

The Trial Court concluded that the Community's decision to accept Crooks as a member mooted a number of his original claims relating to his lack of membership status. In his brief and at oral argument, counsel for appellant did not dispute the Trial Court's decision in this respect, and we therefore do not reach those issues on appeal. The question appellant did raise in the Trial Court, and which he now raises on appeal, is whether his allegation that the Community improperly delayed consideration of his application states a claim upon which relief may be granted under the Due Process Clause of the Indian Civil Rights Act. 25 U.S.C. § 1302(8). Because we agree with the Trial Court that under Community law Crooks does not have a cognizable property interest in having his application acted upon within a certain period of time, we affirm.

II. DISCUSSION

Our review of an order dismissing a complaint under Rule 12(b) is de novo. Smith et al. v. SMS(D)C et al., No. 011-96 (SMS(D)C Ct. App. Aug. 7, 1997) (08/07/97 Order). Accepting the factual allegation in his complaint as true, we ask whether Crooks has stated a claim for which relief may be granted.

In order to invoke the protection of the Due Process Clause of the ICRA, a party must first show a liberty of property interest which has been interfered with. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989); Ragan v. Lynch, 113 F.3d 875, 876 (8th Cir. 1997). Only then does this Court inquire whether the procedures attendant upon that deprivation were constitutionally sufficient. Kentucky Dept. of Corrections, 490 U.S. at 460. Crooks argues that his status as an applicant for Community membership created a property right was interfered with by the delay in processing his application.

In order to have a property interest in a benefit, an independent legal source, such as the law of the Community, must give a claimant more than a unilateral expectation of receiving the benefit -- the person must have a legitimate claim of entitlement to it. Bd. of Regents v. Roth, 408 U.S. 564, 578 (1972). The difference between an "entitlement" and a mere "expectancy" of a benefit is determined by the extent to which the discretion of the relevant decisionmaker is constrained by law. See, e.g., Mallette v. Arlington Cty. Employee's Supplemental Retirement Sys. II, 91 F.3d 630, 635 (4th Cir. 1996). If the decisionmaker has substantial discretion in deciding to grant or deny the benefit, it is not possible for the claimant to have a legitimate claim of entitlement because he does not know whether the benefit will be granted. We must determine, therefore, whether under Community law the relevant decisionmakers had substantial discretion to admit or deny Crooks' application for membership.

Article II of the Community Constitution outlines the requirements for membership. Crooks applied for membership under people claiming membership must apply and be found qualified by the governing body of the Community. This application process is implemented under the terms of the Enrollment Committee and the General Council the power to recommend and approve applications for membership.

Crooks argues that if he meets the requirements for membership, the Community decisionmakers have no discretion and must admit him. His argument, however, assumes the very question the enrollment officials are responsible for answering -- does Crooks meet the requirements for membership in the Community? It is up to the Community, not Crooks or this Court, to decide who meets the requirements for membership. Smith et al. v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. June 30, 1995) (07/08/94 Order), *affirmed*

SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 22, 1995) (06/19/95 Order). This Court had stated in the past that there is no automatic or self-enrollment under Article II, Se. (b) or (c) for people who claim they meet the membership requirements -- applications for membership must be approved by the appropriate Community officials under standards established in accordance with the Constitution and the Enrollment Ordinance. Welch, et al. v. SMS(D)C, et al., No. 023-92 (SMS(D)C Tr. Ct. Dec. 23, 1994).

Under Community law, the Enrollment Committee and the General Council are given substantial discretion to determine if and when a person's application meets the requirements for membership. Nothing in the Constitution or Enrollment Ordinance requires the Enrollment Committee or General Council to approve or disapprove an application within a certain time frame. It is true, as Crooks notes, that Section 6 of the Ordinance requires the Enrollment Officer to offer a preliminary recommendation within 30 days of receiving an application. The Enrollment Officer, however, is not a final decisionmaker in the enrollment process, and no comparable time limits are set on the decisions made by Enrollment Committee or General Council.

the Enrollment Ordinance also gives substantial discretion to enrollment officials for several other reasons. First, under Ordinance the Enrollment Committee and the General Council have the authority to amend the information and mathematical formulas used to establish the Base Rolls for Community membership. Second, Section 6 of the Enrollment Ordinance gives the Enrollment Committee almost unfettered discretion in determining what evidence to consider when evaluating an application. It states that the Enrollment Committee shall accept or reject all applications "based on the record presented and other evidence deemed acceptable

by said Committee" (emphasis added). In addition, Enrollment Ordinance requires the Enrollment Committee to consider challenges by Community members to the approval of an application, it provides no standards to guide the Committee's decision -- whether a challenge to an approved application is upheld or not is completely within the discretion of the Committee. It also provides that it is the General Council who will make the ultimate decision on membership, specifically stating membership decision "shall be final and conclusive" and "[n]o appeal shall lie to any judicial, executive or legislative body", Section 7.

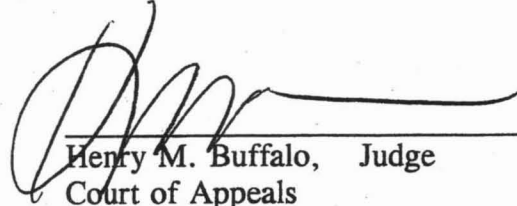
The discretion given to the Community officials and the General Council in evaluating applications means that Crooks could not have foreseen whether his application would be approved under Community law. This degree of uncertainty means that Crooks could not have had a legitimate entitlement to the benefit of Community membership when he submitted his application -- he had only a unilateral expectation of enrollment. Therefore, Crooks did not have a property interest in Community membership until his application was approved.

Crooks has failed to demonstrate that his status as an applicant for Community membership created a property interest in the benefits of such membership, and he has therefore not stated a claim upon which relief may be granted under the Due Process Clause of the ICRA. Since he has not demonstrated a cognizable property interest, it is not necessary for us to consider whether the process attendant upon his alleged deprivation was constitutionally sufficient. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

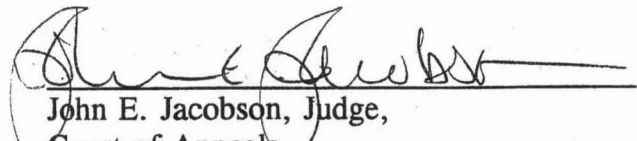
ORDER

For the foregoing reasons, the order of the Trial Court granting Appellee's Motion to Dismiss is AFFIRMED.

Date: November 2, 1998



Henry M. Buffalo, Judge
Court of Appeals



John E. Jacobson, Judge,
Court of Appeals