IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRYCE GARRETT, RALEIGH DECORAH,
MONTELL HORTON, MARK EVANS
and ROBERT CARNEMALLA,

ORDER

Plaintiffs,

04-C-226-C

v.

GERALD BERGE and
MATTHEW FRANK,

Defendants.

- -

Pursuant to 28 U.S.C. § 1441, defendants Berge and Frank have removed to this court a proposed civil action in which plaintiffs seek a declaration that plaintiffs are entitled under the United States Constitution and state law to procedural due process before they are demoted from a higher level to a lower level at the Wisconsin Secure Program Facility and to certain property afforded inmates confined in administrative segregation.

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. (The question of assessing a partial filing fee against plaintiffs does not arise in a removed case. As the removing party, defendant is obligated to pay the fee.)

Plaintiffs' federal due process claim will be dismissed for failure to state a claim upon which relief may be granted. Plaintiffs' state law claim that the Wisconsin Secure Program Facility's Policy and Procedure #300 violates plaintiffs' rights under Wis. Adm. Code § 308.04 will be remanded to the state court for resolution.

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

ALLEGATIONS OF FACT

Plaintiffs are incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Respondent Berge is the warden of the institution and Matthew Frank is Secretary of the Wisconsin Division of Corrections.

Inmates housed in the Wisconsin Secure Program Facility are required to participate in a level system. Under this system, inmates may be demoted from higher levels to lower levels without a hearing. Also, inmates in non-punitive status at the Wisconsin Secure Program Facility do not receive the same items of property guaranteed to inmates in non-punitive status in other state prisons under Wis. Admin. Code § DOC 308.04.

OPINION

In their complaint, plaintiffs suggest that their status at the Wisconsin Secure Program Facility is consistent with the status of inmates placed in involuntary non-punitive segregated status (administrative confinement) in other state institutions. They argue that defendants are ignoring Wis. Admin. Code § DOC 308.04, which governs the rights and privileges of inmates in administrative confinement, with respect to inmates at the Wisconsin Secure Program Facility. Instead, defendants are applying rules to plaintiffs that were created under Wisconsin Secure Program Facility Policy and Procedure #300 and are akin to rules governing prisoners in disciplinary status. In particular, inmates may be demoted from higher levels to lower levels without a hearing and must earn property that other prisoners in non-punitive segregated confinement receive.

Distilled, plaintiffs' arguments are that Wis. Admin. Code § DOC 308.04 grants them state created interests in liberty and property that cannot be taken without first affording them a hearing, and that Policy and Procedure #300 contradicts the requirements of Wis. Admin. Code § DOC 308.04 and is therefore illegal under state law.

To the extent that plaintiffs are alleging that the level system at the Wisconsin Secure Program Facility violates their right to due process, their claim is legally frivolous. I have ruled on more than one occasion that the level system and the related increase or decrease in privileges and property do not implicate a liberty interest. This is because in Sandin v.

Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that in the prison context, protected liberty interests are essentially limited to the loss of good time credits. See also 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). Under Sandin, these alleged losses of privilege and property do not impose atypical and significant hardships on plaintiffs; they do not create a loss in good time credits or otherwise lengthen an inmate's sentence. Therefore, I will dismiss as legally frivolous plaintiffs' claim that they have a state created liberty interest demanding due process protections before they can be demoted or deprived of property in the course of a demotion.

In their removal petition, defendants ask that this court retain jurisdiction over plaintiffs' state law claim even if plaintiffs' constitutional claim is dismissed. They argue that plaintiffs' state law claim is "necessarily intertwine[d]" with the consent decree in Jones-El v. Berge, 00-C-421-C, because the decree describes inmate rights and privileges with regard to certain property, such as reading materials and canteen privileges as shown in the consent decree at §§ 4.3, 7.1, 7.2 and 10.1.

I am not persuaded that plaintiffs' state law claim calls into question any provision of the consent decree. The consent decree provides at § 4.3 that "[a]ll inmates, whether or not in the level program, shall have at least the same rights and privileges that prisoners in

other maximum-security prisons in Wisconsin have in Program or Administrative segregation." Sections 7.1 and 7.2 provide that "[a]dditional reading material will be provided for those on Level 1 and they will have video programs" and "[a]ll prisoners above Level 1 shall have television and additional program material." Section 10.1 provides that "canteen privileges in SMCI shall be approximately the same as in other maximum-security prisons."

Wis. Admin. Code §§ DOC 308.04(12)(b), (h) and (I) address the property rights of inmates in administrative confinement. These provisions read:

> (12) While in administrative confinement, an inmate:
>
> * * *
>
> (b) Shall be allowed to have any property in the inmate's cell that is consistent with property limits for the assigned area.
>
> * * *
>
> (h) May not go to the canteen in person but may have approved items from the canteen delivered to the inmate.
>
> (I) May have any other properties and privileges consistent with departmental rules, at the discretion of the warden.

Because § 308.04 limits an inmate's property to "approved items from the canteen" and property consistent with "limits for the assigned area" and "departmental rules, at the discretion of the warden," plaintiffs stand to gain nothing greater than the consent decree

already provides if they succeed in proving that they are entitled to property rights granted under Wis. Admin. Code § DOC 308.04. To the extent that plaintiffs want a ruling on the question whether Policy and Procedure #300 violates the procedural requirements of § DOC 308.04, I decline to exercise supplemental jurisdiction to hear that claim.

ORDER

IT IS ORDERED that plaintiffs' claim that Wis. Adm. Code § DOC 308.04 grants them a liberty or property interest requiring due process protections is DISMISSED as legally frivolous.

Further, IT IS ORDERED that plaintiffs' state law claims are REMANDED to the Circuit Court for Dane County. The Clerk of Court is directed to return the file of this proceeding to the Clerk of Court for Dane County and close the case in this court.

Entered this 26th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge