

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

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ELPIDIO JUAREZ, #120590,

Plaintiff,

v.

MATTHEW J. FRANK, DANIEL J. BENIK,  
PAMELA WALLACE, BRIAN MILLER,  
LIEUTENANT SHARP, CAPTAIN BENGEL,  
C. WEBSTER, MELISSA WOODFORD,  
SANDRA HAUTAMAKI and RICK RAEMISCH,

Defendants.  
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OPINION AND  
ORDER

05-C-738-C

This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner is presently confined at the Stanley Correctional Institution in Stanley, Wisconsin.

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). 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 contends that respondents violated (1) his due process rights and his right to be free from cruel and unusual punishment when they placed him in temporary lockup; (2) his due process rights when they deprived him of certain personal property and (3) his right of access to the courts when they failed to adequately explain why he was placed in temporary lockup.

In his complaint, petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

Petitioner Elipidio Juarez is incarcerated at the Stanley Correctional Institution in Stanley, Wisconsin. Respondent Matthew Frank is Secretary of the Department of Corrections. Respondent Rick Raemisch works in the office of the Secretary. The remaining

respondents are employed at the Stanley Correctional Institution: respondent Daniel J. Benik is the warden; respondent Pamela Wallace is the deputy warden; respondent Brian Miller is the security director; respondent Sharp is a lieutenant; respondent Bengel is a captain; respondent C. Webster is a unit manager; respondent Melissa Woodford is an inmate complaint examiner; and respondent Sandra Hautamaki is a corrections complaint examiner.

Petitioner is assigned to work in the B-Building at the Stanley Correctional Institution. On January 24, 2005, while petitioner was on work duty, he and inmates Bruce and Dennison witnessed a confrontation between prison guards Wuagh and Seichter. Neither petitioner or any other inmates were involved in the confrontation. Petitioner could not have left the B-Building to avoid witnessing the confrontation because he would have been reprimanded for leaving his assigned work area.

On February 10, 2005, respondent Sharp placed petitioner, Bruce and Dennison in temporary lockup pending an investigation into the January 24 incident between the two guards. When he was placed in temporary lockup petitioner received a copy of a “notice of offender placed in temporary lockup.” The reason given in the notice for petitioner’s placement in temporary lockup was: “the offender may impede a pending investigation or disciplinary action.” In the section of the notice asking for “facts upon which decision is based,” it stated, “Pending investigation by Capt. Bengel.” Respondent Miller approved

petitioner's placement in temporary lockup.

On February 11 respondents Bengel and Webster questioned petitioner about the January 24 incident. Petitioner denied any involvement in the confrontation.

On or about February 16 petitioner spoke with unit manager Pam Myers regarding his placement in temporary lockup. Petitioner again denied any involvement in the confrontation.

Petitioner remained in temporary lockup for a total of thirteen days. During this time his property was recklessly thrown into boxes. Approximately thirty irreplaceable photographs, some legal documents and several canteen items were lost. While petitioner was in temporary lockup he had to cancel a visit that had been scheduled and was subsequently forced to move into a new wing and share a cell with someone he did not get along with.

When petitioner attended his next program review hearing he was confronted about the investigation that got him into temporary lockup. Petitioner's association with the investigation had a negative influence on the hearing officers, who were deciding whether petitioner would remain at the Stanley institution or be transferred to a minimum security institution. This was the second time petitioner suffered from unjustified abuse of policy and administrative authority. There was "widespread" abuse of policy within the department of corrections and among prison guards at the Stanley institution.

On February 23, 2005, petitioner filed an offender complaint in which he stated:

This complaint is initiated on the grounds that three prisoners were place in T.L.U. pending an investigation concerning two prison guards. . . .

Our position is this, we feel this is an abuse of authority when this administration is allowed to place any prisoner on T.L.U., which is a punitive status, for 13 days when their investigation has been and always was concerning two prison guards and their conduct towards each other.

Petitioner's complaint was dismissed and on March 29, 2005, he appealed, stating:

Nothing under DOC 303.11(4) justifies the placement of any one of the three prisoners who were place in TLU. . . .

I further contend that this placement was not completed or processed according to DOC 303.11(5) which states; . . .

(5) When an inmate is placed in TLU, the person who does so **shall** state the reasons on the appropriate form and **shall** include the facts upon which the decision is based.

Respondent Hautamaki reviewed petitioner's complaint and on April 1, 2005, issued the following recommendation:

Review of the TLU notice shows complainant was placed in TLU "pending investigation" by Capt. Bengel. The courts have held that just writing "pending investigation" alone is not sufficient. State ex rel. Riley v. DHSS, 151 Wis.2d 618, 621 n.1, 445 N.W.2d 693 (Ct. App. 1989), clearly states: "(A) 'bare listing' of reasons is insufficient to meet due process requirements." Because the reason for placement in this case was not enunciated with the requisite degree of specificity under that rule, it is recommended this complaint be dismissed with a modification that the record be returned to the supervising officer who made the placement for correction.

The office of the Secretary adopted respondent Hautamki's recommendation. The

“notice of offender placed in temporary lockup” that had been issued to petitioner on February 10, 2005, was amended to read “Pending investigation by Capt. Bengel **for 303.27**” (Emphasis added).

## DISCUSSION

### A. Due Process

#### 1. Placement in temporary lockup

A procedural due process claim against government officials requires proof of inadequate procedures as well as 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.” In the prison context, protected 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); Russ v. Young, 895 F.2d 1149, 1154 (7th Cir.1989) (being placed in temporary lockup does not implicate liberty interest).

Even if respondents placed petitioner in temporary lockup without adequate explanation, it does not follow automatically that respondents violated petitioner's constitutional due process rights. Petitioner does not allege that his time in temporary lockup extended the overall length of his sentence or that he lost good time credits. Accordingly, petitioner has failed to show that he was deprived of a liberty interest and therefore he will be denied leave to proceed on his due process claim.

## 2. Deprivation of property

\_\_\_\_\_ Petitioner alleges that while he was confined in temporary lockup his property was recklessly thrown into boxes and he lost approximately thirty irreplaceable photographs, some legal documents and several canteen items. As long as state remedies are available for the loss of property, neither intentional nor negligent deprivation of property gives rise to a constitutional violation. Daniels v. Williams, 474 U. S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984). In Hudson, the Supreme Court held that an inmate has no due process claim for the intentional deprivation of property if the state has made available to him a suitable post-deprivation remedy. In Daniels, the Court concluded that a due process claim does not arise from a state official's negligent act that causes unintended loss of property or injury to property. Chapters 810 and 893 of the Wisconsin Statutes provide plaintiff with replevin and tort remedies. Section 810.01 provides a remedy for the retrieval

of wrongfully taken or detained property. Section 893 contains provisions concerning tort actions to recover damages for personal property that is wrongfully taken or detained and for the recovery of the property. The existence of state remedies defeats any claim petitioner might have that respondents deprived him of his property without due process of law. Therefore, petitioner will be denied leave to proceed on this claim.

#### B. Cruel and Unusual Punishment

Petitioner contends that he was placed in temporary lockup without an adequate explanation and therefore his placement amounted to cruel and unusual punishment in violation of his Eighth Amendment rights. Petitioner appears to be mixing up his procedural and substantive rights. He appears to believe that the fact that he was placed in temporary lockup without adequate explanation rendered his detention in temporary lockup a form of cruel and unusual punishment. The Eighth Amendment's prohibition against cruel and unusual punishment protects inmates from conditions of confinement that "involve the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The Eighth Amendment is concerned with the nature of the treatment inmates receive, not with the procedure leading up to such treatment. Even if it is true that petitioner was placed in temporary lockup without adequate explanation, it does not automatically follow that his confinement constituted cruel and unusual punishment.



Petitioner's sole recourse against allegedly defective process is to bring a due process claim.

If petitioner's intent was to assert a claim that the conditions of his confinement in temporary lockup amounted to cruel and unusual punishment, he failed to state a claim upon which relief can be granted. The mere fact that he was confined in temporary lockup does not mean he was subjected to cruel and unusual punishment; by definition, temporary lockup does not violate the Eighth Amendment. Temporary lockup is "a nonpunitive segregated status allowing an inmate to be removed from the general population pending further administrative action." Wis. Admin. Code § 303.02. Not every instance of lockup or segregation violates the Eighth Amendment. To raise an Eighth Amendment claim, petitioner would have to allege facts showing that during his confinement in temporary lockup he was exposed to conditions that rise to the level of a constitutional violation. Having failed to do that, petitioner will be denied leave to proceed on his Eighth Amendment claim.

### C. Access to Courts

Petitioner contends that defendants violated his constitutional right of access to the courts. Petitioner appears to ground this contention in his assertion that "Being placed on TLU for reasons not properly documented denies the Plaintiff the right to challenge his segregation and present a defense to the segregation order." His argument appears to be that

if he had known from the time he was placed in temporary lockup that he was being confined there under the auspices of Administrative Code DOC 303.27, he would have challenged the applicability of DOC 303.27 directly in his offender complaint to show that his confinement in temporary lockup was unlawful. This reasoning bears no connection to his constitutional right of access to the courts. Petitioner has stated no arguable basis in fact or law to support his claim that his right of access to court has been violated.

Petitioner's constitutional right of access to the courts pertains to his ability to bring and litigate a lawsuit in state or federal courts. Petitioner has not alleged any facts suggesting that defendant took any actions that deterred or barred his access to court. In fact, petitioner was able to do what was necessary to raise his claim in federal court: he challenged his confinement in temporary lockup within the prison administrative complaint system and then filed this lawsuit.

While petitioner appears to believe that he could have challenged his confinement more effectively if he had known from the outset why he was being confined, this does not mean that he was denied access to courts. Petitioner has not raised a claim of constitutional proportion and therefore he will be denied leave to proceed on the claim that he was denied access to the courts.

D. State Law Claims

I understand petitioner to contend that respondents violated his rights under several provisions of the Wisconsin Administrative Code when they failed to inform him with precision why he was being placed in temporary lockup. Because I am denying petitioner leave to proceed on all of his federal claims, I will decline to exercise supplemental jurisdiction over his state law claim. If petitioner wishes to pursue this claim, he may do so in state court.

E. Amendment to Complaint

On December 25, 2005, petitioner moved this court to amend the caption of his complaint to include the phrase “In their official capacity (and) as well as in their individual capacity.” Because petitioner will be denied leave to proceed on his claims against respondents, this motion will be denied as moot.

ORDER

IT IS ORDERED that

1. Petitioner Elpidio Juarez is DENIED leave to proceed on his claims against respondents;
2. I decline to exercise supplemental jurisdiction over petitioner’s state law claim;

3. Petitioner Elpidio Juarez's motion to amend his complaint is DENIED;

4. A strike will not be recorded against petitioner because I am declining to exercise supplemental jurisdiction over his state law claim; thus I did not dismiss the action for one of the reasons set forth in 28 U. S.C. § 1915(g); and

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

Entered this 6th day of January, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge