

CHARLES A. GRIFFIN,)	
)	
Petitioner/Appellant,)	Appeal No.
)	01-A-01-9511-CH-00533
v.)	
)	Davidson Chancery No.
CHARLES TRAUGHBER, COLIS NEWBLE,)	95-3554-II
DAWN CHASE, ROSE HILL, JIM GRISHAM,)	
JOHN MCGRANAHAN, and TENNESSEE)	
BOARD OF PAROLES,)	
)	
Respondents/Appellees.)	

<p>FILED</p> <p>June 28, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

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REVERSED AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

This is an appeal by petitioner/appellant, Charles A. Griffin, from the trial court's order granting summary judgment in favor of respondents/appellees, Charles Traughber, Colis Newble, Dawn Chase, Rose Hill, Jim Grisham, John McGranahan, and Tennessee Board of Paroles ("the Board").

Petitioner is a convicted sex offender. On 13 June 1994, Jim Grisham, the hearing official, conducted Petitioner's parole hearing. Thereafter, Petitioner received two documents. The first was the inmate copy of the Notice of Board Action Parole Release Hearing. This document came from a carbonless duplicate form. The form contained four pages each of which were a different color and went to a different file or person. It appears that the sheets were not properly aligned when the hearing official completed the form because many of the notations on Petitioner's copy are below the designated spaces. As a result, the letters DR, standing for disciplinary reports, and PV, standing for complete vocational program, are circled in the "Reasons for Decline" portion of Petitioner's copy. In this portion of the top copy of the form, the letters SO, standing for seriousness of offense, and PS, standing for complete sex offender program are circled. Beneath the circled items are spaces to write in the appropriate abbreviations. In this portion of Petitioner's copy, the hearing official wrote SO and PS. The second document received by Petitioner was a form letter from John McGranahan, Institutional Parole Officer II. The letter stated as follows: "The final disposition of your grant/revocation hearing is: Decline; Review 6/96; Disciplinary Reports; Complete Sex Offender Program."

Following the denial of his parole, Petitioner requested an appeal hearing. He based his request on the following grounds: 1)

significant procedural errors by the hearing official; 2) misconduct on the part of the hearing official; and 3) new information that was not available at the time of the hearing. Three members of the Board of Paroles adopted the hearing official's conclusions and denied the appeal. On 18 October 1994, Petitioner received a form letter from Colis Newble, Parole Hearing Director, which stated that the parole board had denied Petitioner's request for an appeal. The reasons for the denial, as indicated by the letter, were that there was no proof of significant new information or evidence that was not available to Petitioner at the time of the 13 June hearing and that there was no misconduct on the part of the hearing official. The letter failed to address Petitioner's claim of significant procedural errors even though there was a space specifically designated for that issue.

On 21 November 1994, Petitioner filed a petition for writ of certiorari in the Davidson County Chancery Court. Petitioner made numerous allegations claiming Respondents acted improperly. After receiving the petition, Respondents filed a motion on 19 December 1994 requesting a thirty day extension for the filing of their response. In an order dated 3 February 1995, the court granted Respondents' motion.

On 21 December 1994, Petitioner filed a "motion to stay decision pending first discovery requests propounded to the Respondents by the petitioner" and attached his first discovery requests. Respondents failed to comply with Petitioner's discovery requests. As a result, Petitioner sent Respondents a letter asking them to comply. When this did not work, Petitioner filed a motion to compel discovery and an affidavit on 2 March 1995.

On 6 March 1995, Respondents filed a motion to dismiss, their only response to any of Petitioner's pleadings. They alleged that

the court lacked subject matter jurisdiction because the petition was not timely. In support of the motion, Respondents filed a memorandum and an affidavit given by Teresa Thomas, staff attorney, Tennessee Board of Paroles. In response, Petitioner denied Respondents' allegations and filed a memorandum of law.

On 31 July 1995, the chancery court entered an order which stated as follows:

The case is before the Court on the petitioner's motions to stay decision pending completion of discovery, motion for directed response, and motion to compel discovery. Also before the Court is respondent's motion to dismiss based upon the assertion that the petition was untimely filed and is otherwise beyond the scope of review permitted under the writ of certiorari. Since the respondent relies on an affidavit in support of its motion, the Court will treat the motion as a motion for summary judgment.

The court then held that the petition was timely, that Petitioner had not alleged "facts which would support a claim that the Board acted illegally, fraudulently, or arbitrarily in refusing to grant [Petitioner] parole or in denying his request for an appeal hearing," and that "Petitioner seeks to attack the correctness of the Board's decision, an issue beyond the scope of judicial review." As a result of these holdings, the court granted Respondents' motion for summary judgment and denied Petitioner's motions finding that the issues were moot.

Petitioner filed a notice of appeal on 21 August 1995. In his brief, Petitioner presented five issues. Taken together, these issues ask whether the chancery court erred in granting summary judgment in Respondents' favor.

A court shall grant summary judgment when there is "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). "In making this determination, the court is to view

the evidence in a light favorable to the nonmoving party and allow all reasonable inferences in his favor." *Id.* The petition at issue seeks a common law writ of certiorari as to the Board's adoption of the hearing official's decision and to its denial of Petitioner's request for an appeal. "The scope of review under the common law writ, however, is very narrow. It covers only an inquiry into whether the Board has exceeded its jurisdiction or is acting illegally, fraudulently, or arbitrarily." *Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871, 873 (Tenn. App. 1994). Thus, the issue before the chancery court was two-fold. First, the court had to determine whether there were any genuine issues of fact material to the issue of whether the Board exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily, and second, if the court determined that there were no genuine issues of material fact, it had to decide whether the law entitled Respondents to a judgment. The court's order, however, did not address these issues directly. Instead, the order reveals that the court decided the law entitled Respondents to a judgment despite any issues of fact. To explain, because the court held that it lacked jurisdiction and that Petitioner failed to state a cause of action, it concluded that Respondents should prevail as a matter of law. Neither of these holdings, in the context of this case, depend on the degree of factual dispute. They are legal issues.

"The allegations of a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers. . . ."

Baxter v. Rose, 523 S.W.2d 930, 939 (Tenn. 1975). The petition at issue clearly alleged that Respondents acted arbitrarily and illegally. Further, it did not simply attack the correctness of the Board's decision, but attacked the Board's means of reaching that decision. A review of the petition reveals that Petitioner made seven allegations of improper conduct on the part of the

Board. These were as follows: 1) the Board failed to address Petitioner's claim that the hearing official committed significant procedural errors; 2) the hearing official and the Board incorrectly required Petitioner to complete the sex offender program as required by Tennessee Code Annotated section 41-21-235(b); 3) the hearing official and the Board denied Petitioner his statutory right to a prerequisite psychological/psychiatric evaluation as required by Tennessee Code Annotated section 40-28-116(a)(2); 4) the hearing official and the Board relied on nonexistent disciplinary reports; 5) the Board violated Tennessee Code Annotated section 4-5-107 which prohibits a board from making a final determination of a contested case unless a majority of the board is present; 6) the Board failed to conduct its proceeding in accordance with Tennessee Code Annotated title 8 chapter 44; and 7) the Board and the hearing official violated Tennessee Code Annotated section 8-16-304 by refusing to receive into evidence a duly notarized letter from the victim. Six of these allegations support a claim that the Board acted illegally, fraudulently, or arbitrarily and attack the means by which the Board reached its decision.

Three of the allegations describe conduct which is illegal on its face. Allegations three, five, and seven allege that the Board violated certain statutes. The violation of a statute by an administrative body or officer constitutes illegal conduct. Further, the allegations not only state a cause of action, but they also assert that the means used by the Board in reaching its decision were improper. This is different than challenging the correctness of the decision. **Powell**, 879 S.W.2d at 873.

The conduct in the first allegation, if proven, is also illegal. The Board can not arbitrarily decide which complaints of an inmate it will address when determining whether to grant a

request for appellate review. Tennessee Code Annotated section 40-28-105(d) provides that "a review will be conducted if there is new evidence or information that was not available at the time of the hearing, or if there are allegations of misconduct by the hearing official that are substantiated by the record or if there were significant procedural errors by the hearing official." TENN. CODE ANN. §40-28-105(d) (1990). As applied to the present case, the Board would have acted illegally if it failed to address Petitioner's allegations of procedural errors because it is required to conduct a review if such errors occurred.¹

The second allegation describes facts which, if true, constitute illegal conduct and attack the Board's method of reaching its decision. Specifically, Petitioner claims that the hearing official denied him parole because he had not completed the sex offender treatment program as required by Tennessee Code Annotated section 41-21-235(b). Petitioner alleged that the Board could not use this statute as a requirement for granting him parole because the law was ex post facto and the Board could not apply it retroactively. Clearly, the retroactive application of an ex post facto law is illegal. TENN. CONST. art. I, §11; *see Kaylor v. Bradley*, 912 S.W.2d 728 (Tenn. App. 1995) (explaining the relation between ex post facto laws and parole).

Petitioner also alleged that the Board's application of the statute violated a stipulation that it had entered into in another case. This court recently stated:

The plain wording of the stipulations approved by the United States District Court limits the board's ability to rely on Tenn. Code Ann. § 41-21-235(b). Under no circumstances can it use an inmate's failure to complete a treatment program for sex offenders as grounds to deny

¹ Under Tennessee Code Annotated section 4-5-315, an administrative agency may, in the exercise of its discretion, "review some but not all of the issues. . . ." TENN. CODE ANN. §4-5-315(a)(2)(A) (1991). This statute, however, does not apply to the Board of Paroles. TENN. CODE ANN. §4-5-106(c) (1991).

parole until it has fully developed and instituted the treatment program required by Tenn. Code Ann. § 41-21-235(a). Even after it institutes this program, it can only apply Tenn. Code Ann. § 41-21-235(b) to inmates who were incarcerated after the program was instituted.

Dalton v. Tennessee Board of Paroles, No. 01-A-01-9601-CH-00029, slip op. at 6 (Tenn. App. 8 May 1996). In this case, the Board relied on completion of the sex offender program when it denied Petitioner parole. Because the stipulation prevented such reliance, the Board's actions were arbitrary and illegal.

This case is similar to ***Dalton*** for another reason. In ***Dalton***, the Board denied Mr. Dalton parole because he failed to complete the sex offender program and because he "'violated position of trust as father figure.'" ***Id.*** at 7-8. After concluding that the Board could not rely on the sex offender statute, we held that such reliance may be harmless error if the Board had other adequate and independent grounds for declining parole. ***Id.*** at 7. We then addressed the Board's other basis for denying Mr. Dalton parole and concluded that it was insufficient because it was not among the grounds listed in the Board's regulations. ***Id.*** at 7-8. As a result, we could not determine, based on the record of the Board's decision, whether the Board could have declined Mr. Dalton parole absent the errors. Thereafter, we ordered the trial court to remand the case to the Board for further review. ***Id.*** at 8.

In this case, there were at least two grounds for denying Petitioner parole. We know that one of these grounds was the completion of the sex offender program; however, the record does not establish the other grounds for the Board's decision. As explained previously, Petitioner received two documents regarding the denial of his parole. One listed disciplinary reports as the other reason, while the second listed disciplinary reports and seriousness of the offense as the other reasons. Both of these

grounds fit easily into the Board's regulations. TENN. COMP. R. & REGS. 1100-1-1-.06(1) (1986). Nevertheless, we are unable to determine if the Board's decision can stand on these other grounds because we do not know the actual basis for the Board's decision. Accordingly, the trial court should hear evidence on this issue to determine whether the Board acted arbitrarily when it denied Petitioner parole.

The fourth allegation also alleges illegal and arbitrary conduct. Illegal conduct includes "the making of findings of fact for which there is no legally sufficient basis." Ben H. Cantrell, *Review of Administrative Decisions by Writ of Certiorari in Tennessee*, 4 MEM. ST. U. L. REV. 19, 28 (1973). Petitioner alleged that the hearing official relied on Petitioner's disciplinary reports when deciding to deny Petitioner parole. As proof of this, Petitioner attached the form letter from John McGranahan, which listed disciplinary reports, and Petitioner's copy of the Notice of Board Action Parole Release Hearing, which has DR, disciplinary reports, clearly circled. Petitioner then alleged that his institutional record did not contain any disciplinary reports and attached a copy of that record. Thus, Petitioner alleged that the Board based its decision on an unsupported finding of fact. This is illegal conduct. **Id.** Finally, the allegation does not challenge the intrinsic correctness of the decision, but simply asserts that the Board could not have relied on unsupported findings when making its decision.

Unlike the other allegations, Petitioner's remaining claim, number six, fails to state a cause of action. In this allegation, Petitioner claimed that the Board violated Tennessee's Open Meetings Act, Tennessee Code Annotated sections 8-44-101 to -108, when it failed to hold an open meeting in regard to its decisions to adopt the hearing official's recommendations and to deny

Petitioner's request for an appeal. It is the opinion of this court, however, that there were no meetings for the Board to open to the public. This court recently came to the same conclusion in a similar case. **Arnold v. Tennessee Board of Paroles**, No. 01-A-01-9508-CH-00375, slip op. at 5-7 (Tenn. App. 8 May 1996).

The Open Meetings Act provides that "[a]ll meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of Tennessee." TENN. CODE ANN. § 8-44-102 (1993). The term meeting as used in the above section means "the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter." *Id.* § 8-44-102(b)(2). A key term in the definition of "meeting" is "convening." The word convene means to come together or to assemble. BLACK'S LAW DICTIONARY 330 (6th ed. 1990). The Board, in this case, did not convene nor was it required to convene when it adopted the hearing official's recommendations and when it denied Petitioner's request for an appeal.

There is no evidence of a meeting. Petitioner does not allege that the board members, assigned to review the hearing official's recommendations, came together to decide or to deliberate the issue. Moreover, Petitioner stated in his petition that the Board did not convene a meeting to address either the hearing official's recommendations or his request for an appeal. Finally, Petitioner failed to cite this court to any authority in support of the proposition that the Board must conduct meetings when addressing these issues. The Open Meetings Act does not prescribe when governing bodies must conduct meetings. Instead, it defines when meetings must be open to the public. Further, Tennessee Code Annotated section 40-28-105, which sets forth the basic procedures of the Board, provides in pertinent part as follows:

(d) A majority of members of the board shall constitute a quorum for official administrative business. The chairman of the board may designate individual parole board members and appoint hearing officers who shall be authorized to conduct hearings, take testimony and make proposed findings of fact and recommendations to the board regarding a grant, denial, revocation or rescission of parole. Such findings and recommendations shall be reduced to writing and reviewed by board members who shall adopt, modify or reject the recommendations. No person shall be paroled nor shall the parole of any person be denied, revoked or rescinded without the concurrence of three (3) board members. . . . Inmates whose parole has been revoked or rescinded, or who have been denied parole, or whose grant of parole has been rescinded, may request an appellate review by the board. . . . An appellate request will be screened by a board member or designee and a review will be conducted if there is new evidence or information that was not available at the time of the hearing, or if there are allegations of misconduct by the hearing official that are substantiated by the record or if there were significant procedural errors by the hearing official.

TENN. CODE ANN. § 40-28-105(d) (1990). This section does not require the Board to meet when it reviews the written findings and recommendations of the hearing official. In addition, the section provides that a single board member shall screen a request for appellate review.² Because there is no evidence that the Board met or that it was required to meet, Petitioner failed to state a cause of action.

For the foregoing reasons, the chancery court incorrectly granted summary judgment as to all issues except that of whether the Board violated the Open Meeting Act. As previously stated, the trial court denied Petitioner's motions finding that the summary judgment determination rendered the issues presented in those motions moot. Because this court has concluded that the grant of summary judgment to Respondents was incorrect, we must also conclude that the motions are no longer moot and that the trial court should address the motions on remand. Finally, although we do not address the lack of discovery issue, we note that there is

² One of Petitioner's allegations is that the Board violated Tennessee Code Annotated section 4-5-107 when it allowed a single board member to review his request for appellate review. Although we previously stated that this allegation states a cause of action, we do not address the merits of the claim at this time.

both federal and Tennessee case law to support the proposition that summary judgment is improper when the nonmoving party has not had a sufficient opportunity to conduct discovery. This proposition is especially true when such discovery is necessary to properly oppose the motion. *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231-32 (6th Cir. 1994) (construing Rule 56 of the Federal Rules of Civil Procedure); *Costello, Porter, Hill, Heisterkamp & Bushnell v. Providers Fidelity Life Ins. Co.*, 958 F.2d 836, 838-39 (8th Cir. 1992) (construing Rule 56 of the Federal Rules of Civil Procedure); *Shaw v. Donnell*, No. 7761, 1988 WL 74650, at *3 (Tenn. App. 1988) (construing Rule 56 of the Tennessee Rules of Civil Procedure); *Sammons v. Rotroff*, 653 S.W.2d 740, 745 (Tenn. App.), *cert. denied*, 464 U.S. 860, 104 S. Ct. 186, 78 L. Ed. 2d 165 (1983)(construing Rule 56 of the Tennessee Rules of Civil Procedure); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d. 265, 273 (1986)(construing Rule 56 of the Federal Rules of Civil Procedure); *Byrd*, 847 S.W.2d at 213 (quoting *Celotex Corp.*, 106 S. Ct. at 2552 and construing Rule 56 of the Tennessee Rules of Civil Procedure).

For the foregoing reasons, the judgment of the chancery court is reversed and the case remanded for further necessary proceedings. Costs of appeal are taxed to Respondents, Charles Traughber, Colis Newble, Dawn Chase, Rose Hill, Jim Grisham, John McGranahan, and Tennessee Board of Paroles.

SAMUEL L. LEWIS, JUDGE

CONCUR :

BEN H. CANTRELL, J.

WILLIAM C. KOCH, JR., J.