IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

KEVIN J. PHILLIPS,

ORDER

Petitioner,

00-C-333-C

v.

JON LITSCHER, JERRY E. SMITH,
LAWRENCE STAHOWIAK,

Respondents.

- -

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Although he has paid the full filing fee for this action, petitioner, who is presently confined at the Oshkosh Correctional Institution in Oshkosh, 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 indigent for the purpose of service of his complaint.

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 has on three or more previous occasions 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. In addition, under most circumstances, a prisoner's request for leave to proceed must be denied if the prisoner has failed to exhaust available administrative remedies.

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

ALLEGATIONS OF FACT

Respondent Jon Litscher is Secretary of the Department of Corrections. Respondent Jerry E. Smith is Chairman of the Wisconsin Parole Commission. Respondent Lawrence Stahowiak is Registrar of the Record Office at Oshkosh Correctional Institution.

On December 6, 1995, petitioner began serving a five-year sentence for "child enticement" of a seventeen year old female. The act was consensual. The sentencing court did not require petitioner to complete any programs while incarcerated. When petitioner went through the assessment and evaluation process at Dodge Correctional Institution, it was determined that he might be in need of a denier's program, Alcohol and Other Drug Abuse level C and sexual offender treatment program. Petitioner did not object and made it clear that he

was willing to enroll in the programs.

At that time, petitioner was classified as medium security and he had no "presumptive mandatory release." Oshkosh Correctional Institution is the only medium security institution that offers the sexual offender treatment program.

In January 1996, petitioner was transferred to the Outagamie County jail in Appleton, Wisconsin. In June 1996, he was transferred to Jackson Correctional Institution in Black River Falls, Wisconsin. At Jackson Correctional Institution, petitioner was seen by the Program Review Committee and told that the prison did not provide the Alcohol and Other Drug Abuse Level 5c program, denier's program or sexual offender treatment program.

In November 1996, petitioner was transferred to Oshkosh Correctional Institution. When he saw the Program Review Committee on January 8, 1997, petitioner stated that he wished to participate in the recommended programs. In February 1997, petitioner was given a twenty-five month deferral to mandatory release by the parole commission, which gave as reasons for the deferral petitioner's failure to complete programs but also noted that he did not have enough time left on his sentence to complete sexual offender treatment.

Petitioner completed the denier's program in November 1997 and the Alcohol and Other Drug Abuse Program, level B, in October 1998.

In 1997, petitioner reviewed his records file and "presumptive mandatory release" was

not marked on any of the records. Social worker Wendy Monfils told petitioner that he was not under presumptive mandatory release. In May 1998, petitioner reviewed his records again and presumptive mandatory release was not marked in any of the records. Petitioner's mandatory release date was listed as March 25, 1999. When petitioner reviewed his records in July 1998, "presumptive mandatory release" had been placed on them. This could only have been done by respondent registrar Stahowiak. This is not the first time respondent Stahowiak has placed things in the files or stamped "PMR" on inmate files. If "PMR" was to have been placed against petitioner, it was supposed to have been done by the assessment and evaluation staff at Dodge Correctional Institution. The "PMR" was placed in petitioner's file thirty-eight months after he began his sentence. Respondent Stahowiak and his office at Oshkosh Correctional Institution had no authority to do this.

Petitioner was cleared as "no risk" by the ECRB board in July 1999. [Petitioner does not explain what the ECRB board is.] In March 1999, petitioner was reviewed for "PMR" by the parole commission and was given a four-month deferral. The commission saw petitioner as a risk to the public unless a "structural parole plan" was established and reinforced by his parole agent. The record stated that petitioner's social worker and parole agent should establish such a plan.

On July 7, 1999, petitioner was seen by parole commissioner M. Huibregste, who

recommended that petitioner be granted parole effective on or after August 3, 1999, because a valid, verified parole plan had been established, petitioner had been accepted in the Attic Halfway House in Appleton, Wisconsin and had completed denier's program and Alcohol and Other Drug Abuse level 5. Petitioner was advised also that Huibregste's recommendation was subject to final approval of the chair of the parole commission, respondent Smith. On August 3, 1999, the agent of record came to Oshkosh Correctional Institution to pick up petitioner and take him to the Attic Halfway House. The recommended parole was denied and "Max Dis" [presumably, "maximum discharge"] written across the recommended release date by respondent Smith. Respondent Smith gave no reason for the denial. The social worker did not know why petitioner was being held to his maximum discharge date. Petitioner's maximum discharge date is now set at November 22, 2000.

DISCUSSION

Petitioner does not allege that he was deprived of a parole hearing. Instead, he contends that his due process rights and his rights under state law were violated by respondent Smith's failure to provide him a reason for denying him parole. Also, I understand petitioner to contend that because he was not released on his mandatory release date of March 25, 1999, he is being held in involuntary servitude in violation of the Thirteenth Amendment and his imprisonment

constitutes cruel and unusual punishment in violation of the Eighth Amendment. Finally, I understand petitioner to be alleging that respondent Stahowiak violated some unidentified right not to have "PMR" written in his file after his sentence was imposed. Petitioner seeks compensatory and punitive damages from respondents.

I. DUE PROCESS CLAUSE

Establishing that government officials have violated procedural due process requires proof of inadequate procedures and interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Although there is no constitutional right to parole, see Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979), Wisconsin's mandatory release statute creates a protectible liberty interest. See Felce v. Fiedler, 974 F.2d 1484, 1491-92 (7th Cir. 1992); Wis. Stat. § 302.11 ("each inmate is entitled to mandatory release on parole . . . at two thirds of the sentence"). In United States ex rel. Richerson v. Wolff, 525 F.2d 797, 800 (7th Cir.1976), the Court of Appeals for the Seventh Circuit determined that "due process includes as a minimum requirement that reasons be given for the denial of parole release." Therefore, petitioner's allegation that respondent Smith did not give any reason for his denial of petitioner's parole under Wisconsin's mandatory release statute states a claim for relief upon which relief may be granted under the due process clause

of the Fourteenth Amendment.

I turn then to the question whether petitioner has exhausted his administrative remedies as required by 42 U.S.C. § 1997e. Wis. Stat. § 302.11(1g)(d) provides that "An inmate may seek review of a decision by the parole commission relating to the denial of presumptive mandatory release *only* by the common law writ of certiorari." (emphasis added). Because the failure to give a reason for the denial of parole is related to the denial of presumptive mandatory release, the statute indicates that there is no administrative appeal process in which to contest the denial of parole under § 302.11. 42 U.S.C. § 1997e(a) requires a prisoner to exhaust "such administrative remedies as are available"; because there are no administrative remedies available to petitioner, I conclude that the PLRA requirement of administrative exhaustion does not bar this lawsuit.

II. OTHER CLAIMS

Petitioner's Thirteenth and Eighth Amendment claims must be construed as a challenge to the fact of his confinement, even though he requests money damages only. This is because it would be impossible to rule that petitioner was to be paid for each day he remained in allegedly unconstitutional custody without implicitly ruling that his custody is illegal. Thus, his claims are barred by the Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994)

(holding that prisoner could not bring claim for money damages pursuant to 42 U.S.C. § 1983 where claim amounts to a challenge to legality of his conviction or confinement, unless prisoner could show that conviction or sentence had been invalidated in separate proceeding).

Petitioner's understanding of "presumptive mandatory release" is different from that which appears in Wis. Stat. § 302.11. Petitioner appears to believe that the requirement that he serve to "presumptive mandatory release" means that he must serve his full five-year sentence and that the words "presumptive mandatory release" should have been placed on his record at sentencing and cannot be added later. A state prisoner in Wisconsin is "entitled to mandatory release on parole" upon serving two-thirds of his sentence. Wis. Stat. § 302.11(1). Section 302.11(1g)(am) states that the mandatory release date set at two-thirds of the sentence is a presumptive mandatory release date for inmates who, like petitioner, committed a felony between April 1994 and December 1999. Since petitioner was sentenced in December 1995, March 25, 1999 appears to be the date when two-thirds of his sentence was served, and therefore is his presumptive mandatory release date. This indicates that "presumptive mandatory release" being written on his records was not the reason that petitioner remained incarcerated after March 1999. In any event, petitioner has not pointed to and I can think of no federal or state law or constitutional provision that would prevent respondent Stahowiak from writing "PMR" on petitioner's records at a date after petitioner's sentencing. Therefore,

petitioner fails to state a claim for relief against respondent Stahowiak.

III. RESPONDEAT SUPERIOR

Petitioner fails to allege that respondent Litscher personally violated petitioner's due process rights. In a § 1983 action, there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Therefore, petitioner will be denied leave to proceed against respondent Litscher.

ORDER

IT IS ORDERED that

1. Petitioner Kevin J. Phillips's motion for leave to proceed in forma pauperis is GRANTED in part and DENIED in part;

2. Petitioner states a claim upon which relief may be granted with respect to his claim that respondent Jerry E. Smith's denial of his parole without providing a reason violated his rights under the due process clause of the Fourteenth Amendment;

3. Petitioner's claims under the 8th and 13th Amendments are DISMISSED because

the claims are legally frivolous;

4. The complaint is DISMISSED against respondents Jon Litscher and Lawrence Stahowiak;

5. Service of this complaint will be made promptly after petitioner submits to the clerk of court one completed marshals service forms and two completed summonses, one for respondent Smith and one for the court. Enclosed with a copy of this order is a set of the necessary forms. If petitioner fails to submit the completed marshals service and summons forms before October 12, 2000, his complaint will be subject to dismissal for failure to prosecute.

6. In addition, petitioner should be aware of the requirement that he send respondent a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondent, he should serve the lawyer directly rather than respondent. 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 respondent or to respondent's attorney.

Entered this 28th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge