

ID: 229

Spring 2008 - Administrative Law...

Dean Doskow

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**University of La Verne College of Law**

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The Parole Board is an agency granted judicial power for inmates by the statute.

A. Initial Review

In this case, procedural DP will be one argument the inmate could make b/c of the adjudicatory nature of the action by the board. Londoner held that DP requires a hearing where there is a small group of persons exceptionally affected on individual grounds. Here, the board action affects one person, the inmate. The prisoner's liberty interest is exceptionally affected by being given the opportunity for earlier release on parole. Thus, adjudication is found here b/c of the way the parole application affects the prisoner's present right to early release from prison.

First Q: Is there a right to this application

Does DP apply?

This is the first inquiry courts make to determine if there is a violation. Procedural Due process (DP) is the contextual fairness required before the government effects an immediate deprivation of a life liberty or property interest. One question necessary to ask is whether there is a deprivation involved. Here, the deprivation would be the opportunity for further review by the board of the application. Also, the other deprivation would be an actual permanent deprivation of the prisoner's liberty from prison (although the prisoner is still subject to terms and conditions of parole, he or she would have more liberty outside of jail).

Another question to ask deals with the property interest involved. To begin, a person must have more than a unilateral expectation of a right - there must be an entitlement to the interest. Roth. Cases have held that there are various sources which provide an entitlement: Constitution (bill of rights), Constitutional caselaw, agency rules, legislation (either federal or state), and common law (defamation, property interests). Here, the state statute provides a property interest in parole as long as the prisoner is not a detriment to the him/herself or the community and if the best interests of society so require.

? note liberty interest?

Is there a liberty interest also? The state statute also arguably provides a liberty interest in physical autonomy.

What Does DP require?

Courts use the Mathews balancing test to determine the answer to this question. The first question is the private interest involved in the official action. Here, the private interest involves both a property and liberty interest - freedom from prison, subject to parole. The second part of the test is the risk of an erroneous deprivation and the value of adding procedural safeguards to the system to decrease the risk. Here, there are the 2 conditions, which can be classified as agency rules. The issue here is that there is no further consideration by the Board of the application if the conditions are not met. But the agency must be given some latitude b/c of its expertise in the parole field. Thus, because the conditions are depending on the prisoner's own actions that put in him jail, (a) does not provide the risk of an erroneous deprivation. Nor does (b), because the opportunity for review is still granted at a later date as long as the required time has passed.

The third part of the question inquires about the government interest and the burden being placed, either administratively or fiscally on the addition of the safeguards. The government interest involved is protection of the prisoner and community from additional harm. The Board seems to be an impartial decisionmaker b/c they did not try the prisoner. The issue is whether the application provides an adequate opportunity to be heard. Should the prisoner have the right to orally present his or her side of the story in a hearing? Should counsel be required for the hearing? Should the timing of the hearing happen before the decision is made? It seems that the administrative burden would be too great to require any additional safeguards at this point b/c the 2 conditions are reasonable and clear. Also, the prison system is already clogged with prisoners and additional oral hearing would clog the system. But the prisoner could argue that the less prisoners there are in prison, the more efficient prison system we would have. Thus, there are good arguments for both sides, but it seems like it be too burdensome on the government and DP does not require an oral hearing at this point. The safeguards are sufficient to prevent erroneous decision. Also, depending on the state, the prisoner may be able to bring a civil action after release if there was an erroneous deprivation.

### B. Possible merit

All of the above rules apply in this setting also. The prisoner still has the same property and liberty interest granted by state statute. Thus, DP applies. Regarding the Mathews test, the private interest involved is the ability of to get out early on parole and avoid an erroneous decision by the Board. Also, concerning the Mathews balancing test second question, an issue that arises here is that of who makes the final decision (unbiased decisionmaker). The prisoner could argue that the input from the warden where the prisoner is incarcerated (does the warden like/dislike the prisoner) combined with the input of the DA would lead to a biased decision. But the process involved here merely takes into account the input from these parties, combined with any written material the prisoner submitted. The Board is the ultimate decisionmaker and is unbiased. Its only mandate is to release the prisoner if in the best interests of society.

The government interest again is protection of the prisoner and community from additional harm. The issue again arises here whether the prisoner should get an oral hearing. Really only one case has granted the right to orally present one's side of the story. <sup>deprivation</sup> Goldberg. Goldberg involved welfare benefits and the destitute circumstances of beneficiaries. This case is distinguishable from Goldberg though and no oral hearing is necessary b/c it is a criminal setting and the interests are different (liberty v. property). Again, it would be too burdensome at this point to require more of the government b/c the risk of erroneous deprivation is slight given the substantial review the Board goes through in its decision making process. They review everybody's submission.

As long as the decision of the board contains sufficient findings for judicial review, then it will pass constitutional muster. If there is any judicial review, the court would give deference to the agency b/c of the agency expertise and it acted reasonably and not "arbitrary and capricious".

2)

The EEOC is an executive agency within the meaning of the APA and is therefore subject to its provisions. 551(1). Promulgation of the manual is rulemaking, not

adjudication b/c of the future effect it will have on parties desiring the benefits. 551(4-7)  
Thus, rulemaking is involved.

A. Enforcement of the Act.

Ultimately the agency may proceed to enforce the manual's rules, but this will be subject to judicial review, pursuant to 706. The statute grants the the agency executive enforcement power to determine who qualifies for benefits.

The first issue is whether there is an intelligible principle granting the agency this power, without violating the non-delegation doctrine (ultimately a separation of powers issue).

In Whitman, the court reaffirmed the notion that all that is required for the legislation is an intelligible principle, not a determinate criterion, which grants the agency its power.

Here, the language of the enacting statute is not given. As long as the legislative policy is clear and the conditions readily observable then it will pass the intelligible principle standard and not violate non-delegation. Interestingly, one justice believes the court should just admit that legislative delegation is okay. The interesting thing about this issue now is that there doesn't seem to be any legislative delegation of power, only ~~rule~~ enforcement. So promulgation of the rules via the Manual may actually be contrary to the organic legislation. Ultimately, it's a matter of interpretation by the courts, who say what the law is. Marbury.

? The staff wrote the Manual

No

Ultimately the agency may proceed to enforce the manual's rules, but this will be subject to judicial review, pursuant to 706. Normally, the court gives great deference to enforcement decisions of an agency. The groups argument is concerning the meaning of the organic statute, that the agency is incorrect in its interstitial interpretation of the terms "impairment" and "major life activities". The agency could argue that its interpretation allows it to promulgate the rules via the manual and obviously that its interpretation is opposite the groups. Ultimately, it's a matter of interpretation by the courts, who say what the law is. Marbury. The court determines the macro meaning of the legislation by looking at the legislative history and the agency will determine the micromeaning in its application, interstitial meaning, and development of sub-standards. The agency's interpretation must follow the Chevron test: first, looking to the language

to determine if there is ambiguity or legislative clarity and second looking to the reasonableness of the interpretation. As long as the agency reviews the statutory history and is in line with it then it will not be acting arbitrarily. Also, there will be no abuse of discretion in enforcement of the manual as long as the agency provides a reasonable basis for its decision to use the manual.

The burden of proof is substantial evidence and this means that the one challenging the decision must determine that the board acted unreasonably.

Also, the agency must give prompt notice to the groups about its decision to use the Manual.

#### B. Advising employers.

It is recommended that the EEOC advise employers despite the objections. Generally, the agency is entitled to administer its legislative program however it sees fit as long as there are no procedural violations. It's necessary to look to the APA, organic legislation of the agency and agency rules and DP to determine a violation.

Retroactivity- If the employers are able to rely on the manual the interested parties would not successfully argue an abuse of discretion on the basis of retroactivity. Courts are not fond of retroactive rules. Due to the agency's expertise, complexity of the issues, and caseload it may be in the best interests for the agency to go the rulemaking route and promulgate the manual's standards. It is recommended that the EEOC advise employers despite the objections b/c the court gives great deference to agency administration of its legislative program.

Another issue is the process involved notice or publication of the intended manual's rules.

#### C. Promulgation as rule

No The difference would probably be that the agency would proceed on an adjudicatory basis. An agency has the discretion whether to promulgate rules either adjudicatively or legislatively. VT Yankee. If manual were not promulgated as a rule, then 554 may be applicable if the trigger language is present (opportunity for hearing on the record). Trigger language then leads to the applicability of 556, 557. There is rarely trigger

language for formal adjudications, so this would likely have to be done in informal adjudication. As long as there are findings promulgated via an order, then the record would be sufficient for review by a court. The agency officials may be required to subject themselves to in-depth questioning as to the motive behind their decision if the findings are inadequate, but this must be a narrow inquiry pursuant to Morgan. Oyerton Park. If 554 applies, as long as there is an impartial decision maker involved in the initial decision that is not involved in investigative or prosecuting functions then there will not be a problem. If there were a formal hearing, then hearsay evidence is admissible. 2. The ALJ may take official notice of facts, based on the agency's technical expertise.

#### D. Necessary procedure

Here, section 553 controls the rulemaking process. If the manual were promulgated as a rule, then certain notice and comment restrictions would ~~not~~ apply. Here, the manual rules don't fall under (a) exemptions bc it is not a military or foreign affair or matter related to agency management or personnel or to public property, loans, grants, or contracts. However, there does seem to be involved the issue granting benefits and in this case nothing more is required than publication of the rule. It would be exempt from the rest of 553, 556, 557 requirements.

However, if it wasn't classified as a benefit then the next step is to analyze the applicability of (b). Assuming the organic legislation does not fall under the exemptions here, then (b)'s procedures are necessary to follow. There is no mention of either a hearing or notice requirement so the next step is to analyze (A) and (B). The manual is not an interpretive rule b/c it has a binding effect on parties seeking benefits - it is thus an substantive rule. It is not likely to have policy statements either. Good cause only exists where it is impracticable, unnecessary, or contrary to public interest. This also would not exist under the circumstances b/c the public is interested in ensuring that applicants for benefits get their due benefits. The agency must publish notice of its intended rules (the manual) subject to (b)'s requirements. It needs statement of the time, place, and nature of the public rulemaking proceedings, reference to the legal authority, and the terms/substance of the proposed rule or a description of the subjects issues involved. The agency would have to likely notify the public of the group's

interpretation of the legislation. This procedure is the most critical - notice is the key here to allow this happen. The agency can do whatever it wants after parties have commented on their side of the story, provided notice requirements are met.

Thus, the next step is to analyze the the notice and comment requirements of (c). The public would have input on their side of the story. The groups could submit their arguments, so long as they had notice. An agency may promulgate rules that establish general facts to cut back on the burden of adjudication pursuant to the Storer doctrine, so long as there are no factual disputes. So the fact that the agency wrote the manual to apply generally to parties is sufficient. *OK*

**END OF EXAM**