IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN F. FERGUSON,

Petitioner,

v.

MELVIN PULVER, CLYDE MAXWELL
and THOMAS BORGAN,

Respondents.

ORDER

06-C-303-C

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner John Ferguson, who is presently confined at the Columbia Correctional Institute in Portage, 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 fee for filing 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. 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).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

John Ferguson is a state prisoner confined at the Columbia Correctional Institution in Portage, Wisconsin. Before residing at Columbia, he was incarcerated at the Fox Lake Correctional Institution in Fox Lake, Wisconsin.

On November 11, 2002, while petitioner was incarcerated at Fox Lake, prison officials suspected him of violating prison rules and placed him in temporary lockup. Four days later respondent Clyde Maxwell, a security supervisor at Fox Lake, wrote conduct report

#1401239, charging petitioner with four rules violations: unauthorized forms of communication, false names and titles, theft, and unauthorized use of the mail. Petitioner demanded a disciplinary hearing, which was held on December 3, 2002. Respondent Melvin Pulver served as the hearing officer. After hearing petitioner's testimony, respondent Pulver found him not guilty of all four charges brought against him. Petitioner was released from temporary lockup.

Three days later, on December 6, 2002, respondent Maxwell "[became] outraged that [petitioner] was found 'not guilty' on the bogus and unfounded charges he foisted upon [petitioner]." He placed petitioner in temporary lockup a second time, where he remained for a month before respondent Maxwell wrote another conduct report, #1402352. The charges contained in the second report were identical to the charges that Pulver had dismissed after the first disciplinary hearing. The charges in the second report were based on the same facts as the first report. At some point between December 6, 2002, and January 23rd, 2003, respondents Maxwell and Pulver conspired to find the petitioner guilty of a second conduct report. At the disciplinary hearing on petitioner's second conduct report, respondent Pulver found him guilty of all four charges. Petitioner was sentenced to 6 days of adjustment segregation and 210 days of program segregation.

When petitioner appealed the guilty finding, respondent Thomas Borgen affirmed respondent Pulver's decision. Borgen denied petitioner's appeal despite knowing that

petitioner previously had been charged with the same violations based on the same facts and had been found not guilty.

Petitioner filed an inmate complaint. Initially the complaint was dismissed. Petitioner appealed the dismissal. On February 28, 2003, corrections complaint examiner Sandra Hautamaki affirmed petitioner's complaint and ordered that conduct report #1402352 be reversed and expunged from petitioner's records. In her report, Hautamaki noted that petitioner "did not have the benefit of an impartial decison-maker"; that "the reason for a finding of guilt [did] not adequately explain how a finding of guilt was reached"; and that "due process" was violated because "more than one conduct [report] was written for the incident at issue." Cindy O'Donnell affirmed Hautamaki's decision on behalf of the Secretary of the Department of Corrections on April 12, 2003.

OPINION

I understand petitioner to allege that respondents' actions violated his procedural and substantive due process rights and that respondents Pulver and Maxwell conspired against him. The essence of petitioner's argument is that respondents violated his substantive due process rights by "reconfining him to punitive segregation and recharging him with identical offenses [on] facts he was previously found not guilty." Cpt., dkt. #2, at ¶ 22. In addition, petitioner argues that his due process rights were violated because respondent "Pulver was

not an impartial [decision maker]." Id. Finally, petitioner alleges that respondents Pulver and Maxwell conspired have him found guilty at his second disciplinary hearing.

A. Substantive Due Process

The substantive component of the due process clause of the Fourteenth Amendment protects a prisoner against abuses of power by prison officials that are so arbitrary that they shock the conscience. County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998) (citing Rochin v. California, 342 U.S. 165, 172 (1952)). However, because it is difficult to place responsible limits on the concept of substantive due process, the Supreme Court has directed lower courts to analyze claims under more specifically applicable constitutional provisions before moving on to a substantive due process inquiry. Albright v. Oliver, 510 U.S. 266, 274 (1994). ("Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" (citing Graham v. Connor, 490 U.S. 386, 395 (1989)). In this case, the double jeopardy clause of the Fifth Amendment provides protection for a person charged twice for the same offense, and a prisoner's right to an impartial decision maker is protected under procedural due process. Therefore, petitioner will be denied leave to proceed on a substantive due process claim.

B. Double Jeopardy

The double jeopardy clause of the Fifth Amendment prohibits multiple prosecutions for the same offense. United States v. Dinitz, 424 U.S. 600, 606 (1976). However, the clause is limited to criminal prosecutions. Breed v. Jones, 421 U.S. 519 (1975). It does not apply to prison disciplinary proceedings. Meeks v. McBride, 81 F.3d 717, 722 (7th Cir. 1996) ("an acquittal in an earlier prison disciplinary hearing is no bar to a subsequent hearing to consider the very same charge"); Gorman v. Moody, 710 F. Supp. 1256, 1266 (N.D. Ind. 1989) (rehearing of disciplinary charges does not violate double jeopardy clause even though inmate was found not guilty at first hearing). Therefore, petitioner will be denied leave to proceed on a claim under the double jeopardy clause.

C. Procedural Due Process

Petitioner's allegation that respondent Pulver was not an impartial decision-maker when he presided over petitioner's second disciplinary hearing also fails to state a claim. To trigger the right to an impartial decision maker and other procedural protections, petitioner's allegations must implicate a protected liberty interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989) (to state procedural due process claim, prisoner must allege deprivation of a liberty or property interest and inadequate procedural safeguards). For prisoners, 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). A prisoner does not have a liberty interest in remaining out of disciplinary confinement so long as that period of confinement does not exceed the remaining term of his incarceration. 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). Although Wilkinson v. Austin, 545 U.S. 209 (2005), and Westefer v. Snyder, 422 F.3d 570 (7th Cir. 2005), suggest that prisoners may have a liberty interest in avoiding long-term segregated confinement if the conditions of that confinement are sufficiently harsh, nothing in petitioner's complaint suggests that his conditions of confinement in temporary lockup or adjustment and program segregation mirrored conditions at the supermax prisons at issue in those cases. Because petitioner did not have a liberty interest at stake, he has not stated a procedural due process claim. Therefore, he will be denied leave to proceed on this claim. However, I note that petitioner's allegations may be sufficient to state a claim that his procedural rights under the Wisconsin Administrative Code were violated, a claim he is free to raise in state court.

D. Conspiracy

Petitioner alleges that respondents Maxwell and Pulver "conspired" to find him guilty of the second set of charges brought against him. To state a claim for conspiracy under § 1983, petitioner must identify the parties, approximate date and general purpose of the alleged conspiracy. Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002). In this case, petitioner has met the minimal pleading requirements for a conspiracy claim. He has identified the parties (respondents Maxwell and Pulver, approximate date (between December 6, 2002, and January 23, 2003) and general purpose (to find him guilty at the second disciplinary hearing. However, conspiracy claims may be brought under § 1983 only when the purpose of the conspiracy is to violate an individual's constitutional rights. Williams v. Seniff, 342 F.3d 774, 785 (7th Cir. 2003) Hill v. Shobe, 93 F.3d 418, 422 (7th Cir. 1996) ("For liability under § 1983 to attach to a conspiracy claim, defendants must conspire to deny plaintiffs their constitutional rights: there is no constitutional violation in conspiring to cover up an action which does not itself violate the constitution.") As noted earlier, petitioner has no liberty interest in avoiding segregation. Because his constitutional rights were not violated when he was found guilty at the second disciplinary hearing, his allegations fail to state a claim of conspiracy. Therefore, he will be denied leave to proceed on this claim.

ORDER

IT IS ORDERED that:

1. Petitioner John Ferguson's request for leave to proceed in forma pauperis on his substantive due process, procedural due process and conspiracy claims is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is $338.40; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. 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 petitioner's state law claim is part of the action and the court did not dismiss that claim for one of the reasons enumerated in § 1915(g), a strike will not be recorded against petitioner under § 1915(g).

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

Entered this 7th day of August, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge