

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

STANLEY HOWARD,

Petitioner,

v.

OPINION AND ORDER

07-C-282-C

OFFICER SCOTT NELSON, DISCIPLINARY
HEARING OFFICER S. LACY AND WARDEN
RICARDO MARTINEZ

Respondents.

This is a proposed civil action brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Petitioner, who is presently confined at the Federal Correctional Institution in Oxford, Wisconsin, has made the initial partial payment of the filing fee required to be paid under the Prison Litigation Reform Act. Pursuant to the act, petitioner's complaint requires screening. 28 U.S.C. § 1915(e)(2). In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous or malicious, fails to state a claim upon which

relief may be granted or seeks money damages from a defendant who is immune from such relief.

Although petitioner has styled his pleading as a civil action, he seeks both money damages and a shortening of the length of his sentence. After examining petitioner's complaint, I conclude that his claim must be brought in its entirety in a habeas corpus action, because the question whether he has been denied procedural due process at his disciplinary hearing is inextricably intertwined with the question whether he is entitled to the return of lost good time.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Stanley Howard is an inmate at the Federal Correctional Institution in Oxford, Wisconsin

Respondents are employees of the Oxford Federal Correctional Institution. Scott Nelson is a correctional officer, respondent S. Lacy is a discipline hearing officer and respondent Ricardo Martinez is Warden.

B. Disciplinary Incident Report

On December 4, 2006, respondent Nelson issued petitioner an incident report charging him with “possession of a weapon.” The report failed to identify petitioner by name in the “Description of Incident” section. This section of the report also did not describe “what conduct [petitioner] participated in to give rise to the charged violation.” On December 21, 2006, respondent Lacy found petitioner guilty of violating the weapons possession rule based on this report. As punishment, petitioner was sentenced to 30 days of segregation and lost 27 days of good conduct credit, 45 days of phone and commissary privileges and the opportunity to receive a one-year reduction in his prison sentence through his participation in a drug program. That same day, respondent Martinez “violated [petitioner’s] due process rights by seeking enforcement of the punishments imposed upon [petitioner].”

On April 24, 2007, petitioner “exhausted [his] administrative remedies with the National Inmate Appeals Administrator.”

DISCUSSION

A. Due Process

To state a due process claim, petitioner must allege facts suggesting that he was deprived of a liberty interest and that this deprivation took place without the procedural safeguards necessary to satisfy due process. In Sandin v. Conner, 515 U.S. 472, 483-484

(1995), 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.” In the prison context, this means that protected liberty interests are generally limited to the loss of good time credits, because this loss affects the duration of an inmate’s sentence. The Court of Appeals for the Seventh Circuit has held that prisoners have a property interest in the good time credit they have earned. See, e.g., Thomas v. McCaughtry, 201 F.3d 995, 999 n.4 (7th Cir. 2000); Sweeney v. Parke, 113 F.3d 716, 718 (7th Cir. 1997); Meeks v. McBride, 81 F.3d 717, 719 (7th Cir. 1996). Therefore, I can infer from petitioner’s factual allegations that he was deprived of a liberty interest.

The second question is whether petitioner has alleged enough to allow the inference that the deprivation of good time credits took place without the proper procedural safeguards. The Fifth Amendment prohibits the federal government from depriving a person of life, liberty, or property without due process of law. Caldwell v. Miller, 790 F.2d 589, 602 (7th Cir. 1986). When loss of good time credit is a sanction, an inmate must receive “(1) advance written notice of the disciplinary charges; (2) an opportunity . . . to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.” McPherson v. McBride, 188 F.3d 784, 785-786 (7th Cir. 1999).

Petitioner asserts that he did not receive advance written notice of the charge of “possession of a weapon.” He maintains notice was defective in two respects: the incident report 1) failed to identify him by name; and 2) did not describe the conduct that “[gave] rise to the charged violation” of possession of a weapon. Unfortunately, petitioner’s characterizations of the content of his incident report leave open the question whether he has stated a claim of a violation of his due process rights. For example, it is hard to fathom how the absence of petitioner’s name in the “Description of Incident” section of the report deprived him of notice. Petitioner admits that the report was issued to him directly. He cannot have been unaware that he was the subject of the incident report.

Moreover, his assertion that the report failed to describe the conduct that was the basis for the charged violation is conclusory and confusing. Petitioner alleges that the incident report charged him with possessing a weapon. That alone suggests he was given some notice of the charge against him. Nevertheless, because petitioner has not submitted the incident report with his complaint, I must speculate about what petitioner might mean when he claims to have received no notice of the charge. Perhaps the report did not describe the weapon. Perhaps it explained nothing about where or when the weapon was found. Either of these deficiencies may be enough to deprive petitioner of sufficient notice. For the purpose of this decision, I will assume that petitioner has alleged facts from which an inference may be drawn that the charge against him was so general or so vague that he could

not prepare to defend against it. Even then, petitioner cannot proceed in this action on the claim, because it is barred by Heck v. Humphrey 512 U.S. 477 (1994)

B. Claim Barred by Heck v. Humphrey

The Supreme Court has held that when a prisoner's claim amounts to a challenge to the legality of his conviction or confinement, the claim must be brought as a habeas corpus claim, regardless of the nature of the remedy the prisoner seeks. Id. at 497-99. Heck's rationale applies to § 1983 claims brought by state prisoners and to federal prisoners' claims brought under Bivens. Clement v. Allen, 120 F.3d 703, 705 (7th Cir. 1997). The Court of Appeals for the Seventh Circuit has applied Heck to procedural due process claims arising out of prison disciplinary hearings, if those claims necessarily call into question decisions of prison adjustment committees that ordered the loss of good times credits. Dixon v. Chrans, 101 F.3d 1228, 1230-31 (7th Cir. 1996) (claim for damages that necessarily implicates results of disciplinary committee hearing must be brought as habeas action); Clayton-El v. Fisher, 96 F.3d 236, 242-45 (7th Cir. 1996) (because prisoner's §1983 procedural due process claim sought damages for placement in segregation, court must consider whether he would have been found guilty and placed in segregation without procedural irregularities; this finding would necessarily implicate actual result of disciplinary hearing that included loss of good time).

Petitioner seeks reinstatement of his lost good time credit as well as punitive damages calculated based on the days of extra confinement. A ruling on the question of the deficiency of the notice he received is inextricably intertwined with a decision on the validity of the finding of guilt. In other words, a favorable ruling on petitioner's due process claim would imply the invalidity of the results of the disciplinary hearing. Accordingly, petitioner's claim may be heard only in a habeas corpus action pursuant to 28 U.S.C. § 2241.

Although petitioner may still seek relief with a habeas corpus action, this court cannot convert this action into one for habeas corpus on its own motion. The Court of Appeals for the Seventh Circuit has held that "[w]hen a plaintiff files a § 1983 [or Bivens] 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. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477). Therefore, petitioner's civil action will be dismissed without prejudice.

_____ Should he choose to file a habeas corpus action, petitioner will not be able to seek money damages, which are unavailable as habeas corpus relief. However, if he prevails on his habeas corpus claim, petitioner will then be able to bring a claim for money damages in a civil action. Heck, 512 U.S. at 487.

ORDER

IT IS ORDERED that petitioner Stanley Howard's request for leave to proceed on his claim that he was denied due process in connection with his December 4, 2006, incident report is DENIED without prejudice to his raising his claims in a petition for a writ of habeas corpus;

2. The unpaid balance of petitioner's filing fee is \$ 287.50; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2)

3. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." Because failure to choose the correct procedural vehicle for raising a claim is not one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g).

Entered this 20th day of June, 2007.

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