

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-12935

STEPHEN FOSTER MICHAEL GOMES, PETER KYRIAKIDES, RICHARD O'ROURKE,
STEVEN PALLADINO, MARK SANTOS, DAVID SIBINICH, MICHELLE TOURIGNY,
MICHAEL WHITE, FREDERICK YEOMANS, & HENDRICK DAVIS,
Plaintiffs

v.

CAROL MICI, Commissioner of the Massachusetts Department of Correction, GLORIANN
MORONEY, Chair, Massachusetts Parole Board, THOMAS TURCO, Secretary of the
Executive Office of Public Safety and Security, & CHARLES BAKER, Governor of the
Commonwealth of Massachusetts,
Defendants

**DEFENDANT MASSACHUSETTS PAROLE BOARD'S
MOTION TO DISMISS**

The Massachusetts Parole Board (“the Board”), a defendant in this action, submits this motion to dismiss the plaintiffs’ complaint (“the complaint”).

The plaintiffs, a group of ten individuals incarcerated in both Department of Correction facilities and county houses of correction,¹ bring this action seeking declaratory judgment and injunctive relief based upon claims that the conditions of their confinement violate both federal and state constitutions.

Each of the claims asserted against the Board fails as a matter of law and must be dismissed pursuant to Mass. R. Civ. P. 12 (b)(6) (insofar as it applies to proceedings before the Single Justice Under Mass. R. Civ. P. 1) or Mass. R. App. P. 15 (insofar as it applies to proceedings before the full Court) for failure to allege any fact suggesting an entitlement to relief as against the Board. *E.g., Burbank Apartments Tenant Ass’n v. Kargman*, 474 Mass. 107, 116 (2016).

¹ The complaint indicates that one plaintiff, Mark Santos, is in fact not in custody (Complaint, ¶ 16).

A violation of the Eighth Amendment or Article 26 of the Massachusetts Declaration of Rights occurs when conditions of an inmate's confinement present "a substantial risk of serious harm" and "prison officials acted with "deliberate indifference" to inmate health or safety." *Torres v. Comm'r of Corr.*, 427 Mass 611, 613-614 (1998); *accord Good v. Comm'r of Corr.*, 417 Mass. 329, 335-336 (1994). Here, the factual allegations in the complaint focus on the conditions of confinement in correctional facilities as regarding the 2019 novel Coronavirus ("COVID-19"), and the legal claims assert that those conditions pose a substantial risk to which prison officials are deliberately indifferent.

The Board is an executive branch agency independent of the Department of Correction. G.L. c. 27, § 4. Its statutory mandate is to determine which inmates are appropriate for release on parole, when that release occurs, and under what conditions.² G.L. c. 27, § 5. The Board is statutorily bound to release an individual on parole only when it determines "there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." G.L. c. 127, § 130. The Board does not have jurisdiction over correctional facilities generally. Nor does it have responsibility for, or authority to change, the conditions of confinement in those facilities.

With respect to the claim for declaratory judgment that the conditions of confinement are unconstitutional, the plaintiffs cannot plausibly suggest an entitlement to relief as to the Board because the Board cannot affect those conditions. *See, e.g., Torres*, 427 Mass. at 613-614 (emphasis added) (successful Eighth Amendment claim requires showing that "*prison officials acted*" deliberately indifferent); *see also* G.L. c. 231A, § 2

² The Board has no jurisdiction over inmates held pursuant to G.L. c. 123, § 35, as they are not serving sentences. *See* G.L. c. 27, § 5.

(declaratory judgment procedure available to resolve allegation that a specific agency practice is in violation of constitution or statute). Similarly the plaintiffs' claim that those purportedly unconstitutional conditions violate their civil rights pursuant to 42 U.S.C. § 1983 must be dismissed as to the Board because there is no claim that the Board has acted to create those conditions or caused inmates to be subjected to them.

To the extent that the plaintiffs claim that parole will relieve them of the alleged unconstitutional condition, the Board can only release inmates to parole supervision according to specified statutory criteria. The plaintiffs have not alleged facts suggesting that the Board has impermissibly denied them release. Moreover, plaintiffs cannot be entitled to relief from the Board because there is no nexus between the plaintiffs' purportedly unconstitutional confinement and the purpose for parole as established by the Legislature in statute. *See Haverly v. Comm'r of Corr.*, 440 Mass. 1, 8-9 (2003) (equitable order awarding good time credits because of illegal conditions of confinement was improper because there was no connection between the wrong suffered and the statutory purpose for those credits); *see id.* at 8 (equitable remedies must comport with statutory and constitutional requirements).

This case presents a unique set of procedural and temporal circumstances. The Board files this motion to dismiss in response to the plaintiffs' complaint. With the plaintiffs' assent, the Board requests leave to file a supplemental memorandum of law in support of the motion to dismiss by 4:00 P.M., on Wednesday, April 29, 2020.

Respectfully submitted,
THE MASSACHUSETTS PAROLE BOARD,
By its attorney,

PAMELA MURPHY
Special Assistant Attorney General

/s/ Pamela Murphy

Pamela Murphy
General Counsel
BBO# 665721
Massachusetts Parole Board
12 Mercer Road
Natick, MA 01760
508-650-4502
Pamela.A.Murphy@mass.gov

Dated: April 24, 2020

CERTIFICATE OF SERVICE

I, Pamela Murphy, hereby certify, under the penalties of perjury, that on April 24, 2020, I caused a true and accurate copy of the foregoing to be filed and served via electronic filing, and served copies upon the following counsel by email to:

Elizabeth Matos, lmatos@plsma.org
James R. Pingeon, jpingeon@plsma.org
Bonita Tenneriello, btenneriello@plsma.org
David Milton, dmilton@plsma.org
Michael Horell, mhorrell@plsma.org
Robert Quinan, Robert.quinan@mass.gov
Susan Terrey, Susan.terrey4@state.ma.us
Stephen Dietrick, Stephen.dietrick@state.ma.us
Nancy White, Nancy.white@state.ma.us
M. Patrick Moore, pmoore@hembar.com
Vanessa Arslanian, Varslanian@hembar.com
Ryan McManus, McManus@hembar.com

/s/

Pamela Murphy, BBO No. 665721
Special Assistant Attorney General