IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GARY CAMPBELL, and on behalf of
WISCONSIN STATE PRISONERS,

ORDER

Petitioners,

00-C-593-C

v.

JERRY SMITH, JR. and MEMBERS OF
THE WISCONSIN PAROLE COMMISSION,

Respondents.

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This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Waupun Correctional Institution in Waupun, 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. 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).

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

## ALLEGATIONS OF FACT

Respondent Jerry Smith, Jr. is the Acting Parole Chairman in Wisconsin.

On January 12, 2000, petitioner was eligible for parole at Racine Correctional Institution and was scheduled to be reviewed by Parole Commissioner Fred Melendez.

Petitioner was never interviewed by Melendez. Petitioner received a Parole Commission Action that indicated that a file review had taken place without his appearance. The notice also stated that petitioner could not appeal the decision to the chairperson of the Wisconsin Parole Commission.

Under the rules of practice and procedure, the only way a prisoner can waive appearance at a scheduled parole hearing is in writing. Petitioner did not sign a written waiver of his appearance before the committee on January 12, 2000. Petitioner was denied access to his file to review the information that was going to be considered by the commission and was not afforded an opportunity to correct any factual errors that may have been considered against him.

On February 6, 2000, respondent Smith stated that every inmate has a right to a scheduled parole hearing before the commission.

## DISCUSSION

In his complaint, petitioner contends that respondents violated his rights under the due process and equal protection clauses of the Fourteenth Amendment when he was denied parole without being able to appear before the parole commission and when he was not allowed to correct any errors that may have been in his file at the time of the parole consideration.

Petitioner contends also that respondents violated state laws and procedures concerning parole hearings.

## 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 general 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."). However, Wisconsin's mandatory release provision, Wis. Stat. § 302.11(1), provides that "Except as provided in subs. (1g), (1m), (1q), (1z), (7) and (10), each inmate is entitled to mandatory release on parole by the department [when he has completed two-thirds of his sentence]." Citing the mandatory language in this provision, the

Wisconsin Court of Appeals has concluded that "under Sandin, [an inmate] retains a liberty interest in not having his mandatory release date extended." Santiago v. Ware, 205 Wis. 2d 295, 315, 556 N.W.2d 356, 364 (Ct. App. 1996). Because it cannot be determined from petitioner's complaint whether petitioner was eligible for parole under § 302.11 or under § 304.06, it cannot be determined whether petitioner has a liberty interest in parole that would trigger the protections of the due process clause of the Fourteenth Amendment. I will allow petitioner to proceed on his due process claim at this time.

It is well established that liability under § 1983 must be based on the defendant's personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). 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, 65 F.3d at 561; Del Raine, 32 F.3d at 1047; Wolf-Lillie, 699 F.2d at 869. Petitioner does not allege that respondent Smith was personally involved in conducting petitioner's parole hearing. However, petitioner may sue respondent Smith in his official capacity as Acting Parole Chairman of the Wisconsin Parole Commission to obtain relief from the enforcement of an unconstitutional department policy. See Monell v. New York City Dep't of Social Services, 436

U.S. 658, 690 (1978) ("the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution"). Petitioner may also proceed against respondent Smith to discover the names of the persons directly responsible for violating his constitutional rights. See Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (pro se complaint should not suffer dismissal of a defendant high official for lack of personal involvement when claim involves conditions or practices which, if they existed, would likely be known to higher officials or if petitioner is unlikely to know the person or persons directly responsible absent formal discovery). If petitioner wants to proceed with his claim against respondent Members of the Wisconsin Parole Commission, he will have to obtain discovery from respondent Smith to learn the names of the individual parole commission members who were personally involved in violating his constitutional rights and then serve them with the complaint because he must provide legal notice of the claim against them. See Fed. R. Civ. P. 5(a).

## II. EQUAL PROTECTION CLAUSE

In his complaint, petitioner alleges "That this file review violated the petitioner's 14th Amendment rights to equal protection." Cpt. at ¶ 10. Because nothing in the complaint suggests why petitioner believes his equal protection rights have been violated, petitioner will

be denied leave to proceed for his failure to state a claim upon which relief may be granted.

## III. STATE LAW CLAIMS

Petitioner alleges that his failure to appear at his parole hearing violated Wis. Admin. Code PAC1 § 1.05(4)(e). That section of the administrative code does not appear to exist. However, Wis. Admin. Code PAC1 § 1.06(3) suggests that petitioner may have had a right to appear at his parole hearing, review documentary evidence considered by the commission and correct factual errors in the record. Because I am allowing petitioner to proceed on his claim under the due process clause, I will exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over petitioner's state law claim that respondents violated Wis. Admin. Code PAC1 § 1.06(3). Should it turn out that petitioner has no liberty interest in parole and therefore no right to due process under the federal Constitution, I will dismiss the state law claims without prejudice at that time.

## IV. MOTION FOR CLASS CERTIFICATION

Petitioner seeks to litigate this case on behalf of a class. In order to certify a class action, the court must find, among other things, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). I cannot make this

finding in the present action for two reasons. First, petitioner is not represented by an attorney, and it appears from the complaint and from the circumstances that petitioner is not an attorney. Since absent class members are bound by a judgment whether for or against the class, they are entitled at least to the assurance of competent representation afforded by licensed counsel. See Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); see also Ethnic Awareness Org. v. Gagnon, 568 F. Supp. 1186, 1187 (E.D. Wis. 1983); Huddleston v. Duckworth, 97 F.R.D. 512, 51415 (N.D. Ind. 1983) (prisoner proceeding pro se not allowed to act as class representative). Second, even lawyers may not act both as class representative and as attorney for the class because that arrangement would eliminate the checks and balances imposed by the ability of the class representatives to monitor the performance of the attorney on behalf of the class members. See, e.g., Sweet v. Bermingham, 65 F.R.D. 551, 552 (1975); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973); see also Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 n. 5 (7th Cir. 1977), appeal after remand, 587 F.2d 866 (1978); Conway v. City of Kenosha, 409 F. Supp. 344, 349 (E.D. Wis. 1975) (plaintiff acting both as class representative and as class attorney precludes class certification). Consequently, class certification will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Gary Campbell'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 against respondent Smith with respect to his claims under the due process clause of the Fourteenth Amendment and under Wis. Admin. Code PAC1 § 1.06(3);

3. Petitioner's claim under the equal protection clause of the Fourteenth Amendment is DISMISSED for his failure to state a claim upon which relief may be granted;

4. Petitioner's motion for class certification is DENIED;

5. The unpaid balance of petitioner's filing fee is $69.60; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

6. Service of this complaint will be made promptly after petitioner submits to the clerk of court one copy of his complaint, one completed marshals service form 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 December 11, 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 22nd day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge