IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

CARLOS RODRIGUEZ,

Petitioner,

ORDER

v.

02-C-0356-C

FEDERAL CORRECTIONAL INST.
OXFORD,

Respondent.

- -

This is a proposed civil action for injunctive relief in which petitioner Carlos Rodriguez, who is an inmate at the Federal Correctional Institution in Oxford, Wisconsin, alleges that he was denied due process and equal protection in connection with a disciplinary hearing involving the discovery of intoxicants in his cell. Petitioner requests the return of 27 days' good time credit, reinstatement to his job and expungement of the disciplinary hearing proceedings.

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, the prisoner's complaint must be dismissed if, even under a liberal construction, it 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. See 42 U.S.C. § 1915e.

Because petitioner is challenging the fact or duration of his confinement, he must file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and include his related claims of violations of due process and equal protection. Accordingly, petitioner's request for leave to proceed in forma pauperis will be denied without prejudice.

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

ALLEGATIONS OF FACT

On March 8, 2000, petitioner was found guilty of a "Code 222" violation for possession of approximately two gallons of intoxicants. During the disciplinary hearing, petitioner's cellmate, Joseph Johnson, testified that petitioner was not in possession of the intoxicants and did not have any knowledge that intoxicants were in their common living area. Petitioner was in the recreation yard playing basketball at the time the intoxicants were discovered in his cell. Petitioner's cellmate took full responsibility for these intoxicants.

On August 10, 2001, petitioner was found to have committed the act charged and sanctioned with 30 days in disciplinary segregation, 27 days' loss of good time credit, loss of his Unicor job and removal from preferred housing.

In a similar situation involving two white inmates in another housing unit, one inmate took responsibility for the intoxicants and neither inmate was prosecuted by the institution. (Although it is not entirely clear, it appears that petitioner is alleging that he and his cellmate are inmates of a "nationality" other than white.)

DISCUSSION

A. Administrative Procedure Act

Petitioner alleges jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 702. Therefore, the first question is whether judicial review under the APA is precluded by 18 U.S.C. § 3625. There is a presumption favoring judicial review of administrative action, which applies absent "clear and convincing evidence" that Congress intended to foreclose judicial review. See Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). Section 3625 states that "[t]he provisions of sections . . . 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under [Subchapter C – Imprisonment, §§ 3621-26]." 18 U.S.C. § 2635. Although §§ 701-706 deal generally with judicial review of agency action, § 3625 states that § 702 does not apply to agency decisions, determinations and orders. The few courts that have addressed § 3625 in this context have held that a court is precluded from reviewing "adjudicative" decisions of agencies but is not precluded from reviewing "rulemaking" decisions. Lyle v. Sivley, 805

F. Supp. 755 (D. Ariz. 1992); Wiggins v. Wise, 951 F. Supp. 614 (S.D.W.Va.1996); Sesler v. Pitzer, 926 F. Supp. 130, 132 (D. Minn. 1996). Moreover, the House Report on § 3625 "provides that rule-making activities are to be reviewed under the APA, while 'adjudication[s] of specific cases' are not." Lyle, 805 F. Supp. at 759. Accordingly, § 3625 precludes judicial review of this cause of action under 5 U.S.C. § 702. Therefore, the question becomes whether petitioner's allegations can be construed to fall under another federal statute that would confer jurisdiction.

B. Due Process Claim

Petitioner requests reinstatement of 27 days of good time credit, restoration of his job and expungement of his conduct report, arguing that he was denied due process in a disciplinary hearing. Petitioner alleges that he was found guilty of possession of intoxicants despite his testimony and the testimony of his cellmate to the contrary. As an initial matter, the question whether petitioner's claims are properly raised in as so-called Bivens action must be considered. See generally Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). In Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court held that when a prisoner's claim amounts to a challenge to the legality of his conviction or confinement, the claim must be brought as a habeas corpus claim, regardless of the nature of the remedy the prisoner seeks. The Court of Appeals for the Seventh Circuit has applied

Heck to § 1983 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. See Dixon v. Chrans, 101 F.3d 1228, 1230-31 (7th Cir. 1996) (claim for damages necessarily implicates results of disciplinary committee hearing and 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). In this case, petitioner seeks restoration of the loss of 27 days' good time credit. Therefore, petitioner's claim of lack of due process may be brought only in an habeas action after he has exhausted his administrative remedies. See Sanchez v. Miller, 792 F.2d 694 (7th Cir. 1986); 28 U.S.C. 2241.

C. Equal Protection Claim

Petitioner alleges that in a similar situation two white inmates who were found to have intoxicants in their cell were not prosecuted for a violation of the disciplinary rules but that he and his cellmate, who are not white, were prosecuted. (Petitioner does not indicate his race other than stating that he is not white.) I understand petitioner to allege that he was

prosecuted for possessing intoxicants (which appears to be a strict liability offense under the prison rules) because of his race and in violation of his right to equal protection under the Fourteenth Amendment. However, petitioner seeks the same relief as to this claim as he does for his due process claim. If this court were to find that petitioner's prosecution violated equal protection, his conviction at the disciplinary hearing could not stand. Thus, petitioner's good time credit and job would be restored and his conduct report would be expunged. Because rectifying an allegedly unconstitutional prosecution would require invalidating petitioner's conviction, this equal protection claim, like his due process claim, may be heard only in a habeas corpus action. See Heck, 512 U.S. at 486-87; see also Edwards v. Balisok, 520 U.S. 641, 648 (1997); cf. DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000) (restoration of loss of job as result of allegedly unconstitutional disciplinary hearing proper in § 1983 action only when habeas corpus relief is not available).

However, this court cannot convert sua sponte petitioner's action into a petition for habeas corpus under 28 U.S.C. § 2241. See Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (when prisoner files civil rights action that cannot be resolved without inquiring into validity of confinement, court should dismiss the suit without prejudice rather than convert it into petition for habeas corpus). Accordingly, petitioner's request for leave to proceed in forma pauperis will be denied without prejudice.

ORDER

IT IS ORDERED that petitioner Carlos Rodriguez's request for leave to proceed in forma pauperis is DENIED without prejudice to his raising his claims in a petition for a writ of habeas corpus;

2. The unpaid balance of petitioner's filing fee is $120.50; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2); and

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

Entered this 24th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge