IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSEPH D. BUSH,

Petitioner, ORDER

v. 02-C-0090-C

BLACKBOURN, JON E. LITSCHER,
STEPHEN PUCKETT, DICK VERHAGEN,
GERALD A. BERGE, TRINA HANSON,
CORRECTIONS CORPORATION OF AMERICA,
PRISON TRUST, INC., JOHN DOE A-B-C,
MARY S. DAVIS, TINA SIMONS, ROBERT
ADAMS, BILL CRAFT, CAROLYN McGRRAW,
WOOLEY and PERCY PITZER,

Respondents.

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This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Joseph D. Bush, who is currently an inmate at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin, alleges that his Fourteenth Amendment due process rights were violated by (1) placing him in administrative confinement after a hearing at Whiteville Correctional Facility in which he was denied appointed representation, was not allowed to present evidence and could not call witnesses; (2) transferring him to

Supermax Correctional Institution; and (3) placing him in administrative confinement without a hearing at Supermax. Petitioner has submitted 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, 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's claims are legally frivolous, I will deny his request for leave to proceed in forma pauperis.

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

ALLEGATIONS OF FACT

Petitioner is an inmate at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. At all times relevant to this complaint, petitioner was an inmate at the Whiteville Correctional Facility in Whiteville, Tennessee, and the Supermax Correctional Institution in Boscobel, Wisconsin. The identities of the 16 named respondents are as follows: Blackbourn is captain at Supermax; Jon E. Litscher is secretary of Wisconsin

Department of Corrections; Stephen Puckett is a program classification official located in Madison, Wisconsin; Dick Verhagen is administrator of Wisconsin Division of Adult Institutions; Gerald A. Berge is warden of Supermax; Trina Hanson is chair of the program review classification at Supermax; Corrections Corporation of America; Prison Trust, Inc.; John Doe A-B-C; Mary S. Davis, Tina Simons, Bill Craft and Wooley are members of the administrative confinement review committee at Whiteville; Robert Adams and Carolyn McGrraw are chairs of the administrative confinement review committee at Whiteville; Percy Pitzer is warden of Whiteville.

On February 12, 1998, petitioner was sentenced to the Wisconsin Department of Corrections. On September 25, 1999, petitioner was transferred to Whiteville Correctional Facility.

1. Whiteville Correctional Facility

On November 30, 1999, a major disturbance erupted in the main dining room at Whiteville. (Thirteen correctional officers were overpowered and held captive for 90 minutes. Staff members were beaten; one officer had his throat slashed and another was stabbed twice in the stomach.) Respondent Litscher was at Whiteville at the time of the disturbance and is aware that petitioner was not involved in the riot.

On December 5, 1999, respondents Litscher, Pitzer and Adams ordered petitioner

transferred to another facility in Tennessee and placed in segregation.

On December 22, 1999, petitioner received a memo from respondent Pitzer that stated that he had been placed in temporary lock-up because he was being investigated for the November 30 disturbance. (From the allegations, it appears that at this point petitioner had been transferred back to Whiteville.)

On February 4, 2000, an administrative confinement hearing was held at Whiteville. Petitioner did not receive notice of the hearing or of the charges against him. During the hearing, petitioner was told by the committee that he was an active gang member and that they had gathered this information from the Wisconsin Department of Corrections and Internal Affairs. The committee "failed to give the factual statements that were relied upon in order to place [petitioner] into a status of administrative confinement." Petitioner was denied appointed representation before and during the hearing, was not allowed to present evidence and could not call witnesses. Defendant Litscher is aware of these facts.

On February 8 and 27, 2000, petitioner filed "informal grievances" concerning his inadequate hearing. He did not receive a response to either grievance

On March 22, 2000, petitioner attended a program review committee hearing. In the committee's report, petitioner was falsely accused of being an "integral member of a security threat group that is responsible for numerous asslts [sic] and extortion of inmates." The program review committee subjected petitioner to wanton pain and suffering by inserting

false accusations into the report. The committee knew that the information was false. Respondent Puckett was aware that false information was inserted into the report. On April 24, 2000, petitioner appealed the program review committee's recommendation of administrative confinement. Petitioner did not receive a response.

On July 13, 2000, petitioner received notice of an administrative confinement hearing to be held that same day. Petitioner waived the two-day notification.

On August 15, 2000, petitioner received a memorandum from Roy Fisher, internal affairs supervisor for the Corrections Corporation of America, in which Fisher falsely stated, "[Petitioner] was a member of the Gangster Disciple Steering Committee on Nov. 30, 2000 [sic]. He was present and participated in a strategic planning session with other committee members the morning of the riot. Evidence indicated that [petitioner] supported and sanctioned the riot. Although, he was not present during it's [sic] occurrence." Petitioner never received a conduct report for his alleged participation in the November 30 disturbance.

On September 25, 2000, the program review committee approved petitioner for transfer to Supermax. The committee relied on the false statements in the August 15 memorandum. Respondents Litscher and Puckett approved petitioner's transfer without investigating the information in the August 15 memorandum.

2. Supermax Correctional Institution

On September 27, 2000, petitioner was transferred to Supermax. Upon arrival, petitioner was placed in administrative confinement without a hearing. Respondent Berge was aware that petitioner was placed in administrative confinement without a hearing. Respondent Berge conspired with respondents Puckett and Litscher to house petitioner at Supermax "for political reasons only." No one investigated whether petitioner fit the criteria for placement at Supermax.

On October 18, 2000, petitioner appealed his administrative confinement status to respondents Berge and Verhagen. On November 21, 2000, petitioner's appeal was denied. Petitioner appealed the decision to respondents Berge and Puckett.

On December 6, 2000, petitioner filed an inmate complaint (SMCI-2000-34923) stating that he has a right to appeal his administrative confinement hearing that occurred at Whiteville on July 13, 2000. On January 19, 2001, the complaint was dismissed and petitioner was told to direct his appeal to the Whiteville Facility.

On January 4, 2001, petitioner received notice of an upcoming administrative confinement review committee hearing. Petitioner also received a copy of a January 12, 2000 memorandum from Fisher to respondent Pitzer. Petitioner had never seen this memo before. The memorandum outlined the events of the November 30 disturbance at Whiteville and the resulting injuries. The memo stated that an investigation yielded the

following:

> [Petitioner] has been identified by sources as a steering committee member of the Gangster Disciples/Security Threat Group-Prison Gang at this institution. He held this position before and during the incident. . . . Sources reveal that [petitioner] was present during a riot planning session at breakfast with other steering committee members during the morning of the riot. It is reported that [petitioner] was in support of and sanctioned the incident . . . In an interview with [petitioner] by this investigator, [petitioner] admitted his position on the steering committee. He said he found out about the pending riot the day before its occurrence, and that he did attend the riot planning session . . . However, [petitioner] maintains that he was adamantly against the insurrection.

On that same day, petitioner requested five inmates as witnesses who knew that he was not involved in the November 30 disturbance. Respondent Blackbourn denied petitioner's request.

On January 17, 2001, petitioner attended an administrative confinement hearing. Petitioner told the committee members that he had not had a hearing with due process at Whiteville regarding the November 30 disturbance. Respondent Blackbourn told petitioner that he should have taken the matter up at Whiteville. Respondent Blackbourn recommended that petitioner stay at Supermax and finish the level program. Respondents Litscher, Berge and Blackbourn were aware that petitioner had never received a conduct report or a hearing with due process. On that same day, petitioner appealed the committee's decision to respondent Berge. Petitioner did not receive a response.

On March 21, 2001, petitioner filed an inmate complaint (SMCI-2001-8830) stating

that he should not be held at Supermax because his "Administrative Confinement Appeal wouldn't be heard." On April 4, 2001, this complaint was dismissed.

On April 9, 2001, petitioner attended a program review committee hearing. During the hearing, respondent Hanson used "that same false and fabricated information" to keep petitioner housed at Supermax and finish the level program.

On July 17, 2001, petitioner attended a program review committee hearing. During the hearing, respondent Hanson told petitioner "that all that false and fabricated information will be expunged from [petitioner's] inmate file and that [he] would be transferred from Supermax Correctional Institution." That same day, petitioner was transferred to Dodge Correctional Institution to await transfer to Kettle Moraine Correctional Institution, pursuant to orders issued by respondents Litscher and Puckett.

On July 28, 2001, petitioner filed an inmate complaint (DCI-2001-2362) asking to be compensated for back pay wages that he would have earned. On August 13, 2001, the complaint was dismissed.

DISCUSSION

I understand petitioner to allege that his Fourteenth Amendment due process rights were violated by (1) placing him in administrative confinement after a hearing in which he was denied appointed representation, was not allowed to present evidence and could not call

witnesses at Whiteville; (2) transferring him to Supermax; and (3) placing him in administrative confinement without a hearing at Supermax.

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. Averhart v. 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).

Prisoners do not have a liberty interest in remaining out of administrative confinement so long as that period of confinement does not exceed the remaining term of their incarceration. 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). In Sandin, 515 U.S. at 486, the Supreme Court held that an inmate's "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Petitioner does not have a liberty

interest in remaining free of administrative confinement because such confinement does not impose an atypical and significant hardship on him in light of "the ordinary incidents of prison life." Id. at 484. Therefore, petitioner was not entitled to due process protections at his administrative confinement hearing. See Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001) (in absence of liberty interest, "the state is free to use any procedures it chooses, or no procedures at all.").

For the same reason, petitioner's transfer to Supermax does not implicate a liberty interest. Prisoners do not have a liberty interest in not being transferred from one institution to another. See 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). Petitioner also alleges that no one investigated whether he met the criteria for placement at Supermax. Although respondents may not be following a Department of Corrections policy, regulation or even a Wisconsin statute, their failure to do so does not infringe on a liberty interest. At most, this allegation supports a claim that petitioner's rights under state law may have been violated, but such a claim must be raised in state court.

Because petitioner's placement in administrative confinement and transfer to Supermax do not implicate a liberty interest under Sandin, his request for leave to proceed will be denied as legally frivolous.

ORDER

IT IS ORDERED that

1. Petitioner Joseph D. Bush's request for leave to proceed in forma pauperis is DENIED as legally frivolous;

2. The unpaid balance of petitioner's filing fee is $126.88; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

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

Entered this 4th day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge