IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALEJANDRO RIVERA,

ORDER

Plaintiff,

01-C-423-C

v.

GERALD BERGE, Warden of
Supermax Correctional Institution,

Defendant.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Alejandro Rivera, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, alleges that defendant Gerald Berge violated his due process rights due process by not performing an Assessment and Evaluation at the start of his incarceration, transferring him to Supermax, leaving him unclassified for a period of time upon his arrival, placing him in temporary lock-up status, classifying him improperly for administrative confinement status and subjecting him to meaningless hearings and appeals processes. Plaintiff also alleges that defendant violated his equal protection rights by treating him differently from other prisoners with similar criminal

records.

Plaintiff has paid the full fee for filing his complaint. However, because he is a prisoner and defendant is a "governmental entity or officer or employee of a governmental entity," this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(a), (b). Having screened plaintiff's complaint, I conclude that his due process and equal protection claims must be dismissed because the claims are legally frivolous.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). Plaintiff's complaint may be fairly read to state the following material allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Alejandro Rivera is an inmate at Supermax Correctional Institution. Defendant Gerald Berge is the warden of the institution.

B. Assignment to Supermax

Plaintiff was questioned by officials from the Department of Corrections and the

Federal Bureau of Investigation. He refused to answer the questions. On March 2, 2000, he was sentenced and transferred directly to Supermax. It is customary for individuals like plaintiff who are sentenced at the Douglas County Courthouse to be housed at the Dodge Correctional Institution.

When plaintiff arrived at Supermax, he was placed on a "no status" classification for nearly thirty days. Supermax has only three security classifications: temporary lock-up for those awaiting administrative confinement or disciplinary hearings; administrative confinement; and program segregation. During this period, plaintiff wrote letters to defendant Berge and several other prison officials about his status at Supermax and why he was not sent to Dodge Correctional Institution in accordance with the Wisconsin Administrative Code. Plaintiff received no official response. Plaintiff asked Captain Richardson the same question. Richardson stated that it was his understanding that officials from the Department of Corrections had spoken with Bill Puckett, director of the Bureau of Classification and Movement, who had arranged for plaintiff's transfer to Supermax.

On March 22, 2000, Captain Blackburn placed plaintiff on temporary lock-up status pending an administrative confinement hearing. On April 4, 2000, the hearing took place at which the committee relied upon several improper pieces of information: plaintiff's criminal record; "pending charges" against plaintiff that were subsequently dropped; his offense itself; an alleged assault on two staff personnel at Mendota Mental Health Institute;

an alleged admission by plaintiff that he had fire-bombed a district attorney's home; a conduct report for possessing contraband although plaintiff had never been given a handbook to know what constituted contraband; and his pre-sentence investigation. The pre-sentence investigation is relevant only to correctional programming considerations and not to non-punitive segregation status such as administrative confinement. There is no evidence of substantial content that defines plaintiff as being a legitimate threat to institutional security. As a result of this improper information, plaintiff was placed in administrative segregation.

For a period of time, plaintiff received only a minor rule infraction. On October 25, 2000, and April 18, 2001, additional administrative confinement hearings took place. Plaintiff submitted a comprehensive statement for the April 18 hearing but the committee did not consider his arguments. At the close of both hearings, plaintiff was placed on continued administrative confinement status again for nearly the identical reasons for which he had been placed there the first time.

On May 1, 2001, plaintiff received the committee decision. Plaintiff filed an appeal with defendant Berge. On June 1, 2001, plaintiff received a response from defendant. Defendant's reasons for affirming the committee's decision were nearly identical to the committee's reasons for placing plaintiff on administrative confinement, with the exception that defendant added the reason of plaintiff's "assault on institution staff." Before sending

plaintiff his response, defendant sent a copy to Dick Verhagan, director of the Division of Adult Institutions, who also signed the response. Plaintiff was not given the opportunity to review defendant Berge's decision and to respond to Berge's reasoning in his appeal to the administrative confinement decision.

On March 27, 2001, plaintiff was reviewed by the institution program review committee. He was classified and assigned to Supermax. On April 23, plaintiff received the results that had been affirmed by the Bureau of Classification and Movement and filed a timely appeal. To date, plaintiff has not received a response from Puckett, the director of the Bureau of Classification and Movement.

C. Inmate Complaints

On May 6, 2001, plaintiff filed an inmate complaint, challenging the applicability of administrative confinement to his circumstances. The complaint was rejected because it was received beyond the 14-day limit for filing complaints although plaintiff was still in administrative confinement on May 6. The same day, plaintiff filed a second inmate complaint, challenging his placement at Supermax instead of Dodge Correctional Institution as his "reception center." Plaintiff has not received a response to the complaint.

On May 8, 2001, plaintiff filed an inmate complaint, challenging his initial placement at Supermax. The complaint was rejected because it was received beyond the 14-day limit

for filing complaints.

On May 13, 2001, plaintiff filed an inmate complaint, complaining about information that was used improperly in determining his confinement status. The complaint was rejected because it allegedly covered more than one issue.

On May 14, 2001, plaintiff filed an inmate complaint, challenging the applicability of temporary lock-up to his circumstances. The complaint was rejected because it was received beyond the 14-day limit for filing complaints.

On June 4, 2001, plaintiff submitted an "inmate complaint by law" pursuant to Wis. Admin. Code 301.29(3) which provides a grievance procedure to inmates subjected to grossly deficient or inadequate grievance opportunities. In that complaint, plaintiff summarized all of his previous complaints. Plaintiff sent the complaint to Litscher, who in turn referred the complaint to an inmate complaint examiner at Supermax even though plaintiff stated that he had exhausted his remedies at Supermax.

On June 7, 2001, plaintiff submitted a "notice of claim" to James Doyle in order to provide the government a further opportunity to remedy the issues addressed in his complaint.

Officials at Supermax have promulgated guidelines stating under what circumstances inmates are to be transferred to the institution. In a memorandum from the Joint Committee on Finance, a committee of the Legislative Fiscal Bureau, dated May 27, 1999,

it is stated that "the supermax facility will be Wisconsin's highest security correctional facility and will house and manage inmates who demonstrate serious behavioral control problems in other prison settings. Inmates placed in the facility will be those who: (a) have been highly assaultive to staff and/or inmates; (b) pose a high escape risk; (c) are gang leaders; (d) are organizers of threats to institutional security; (e) have outside ties that threaten institutional security; or (f) are long-term segregation inmates."

Dodge Correctional Institution is the only institution within the Department of Corrections that retains the personnel qualified and programs necessary to effectuate proper Assessment and Evaluation, as required by the Wisconsin Administrative Code. The Assessment and Evaluation process requires evaluations by more than one specialist in classification. An inmate undergoes clinical, social services, health service, dental service evaluations and various screening tests. Generally the process takes from four to six weeks. One specialist performing a one-day interview at Supermax cannot meet these Assessment and Evaluation requirements. Only after the Assessment and Evaluation process is complete can an inmate be classified and assigned to a particular institution for the fulfilment of his sentence.

On March 18, 2001, plaintiff filed an interview request with unit manager Tom Haines, asking to obtain a Dodge Correctional Institution reception Assessment and Evaluation handbook. Haines suggested that plaintiff would undergo the Assessement and

Evaluation process once he was released from Supermax, which suggested to plaintiff that he had not received the Assessment and Evaluation stipulations.

On May 8, 2001, plaintiff wrote to the Program Review Committee coordinator Trina Hanson, asking why he did not undergo the Assessment and Evaluation process at Dodge Correctional Institution. Hanson responded, indicating that she did not know the answer to plaintiff's question.

On May 8, 2001, plaintiff filed an interview request with Ms. Frye, the unit social worker, asking how the Assessment and Evaluation process was bypassed when plaintiff was transferred into Department of Corrections custody. Frye responded that he was given classification in accordance with the Wis. Admin. Code on April 10, 2001, at a hearing conducted after plaintiff was placed on administrative confinement.

On May 10, 2001, plaintiff filed an interview request with Frye, asking for help getting an Assessment and Evaluation handbook. Frye responded that plaintiff needed to write to Dodge Correctional Institution because there were none at Supermax.

DISCUSSION

A. Due Process

A claim that government officials violated due process requires proof of both inadequate procedures and interference with a liberty or property interest. Kentucky Dept.

of Corrections v. Thompson, 490 U.S. 454, 460 (1989). 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." After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty).

Plaintiff contends that defendant has violated his right to due process in many ways. Plaintiff alleges that defendant violated his due process rights by not performing an Assessment and Evaluation at the start of his incarceration, transferring him to Supermax although he does not meet the Department of Corrections' criteria for placement there, leaving him unclassified for a period of time upon his arrival at Supermax, placing him in temporary lock-up status although he does not meet the criteria under Wis. Admin. Code § 303.11 and classifying him improperly for administrative confinement status.

The placement and classification decisions about which plaintiff complains do not implicate a liberty interest. Prisoners do not have a liberty interest in not being transferred from one institution to another. Meachum v. Fano, 427 U. S. 215 (1976) (due process

clause does not limit interprison transfer even when the new institution is much more disagreeable). Although all Wisconsin inmates receive a security classification and are assigned to an institution, Wis. Admin. Code § DOC 302.01(1), they do not have a right to any particular classification. Adell v. Smith, 248 F.3d 1156 (7th Cir. 2000). Officials are given criteria to consider in assigning a security classification but they maintain broad discretion in applying the criteria: "[t]he system, however, permits correctional staff to exercise professional judgment in making the final security classification determination." Wis. Admin. Code § DOC 302.14 (Appendix). Finally, prisoners do not have a liberty interest in remaining out of segregation status so long as that period of confinement does not exceed the remaining term of their incarceration. Wagner, 128 F.3d at 1176.

Plaintiff alleges that he does not meet the mandatory criteria for placement at Supermax, in temporary lock-up or in administrative confinement. Although defendant may not be following a Department of Corrections policy, regulation or even a Wisconsin statute, his failure to do so does not infringe upon a liberty interest of plaintiff. At most, these allegations support a claim that plaintiff's rights under state law may have been violated, but such a claim must be raised in state court. Because plaintiff has not alleged facts sufficient to establish that remaining out of Supermax, temporary lock-up or administrative confinement implicates a liberty interest under Sandin, his claim will be dismissed as legally frivolous.

Plaintiff contends that the hearings and appeals processes that are available to him are meaningless because his complaints are rejected for such things as including too many claims or because they are untimely, and that this violates his due process rights. However, the mere existence of procedural guidelines does not give rise to a protected liberty interest. Culbert v. Young, 834 F.2d 624, 628 (7th Cir. 1987). Again, at most, defendant's failure to follow procedures may make out a claim of violation of state law that may be the subject of a suit brought in state court. As a claim arising allegedly under federal constitutional law, it is legally frivolous and will be dismissed.

In the alternative, plaintiff alleges that defendant is violating his substantive due process rights by engaging in arbitrary governmental action. However, because it is difficult to place responsible limits on the concept of substantive due process, the Supreme Court has directed the lower courts to analyze claims under more specifically applicable constitutional provisions before moving on to a substantive due process inquiry. Albright v. Oliver, 510 U.S. 266, 273 (1994). "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that amendment not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" Id. (citing Graham v. Connor, 490 U.S. 386, 395 (1989)). Because plaintiff alleges that several aspects of defendant's conduct deprived him of due process, this aspect of plaintiff's argument is more appropriately analyzed under the more

specific provisions of the Fourteenth Amendment. Plaintiff's substantive due process claim will be dismissed as legally frivolous.

B. Equal Protection

Plaintiff contends that defendant is violating his right to equal protection by housing him at Supermax. He argues that there are other inmates in the Wisconsin prison system who are involved in gangs and who are convicted for the same crime as he is, but who are not housed at Supermax. He seems to be arguing that the failure of prison officials to house all persons convicted of the same crime and identified as gang affiliates in the same prison violates the equal protection clause. This argument is wholly unpersuasive and legally frivolous.

The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Plaintiff's allegations fall far short of suggesting that he is similarly situated to other inmates who are not housed at Supermax Correctional Institution. Plaintiff's own allegations make clear that prison officials factor a wide range of information into their placement decisions. They may consider an inmate's criminal history, the record of the inmate's behavior within the prison system, and information obtained from the inmate's presentence investigation report, among other things. Plaintiff

does not allege that in all important respects, his criminal history, inmate behavior, and presentence report matches the criminal history, inmate behavior and presentence report of any other prisoner not confined at Supermax. Because plaintiff's allegations do not support an inference that he is being treated differently from other inmates with whom he is similarly situated, he cannot succeed on his claim that defendant is depriving him of his right to equal protection. Plaintiff's equal protection claim will be dismissed as legally frivolous.

ORDER

IT IS ORDERED that

1. Plaintiff Alejandro Rivera's due process and equal protection claims against defendant Gerald Berge are DISMISSED pursuant to 28 U.S.C. § 1915A as frivolous.

2. The clerk of court is directed to enter judgment for defendant and close this case.

3. A strike will be recorded against plaintiff in accordance with 28 U.S.C. § 1915(g).

Entered this 10th day of October, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge