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

DANA CARTER and RICHARD CARTER, Plaintiffs,	:	CIVIL ACTION
	:	NO. 97-5414
v.	:	
TOM RIDGE, GOVERNOR OF PENNSYLVANIA, et al. Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J. December 18, 1997

Currently before the Court are plaintiffs' motions for Reconsideration; for a Temporary Restraining Order; for the Appointment of Counsel; and for Certification as a Class. The Court will grant the motion for Reconsideration[1] and deny the remaining motions for the reasons that follow.

I. BACKGROUND

Plaintiffs Dana and Richard Carter are both incarcerated in the Pennsylvania prison system. Their civil rights[2] Complaint alleges that since they were sentenced to

1. The Court denied Plaintiff's motion for a temporary restraining order without prejudice on October 30, 1997 because it appeared that Plaintiffs had not properly served their Complaint on defendants. They have moved for reconsideration on the grounds that defendants have waived service. (Dkt. # 14). The motion for reconsideration will be granted because it appears that service has been perfected (Dkt. #s 15-17). Defendants have answered the motion for a temporary restraining order, which the court will address in this memorandum.

2. Plaintiffs cite 42 U.S.C. §§ 1983, 1984, 1985, 1986 & 2000(d), in addition to 18 U.S.C. § 1961 et seq.

prison, the various defendants, including the Department of Correction ("DOC"), have raised the eligibility threshold for parole from 50% of time served, 42 Pa. C.S.A. § 9756 (c), to 85%, and that defendants have applied this enhanced requirement against them. They contend that defendants made parole eligibility more stringent to obtain federal grant money for prison construction under the Violent Offender Incarceration and Truth in Sentencing Grant Programs ("VOITIS"), 42 U.S.C. §§ 13701 et seq., which requires, in part, that "[t]o be eligible to receive such a grant, a State . . . shall demonstrate that the State--

> (1) has in effect laws which require that persons convicted of violent crimes serve not less than 85 percent of the sentence imposed; or
>
> (2) since 1993--
>
> > (A) has increased the percentage of convicted violent offenders sentenced to prison;
> >
> > (B) has increased the average prison time which will be served in prison by convicted violent offenders sentenced to prison;
> >
> > (C) has increased the percentage of sentence which will be served in prison by violent offenders sentenced to prison; and

> (D) has in effect at the time of application laws requiring that a person who is convicted of a violent crime shall serve not less than 85 percent of the sentence imposed if --
>
> (i) the person has been convicted on 1 or more prior occasions in a court of the united States or of a State of a violent crime or a serious drug offense; and
>
> (ii) each violent crime or serious drug offense was committed after the defendant's conviction of the preceding violent crime or serious drug offense.

42 U.S.C. § 13702 (a).

Plaintiffs have attached documents demonstrating that on September 20, 1996, Pennsylvania received a VOITIS grant of $1,248,453, and a subsequent supplemental grant of over $10,000,000 based on Pennsylvania's documented annual increases in violent offenders arrested; sentenced to prison and/or serving longer periods of confinement. Because Pennsylvania has not enacted a law which would require that persons convicted of certain violent crimes serve at least 85% of their sentence, plaintiffs allege that defendants have implemented new policies which satisfied the grant requirements. In response, the Commonwealth has attached a statement which appears to describe

new, tougher Pennsylvania sentencing policies, and which states somewhat ambiguously that while "those offenders already in prison are not subject to these new sentencing policies . . . since parole at minimum is discretionary, parole polices can effect [sic] the time served in prison for these offenders." (Def. Exh. A). Plaintiffs contend that the new policies have in fact affected prisoners currently serving time, including, apparently, themselves.[3] They claim that, in order to receive these funds in the absence of a specific Pennsylvania statute, the Board of Probation and Parole ("BPP') routinely provides false reasons for denying parole to persons serving between 50 and 85% of their sentences.[4]

To remedy this, Plaintiffs request the court to enjoin defendants from:

a. Continuing construction at various Pennsylvania corrections facilities;

b. Continuing to deny parole, program adjustments and prerelease status in accordance with the "unconstitutional usage of the provisions contained in the [VOITIS] incentive Grant Programs"

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3. Although Plaintiffs do not state their actual sentences, they imply that they have served over 50% of their sentences are thus eligible for parole under the statute.

4. To the extent that plaintiffs argue that Pennsylvania came by this money illegally, as it did not specifically enact a law effecting new changes, the court does not believe the plaintiffs have standing to question the DOJ's determination that Pennsylvania met the grant requirements.

c. Using or expending any funds for further expansion of the Pennsylvania prison infrastructure.[5]

They also seek the appointment of counsel and class certification.

II. DISCUSSION

A. Temporary Restraining Order

Plaintiffs have failed to demonstrate their entitlement to injunctive relief. Reading their motion for injunctive relief together with the Complaint, the Court finds that, while Plaintiffs have arguably stated a claim for relief, they have not demonstrated a likelihood of success on the merits, nor have they shown that they will suffer from "immediate and irreparable injury" if relief is not granted. Fed. R. Civ. P. 65(b). While Plaintiffs imply that they have served more than 50% of their prison terms and that they have been denied parole, the only injury they allege is that defendants' actions have had an "overall effect" on Pennsylvania's prison population, and that "Defendants are in agreement to occasionally alter the competency of inmate reports which would show positive program involvement

5. Plaintiffs assert that higher parole eligibility requirements have caused prison overcrowding. From this they argue that the Commonwealth is attempting to gain more funds for more construction and thus to create more employment in Pennsylvania. The Court does not believe that enjoining prison construction would remedy any injury to plaintiffs -- indeed, if plaintiffs are concerned about overcrowding, construction would benefit them. Regardless, Plaintiff's political observations are beyond the scope of this lawsuit.

and completion when forwarding said reports to the PBPP for the decision to parole an inmate." Because plaintiffs do not actually connect these allegations to themselves, they will not support injunctive relief.

Even if the court liberally construes the Complaint to assert that defendants are arbitrarily and capriciously denying parole for false reasons in order to obtain federal funding, the plaintiffs have not put forth sufficient evidence to warrant injunctive relief. Without deciding the merits of defendants' contention that plaintiffs are unable to sustain a due process challenge to defendants' actions, and even assuming that the plaintiffs can state a claim that application of the new parole policy denied them a substantive due process right, see Jubilee v. Horn, 959 F.Supp. 276, 280 (E.D. Pa. 1997), it is unclear whether they have even been denied parole, much less for an unconstitutional reason. (There is no allegation that race or religion played a role in denial).

Although the Court will deny the motion for a temporary injunction, and although plaintiff's ex post facto claims suffer from the same lack of specificity, the court thinks the Commonwealth errs when it argues that parole regulations do not constitute laws for purposes of the Ex Post Facto Clause. The Commonwealth has overlooked Judge Becker's statement that "[t]his circuit, alone among all others, maintains that parole

regulations may be laws for purposes of ex post fact[o] analysis." Royster v. Fauver, 775 F.2d 527, 534 (3d Cir. 1985); see also United States ex rel. Forman v. McCall, 709 F.2d 852, 859 (3d Cir. 1983); Jubilee, 959 F.Supp. at 282. In further developing the ex post facto claims, the parties should examine whether there actually is a new parole eligibility standard; whether that standard is applied "without sufficient flexibility," and is thus a law, McCall, 709 F.2d. at 859, or merely a change in internal board policy, which would arguably not implicate the Ex Post Facto Clause, see Jubilee, at 959 F.Supp. at 282; see also Geraghty v. United States Parole Commission, 579 F.2d 238, 267 (3d Cir. 1978), vacated and remanded on other grounds, 445 U.S. 388 (1980); whether it has in fact been applied to plaintiffs, and whether that application worked to their detriment. See Crowell v. United States Parole Com'n, 724 F.2d. 1406, 1408 (3d Cir. 1984).[6]

B. Plaintiffs' Motion for Appointment of Counsel

Plaintiffs also request the court to appoint counsel to represent them, and in particular, to bring a class action on behalf of them and all Pennsylvania prisoners who have served between 50 and 85% of their sentences. Having held that

6. The Commonwealth's reliance on the Parole Board's broad discretion as a complete defense may miss the point; that discretion has always been understood to be limited by constitutional parameters, and the Commonwealth's arguments do not respond to plaintiffs' claim that the Board's discretion has been curtailed to such an extent that application of the alleged new policy to plaintiffs may have violated the Ex Post Facto Clause.

plaintiffs' claims are not devoid of merit, the court nonetheless does not now believe that plaintiffs have demonstrated that their claims are of sufficient merit to warrant appointment of counsel. Plaintiffs have extensive litigation experience in the federal courts, and they have presented their arguments well. The court does not believe they need a lawyer at this stage to provide the information necessary for evaluation of their claims. See Tabron v. Grace, 6 F.3d 147, 155-57 (3d Cir. 1993) (outlining factors court should consider in determining whether to appoint counsel).

C. Class Action

Plaintiffs request the court to certify as a class all Pennsylvania prisoners "imprisoned over their minimum sentence release dates, as well as those refused program adjustments and/or prerelease status as the result of defendants' unconstitutional application of a new classification scheme which effects [sic] all prison inmates convicted of violent crimes, [to whom] defendants have applied [the 85 % policy retroactively]." This class would apparently number over 14,000 members. The court will deny this request, not only because, as the Commonwealth argues, a class action should not be maintained by pro se litigants who cannot adequately represent and protect the interests of the class, Fed. R. Civ. P. 23(a)(4), but also because, even if plaintiffs had counsel, the court does not

believe that they can now describe with any specificity the actual parameters of a class which shares common questions of law or fact. Fed. R. Civ. P. 23 (a)(2). The court also believes that the interests of plaintiffs and any similarly-situated parties will be adequately served by the present litigation.

An order follows.

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O R D E R

AND NOW, this 18th day of December 1997, upon consideration of Plaintiffs' unopposed Motion for Appointment of Counsel (Dkt. # 13); Plaintiffs' unopposed Motion for Reconsideration of this Court's Order dated October 30, 1997 (Dkt. #14); Plaintiffs' Motion for a Temporary Restraining Order (Dkt. #6) and Defendants' Response in Opposition thereto (Dkt. # 18); and, Plaintiffs' Motion for Certification of this Case as a Class Action (Dkt. # 10), Defendants' Response thereto (Dkt. # 19), and Plaintiffs' Amended Reply (Dkt. # 21), it is hereby **ORDERED** that:

(1) Plaintiffs' Motion for Appointment of Counsel is **DENIED**;

(2) Plaintiffs' Motion for Reconsideration of the Court's Order dated October 30, 1997 is **GRANTED**, and Plaintiffs' Motion for a Temporary Restraining Order is reinstated;

(3) Plaintiff’s Motion for a Temporary Restraining Order is **DENIED**; and,

(4) Plaintiffs’ Motion for Certification of this Case as a Class Action is **DENIED**.

BY THE COURT:

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RONALD L. BUCKWALTER, J.