

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JEFFERY PITT,

Petitioner,

v.

JERRY E. SMITH, JR., Chairman,
Wisconsin Parole Commission; and
JANE HACKBARTH, Wisconsin Parole
Commission,

Respondents.

ORDER

00-C-450-C

This is a proposed civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Jeffery Pitt, who is presently confined at the Oregon Correctional Center in Oregon, 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 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, 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

On April 10, 2000, social worker Mary Bloczynski gave petitioner a notice stating that petitioner's parole hearing was to be held on May 10, 2000 at Kettle Moraine Correctional Institution. (At that time, petitioner was incarcerated at Kettle Moraine Correctional Institution.) Petitioner's parole hearing was pursuant to Wis. Stat. § 304.01(2). On May 10, 2000, respondent Jane Hackbarth came to Kettle Moraine Correctional Institution to give petitioner and other inmates their parole hearings as mandated by Wis. Stat. § 304.02(2). Respondent Hackbarth gave all other inmates eligible under § 304.01(2) their parole hearing

but refused intentionally to give petitioner a hearing. Respondent Hackbarth discriminated purposefully against petitioner and singled him out for harsher treatment than that accorded other similarly and worse situated inmates. Instead of giving petitioner his mandatory parole hearing, respondent Hackbarth gave petitioner a file review. Respondent Hackbarth reviewed petitioner's sentence data sheet but did not review his file.

Respondents Hackbarth and Jerry Smith know that they cannot make a discretionary parole decision without a hearing. Respondent Smith told The Milwaukee Journal Sentinel, that all inmates are entitled to a parole hearing as a matter of law. Petitioner has written to both respondents to request a parole hearing. Respondents refused, telling petitioner in writing that he could not appeal the decision not to give him a parole hearing.

On June 29, 2000, petitioner filed a notice of claim against respondents pursuant to Wis. Stat. § 893.82. It is the policy of both respondents to refuse to comply with the plain, mandatory language of Wis. Stat. § 304.01(2) and to deny inmates their parole hearings.

DISCUSSION

Petitioner contends that respondents Smith and Hackbarth's failure to provide him with a parole hearing violated his rights under the due process clause of the Fourteenth Amendment. Petitioner also contends that respondents singled out petitioner for harsher treatment than that

accorded other inmates in violation of the equal protection clause of the Fourteenth Amendment. Finally, petitioner contends that respondents violated Wis. Stat. 304.01(2), which sets out the general duties of the parole commission and commission chairperson.

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). There is no independent constitutional right to parole, see Heidelberg v. Illinois Prisoner Review Board, 163 F.3d 1025, 1026 (7th Cir. 1998), and Wisconsin has not created such a right through its parole statute, Wis. Stat § 304.06, because under the statute parole is discretionary rather than mandatory. See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (whether state creates protected liberty interest in parole depends upon whether parole is discretionary or mandatory under state law); State v. Borrell, 167 Wis.2d 749, 772, 482 N.W.2d 883,891 (1992) (“The possibility of parole does not create a claim of entitlement nor a liberty interest.”). Because petitioner’s parole was discretionary and he has no liberty interest in discretionary parole, he has failed to state a claim upon which relief may be granted under the due process clause of the Fourteenth Amendment.

II. EQUAL PROTECTION CLAUSE

Although petitioner may have stated a claim for relief that respondents' singling him out for harsher treatment violated the equal protection clause, he will not be granted leave to proceed on this claim because he has failed to submit proof that he has exhausted his administrative remedies. Petitioner alleges that respondents told him that he could not appeal the decision to deny him a parole hearing. However, the exhibit petitioner points to in support of that assertion is a parole commission action form that states "There is no administrative appeal of this decision." Comp. Ex. A. This indicates that there is no administrative process in which petitioner may appeal the denial of his parole; it does not imply that petitioner may not challenge respondents' failure to provide him with a parole hearing. Plaintiff himself notes that he "is challenging the 'procedure' used to make the parole decision, not the decision." Comp. ¶ 17.

The inmate complaint review system is described in Wis. Admin. Code Chapter DOC 310. Before commencing a civil action, an inmate "shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14." DOC 310.04. Petitioner's request for leave to proceed on his equal protection claim will be denied without prejudice for his failure to submit proof of administrative exhaustion.

III. WIS. STAT § 304.01(2)

Because I will deny leave to proceed on petitioner's federal constitutional claims, I decline to exercise supplemental jurisdiction over his state law claim.

The 1996 Prison Litigation Reform Act requires that "strikes" be recorded against inmates for every "action" that is filed which is "frivolous, malicious, or fails to state a claim upon which relief may be granted." See 28 U.S.C. § 1915(g). If a prisoner gets three such strikes, he or she is barred from seeking leave to proceed in forma pauperis in further actions "unless the prisoner is under imminent danger of serious physical injury." See id. I have found that petitioner fails to state a federal law claim upon which relief may be granted. However, because petitioner presents an additional state law claim in this action, a strike will not be recorded against him because it cannot be said that his action is without merit.

ORDER

IT IS ORDERED that:

1. Petitioner's request for leave to proceed in forma pauperis on his claim under the due process clause of the Fourteenth Amendment is DENIED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. Petitioner's request for leave to proceed in forma pauperis on his claim under the

equal protection clause of the Fourteenth Amendment is DENIED without prejudice for petitioner's failure to submit proof that he has exhausted his administrative remedies;

3. The unpaid balance of petitioner's filing fee is \$50.48; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. A strike will not be recorded against petitioner pursuant to § 1915(g); and 5. The clerk of court is directed to enter judgment and close the file.

Entered this 25th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge