

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

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GARY B. CAMPBELL,

Petitioner,

v.

ORDER NO. 1

05-C-481-C

SECRETARY, DEPARTMENT OF CORRECTIONS;  
MILWAUKEE COUNTY JAIL; MILWAUKEE  
SHERIFF'S DEPARTMENT; HEALTH SERVICE  
DEPARTMENT; DAVID A. CLARKE, Deputy  
Inspector; KEVIN CARR, Deputy Inspector;  
RICHARD R. SCHMIDT, Deputy Inspector;  
CAPTAIN NYKLEWICK; CAPTAIN PARADISE;  
CAPTAIN JOHN DOE; SGT. KERNAN; SGT. SAWCZUK;  
SGT. MAAS; DEPUTY MURPHY; DEPUTY DOMINSKI;  
DEPUTY MOATS; JOHN DOE, Doctor; NURSE JANE  
DOE, NURSE JANE DOE, NURSE JANE DOE,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Milwaukee County jail in Milwaukee, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has

made the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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). 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).

Petitioner's complaint was filed originally as a proposed amended complaint in another case presently before this court, Ali v. Milwaukee County Sheriff, 05-C-363-C. At one time, petitioner was one of sixteen named plaintiffs in that case. However, in an order dated August 1, 2005, I concluded that petitioner's complaint would be treated as a separate pleading filed only by him because he was the only inmate who signed it. Accordingly, I

severed his suit and assigned it a new case number. Because petitioner is the only inmate who signed the complaint, I will consider only the allegations that involve him personally. From his complaint, I understand petitioner to allege the following facts.

## ALLEGATIONS OF FACT

### A. Parties

Petitioner Gary Campbell is an inmate at the Milwaukee County jail. At the time of the relevant events he was a pretrial detainee. Respondents David Clarke, Richard Schmidt, Kevin Carr, Captain Nyklewick, Captain Paradise, Captain John Doe, Sgt. Kernan, Sgt. Sawczuk, Sgt. Maas, Deputy Murphy, Deputy Dominski, Deputy Moats, John Doe (Doctor), and Nurse Jane Does ##1, 2 and 3 are employed by the Milwaukee County Sheriff's Department in various capacities at the Milwaukee County jail in Milwaukee, Wisconsin.

### B. Delay in Receiving Mail

On June 15, 2005, petitioner received a notice from the United States District Court for the Western District of Wisconsin regarding Case No. 04-C-661-C. The notice, dated June 13, 2005, instructed petitioner to file briefs in opposition to two motions that had been filed by the defendant in that case. (Petitioner had received a copy of one of the motions

on June 13, which was a Monday.) The Milwaukee County jail delivers mail to inmates five days each week. Inmates do not receive mail on Sundays or Mondays. Members of the general public receive mail six days each week. Because he received the notice on June 15, petitioner was unable to file a response to one of the motions, a motion to strike the testimony of plaintiff's expert witness.

### C. Placement in Lockdown

On June 26, 2005, petitioner and the other inmates in pod 6C of the Milwaukee County jail were locked up in response to an alleged incident a day earlier in which a nurse had been threatened. Respondent Dominski ordered the lockdown on the 1st shift on June 26. The inmates were not let out of their cells when respondent Moats arrived at the start of 2nd shift and were not told why they were being kept locked up. As a result, several inmates became agitated and began yelling and asking to see a sergeant or a captain. Respondent Moats denied the inmates' requests, which caused at least one inmate to begin kicking his cell door. Eventually a captain came to the pod and threatened to turn it into a segregation unit if the inmates were not quiet. Several inmates continued to talk to each other. Respondent Moats told them to be quiet but they continued to talk and several kicked their cell doors.

At some point on June 26, all inmates housed on the pod were placed on segregation

status. No inmate received a written report of the conduct that resulted in the lockdown. Inmates on the pod were not allowed to order legal paper, stamps, pencils or personal hygiene items from the canteen. They were placed on a restricted diet consisting of two sandwiches and milk but no fruit.

On June 27, 2005, the inmates on the pod received sandwiches. Around 11:30 a.m., petitioner awoke to the sound of barking. Petitioner went to the front of his cell and saw corrections officers with dogs. The dogs were taken to each cell while the inmates ate. In addition, respondent Murphy denied every inmate on the bottom tier of the pod an hour of recreation. The inmates on the pod were kept in their cells the entire day.

On June 28, 2005, petitioner was allowed to shower and received 30 minutes of recreation time. At this point, none of the inmates had received a written explanation for the lockdown or a conduct report. Also on June 28, petitioner received an order from the United States District Court for the Western District of Wisconsin in Case No. 05-C-363-C. The order had been sent out on June 24, 2005 and petitioner received it "in an open condition." When the order arrived at the jail, jail officials learned that petitioner and other inmates had filed suit against them. They began subjecting petitioner and the other inmates to corporal punishment on June 26.

On June 29, 2005, petitioner received a sandwich for breakfast. At the same time, inmates on other pods received hot meals for breakfast and dinner, including inmates housed

in designated segregation units.

#### D. Conduct Hearings

On June 29, 2005, the jail began conducting hearings into the reasons for the lockdown. The Milwaukee County jail's inmate handbook states that inmates charged with rule violations are entitled to the following: a written copy of the disciplinary hearing report within 24 hours of the violation, including a description of the offending conduct; a hearing within 7 days of the violation; 24 hours' advance notice before the hearing; the opportunity to attend the hearing in person or to submit a written statement to the hearing officer; the assistance of a volunteer advocate in preparing a defense; the opportunity to call witnesses at the hearing; and a written description of the hearing officer's decision.

Petitioner did not receive advance notice of his hearing. He appeared before respondents Nyklewick and Paradise separately and was told that he was charged with disrupting the orderly operation of the jail, threatening another person and participating in a riot. (Respondent Nyklewick had issued the order to lock down the pod.) Although petitioner told respondent Paradise that he was not involved in the disturbance, he was found guilty and was sentenced to 10 days of segregated confinement. Petitioner was not given the assistance of an advocate or the chance to call witnesses, including the official who had allegedly been threatened. After being found guilty, he did not receive a written statement

of the hearing officer's conclusions.

On June 30, 2005, the deputy inspector walked around the pod with respondents Nyklewick and Kernan. They stopped in front of petitioner's cell for three minutes. Later in the day, a group of sheriff's deputies came onto the pod and took all of the inmates's hygiene products and personal and legal papers.

#### E. Conditions During Lockdown

From June 27 to July 6, 2005, petitioner and the other inmates on the pod were exposed to an inmate who had a staph infection that was not treated despite his repeated requests. The inmate was contagious. His infection created a bullet-sized hole in his neck. Petitioner and other inmates were forced to use the same showers as this inmate.

The inmates were not given fresh clothes for two weeks and were not allowed to clean their cells. In addition, none of the inmates received "time out," during which an inmate may call his lawyer, shower or go to recreation. Respondent Sawczuk was responsible for denying inmates recreation time. When inmates were given recreation time, it was in 30-minute increments instead of hours. In total, petitioner was confined to his cell for six 24-hour periods, during which he was not allowed to shower or call his lawyer.

## DISCUSSION

## A. First Amendment

### 1. Delay in receiving mail

I understand petitioner to allege that the Milwaukee County jail's policy concerning distribution of mail to inmates violates his rights under the First Amendment. He alleges that the jail distributes incoming mail 5 days each week and that one of the days on which mail is not distributed is Monday. As a result of the this policy, petitioner did not receive an order from this court dated June 13, 2005 until June 15, 2005 and was unable to file a response to a motion. Also, petitioner alleges that he received an order from this court dated June 24, 2004 on June 28, 2005.

Prison inmates and pretrial detainees have a constitutional right to send and receive mail while incarcerated. Thornburgh v. Abbott, 490 U.S. 401 (1989). However, this right may be circumscribed by restrictions that are "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987). Denial of mail or lengthy, repeated delays in receiving mail may be serious enough to implicate constitutional concerns but the Court of Appeals for the Seventh Circuit has held that short-term delays are not serious enough to do so. Sizemore v. Williford, 829 F.2d 608, 610 (7th Cir. 1999). In this case, petitioner alleges that his mail was delayed for a few days on two occasions. This allegation is similar to sporadic, short-term delays that the court of appeals has found insufficient to state a claim under the First Amendment. Zimmerman v. Tribble, 226 F.3d 568, 572-73

(7th Cir. 2000) (one incident in which inmate's mail was not delivered for three weeks not sufficient to state a claim); Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999). Petitioner complains that the Milwaukee County jail delivers mail to inmates 5 days each week but not on Sundays and Mondays, but this adds nothing to his claim. Zimmerman, 226 F.3d at 573 (allegation that prison had routine practice of not processing mail timely not enough to state a claim). In a similar vein, petitioner's allegation that he was unable to file a response to a motion because of the delay in receiving his mail will not support a First Amendment claim. Id. at 571. (Whether it supports a claim of denial of access to the courts will be addressed later in this opinion.) Petitioner will be denied leave to proceed on this claim.

## 2. Opening of mail

Petitioner alleges that he received the order from this court dated June 24, 2005 "in an open condition." I understand petitioner to allege that jail officials opened this piece of mail before delivering it to him. Prison officials may lawfully open mail sent by a court to an inmate without violating the inmate's constitutional rights. Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996). Thus, petitioner will be denied leave to proceed on this claim.

## 3. Retaliation

Petitioner alleges that officials at the jail learned that he and other inmates had filed the present lawsuit against them when the June 24, 2005 order from this court arrived at the jail. He alleges further that officials began subjecting the inmates to corporal punishment on June 26, 2005. Although the timing of these events is not clear (petitioner says he received this mail on June 28, 2005), I understand petitioner to allege that the order from this court was possibly received at the jail on June 26, 2005 and read by jail officials, who then began subjecting petitioner and other inmates to corporal punishment.

A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. Id. To state a claim, the prisoner must allege a chronology of events that supports drawing an inference that the official acted in retaliation. Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994). The allegations must show that absent a retaliatory motive, the prison official would have acted differently. Babcock, 102 F.3d at 275.

Petitioner alleges that jail officials began subjecting him and other inmates to corporal punishment on June 26, the same day that the inmates in pod 6C of the jail were placed in segregated status after an alleged incident in which a nurse was threatened. Petitioner does not provide specific examples of the "corporal punishment" to which he was subjected. Therefore, I understand him to be referring to the placement of the pod on segregated status.

With that understanding, petitioner has pleaded himself out of a retaliation claim because his allegations suggest that, even if the jail officials did not learn of his lawsuit, they would have placed the pod on segregated status because an inmate on the pod had threatened a nurse. Therefore, petitioner has failed to state a claim for retaliation.

#### B. Access to Courts

Petitioner alleges that he was unable to file a response to a motion in another case pending in this court, Case No. 04-C-661-C, because he received a notice from the court dated June 13, 2005 instructing him to do so on June 15, 2005. I understand petitioner to allege that the delay in receiving his mail infringed his right of access to the courts. He alleges that he was unable to file a response to a motion to strike the testimony of his expert witness. However, the court's record for Case No. 04-C-661-C indicates that petitioner filed a brief in opposition to the motion on June 21, 2005. A decision on the motion was not issued by this court until August 8, 2005. Because the court considered petitioner's brief before it resolved the motion, petitioner will be denied leave to proceed on an access to courts claim.

#### C. Due Process

I understand petitioner to allege multiple violations of this rights under the due

process clause in connection with the lockdown of pod 6C. The initial question is whether the lockdown and petitioner's sentence of 10 days in segregated confinement violated petitioner's substantive due process right to be free from punishment. The second question is whether petitioner was entitled to procedural due process protections in connection with either the lockdown or sentence.

### 1. Substantive due process

Because pretrial detainees such as petitioner have not been convicted of the offense for which they are detained, they possess a substantive due process right to be free from punishment. Youngberg v. Romeo, 457 U.S. 307, 320 (1982); Bell v. Wolfish, 441 U.S. 520, 535 (1978). Although pretrial detainees may not be punished for the crime for which they are being held, they may be disciplined for violating prison regulations designed to maintain order and security. Rapier v. Harris, 172 F.3d 999, 1003 (7th Cir. 1999) (“a pretrial detainee can be punished for misconduct that occurs while he is awaiting trial in a pretrial confinement status.”). An action taken against a pretrial detainee constitutes unlawful punishment if it is (1) motivated by an intent to punish; (2) not reasonably related to a non-punitive purpose such as maintaining security and order; or (3) an exaggerated response to that interest. Bell, 441 U.S. at 538; Rapier, 172 F.3d at 1005. In determining whether a restriction or condition is reasonably related to an institution's interest in

maintaining security and order, courts must defer to the expertise of prison officials unless it is clear that they have overreacted. Bell, 441 U.S. at 540 n.23.

In this case, petitioner alleges that either respondent Dominski or respondent Nyklewick ordered a lockdown of the pod in which petitioner was housed after a nurse was allegedly threatened by one of the inmates. Furthermore, at his disciplinary hearing, petitioner learned that he had been charged with disruptive conduct, threatening another person and participating in a riot. These allegations indicate that petitioner or some other inmate engaged in conduct that posed a threat to the order and security of the jail and that the lockdown was imposed in response to this threat. “Restraints that are reasonably related to the institution’s interest in maintaining jail security do not, without more, constitute unconstitutional punishment.” Bell, 441 U.S. at 540. Although petitioner alleges that he remained in lockdown for six days and that he was sentenced to ten days in segregated confinement, it is not clear that these sanctions constituted an exaggerated response to the threat perceived by jail officials. Therefore, this court must defer to the judgment of jail officials that the sanctions were a necessary response. Id. at 540 n.23. Because petitioner’s allegations indicate that the lockdown and his sentence to segregated confinement were not imposed as punishment for the crime for which he was being detained, he will be denied leave to proceed on a substantive due process claim.

## 2. Procedural due process

Although the lockdown and time in segregated confinement did not constitute “punishment” as that term is understood in the Eighth Amendment, the question remains whether petitioner was entitled to procedural due process in connection with either sanction.

In Rapier, 172 F.3d at 1001-02, a pretrial detainee was placed in solitary confinement for 270 days without receiving notice or a hearing after repeatedly engaging in disruptive behavior, including attacking another inmate. The Court of Appeals for the Seventh Circuit held that “it is permissible to punish a pretrial detainee for misconduct while in pretrial custody . . . only after affording the detainee some sort of procedural protection.” Id. at 1005. Several years later, in Higgs v. Carver, 286 F.3d 437 (7th Cir. 2002), the court of appeals hinged the applicability of due process protections on the reasons behind a detainee’s placement in segregation. The court reaffirmed that a pretrial detainee “cannot be placed in segregation as a punishment for a disciplinary infraction without notice and an opportunity to be heard” but stated also that “no process is required if he is placed in segregation not as punishment but for managerial reasons.” Id. at 438. The court explained that “managerial reasons” could include protecting a detainee from other inmates or protecting jail staff from the detainee’s “violent propensities.” Id. Most recently, the court held that prison officials did not violate a pretrial detainee’s due process rights by placing him in segregated confinement for two days and then giving him a hearing. Holly v.

Woolfolk, 415 F.3d 678 (7th Cir. 2005). The court analogized the brief, two-day detention to the 48 hours in which a person can be arrested and held before being charged with a crime or given a hearing.

In the present case, petitioner alleges that he was placed in lockdown for six days without receiving a hearing or explanation and that he was sentenced to ten days in segregated confinement after a hearing in which he alleges he was denied a host of procedural protections. With respect to the lockdown, it is clear that no process was required before or after because it was implemented in response to a security threat. Petitioner concedes that his pod was locked down after an alleged incident in which a nurse was threatened. A hearing before or after the lockdown would frustrate the jail's efforts to restore order and investigate the threat. Also, a hearing would have served no purpose because the lockdown was an emergency measure, not the result of the application of law to facts. Higgs, 286 F.3d at 438.

The sentence of ten days in segregated confinement is a closer question. On one hand, the sentence appears more analogous to the two-day segregation in Holly than the 270-day detention in Rapier and the 34-day segregation in Higgs, at least with respect to its length. However, petitioner's sentence was imposed after an adjudicatory hearing. Moreover, Holly's comparison of a two-day confinement in disciplinary segregation to an arrest of a free citizen suggests that formal process must accompany any segregation of a

pretrial detainee that lasts beyond two days. Because I cannot conclude definitively that petitioner's due process rights were not violated, I will allow him to proceed on this claim.

Under Wolff v. McDonnell, 418 U.S. 539, 565 (1974), the following procedural protections are required when a liberty interest is at stake: 1) advance written notice of the disciplinary charges; 2) an opportunity to call witnesses and present documentary evidence; and 3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. Also, if institutional safety requires the omission of certain evidence, the inmate must be provided a statement indicating the fact of such omission. Id.

Petitioner alleges that he did not receive the assistance of an advocate. Due process does not guarantee petitioner the assistance of an advocate; therefore, his failure to receive that assistance did not violate his procedural due process rights. The fact that the jail's procedures for inmate discipline guaranteed him the assistance of an advocate is irrelevant because federal law defines the requirements of due process in a given situation, not state or local law. A state's or local government's failure to follow its own procedures does not necessarily violate due process. Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993) ("a violation of state law . . . is not a denial of due process, even if the state law confers a procedural right"); Colon v. Schneider, 899 F.2d 660, 670 n.6 (7th Cir. 1990).

Petitioner alleges that he did not receive advance notice of the hearing or a written statement of reasons for his sentence of 10 days in disciplinary segregation. Because Wolff

guarantees inmates advance written notice of disciplinary charges and a statement of reasons supporting disciplinary action, petitioner's allegations are sufficient to support a due process claim.

Finally, petitioner alleges that he was not allowed to call witnesses at his hearing. The right to call witnesses is basic to a fair hearing. Wolff, 418 U.S. 566 (1974). Generally speaking, inmates have the right to call witnesses in their defense at prison disciplinary hearings, subject to the prison's legitimate security concerns, id. at 566; Redding v. Fairman, 717 F.2d 1105, 1114 (7th Cir. 1983), but the Supreme Court has determined that cross-examination of an adverse witness poses more dangers than examination of a friendly one. Cross-examination of an adverse witness such as a corrections officer or an inmate who accuses another of misconduct might easily lead to violence or other forms of retaliation. With these dangers in mind, the Court has held that the Constitution does not guarantee the procedural right to call adverse witnesses. Wolff, 418 U.S. at 567-68. Therefore, petitioner's allegation that he was not allowed to call his own witnesses is sufficient to state a due process claim.

The only remaining question is the identity of the proper defendant. Petitioner alleges that respondents Nyklewick and Paradise were the hearing officers at his hearing. Because it appears that they sentenced him to segregated confinement, I will allow petitioner to proceed on his claim against them.

#### D. Conditions in Lockdown

I understand petitioner to allege that several conditions of the lockdown violated his constitutional rights. Specifically, he alleges that jail officials restricted his diet and recreation time, that dogs were brought onto the pod and walked past each cell, that he was not given clean clothes or allowed to clean his cell for two weeks and that he was exposed to an inmate who was infected with a contagious disease.

If petitioner were a convicted inmate, his allegations would be analyzed directly under the Eighth Amendment, which prohibits state actors from acting with deliberate indifference towards an inmate's basic needs. Board v. Farnham, 394 F.3d 469, 478 (7th Cir. 2005). Because he is a pretrial detainee, petitioner's allegations are analyzed instead under the due process clause. However, the Court of Appeals for the Seventh Circuit has stated that the deliberate indifference standard is applicable to pretrial detainees as well as convicted inmates. Id.; Mathis v. Fairman, 120 F.3d 88, 91 (7th Cir. 1997).

That standard has objective and subjective components. The objective component focuses on whether petitioner was exposed to an objectively serious harm. The subjective component focuses on whether respondents were deliberately indifferent to his health or safety. A prison official is deliberately indifferent when he "knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from

which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994).

1. Restricted diet

Petitioner alleges that he was given sandwiches and milk during the lockdown instead of the hot meals that other inmates at the jail received. This allegation is wholly insufficient to constitute a serious risk to his health. Failure to provide an inmate “nutritionally adequate food” may violate the Eighth Amendment if it continues for an extended period. Antonelli v. Sheehan, 81 F.3d 1422, 1432 (7th Cir. 1996). Petitioner does not allege that he was not given enough food to maintain his health. He appears merely to express a preference for the meals served to other prisoners. Cold meals that are merely less desirable than warm meals do not implicate a constitutional right.

2. Restricted recreation time

Petitioner alleges that he was not given his usual amount of recreation time while he was on lockdown. He alleges that he received at least one 30-minute period of recreation time on June 28, 2005. Like restrictions on food, restrictions on an inmate’s ability to exercise implicate constitutional concerns only if lack of movement causes muscle atrophy, threatening the health of the prisoner. Thomas v. Ramos, 130 F. 3d 754, 763 (7th Cir.

1997). “Unless extreme and prolonged, lack of exercise is not equivalent to a medically threatening situation.” Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988); see also Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986) (no Eighth Amendment violation even though inmates confined to cells twenty-four hours a day for a one-month period after a lockdown). Petitioner’s allegation is insufficient to state a claim.

### 3. Presence of dogs

Petitioner alleges that dogs were brought onto the pod on June 27, 2005 and allowed to pass by each inmate’s cell. There is no indication that the presence of dogs placed petitioner’s health or safety at risk. Therefore, his allegation is insufficient to state a claim.

### 4. Lack of clean clothes and inability to clean cell

Although petitioner alleges that the lockdown lasted only six days, he contends that he was denied clean clothes and could not clean his cell for two weeks. The Court of Appeals for the Seventh Circuit has stressed that prison officials must maintain sanitary and safe prison conditions. Johnson v. Pelker, 891 F.2d 136, 139 (7th Cir. 1989). However, the deprivation of cultural amenities does not constitute cruel and unusual punishment, Davenport v. DeRobertis, 844 F.2d 1310, 1316 (7th Cir. 1987), and conditions that create “temporary inconveniences and discomforts” or that make “confinement in such quarters

unpleasant” are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F.2d 105, 109 (7th Cir. 1971). Petitioner’s allegations that he was denied clean clothes and the chance to clean his cell for two weeks do not rise to the level of a constitutional violation.

5. Exposure to contagious inmate

Petitioner alleges that from June 27, 2005 to July 6, 2005, he was exposed to an inmate who had a staph infection that was contagious. Although petitioner alleges that he was locked down 24 hours a day for six days during this time period, he alleges also that he was forced to use the same shower as this inmate. The Supreme Court has indicated that prison officials may be liable for the exposure of inmates to a serious, communicable disease. Helling v. McKinney, 509 U.S. 25, 33 (1993). Although it is permissible to infer that the infected inmate posed a serious risk to petitioner, he has not alleged that any jail official was aware of this risk and consciously disregarded it. Therefore, he has failed to state a claim.

E. Equal Protection

Finally, I understand petitioner to be alleging two violations of his rights under the equal protection clause of the Fourteenth Amendment. First, petitioner alleges that his equal protection rights are violated because inmates at the jail receive mail five days each week but members of the general public receive mail six days each week. Second, petitioner alleges

that he and the other inmates on pod 6C received only sandwiches to eat during their lockdown although inmates in other areas of the jail, including those housed in designated segregation units, received hot meals.

The equal protection clause of the Fourteenth Amendment prohibits government actors from applying different legal standards to similarly situated individuals. See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Petitioner's allegations are insufficient to state a claim under the equal protection clause because he is not similarly situated to members of the general public with respect to mail delivery and because he was not similarly situated to inmates at the jail who were not locked down. Therefore, he will be denied leave to proceed on an equal protection claim.

#### F. Motions

Two motions are pending currently in this case. The first is plaintiff's motion for class certification, which will be denied. To certify a class action, the court must find, among other things, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). I cannot make this finding in the present action because plaintiff is not represented by an attorney. Since absent class members are bound by a judgment whether for or against the class, they are entitled at least to the assurance of competent representation afforded by licensed counsel. Oxendine v. Williams, 509 F. 2d

1405, 1407 (4th Cir. 1975); see also Ethnic Awareness Organization v. Gagnon, 568 F. Supp. 1186, 1187 (E.D. Wis. 1983); Huddleston v. Duckworth, 97 F.R.D. 512, 51415 (N.D. Ind. 1983)(prisoner proceeding pro se not allowed to act as class representative).

Second, plaintiff filed a motion for extension of time to submit his initial partial payment. This motion will be denied as moot because plaintiff has submitted his initial partial payment.

Finally, I note that petitioner's allegations concern events that occurred while he was incarcerated at the Milwaukee County jail in Milwaukee, Wisconsin. Because Milwaukee is outside this judicial district, this case may be subject to dismissal or transfer on the ground of improper venue.

#### ORDER

IT IS ORDERED that

1. Petitioner Gary Campbell's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondents Nyklewick and Paradise violated his rights under the due process clause of the Fourteenth Amendment by sentencing him to segregated confinement without providing him advance written notice of the disciplinary charges he was facing, an opportunity to present witnesses at his disciplinary hearing and a written statement of findings justifying his sentence of 10 days in disciplinary segregation;

2. Petitioner is DENIED leave to proceed in forma pauperis on all other claims raised in this lawsuit;

3. Respondents Secretary, Department of Corrections, Milwaukee County jail, Milwaukee Sheriff's Department, Health Service Department, David A. Clarke, Kevin Carr, Richard Schmidt, Captain John Doe, Sgt. Kernan, Sgt. Sawczuk, Sgt. Maas, Deputy Murphy, Deputy Dominski, Deputy Moats, John Doe (Doctor), Nurse Jane Doe, Nurse Jane Doe and Nurse Jane Doe are DISMISSED from this case;

4. Petitioner's motion for class certification, dkt. #3, is DENIED;

5. Petitioner's motion for an extension of time to submit his initial partial payment, dkt. #5, is DENIED as moot;

6. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondents or to respondents's lawyer.

7. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

8. The unpaid balance of petitioner's filing fee is \$79.56; petitioner is obligated to

pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

9. Because petitioner is proceeding in this action in forma pauperis, the court will make arrangements with the United States Marshal to complete service of process on the respondents.

Entered this 3rd day of November, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge