

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

JAMES G. DUDGEON,

Petitioner,

v.

MATTHEW J. FRANK, DICK VERHAGEN,
JANE DIER-ZIMMEL, ROY BOUTAN,
TODD JOHNSON and WAYNE MIXDORF,

Respondents.

ORDER

04-C-075-C

In this proposed civil action brought under 42 U.S.C. § 1983, petitioner James Dudgeon seeks monetary, declaratory and injunctive relief for certain alleged due process violations. In an order dated April 15, 2004, I screened petitioner's complaint pursuant to the 1996 Prisoner Litigation Reform Act and concluded that it appeared from the face of the complaint that petitioner had not exhausted his administrative remedies—his inmate complaint had been dismissed as untimely. I gave petitioner until May 5, 2004, in which to inform the court whether it had misconstrued the allegations of his complaint. Petitioner filed a rebuttal/response to the order, informing the court that he was unable to submit an inmate grievance within the appropriate time because prison staff failed to respond to his

requests for an inmate grievance form or set of procedures.

The Prison Litigation Reform Act requires inmates to exhaust their administrative remedies before suing over prison conditions. 42 U.S.C. § 1997e(a). However, an inmate “must exhaust only those administrative remedies that are available to him.” Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002). The Seventh Circuit has held that prison officials' failure to respond to grievances can render administrative remedies unavailable. Lewis v. Washington, 300 F.3d at 833. The court “refuse[d] to interpret the PLRA so narrowly as to permit prison officials to exploit the exhaustion requirement through indefinite delay in responding to grievances.” Id. (internal quotation marks omitted). The same concern about not allowing prison officials to exploit the exhaustion requirement applies when officials fail to provide inmates with access to the grievance system by denying requests for grievance forms. Because it is not clear from the allegations of the complaint that petitioner failed to exhaust administrative remedies available to him, I will not dismiss this case at the outset on this ground. I turn then to the issue whether plaintiff’s allegations make out a viable constitutional claim. From the complaint, I understand petitioner to allege the following facts.

ALLEGATIONS OF FACT

Petitioner James Dudgeon is an inmate at the Oakhill Correctional Institution in Oregon, Wisconsin. He was transferred there from the Independent Living Unit at the Thompson Correctional Center in Deerfield, Wisconsin on August 13, 2003. Respondent Matthew Frank is the secretary of the Wisconsin Department of Corrections. At the Oakhill Correctional Institution, respondent Dick Verhagen is the warden, respondent Jane Dier-Zimmel is the superintendent, respondents Roy Boutan and Todd Johnson are both correctional captains. Respondent Wayne Mixdorf is the deputy warden of the Wisconsin Community Corrections System in Oregon, Wisconsin.

On August 19, 2003, respondent Johnson gave petitioner a major conduct report. Respondent Johnson attached a copy of Wisconsin Department of Corrections document #71, which is entitled "Notice of Major Disciplinary Hearing Rights and Waiver of Major Hearing and Waiver of Time." This document indicates that petitioner or his advocate would have the right to question any adverse witnesses and to present oral, written, documentary and physical evidence and evidence from voluntary eye witnesses at his disciplinary hearing. This notice indicates that "[i]f there are eye witnesses (institutional offenders and/or staff) to the alleged violation(s), [the inmate] may request, in writing, within two days of this notice, using form DOC-73 which will be provided to you."

Petitioner made numerous requests to the staff at the Oakhill facility for document DOC-73 within the first two days after having received notice of the disciplinary hearing.

Because he did not receive a copy of this document, he continued to make requests after the two days had expired. Despite these requests, petitioner never was provided with a copy of this form. On or about September 30, 2003, Kelly Nabiley, a librarian at the Oakhill facility, told petitioner in response to one request that document DOC-73 does not exist.

Because petitioner was not provided with a copy of the document DOC-73, he was unable to call supporting witnesses in his defense or question adverse witnesses. Respondent Boutan, who was in charge of petitioner's hearing, would not allow petitioner or his advocate to question the adverse witness and failed to postpone the hearing in order to insure that petitioner's due process rights would not be violated. Petitioner's inability to question either the adverse witness or his own supporting witnesses had a direct effect on the outcome of the hearing.

DISCUSSION

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. Not every procedural deprivation rises to the level of a constitutional violation; petitioner must first have a protected liberty or property interest at stake before due process protections attach. Averhartv. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). In the prison context, liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in

such an unexpected manner as to give rise to protection by the due process clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995).

Petitioner claims that he was denied due process because he was not given a copy of the document DOC-73 and that the outcome of his disciplinary hearing was affected as a result. He does not allege expressly what disciplinary action was taken against him after he was found guilty of the charges in the August 19, 2003 conduct report and he does not attach to his complaint the disciplinary committee’s finding of guilt, which would include a written record of the penalty petitioner suffered as a result of the finding. However, petitioner requests as relief that he be compensated for lost wages, that the conduct report be declared null and void and that a new release or discharge date be calculated. From these requests, I infer that petitioner is alleging that he lost his job as well as good time credits as a penalty for the finding of guilt.

A petition for a writ of habeas corpus under 28 U.S.C. § 2254 “is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release.” Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)). The Court of Appeals for the Seventh Circuit has held that “when a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without

prejudice” rather than convert it into a petition for habeas corpus under § 2254. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. at 477). Accordingly, petitioner cannot seek a speedier release in this action. In addition, he cannot seek money damages for the alleged deprivation of due process in this suit.

When a petitioner questions the loss of good time credits as a result of a prison disciplinary hearing, a decision by the court whether the petitioner’s due process rights were violated might imply that his disciplinary sentence and the loss of his good time credits or credit-earning status were invalid, even if petitioner is seeking only money damages. The effect is the same as if the petitioner were seeking to have his good-time credits restored. This prevents petitioner from proceeding at this time under § 1983 on his claim that he was deprived of due process at his disciplinary hearing. 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”)). If petitioner succeeds 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, he can file a lawsuit for money damages under § 1983 at that time. Heck, 512 U.S. at 487.

There is a remote possibility that petitioner is requesting an earlier release without

having actually lost any good time credits as punishment for his conduct. Perhaps he has requested an early release simply to drive a sharp point home to respondents that refusing to provide inmates with forms necessary to secure witnesses at disciplinary hearings requires a severe response. However, if petitioner did not lose good time credits, his complaint fails for another reason.

As noted above, in Sandin v. Conner, 515 U.S. 472 at 484, the Supreme Court held that liberty 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.” After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. 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). Petitioner contends that respondents violated his rights under the due process clause by denying him the opportunity to call witnesses on his own behalf and cross examine adverse witnesses. However, this claim must fail if no good time credits were taken, because no liberty interest is implicated by any lesser penalty, such as the loss of a prison job.

ORDER

IT IS ORDERED that:

1. Petitioner James Dudgeon is DENIED leave to proceed against respondents Matthew Frank, Dick Verhagen, Jane Dier-Zimmel, Roy Boutan, Todd Johnson and Wayne Mixdorf on his claim that he was denied due process because he was not provided with a copy of Wisconsin Department of Corrections document 73. This case is DISMISSED with prejudice for petitioner's failure to state claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is \$144.87; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 18th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge