IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FREDDIE DONATE,

ORDER

Petitioner,

01-C-0491-C

v.

RICHARD S. TAYLOR, Captain K. TEGELS, Guard T. KARLEN, P.R.C. Mr. BROWN, Social Worker C. HEDLER, JUAN/JUANA PEREZ (1-100),

Respondents.

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This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is confined at the Supermax Correctional Institution in Boscobel, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has made the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint

liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if on three or more previous occasions the prisoner has had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, 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.

I read petitioner's complaint, which was written in Spanish and translated into English by a federally certified court interpreter, to allege the following facts.

ALLEGATIONS OF FACT

Petitioner Freddie Donate is a prisoner at the Supermax Correctional Institution in Boscobel, Wisconsin. Petitioner does not read, write or understand English well. Respondent Richard S. Taylor is a security guard at the Jackson Correctional Institution in Black River Falls, Wisconsin, a medium security prison. Respondents Captain K. Tegels, Guard T. Karlen, P.R.C. Mr. Brown and social worker C. Hedler work at the Jackson Correctional Institution. "Juan/Juana Perez (1-100)" are John and Jane Doe respondents.

On August 14, 1997, an unnamed respondent told petitioner that he would give petitioner a Spanish translation of the Department of Corrections Administrative Rule Book, but petitioner never received the promised translation.

On February 13, 2001, respondents Taylor, Kegels, Karlan and unnamed respondents removed petitioner from his cell at the Jackson Correctional Institution and locked him in an interrogation cell for more than 30 days where he was questioned constantly, even though he had received no conduct report.

An unnamed respondent found petitioner guilty of 19 minor and five major conduct reports that have resulted in petitioner's spending eight days in adjustment segregation, 360 days in program segregation, and having good time taken away, even though petitioner does not understand English. Because petitioner does not understand English, he was unable to present evidence in his own defense in response to these conduct reports.

On May 3, 2001, respondent Brown and unnamed respondents held a Program Revision and Classification hearing for petitioner. The hearing was conducted in English and certain evidence was written in English, despite the fact that petitioner does not understand English. On May 10, 2001, these same respondents sent petitioner a copy of the findings from the Program Revision and Classification hearing. Because the findings were written in English, petitioner could not read them. On May 11, 2001, respondents Brown, Taylor, Tegels, Karlen, Hedler and unnamed respondents transferred petitioner to Supermax Correctional Institution, even though petitioner is not violent or disrespectful. Respondent Hedler never told petitioner that he had been evaluated using the Supermax mental illness screening tool before his transfer to Supermax Correctional Institution. Petitioner cannot

understand the mental illness screening tool because it is written in English. A real psychiatrist never signed the papers authorizing petitioner's transfer to Supermax Correctional Institution.

OPINION

I understand petitioner to contend that respondents violated his rights under the due process clause of the Fourteenth Amendment when they placed him in segregated confinement, transferred him to Supermax Correctional Institution and took away his good time credits, all after issuing conduct reports and holding hearings related to these actions in English. The reports and hearings were procedurally inadequate, petitioner argues, because they were written and conducted in English, a language petitioner cannot read, write or understand.

The Court of Appeals for the District of Columbia Circuit recently considered the impact of the due process clause on various prison hearings and procedures involving prisoners with little or no ability to speak English. Franklin v. District of Columbia, 163 F.3d 625 (D.C. Cir. 1998). In that case, the court of appeals reviewed a district court's injunction requiring "interpreters [for Spanish-speaking prisoners with limited English language skills] at all stages of the disciplinary, classification, housing, adjustment and parole hearing process and [the] implement[ation of] a procedure to ensure translation into Spanish

of documents" related to due process hearings. Id. at 631-32 (internal quotations omitted). The court of appeals did "not take issue with the proposition that when liberty interests are at stake, the Due Process Clause gives prisoners certain procedural rights, including the right to obtain an understanding of the proceedings." Id. at 634. However, in invalidating the injunction, the court of appeals objected to the fact that the district court had not determined whether liberty interests actually were at stake in the various prison proceedings at issue in the case, including housing determinations, classification hearings and disciplinary proceedings. Id. The court of appeals found this to be error because a procedural due process claim against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). The court of appeals' reasoning is logical: any due process right to a full understanding of the charges against petitioner would apply only when his liberty interests are at stake. In this case I must determine whether petitioner had any actual liberty interest that was jeopardized by respondents' actions in transferring petitioner to Supermax, placing him in segregation and taking away his good time credits while using English language procedures that petitioner could not understand.

In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that in the prison context, state-created protected liberty interests are limited essentially to the loss of good time credits because the loss of such credit affects the duration of an inmate's

sentence. See 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). Petitioner has not alleged that his transfer to Supermax or his segregated status will keep him confined beyond the term of his sentence. Therefore, petitioner has failed to allege facts suggesting that his transfer to Supermax or the time he has spent in segregation imposes such an atypical and significant hardship on him in relation to the ordinary incidents of prison life that it requires the state to provide due process protections.

The fact that petitioner does not understand English does not change this determination. "Decisions about where a prisoner should be confined, at what level of custody (maximum, close, medium, minimum or community) he should be classified, when he should be transferred and so forth are commonplace judgments in the 'day-to-day management of prisons.'" Franklin, 163 F.3d at 635 (quoting Sandin, 515 U.S. at 482). In invalidating the district court's injunction requiring translators for Spanish-speaking prisoners at a wide range of prison hearings, the court of appeals noted in Franklin that

> [t]he district court did not, and on this record, could not determine that Spanish-speaking prisoners are routinely subjected to greater restraints than other prisoners as a result of housing or classification proceedings. Indeed, the court identified no Spanish-speaking prisoner who even arguably could claim that he had, under the Sandin test, been deprived of his liberty as a result of such proceedings.

Id. Transfers between prisons and confinement classifications do not implicate liberty

interests. In the absence of a liberty interest, "the state is free to use any procedures it chooses, or no procedures at all." Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001). The fact that petitioner cannot understand the procedures the Department of Corrections uses in making transfer and classification decisions does not convert petitioner's transfer to Supermax or his placement in segregated confinement into an "atypical and significant hardship . . . in relationship to the ordinary incidents of prison life." Sandin, 515 U.S. at 484. Under Sandin, petitioner could be transferred or reclassified without the benefit of any process at all. Accordingly, petitioner's transfer and segregation status do not implicate the due process clause.

On the other hand, petitioner's contention that good time credits he previously earned have been revoked as the result of hearings and procedures that he could not understand does state a claim. "Good-time credits are statutory liberty interests once they have been awarded" and "states must use appropriate procedures before revoking credits they have bestowed." Montgomery, 262 F.3d at 644-45 (citing Wolff v. McDonnell, 418 U.S. 539 (1974)). If a prisoner cannot understand the procedural safeguards required by Wolff, such as advance written notice of the charges a prisoner will be called to answer for, the requirements of the due process clause may not be satisfied. Accordingly, petitioner's allegation that he lost good time credits as the result of procedures that he could not understand states a claim under the due process clause.

Nevertheless, petitioner's good time credits cannot be restored in this proceeding. Petitioner has brought this challenge under 42 U.S.C. § 1983. When a prisoner seeks the restoration of good time credits already earned, he must do so by filing a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Such a petition "provide[s] the exclusive avenue for seeking federal relief." Id. at 643 (citing Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000)). Petitioner also seeks money damages. Monetary relief is unavailable to petitioner in this § 1983 proceeding unless petitioner can show that he has already successfully challenged his sentence or discipline in a § 2254 proceeding, because even a claim "challenging only the procedures employed in a disciplinary hearing" cannot be raised under § 1983 when "the nature of the challenge to the procedures could be such as [to] necessarily . . . imply the invalidity of the judgment." Edwards v. Balisok, 520 U.S. 641, 645 (1997). Petitioner essentially alleges that because he cannot understand English he was denied any opportunity to put on a defense at his hearings. This alleged defect is serious enough to imply that the judgments depriving petitioner of his good time credits are not valid. Id. at 646 (claim that prisoner "was completely denied the opportunity to put on a defense through specifically identified witnesses who possessed exculpatory evidence" necessarily implied the invalidity of the deprivation of his good time credits).

Construed liberally, petitioner's complaint also asks for prospective injunctive relief. Petitioner seeks an injunction requiring the Department of Corrections to remove conduct

reports from his prison file and to insure that Spanish speaking prisoners receive the benefit of the procedural safeguards required by the due process clause with respect to hearings where good time credits are at stake. "Ordinarily, a prayer for . . . prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983." Id. at 648. However, a request for prospective injunctive relief can be so intertwined with a request for reinstatement of good time credits that a favorable ruling on the prospective relief would necessarily imply the invalidity of the loss of good time credits. Clarke v. Stalder, 154 F.3d 186, 189 (5th Cir. 1998); Kerr v. Orellana, 969 F. Supp. 357, 358 (E.D. Va. 1997). Here, petitioner essentially seeks an injunction forcing respondents to insure that Spanish-speaking prisoners receive the full range of due process protections required by Wolff. The imposition of such an injunction would be inextricably intertwined with petitioner's claim regarding the loss of his good time credits and would necessarily imply the invalidity of the prison disciplinary action that led to the loss of those credits.

Petitioner has not challenged merely a single aspect of the disciplinary process as procedurally faulty, as in Whitlock v. Johnson, 153 F.3d 380 (7th Cir. 1998) (affirming grant of prospective relief to prisoners who challenged method for calling witnesses in disciplinary hearings where good time credits were at stake). Rather, petitioner asserts that he has not had the benefit of *any* of the procedures required by Wolff. If the issues raised

in determining the validity of the broad injunction petitioner seeks were eventually resolved in his favor, he would be entitled to a restoration of his good time credits. Accordingly, the prospective relief petitioner seeks cannot be provided him in a § 1983 action at this time. To seek the return of his good time credits, petitioner must first file a petition for habeas corpus pursuant to 28 U.S.C. § 2254 after exhausting any remedies available to him in the state court system.

Finally, a word on petitioner's allegation that he was transferred improperly to Supermax Correctional Institution because he was not informed that respondent Hedler and unnamed respondents used the Supermax mental health screening tool before transferring him to Supermax, and because a "real psychiatrist" never authorized petitioner's transfer. In his proposed complaint, petitioner does not allege that he suffers from a mental illness that makes his confinement in Supermax cruel and unusual under the Eighth Amendment. See Jones 'El v. Berge, 00-C-421-C, slip op. at 45 (order entered October 10, 2001). Rather, petitioner's objection to the use of the screening tool seems to be part and parcel of his argument that his transfer to Supermax violated his due process rights because he could not understand the procedures used to approve his transfer. I have rejected that argument. Similarly, petitioner's argument that his transfer is invalid because a "real psychiatrist" did not approve it cannot succeed on a due process theory. Even assuming the existence of regulations requiring a "real psychiatrist" to approve transfers to Supermax, the mere absence

of such approval does not jeopardize a due process liberty interest, particularly when petitioner does not allege he is mentally ill. In Sandin, the Supreme Court sought to focus the liberty interest inquiry on the nature of the deprivation rather than the language of a particular regulation in order to discourage "prisoners [from] comb[ing] regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." Id. at 481. As noted above, after Sandin, a transfer to another prison does not implicate a liberty interest protected by the due process clause.

State Law Claims

Petitioner's proposed complaint also alleges violations of the Wisconsin Constitution. Because petitioner will be denied leave to proceed on his Fourteenth Amendment due process claim, he has no viable federal law claim. I decline to exercise supplemental jurisdiction over his state law claims. 28 U.S.C. § 1367(c)(3).

ORDER

IT IS ORDERED that:

1. Petitioner 's request for leave to proceed in forma pauperis on his claim is DENIED and the action is DISMISSED without prejudice;

2. 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 the state law claims do not fall under one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g); and

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

Entered this 30th day of November, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge