IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SOUVANNASENG BORIBOUNE,

Petitioner, ORDER

v. 03-C-50-C

JON LITSCHER, CINDY O'DONNELL, SANDRA HAUTAMAKI, WARDEN GERALD BERGE, I.C.I. DEPT., KELLY COON, ELLEN RAY, C.O. McCLIMANS, RON EDWARDS, MS. HARPER, TIM HAINES, Security Director BOUGHTON, CAPT. BLACKBOURN, C.O. BARR, SGT. BRUDUS, SGT. PATTON, JOHN RAY, PETER HUIBREGTSE, LT. BIGGAR, SGT. SICKINGER, and TOM GOZINSKI,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Souvannaseng Boriboune is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He contends that respondents violated his state and federal constitutional rights when they issued conduct reports to him for communicating in a language other than English on the telephone before receiving approval from his social worker. In addition, he alleges that his right to due process

was violated at the disciplinary hearings because evidence was kept from him and he was unable to call witnesses.

Petitioner 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, on three or more previous occasions, the prisoner has 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. This court will not dismiss petitioner's case on its own for lack of administrative exhaustion, but if respondents believe 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).

Petitioner's request for leave to proceed will be denied on each of his claims. I conclude that the prison's policy of requiring social worker approval for communicating in foreign languages is reasonably related to the prison's interest in preventing inmates from making communications that threaten prison security. The delay that occurred before petitioner received approval did not rise to the level of a violation of petitioner's right to free speech or his right to associate with his family. This claim will be denied for failure to state a claim on which relief may be granted. In addition, because no liberty interest was at stake when petitioner received his conduct reports, due process does not apply. Petitioner's due process claim will be dismissed as legally frivolous.

ALLEGATIONS OF FACT

Petitioner has been an inmate at the Wisconsin Secure Program since January 2002. He is originally from Laos. When petitioner first arrived at the prison, officials permitted him to speak Lao on the telephone to his family and friends. On May 7, 2002, petitioner learned of a new prison policy that prohibited inmates from communicating in languages other than English. There is an exception for inmates who receive permission from their social worker to speak other languages. Petitioner wrote his social worker, respondent Ron Edwards, asking whether the policy would affect him and, if so, whether Edwards would

grant him permission to be excepted from the policy's requirements. Edwards did not respond. On June 1, 2002, petitioner wrote his new social worker, respondent Harper, asking for her to approve an exception. Harper did not write back.

On June 12, 2002, petitioner made a telephone call to his mother, who lives in the United States. She knows very little English, so petitioner spoke to his mother in Lao. The following day, respondent C.O. McClimans issued petitioner a conduct report for speaking a foreign language on the telephone. After a hearing, respondent Tim Haines found petitioner not guilty because it was "unclear whether or not [petitioner] was warned" about the "English only" policy. Haines gave petitioner a warning instead.

On June 26, 2002, petitioner called his mother to discuss "legal and religious matters." Again, he spoke to her in Lao. Respondent McClimans issued petitioner a second conduct report. At the hearing, petitioner's request to call his mother as a witness was denied. He was found guilty. As a result, petitioner received 60 days of program segregation and was denied his next two scheduled telephone calls. Respondent Blackbourne noted that petitioner had not yet received permission from his social worker to speak in Lao on the telephone. After petitioner filed an inmate complaint, the examiner reminded petitioner to speak with his social worker.

Petitioner wrote to respondent Harper again on June 27, 2002. She responded on June 30, 2002, asking petitioner "to wait."

When petitioner spoke to his mother on July 17, 2002, respondent Patton yelled at petitioner to speak in English. Petitioner explained to Patton that his mother could not speak English. Respondent Patton unplugged the telephone. Plaintiff was then "demoted"; respondent Boughton also placed petitioner on "back cell" restrictions. On July 20, 2002, petitioner received a conduct report for speaking Lao during his July 17 telephone conversation. At the disciplinary hearing, respondent Biggar refused to "gather" evidence requested by petitioner. Biggar found petitioner guilty on August 26, 2002, of disobeying orders, disruptive conduct, and using an unauthorized form of communication. He received 120 days of program segregation and lost telephone privileges for 14 days.

Petitioner filed an inmate complaint against respondent Patton on July 18, 2002. The examiner informed petitioner that his social worker, respondent Harper, was "currently looking into the situation" and the examiner recommended that the complaint be dismissed. Petitioner received a letter from respondent Harper on July 31, 2002, who told him that she had sent a recommendation to respondent Boughton to permit petitioner to speak Lao on the telephone. Petitioner appealed his complaint to the corrections complaint examiner. On August 21, 2002, the examiner confirmed that respondent Boughton had adopted respondent Harper's recommendation to allow petitioner to speak with his mother in Lao. Petitioner's complaint was dismissed.

DISCUSSION

It is well-established that prisoners have a First Amendment right to communicate with those outside the prison. See Thornburgh v. Abbott, 490 U.S. 401(1989); Turner v. Safley, 482 U.S. 78 (1987). Moreover, the United States Supreme Court has long recognized that the right to associate with one's family is encompassed within the concept of liberty of the Fifth and Fourteenth Amendments. See, e.g., Moore v. City of East Cleveland, 431 U. S. 494 (1977); see also Troxel v. Granville, 530 U.S. 57, 93 n.2 (2000) (Scalia, J., dissenting) (suggesting that right to associate with one's family may be protected by First Amendment). Although incarcerated individuals do not enjoy the same rights to familial association as those with no restrictions on their liberty, prisoners do not surrender all rights to family relations upon incarceration. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 465 (1989) (Kennedy, J. concurring) (prison regulation forbidding visits would implicate due process clause although "precise and individualized restrictions" do not). However, prison officials have the right to limit an inmate's access to visitation, phone calls and mail to the extent that such limitations are "reasonably related to legitimate penological interests." Turner, 482 U.S. at 89 (1987).

In this case, petitioner is challenging a policy that prohibits communication in languages other than English. A number of courts, including the Court of Appeals for the Seventh Circuit, have recognized that the First Amendment rights of prisoners extend to

communicating in their native tongue. See Kikumura v. Turner, 28 F.3d 592 (7th Cir. 1994); see also Thongvanh v. Thalacker, 17 F.3d 256 (8th Cir. 1994); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980). Unlike the prison in Kikumura, however, the Wisconsin Secure Program Facility does not flatly prohibit all non-English communication. Rather, prisoners are simply required to obtain approval from their social worker before they may communicate with others in a foreign language. This is a reasonable regulation. The Supreme Court has recognized that prisons have legitimate security concerns when inmates communicate in ways that officials cannot understand because such communication could be used to "communicate escape plans and to arrange assaults and other violent acts." Turner, 482 U.S. at 91. Requiring approval from a social worker is a reasonable way to insure that an inmate's communication will not be used for an illegitimate purpose.

Petitioner knew that he needed to receive social worker approval before speaking Lao on the telephone, yet he chose not to wait for approval and he received two conduct reports as a result. Petitioner complains that his social workers were not responding quickly enough and that he did not want to wait to speak to his mother. Petitioner's frustration is understandable and his devotion to his mother is commendable. But petitioner must accept that bureaucracies do not always move as swiftly as we would like them to. A short-term delay in receiving approval to communicate in Lao on the telephone is not enough to establish a constitutional violation. See Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir.

2000); Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999).

Petitioner also complains that he was found guilty of misconduct even after he had been approved to speak Lao. Although petitioner is technically correct that one disciplinary hearing was held after he received approval, the conduct report at issue in that hearing involved an incident that had occurred a month earlier, *before* approval was given. Apparently, petitioner believes that once permission was granted, he could no longer be disciplined for disobeying previous orders. But petitioner's approval was not retroactive and I am unaware of any authority that would require it to be. When petitioner received the conduct report for disobeying orders and communicating in an unauthorized manner, he was still prohibited from speaking in a foreign language. The approval petitioner obtained later did not magically wipe away his previous noncompliance. I will deny petitioner's request for leave to proceed on a claim that respondents violated his constitutional rights by requiring him to obtain social worker approval before communicating on the telephone in Lao. Petitioner has failed to state a claim upon which relief may be granted.

I also understand petitioner to allege that various respondents have violated his right to due process by refusing at the disciplinary hearings to permit him to call his mother as a witness and to gather the evidence he requested. However, due process applies only when a liberty or property interest is implicated. Ledford v. Sullivan, 105 F.3d 354, 356 (7th Cir. 1997). The punishment that petitioner received was time in program segregation and short-

term loss of phone privileges. The Supreme Court has already held that because disciplinary segregation falls within the expected parameters of a prison sentence, it does not create a liberty interest. Sandin v. O'Connor, 515 U.S. 472, 486 (1995); see also Thomas v. Ramos, 130 F.3d 754, 758 (7th Cir. 1997). I am not persuaded that prisoners have a liberty interest in the much milder discipline of short-term loss of phone privileges. Petitioner's request for leave to proceed on a claim that his due process rights were violated when he was unable to call witnesses at his hearing and when respondents did not produce evidence he requested will be dismissed as legally frivolous.

Because petitioner is being denied leave to proceed in forma pauperis on his federal law claims, his state law claims must be dismissed except under extraordinary circumstances. Wentzka v. Gellman, 991 F.2d 423, 425 (7th Cir. 1993) (only in "extraordinary circumstances" should trial court exercise pendent [now supplemental] jurisdiction over state law claim when federal claims are dismissed before trial). No extraordinary circumstances warrant retention of supplemental jurisdiction over petitioner's state law claims.

ORDER

IT IS ORDERED that

1. Petitioner Souvannaseng Boriboune's request for leave to proceed in forma pauperis on his claim that respondents violated his federal constitutional rights by

prohibiting him from communicating on the telephone in Lao without approval from his social worker is DENIED and this claim is DISMISSED with prejudice for failure to state a claim upon which relief may be granted.

2. Petitioner's claim that respondents violated his right to due process by refusing to allow him to call witnesses at his disciplinary hearings and by failing to provide him with evidence he requested is DENIED and this claim is DISMISSED with prejudice as legally frivolous.

4. Because I decline to exercise supplemental jurisdiction over petitioner's claims under the Wisconsin Constitution, these claims are DISMISSED without prejudice.

5. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because the state law claims do not fall under one of the enumerated grounds, this "action" has not been dismissed on the grounds listed in § 1915(g) and a strike will not be recorded against petitioner.

6. The unpaid balance of petitioner's filing fee is $147.34; this amount is to be

paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

Entered this 24th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge

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