaint ¶ 47. They assert however, that the percentage rate of parole grants has been reduced since the abolition of parole and that this is most apparent as applied to the violent offenders. They assert that violent offenders, even those that are granted parole, are being forced to serve more of their criminal sentence than in previous years. Complaint ¶ 48. Plaintiffs contend that it is the changes in attitudes, practices and policies which constitute the ex post facto violation.

[7] Va. Code § 53.1-165.1 abolishes parole for any felony offenses committed on or after January 1, 1995.

Plaintiffs cannot establish an ex post facto violation based on Defendants adopting less favorable attitudes, guidelines, policies, or practices. *Warren v. Baskerville*, *supra*. "As the constitutional text makes clear, the ex post facto prohibition applies to 'laws.'" *Warren v. Baskerville*, 233 F.3d at 207; see *Garner v. Jones*, *supra*. None of the Board's conduct, as alleged by Plaintiffs, amount to anything more than policy or practice changes. Changes to policy or practice in enforcing the parole laws are not prohibited by the Ex Post Facto Clause. *Warren v. Baskerville*, 233 F.3d at 207. Indeed, in the exercise of discretion, it is expected that changes will occur.

> [W]here parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised. The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. New insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors will inform parole decisions.

Garner v. Jones, 529 U.S. at 253.

None of the Plaintiffs have served the full term of their criminal sentences. See Complaint ¶¶ 61-67, 69-71[8]. The Parole Board's failure to grant early parole release to Plaintiffs does not increase the measure of the punishment imposed by the Virginia courts and juries. Accordingly, Plaintiffs' ex post facto argument fails to state a claim upon which relief may be granted and must be dismissed.

Wherefore, Defendants respectfully request this Court grant their motion and dismiss the complaint against them.

Respectfully Submitted,

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[8] Plaintiffs are all "serving lengthy prison sentences" (Complaint ¶ 1). Most are serving one or more life sentences, with the shortest sentence identified being 80 years. Plaintiffs' pleading discloses specific sentences for all but one Plaintiff, Marvin McClain. Upon information and belief, McClain is serving a sentence of life for the offense of homicide in addition to a term of years for other offenses.

HELEN F. FAHEY
CAROL ANN SIEVERS
JACKIE T. STUMP
MICHAEL M. HAWES
RUDOLPH C. MCCOLLUM, JR.

By_____________/s/_____________
Counsel

Richard C. Vorhis, SAAG, VSB #23170
Attorney for Defendants
Office of the Attorney General
Public Safety and Enforcement Division
900 East Main Street
Richmond, Virginia 23219
Phone: 804-786-4805
Fax: 804-786-4239
rvorhis@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Stephen A. Northup, Esquire
TROUTMAN SANDERS LLP,
Post Office Box 1122, Richmond, Virginia 23218-1122
steve.northup@troutmansanders.com

Robert A. Angle, Esquire
TROUTMAN SANDERS LLP
Post Office Box 1122, Richmond, Virginia 23218-1122
Robert.angle@troutmansanders.com

Alex R. Gulotta, Esquire
Legal Aid Justice Center
100 Preston Avenue, Charlottesville, Virginia 22903
alex@justice4all.org

And I hereby certify that I will mail the document by U.S. mail to the following non-filing user:

N/A

______________/s/_______________
Richard C. Vorhis, SAAG, VSB #23170
Attorney for Defendants
Office of the Attorney General
Public Safety and Enforcement Division
900 East Main Street
Richmond, Virginia 23219
Phone: 804-786-4805
Fax: 804-786-4239
rvorhis@oag.state.va.us