IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

LEONARD COLLINS,

ORDER

Petitioner,

04-C-147-C

v.

MATTHEW FRANKS, JANE DIER-ZIMMER,
GARY McCAUGHTRY, LEONARD WELL,
S.M. PUCKETT, DICK POLINSKE, LT. THOMAS,
LT. PEARCE, JERRY HAUKE, MOLLY OLSON,
MARY JO PLEUSS, MICHAEL THURMER,
ROBERT HUMPHREYS, JOHN BOLLIG,
JENNY FURSTENBERG, CURT JANSSEN,
DERRELL ALDRICH, L. BONIS,
MARIANNE A. COOK, MARK CLEMENTS,
FRED MELENDEZ, L. MELCHER,

Respondents.

- -

This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Waupun Correctional Institution in Waupun, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit.

Petitioner has paid the initial partial payment required under § 1915(b)(1).

Petitioner will be granted leave to proceed on his claims that (1) respondent Olson retaliated against him for filing an appeal by placing him in segregation; (2) respondent Polinske retaliated against him for speaking out against an anger management course by denying him a transfer to a lower security facility; and (3) respondent McCaughtry denied him hardbound books while he was in segregation. Petitioner will be denied class certification and leave to proceed on all other claims.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of

Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts. (In outlining the allegations of fact, I have omitted allegations regarding persons not named as defendants in the caption.)

ALLEGATIONS OF FACT

A. Parties

Petitioner Leonard Collins is an inmate at the Waupun Correctional Institution in Waupun, Wisconsin. Respondent Matthew Franks is the secretary of the Wisconsin Department of Corrections. Respondents Jane Dier-Zimmer and Marianne Cooke are assistant administrators at the Wisconsin Department of Corrections. Respondent S.M. Puckett is the director of classification at the Wisconsin Department of Corrections. Respondents Fred Melendez and Leonard Well are parole chairpersons for the Wisconsin Department of Corrections. At the Waupun facility, respondent Gary McCaughtry is the warden, respondent Dick Polinske is the head of the program review committee, respondents Thomas and Pearce are lieutenants, respondent Jenny Furtenburg is a social worker, Curt Janssen is a unit manager, Darrell Aldrich is a unit manager, L. Bonis is a social worker, Mark Clements is a security director and respondent L. Melcher is a school administrator. At the Kettle Moraine Correctional Institution in Plymouth, Wisconsin, respondent Jerry

Hauke is a social worker, respondent Michael Thurmer is a deputy warden and respondent John Bollig is a teacher. At the Oshkosh Correctional Institution in Oshkosh, Wisconsin, respondent Molly Olson is a section chief and respondent Robert Humphrey is a correctional unit supervisor.

B. Conduct Reports

1. Procedural Deficiencies

When petitioner entered Waupun prison in 1976, he was not given a rule book regarding disciplinary procedures. He received institutional conduct reports for which he was given only one notice for each disciplinary hearing, in violation of the Department of Corrections' regulation § 303.76 which requires two notices.

Respondents Olson and Janssen gave petitioner conduct reports for rioting, attempting to riot and attempting to escape even though he had not done any of these things. Petitioner appealed these conduct reports to respondent Cook, who dismissed the rioting and attempted rioting charges but upheld the attempted escape conduct report even though she knew that it was false. Respondent Hauke reported to petitioner's program review committee that petitioner had been issued these conduct reports but not that they had been overturned on appeal.

Respondent Pearce falsified certain evidence at one of petitioner's disciplinary

hearings in which he was charged with attacking another inmate. Respondent Pearce changed the victim's report to state that the attack took place inside the cooler and that the no one was able to see it when the evidence should have shown that the attack happened outside a cooler and that there was a witness who saw it.

A security director served as a hearing officer at petitioner's adjustment committee hearing in violation of Department of Corrections regulation § 303.82 which forbids a person who has witnessed or been involved in an incident that is the subject of a hearing to serve on the committee for that hearing.

2. Attempts to have errors corrected

Petitioner made a variety of attempts to have his disciplinary history corrected and the wrongful conduct reports expunged. Respondent Franks refused to expunge petitioner's record after petitioner wrote a letter, telling respondent Franks that the two notice requirement was not being implemented. Respondents Polinske and Aldrich did not correct petitioner's inmate classification summary, which indicated that he had been convicted of first degree murder for breaking into his mother-in-law's home, where he beat her and stabbed her to death with a bayonet, after petitioner told them that he had not beat her and showed them her medical record indicating that she died from the side effects of medication given to her and not from the stab wounds. Respondent Polinske failed to conduct an

investigation or correct petitioner's record after petitioner explained that he had not attempted to escape.

3. Consequences

Respondents denied petitioner parole, transferred him to a maximum security facility and took away some of his good time credit at least in part because of his conduct report history. Respondents took these actions despite the numerous procedural shortcomings.

C. Other Procedurally Deficient Deprivations

On May 29, 1987, a parole board denied petitioner parole without first obtaining a psychological evaluation which it had previously indicated that it would need before it could make any determination regarding petitioner's eligibility for parole.

Respondent Thomas served petitioner with a notice that he would be placed in administrative confinement but did not give petitioner a reason why. Respondent Clemman kept petitioner in administrative confinement even after petitioner notified him in writing that there was no evidence or reason for the confinement. Respondent Schueller questioned petitioner about his conduct reports and petitioner explained that the rioting and escape charges were false and the hearing officer had falsified the record with respect to the battery charge. Respondent Schueller had plaintiff placed in temporary lock-up, which is used as a

form of punishment.

D. Treatment of Mentally Ill Inmates

Respondent Franks housed mentally ill inmates in segregation instead of transferring them to a mental institution for treatment. Respondent Franks and his agents placed petitioner and other inmates in cells that were unbearably hot.

E. Failure to Provide Social Services

Respondent Frank has refused to allow any programming in the segregation building in violation of Department of Corrections regulation § 303.70(7), which requires correction institutions to "provide social services, clinical services, program opportunities and opportunity to exercise for inmates in program segregation." Petitioner and other inmates have not been allowed to participate in programming such as aggression and anger management, alcohol and drug education, domestic violence counseling and sex offender treatment.

F. Racial Inequality in Parole Decisions

Respondent Polinske is granting white inmates parole release at a higher rate than non-whites. In May 1995, new parole standards were issued making it more difficult for

inmates who had been incarcerated for long periods to obtain parole release. Petitioner wrote a letter to Senator Herb Kohl about these issues. Senator Kohl forwarded the letter to the Wisconsin Department of Corrections, but nothing changed.

G. Retaliation

Sometime around August 8, 1998, respondent Olson had petitioner placed in segregation in retaliation for petitioner filing an appeal regarding his placement on a transfer list.

At a program review committee hearing, respondent Polinkse denied petitioner transfer to a lower security facility because petitioner stated that he did not want to take an anger management course.

H. Book Denial

Petitioner wrote the school department requesting English books. Respondent Malcher responded, indicating that the school did not have any extra English books and suggesting that petitioner check out books from the library. When petitioner asked for an English book from the library, he was told that inmates in segregation were allowed only paperback books.

G. Access to Court

Respondents Puckett and Polinske insure that the law library contains outdated material so that inmates do not have access to classification I.M.P.

DISCUSSION

A. Class Certification

Initially, I note that petitioner seeks to prosecute this case as a class action. 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 he 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. Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); see also Ethnic Awareness Organization 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 preceeding 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 Saving & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973); see also Susman v. Lincoln American Corp., 561 F.2d 86, 90 n. 5 (7th Cir. 1977), appeal after remand, 587 F.2d 866 (1978), cert. denied, 445 U.S. 942 (1980); 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.

B. Standing

I understand petitioner to allege that respondent Franks housed mentally ill inmates in segregation instead of transferring them to a mental institution for treatment and that respondent Polinkse favors whites over non-whites in granting parole release. A party must have sustained some sort of injury as a result of the alleged wrongdoing to have standing to bring a claim. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Because petitioner fails to allege that he is or was mentally ill and was denied treatment or that he was denied parole because of his race, he does not have standing to pursue these claims and will be denied leave to proceed with respect to them.

C. Procedural Due Process

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. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989); 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). Because I conclude for the reasons stated below that petitioner has not identified a protected liberty interest entitling him to due process, he will be denied leave to proceed under this constitutional provision. However, if petitioner believes that respondents have violated state law by failing to provide him with certain procedural safeguards, he is free to pursue his claims in state court.

1. Programming in segregation

I understand petitioner to allege that he was denied due process by respondent Franks' refusal to allow programming such as aggression and anger management, alcohol and

drug education and sex offender treatment in the segregation unit. Withdrawal of educational privileges and opportunities for recreation does not implicate interests protected by the Fourteenth Amendment. See Higgason v. Farley, 83 F.3d 807, 809-10 (7th Cir. 1995); Williams v. Ramos, 71 F.3d 1246 (7th Cir. 1995). Deprivation of educational programming does not impose the type of atypical or significant hardship that the due process clause protects. Accordingly, petitioner will be denied leave to proceed on his claim that respondent Franks violated the due process clause by failing to provide petitioner with educational programming while he was in segregation.

2. Segregated Confinement

Prisoners do not have a liberty interest in remaining out of segregated 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 program segregation 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 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").

3. Parole Denial

I understand petitioner to allege that his due process rights were violated when he was denied parole because of his conduct report history, which included two rioting charges, even though they had been overturned on appeal, one report based on falsified evidence, at least one for which the security director sat on the hearing board and several other reports for which petitioner received only one notice of each accompanying disciplinary hearing and never received a copy of a rule book. In addition, petitioner alleges that he was denied due process when a parole board denied his parole without first obtaining a psychological evaluation.

There is no independent constitutional right to parole, Heidelberg v. Illinois Prisoner Review Board, 163 F.3d 1025, 1026 (7th Cir. 1998). Whether a state creates a protected liberty interest in parole depends on whether parole is mandatory or discretionary under state law. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979). See also 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."). 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. Because petitioner has no liberty interest in his parole, he will be denied leave to proceed on his claim that his rights under the due process clause were violated by its denial.

4. Good time credits

Petitioner alleges that certain respondents failed to provide adequate procedure for his disciplinary hearings and that as a result of these hearings, he was deprived of good time credits. In Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court held that when a prisoner's claim amounts to a challenge to the legality of his conviction or confinement, the claim must be brought as a habeas corpus claim, regardless of the nature of the remedy the prisoner seeks. The Court of Appeals for the Seventh Circuit has applied Heck to § 1983 procedural due process claims arising out of prison disciplinary hearings, if those claims necessarily call into question decisions of prison adjustment committees that ordered the loss of good time credits. Dixon v. Chrans, 101 F.3d 1228, 1230-31 (7th Cir. 1996) (claim for damages necessarily implicates results of disciplinary committee hearing and must be brought as habeas action); Clayton-El v. Fisher, 96 F. 3d 236, 242-45 (7th Cir. 1996) (because prisoner's § 1983 procedural due process claim sought damages for placement in

segregation, court must consider whether he would have been found guilty and placed in segregation without procedural irregularities; this finding would necessarily implicate actual result of disciplinary hearing that included loss of good time). In this case, petitioner seeks restoration of his good time credit. Therefore, petitioner's claim that he was denied due process before his good time credits were taken may be brought only in an habeas action after he has exhausted his administrative remedies. See Sanchez v. Miller, 792 F.2d 694 (7th Cir. 1986); 28 U.S.C. 2241.

D. First Amendment

1. Access to the courts

Petitioner claims that respondents Puckett and Polinske have failed to insure that materials in the law library are kept up to date. Under the United States Constitution, respondents are required to give petitioner a reasonable opportunity to present claimed violations of fundamental rights to the court, Bounds v. Smith, 430 U.S. 817, 825 (1977), but the law is settled that petitioner does not have an unlimited right to court access . Lewis v. Casey, 518 U.S. 343 (1996) (holding no abstract constitutional right to law libraries or legal assistance); Bounds, 430 U.S. at 825 (recognizing that prison officials may consider economic factors "in choosing the methods used to provide meaningful access"). To have standing to bring a claim of denial of access to the courts, petitioner must allege facts from

which an inference can be drawn of "actual injury." Lewis, 518 U.S. at 349. The plaintiff must have suffered injury "over and above the denial." Walters v. Edgar, 163 F.3d 430, 433-34 (7th Cir. 1998) (citing Lewis, 518 U.S. 343). At a minimum, petitioner must allege facts suggesting that the "blockage prevented him from litigating a nonfrivolous case." Id. at 434. This principle derives from the doctrine of standing and requires that plaintiff demonstrate that a non-frivolous legal claim has been or is being frustrated or impeded. Lewis, 518 U.S. at 353. Because petitioner has failed to identify a suit he was unable to pursue as a result of the outdated books in the law library, he will be denied leave to proceed on this claim.

2. Book denial

Petitioner alleges that he was denied access to an English book while he was in segregation because inmates in segregation are allowed to keep only paperback books in their cells. As a prisoner, petitioner retains those First Amendment rights that are not inconsistent with his status as an inmate or with the legitimate penological interests of the corrections system. Pell v. Procunier, 417 U.S. 817, 822 (1974); Giano v. Senkowski, 54 F.3d 1050, 1053 (2d Cir. 1995); Aikens v. Jenkins, 534 F.2d 751, 755 (7th Cir. 1976). Prisoners retain the right to receive and have access to reading materials free from arbitrary restriction, Antonelli v. Sheahan, 81 F.3d 1422, 1433 (7th Cir. 1996), but that right may

be infringed by prison regulations reasonably related to legitimate penological interests. Thornburgh v. Abbott, 490 U.S. 401, 414 (1989); Turner v. Safley, 482 U.S. 78, 89 (1987).

Courts have held that prison censorship of reading materials may be justified by governmental interests in maintaining prison security and order and in rehabilitating the inmate population. See Trapnell v. Riggsby, 622 F.2d 290, 293 (7th Cir. 1980). In Caldwell v. Miller, 790 F.2d 589, 609 (7th Cir. 1986), the court upheld a ban on hardbound books because prison officials were legitimately concerned that hardbound books could be used to hide weapons and other contraband. Although it seems probable that there is a legitimate penological interest in the ban on hardback books, it would be an abuse of discretion to dismiss petitioner's claim when the record contains no indication of the prison's need for the restriction. Alston v. DeBruyn, 13 F.3d 1036, 1039-40 (7th Cir. 1994) (concluding that district court abused its discretion by dismissing petitioner's free-exercise complaint as frivolous where record did not contain evidence of prison's need for restriction). Accordingly, petitioner will be granted leave to proceed on his claim that he was denied an English book in violation of his rights under the First Amendment. Because petitioner's claim amounts to a challenge to the institution's policy of banning hardbound books in the segregation unit, I will allow petitioner to proceed on this claim against respondent McCaughtry, who I presume is responsible for internal regulations.

3. Retaliation

Petitioner has alleged two acts of retaliation. He asserts that respondent Olson had him placed in segregation for filing an appeal regarding his placement on a transfer list. In addition, petitioner alleges that respondent Polinske denied him a transfer to a lower security facility because he had complained about not wanting to participate in anger management programming. Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000); see also Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("[O]therwise permissible conduct can become impermissible when done for retaliatory reasons.") Plaintiff has a constitutional right to file nonfrivolous lawsuits and to complain about prison conditions. To state a claim for retaliation, a plaintiff need not allege a chronology of events from which retaliation could be plausibly inferred. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). It is sufficient that he allege sufficient facts to put the defendants on notice of the claim so that they can file an answer. Id. Because petitioner has identified the protected speech and the alleged act of retaliation, he will be granted leave to proceed on both of his retaliation claims.

ORDER

IT IS ORDERED that

1. Petitioner Leonard Collins is GRANTED leave to proceed on his First Amendment claims that

(1) Respondent Molly Olson retaliated against petitioner for filing an appeal by placing him in segregation;

(2) Respondent Dick Polinske retaliated against petitioner for speaking out against an anger management course by denying him a transfer to a lower security facility;

(3) Respondent Gary McCaughtry denied petitioner a hardbound book while he was in segregation.

2. Petitioner is DENIED leave to proceed on all other claims.

3. Respondents Matthew Franks, Jane Dier-Zimmer, Leonard Well, S.M. Puckett, Lt. Thomas, Lt. Pearce, Jerry Hauke, Mary Jo Pleuss, Michael Thurmer, Robert Humphreys, John Bollig, Jenny Furestenberg, Curt Janssen, Derrell Aldrich, L. Bonis, Marianne Cook, Mark Clements, Fred Melendez, L. Melcher are DISMISSED from this case.

4. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

5. Petitioner should keep 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.

6. The unpaid balance of petitioner's filing fee is $144.16; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.

Entered this 22nd day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge