

RENDERED: February 13, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-1920-MR

KENNETH SEWELL

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER, JUDGE
ACTION NO. 97-CI-0279

JAMES C. RANKIN; LINDA F.
FRANK; LUTITIA PAPAILLER;
KENTUCKY PAROLE BOARD

APPELLEES

OPINION

AFFIRMING

*** ** ** ** **

BEFORE: ABRAMSON, KNOPF AND MILLER, JUDGES.

MILLER, JUDGE. Kenneth Sewell appeals pro se from an order dismissing his petition for declaratory judgment. Sewell argues that his constitutional rights were violated when the Kentucky Parole Board (Board) rescinded a previous recommendation that he be released on parole. After reviewing the record and the applicable law, we affirm the decision of Boyle Circuit Court.

Sewell is an inmate serving an eighteen-year sentence for marijuana cultivation, marijuana trafficking, persistent

felony offender second degree, and use and investment of drug-related income. At Sewell's request, in December 1996 the Board voted to meet with him ten months before his regularly scheduled hearing date to consider him for the "Intensive Supervision Program." After a hearing in January 1997, the Board recommended him for parole under this program. However, after receiving additional information, the Board set another hearing for February 1997. At the conclusion of the second hearing, the Board rescinded its earlier recommendation of parole and deferred Sewell for 72 months.

Sewell requested the Board to reconsider its decision. The Board denied his request by letter dated June 19, 1997. On June 13, 1997, Sewell filed a petition for declaratory judgment in Boyle Circuit Court. He claimed that the Board and the individual defendants violated his constitutional right against cruel and unusual punishment, denied him due process, acted arbitrarily, and made procedural errors when it rescinded the recommendation of parole. The defendants filed a response and moved to dismiss. Sewell filed a reply. By order entered July 23, 1997, the circuit court held that the defendants were entitled to judgment as a matter of law and dismissed the action. This appeal followed.

On appeal Sewell again argues that the Board violated his rights under the United States and Kentucky Constitutions by rescinding its previous recommendation of parole. The Board

responds that Sewell received all the process to which he was entitled and that the Board acted within its powers. We agree.

The circuit court dismissed Sewell's action summarily, finding the Board entitled to judgment as a matter of law. We review its decision under the summary judgment standard. See, Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 355 n.1 (1997). Summary judgment for the Board is proper only if Sewell's petition and any supporting materials, construed in light of the entire agency record, do not raise specific, genuine issues of material fact sufficient to overcome the presumption of agency propriety and the Board is entitled to judgment as a matter of law. Ky. R. Civ. P. 56; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991); Smith v. O'Dea, supra.

Sewell's allegations raise no issues of material fact, and the Board was entitled to judgment as a matter of law. When determining a prisoner's parole eligibility, the Board must consider the pertinent information regarding the prisoner and have him appear for interview and hearing. KRS 439.340(2). The Board has adopted administrative regulations with respect to the eligibility of prisoners for parole and the conduct of parole hearings, pursuant to KRS 439.340(3). 501 Ky. Admin. Regs. (KAR) 1:030-1:050. Under the regulatory definitions, parole recommendation means that an inmate may be released if the inmate has an approved parole plan and he has signed his parole certificate; parole rescission means a decision to rescind an inmate's parole

recommendation before actual release; and parole means the release of an inmate. 501 KAR 1:030 §1 (9), (11), (10). "The Board may rescind a parole recommendation any time prior to the release of an inmate on parole." 501 KAR 1:030 §5 (2).

In Kentucky, parole is a matter of legislative grace. Neither the applicable statutes nor regulations create a liberty interest. The Board is not required to give inmates the same due process required to convict and confine. At most, Sewell has a legitimate interest in a decision rendered in conformity with the established procedure and policies, based upon consideration of the relevant criteria. Belcher v. Kentucky Parole Board, Ky. App., 917 S.W.2d 584, 587 (1996). The fact that the Board first recommended Sewell for parole and then later rescinded that decision does not change the analysis. See Jago v. VanCuren, 454 U.S. 14, 21, 102 S. Ct. 31, 36, 70 L. Ed.2d 13 (1981) (holding that because Ohio law creates no liberty interest in parole, an inmate recommended for parole was not entitled to a hearing regarding rescission of parole recommendation).

The record contains only those parts of the administrative proceedings by the Board that the parties were able to obtain and chose to include. From that record, it appears the Board recommended Sewell for parole after the first hearing, obtained additional information relevant to his parole plan, held a second hearing, and then decided to rescind the parole recommendation before he was actually released. Sewell has not

alleged that the Board conducted the first parole hearing improperly, nor has he shown that the Board violated any statute or regulation. Under the applicable statutes, regulations, and Jago, supra, the Board could have rescinded the parole recommendation without a second hearing. The Board's decision was rendered in conformity with the established procedure and policies, and did not constitute cruel and unusual punishment. Belcher, supra. The Board was entitled to judgment as a matter of law. Steelvest, supra, and Smith v. O'Dea, supra.

For the foregoing reasons, the order of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth Sewell, Pro se
Burgin, Kentucky

BRIEF FOR APPELLEES:

Keith Hardison
Frankfort, Kentucky