

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID H. JACOB,

PETITIONER,

vs.

ROSALYN COTTON, et al.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 23-1023

David H. Jacob

Plaintiff - Appellant

v.

Rosalyn Cotton, Chairperson, Nebraska Board of Parole; Mark T. Langan,
Member, Nebraska Board of Parole; Robert Twiss, Member, Nebraska Board of
Parole; Layne Gissler, Member, Nebraska Board of Parole; Virgil J. Patlan,
Member, Nebraska Board of Parole

Defendants - Appellees

Appeal from United States District Court
for the District of Nebraska - Lincoln

Submitted: September 29, 2023
Filed: October 6, 2023
[Unpublished]

Before BENTON, KELLY, and STRAS, Circuit Judges.

PER CURIAM.

Nebraska inmate David Jacob appeals following the district court's¹ adverse grant of summary judgment in his pro se 42 U.S.C. § 1983 action. After careful review of the record and the parties' arguments on appeal, we conclude that the grant of summary judgment was proper. See Morris v. Craddock, 954 F.3d 1055, 1058 (8th Cir. 2020) (grant of summary judgment is reviewed de novo). We also conclude that the district court did not abuse its discretion in denying Jacob leave to amend the complaint. See Pinson v. 45 Dev., LLC, 758 F.3d 948, 951 (8th Cir. 2014) (standard of review). Accordingly, we affirm. See 8th Cir. R. 47B.

¹The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, now retired.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-1023

David H. Jacob

Plaintiff - Appellant

v.

Rosalyn Cotton, Chairperson, Nebraska Board of Parole; Mark T. Langan, Member, Nebraska Board of Parole; Robert Twiss, Member, Nebraska Board of Parole; Layne Gissler, Member, Nebraska Board of Parole; Virgil J. Patlan, Member, Nebraska Board of Parole

Defendants - Appellees

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:20-cv-03107-JFB)

JUDGMENT

Before BENTON, KELLY, and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

October 06, 2023

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAVID H. JACOB,

Plaintiff,

vs.

ROSALYN COTTON, Chairperson,
Nebraska Board of Parole; MARK T.
LANGAN, Member, Nebraska Board of
Parole; ROBERT TWISS, Member,
Nebraska Board of Parole; LAYNE
GISSLER, Member, Nebraska Board of
Parole; and VIRGIL J. PATLAN,
Member, Nebraska Board of Parole;

Defendants.

4:20CV3107

MEMORANDUM AND ORDER

This matter is before the court on Defendants' Motion for Summary Judgment. (Filing 61). Also pending are Plaintiff's Motion to Alter or Amend (Filing 69), Defendants' Motion to Strike Index (Filing 70), Plaintiff's Objection to the Motion to Strike (Filing 72), and Plaintiff's own Motion to Strike (Filing 73). For the reasons that follow, the Motion for Summary Judgment is granted, the Motion to Amend is denied, the Motions to Strike are denied as moot, and Plaintiff's Objection is overruled.

I. BACKGROUND RELEVANT TO ALL PENDING MOTIONS

Plaintiff David H. Jacob ("Plaintiff"), an inmate at the Nebraska State Penitentiary, filed this 42 U.S.C. § 1983 action against Rosalyn Cotton, Layne Gissler, Virgil Patlan, Robert Twiss, Mark Langan, and Habib Olomi, all members of the Nebraska Board of Parole ("Board"). Plaintiff is currently serving a sentence for convictions on three counts of second-degree murder and two counts of use of a firearm to commit a felony.

Plaintiff became eligible for parole in January 2015 and had an offender review interview with the Board in September 2019. After the review, the Board deferred Plaintiff's parole hearing and sent him an Offender Board Review Notice that identified Plaintiff's "prior criminal record" as one reason for the deferral. Plaintiff seeks a declaratory judgment finding that the Board's decision violated Plaintiff's due process rights. (Filing 1 at CM/ECF p. 6.) Plaintiff also seeks prospective injunctive relief prohibiting Defendants from finding Plaintiff had a "prior criminal record" and an order requiring the Board to implement a variety of procedural changes to the Board review process. (*Id.* at CM/ECF p. 7.)

II. MOTION TO ALTER OR AMEND (Filing 69)

A. Background

The court entered its Progression Order in this case on June 1, 2021, requiring, among other deadlines, that all motions to amend pleadings be filed on or before August 10, 2021. (Filing 29 at CM/ECF p. 1.) On August 13, 2021, Plaintiff filed a Motion to Extend Deadline for Filing Amended Pleadings from August 10, 2021, until the end of the discovery process (September 21, 2021) because the incomplete discovery responses he received as of that time "suggested a potentially further constitutional violation in this case" occurring in the Board's November 5, 2020, review of Plaintiff's case. (Filing 40.) On August 17, 2021, the court denied Plaintiff's Motion without prejudice as premature because of Plaintiff's ongoing discovery discussions with Defendants' counsel, a change in Defendants' counsel of record, and because Plaintiff had until September 21, 2021, to compel additional discovery if necessary. (Filing 42.)

Instead of filing another motion for leave to file an amended complaint at the close of discovery, Plaintiff did not file another such motion until December 2, 2021. (Filing 57.) In his Motion, Plaintiff sought to add two claims related to the Board's 2020 and 2021 offender-review deferrals and one Defendant who was involved in these decisions.

The court concluded Plaintiff failed to show good cause to file an amended complaint outside the court's scheduling order under Fed. R. Civ. P. 16(b)(4). (Filing 64 at CM/ECF p. 4-6.) The court reasoned that Plaintiff failed to explain why he waited until December 2, 2021, to file a motion to amend the pleadings when discovery closed on September 21, 2021, even after the court advised Plaintiff that his prior motion to amend was premature until the close of discovery. Accordingly, Plaintiff had not shown good cause to amend the pleadings outside of time. (*Id.* at CM/ECF pp. 4-5.)

Moreover, even if Plaintiff had shown "good cause" to modify the scheduling order to allow him to amend his Complaint, the court would still have denied Plaintiff's motion because of undue prejudice to the Defendants. Discovery was closed on September 21, 2021, Defendants had filed a motion for summary judgment, and the final pretrial conference was only months away. Thus, the court explained, if two additional claims and a Defendant were added, Defendants would need to repeat discovery on the additional claims, perform full discovery on an additional Defendant, and file a new motion for summary judgment. (*Id.* at CM/ECF pp. 5-6.)

Plaintiff now argues the court should alter or amend its Order (Filing 64) denying his Motion to Amend because the court "did not specifically find that the Plaintiff had NOT shown good cause." (Filing 69 at CM/ECF p. 1.) He also argues Defendants would no longer be prejudiced because Plaintiff has filed an additional lawsuit under § 1983 against Defendants, asserting the claims that he would have included in his first amended complaint in this case. Thus, according to Plaintiff, Defendants will have to complete additional discovery anyway.

B. Analysis

Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence. *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006). Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment. *Id.*

Plaintiff has not identified any newly discovered evidence and fails to identify any manifest error of law or fact in the court's previous Order at Filing 64. Despite Plaintiff's statement to the contrary, the court did specifically find that he had not shown good cause to file a motion to amend out of time. (Filing 64 at CM/ECF pp. 4-5.) Moreover, for the reasons described in the court's previous Order, Defendants would still be prejudiced in this case if Plaintiff were permitted to amend his Complaint. Accordingly, Plaintiff has failed to show a manifest error of law and his motion under Rule 59(e) (filing 69) is denied.

III. MOTIONS TO STRIKE AND OBJECTION TO MOTION TO STRIKE

The parties each filed Motions to Strike portions of the opposing party's evidence supporting their positions on Defendants' Motion for Summary Judgment. Thus, the court first considers the Motions to Strike to determine which evidence it will consider relative to Defendants' Motion for Summary Judgment.

A. Defendants' Motion to Strike (Filing 70) and Plaintiff's Objection (Filing 72)

Defendants move to strike portions of Plaintiff's Declaration, (filing 68 at CM/ECF pp. 9-12), that Plaintiff included in his evidence in opposition to summary judgment. Specifically, Defendant argues paragraphs 15-21, 23, and 24 of Plaintiff's Declaration should be stricken because they assert conclusions of law or conclusory findings of fact that are not otherwise supported by evidence in the record. Plaintiff objects to the Motion to Strike, arguing Defendants are attempting to take advantage of Plaintiff's limited knowledge of court procedures and the law.

The court concludes it need not strike the enumerated portions of Plaintiff's Declaration, but it will disregard Plaintiff's assertions that state legal conclusions. "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Courts must disregard portions of affidavits made without personal knowledge or that attempt to assert legal conclusions as fact. *Howard v. Columbia Pub. School Dist.*, 363 F.3d 797, 801 (8th Cir. 2004). Paragraphs 15-21, 23, and 24

of Plaintiff's Declaration do not state facts; they assert purely legal arguments. Thus, although the court will not strike these paragraphs, they will not be considered as admissible facts in opposition to summary judgment.

B. Plaintiff's Motion to Strike (Filing 73)

Plaintiff moves to strike paragraphs 5, 9, 10, and 23 from Layne Gissler's Declaration (filing 62-7) and paragraphs 5, 12, 13, and 23 from Robert Twiss' Declaration (filing 62-8). Unlike paragraphs 15-21, 23, and 24 of Plaintiff's Declaration, these paragraphs are not purely legal arguments. These statements purport to be based on Gissler's and Twiss' personal knowledge or understanding about the actions they took individually, or the actions of the Board. Accordingly, Plaintiff's Motion to Strike is denied.

IV. MOTION FOR SUMMARY JUDGMENT (Filing 61)

A. Summary Judgment Procedure

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

This court's local rules further specify that "[t]he moving party must include in the brief in support of the summary judgment motion a separate statement of material facts," which "should consist of short numbered paragraphs, each containing pinpoint references to affidavits, pleadings, discovery responses,

deposition testimony (by page and line), or other materials that support the material facts stated in the paragraph.” NECivR 56.1(a) (underlining in original). “The statement must not contain legal conclusions.” *Id.*

The opposing party’s brief must include “a concise response to the moving party’s statement of material facts.” NECivR 56.1(b)(1). “Each material fact in the response must be set forth in a separate numbered paragraph, must include pinpoint references to affidavits, pleadings, discovery responses, deposition testimony (by page and line), or other materials upon which the opposing party relies, and, if applicable, must state the number of the paragraph in the movant’s statement of material facts that is disputed.” *Id.*

A party’s failure to comply with these requirements can have serious consequences: The moving party’s “[f]ailure to submit a statement of facts” or “[f]ailure to provide citations to the exact locations in the record supporting the factual allegations may be grounds to deny the motion” for summary judgment. NECivR 56.1(a) (underlining omitted). On the other hand, “[p]roperly referenced material facts in the movant’s statement are considered admitted unless controverted in the opposing party’s response.” NECivR 56.1(b)(1) (underlining omitted).

In accordance with the court’s local rules, Defendants’ brief (Filing 63) includes “a separate statement of material facts about which the moving party contends there is no genuine issue to be tried and that entitles the moving party to judgment as a matter of law.” NECivR 56.1(a)(1). The material facts below, appearing in numbered paragraphs, are those that have not been properly disputed by Plaintiff pursuant to the court’s local rules. Plaintiff did not directly respond to several of Defendants’ numbered statements of fact. Accordingly, those facts are considered admitted. *See* NECivR 56.1(b). To the extent admissible, the court has considered Plaintiff’s Index in Opposition to Summary Judgment. (Filing 68.) However, as noted above, the court has not considered Plaintiff’s legal conclusions and arguments asserted as facts because such statements are not admissible to oppose summary judgment. Although Plaintiff is proceeding pro se, he is bound by and must comply with all local and federal procedural rules. NEGenR 1.3(g).

B. Relevant Undisputed Material Facts

1. Plaintiff is, and at all relevant times was, a person in the custody of the Nebraska Department of Correctional Services (“NDCS”). He is, and at all relevant times was, incarcerated at the Nebraska State Penitentiary. (Filing 1 at CM/ECF p. 1; Filing 62-5 at CM/ECF p. 2, ¶ 6.)
2. Cotton is, and at all relevant times was, a member and Chair of the Board. (Filing 1 at CM/ECF p. 1; Filings 22, 23, 24, 25, 26, 27.)
3. Gissler is, and at all relevant times was, a member and Vice Chair of the Board. (Filing 1 at CM/ECF p. 2; Filings 22, 23, 24, 25, 26, 27; Filing 62-7 at CM/ECF pp. 1-2, ¶¶ 3, 6.)
4. Patlan was, at all relevant times, a member of the Board. (Filing 1 at CM/ECF p. 2; Filings 22, 23, 24, 25, 26, 27.)
5. Twiss is, and at all relevant times was, a member of the Board. (Filing 1 at CM/ECF p. 2; Filings 22, 23, 24, 25, 26, 27.)
6. Langan is, and at all relevant times was, a member of the Board. (Filing 1 at CM/ECF p. 2; Filings 22, 23, 24, 25, 26, 27.)
7. The parties agree the court has jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff’s Complaint alleges a violation of his 14th Amendment right to due process. (Filing 1 at CM/ECF p. 2.)
8. The parties agree this court is the proper venue for this action pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim occurred in the District of Nebraska. (Filing 1 at CM/ECF pp. 1-5.)
9. Plaintiff is currently serving an indeterminate sentence for three counts of second-degree murder and two counts of use of a firearm to commit a felony (collectively referred to in this Memorandum and Order as the “Criminal Convictions”). (Filing 1 at CM/ECF p. 2; Filing 62-5 at CM/ECF p. 2, ¶ 7; Filing 62-6.)

10. Plaintiff's inmate file does not contain any criminal convictions other than the Criminal Convictions described above. (*See* Filing 62-5 at CM/ECF p. 2, ¶ 8; Filing 62-6.)

11. Plaintiff became eligible for parole in January 2015. (Filing 62-3 at CM/ECF p. 2, ¶ 7; Filing 1 at CM/ECF p. 2.)

12. On September 5, 2019, Plaintiff had an annual "offender review interview" with members of the Board (hereinafter "2019 Offender Review Interview"). (Filing 1 at CM/ECF p. 2; Filing 22, 23, 24, 25, 26, 27; Filing 62-3 at CM/ECF p. 2, ¶¶ 8-11; Filing 62-7 at CM/ECF p. 2, ¶ 8; Filing 62-8 at CM/ECF p. 2, ¶ 8.)

13. An offender review interview is a review before at least two members of the Board to determine whether an inmate should be scheduled for a parole hearing. (Filing 62-3 at CM/ECF p. 2, ¶ 9; Filing 62-7 at CM/ECF p. 2, ¶ 9; Filing 62-8 at CM/ECF p. 3, ¶ 12; Filing 62-2.)

14. Gissler and Twiss were present for Plaintiff's 2019 Offender Review Interview. (Filing 62-3 at CM/ECF p. 2, ¶¶ 10-11; Filing 62-7 at CM/ECF p. 2, ¶ 8; Filing 62-8 at CM/ECF p. 2, ¶¶ 8-9; Filing 62-10.)

15. Cotton, Patlan, and Langan were not present for Plaintiff's 2019 Offender Review Interview. (Filing 62-3 at CM/ECF p. 2, ¶ 12; Filing 62-7 at CM/ECF p. 3, ¶ 12; Filing 62-8 at CM/ECF p. 2, ¶ 10.)

16. Cotton, Patlan, and Langan did not assist with or participate in Plaintiff's 2019 Offender Review Interview. (Filing 62-3 at CM/ECF p. 3, ¶ 15; Filing 62-7 at CM/ECF p. 3, ¶¶ 12, 17; Filing 62-8 at CM/ECF pp. 2-3, ¶¶ 10, 17.)

17. On the date of the 2019 Offender Review Interview, NDCS and the Board were not under a correctional system overcrowding emergency, as stated in Neb. Rev. Stat. § 83-962. (Filing 62-7 at CM/ECF p. 2, ¶ 7; Filing 62-8 at CM/ECF p. 2, ¶ 7.)

18. During the 2019 Offender Review Interview, Plaintiff had the opportunity to discuss matters relevant to the Board's decision, including his underlying criminal convictions. (Filing 62-7 at CM/ECF p. 3, ¶ 18; Filing 62-8 at CM/ECF p. 3, ¶ 18.) Plaintiff asserted that only his three convictions for second degree murder were addressed at the 2019 Offender Review Interview. (Filing 62-10, Interrogs. 2-3, at CM/ECF p. 1-2.)

19. After the 2019 Offender Review Interview, Gissler and Twiss deferred Plaintiff's request for parole until September 2020. (*See* Filing 62-7 at CM/ECF p. 3, ¶ 19; Filing 62-8, at CM/ECF p. 3, ¶ 19.) Gissler and Twiss both reasoned that release on parole would undermine the serious nature of the Criminal Convictions underlying Plaintiff's current sentence. (Filing 62-7 at CM/ECF p. 3-4, ¶ 20; Filing 62-8, at CM/ECF p. 4, ¶ 20.)

20. Plaintiff received an "Offender Board Review Notice," dated September 5, 2019, informing him of the deferral (the "2019 OBR Notice"). (Filing 1 at CM/ECF p. 3; Filing 62-4.)

21. The 2019 OBR Notice states the following two reasons as the basis for Plaintiff's deferral:

The nature/circumstances of your offense(s) indicates that an early release would depreciate from the seriousness of your crime and promote disrespect for the law.

Due to your prior criminal record.

(Filing 1 at CM/ECF p. 3; Filing 62-4.)

C. Analysis

1. Summary Judgment Standard of Review

Summary judgment should be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). It is not the court's function to weigh evidence

in the summary judgment record to determine the truth of any factual issue. *Schilf v. Eli Lilly & Co.*, 687 F.3d 947, 949 (8th Cir. 2012). In passing upon a motion for summary judgment, the district court must view the facts in the light most favorable to the party opposing the motion. *Dancy v. Hyster Co.*, 127 F.3d 649, 652-53 (8th Cir. 1997).

In order to withstand a motion for summary judgment, the nonmoving party must substantiate allegations with “sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy.” *Moody v. St. Charles Cnty.*, 23 F.3d 1410, 1412 (8th Cir. 1994) (quoting *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992)). “A mere scintilla of evidence is insufficient to avoid summary judgment.” *Id.* Essentially, the test is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

A party opposing summary judgment “may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial, and must present affirmative evidence in order to defeat a properly supported motion for summary judgment.” *Ingrassia v. Schafer*, 825 F.3d 891, 896 (8th Cir. 2016) (quoting *Anderson*, 477 U.S. at 256-57 (quotations omitted)); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-60 (1970).

2. Due Process During the 2019 Offender Review Interview

The court first considers Plaintiff’s argument that the 2019 Offender Review Interview failed to comply with the procedural protections mandated by *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979). While there is no federal constitutional right to be paroled, *id.* at 7, state laws “may create liberty interests in parole release that are entitled to protection under the Due Process Clause.” *Bd. of Pardons v. Allen*, 482 U.S. 369, 371 (1987). This court has noted “that Nebraska law creates a liberty interest in parole worthy of minimal protection under the Due Process Clause.” *Matthies v. Houston*, No. 4:12CV3069, 2013 WL 527771, at *2 (D. Neb. Feb. 11, 2013) (citing *Greenholtz*, 442 U.S. at 12). When

state law creates a liberty interest, “the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures.” *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011).

Because Plaintiff’s argument relies heavily on the *Greenholtz* decision, a review of that case is helpful. In *Greenholtz*, the Supreme Court had to decide whether the Due Process Clause applied to Nebraska’s procedures for discretionary parole, and, if so, whether such procedures met constitutional requirements. 442 U.S. at 3. In relevant part, Nebraska’s procedures required that prisoners receive an informal hearing and parole eligibility would be determined based on the inmate’s records and any statements or letters presented by the inmate, and a short statement describing why parole was denied. *Id.* at 6. The Supreme Court concluded that a prisoner subject to Nebraska’s parole statute received adequate process when he was allowed an opportunity to be heard and was provided a statement of reasons why parole was denied. *Id.* at 16. The Court held that the United States Constitution “does not require more.” *Id.*

The undisputed facts show Plaintiff’s 2019 Offender Review Interview complied with the due process requirements described in *Greenholtz*. First, the evidence establishes the Board gave Plaintiff the opportunity to be heard on his Criminal Convictions during the 2019 Offender Review Interview. (Filing 62-7 at CM/ECF p. 3; Filing 62-8 at CM/ECF p. 3; Filing 62-10, Interrogs. 2-3, at CM/ECF pp. 1-2.) Thus, he was given an opportunity to present evidence on his own behalf and to ensure the records considered related to his case. Second, Gissler and Twiss confirmed they based their decision to defer parole on Plaintiff’s Criminal Convictions and indicated this reasoning with the reference to Plaintiff’s “prior criminal record” in the OBR Notice. (Filing 62-7 at CM/ECF p. 4; Filing 62-8 at CM/ECF p. 4.) Thus, the OBR Notice provided Plaintiff a written statement of reasons as to why his parole hearing was deferred.

Additionally, and particularly relevant to this case, the Supreme Court noted that when “the Board defers parole after the initial review hearing, it does so because

examination of the inmate's file and the personal interview satisfies it that the inmate is not yet ready for conditional release." *Greenholtz*, 442 U.S. at 14-15. Thus, to comply with due process at the Board's initial interview hearing, an inmate must be permitted "to appear before the Board and present letters and statements on his own behalf." *Id.* at 15. The inmate thus has an opportunity "to insure that the records before the Board are in fact the records relating to his case" and "to present any special considerations demonstrating why he is an appropriate candidate for parole." *Id.*

The undisputed evidence shows the Board provided Plaintiff an opportunity to be heard and ensure the record considered related to his case. During the 2019 Offender Review Interview, there is no dispute that Plaintiff had the opportunity to discuss matters relevant to the Board's decision, including his underlying criminal convictions. (Filing 62-7 at CM/ECF p. 3; Filing 62-8 at CM/ECF p. 3.) Plaintiff's answers to discovery show that he was given an opportunity to address the criminal convictions at the 2019 Offender Review Interview. (See Filing 62-10, Interrogs. 2-3, at CM/ECF p. 1-2.) In sum, Plaintiff was given the opportunity to appear and to ensure the records considered related to his case. Therefore, the 2019 Offender Review Interview met the due process requirements articulated in *Greenholtz*.

Plaintiff seeks to avoid this result by arguing that Nebraska's procedure no longer complies with the requirements of *Greenholtz*. Plaintiff implies that Nebraska procedure is constitutionally deficient because it does not provide legal means to challenge the Board's factual findings. (Filing 67 at CM/ECF p. 4.) However, the *Greenholtz* decision did not mandate any sort of appellate review, nor did it condition due process on the availability of review. See *Greenholtz*, 442 U.S. at 16; see also *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (noting "[t]here is, of course, no constitutional right to an appeal.").

Plaintiff also argues that the Board's deferral at his 2019 Offender Review Interview required a majority vote by the Board. Section 83-1,111(2) requires that the Board render its "decision" on the offender's release on parole by a majority vote. Neb. Rev. Stat. § 83-1,111(2). Plaintiff argues that because only Gissler and

Twiss determined his parole should be deferred, the Board failed to make a decision by a majority vote.

As used in § 83-1,111(2), the word “decision” is a term of art. As the Nebraska Supreme Court explained, “[w]hen the board ‘defers the case for later reconsideration,’ it delays making a determination regarding parole pending further consideration, and the board may order such reconsideration at any time.” *Van Ackeren v. Nebraska Bd. of Parole*, 558 N.W.2d 48, 52 (Neb. 1997). Thus, when the Board defers parole, it delays making its decision under § 83-1,111(2). Thus, a majority vote of the Board is not required, though the offender is entitled to “a parole review at least once a year until a release date is fixed” under § 83-1,111(4). Because the Board deferred Plaintiff’s parole decision, a majority vote was not required.

In sum, there is no evidence that creates a triable issue as to whether the Board failed to comply with due process under the guidance in *Greenholtz*. Plaintiff was provided an opportunity to appear and review the record considered by the Board. Under *Greenholtz*, the United States Constitution “does not require more.” 442 U.S. at 16. Accordingly, the 2019 Offender Review Interview complied with due process.

3. “Prior Criminal Record”

One of the listed reasons the Board deferred his parole was “[d]ue to [Plaintiff’s] prior criminal record.” (Filing 62-4.) Because Plaintiff did not have convictions prior to his Criminal Convictions, Plaintiff argues he could not have a “prior criminal record.” Thus, he argues the Board violated his 14th Amendment right to due process when it deferred parole on the basis of Plaintiff’s “prior criminal record.”

Under Neb. Rev. Stat. § 83-1,114, the Board is required to order an eligible parolee’s release unless the Board finds parole should be deferred because:

- (a) There is a substantial risk that he or she will not conform to the conditions of parole;

(b) His or her release would depreciate the seriousness of his or her crime or promote disrespect for law;

(c) His or her release would have a substantially adverse effect on institutional discipline; or

(d) His or her continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his or her capacity to lead a law-abiding life when released at a later date.

Neb. Rev. Stat. § 83-1,114(1). In making this determination, the Board must consider its own decision guidelines and several factors, including “[t]he offender’s prior criminal record, including the nature and circumstances, dates, and frequency of previous offenses.” Neb. Rev. Stat. § 83-1,114(2)(j).

The phrase “prior criminal record” is not defined in the Nebraska Treatment and Corrections Act, Neb. Rev. Stat. § 83-170 *et seq.* (“NTCA”), nor has it been interpreted by Nebraska courts. Specific to this case, Nebraska law has not specifically declared whether “prior criminal record” as used in § 83-1,114(2)(j) includes the offenses for which the offender is currently incarcerated. Plaintiff argues that the word “prior” means the Board may only consider offenses other than those for which he is currently incarcerated.

Plaintiff’s interpretation is contrary to the Supreme Court’s direction in *Greenholtz*. In describing the Board’s procedures, the Supreme Court explained that when the Board defers parole after an initial review hearing, “it does so because examination of the inmate’s file and the personal interview satisfies it that the inmate is not yet ready for conditional release.” *Greenholtz*, 442 U.S. at 14–15. “The parole determination therefore must include consideration of what the entire record shows up to the time of the sentence, *including the gravity of the offense in the particular case.*” *Id.* at 15 (emphasis added). Thus, the Supreme Court’s interpretation of Nebraska procedures contemplated that the initial Board review interview would consider an offender’s entire record, including the offense for which the offender was incarcerated.

The phrase “prior criminal record,” as used by the Board in the 2019 OBR Notice review, is consistent with its use in the NTCA and the Supreme Court’s guidance in *Greenholtz*. The Board was required to examine all convictions prior to the date of the parole determination, including the underlying Criminal Convictions. Accordingly, there was no constitutional violation to defer Plaintiff’s parole on the basis of his prior criminal record.

IT IS THEREFORE ORDERED that:

1. Defendants’ Motion for Summary Judgment (Filing 61) is granted;
2. Plaintiff’s Motion to Alter or Amend (Filing 69) is denied;
3. Defendants’ Motion to Strike Index (Filing 70) is denied as moot;
4. Plaintiff’s Objection to the Motion to Strike (Filing 72) is overruled;
5. Plaintiff’s own Motion to Strike (Filing 73) is denied; and
6. A separate judgment will be entered.

Dated this 10th day of June, 2022.

BY THE COURT:



Richard G. Kopf
Senior United States District Judge

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-1023

David H. Jacob

Appellant

v.

Rosalyn Cotton, Chairperson, Nebraska Board of Parole, et al.

Appellees

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:20-cv-03107-JFB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 14, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Neb.Rev.Stat. §83-1,111 Committed offender; hearing before the majority of the Board of Parole; when; board to render decision concerning parole; written notification of denial; release date set; case deferred; later hearing; release only by board. (1976)

(1) Every committed offender shall have a hearing before a majority of the members of the Board of Parole within sixty days before the expiration of his minimum term less than reductions. Every committed offender shall be interviewed within sixty days prior to the final parole hearing by a member of the Board of Parole. The hearing shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.

(2) The board shall render its decision regarding the committed offender's release on parole within a reasonable time after the hearing. The decision shall be by majority vote of the board. The decision shall be based on the entire record before the board, which shall include the opinion of the member who presided at the hearing. If the board shall deny parole, written notification listing the reasons for such denial and the recommendations for correcting deficiencies which cause the denial shall be given to the committed offender within thirty days following the hearing.

(3) If the board fixes the release date, such date shall not be more than six months from the date of the committed offender's parole hearing, or from the date of the last reconsideration of his case, unless there are special reasons for fixing a later release date.

(4) If the board defers the case for later consideration, the committed offender shall be afforded a parole hearing at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at any time.

Neb.Rev.Stat. §83-1,111 Committed offender; release on parole; review procedures; release date set; case deferred; reconsideration. (Reissue 2008)

(1) Every committed offender shall be interviewed and have his or her record reviewed by two or more members of the Board of Parole or a person designated by the board within sixty days before the expiration of his or her minimum term less any reductions as provided in section 83-1,110. If in the opinion of the reviewers, the review indicates the offender is reasonably likely to be granted parole, the Board of Parole shall schedule a public hearing before a majority of its members. At such hearing the offender may present evidence, call witnesses, and be represented by counsel. If in the opinion of the reviewers, the review indicates the offender should be denied parole, the offender may request an additional review by a majority of the members of the board. A review by the majority of the members of the board may be conducted not more than once annually. Any hearing and review shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.

(2) The board shall render its decision regarding the committed offender's release on parole within a reasonable time after the hearing or review. The decision shall be by majority vote of the board. The decision shall be based upon the entire record before the board which shall include the opinion of the person who conducted the review. If the board shall deny parole, written

notification listing the reasons for such denial and the recommendations for correcting deficiencies which cause the denial shall be given to the committed offender within thirty days following the hearing.

(3) If the board fixes a release date, such date shall be not more than six months from the date of the committed offender's parole hearing; or from the date of the last reconsideration of his or her case, unless there are special reasons for fixing a later release date.

(4) If the board defers the case for later reconsideration, the committed offender shall be afforded a parole review at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at anytime.

(5) The release of a committed offender on parole shall not be upon the application of the offender but by the initiative of the Board of Parole. No application for release on parole made by a committed offender or on his or her behalf shall be entertained by the board. Nothing herein shall prohibit the Director of Correctional Services from recommending to the board that it consider an individual offender for release on parole.

Neb.Rev.Stat. §83-1,112 Committed offender; eligible for parole;
Parole plan of offender.

(1) Each committed offender eligible for parole shall, in advance of his or her parole hearing, have a parole plan in accordance with the rules of the Board of Parole. Whenever the board determines that it will facilitate the parole hearing, it may furnish the offender with any information and records to be considered by it at the hearing.

(2) An offender shall be permitted to advise with any person whose assistance he or she desires, including his or her own legal counsel, in preparing for a hearing before the Board of Parole.

Neb.Rev.Stat. §83-1,114(1)&(2) Board; deferment of parole;
grounds. (2018)

(1) Whenever the Board of Parole considers the release of a committed offender who is eligible for parole, it shall order his or her release unless it is of the opinion that his or her release should be deferred because:

(a) There is a substantial risk that he or she will not conform to the conditions of parole;

(b) His or her release would depreciate the seriousness of his or her crime or promote disrespect for the law;

(c) His or her release would have a substantially adverse effect on institutional discipline; or

(d) His or her continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his or her capacity to lead a law-abiding life when released at a later date.

(2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

(a) The offender's personality, including his or her maturity, stability, and sense of responsibility and any apparent development in his or her personality which may promote or hinder his or her conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

- (d) The offender's intelligence and training;
- (e) The offender's family status and whether he or she has relatives who display an interest in him or her or whether he or she has other close and constructive associations in the community;
- (f) The offender's employment history, his or her occupational skills, and the stability of his or her past employment;
- (g) The type of residence, neighborhood, or community in which the offender plans to live;
- (h) The offender's past use of narcotics or past habitual and excessive use of alcohol;
- (i) The offender's mental or physical makeup, including any disability or handicap which may affect his or her conformity to law;
- (j) The offender's prior criminal record, including the nature and circumstances, recency, and frequencies of previous offenses;
- (k) The offender's attitude toward law and authority;
- (l) The offender's conduct in the facility, including particularly whether he or she has taken advantage of the opportunities for self-improvement, whether he or she has been punished for misconduct within six months prior to his or her hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience;

(n) The risk and needs assessment completed pursuant to section 83-192; and

(o) Any other factors the board determines to be relevant.

Neb.Rev.Stat. §83-1,125.01(1)&(2) Person under jurisdiction of Board of Parole; file; contents; confidential; access by Public Counsel; information accessible through Criminal Justice information system.

(1) The Board of Parole and the Division of Parole Supervision may maintain an individual file for each person who is under the jurisdiction of the Board of Parole. Such file may be maintained electronically and shall include, when available and appropriate, the following information on such person:

- (a) Admission summary;
- (b) Presentence Investigation Report;
- (c) Classification Report and recommendation;
- (d) Official records of conviction and commitment along with any earlier criminal records;
- (e) Progress reports and admission-orientation reports;
- (f) Reports of any disciplinary infractions and their dispositions;
- (g) Risk and Needs assessment;
- (h) Parole plan and Parole placement and investigation worksheets;
- (i) Decision guideline scores;
- (j) Parole case plan;
- (k) Parole progress reports;
- (l) Arrest and violation reports;
- (m) Parole proceedings orders and notices;
- (n) Other documents related to Parole Supervision;
- (o) Correspondence; and

(p) Other pertinent data concerning his or her background, conduct, associations, and family relationships.

(2) Any decision concerning release on or revocation of parole or imposition of sanctions shall be made only after the individual file has been reviewed. The contents of the individual file shall be confidential unless discussed in connection with a public hearing and shall not be subject to public inspection except by court order for good cause shown. The contents of the file shall not be accessible to any person under the jurisdiction of the Board of Parole. A person under the jurisdiction of the board may obtain access to his or her medical records by request to the provider pursuant to sections 71-8401 to 71-8407 notwithstanding the fact that such medical records may be a part of his or her parole file. The Board and the Division of Parole Supervision have the authority to withhold decision guideline scores, risk and needs assessment scores, and mental health and psychological records of a person under the jurisdiction of the board when appropriate.

Neb.Rev.Stat. §83-962 Correctional system overcrowding emergency;
Governor; declaration; when; effect.

(1) Until July 1, 2020, the Governor may declare a correctional system overcrowding emergency whenever the Director certifies that the Department's inmate population is over one hundred forty percent of design capacity. Beginning July 1, 2020 a correctional system overcrowding emergency shall exist whenever the Director certifies that the Department's inmate population is over one hundred forty percent of design capacity. The Director shall so certify within thirty days after the date on which the population first exceeds one hundred forty percent of design capacity.

(2) During a correctional system overcrowding emergency, the board shall immediately consider or reconsider committed offenders eligible for parole who have not been released on parole.

(3) Upon such consideration or reconsideration, and for all other consideration of committed offenders eligible for parole while the correctional system overcrowding emergency is in effect, the board shall order the release of each committed offender unless it is of the opinion that such release should be deferred because:

(a) The board has determined that it is more likely than not that the committed offender will not conform to the conditions of parole;

(b) The board has determined that release of the committed offender would have a significant and quantifiable effect on

institutional discipline;

(c) The board has determined that there is a very substantial risk that the committed offender will commit a violent act against a person.

(4) In making the determination regarding a risk that a committed offender will not conform to the conditions of parole, the board shall take into account the factors set forth in subsection (2) of section 83-1,114.

(5) The board shall continue granting parole to offenders under this section until the Director certifies that the population is at operational capacity. The Director shall so certify within thirty days after the date on which the population first reaches operational capacity.