

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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LARRY PRITCHARD,

Petitioner,

v.

THOMAS BORGEN, JAN BLOEDOW,

Respondents.  
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ORDER

02-C-393-C

This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed

if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner makes the following allegations of fact.

#### ALLEGATIONS OF FACT

Petitioner Larry Pritchard is an inmate confined at the Supermax Correctional Institution in Boscobel, Wisconsin. Respondent Thomas Borgen is the warden at Fox Lake Correctional Institution in Fox Lake, Wisconsin. Respondent Jan Bloedow is a unit manager at the Fox Lake prison and is responsible for conducting prison disciplinary hearings.

On February 11, 2002, petitioner received a major conduct report and a related summary of statements made by prison confidential informants. On February 17, petitioner

met with his hearing advocate and gave him written instructions and a statement to type. On February 19, petitioner attended a hearing on his conduct report that was presided over by respondent Bloedow. On February 21, respondent Bloedow found petitioner guilty of all charges and sentenced him to four days' adjustment segregation, 360 days' program segregation and referral to the Program Review Committee.

Petitioner was denied his own advocate at the conduct report hearing. Defendant Bloedow forced petitioner to share an advocate with another prisoner. The advocate neglected petitioner's requests and even presented evidence damaging to petitioner. Petitioner never received a hearing notice or a witness notice. The witnesses requested by petitioner did not show up for the hearing and the investigating officer was allowed to testify by way of a written statement so he could not be questioned. Respondent Bloedow held eight hearings, one each for petitioner and seven other prisoners facing related charges. Respondent Bloedow used evidence presented in other hearings to find petitioner guilty and ignored evidence from those hearings that was exculpatory. Petitioner gave his advocate the names of four witnesses with instructions to interview them and select the best ones, but petitioner only learned which witnesses had been chosen at the hearing. Respondent Bloedow did not explain why she discounted a particular piece of exculpatory evidence and failed to implement the "reliability test" in that she failed to 1) state on the record her knowledge of the confidential informants and their past reliability; 2) require the investigator

to appear at the hearing; 3) require corroborative testimony; and 4) conduct an in camera review of certain documents.

Respondent Bloedow failed to inform petitioner in advance that the confidential witnesses refused to testify and be cross examined, even though this was key to petitioner's defense strategy. The basis for respondent Bloedow's judgment was inadequate. Petitioner's objections during the hearing were not recorded. Respondent Bloedow asked leading questions of the witnesses and told petitioner he could not ask witnesses about his character even though she had. Respondent Borgen refused to overturn petitioner's disciplinary conviction even though he knew it was obtained in violation of petitioner's due process rights.

#### OPINION

Petitioner alleges that the procedures used in his disciplinary hearing violated his Fourteenth Amendment due process rights. He also mentions the Eighth Amendment in passing but on the basis of the facts he has alleged he has no conceivable claim under that amendment. In his request for relief, petitioner asks only for money damages. However, he notes that he has filed a petition for a writ of certiorari in state court seeking to have the disciplinary report at issue in this case expunged from his record and his good-time credits restored.

Petitioner's due process claim must fail. Although petitioner has not asked this court to restore his good-time credits, he has asked a state court to do so. Petitioner states in his complaint that he has filed a civil suit in state court seeking expungement of his conduct report "and that all good time be restored." It is not clear from the complaint exactly how petitioner may have lost good-time credits as a result of his disciplinary hearing. He may be seeking to have restored good-time credits that he had already earned, although the form attached to petitioner's complaint showing the disposition of the conduct report does not reflect that good-time credits were taken. Alternatively, petitioner may be seeking an award of credits to compensate him for the time he has been held in allegedly illegal segregated confinement, where such credits cannot accrue. Unfortunately for petitioner, the difference is irrelevant. When a petitioner draws into question the loss of good-time credits in connection with a disciplinary hearing, a decision whether the petitioner's due process rights were violated would imply the invalidity of his disciplinary sentence and the loss of his good-time credits or credit-earning status, a state of affairs that prevents petitioner from proceeding under § 1983. Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001) (citing Edwards v. Balisok, 520 U.S. 641, 648 (1997) (Fourteenth Amendment due process claim for money damages "that necessarily impl[ies] the invalidity of the punishment imposed is not cognizable under § 1983")). Accordingly, petitioner cannot raise his claim for money damages in a § 1983 suit such as this one until he can show that he has succeeded

in having his disciplinary sentence “reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus” under 28 U.S.C. § 2254. Heck v. Humphrey, 512 U.S. 477, 487 (1994). Petitioner has not made the required showing. Therefore, petitioner’s complaint under § 1983 must be dismissed.

ORDER

IT IS ORDERED that

1. Petitioner Larry Pritchard’s request for leave to proceed in forma pauperis on his Fourteenth Amendment due process claim is denied;
2. The unpaid balance of petitioner's filing fee is \$147.20; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and
3. The clerk of court is directed to close the file.

Entered this 7th day of August, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge