IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HUMBERTO PACHECO,

ORDER

Petitioner,

05-C-141-C

v.

HARLEY G. LAPPIN, Director,
Bureau of Prisons;
REGIONAL DIRECTOR, North
Central Region, BOP; and
JOSEPH SCIBANA, Warden of FCI OXFORD, WI,

Respondents.

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This is a proposed civil action for mandamus and injunctive relief, brought pursuant to 28 U.S.C. § 1361, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and 28 U.S.C. § 1331. Petitioner, who is presently confined at the Federal Prison Camp in Oxford, 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).

In addressing any pro se litigant's complaint, the court must read the allegations of

the complaint generously. 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 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). 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 alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Humberto Pacheco, an inmate of Mexican descent, is incarcerated at the Federal Prison Camp in Oxford, Wisconsin. Petitioner was convicted of conspiracy with intent to distribute cocaine, a non-violent offense. He received no enhancements for possession of a weapon. Respondent Harley G. Lappin is Director of the Federal Bureau of

Prisons. Respondent Joseph Scibana is Warden at the Federal Prison Camp. In addition, petitioner is suing the Regional Director of the North Central Region for the Federal Bureau of Prisons.

Under 18 U.S.C. § 3621(e)(1), the Bureau of Prisons "shall" provide residential substance abuse treatment for "eligible prisoners." The statute permits prison officials to reduce the amount of time a prisoner remains in custody, up to one year, if that prisoner successfully completes the residential treatment program. 18 U.S.C. § 3621(e)(5)(B) defines an "eligible prisoner" as one who the Bureau of Prisons determines has a substance abuse problem and is willing to participate in a 500-hour residential substance abuse treatment program. 28 C.F.R. 550.56 further defines "eligible prisoner" for the residential drug abuse treatment program as an inmate who: 1) has a verifiable documented drug or alcohol problem; 2) has no serious mental impairment that would substantially interfere with or preclude full participation in the program; 3) signs an agreement acknowledging his or her program responsibility; 4) is within 36 months of release; and 5) is in an institution with an appropriate level of security for the inmate. To determine whether an inmate has a verifiable documented drug or alcohol problem, Bureau of Prisons staff rely on program statement 5330.10, which states:

> (1) The inmate must have a verifiable drug abuse problem. Drug abuse program staff shall determine if the inmate has a substance abuse disorder by first conducting the residential Drug Abuse Program Eligible Interview,

> followed by a review of all pertinent documents in the inmate central file to corroborate self-reported information . . .
>
> Additionally, there must be verification in the [pre-sentence investigation report] (PSI) or other similar documents in an inmate's central file which supports the diagnosis.
>
> Any written documentation in the inmate's central file which indicates that the inmate used the same substance for which a diagnosis of abuse or dependence was made via the interview, shall be accepted as verification of a drug problem.

Petitioner told Linda Barney about the heavy drinking problem that he had before his arrest and after his indictment. Petitioner's pre-sentence investigation report reflects his abuse of alcohol. Throughout his adult life, petitioner has dealt with problems by using alcohol or drugs. Without intensive treatment, petitioner fears, he will not be prepared to cope with the pressures of normal life once he is released from prison.

Because petitioner committed a non-violent felony, he qualifies for the residential treatment program and early release. However, respondents denied petitioner's request to be placed in the residential drug abuse treatment program because he did not have sufficient documentation in his file showing drug or alcohol use before entering the federal prison in Oxford. In the last year, respondents allowed Arnold Chapman, a white inmate with less drug documentation than petitioner, to enter the residential treatment program. Initially, respondents denied Chapman enrollment into the residential treatment program after two evaluations by Linda Barney. However, when Chapman began pursuing his intake records

through the administrative process, as petitioner is doing currently, respondents reversed their decision and allowed him into the program even though Chapman had no drug use documentation in his central file. Prison staff at Oxford make eligibility decisions on a case-by-case basis, which invites favoritism, disunity and inconsistency.

DISCUSSION

I understand petitioner to be asking the court for two forms of relief: 1) a writ of mandamus under 28 U.S.C. § 1361 and 2) injunctive relief under Bivens for respondents' alleged violations of his equal protection and due process rights under the Fifth Amendment. Specifically, under petitioner's mandamus claim, petitioner argues that respondents abused their discretion in their application of the eligibility requirements under program statement 5330.10 for the residential drug abuse treatment program. He contends that because he told Linda Barney about his heavy drinking problem and because his pre-sentence investigation report reflects alcohol abuse, he has a verifiable drug abuse problem under the Bureau of Prison's program statement 5330.10. Petitioner argues that he meets all the eligibility requirements for the residential drug abuse treatment program and that respondents should allow him to enroll in the program so that he can get his sentence reduced upon completion of the program. Under his injunctive relief claim, petitioner alleges that respondents violated his equal protection rights by allowing inmate Chapman, a white inmate, to enroll in the

residential treatment program and denying petitioner access to the program even though his and Chapman's documentation regarding alcohol use is the same.

Petitioner attempted to bring his claims under 28 U.S.C. § 2241, but I dismissed his request in an order dated January 10, 2005, stating that the relief he seeks is not cognizable in a habeas corpus action. Petitioner now points to two decisions from other district courts that granted petitions for writs of habeas corpus because the Bureau of Prisons had abused its discretion when it denied the inmates admission into the residential drug abuse treatment program. Specifically, in Kuna v. Daniels, 234 F. Supp. 2d 1168 (D. Ore. 2002), the court found that program statement 5330.10 does not require verification in the inmate's central file of "abuse or dependence," but mere use of drugs or alcohol. It believed that because the petitioner's pre-sentence investigation report stated that he drank alcohol, that documentation was sufficient to allow petitioner into the residential treatment program. Id. at 1169. In Mitchell v. Andrews, 235 F. Supp. 2d 1085 (E.D. Calif. 2001), the court granted the inmate's petition for writ of habeas corpus because the Bureau of Prisons' decision to deny the inmate admission into the residential treatment program was arbitrary and capricious; the court found that the Bureau of Prisons was not following program statement 5330.10 when it required documentation of substance abuse or dependency as a pre-requisite for eligibility for the residential treatment program.

Although these other district court cases present factual circumstances similar to those

faced by petitioner, they are not binding on this court. As noted in the January 10, 2005 order, petitioner may not use 28 U.S.C. § 2241 to challenge respondents' interpretation of the statutes and policies governing the residential drug abuse treatment program. The Court of Appeals for the Seventh Circuit has held that § 2241 does not furnish the appropriate means to contest the Bureau of Prison's understanding of its own governing statutes, such as 18 U.S.C. § § 3621 and 3624. Richmond v. Scibana, 387 F.3d 602, 604-06 (7th Cir. 2004). Rather, challenges to rules having only potential affect on the duration of a particular kind of custody must proceed as ordinary civil actions. Id. at 606 (citing Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974)); see also Wilkinson v. Dotson, 125 S.C. 1242, 1248 (2005) (if favorable judgment of prisoner claims would not spell speedier release but mere consideration of prison term length, then such claims fall within § 1983 actions, not habeas corpus). The rule that petitioner challenges, 18 U.S.C. § 3621, describes a program that may potentially affect the duration of his custody if respondents would admit him into the program. In this circuit, petitioner may not use § 2241 to bring his claim that respondents acted unlawfully when they denied him admission into the residential drug abuse treatment program.

A. Writ of Mandamus

Failing in his request for habeas corpus relief, petitioner tries to challenge the rules

governing the residential drug abuse treatment program by seeking a writ of mandamus under 28 U.S.C. § 1361, which provides district courts with jurisdiction to issue a "mandamus to compel a federal officer or agency to perform a duty owed to the plaintiff." Petitioner seeks the writ in order to compel respondents to follow the eligibility requirements in program statement 5330.10. For a court to grant a petition for a writ of mandamus, it must find that a federal official has forgone a duty required of him by law. Banks v. Secretary of the Indiana Family and Social Services Administration, 997 F.2d 231, 244 (7th Cir. 1993) (the "extraordinary remedy of mandamus 'is traditionally available to compel a ministerial duty owed by the agency and then only when the statute defining that duty is 'clear and free from doubt'"). Bureau of Prisons program statements and internal policies do not qualify as "law" for the purpose of bringing a mandamus action. Instead, the Court of Appeals for the Seventh Circuit has held that "[t]he BOP's program statements are internal agency interpretations of its statutory regulations." Parsons v. Pitzer, 149 F.3d 734, 738 (7th Cir. 1998); see also Koray v. Sizer, 21 F.3d 558, 562 (3d Cir. 1994), rev'd on other grounds sub nom. Reno v. Koray, 515 U.S. 50 (1995) ("The Bureau's interpretation is recorded in its 'Program Statements,' which are merely internal agency guidelines and may be altered by the Bureau at will."). Bureau of Prisons program statements do not create a federal cause of action for a prisoner; rather, they serve as internal guidelines for the government agency. Miller v. Henman, 804 F.2d 421, 426 (7th Cir. 1986) ("The manual

was not promulgated under the Administrative Procedure Act or published in the Code of Federal Regulations, and therefore it does not create legally enforceable entitlements."). I conclude that petitioner cannot use the mandamus statute to sue for enforcement of the program statement at issue.

B. Injunctive Relief

In addition to mandamus relief, petitioner seeks injunctive relief under Bivens for alleged violations of his equal protection and due process rights under the Fifth Amendment. Petitioner argues that respondents allowed inmate Chapman, a white inmate, into the residential treatment program but did not allow him into the program although he had the same drug use documentation. The equal protection clause of the Fifth and Fourteenth Amendments prohibits government actors from applying different legal standards to similarly situated individuals. See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Discriminatory intent may be established by showing an unequal application of a policy or system, but conclusory allegations of racism are insufficient. Minority Policy Officers Ass'n v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986).

Petitioner's own allegations demonstrate that he is not similarly situated to inmate Chapman. Petitioner admits that respondents denied Chapman entry into the residential treatment program until Chapman pursued his intake records through the administrative

process, a process that petitioner is only starting to pursue. If respondents deny petitioner access to the residential treatment program after he completes the administrative process in acquiring his intake records, then he may have an equal protection claim. Until that time, however, petitioner is not similarly situated to inmate Chapman and respondents have not violated petitioner's equal protection rights. I will deny petitioner leave to proceed on his equal protection claim against respondents without prejudice.

Petitioner's due process claim is without legal merit. A claim that government officials violated due process requires proof of both inadequate procedures and interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protectible liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. 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).

Petitioner does not have a liberty interest in participating in the residential drug abuse

treatment program and receiving a reduction of his sentence upon successful completion of the program because the Bureau of Prisons has discretionary authority to decide who participates in the program and of those participants, who is eligible for a sentence reduction. 18 U.S.C. § 3621(e)(5)(B); Parsons, 149 F.3d at 737 (mere eligibility to be considered for sentence reduction does not require Bureau of Prisons to grant relief prisoner seeks). Discretionary decisions concerning release from prison do not imply a liberty interest in that possible release. Cf. 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."). Not allowing petitioner to participate in the residential drug abuse treatment program does not impose an atypical and significant hardship on petitioner. Therefore, I will deny him leave to proceed in forma pauperis on his due process claim.

ORDER

IT IS ORDERED that

1. Petitioner Humberto Pacheco's petition to proceed in forma pauperis on a mandamus claim to compel respondents Joseph Scibana, Harley G. Lappin and the Regional

Director of the North Central Region for the Federal Bureau of Prisons to comply with prison rules under 28 U.S.C. § 1361 is DENIED as legally meritless;

2. Petitioner's request for leave to proceed in forma pauperis on his equal protection and due process claims are DENIED for petitioner's failure to state a claim upon which relief may be granted;

3. The unpaid balance of petitioner's filing fee is $198.95; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. A strike will be recorded against petitioner under 28 U.S.C. § 1915(g);

5. The clerk of court is directed to close the file.

Entered this 30th day of March, 2005.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge