IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSHUA A. ANEY,

Petitioner, ORDER

v. 02-C-131-C

CAPT. GILBERG, in his official and individual capacities; C/O D. ESSER, in his official and individual capacities; SGT. HOTTENSTEIN, in his official and individual capacities; CAPT. BLACKBOURN, in his official and individual capacities; GERALD BERGE, in his official capacity; and DOES 1-100, in their official and individual capacities,

Respondents.

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This is a proposed civil action for declaratory and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Joshua A. Aney, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, alleges that respondents violated his Eighth Amendment right to be free from excessive force by performing a cell extraction, his Fourth Amendment right to be free from unreasonable searches by performing a strip search, his Eighth Amendment right to be free from cruel and unusual punishment by placing him in

his cell naked for 12 hours, his First Amendment right to freedom of speech by performing a cell extraction for his not speaking and his Fourteenth Amendment right to due process by considering the conduct report and physical evidence but not petitioner's evidence.

Petitioner 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. In addition, from his trust fund account statement, it appears that petitioner presently has no means with which to pay an initial partial payment of the $150 fee for filing his complaint. Therefore, although he has not made the initial partial payment required under § 1915(b)(1), he is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

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 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. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion

as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner's request for leave to proceed in forma pauperis on his Eighth Amendment excessive force claim and his Fourth Amendment unreasonable searches claim will be granted. His request for leave to proceed on his Eighth Amendment cruel and unusual punishment claim will be denied because it fails to state a claim upon which relief can be granted. His request for leave to proceed on his claims of freedom of speech and due process will be denied because the claims are legally frivolous.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Petitioner Joshua A. Aney is an inmate at Supermax Correctional Institution. All respondents are employed at Supermax: respondent Capt. Gilberg is a captain; respondent c/o D. Esser is a correctional officer; respondent Sgt. Hottenstein is a sergeant; respondent Capt. Blackbourn is a captain and a hearing officer; respondent Gerald Berge is the warden; and respondents Does 1-100 are individuals who participated in the violations and whose identities are unknown.

B. Eighth Amendment Excessive Force

On September 16, 2001, petitioner returned to his cell from the law library to find that it had been completely destroyed during a cell search. After a verbal altercation with an officer about the cell search, petitioner became very angry and refused his supper meal. As a result of this severe anger, petitioner then became very depressed. During the supper meal pickup, respondent Esser observed petitioner sitting in the corner of his cell, crying. Respondent Esser pounded on the range window a few times and said, "Aney, I need a response from you." Petitioner did not respond verbally, but was rocking back and forth, so respondent Esser "did verify safety." Respondent Esser left.

About five minutes later, respondent Hottenstein appeared at petitioner's door. Respondent Hottenstein gave petitioner a direct order to talk to him. Respondent Hottenstein then left. About five minutes later, respondent Gilberg appeared at petitioner's door. Respondent Gilberg gave petitioner a direct order to respond verbally. Petitioner remained silent and was still sitting on the floor crying. Respondent Gilberg then left.

Respondent Gilberg returned about fifteen minutes later with a cell extraction team. He told petitioner that he had the authority to use chemical agents and the Ultron II stun gun on him. Respondent Gilberg told a member of the cell extraction team to turn on the camera. A few seconds later, respondent Gilberg gave petitioner a direct order to come to the cell front to be handcuffed. Petitioner remained on the floor, crying and saying nothing.

Respondent Gilberg then gave the extraction team the order to line up. Respondent Gilberg asked respondent Esser, who was standing by the window, where petitioner was. Respondent Esser reported that petitioner was still sitting down by the shower.

The cell door then opened and the extraction team started yelling, "stop resisting, stop resisting" despite the fact that petitioner was not resisting at all. Petitioner was immediately hit under his right eye. The team then hit him a few times, smashed his face to the wall and ground and twisted his arms into painful positions. After petitioner was handcuffed and shackled, two members of the extraction team tried to stand him up. One of the shackles was twisted around petitioner's ankles, so petitioner did not stand up right away. Taking this as a sign of resistance, two members of the team lifted petitioner off the ground by the chain of his handcuffs.

Once petitioner was on his feet, members of the team wrenched his head backward to "walk" him. At this time petitioner started yelling remarks to the officers about how he was going to sue them and they would lose their jobs. Someone threatened to shock petitioner with the stun gun.

C. Fourth Amendment Unreasonable Search

The extraction team walked petitioner out into the middle of the hallway. Once there, they cut his clothes off him and performed a "staff assisted strip search" in which

petitioner was fondled in the genital and other areas and a finger was stuck partway into his anus. The extraction team then walked petitioner back to his cell, applying extremely painful pressure on his wrists and neck.

D. Eighth Amendment Cruel and Unusual Punishment

Petitioner was placed into his cell completely naked. There was nothing in his cell, not even a mattress. Petitioner paced back and forth a few times and then sat back down in the corner by the shower. Petitioner was asked if he had any injuries. Believing it was pointless to report any injuries, petitioner did not answer. Petitioner was left in the cell from approximately 5:30 p.m. on September 16, 2001, until approximately 9:00 a.m. on September 17, 2001. At about 5:00 a.m. on September 17, petitioner was given socks and underwear. Respondent Gilberg stated that he wasn't giving petitioner a mattress or blankets because petitioner wouldn't "own up to the fact" that this was petitioner's fault.

E. First Amendment Freedom of Speech

When petitioner approached him about the excessive force that was used, respondent Gilberg stated that his extraction teams are always on the offensive. Petitioner also approached respondent Hottenstein about the extraction. Respondent Hottenstein told petitioner that they can perform a cell extraction because petitioner wouldn't answer.

As a result of the cell extraction, petitioner received a knot under his right eye, a bruise on his forehead, numerous scrapes on his neck, shoulders and hip areas and bruises on his wrists from the team lifting him off the floor by the chain on his handcuffs.

F. Fourteenth Amendment Due Process

Because of the cell extraction, petitioner was given a major conduct report, written by respondent Esser. The conduct report was written as an attempt to justify the cell extraction and contained many lies to back up the justification. Two prime examples include respondent Esser stating that he never saw any movement from petitioner and that the extraction was done because petitioner's inhaler was "scattered all over the ground."

The conduct report was heard by respondent Blackbourn on October 4, 2001. At the hearing, petitioner produced substantial evidence of his innocence, including contradictory and inconsistent statements from respondents Esser, Gilberg and Hottenstein, petitioner's own written statement pointing out numerous contradictions and inconsistencies and an argument that one of the charges did not fit within the Administrative Code.

In finding petitioner guilty of the charges, respondent Blackbourn chose to rely only on the conduct report and a picture of petitioner's cut-up clothes and to ignore everything else. Respondent Blackbourn acknowledged that petitioner's inhaler was given back to him because it was found to be intact and that petitioner's windows were never covered, which

was one of respondent Gilberg's stated reasons for performing the cell extraction.

Respondent Blackbourn gave petitioner the maximum penalty of 360 days of program segregation (which extends petitioner's release date by 6 months), 30 days of cell confinement (which means no time out of the cell at all) and restitution for the clothes that were cut off him. After giving the penalty, respondent Blackbourn chuckled a little and stated, "so, enjoy your stay at Supermax."

DISCUSSION

A. Eighth Amendment Excessive Force

Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court considers factual allegations as to the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. Whitley v. Albers, 475 U.S. 312, 321 (1986).

In this case, petitioner alleges that respondents Gilberg, Esser, Hottenstein and Does used excessive force when they extracted him from his cell, hitting him under his eye, hitting

him a few times, smashing his face into the wall and ground and twisting his arms into painful positions. Petitioner alleges that he was sitting on the floor, crying but saying nothing when the extraction took place and that he did not resist the extraction until respondents Does wrenched his head backward in order to "walk" him out of the cell. From these alleged facts, it can be inferred that respondents used force that was not commensurate to the perceived need for force and that they did not take any steps to mitigate the severity of the force. For these reasons, petitioner's request for leave to proceed in forma pauperis will be granted on his claim of excessive force against respondents Gilberg, Esser, Hottenstein and Does.

In his complaint, petitioner alleges that along with respondents Gilberg, Esser and Hottenstein, respondents Doe were directly responsible for subjecting him to excessive force in violation of the Eighth Amendment. Under Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (explaining that a prisoner may name a high-level prison official as a defendant to uncover through discovery the names of persons directly responsible), petitioner will also be granted leave to proceed against respondent warden Berge on his excessive force claim so that he may discover the identities of respondents Doe. Petitioner is advised to conduct his discovery promptly and to amend his complaint to reflect the names of the correctional officers as quickly as possible.

B. Fourth Amendment Unreasonable Search

Petitioner alleges that after he was extracted from his cell, respondents Doe (members of the cell extraction team) subjected him to an unreasonable search by cutting off his clothes and performing a strip search in the middle of the hallway in which they fondled his genital area and stuck a finger partway into his anus. In Bell v. Wolfish, 441 U.S. 520 (1979), pretrial detainees at a New York City facility alleged that the policy of conducting body cavity searches following visits from outsiders violated their Fourth Amendment rights. The Supreme Court found that the searches were reasonable in light of the circumstances. Id. at 558-60. The Court held that reasonableness must be determined by balancing the need for the search against the invasion of personal rights, as revealed by four factors: "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Id. at 559. The court held that the danger of contraband entering the facility was so significant that it outweighed the intrusive nature of the search. Id. at 560.

It may be that respondents are able to justify why they initiated the strip search, the manner in which it was conducted and why they conducted it in the middle of the hallway. However, from the allegations in petitioner's complaint, I cannot determine whether the strip search was reasonable. Petitioner's request for leave to proceed on his excessive force claim will be granted against respondents Doe and Berge (to determine the identity of the

correctional officers under Duncan v. Duckworth, 644 F.2d at 655-56).

C. Eighth Amendment Cruel and Unusual Punishment

The Eighth Amendment imposes a duty on prison officials to provide adequate shelter and prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Although prisoners are entitled to "the minimal civilized measure of life's necessities," Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)), conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F.2d 105, 108, 109 (7th Cir. 1971).

Petitioner alleges that respondents violated his right to be free from cruel and unusual punishment by placing him in his cell completely naked and with no possessions, including a mattress, from approximately 5:30 p.m. until 5:00 a.m. the following morning when he was given socks and underwear. Although these conditions created temporary inconveniences and discomforts for petitioner and made his confinement unpleasant, the situation was temporary, lasting about twelve hours. The allegations of fact do not suggest that respondents were engaged in the wanton and unnecessary infliction of pain: petitioner does

not allege that the cell was kept at a low temperature or that he suffered any physical harm as a result. Although the conditions were unpleasant, petitioner's allegations simply do not rise to the level of cruel and unusual punishment under the Eighth Amendment. Petitioner's request for leave to proceed on this claim will be denied for failure to state a claim.

D. First Amendment Freedom of Speech

Petitioner contends that respondents violated his right to freedom of speech when they performed a cell extraction because of his refusal to respond to officers' direct orders to answer them.

The Supreme Court has held that "it [is] important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." Turner v. Safley, 482 U.S. 78, 90 (1987). Prison officials violate the First Amendment when for reasons unrelated to legitimate penological interests, they engage in "censorship of . . . expression of 'inflammatory political, racial, religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate.'" Procunier v. Martinez, 416 U.S. 396, 415 (1974).

The fact that respondents performed a cell extraction when petitioner refused to speak does not implicate the First Amendment. It is true that under the Fifth Amendment, government officials cannot force citizens to speak in certain situations, such as when such

speech would force an individual to incriminate himself. In this case, however, petitioner is not protected by the Fifth Amendment. Instead, respondents were giving petitioner a direct order to answer their questions, presumably to verify petitioner's well-being. In short, petitioner has not alleged facts tending to suggest that this policy is not reasonably related to legitimate penological interests. Therefore, petitioner's request for leave to proceed in forma pauperis on his First Amendment claim will be denied because the claim is legally frivolous.

E. Fourteenth Amendment Due Process

Petitioner alleges that respondent Blackbourn violated his right to due process by relying on a fabricated conduct report and a picture of torn clothing and by ignoring the evidence of innocence that petitioner presented, including arguments that were intended to show numerous contradictions and inconsistencies in the reporting officers' statements.

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Before petitioner is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. Averhartv. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). Liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process

Clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted). Because petitioner alleges that his release date was extended by six months as a result of the penalty imposed at the conduct report hearing, I understand petitioner to allege that he lost good time credits as a result of the hearing, implicating due process procedural protections under Sandin.

Where a protected liberty interest is at stake in a disciplinary hearing, a prisoner is entitled to certain basic procedural due process protections, including a written statement by the disciplinary committee of the evidence relied and the reasons for the action taken. Wolff v. McDonnell, 418 U.S. 539, 563 (1974). Not much evidence is required to satisfy due process requirements. The United States Supreme Court has held that the constitutional standard is satisfied by a "modicum of evidence." Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 455 (1985) (relevant question is whether there is "any" evidence in the record that could support the conclusion reached by the disciplinary board). See also Culbert v. Young, 834 F.2d 624, 629-31 (7th Cir. 1987). Here, respondent Blackbourn provided petitioner with a written statement of the evidence relied upon and the reasons for the action taken. Because petitioner's allegations establish that he received the basic procedural due process protections, his request for leave to proceed in forma pauperis on his due process claim will be denied because the

claim is legally frivolous.

To the extent that petitioner's allegations may raise state law claims, I decline to exercise supplemental jurisdiction over them because the allegations do not raise a viable federal law claim. See 28 U.S.C. § 1367(c)(3); Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (A "district court ha[s] the discretion to retain or to refuse jurisdiction over state law claims.").

ORDER

IT IS ORDERED that

1. Petitioner Joshua A. Aney's request for leave to proceed in forma pauperis is GRANTED as to his Eighth Amendment excessive force claim against respondents Capt. Gilberg, c/o D. Esser, Sgt. Hottenstein, Does and Gerald Berge and his Fourth Amendment unreasonable search claim against respondents Does and Berge.

2. Petitioner's request for leave to proceed is DENIED on his Eighth Amendment cruel and unusual punishment claim for failure to state a claim upon which relief can be granted.

3. Petitioner's request for leave to proceed is DENIED on his First Amendment freedom of speech claim and his Fourteenth Amendment due process claim because the claims are legally frivolous.

4. Respondent Capt. Blackbourn is DISMISSED from this case.

5. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondents, he should serve the lawyers directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' lawyers.

8. The unpaid balance of petitioner's filing fee is $150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 22nd day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge