

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

DEAN SNODGRASS,

Petitioner,

v.

DR. GLEN HEINZL;
CANDANCE WARNER, M.G.R.;
C.O. BOOTH; JAMES GREER;
CATHERINE FERREY; MATT FRANK;
STEVEN CASPERSON; LIZZIE TEGELS;
SHARON ZUNKER and LISA GREGAR,

Respondents.

ORDER

05-C-608-C

This is a civil rights action brought under 42 U.S.C. § 1983 by petitioner Dean Snodgrass, an inmate at the New Lisbon Correctional Center in New Lisbon, Wisconsin. In an order dated December 16, 2005, I denied petitioner's request for leave to proceed in forma pauperis on several claims raised in his complaint. I stayed a decision on his request for leave to proceed in forma pauperis on his Eighth Amendment claim concerning his inability to obtain hearing aids because the allegations in his complaint were difficult to understand and appeared to conflict with statements made by the prison officials who

responded to his inmate complaints. I directed petitioner to send the court a statement that he was to write himself, giving answers to questions I asked in the December 16 order.

On December 21, 2005, petitioner filed two documents with the court. The first is a one-page letter dated December 20, 2005. The second document filed by petitioner is titled “Amended Complaint Supplement.” I will set out the allegations in these documents and then discuss their impact on petitioner’s Eighth Amendment claim. At the end of this order, I will address petitioner’s motion for appointment of counsel.

A. Petitioner’s Supplemental Allegations

1. December 21, 2005 letter

Petitioner had two hearing aids while he was “on the street” and while he was detained at the Marathon County Jail. Respondent Heinzl was at the jail and knew petitioner had them. The hearing aids were lost through no fault of petitioner while he was being transferred to the Dodge Correctional Institution.

2. “Amended Complaint Supplement”

Petitioner arrived at the Dodge Correctional Institution on April 29, 2002. He told a doctor at the institution that he had hearing loss from the military. The doctor diagnosed him with hearing problems and told him that he needed two hearing aids. However,

petitioner did not receive any hearing aids during the time he spent at Dodge. At some point, he was transferred from Dodge to the Waupun Correctional Institution. He received one hearing aid nine months after his transfer because “the hearing aid doctor” told him that the Department of Corrections would give him only one hearing aid.

Petitioner remained at Waupun until being transferred to the New Lisbon Correctional Institution, where he was seen by a nurse named Lisa Gregar. Petitioner told Gregar that his hearing aid was not working and she told him that he would have to see respondent Heinzl before he could receive a new one. Gregar refused to allow petitioner to get his hearing aid out of the institution’s property room until he had seen respondent Heinzl. Petitioner saw respondent Heinzl two months later and requested his hearing aid. Respondent Heinzl stated that he was going to test the hearing aid and that petitioner needed two hearing aids but that the department would have discretion to decide whether petitioner received them.

It took petitioner three and a half months and many requests to get his hearing aid, which did not work. Nurse Gregar told him he could not have it fixed because the institution was locked down after a riot. Petitioner asked respondent Heinzl again why he could not get two hearing aids and respondent Heinzl told him that the decision was within the department’s discretion. Petitioner continued to ask members of the Health Services Unit about getting his hearing aid fixed. At some point, respondents Warner and Heinzl

told petitioner that he should see a specialist. Petitioner wanted his hearing aid fixed because he could not understand what inmates around him were saying and why they were pushing him around. At some point, respondent Heinzl told petitioner that he would arrange an appointment for petitioner with a specialist. Some time later, respondent Heinzl told petitioner that he would be going to see a specialist but that he could not have his broken hearing aid fixed. During the time petitioner tried unsuccessfully to obtain two hearing aids and have his broken hearing aid fixed, he was losing more of his hearing.

Respondent Booth took petitioner to his appointment with the specialist. He told the specialist repeatedly that the Department of Corrections would not allow petitioner to have two hearing aids. The specialist told petitioner that he had lost about seventy percent of his hearing because he did not have two hearing aids. The Department of Corrections knew about petitioner's condition because respondent Heinzl told petitioner that he contacted the department about getting petitioner two hearing aids.

B. Eighth Amendment Claim

In the December 16, 2005 order, I asked petitioner to answer three questions.

1. When was petitioner first medically assessed as needing two hearing aids?
2. When and how did each respondent learn of his need for hearing aids, what did each respondent know about his condition and how did each

respondent respond?

3. What facts does petitioner have to support his contention that the Wisconsin Department of Corrections has a policy prohibiting inmates from receiving more than one hearing aid?

With respect to the first question, petitioner's supplementary allegations indicate that he was first diagnosed as needing two hearing aids some time after April 29, 2002, when he was detained at the Dodge Correctional Institution.

In answering the third question, petitioner backs away from his earlier contention that the Wisconsin Department of Corrections had a policy prohibiting inmates from receiving more than one hearing aid. In his supplementary materials, petitioner alleges that respondent Heinzl informed him that the department retained discretion to decide whether he would receive one or two hearing aids. An allegation that the department has discretion as to the medical care it provides inmates does not state a claim under the Eighth Amendment. The department has a limited budget and cannot provide the best health care possible to each inmate. Nor is it required to do so under the Eighth Amendment.

The second question petitioner was directed to answer addressed the issue of personal involvement. One of the reasons petitioner's original complaint was difficult to understand was that he did not allege clearly how each prison official named in his complaint was personally involved in denying him hearing aids. This is a critical requirement because

liability under § 1983 attaches only to those state actors who are involved personally in a constitutional violation. Gossmeier v. McDonald, 128 F.3d 481, 495 (7th Cir. 1997). Therefore, I ordered petitioner to explain when and how each respondent learned of his need for hearing aids, precisely what they knew about his condition and how they responded.

In his supplementary materials, petitioner mentions only three of the eight officials named as defendants in his original complaint. In addition, he has added another potential defendant, a nurse at New Lisbon named Lisa Gregar. I will discuss his allegations with respect to each official.

1. Respondents Greer and Zunker

In his original complaint, petitioner alleged that respondents Greer and Zunker were contacted by other respondents and asked why petitioner could not obtain two hearing aids. In the December 16 order, I stated that this allegation was insufficient because petitioner did not indicate who contacted respondents Greer and Zunker, when they were contacted, what they were told and how they responded. Petitioner does not mention respondents Greer or Zunker in his supplementary materials. He provides no additional information that indicates how they were involved in denying him hearing aids. His allegation that the Department of Corrections knew about his need for hearing aids because respondent Heinzl told petitioner that he contacted the department about getting petitioner two hearing aids

is insufficient because it is even more vague than the allegations in his original complaint. Therefore, he will be denied leave to proceed in forma pauperis against respondents Greer and Zunker.

2. Respondents Ferrey and Tegels

Respondents Ferrey and Tegels are employed as warden and deputy warden at New Lisbon. In the December 16 order, I stated that petitioner had not made clear in his original complaint when respondents Ferrey and Tegels knew of his need for hearing aids and when they approved a decision not to provide them. From my review of petitioner's allegations and the responses he received to his inmate complaints, I concluded that the only time they could have been deliberately indifferent to his need was from the start of petitioner's incarceration at New Lisbon in October 2004 until April 2005, when he saw the specialist. However, petitioner had not provided any allegations to suggest that respondents Ferrey or Tegels were aware of his need during this time and failed to act.

Petitioner does not make any new allegations with respect to respondents Ferrey or Tegels in his supplementary materials. He does not allege that they were aware of his need for hearing aids when he arrived at New Lisbon. He does not allege that they refused to allow him to obtain hearing aids at any time during his incarceration. Therefore, he has not alleged that they were personally involved in denying him hearing aids. He will be denied

leave to proceed in forma pauperis against them.

3. Respondents Frank and Casperson

Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections and respondent Steven Casperson is employed by the department as an administrator. In his original complaint, petitioner alleged that these two men violated his rights under the Eighth Amendment because they (1) knew that other respondents were violating his constitutional rights but did nothing and (2) had an opportunity to “change the rules” in their discretion after learning that petitioner’s rights were being violated. In the December 16 order, I stated that petitioner’s allegations were insufficient to state a claim against them because he had not indicated when they became aware of petitioner’s need for hearing aids and how they responded. Petitioner has not answered these questions in his supplementary materials. He does not mention respondent Frank or respondent Casperson after listing their names in the caption of his “Amended Complaint Supplement.” He has not made any new allegations that would suggest how and when respondents Frank and Casperson learned of his need for hearing aids and how they responded. Moreover, his allegation that respondents Frank and Casperson had the discretion to alter an apparently informal policy of the department but failed to do so is insufficient to state a claim against them. Thus, petitioner will be denied leave to proceed in forma pauperis against these respondents.

4. Respondent Booth

Respondent Booth is a correctional officer at New Lisbon. In his supplementary materials, petitioner alleges that respondent Booth took him to see a hearing specialist and informed the specialist that the department would not allow petitioner to have two hearing aids. Petitioner characterizes this action as “interference.” However, from petitioner’s other allegations, it appears that at worst, respondent Booth was merely telling the specialist that the department often chose not to provide inmates with two hearing aids. Petitioner conceded that the specialist recommended that he receive two hearing aids. Nothing in petitioner’s original complaint or his supplementary materials suggests that respondent Booth prevented the specialist from examining petitioner or recommending that he receive two hearing aids. Therefore, I conclude that petitioner’s allegations are insufficient to state a claim against respondent Booth. He will be denied leave to proceed in forma pauperis against respondent Booth.

5. Respondent Gregar

Petitioner alleges that respondent Gregar, a nurse at New Lisbon, examined him soon after he was transferred there from the Waupun Correctional Institution. He alleges further that she told him that respondent Heinzl would have to see him before he could receive a

new hearing aid. Nothing in this allegation suggests that she was being deliberately indifferent to his condition. As a nurse, it is likely that she would not be able to order a new hearing aid for petitioner without the approval of a physician. Petitioner alleges also that, soon after he arrived at New Lisbon, respondent Gregar refused to allow him to get his hearing aid out of property storage until he had seen respondent Heinzl. This allegation is somewhat troubling because it is not immediately clear why respondent Heinzl's approval would be required to allow petitioner to retrieve the hearing aid with which he arrived at New Lisbon. I conclude that when this allegation is liberally construed, it states a claim of deliberate indifference against respondent Gregar.

Finally, petitioner alleges that respondent Gregar informed him that his hearing aid could not be fixed because the institution was on lockdown status. This allegation is insufficient to support a claim of deliberate indifference.

6. Respondent Warner

Respondent Warner is manager of the Health Services Unit at New Lisbon. In his original complaint, petitioner alleged that respondent Warner knew he needed two hearing aids and that she and respondent Heinzl contacted persons in the Department of Corrections about petitioner's need but were rebuffed. In his supplementary materials, petitioner alleges that respondents Warner and Heinzl told him that he should see a

specialist and that some time later, respondent Heinzl made an appointment for him to see a specialist. These allegations are insufficient to support a claim of deliberate indifference against respondent Warner because they show that she pursued petitioner's grievance with superiors and worked with respondent Heinzl to arrange for petitioner to see a specialist. Petitioner will be denied leave to proceed in forma pauperis against respondent Warner.

7. Respondent Heinzl

In his original complaint, petitioner alleged that respondent Heinzl was his doctor at the Dodge Correctional Institution and New Lisbon. He alleged further that, while he was detained at New Lisbon, respondent Heinzl contacted other persons within the department about petitioner's need and that he never gave petitioner two hearing aids at Dodge or New Lisbon despite petitioner's repeated requests. In his supplementary materials, petitioner alleges that respondent Heinzl was at the Marathon County jail at the time petitioner was detained there and that respondent Heinzl knew then that petitioner had two hearing aids. He alleges further that he saw respondent Heinzl two months after arriving at New Lisbon, at which point respondent Heinzl told him he was going to test his hearing aid that was not working properly and that the Department of Corrections had the discretion to determine whether petitioner received two hearing aids. Finally, petitioner alleges that respondent Heinzl arranged for him to see a specialist.

From these allegations, it appears that respondent Heinzl was attentive to petitioner's need for hearing aids, at least when petitioner was detained at New Lisbon. Respondent Heinzl contacted persons within the Department of Corrections about getting petitioner two hearing aids, told petitioner he was going to test the hearing aid petitioner had that was not working properly and made an appointment for petitioner to see a specialist. The fact that two or three months passed between these events does not mean that respondent Heinzl was ignoring petitioner's requests. A prison official is deliberately indifferent when he or she ignores or disregards an inmate's medical condition. Collignon v. Milwaukee County, 163 F.3d 982, 988 (7th Cir. 1998). Petitioner's allegations indicate that respondent Heinzl took action aimed at resolving petitioner's concerns regarding his hearing. Although petitioner's allegations are to be construed in his favor, I cannot ignore the actions petitioner concedes respondent Heinzl took on his behalf. Because his allegations do not state a claim for deliberate indifference, I will deny petitioner's request for leave to proceed in forma pauperis against respondent Heinzl.

C. Motion for Appointment of Counsel

Petitioner asks that counsel be appointed to represent him in this case. Before the court can appoint counsel in a civil action such as this, it must find first that the petitioner made a reasonable effort to retain counsel and was unsuccessful or that he was prevented

from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). In this court, a petitioner must list the names and addresses of at least three lawyers who declined to represent him before the court will find that he made reasonable efforts to secure counsel on his own. Petitioner attached to his motion letters from three law firms declining to represent him in this action. Therefore, he has made reasonable efforts to retain counsel on his own.

Second, the court must consider whether the petitioner is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is in its early stages. It involves an isolated incident in which a nurse refused to allow petitioner to retrieve a hearing aid from the property storage area. If petitioner did not file an inmate complaint concerning this issue, it is unlikely his case will survive a motion to dismiss for failure to exhaust administrative remedies. At this early stage of the proceedings, petitioner's request for appointment of counsel will be denied without prejudice to his renewing it at a later stage.

ORDER

IT IS ORDERED that

1. Petitioner Dean Snodgrass's request for leave to proceed against respondent Lisa Gregar is GRANTED with respect to his claim that she violated his Eighth Amendment rights by refusing to allow him to retrieve his hearing aid from the property storage shortly after he was transferred to the New Lisbon Correctional Institution;

2. Petitioner's request for leave to proceed against respondents Glen Heinzl, Candance Warner, C.O. Booth, James Greer, Catherine Ferrey, Matt Frank, Steven Casperson, Lizzie Tegels and Sharon Zunker is DENIED and these individuals are DISMISSED from this case;

3. Petitioner's motion for appointment of counsel is DENIED without prejudice to his renewing it at a later stage of the proceedings.

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

5. 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.

6. The unpaid balance of petitioner's filing fee is \$245.87; petitioner is obligated to

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

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendant.

Entered this 5th day of January, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge