

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

David Hall et al., :
 :
Plaintiffs, : 05CVH05-5459
 :
-vs- : JUDGE CONNOR
 :
Harry Hageman et al., :
 :
Defendants. :

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
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CLERK OF COURTS

DECISION AND ENTRY SUSTAINING PLAINTIFFS' MOTION FOR LEAVE TO FILE
REPLY IN EXCESS OF PAGE LIMIT, FILED APRIL 27, 2007; AND

DECISION SUSTAINING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT,
FILED APRIL 9, 2007; AND

DECISION AND ENTRY OVERRULING DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT, FILED APRIL 9, 2007; AND

DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTION TO STRIKE, FILED
DECEMBER 11, 2007; AND

ORDER STRIKING AMICUS CURIAE BRIEF FILED ON NOVEMBER 29, 2007

Rendered this 27th day of January 2009.

CONNOR, J.

I. INTRODUCTION

This matter comes before the Court upon the following:

1. Motion by Defendants Harry Hageman and the Ohio Adult Parole Authority (hereinafter "APA" or collectively as "Defendants") for Summary Judgment, filed April 9, 2007. Plaintiff David Hall and other class members (hereinafter "Plaintiffs" or "Plaintiff class" collectively) filed their Memorandum Contra on April 26, 2007. Defendants filed their Reply on May 7, 2007.
2. Motion by Plaintiffs for Summary Judgment, filed April 9, 2007. Defendants filed their Memorandum Contra on April 23, 2007. Plaintiffs filed their Reply on May 3, 2007.
3. Motion by Plaintiffs for Leave to File Reply in excess of the seven-page Limit, filed April 27, 2007. This motion is unopposed.

4. Motion by Defendants to Strike, filed December 11, 2007. This motion is also unopposed.

II. FACTUAL AND PROCEDURAL BACKGROUND

This matter results from the case of *Ankrom v. Hageman* (March 31, 2005), Franklin App. No. 04AP-984, 2005-Ohio-1546, which examined the parole eligibility of “old-law” prisoners given indeterminate sentences, prior to the changes associated with Senate Bill 2 that became effective on July 1, 1996. The plaintiff class in *Ankrom* consisted of “all parole-eligible Ohio prison inmates who pleaded guilty or no contest to lesser or fewer offenses than for which they were indicted.” *Ankrom* at ¶1. Therefore the *Ankrom* Court analyzed the plea agreements in accordance with contract principles and held:

[A] defendant has an expectation that he will be assigned an offense category score consistent with his conviction and plea, rather than the charges included within the indictment, and that the state breaches its plea agreement with the defendant when its actions run afoul of such expectations.

Ankrom at ¶29.

The *Ankrom* Court found that the APA effectively disregarded the sentence imposed by the trial judge and impermissibly encroached on judicial functions. *Ankrom* at ¶34. As a result, the court held that the APA denied inmates “meaningful consideration” for parole. *Ankrom* at ¶34.

After the *Ankrom* decision, a notice was sent to all inmates at the North Central Correctional Institution in Marion, Ohio. The notice listed all inmates that the APA determined to be eligible for a new parole consideration based upon the holding in *Ankrom*. Plaintiff David Hall is incarcerated at the Institution. His name, however, was omitted from the list.

As a result, on May 17, 2005, David Hall filed a Complaint in the Franklin County Court of Common Pleas, arguing that the APA should be ordered to immediately comply with *Ankrom* and

grant him a meaningful parole hearing. The Ohio Public Defender later entered an appearance on behalf of Hall and requested class certification of this controversy, which was granted by the Court. On September 1, 2006, the Court signed and filed the Entry Certifying Class Action, which defined the class as: “all parole-eligible Ohio prison inmates whose conviction(s) were obtained by a trial.”

On May 24, 2006, Defendants filed a motion for summary judgment, which this Court overruled. Specifically, this Court provided, “[t]he Court finds that questions of fact remain as to whether Plaintiffs have been placed in the proper category, and whether meaningful parole hearings are being conducted.” *Decision and Entry*, filed August 28, 2006, p. 11.

On August 28, 2006, this Court accepted Plaintiffs’ Second Amended Complaint, which presents the following causes of action: (1) a declaratory judgment regarding Plaintiffs’ statutory right to meaningful consideration for parole; (2) a declaratory judgment regarding whether the APA’s guidelines must be promulgated in accordance with Ohio administrative rulemaking law; (3) a declaratory judgment regarding the Ohio Constitution, including alleged violations of the: (a) ex post facto clause, (b) double jeopardy clause, (c) equal protection clause, (d) contract clause, (e) separation of powers clause, and (f) due process clause; and (4) a 42 U.S.C §1983 action for alleged violations of the United States Constitution, including the: (1) ex post facto clause, (2) double jeopardy clause, (3) equal protection clause, and (4) due process clause.

The parties have filed cross-motions for summary judgment, responses and replies. At issue therefore is whether either side is entitled to judgment as a matter of law.

III. CROSS-MOTIONS FOR SUMMARY JUDGMENT

A. PLAINTIFFS’ ARGUMENTS

Plaintiffs assert that the opinions of *Layne v. Ohio Adult Parole Auth.* (2002), 97 Ohio St. 3d 456 and *Akrom supra* should direct this Court’s analysis in this matter. Many Plaintiffs are serving

lengthy continuances as a result of pre-*Layne* and pre-*Ankrom* hearings at which they were denied meaningful consideration for parole.

Since these two decisions, Defendants have made sweeping changes to their policies and practices. These policies and practices “voluntarily and unilaterally adopted by the OAPA following the *Layne* and *Akrom* decisions are a reasonable expression of at least the minimum criteria for meaningful parole consideration.” *Plaintiffs’ MSJ*, p. 19. Therefore Plaintiffs seek re-hearings under the current criteria for those individuals who are awaiting the meaningful consideration to which they are and have been statutorily entitled.

Furthermore, Plaintiffs seek a declaration that the guidelines be subject to the administrative rulemaking procedures. Plaintiffs do, however, note that the Tenth District Court of Appeals has rejected this same argument in the past.

Finally, Plaintiffs assert they are entitled to judgment as a matter of law on their constitutional claims. The *Ankrom* Court already held that Defendants’ previous policies and practices violate the separation of powers. Similarly, Defendants’ policies and practices have violated the ex post facto clause, due process clause, double jeopardy clause, and equal protection clause.

B. DEFENDANTS’ ARGUMENTS

Plaintiffs fail to present any cognizable declaratory judgment claim. Defendants have changed the guidelines such that parole hearings are conducted at the statutory minimum time period. Furthermore, Defendants do not deny an inmate release merely because they have not met the guideline range, which initially may have been established beyond the minimum statutory eligibility date. Instead, Defendants’ decision to deny parole is based upon the lack of suitability for parole, not eligibility. As a result, there is no justiciable issue for this Court to determine.

Next, the Court should dismiss Plaintiffs' administrative rulemaking claim. Controlling Tenth District case law has consistently and unequivocally held against Plaintiffs' position. Therefore Plaintiffs are not entitled to a declaratory judgment in this regard.

Finally, Plaintiffs' constitutional claims fail. The guidelines are not constitutional provisions, statutes, or rules, and therefore they cannot be subjected to constitutional review. Additionally, the guidelines have survived similar constitutional challenges in the past.

C. SUMMARY JUDGMENT STANDARD

A motion for summary judgment is governed by Rule 56(C) of the Ohio Rules of Civil Procedure, which provides: "summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

The Supreme Court of Ohio has adopted a three-part standard to be used when deciding if summary judgment is appropriate. The moving party must show: "(1) [T]hat there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the

evidence construed most strongly in his favor.” *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

Additionally, the nonmoving party must go beyond the allegations or denials contained in his pleadings and affirmatively demonstrate the existence of a genuine issue of material fact in order to prevent the granting of a motion for summary judgment. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

Moreover, the entry of summary judgment against a party is mandated when the nonmoving party: “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial * * * [by designating] specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett* (1986) 477 U.S. 317.

The Supreme Court of Ohio has adopted and approved the *Celotex* burden on the nonmoving party, provided that the moving party meets its initial burden of informing the court of the basis for the motion and identifying portions of the record demonstrating the absence of any genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280.

D. LAW AND COURT’S ANALYSIS

Plaintiffs seek declaratory judgment alleging constitutional infirmities. Ohio Civil Rule 57 and R.C. §2721.02(A) govern such claims and provide:

Subject to division (B) of this section, courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree.

It is well established that there is no constitutional, statutory or inherent right to parole. *State ex rel. Hattie v. Goldhardt* (1994), 69 Ohio St.3d 123, 125; *State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490 (Ohio inmate has “no legitimate claim of entitlement to parole prior to the expiration of a valid sentence of imprisonment.”) Rather, the decision to grant or deny parole is within the discretion of the APA. See *Inmates of Orient Correctional Inst. v. Ohio State Parole Auth.* (C.A. 6, 1991), 929 F.3d 233; *State ex rel. Blake v. Shoemaker* (1983), 4 Ohio St. 3d 42; *State ex rel. Ferguson v. Ohio Adult Parole Auth.* (1989), 45 Ohio St3d 355, 356. This discretion, however, “must yield when it runs afoul of statutorily based parole eligibility standards.” *Layne* at 464.

The “parole guidelines themselves are not subject to the declaratory judgment statute.” *Festi v. Ohio Adult Parole Auth.*, 10th Dist. No. 04AP-1372, 2005-Ohio-3622, ¶13. However, declaratory relief is proper regarding the constitutionality and/or constitutional *application* of the parole guidelines. *Ritchie v. Ohio Adult Parole Auth.*, 10th Dist. No. 05AP-1019, 2006-Ohio-1210, ¶13; See also, *Hattie v. Anderson* (1994), 68 Ohio St. 3d 232, 235 (“declaratory judgment is the proper remedy to determine the constitutionality or constitutional application of parole guidelines.”).

In *Layne v. Ohio Adult Parole Auth.* (2002), 97 Ohio St. 3d 456, at syllabus, the Court held that in “any parole determination involving indeterminate sentencing, the Adult Parole Authority must assign an inmate the offense category score that corresponds to the offense or offenses of conviction.” Furthermore, the court recognized the statutory right to parole eligibility under former R.C. §2967.13.

After *Layne* the Tenth District was presented with the case of *Ankrom v. Hageman*, 2005-Ohio-1546. The issue in *Ankrom* was whether the APA’s procedures complied with the

“meaningful consideration” requirements set forth in *Layne*. *Ankrom* at ¶¶3, 13. In affirming summary judgment for the plaintiff class, the Tenth District agreed with the trial court and held that an inmate does not receive meaningful consideration when “the lowest possible range on the guidelines chart was beyond the earliest parole eligibility date.” *Ankrom* at ¶16. Since the Tenth District decided *Ankrom*, the APA has conducted re-hearings for 1334 members of the *Ankrom* plaintiff class. [Mausser Affidavit, ¶13].

Both *Layne* and *Ankrom* determined that the APA’s practices and procedures effectively denied an inmate his/her right to meaningful consideration for parole. Furthermore, both *Layne* and *Ankrom* regarded plea agreements and were decided, in part, on contract principles. Conversely, the dispute *sub judice* regards inmates who were convicted after trials.

Despite this distinguishing feature, courts have applied the holdings of *Layne* and *Ankrom* to inmates convicted after trials. See *Ritchie*, supra and *Larson v. Ohio Adult Parole Auth.* (Oct. 19, 2006), Franklin App. No. 06AP-80, 2006 Ohio 5442, ¶13 (court applied holdings of *Layne* and *Ankrom* to inmate convicted by a jury). Indeed, *Layne* held that inmates have a *statutory* right to meaningful consideration for parole. *Layne* at pp. 463-464 citing former R.C. §2967.13. Therefore this Court will apply these holdings to the Plaintiff class.

Plaintiffs’ claim for meaningful parole consideration

[A]n inmate is denied meaningful parole consideration * * * when the inmate is placed within the proper guidelines category pursuant to the offense of conviction, but the lowest possible range on the guidelines chart for that category is beyond the inmate’s earliest statutory parole eligibility date.

(Internal citations omitted). *Eubank v. Ohio Adult Parole Auth.* (Aug. 25, 2005), Franklin App. No. 05AP-274, 2005 Ohio 4356, at ¶10.

Plaintiffs have cited one consistent, illustrative example in the trial and appellate courts in *Ankrom*, as well as the briefing *sub judice*. The example regards a hypothetical inmate who was convicted of voluntary manslaughter and sentenced to a minimum term of 5-25 years in prison. *Ankrom* at ¶15. Under former R.C. §§2903.03 and 2929.11 and in accordance with the conditions set forth in former R.C. §2967.13, such an inmate would become eligible for parole after serving approximately 3 ½ years. However, under the guidelines, this inmate would have to serve 7 years before receiving meaningful consideration for parole.

In response, Defendants note that the guidelines have been modified so that all of the minimum values of months in the guidelines chart correspond with the statutory minimum set by statute. [Mausser Affidavit, ¶¶9-10; Mausser Depo. Tr., p. 118-122, 134, 150-152]. Additionally, Defendants recite the current policies and procedures to afford inmates with meaningful consideration at each and every parole hearing.¹ [Mausser Affidavit, ¶10].

Defendants' arguments, however, miss the mark. Specifically, Defendants' arguments are based upon the presumption that Plaintiffs have been given hearings that comply with the post-*Ankrom* changes. Therefore, in the event that an inmate has not yet received a hearing post-*Ankrom*, these arguments are irrelevant.

This Court finds the circumstances are such that members of the Plaintiff class may have been "flopped" at their first hearing and consequently may be currently awaiting a hearing that complies with Defendants' post-*Ankrom* policies and practices.² Indeed, this is the heart of Plaintiffs' position. Specifically, Plaintiffs assert: "many Plaintiff class members continue to serve

¹ Plaintiffs concede that Defendants' *current* policies and practices "are a reasonable expression of at least the minimum criteria for meaningful parole consideration." *Plaintiffs' MSJ*, p. 19. These policies were adopted in June of 2005 in response to *Ankrom*. [Mausser Affidavit, ¶10].

² Unlike the court in *Ankrom*, this Court is not presented with the issue of whether or not a "flop" is reasonable.

lengthy continuances as a result of pre-*Layne* and pre-*Ankrom* hearings at which they were denied meaningful parole consideration. These inmates should not be made to serve out their entire unjust and illegal ‘flops’ before finally receiving the meaningful consideration to which they are statutorily entitled.” *Plaintiffs’ MSJ*, p. 21.

Furthermore, Defendants even acknowledge the fact that this scenario may have occurred. Specifically, Defendants provide: “the Ohio Parole Board could conduct a file review to determine which inmates were convicted at a trial by a jury, were given a guideline range above the statutory minimum, were extended at the first statutory eligible minimum hearing merely because the guideline range wasn’t met, and re-hear those remaining inmates.” [Mausser Affidavit, ¶14].

Pursuant to the mandates of *Layne*, *Ankrom*, *Eubank*, *Ritchie* and *Larson*, this Court finds that Defendants have denied some portion of the Plaintiff class meaningful consideration for parole. Accordingly, the Court finds that no genuine issues of material fact exist in this regard. Plaintiffs are entitled to summary judgment on Count I of Plaintiffs’ Second Amended Complaint. The Court therefore **SUSTAINS** Plaintiffs’ Motion for Summary Judgment and **OVERRULES** Defendants’ Second Motion for Summary Judgment.

Furthermore, the Court hereby issues the following declaratory judgment:

1. The members of the Plaintiff class are entitled by statute to meaningful consideration for parole that consists of true eligibility and parole hearings in accordance with the post-*Ankrom* policies and procedures employed by the APA.
2. That the Defendants deny and/or have denied meaningful parole consideration when they assign an inmate to a proper guidelines category, but the lowest possible range in the guidelines chart is beyond the inmate’s earliest statutory parole eligibility date. See *Ankrom* at ¶15 and *Eubank* at ¶10.

3. That the Defendants deny meaningful parole consideration when they deny a class member a hearing or re-hearing that complies with Defendants' post-*Ankrom* practices and policies.

Defendants are hereby ordered to immediately re-hear and grant meaningful consideration for parole to any class member who has not had a parole hearing since June of 2005, the time when Defendants adopted post-*Ankrom* policies and practices. This does not equate to a finding that each and every Plaintiff class member necessarily received meaningful consideration for parole merely because his/her hearing occurred after the bright line of June of 2005. See *Ritchie* at ¶24. However, the record fails to demonstrate allegations of specific instances where Defendants failed to meet the statutory requirements after June of 2005.³ As such, this Court cannot find that Defendants have denied meaningful consideration in hearings after June of 2005.

According to Defendants' evidentiary support,⁴ there are approximately 1262 inmates who were convicted at trial by a jury that were not a part of the *Ankrom* class. Additionally, approximately 629 of these inmates have either received a hearing since June of 2005. [Mausser Affidavit, ¶12]. Therefore this holding may potentially relate to 633 inmates.

Plaintiffs' constitutional claims

"Where a case can be resolved upon other grounds the constitutional question will not be determined." *Kinsey v. Board of Trustees of Police & Firemen's Disability & Pension Fund* (1990),

³ The Court will not find that Defendants violate Plaintiffs statutory rights by implementing the practice of denying parole for inmates whose security classification is level four or five. Indeed, Mausser testified that such inmates receive parole hearings and are determined to be *unsuitable*, rather than ineligible, for parole. [Mausser Depo. Tr., p. 137-139]. Such determinations are supported by controlling case law. See *Larson*, *supra*; see also *Fugett v. Ghee* 10th Dist. No. 02AP-618, 2003 Ohio 1510, at P17.

Additionally, this Court will not order Defendants to either: (1) allow inmates to have counsel attend hearings, or (2) record each and every hearing. There is neither statutory nor case law that supports these requests. Additionally, to order such would require this Court to impermissibly encroach upon both the executive and legislative branches of government.

⁴ These statistics were formulated in April of 2007.

49 Ohio St. 3d 224, 225. As a result of the foregoing analysis, the Court finds that Plaintiffs are entitled to that which they seek, namely, re-hearings in accordance with Defendants' post-*Ankrom* policies and procedures. Accordingly, this Court need not address the constitutional arguments advanced by Plaintiffs.

IV. CONCLUSION

Regarding the pending procedural motions, the Court **SUSTAINS** Plaintiffs' Motion for Leave, filed April 27, 2007, **SUSTAINS** Defendants' Motion to Strike, filed December 11, 2007, and **ORDERS STRICKEN** the amicus curiae brief filed on November 27, 2007.

As to the substantive motions, the Court hereby **SUSTAINS** Plaintiffs' Motion for Summary Judgment, filed April 9, 2007 and **OVERRULES** Defendants' Second Motion for Summary Judgment, filed April 9, 2007.

Counsel for Plaintiffs shall submit the appropriate judgment entry within twenty (20) days of receipt of this decision, pursuant to Local Rule 25. The first paragraph of the entry shall contain the name of the motion, the date upon which the motion was filed, and by whom the motion was filed. A copy of this decision shall accompany the entry. Finally, the entry shall state that it is a terminating entry and there is no just reason for delay.



JOHN A. CONNOR, JUDGE

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