IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRYCE GARRETT and DANIEL HARR,

ORDER

Plaintiffs,

01-C-0523-C

v.

GERALD BERGE and WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendants.

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Pursuant to 28 U.S.C. § 1441, defendants Gerald Berge and the Wisconsin Department of Corrections have removed to this court a proposed civil action for injunctive and declaratory relief, brought pursuant to 42 U.S.C. § 1983, and filed originally in the Circuit Court for Dane County, Wisconsin. Plaintiffs Bryce Garrett and Daniel Harr, who are presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, allege that defendants violated their due process and equal protection rights. They seek to proceed on behalf of themselves and a class of all Supermax Correctional Institution inmates similarly situated.

Now that the case is in federal court, plaintiffs are subject to the 1996 Prison Litigation

Reform Act. This means that this court must screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(a), (b). (The question of assessing a partial filing fee against plaintiff does not arise in a removed case. As the removing party, defendant is obligated to pay the fee.)

Plaintiffs' due process claims will be dismissed for failure to state a claim upon which relief may be granted. Plaintiffs' equal protection claims will be dismissed as legally frivolous.

In their complaint, plaintiffs make the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Plaintiffs Bryce Garrett and Daniel Harr are state prisoners confined at Supermax Correctional Institution. Defendant Gerald A. Berge is the warden at Supermax Correctional Institution. The Wisconsin Department of Corrections is a department in the executive branch of the government of the State of Wisconsin.

B. The Supermax Level System

Inmates at the Supermax Correctional Institution must advance through a behavior

modification system comprising five levels before becoming eligible for transfer to a less restrictive facility. Inmates on lower levels are provided with fewer privileges than inmates on higher levels. Inmates must spend a fixed amount of time without incident at each level before being allowed to move progressively up through the level system and eventually out of Supermax. When added together, the total minimum time required to navigate all five levels is 17 months.

All inmates at Supermax are in some form of segregation status, with the vast majority being on administrative confinement status. Inmates on administrative confinement status at other Wisconsin prisons are not subject to a level system. Moreover, the requirements of the level system mean that Supermax inmates on administrative confinement status are denied the privileges enjoyed by inmates on the same status at other Wisconsin prisons. The criteria for release from administrative confinement status listed in the Department of Corrections regulations contain no reference to completion of a level system. However, inmates at Supermax who do not progress through the level system are effectively kept on administrative confinement status indefinitely. Indeed, plaintiffs are aware of only a few isolated instances in which inmates were removed from administrative confinement status and transferred out of Supermax before completion of all five levels. Those inmates had either reached their mandatory release date, were in need of psychiatric treatment or were removed from Supermax pursuant to a court order.

Department of Corrections regulations entitle inmates in administrative confinement status to a review occurring at least once every six months that may lead to their removal from administrative confinement. These reviews include a hearing at which inmates have certain rights, including the right to present documents and witnesses, receive a decision based solely on the evidence presented to the review committee, and to appeal the committee's findings. However, the level system at Supermax renders these hearings meaningless because no prisoner who enters Supermax can be released from administrative confinement and returned to the general prison population for a minimum of 17 months. Program review hearings that inmates are entitled to every six months and at which they may be considered for transfer out of Supermax are rendered similarly superfluous by the level system and its 17 month minimum duration.

Finally, the Supermax level system is outlined in and implemented according to "SMCI Policy and Procedure 300.00." That regulation has never been properly promulgated pursuant to the Wisconsin statutes governing administrative regulations.

C. The Supermax Warning System

The Wisconsin administrative code authorizes prisons to use a warning system to monitor inmate behavior. The purpose of the warning system is merely to inform the inmate that the inmate's behavior is against the rules when the behavior is not serious or repetitive

enough to warrant a formal conduct report. The administrative code does not authorize sanctions for warnings. Sanctions may be applied only in conjunction with service on the inmate of a conduct report. The general practice at all Wisconsin prisons other than Supermax is to serve a conduct report on an inmate who earns three or more warnings for the same type of behavior. With the exception of Supermax, no Wisconsin prison uses warnings alone to affect an inmate's privileges or to influence his administrative confinement or program review hearings. At Supermax, defendants use warnings to prevent inmates from moving to higher levels, a practice that has a direct affect upon inmates' privileges and the length of their stay at Supermax. Defendants also use warnings as justification for keeping inmates in administrative confinement. However, no procedures exist for inmates to contest warnings or present evidence and testimony in their own defense. Usually, inmates are not even informed they have received a warning until after a warning has been used against them in some way. Warnings have been used against the plaintiffs to deny them access to higher levels, to decrease their level and in ways that affect their administrative confinement and placement. Plaintiffs were never afforded the opportunity to challenge these warnings and typically were not notified they had received warnings until after they were used against them. All of plaintiffs' complaints and appeals regarding the defendants' use of warnings in this fashion have been dismissed by prison officials.

DISCUSSION

I understand plaintiffs to contend that the Supermax level system violates several liberty interests protected by the due process clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs contend first that certain Department of Corrections regulations invest them with a liberty interest in remaining free from segregated administrative confinement status unless they meet one of the regulations' specific criteria and that failure to complete a level system is not one of the enumerated criteria. Plaintiffs next argue that certain other Department of Corrections regulations invest them with a liberty interest in being considered every six months both for removal from administrative confinement status and for transfer from Supermax, interests that are infringed by the 17 month minimum stay on administrative confinement at Supermax imposed by the level system. In addition, plaintiffs maintain that their due process rights are violated when defendants use warnings as a basis for depriving them of privileges and for postponing their transfer to a less restrictive prison when they receive no notice of the warnings or an opportunity to contest them. Finally, plaintiffs contend that their due process rights have been violated because the level system has never been properly promulgated pursuant to the Wisconsin statutes governing administrative regulations.

Plaintiffs contend also that their rights under the Fourteenth Amendment's equal protection clause have been violated because inmates on administrative confinement status

at other Wisconsin prisons are not subject to a level system and are not subject to sanctions for warnings and because Supermax inmates on levels one through four receive fewer "properties, privileges and amenities" than inmates on level five.

A. Due Process

Plaintiffs fail to state a claim upon which relief may be granted because their allegations do not establish that they were deprived of any protected liberty interest. A procedural due process claim against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). The due process clause itself can create liberty interests of its own force, but "changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause '[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him.'" Vitek v. Jones, 445 U.S. 480, 493 (1980) (quoting Montanye v. Haymes, 427 U.S. 236, 242 (1976)). A prisoner has no liberty interest in not being kept at Supermax Correctional Institution in administrative confinement for a minimum of 17 months because such confinement is "well within the terms of confinement ordinarily contemplated by a prison sentence." Hewitt v. Helms, 459 U.S. 460, 468 (1983). See also Smith v. Shettle, 946 F.2d

1250, 1252 (7th Cir.1991) ("a prisoner has no natural liberty to mingle with the general prison population"); Whitford v. Boglino, 63 F.3d 527, 532 (7th Cir. 1995) (“a transfer to another prison, even to one with a more restrictive environment, is not a further deprivation of an inmate’s liberty under the Due Process Clause itself because the prisoner could have been initially placed in a more restrictive institution”) ; Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (prisoner has no legally protected interest "in [his] keeper's identity"). Plaintiffs have identified no liberty interest created by the due process clause itself under which they may seek procedural protections.

Protected liberty interests may also be created by states through the enactment of certain statutes and regulations. Hewitt, 459 U.S. at 469. However, in Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that although “States may under certain circumstances create liberty interests which are protected by the Due Process Clause,” those interests “will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” In so holding, the Court sought to focus the liberty interest inquiry on the nature of the deprivation rather than the language of a particular regulation in order to discourage “prisoners [from] comb[ing] regulations in search of mandatory language on which to base entitlements to various state-conferred privileges.” Id. at 481. After Sandin, in the prison context, state-created protected liberty interests are limited essentially to the loss of good

time credits because the loss of such credit affects the duration of an inmate's sentence. See Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). Plaintiffs have not alleged that application of the level system will keep them confined beyond the terms of their incarceration. Therefore, plaintiffs have failed to allege facts suggesting that the level system or its administration imposes an atypical and significant hardship on them in relation to the ordinary incidents of prison life. Accordingly, they fail to state a claim that a liberty interest has been infringed and that their right to due process has been denied.

Plaintiffs allege also that the level system has never been properly promulgated pursuant to the Wisconsin statutes governing administrative regulations. To the extent plaintiffs argue this is a violation of their due process rights, they cannot succeed because they have not identified a protected liberty interest jeopardized by enforcement of the level system. To the extent plaintiffs allege a violation of state law relating to the promulgation of administrative regulations, I decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over plaintiffs' state law claims. See 28 U.S.C. § 1367(c)(3); see also Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or to refuse jurisdiction over state law claims).

B. Equal Protection

The equal protection clause of the Fourteenth Amendment provides that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Statutes or regulations that allegedly violate the equal protection clause are subject to varying levels of court scrutiny. Only if the statute or regulation either interferes with a fundamental right or discriminates against a suspect class will it have to withstand strict scrutiny. Otherwise a statute or regulation will generally survive an equal protection challenge if "the legislative classification . . . bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631 (1996). Plaintiffs' complaint identifies no fundamental right at stake and does not identify plaintiffs as members of a suspect class. Therefore, plaintiffs' equal protection claims must be evaluated under the rational basis test. Under rational basis review, classifications "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

There can be little doubt that prison administrators may rationally implement different behavior modification programs for different offenders at different prisons in order to achieve the legitimate goal of safely incarcerating and rehabilitating convicted criminals. A similar rational basis underlies the disparate access to privileges available to prisoners at different levels within the same behavior modification program. There is no constitutional

imperative that prison administrators adopt a one-size-fits-all approach to managing prisoners in administrative confinement. Various prisoners in administrative confinement will react to their situation differently and prison officials can rationally provide incentives for good behavior or punishment for bad behavior based on those reactions. Plaintiffs will not be allowed to proceed on their equal protection claim because it is legally frivolous.

C. Class Certification and Appointment of Counsel

Because plaintiffs will be denied leave to proceed on all of their claims, I do not consider their motions for class certification or appointment of counsel.

ORDER

IT IS ORDERED that

1. Plaintiffs' due process claims are DISMISSED pursuant to 28 U.S.C. § 1915A for plaintiffs' failure to state a claim upon which relief may be granted.

2. Plaintiffs' equal protection claims are DISMISSED pursuant to 28 U.S.C. § 1915A as legally frivolous.

3. I decline to exercise supplemental jurisdiction over plaintiffs' state law claim. The case is remanded to the Circuit Court for Dane County for consideration of plaintiffs' claim that "SMCI Policy and Procedure 300.00" was never properly promulgated according to state

law.

Entered this 26th day of September, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge