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

ERIC RODRIGUEZ,

Plaintiff,

v.

TIMOTHY HAINES, S. MASON, D. GARDNER, C. MORRISON, C. BROADBENT, K. TRUMM, ELLEN K. RAY, C. BEERKIRCHER, S. BROWN, T. EVERS, R. HABLE, SGT. JANTZEN, MS. WALTERS JOHN DOE, and K. GOURLIE,

Defendants.

OPINION & ORDER

14-cv-86-jdp

Pro se prisoner Eric Rodriguez has filed a proposed complaint under 42 U.S.C. § 1983 in which he alleges that numerous prison officials deprived him of due process during two different hearings, in violation of the Fifth and Fourteenth Amendments. In short, plaintiff alleges that each defendant, either through direct involvement in the hearings or through the inmate complaint process, prevented plaintiff from introducing statements he prepared and questions he intended to ask of witnesses who supported his continued administrative confinement, and that defendants used unfair procedures before and during the hearings.

Plaintiff has made an initial partial payment of the filing fee under 28 U.S.C. § 1915(b)(1). The next step in this case is for the court to screen plaintiff's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for monetary damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. In screening 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). After reviewing the complaint with this principle in mind, I conclude that much of

plaintiff's complaint fails to state a claim upon which relief may be granted. I will therefore dismiss portions of the complaint and deny plaintiff leave to proceed on those portions, but I will grant him leave to proceed on his claim under the Fifth and Fourteenth Amendments for deprivation of due process through the presence of a biased hearing official at plaintiff's administrative confinement hearing.

ALLEGATIONS OF FACT

Plaintiff has submitted a 34-page complaint and almost 150 pages of exhibits. Although legible, plaintiff's submissions are difficult to understand. His claims appear to arise out of two separate hearings, during which Wisconsin Department of Corrections (DOC) officials determined plaintiff's custody level and confinement status. Plaintiff is currently a prisoner at the Waupun Correctional Institution. At the time relevant to this complaint, however, plaintiff was incarcerated at the Wisconsin Secure Program Facility (WSPF), located in Boscobel, Wisconsin. The defendants include Warden Timothy Haines and other DOC employees, most of whom worked at WSPF during the relevant time period.

The first hearing plaintiff discusses is a June 8, 2012, review of his placement and custody level. Plaintiff is currently serving three life sentences for first-degree intentional homicide. Because of his offense, plaintiff has been in "maximum" custody since entering prison. *See* Wis. Admin. Code DOC §§ 302.05, 302.07. After the hearing, a committee recommended that he remain at WSPF and retain his "maximum security" designation. Beforehand, plaintiff had filed a statement and a list of questions he wanted his WSPF staff advocate to ask witnesses at the hearing. It is unclear from the record whether these documents were actually presented before the committee. Plaintiff submitted a number of administrative complaints regarding this issue, all of which were unsuccessful.

The second hearing plaintiff discusses is a November 21, 2012, review of his confinement status. Since beginning his sentence in 1997, plaintiff has had over 55 conduct reports, with 27 incurring major sanctions. Based on this behavior, DOC officials assigned plaintiff to "administrative confinement" status sometime after he entered the prison system. *See* Wis. Admin. Code DOC § 308.04(1) ("Administrative confinement is an involuntary nonpunitive status for the segregated confinement of an inmate whose continued presence in general population poses a serious threat to life, property, self, staff, or other inmates, or to the security or orderly running of the institution."). Under DOC regulations, the warden must periodically review plaintiff's status. Ahead of plaintiff's November 21 review hearing, defendant Captain S. Mason prepared a "Recommendation for Administrative Confinement" form, in which she recounted plaintiff's disciplinary issues and concluded that his "presence in the general population would . . . jeopardize the safety and security of both staff and inmates." Dkt. 1-2, at 3. Mason recommended that plaintiff remain in administrative confinement. Plaintiff requested that Mason attend the hearing and prepared a list of questions he intended to ask her as well as a written statement for the committee. According to documentation from defendants, Mason did not attend the hearing because she was not at the institution that day (plaintiff disputes whether this is true).

Plaintiff attended the November 21 hearing and objected to continued placement in administrative confinement. Specifically, he argued that the committee could not rely on his prior bad conduct because he had already been disciplined for those incidents and, furthermore, that defendant Sergeant Jantzen was involved in two of those incidents so it was improper for him to be a member of the committee. The committee ultimately decided, unanimously, to keep plaintiff in administrative confinement. Plaintiff appealed the committee's decision, but both Haines and defendant Division of Adult Institutions administrator John Doe agreed that

plaintiff should remain in administrative confinement. As with his custody hearing, plaintiff has filed a number of administrative complaints regarding his status and the committee's decision; none have been successful.

On February 10, 2014, plaintiff filed a complaint in this court. Other than the defendants already identified, plaintiff named the WSPF inmate complaint examiners who denied his administrative complaints; DOC complaint examiners who denied his complaint appeals; the members of both committees who rendered adverse decisions; and the staff advocates he elected to have present at both hearings. His prayer for relief seeks monetary and punitive damages from the defendants as well as an order that defendants release plaintiff into the general prison population and expunge the conduct reports on which defendants relied to continue his administrative confinement.

ANALYSIS

I understand plaintiff to be bringing claims against all defendants under the Fifth and Fourteenth Amendments[1] for violating his right to procedural due process at the June 8 and November 21 hearings. To state a claim for a procedural due process violation against government officials, an inmate must allege inadequate procedures and interference with a liberty or property interest. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). In this case, plaintiff alleges that defendants did not provide him with adequate procedures at either hearing and that both resulting adverse decisions therefore interfered with his liberty interests. Plaintiff appears to state separate claims that are similar in substance: (1) procedural due process violations at the June 8 hearing regarding his retention at WSPF and "maximum

[1] Specifically, I understand plaintiff to allege a violation of the due process clause of the Fifth Amendment, which applies to state governments by virtue of the Fourteenth Amendment. The amendments provide identical due process protections.

custody" designation; and (2) procedural due process violations at the November 21 hearing regarding his retention in "administrative confinement."

I note that plaintiff's complaint faces an uphill battle from the outset. Although the Supreme Court has recognized that conditions of confinement in super maximum prisons might by atypical so as to implicate a liberty interest, *Wilkinson v. Austin*, 545 U.S. 209, 223-24 (2005), any "interest . . . is derived from the drastic *change* in the conditions of confinement. That kind of change might not be present if, for example, the inmate was *already* confined to segregation." *Lagerstrom v. Kingston*, 463 F.3d 621, 623 (7th Cir. 2006) (emphasis added). Here, plaintiff alleges due process violations relating to the hearings defendants held to consider maintaining his custody and security classifications. It is doubtful that plaintiff has a liberty interest in either, although I will not foreclose the possibility at such an early stage in the case. *Adell v. Smith*, 248 F.3d 1156 (7th Cir. 2000) ("All Wisconsin inmates receive a security classification and are assigned to an institution . . . . They do not, however, have a right to any particular classification.") (internal citations omitted); *Rivera v. Berge*, No. 01-cv-423, 2001 WL 34379468, at *4 (W.D. Wis. Oct. 10, 2001) ("The placement and classification decisions about which plaintiff complains do not implicate a liberty interest."); Wis. Admin. Code DOC § 308.04 note ("[B]y providing the review, the [DOC] does not intend to create any protected liberty interest by using mandatory language.").

A further complication is that even assuming plaintiff could allege that defendants infringed on a valid liberty interest, most of the specific issues plaintiff describes in his complaint do not amount to due process violations. Prisoners retain due process rights during their incarceration, but the Supreme Court has "indicated [that] the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed."

Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In the context of a periodic review hearing for continued placement in administrative confinement, only "informal" due process is required—prison officials must give "'some notice' of the reasons for the inmate's placement . . . and enough time to 'prepare adequately' for the administrative review." *Westefer v. Neal*, 682 F.3d 679, 684 (7th Cir. 2012) (internal citations omitted). The Seventh Circuit also requires that an inmate

> have an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective. So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied.

Id. at 685 (internal citations and quotation marks omitted).

Plaintiff identifies a litany of what he perceives to be procedural defects in his June 8 and November 21 hearings. With one exception, however, none of plaintiff's allegations state a claim under the Fifth and Fourteenth Amendments because his submissions affirmatively demonstrate that defendants provided him with the necessary process for both hearings. I will therefore dismiss the majority of plaintiff's complaint for failure to state a claim upon which relief may be granted.

The complaint does not allege that plaintiff had insufficient time to prepare for either hearing, although plaintiff alleges that the packet he received ahead of the November 21 hearing "assemble[d] by defendant Capt. Mason was delivered to plaintiff['s] cell incomplete and 'so' misleading that plaintiff couldn't build his defense properly to challenge Capt. Mason['s] recommendation for" administrative confinement. Dkt. 1, at 3. I construe this statement as a challenge to the adequacy of the notice defendants provided regarding the issues to be discussed

at plaintiff's hearing. But plaintiff's own allegations belie any suggestion that he did not understand the evidence against him. In the same paragraph of his complaint, plaintiff explains that Mason highlighted his conduct reports in making her recommendation. *Id.* Later, plaintiff states that it was improper for the committee to rely on these reports given how old they were, and acknowledges that he was able to articulate this argument in the questionnaire he prepared ahead of the hearing and through his inmate complaints. Given that plaintiff's assertions demonstrate an obvious understanding of the reasons contained in Mason's recommendation, plaintiff cannot genuinely allege that defendants failed to provide him with adequate notice of the issues to be discussed at the hearing. This claim will be dismissed.

Plaintiff also alleges that he was unable to present written statements and call certain witnesses at his hearings. The reports from both hearings, however, confirm that plaintiff was present and that each committee heard his objections to his custody and confinement status. Under *Westefer*, the fact that plaintiff had an opportunity to orally describe his position satisfies the requirements of due process. Moreover, the report from the November 21 hearing expressly recognizes that plaintiff "submitted a written statement which was read and considered." Dkt. 1-3, at 7. Plaintiff nevertheless alleges that both committees ignored his statements because neither report mentions "crux information" regarding Haines's illegal status as warden of WSPF. Plaintiff weaves this overarching theme into most of his complaint. He contends that Wisconsin law requires Haines, as warden, to file his official oath and bond with the Wisconsin secretary of state. Plaintiff alleges that Haines never did so and, therefore, lacks the authority to determine plaintiff's confinement status, review plaintiff's administrative complaints, and appoint the designees who rendered adverse decisions during plaintiff's confinement at WSPF. In his submissions for both hearings, plaintiff presented this argument and he now alleges that each committee's failure to respond to the point amounted to a procedural deficiency that invalidated

their overall decisions. This exact argument—against this exact warden—has been presented to this court before and rejected. *See Simpson v. Walker*, No. 13-cv-776 (W.D. Wis. Dec. 9, 2013) (order screening pro se prisoner's complaint) ("Even assuming that Haines did not take his oath, plaintiff does not explain how Haines's failure to take the oath works a constitutional deprivation of any right of plaintiff. I cannot conceive of a plausible claim he could bring for this alleged problem. Therefore, I will not allow him to tie all of his claims into one lawsuit based on this overarching theory."). Plaintiff cannot establish that the committee's failure to consider a frivolous argument deprived him of any "informal" due process to which he was entitled. Finally, although plaintiff alleges that he was not permitted to call Mason as a witness during the November 21 hearing, there is no due process violation because even "[i]f the prison chooses to hold [confinement status] hearings, inmates do not have a constitutional right to call witnesses or to require prison officials to interview witnesses." *Westefer*, 682 F.3d at 685 (citing *Wilkinson*, 545 U.S. at 228). This claim will therefore be dismissed.

Plaintiff's final challenge is that Jantzen served on the November 21 committee that reviewed his confinement status, despite the fact that Jantzen was the reporting corrections officer for two of plaintiff's conduct reports in 2011. The court notes that the committee did not cite either of the two reports in its "reason for decision" narrative. But the Seventh Circuit requires that "[a] prisoner . . . be afforded the opportunity to be heard before an impartial decision maker." *Henderson v. U.S. Parole Comm'n*, 13 F.3d 1073, 1077 (7th Cir. 1994). Specifically, "[i]f an officer is substantially involved in the investigation of the charges against an inmate, due process forbids that officer from serving on the [disciplinary] committee . . . . 'Tangential involvement' in the investigation, however, does not disqualify an officer." *Whitford v. Boglino*, 63 F.3d 527, 534 (7th Cir. 1995) (citing *Merritt v. De Los Santos,* 721 F.2d 598, 601 (7th Cir. 1983)).

It is unclear how extensively Jantzen was involved in the two conduct reports plaintiff identifies in his submissions. In an exhibit to his complaint, plaintiff included a photocopy of a "conduct record" indicating that Jantzen reported two separate offenses; one on May 14, 2011, and one on December 16, 2011. Dkt. 1-3, at 6. Plaintiff alleges that Jantzen "had substantial involvement" with the two earlier conduct reports, but does not explain whether Jantzen simply signed reports as a shift supervisor or was actively involved in investigating these two incidents. *See Whitford*, 63 F.3d at 534 ("Simply signing a disciplinary report as shift supervisor is the type of 'tangential involvement' . . . that does not mandate disqualification."). At this point in the case, however, plaintiff has sufficiently alleged that Jantzen's presence on the November 21 hearing committee, despite his involvement with two prior disciplinary issues, may have deprived plaintiff of a neutral decision-making body. Accepting plaintiff's allegations as true for purposes of screening this complaint, there is a sufficient basis for him to pursue a claim for violation of his due process rights. Plaintiff alleges that defendants Sgt. Jantzen, Ms. Walters, R. Hable, K. Trumm, and Timothy Haines had some level of personal involvement with this claim. Specifically, Jantzen, Walters, and Hable were the members of the November 21 hearing committee; Trumm was the inmate complaint examiner who denied plaintiff's internal complaint regarding Jantzen's presence on the committee; and Haines was the warden who approved Trumm's denial and who presumably selected the members of the committee. I will grant plaintiff leave to proceed against these defendants, but the remaining defendants will be dismissed.

ORDER

IT IS ORDERED that:

1) Plaintiff Eric Rodriguez is GRANTED leave to proceed on his Fifth and Fourteenth Amendment due process claims against defendants Sgt. Jantzen, Ms. Walters, R. Hable, K. Trumm, and Timothy Haines for their involvement in the November 21, 2012, administrative confinement review hearing;

2) As indicated in this opinion, the remaining claims in plaintiff's complaint are DISMISSED for failure to state a claim upon which relief may be granted. Plaintiff is DENIED leave to proceed against the remaining defendants, who are DISMISSED from this case;

3) For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney;

4) Plaintiff 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 his documents;

5) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants. Plaintiff should not attempt to serve defendants on his own at this time. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants; and

6) Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under *Lucien v. DeTella*, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 25th day of September, 2014.

BY THE COURT:
/s/
JAMES D. PETERSON
District Judge