

COMMONWEALTH OF KENTUCKY
48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 21-CI-00443

ROBERT CALVIN LANGDON,

PLAINTIFF

v.

OPINION and ORDER

**ANDY BESHEAR, in his official capacity as
Governor of the Commonwealth of Kentucky**

DEFENDANT

This matter is before the Court on the *Motion to Dismiss* the Second Amended Complaint filed by Governor Andy Beshear. The Plaintiff has filed this action seeking injunctive relief against the Governor, alleging that the Governor acted improperly by treating previously submitted applications for civil rights restorations as invalid, and by denying those applications without any explanation. *Complaint*, at 1-2. The Governor argues that he is not constitutionally mandated to provide a statement of reason for restoration application denials and that he has not denied or effectively denied any application submitted to a prior Governor. *Motion to Dismiss*, at 2. Upon review of the record, and otherwise being sufficiently advised, the Court hereby **GRANTS** Defendant's *Motion to Dismiss* for the reasons more fully stated below.

BACKGROUND

The Plaintiff is a convicted felon who has applied to the Governor's Office to have his voting rights restored during the administration of former Governor Bevin. In Kentucky, individuals convicted of a felony have their right to vote taken away. Ky. Const. § 145. However, those individuals may have their civil right to vote restored by executive pardon. *Id.* As a result, the individual must apply through the Department of Corrections, which then sends the applications to the Office of the Governor. *Complaint*, at 5-6. As a matter of law, applicants

cannot be under felony indictment, have and pending warrants, charges, or indictments, or owe any outstanding restitution. KRS § 196.045(2)(b). Governor Beshear, upon taking office in 2019, issued an Executive Order, which *automatically* restored voting rights to individuals who were convicted of nonviolent Kentucky felonies upon their discharge or completion of sentence. *Plaintiff's Complaint*, at 6. Other persons with felony convictions, not included in the Governor's Executive Order, must still apply for restoration of rights.

The Plaintiff falls in the category of individuals who were convicted of a felony and submitted a restoration of rights applications to the prior Governor, Matt Bevin. Now, the Plaintiff argues that the Defendant considers previously submitted applications denied, Defendant failed to notify him and give him reasons for his denial, and that Plaintiff is entitled to notice of his need to reapply. *See generally Complaint*. In response, the Governor argues that the Plaintiff has failed to allege facts that violate Ky. Const. § 77 & § 2. *Motion to Dismiss*, at 4.

STANDARD OF REVIEW

When a court considers a motion to dismiss under Kentucky Rule of Civil Procedure (“CR”) 12.02, “the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true.” *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987) (citation omitted). Thus, the Court should only grant a motion to dismiss when it “appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (quoting *James v. Wilson*, 95 S.W.3d 875, 883–84 (Ky. App. 2002)).

ANALYSIS

1. Has the Defendant violated Section 77 of the Kentucky Constitution?

The Defendant receives his power to grant pardons from Section 77 of the Kentucky Constitution. Section 77 states, “He shall have power to remit fines and forfeitures, commute sentences, grant reprieves and pardons, except in case of impeachment, and he shall file with each application therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection.” Ky. Const. § 77. This power, reserved to the Governor, is discretionary and no restrictions are placed on the authority. *Fletcher v. Graham*, 192 S.W.3d 350, 358 (Ky. 2006). Additionally, the Kentucky Court of Appeals has found that Section 77 of the Kentucky Constitution does not establish specific procedures to be followed when the Governor exercises his power. *Chandler v. Patton*, 2008 WL 4952109, *1, 2007-CA-002222-MR (Ky. App. Nov. 21, 2008). Rather, the Governor’s decision to grant a pardon is extremely broad and discretionary, and it is uniquely within the personal judgment and discretion of each incumbent Governor.

The Plaintiff interprets Section 77 of the Kentucky Constitution to mandate the Governor to give a statement of reasons for the denial of an executive pardon as well as the denial of an executive pardon by a former Governor. The Plaintiff argues that the phrase “for his decision thereon” mandates a statement of reasons for both a grant and denial of rights. *Plaintiff’s Response*, at 12. In addition, the Plaintiff cites the Kentucky Supreme Court case *Baze v. Thompson*, 302 S.W.3d 57 (Ky. 2010). Plaintiff cites the Court’s observation, “[t]here exist only two constitutionally mandated requirements under Section 77: that the movant file an application for clemency with the Governor; and that the Governor file with each application a statement of the reasons for his decision.” *Baze*, 302 S.W.3d at 60.

When reading the text of Section 77 of the Kentucky Constitution, the text only refers to the “grant[ing]” of pardons and does not mention anywhere denial of pardons. Ky. Const. § 77.

In the context of granting pardons, the Governor is mandated to give a statement of reason for his decision. *See* Ky. Const. § 77. The “decision thereon” is referring to the decision to grant a pardon and not the denial of the pardon. The reason for this seems clear. When the Governor *denies* a pardon, or fails to act on a pardon application, he leaves the sentence imposed by the judicial system, which has been subject to due process and appellate review, in place. But when a Governor *grants* a pardon, and overrides the sentence imposed by the judicial system, the public is entitled to an explanation of the reasons.

Thus, it is only the action of the Governor in granting a pardon that triggers the requirement for an explanation. When the Governor takes no action, as is the case here, there is no constitutional requirement for an explanation under Section 77 of the Kentucky Constitution. Reading Section 77 as a whole, the Court finds no basis for the Plaintiff’s argument that each pardon application, even those which are not acted on, must be explained by the Governor. This is confirmed by Kentucky Supreme Court case law. When the *Baze* Court discussed the constitutional mandate of filing a statement of reasons for his decision in accordance with Section 77, the only decision to be made, in the context of Section 77, was the granting of clemency. *See Baze*, 302 S.W.3d at 60; Ky Const. § 77. When the Governor makes the decision to grant a pardon, then a statement of reasons for the decision is required.

Moreover, here the Plaintiff seeks to impose on a new Governor the obligation to explain the inaction of his predecessor. While Section 77 of the Kentucky Constitution makes no reference to a statement of reasons for denial, it surely does not task a current Governor to give reasons for a prior Governor’s inaction or denial. As for notice of a decision, Section 77 of the Kentucky Constitution does not mandate that any Governor, current or former, provide an individual notice of a denial. Rather, a statement of reasons for granting a pardon is required.

The Plaintiffs claims that the Defendant violated Section 77 of the Kentucky Constitution must fail. The Plaintiff is not entitled to relief under any set of the facts, which could be proven in support of his claim.

2. Did the Defendant violate Section 2 of the Kentucky Constitution?

Secondly, the Plaintiff has broadly alleged violations of due process rights. The Plaintiff argues that without notice of the Governor's decision to deny an application that the applicants will continue to believe that their applications are valid and are pending consideration. *Plaintiff's Response*, at 9. Section 2 of the Kentucky Constitution states, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. § 2. Section 2 of the Kentucky Constitution entitles each individual to due process under the law.

The Plaintiff has no constitutional right to a pardon, or to any particular process for consideration of a pardon. The granting of a pardon is up to the broad discretionary power of the Governor. The only due process right provided for by Section 77 of the Kentucky Constitution is the right to file an application for an executive pardon and to have a statement of reasons provided for that pardon. Nothing more is guaranteed by Section 77 and Section 2 of the Kentucky Constitution. Additionally, the Defendant has not taken any steps towards the Plaintiffs application because the only application submitted was to former Governor, Matt Bevin. It is odd to argue that the Defendant has violated the Plaintiff's due process rights when the Plaintiff has not even submitted an application for restoration of civil rights to Governor Beshear. Rather, Governor Beshear has invited applications to be submitted to him for consideration of pardons, without taking any action on the Plaintiff's prior application to

Governor Bevin. Plaintiff's claims that the Defendant has violated his due process rights must fail as Plaintiff is not entitled to any relief under the provable set of facts.

As the U.S. Court of Appeals for the Sixth Circuit explained Section 77 of the Kentucky Constitution in *In re Sapp*:

It in no way established specific procedures to be followed and imposes no standards, criteria, or factors that the Governor need consider in exercising his power. Thus, in Kentucky, the decision to grant clemency is left to the Governor's unfettered discretion and the state has not made the clemency process an integral part of the state's overall adjudicative process.

In re Sapp, 118 F.3d 460, 465 (6th Cir. 1997).

The Kentucky Supreme Court has held that the Governor's public announcement, prior to the filing of a clemency petition, that he will not grant clemency does not violate due process. *McQueen v. Patton*, 948 S.W.2d 418 (Ky. 1997). Plaintiff has not yet filed a clemency petition with Governor Beshear, as required by the *McQueen* case. But clemency in Kentucky is a matter of executive grace, and it is not governed by due process, nor is it subject to judicial review. Under Sections 27 and 28 of the Kentucky Constitution, the judicial branch of government lacks jurisdiction to regulate the Governor's exercise of purely executive discretion, even when gubernatorial action or inaction has a direct impact on compliance with other constitutional mandates. *See e.g. Geveden v. Commonwealth*, 142 S.W.3d 170 (Ky. App. 2004). The executive pardon power in Kentucky is extremely broad, and the Kentucky Supreme Court has emphatically rejected attempts by the judiciary to subject the exercise of that power to even the most minimal judicial scrutiny, even in cases where the exercise of the pardon power collides with the historic role of an independent grand jury. *See Fletcher v. Graham*, 192 S.W.2d 350 (Ky. 2006).

This Court must reject the Plaintiff's attempt to require a new Governor to carry over and act upon all pardon petitions that were pending but unresolved at the time of the change of administrations. Because the pardon power is uniquely addressed to the personal discretion of each individual Governor, any pardon petition that was unresolved at the end of a Governor's administration, must be re-filed and presented to the new Governor if the convicted person wants to continue pursue the request for a pardon. The burdens of the Governor's office are great enough in dealing with the problems that arise each day. There is no basis for the judiciary to impose the additional burden of requiring individual consideration and action on all past pardon applications that were unresolved by prior Governors. The clock ran out on any pardon application pending at the time the prior Governor's administration ended. Any person seeking to renew such a pardon request needs to simply re-file a pardon application with the new Governor.

CONCLUSION

Upon review of the record, the Court concludes that Governor Beshear did not violate Section 77 or Section 2 of the Kentucky Constitution, and he was under no obligation to continue processing or responding to the pardon applications filed under Governor Bevin that were not acted on prior to the end of the Bevin Administration. Section 77 of the Kentucky Constitution requires the Governor to file a statement of reasons for *granting* a pardon and contemplates nothing more. Additionally, the Plaintiff's due process rights have not been violated as the Kentucky Constitution guarantees him, and others similarly situated, nothing more than the right to file an application for a pardon. Accordingly, the Defendant's *Motion to Dismiss* is **GRANTED**. This Order is final and appealable and there is no just cause for delay.

SO ORDERED, this 12th day of October, 2021.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

DISTRIBUTION:

Hon Ben Carter
Kentucky Equal Justice Center
222 South 1st St., Suite 305
Louisville, KY 40202

Hon. Jon Sherman
Hon Michelle Kanter Cohen
Hon. Cecilia Aguilera
Fair Elections Center
1825 K St. NW, Ste. 450
Washington, D.C. 20006

Hon. Travis Mayo
Hon. Taylor Payne
Office of the Governor
700 Capital Avenue, Suite 106
Frankfort, KY 40601

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