IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHARLES W. RAY,

Petitioner,

v.

RICHARDO MARTINEZ, Warden; RICHARD ENGLE, Associate Warden; JOHN SHOOK, Associate Warden; A. SALES, Captain; D. SPROUT, Unit Manager; JOETTA A. TERRELL, Discipline Hearing Officer; S. LACY, Discipline Hearing Officer; MICHAEL K. NALLEY, Regional Director; HARRELL WATTS, National Inmate Appeals Administrator; J. ROEBUCK, Lieutenant; ALICE DREWITZ, Discipline Hearing Coordinator; JOHN DOE and JANE DOE,

Respondents.

OPINION and ORDER

08-cv-69-bbc

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This is a proposed civil action for monetary and declaratory relief, brought under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Petitioner Charles W. Ray, who is presently confined at the Federal Correctional Institution in Pekin, Illinois, 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

has no means to prepay any portion of the fees and costs for filing his complaint. 28 U.S.C. § 1915(b)(4). Nevertheless, he should be aware that he owes $350 for filing this lawsuit, which must be collected from his prison account under § 1915(b)(2) at such time as funds exist in his account.

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, pursuant to 28 U.S.C. § 1915(e)(2), if a litigant is requesting leave to proceed in forma pauperis, the court must deny leave to proceed if the action is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune to such relief. I conclude that petitioner has failed to state a claim upon which relief may be granted. Therefore, his case must be dismissed at the outset, rendering his motion for appointment of counsel moot.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Charles Ray has been confined at the Federal Correctional Institution in Pekin, Illinois, since April, 25, 2007. Before that time, petitioner was confined at the Federal Correctional Institution in Oxford, Wisconsin, from May 10, 2004, until April 12,

2007.

At all times relevant to petitioner's complaint, petitioner was confined at FCI-Oxford. Respondent Richardo Martinez was the warden. Respondents Richard Engle and John Shook were associate wardens. Respondent A. Salas was an officer captain. Respondent D. Sproul was petitioner's unit manager. Respondent J. Roebuck was a lieutenant. Respondent Alice Drewitz was a discipline hearing coordinator. Respondents Joetta A. Terrell, S. Lacy, Michael Nalley and Harrell Watts were employees of the Federal Bureau of Prisons; Terrell and Lacy were discipline hearing officers, respondent Nalley was a regional director and respondent Watts was a national inmate appeals administrator.

B. Oxford's Tobacco Policy

On November 14, 2004, FCI-Oxford's warden at the time, Joseph Scibana, implemented a Bureau of Prisons' policy that made Oxford a tobacco-free institution. Under the policy, after November 14, 2004, smoking tobacco would be categorized as nuisance contraband and after November 15, 2005, chewing tobacco would be so categorized.

C. Petitioner's Chewing Tobacco

Between August 29, 2005, and October 5, 2005, petitioner purchased ten cans of Copenhagen chewing tobacco from the prison's commissary. On March 1, 2006, respondent

Salas posted a memorandum titled "Incident reports for Possession of Tobacco" in which he stated,

> The purpose of this memorandum is to serve as an advisement to inmate population of FCI Oxford. Effective with the posting of this memorandum and completion of town hall meetings, inmates found in possession of large quantities of tobacco will be subject to receipt of incident reports charging them with Code 113, Possession of Narcotics, Marijuana, Drugs, or paraphernalia not prescribed to the individual by the medical staff.
>
> This decision has been made due to the increase in serious incidents such as fights, assaults and other illicit activities and the increase in protective custody cases in direct relation to the presence of tobacco products. Any questions regarding this decision can be forwarded to my office.

On March 6, 2006, petitioner was issued incident report #1441643, charging him with violation of Code 199A/113, "Conduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons most like (113) possession of any narcotics, marijuana, drugs, or related paraphernalia not prescribed for the individual by the medical staff." On March 16, 2006, petitioner received a disciplinary hearing on the incident report. Respondent Terrell presided over the hearing. Upon completion of the hearing, Terrell found petitioner guilty of the 199A/113 charge, saying,

> The DHO based her decision on the following information:
>
> The reporting officer stated at approximately 12:30 p.m., on 3/6/06 while searching cell C-4, Juneau Unit, he found (10) cans of Copenhagen Chewing Tobacco (unopened) inside a "Sierra Mist Free" 12 pack soda box. The Copenhagen was hidden and covered inside the box of cans of soda. You were the sole occupant of cell C-4 Juneau Unit.

> You admitted to the DHO, "The report is correct. The tobacco was mine."
>
> A memo as posted March 1, 2006, by A. Salas, Captain, stating that inmates found in possession of large quantities will be written an incident report and charged with the Code #199/113, Conduct Which Disrupts, Most Like Possession of Narcotics, Marijuana, Drugs, or Related Paraphernalia Not Prescribed for the Individual.
>
> The DHO considered the contents found in your cell to be a "large quantity" of tobacco, as the items are a security hazard to the facility, inmates and staff, as this type of misconduct disrupts and is most like possession of any narcotic, drug, or related paraphernalia not prescribed for you by medical staff. Inmates are addicted to the nicotine/tobacco and are willing to pay a lot of money for it, thus in a sense is similar to drugs, or narcotics and is most like something not prescribed by medical staff. Inmates in the past have been known to run stores with large quantities of tobacco, which causes a number of prohibited acts and poses a security threat to the institution.
>
> Based on some evidence as annotated above, the DHO finds that you did commit the prohibited act of Code #199/113, Conduct which Disrupts, Most Like Possession of Narcotics, Marijuana, Drugs, or Related Paraphernalia Not Prescribed for the Individual.

Terrell imposed on petitioner the following sanctions: loss of 40 days' good conduct time; 30 days' disciplinary segregation; 60 days' loss of commissary privileges; and 60 days' loss of telephone privileges. In addition, because of the guilty finding, petitioner lost his preferred housing status and employment opportunities with federal prison industries.

On May 27, 2006, petitioner filed a Regional Administrative Remedy Appeal, which respondent Nalley denied on July 6, 2006. Petitioner appealed further to the National Inmate Appeals. On November 27, 2006, respondent Harrell Watts partially granted

petitioner's appeal, noting,

> You appeal the March 16, 2006, decision of the Discipline Hearing Office (DHO) in which you were found to have committed the prohibited act of Conduct which Disrupts or Interferes with the Security or Orderly Running of the Institution, Most Like Possession of Any Narcotics or Related Paraphernalia Not Prescribed for the Individual by the Medical Staff (Code 199/113). Specifically, you contend there is insufficient evidence to find you guilty of this prohibited act and staff have no authority to implement policy that is in conflict with Program Statement 5270.07. You assert the maximum series infraction applicable in your case is a 300-series charge for nuisance contraband. You request the incident report be expunged, sanctions revoked, and reinstatement to your work assignment in UNICOR with vacation and back pay.
>
> We find merit to some of the issues raised in your appeal. Accordingly, your appeal is being returned to the institution for appropriate action.
>
> Your appeal is partially granted to the extent above.

On December 6, 2006, petitioner attended a new disciplinary hearing regarding the incident report filed against him back in March. This time, the charge against petitioner was changed to a charge of violation of Code 305, "Possession of Contraband." Respondent Lacy presided over the hearing. In a report dated December 6, 2006, Lacy found petitioner guilty of violating Code 305. According to the report, Lacy supported her finding as follows:

> Your due process rights were reviewed with you by the DHO at the time of your hearing. You stated you understood your rights, presented no documentary evidence, requested no witnesses, and declined staff representation.
>
> The reporting officers documented account that on 03-06-06 at approximately 12:30 p.m. during a routine search of cell C-4 in Juneau, that solely housed

> inmate Ray, Reg. No. 11840-030, inside a twelve pack of Mist soft drink he discovered hidden inside ten cans of Copenhagen tobacco.
>
> The inmates statement on his behalf before the Investigating Lieutenant after being advised of his rights was they were mine.
>
> The inmate declined to make any statement before members of his UDC after being advised of his rights.
>
> The inmate's first statement before the DHO after indicating he was aware of his rights, was the recovered tobacco did belong to him and he was guilty of the charge of code 305 possessing contraband, however he then opted to request to change his plea to he had no comment.
>
> Based upon the evidence annotated above (staff member written report and supporting documentation) this DHO concludes there was sufficient information present in the body of this report to support the reduced charge of Code 305 (Possession of Contraband). Although you declined to make any statement before members of your UDC, the DHO found based on the greater weight of the evidence (Officer written statement and supporting photographic documentation) which the DHO found credible as the reporting officer gains nothing by submitting a false report, coupled with your admission of "they were mine" to the Investigating Lieutenant which the DHO found gave credence to the reporting officers documented account of the incident. The DHO found you did commit the prohibited act of Code 305, (Possession of Contraband). As this charge does not allow the severity of the previous sanctions, the disallowance of 14 days loss of good time will be reflected in the record. The remainder of the previously disallowed good time will be restored.

The new sanctions imposed on petitioner for his violation of Code 305 were: loss of 14 days' good conduct time; 15 days' disciplinary segregation; 60 days' loss of commissary privileges; and 60 days' loss of telephone privileges. Twenty-six days of good conduct time was restored and petitioner's Code 199/113 violation was expunged from his record.

On December 13, 2006, petitioner filed a regional administrative appeal regarding the new finding of guilt. In his appeal, petitioner argued that the guilty finding by a Disciplinary Hearing Officer should be overturned because the matter should have been heard "informally" by a Unit Disciplinary Committee. In addition, he argued that he did not violate Code 305 because that code forbids "possession of anything not authorized for retention or receipt by the inmate, *and not issued to him through regular channels*," because petitioner obtained his cans of Copenhagen through the commissary or "regular channels." On February 2, 2007, respondent Nalley denied the appeal. On February 15, 2007, petitioner filed appeal #437596-A1 with the Central Office of the Bureau of Prisons. The Central Office acknowledged receipt of petitioner's appeal on February 26, 2007. On April 4, 2007, the office notified petitioner that the response time for his appeal had been extended to April 23, 2007. A computer printout titled "Administrative Remedy Generalized Retrieval" dated May 7, 2007 suggests that on April 19, 2007, petitioner's appeal was denied.

D. Discrimination

Around the same time petitioner was being sanctioned in March of 2006 for his alleged violation of Code 199/113, a Vietnamese inmate, Minh Nguyen, received an incident report charging him with violation of Code 199/113 for his possession of 45 rolled cigarettes

that had not been purchased through the commissary or received through approved channels. Nguyen pleaded guilty to violating Code 199/113 and received a sanction of loss of 27 days' good conduct time, 45 days' disciplinary segregation, and 45 days' loss of commissary and telephone privileges. Nguyen was not subjected to any additional collateral sanctions, such as loss of preferred housing or employment opportunities. Petitioner believes that he received more severe sanctions than Nguyen because of his Caucasian-American race.

DISCUSSION

I understand petitioner to be contending that his federal rights were violated in several respects. First, I understand petitioner to be challenging the validity of the March 6, 2006 incident report charging him with violating Code 199/113 on the grounds that 1) respondent Salas had no authority to issue a memorandum making possession of large quantities of tobacco a violation of Code 113; and 2) on account of his Caucasian race, he was subjected to a penalty greater than the penalty received by a Vietnamese inmate charged with similar misconduct. In addition, I understand petitioner to be challenging his finding of guilt on the revised charge of violation of Code 305, on the ground that his behavior was not behavior prohibited by Code 305.

Unfortunately, petitioner's claims fail to state a claim upon which relief may be granted. As petitioner's own allegations show, the charge brought against him for violation

of Code 199/113 and the alleged discriminatory penalty he received were in place only temporarily, while petitioner appealed his finding of guilt to higher authorities, one of whom agreed with petitioner that he should not have been charged under Code 199/113 and ordered the incident report and resulting penalties expunged. The only penalty to which petitioner ultimately was subjected was in fact of lesser severity than the penalty suffered by the Vietnamese inmate. Because prison officials corrected the injuries about which petitioner complains with respect to the initial charge brought against him, he has no arguable basis in fact or law for a finding that his constitutional rights were violated in connection with that charge. Any such claim he may have had was rendered moot when the incident report was expunged.

Petitioner's claim that he was wrongfully charged and convicted of violating Code 305 because he was not in possession of contraband as defined under 28 C.F.R. § 553.12(a) must be dismissed for another reason. Because he is challenging on the merits the finding of a Disciplinary Hearing Officer that he violated Code 305, a decision on the validity of his claim would call into question the validity of the decision to impose as a penalty the deprivation of 14 days' good time credit. When a prisoner's claim amounts to a challenge to the legality of the length of his confinement, the claim must be brought as a habeas corpus claim, regardless of the nature of the remedy the prisoner seeks. Heck v. Humphrey 512 U.S. 477, 497-99 (1994). Heck's rationale applies to claims brought by federal prisoners

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 time 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 conduct time as well as punitive and compensatory damages for his asserted illegal loss of liberty and property. A ruling on the legality of the disciplinary conviction is inextricably intertwined with the question of the validity of the finding of guilt and resulting penalties. In other words, a favorable ruling on petitioner's claim concerning his conviction for a violation of Code 305 would imply the invalidity of the results of the disciplinary hearing. Accordingly, petitioner's claim may be heard only in a habeas corpus action filed under 28 U.S.C. § 2241.

Although petitioner may still seek relief in a habeas corpus action, this court cannot

convert this action into one for habeas corpus. 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 a writ of habeas corpus. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477). Therefore, to the extent that petitioner is seeking to challenge his conviction for violation of Code 305, his civil action will be dismissed without prejudice.

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

ORDER

IT IS ORDERED that:

1. Petitioner Charles W. Ray is DENIED leave to proceed in forma pauperis on his claims that the incident report charging him with violation of Code 199/113 was illegal because respondent Salas lacked authority to make possession of large quantities of tobacco contraband a violation of those codes, and because the penalty petitioner received after being found guilty of violating 199/113 was discriminatory; these claims fail to state a claim upon which relief may be granted and are dismissed with prejudice.

2. Petitioner is DENIED leave to proceed in forma pauperis on his claim that he was wrongfully charged and convicted of violating Code 305 because he was not in possession of contraband as defined under 28 C.F.R. § 553.12(a); this claim calls into question the validity of his conviction and resulting loss of good time and, therefore, must be brought in a habeas corpus action filed under 28 U.S.C. § 2241. It is DISMISSED without prejudice.

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

4. Petitioner is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Federal Correctional Institution in Pekin, Illinois, of that institution's obligation to deduct payments from petitioner's account until the filing fee has been paid in full.

5. Petitioner's motion for appointment of counsel, dkt. #10, is DENIED as moot.

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

Entered this 23rd day of October, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge