IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STATE EX REL DALE R. WIEGERT,

ORDER

Petitioner,

00-C-610-C

v.

JUDY P. SMITH, Warden,

Respondent.

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Pursuant to 28 U.S.C. § 1441(a), respondent Judy Smith has removed to this court a petition for a writ of certiorari that petitioner Dale R. Wiegert filed originally in the Circuit Court for Dane County, Wisconsin. The removal raises a number of issues.

Now that the case is in federal court, the 1995 Prison Litigation Reform Act governs petitioner's case because petitioner was a prisoner at the time he filed his action. Therefore, before the case may proceed further, the complaint must be screened pursuant to 28 U.S.C. § 1915A. (The question of assessing a partial filing fee against petitioner does not arise in a removed case. As the removing party, respondent is obligated to pay the fee.)

In reviewing the claims raised in the petition for certiorari, I note that the vast majority

arise under state law and the state constitution, leading me to question why the case was removed. Only one claim appears cognizable under federal law. Petitioner contends that he was denied his Fourteenth Amendment constitutional right to procedural due process in connection with conduct report #1144062, which resulted in his loss of good time credits. (At first glance, it appears petitioner may have been attempting to raise a claim that he was denied his constitutional right to procedural due process in connection with a second conduct report issued against him, conduct report #1111413. However, petitioner alleges in his complaint that he waived his right to a full hearing with respect to that conduct report. Having done so, he cannot contend that he was denied due process in that regard.)

Petitioner's federal claim is one that can be brought only by means of a petition for a writ of habeas corpus and only after petitioner has exhausted his state court remedies. The only relief that petitioner is seeking is reversal of the finding of guilt of the disciplinary committee and that his record be cleared and his good time restored. In Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court held that when a prisoner's claim amounts to a challenge to the legality of his conviction or confinement, the claim must be brought as a habeas corpus claim, regardless of the nature of the remedy the prisoner seeks. The Court of Appeals for the Seventh Circuit has applied Heck to § 1983 procedural due process claims arising out of prison disciplinary hearings if those claims necessarily call into question decisions of prison

adjustment committees that ordered the loss of good time credits. See Walker v. O'Brien, 216 F.3d 626, 633 (7th Cir. 2000) (§ 2254 is correct vehicle for contesting loss of good time credit in prison disciplinary proceedings); see also Dixon v. Chrans, 101 F.3d 1228, 1230-31 (7th Cir. 1996) (claim for damages necessarily implicates results of disciplinary committee hearing and must be brought as habeas action); Clayton-El v. Fisher, 96 F.3d 236, 242-45 (7th Cir. 1996) (because prisoner sought damages for his placement in segregation, court must consider whether he would have been found guilty and placed in segregation without procedural irregularities; this finding would necessarily implicate actual result of disciplinary hearing that included loss of good time; and case should have been brought as habeas corpus action).

In this case, petitioner alleges that his disciplinary hearing was deficient in numerous ways that may violate state law, but in only one way that implicates the basic procedural protections mandated in Wolff v. McDonnell, 418 U.S. 539 (1974), that is, that he was denied the use of documentary evidence and witness statements in defense of the charges against him. A finding that petitioner was not allowed to defend himself at the disciplinary hearing will necessarily call into question the final decision of the disciplinary committee that ordered the loss of good time credits. Accordingly, Heck v. Humphrey prevents me from construing petitioner's disciplinary due process claim as an action brought pursuant to 42 U.S.C. § 1983. However, I am not free to construe the claim as having been brought pursuant to 28 U.S.C. §

2254, see Copus v. City of Edgerton, 96 F.3d 1038 (7th Cir. 1996) (reversing court's decision to convert § 1983 claim to § 2255 petition), even though petitioner did not bring his claim under § 1983. It is up to petitioner to decide whether he wants to raise his claim in this court in a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254.

The rule is that a court may grant a petition for a writ of habeas corpus only if the petitioner has exhausted all the state court remedies available. See § 2254(b)(1)(A). Persons challenging a prison disciplinary system have as a remedy the common law writ of certiorari, filed in state court. See, e.g., State ex rel. Smith v. McCaughtry, 222 Wis. 2d 68, 586 N.W.2d 63 (Ct. App. 1998). It appears, however, that by removing the petition from the state court, respondent has prevented petitioner from availing himself of his state court remedies. Section (b)(1)(B) provides an exception to (b)(1)(A) if "there is an absence of available State corrective process." Not allowing a petitioner to utilize the state corrective process seems the equivalent of an absence of corrective process.

With this odd procedural tangle, there are several potential routes I could take. One is simply to dismiss the federal claim of the petition, on the ground that it must be brought as a petition for a writ of habeas corpus, pursuant to § 2254, after petitioner has made another effort to exhaust his state court remedies. In that case, I would remand the state law claims to state court. I am reluctant to choose this option because it would be asking petitioner to make

a second effort to do what the state has prevented him from doing earlier. Second, petitioner could advise the court that he wishes the court to construe his federal claim as a petition brought pursuant to § 2254, in which case I would direct respondent to advise the court whether, in removing the state court action petitioner brought, she is choosing to waive her right to require that petitioner exhaust his state court remedies. (Petitioner should be aware that if he chooses this route and I agree with him, I would address only the federal law claim and remand the remaining state law claims to state court.) The third and most straightforward option is for respondent to withdraw her removal action voluntarily. The parties may have other suggestions. I will give them an opportunity to advise me on the procedure they think is preferable.

ORDER

IT IS ORDERED that petitioner and respondent may advise the court, in writing, no later than November 17, 2000, of their suggestions for resolving this procedural puzzle.

Entered this 9th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge