IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WAR N. MARION,

Petitioner,

ORDER

v.

07-C-243-C

COLUMBIA CORRECTIONAL INSTITUTION,
WARDEN GREGORY GRAMS,
DEPUTY WARDEN MARC CLEMENTS,
CAPTAIN LESLY WINSLOW-STANLEY,
C.O. GREGORY GARRISON,
CAPTAIN DYLON RADTKE,
SUPERVISOR JANEL NICHOLS,
ADVOCATE MARY PEISER,
PSYCHOLOGIST ANDREA NELSON, and
LT. KELLER,

Respondents.

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On March 23, 2009, the Court of Appeals for the Seventh Circuit reversed this court's dismissal of petitioner War N. Marion's claim that he had been denied procedural due process in connection with a disciplinary proceeding that resulted in his receiving a penalty of 240 days' confinement in "D.S.1." disciplinary segregation. The court noted that it was premature for this court to decide in its screening order that petitioner's segregated

confinement did not trigger due process protections. It ruled that the question whether a prisoner has a liberty interest in avoiding segregation depends on two things: the length of time the prisoner must spend in segregation and the conditions imposed as a part of the segregation status. It concluded that petitioner's penalty of eight months in D.S.1 segregation was sufficiently long to implicate a cognizable liberty interest if the conditions imposed on him in that status were significantly harsher "than those in the normal prison environment." Marion v. Columbia Correctional Institution, 559 F.3d 693, 698 (*7th Cir. 2009) (citing Bryan v. Duckworth, 88 F.3d 431, 433-34 (7th Cir. 1996), abrogated on other grounds, Diaz v. Duckworth, 143 F.3d 345, 346 (7th Cir. 1998)). Because petitioner Marion had not disclosed in his complaint the nature of the conditions he endured in D.S.1 segregation (and was not required to do so under liberal notice pleading standards), the court of appeals concluded that petitioner Marion had stated a claim upon which relief may be granted and should have been allowed to proceed on that claim. In keeping with the court of appeals' March 23, 2009 decision, petitioner will be granted leave to proceed in forma pauperis on his claim that he was denied due process in connection with a disciplinary hearing that resulted in his receiving a penalty of 240 days' confinement in D.S.1 disciplinary segregation.

In deciding that petitioner has stated a claim that his due process rights were violated, the court of appeals did not decide which of the respondents petitioner was suing were

involved personally in the alleged violation of petitioner's constitutional right to due process. Therefore, I must review the allegations of petitioner's complaint now to make that determination.

Before setting out the factual allegations contained in petitioner's complaint, however, I note that the court of appeals did not disturb this court's earlier ruling that petitioner failed to state a claim upon which relief may be granted with respect to his claim that his rights under the Fourteenth Amendment's equal protection clause were violated when he was disciplined and another prisoner was not. Nor did the court of appeals disagree with this court's decision that it is not proper for petitioner to raise in his federal lawsuit claims that one or more of the respondents violated state administrative regulations. Therefore, these claims remain dismissed from this action and the strike recorded against petitioner for filing a legally meritless claim will stand. George v. Smith, 507 F.3d 605 (7th Cir. 2007) (any *claim* dismissed from a complaint for one of the grounds enumerated in 28 U.S.C. § 1915(g) warrants a strike).

I turn then to the question whether petitioner has alleged facts sufficient to suggest that each respondent he names in his complaint denied him due process in connection with the disciplinary hearing. I conclude that petitioner has alleged facts suggesting that respondents Lt. Keller, Janel Nichols and Dylon Radtke were personally involved in failing to afford petitioner process he may have been due. However, the complaint is devoid of any

allegations of wrongdoing against respondents Gregory Grams and Marc Clements and petitioner's allegations against respondents Andrea Nelson, Lesly Winslow-Stanley, Gregory Garrison and Mary Peiser would permit the drawing of an inference that these respondents engaged in conduct that would have violated petitioner's procedural due process rights. In addition, petitioner's claim against respondent Columbia Correctional Institution must be dismissed because an institution is not a suable entity.

The factual allegations relating to petitioner's due process claim were set out originally in this court's order of June 8, 2007. They are repeated below.

ALLEGATIONS OF FACT

Petitioner War Marion is a prisoner at the Columbia Correctional Institution in Portage, Wisconsin. On December 7, 2006, respondent Andrea Nelson, a psychologist at the prison, was passing out puzzles to the prisoners in their cells. When petitioner received three puzzles and his cell mate, C.S., received only one, C.S. began to "charge" petitioner. Petitioner clenched his fists to defend himself.

Respondent Nelson returned to the cell and saw petitioner with clenched fists. Correctional officers came to the cell to separate petitioner from C.S.; they placed petitioner in segregation and left C.S. in the cell.

Respondent Lesly Winslow-Stanley, a captain, investigated the incident. Petitioner

told her everything that happened. Winslow-Stanley did not return petitioner to his housing area, despite assurances that she would.

Respondent Gregory Garrison, a "staff writer," issued petitioner a conduct report. In the report, Garrison wrote that he saw petitioner with clenched fists, which was a lie; Garrison was not on the scene at the time.

In anticipation of his disciplinary hearing, petitioner requested the presence of four witnesses, respondents Nelson and Winslow-Stanley, as well as two other prisoners. Respondents Janel Nichols (the security director) and Dylon Radtke (a captain) did not allow petitioner to call the staff witnesses, on the ground that they were "unavailable."

Petitioner's advocate, respondent Mary Peiser, failed to prepare a defense for him. She "had involvement with the deliberate intentions in finding [petitioner] guilty."

On the date of the hearing, "staff failed to come get" petitioner. Later, respondent Keller, the hearing officer, wrote falsely that petitioner had refused to attend.

Petitioner was found guilty of the charges against him and given a punishment of 240 days in segregation.

OPINION

The question before the court is whether petitioner has alleged each respondent's personal involvement in violating his constitutional right to due process. Because petitioner

alleges that the respondents failed in different ways to afford him procedural protections, I will assume first that petitioner will be able to prove that the conditions of his confinement in D.S.1 segregation were so unusually harsh that he had a liberty interest in avoiding that status, and consider next what procedural protections petitioner may have been due.

In the context of a disciplinary proceeding that implicates a liberty interest, it has long been established that due process requires that the prisoner be given "(1) advance (at least 24 hours before hearing) written notice of the claimed violation; (2) the opportunity to be heard before an impartial decision maker; (3) the opportunity to call witnesses and present documentary evidence (when consistent with institutional safety); and (4) a written statement by the fact-finder of the evidence relied on and the reasons for the disciplinary action." Scruggs v. Jordan, 485 F.3d 934, 939 (7th Cir. 2007) (quoting Rasheed-Bey v. Duckworth, 969 F.2d 357, 361 (7th Cir. 1992)); see also Wolff v. McDonnell, 418 U.S. 539 (1974).

Petitioner Marion has alleged facts sufficient to allow me to infer that respondent Keller, the hearing officer, prevented petitioner from having an opportunity to be heard when Keller wrote "falsely" that petitioner had refused to attend the hearing. Drawing all inferences in petitioner's favor as I am required to do at this early stage of the proceedings, I understand petitioner to be saying that respondent Keller knew that prison staff had not arranged for him to be present at the hearing, yet he proceeded with the hearing anyway.

This is enough to suggest that respondent Keller deprived petitioner of due process protections to which he may have been entitled. Therefore, I will grant petitioner leave to proceed in forma pauperis on his due process claim against respondent Keller.

Likewise, petitioner has alleged sufficient minimal facts to allow an inference to be drawn that respondents Janel Nichols and Dylon Radtke denied him his right to call witnesses. Petitioner alleges he asked for four witnesses, but was denied two of them, respondents Nelson and Winslow-Stanley. If the decision to deny petitioner these witnesses was entirely arbitrary, petitioner may be able to succeed on his claim that he was deprived of due process in that regard. However, petitioner should be aware that he does not have an unlimited right to call witnesses. Prison officials are afforded discretion to deny witnesses in order to keep disciplinary hearings within reasonable limits, because the witness may create a risk of reprisal, undermine authority or otherwise threaten institutional security, or because the witness's testimony would be irrelevant or cumulative. Wolff , 418 U.S. at 566; Redding v. Fairman, 717 F.2d 1105, 1114 (7th Cir. 1983). In addition, prisoners have no right to confront or cross-examine adverse witnesses in disciplinary proceedings. Rasheed-Bey v. Duckworth, 969 F.2d 357, 361 (7th Cir. 1992). In other words, if petitioner cannot prove at summary judgment or at trial that the decision to deny his requested witnesses was arbitrary, he will not be able to succeed on his claim that respondents Nichols' and Radtke's refusal to produce Nelson and Winslow-Stanley violated his due process rights.

Petitioner does not state a claim of constitutional wrongdoing against respondent Mary Peiser, his lay advocate. Petitioner alleges that Peiser "failed to prepare a defense for him" and "had involvement with the deliberate intentions in finding [him] guilty." However, a prisoner has no due process right to a lay advocate unless he is illiterate or the issue is so complex that the inmate is unable to collect and present necessary evidence. Wolff, 418 U.S. at 570. Petitioner does not suggest that he is illiterate and his complaint in this court provides adequate proof that he is not. Moreover, although he does not indicate in his complaint what charges were brought against him, his description of the incident giving rise to the disciplinary proceedings is far from complex. In light of the fact that petitioner has no right to a lay advocate at all, he cannot claim that his advocate violated his constitutional right to due process by failing to represent him adequately. Therefore, respondent Mary Peiser will be dismissed from this case pursuant to 28 U.S.C. § 1915A.

Petitioner's claim of constitutional wrongdoing against respondents Andrea Nelson and Lesly Winslow-Stanley are likewise meritless. Andrea Nelson is alleged to have done nothing more than observe petitioner with his fists clenched and Winslow-Stanley is alleged to have done nothing more than investigate the incident and then fail to return petitioner to his housing area. None of these actions violates petitioner Marion's procedural due process rights. Therefore, these respondents will be dismissed from the case for petitioner's

failure to state a claim against them.

Petitioner appears to have named respondents Gregory Grams and Marc Clements simply because they are the warden and deputy warden, respectively, at the Columbia Correctional Institution. Nowhere in his complaint does petitioner describe any actions these respondents took or failed to take in connection with his disciplinary hearing. Therefore, I assume petitioner is suing them simply because they are high officials at the institution.

Liability under 42 U.S.C. § 1983 attaches only when a respondent official acts or fails to act with a deliberate or reckless disregard of the petitioner's constitutional rights or if the conduct causing the constitutional deprivation occurs at the official's direction or with her knowledge or consent. Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). There must be a "causal connection, or an affirmative link, between the misconduct complained of and the official sued." Smith v. Rowe, 761 F.2d at 369; Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). The theory of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates, does not apply in § 1983 actions. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Therefore, petitioner will not be permitted to proceed against respondents Grams and Clements.

Next, petitioner alleges that respondent Gregory Garrison issued petitioner a conduct

report in which he lied by saying that he, rather than Andrea Nelson, had observed petitioner clench his fists. In the first place, petitioner admits that he clenched his fist, which is likely the basis for the conduct report he received. The fact that the conduct reported misstated *who* saw him do it would seem irrelevant to the hearing officer's decision to find petitioner guilty of misconduct. In any event, even if I assume that respondent Garrison deliberately misstated a fact in the conduct report and the misstatement was somehow prejudicial to petitioner, petitioner cannot succeed on a claim that the falsification, by itself, deprived him of due process. The protection from arbitrary actions such as falsifications in conduct reports lies in the procedures mandated by due process. McPherson v. McBride, 188 F.3d 784, 787 (7th Cir. 1999). In other words, so long as a prisoner is given an opportunity to respond to the conduct report, he is free in that context to bring to the attention of the disciplinary hearing officer any deficiencies he detects in the conduct report. That is all the process he is due. Accordingly, petitioner's claim that respondent Garrison deprived him of procedural due process when he wrote in the conduct report that he had witnessed petitioner clench his fists will be dismissed pursuant to 28 U.S.C. § 1915A for petitioner's failure to state a claim upon which relief may be granted.

Finally, petitioner has named the Columbia Correctional Institution as a respondent. However, an institution is not a "person" that may be sued under 42 U.S.C. § 1983 and is incapable of accepting service of petitioner's complaint. Therefore, respondent Columbia

Correctional Institution will be dismissed from this lawsuit.

ORDER

IT IS ORDERED that

1. Petitioner is GRANTED leave to proceed in forma pauperis against respondents Janel Nichols, Dylon Radtke and Lt. Keller on his claim that these respondents deprived him of due process in connection with a disciplinary hearing concerning an incident involving petitioner that occurred on December 7, 2006.

2. Petitioner is DENIED leave to proceed in forma pauperis on his due process claim against respondents Warden Gregory Grams, Deputy Warden Marc Clements, Captain Lesly Winslow-Stanley, Correctional Officer Gregory Garrison, Advocate Mary Peiser and Psychologist Andrea Nelson, because petitioner's complaint fails to state a claim of constitutional wrongdoing against these respondents. Further, petitioner is DENIED leave to proceed in forma pauperis against respondent Columbia Correctional Institution because an institution is not a suable entity under 42 U.S.C. § 1983. Respondents Columbia Correctional Institution, Grams, Clements, Winslow-Stanley, Garrison, Peiser and Nelson are DISMISSED from this action.

3. For the remainder of this lawsuit, petitioner must send respondents Nichols, Radtke and Keller a copy of every paper or document that he files with the court. Once

petitioner has learned what lawyer or lawyers will be representing respondents, he should serve the lawyer directly rather than the respondents.

4. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of their documents.

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

Entered this 1st day of May, 2009.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge