

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

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MARK HINTON,

Plaintiff,

v.

LEONARD WELLS, JOHN CLARK,  
MS. FRITZ, Social Worker, CAPTAIN  
RANKIN, Security Supervisor, MOLLY  
SULLIVAN OLSON, BOCM Sector Chief and  
GERALD KONITZER, BOCM Sector Chief.

Defendants.  
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ORDER

06-C-0543-C

Plaintiff Mark Hinton is a state prisoner currently in custody at the Fox Lake Minimum Correctional Institution in Fox Lake, Wisconsin. Plaintiff brings this claim for injunctive and monetary relief under 42 U.S.C. § 1983. He contends that defendant Leonard Wells violated his rights by deferring his parole date by nearly two years. Further, plaintiff contends that defendants John Clark, Ms. Fritz and Captain Rankin violated his rights by assigning him to temporary lockup and higher-security placement, which caused him to lose his work release and “community custody” classification. Finally, plaintiff

contends that defendants Molly Sullivan Olson and Gerald Konitzer violated his rights by affirming a Program Review Committee's decision to assign him to higher security placement. As discussed below, I read all of plaintiff's claims to allege violations of his constitutional right to procedural due process.

Although plaintiff has paid the filing fee in full, the court must screen his complaint pursuant to 28 U.S.C. § 1915A. During screening, the court must examine plaintiff's claims, interpreting them broadly, and dismiss any that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

From a review of plaintiff's complaint and documents attached to the complaint, I understand him to allege the following.

## FACTS

Plaintiff Mark Hinton is a prisoner who is presently confined at the Fox Lake Minimum Correctional Institution in Fox Lake, Wisconsin. At times relevant to this complaint, plaintiff was housed at the Gordon Correctional Center, Douglas County jail, Stanley Correctional Institution and Fox Lake Minimum Correctional Institution.

Defendant Leonard Wells is a former Wisconsin Parole Commissioner. Defendant John Clark is a supervisor at the Wisconsin Department of Corrections. Defendant Ms.

Fritz is a Department of Corrections social worker. Defendant Captain Rankin is a Department of Corrections security supervisor. Defendants Molly Sullivan Olson and Gerald Konitzer are "BOCM" sector chiefs.

On July 19, 2005, plaintiff met with an unnamed parole examiner who recommended a grant of parole. On July 20, 2005, defendant Leonard Wells rejected the recommended grant and instead deferred plaintiff's recommended parole date to his mandatory release date. At that time, plaintiff had served close to 21 years on his sentences and his mandatory release date was slightly less than two years away. Plaintiff's prior parole deferment had been only six months. Defendant Wells explained his decision to defer plaintiff's parole date, stating that he was "basing [his] decision on a review of [plaintiff's] record of conviction and [his] review of the tape of [plaintiff's] parole interview of July 19, 2005." Among other stated reasons for deferring plaintiff's parole date, defendant Wells noted that plaintiff had made the comment that he was in prison "for one stupid act" when referring to a third degree sexual assault conviction and that plaintiff blamed his consumption of alcohol for his participation in events that led to the assault and death of a woman. Plaintiff contends that the "behaviors" that defendant Wells cited had been corrected prior to plaintiff's earlier six-month parole deferral. Wells also indicated that there had been strong public opposition to plaintiff's release.

In response to defendant Wells's decision to defer plaintiff's parole date, defendant

John Clark ordered plaintiff moved from the Gordon Correctional Center to temporary lockup at the Douglas County jail. Plaintiff was moved to temporary lockup on July 20, 2005. The reasons that plaintiff was given for his placement in temporary lockup were vague, but included the statement that there was a “pending investigation” and that plaintiff was a potential escape risk. In total, plaintiff spent 42 days in temporary lockup and was not served “extension papers.” At some point following his placement in temporary lockup, plaintiff was moved to the Stanley Correctional Institution.

Defendant Ms. Fritz was plaintiff’s social worker. When she met with plaintiff, she indicated that she was recommending his placement in a more secure minimum security facility. Defendant Fritz and defendant Captain Rankin participated in plaintiff’s Program Review Hearing, at which the committee revoked plaintiff’s work release and “community custody” classification. (Although plaintiff’s complaint and the attached materials are not clear on this point, it appears that the Program Review Committee also recommended plaintiff’s transfer to the Fox Lake Minimum Correctional Institution.) Plaintiff appealed, and the decision of the Program Review Committee was upheld by defendants Molly Sullivan Olson and Gerald Konitzer. Defendants Sullivan Olson and Konitzer indicated that the outcome of the Program Review Hearing was appropriate because the Parole Commission action, length of time before plaintiff’s mandatory release date and public reaction had a “significant impact” on the risk plaintiff posed in a non-secure setting and

that “placement in a secured minimum [was] justified to protect the public.” Plaintiff asserts that these statements were untrue and that his behavior had been excellent.

## DISCUSSION

### A. Delayed Date of Parole Eligibility

Plaintiff contends that defendant Wells violated his constitutional rights when he deferred plaintiff’s recommended date of parole to his mandatory release date. Plaintiff believes that defendant Wells’s reasons for deferment were disingenuous. He seeks immediate release from custody and other damages.

As noted above, plaintiff filed his complaint under 42 U.S.C. § 1983. However, a petition for a writ of habeas corpus under 28 U.S.C. § 2254 “is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release.” Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)). The Court of Appeals for the Seventh Circuit has held that “when a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice” rather than convert it into a petition for habeas corpus under § 2254. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. at 477). Accordingly, plaintiff cannot seek his release in this action. If he wishes to pursue his claim

for speedier release, he will have to do so in a petition for a writ of habeas corpus after he has exhausted all the state court remedies available to him. 28 U.S.C. § 2254.

B. Transfer to Temporary Lockup and Loss of Work Release and Community Custody

Plaintiff contends that his rights were violated when he was placed in temporary lockup for 42 days and when he was moved to a higher security facility, which caused him to lose his work-release and “community custody” classification. He seeks compensatory damages for lost wages, punitive damages and sanctions against the Department of Corrections for these actions. I construe plaintiff’s allegations as a claim that defendants violated his constitutional right to procedural due process.

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, these protected liberty interests are essentially limited to the loss of good time credits or placement for an indeterminate period of time in one of this country’s “supermax” prisons. See, e.g., Wilkinson v. Austin, 545 U.S. 209 (2005). As the Court of Appeals for the

Seventh Circuit noted in Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997):

Every state must have somewhere in its prison system single-person cells in which prisoners are sometimes confined not because they have misbehaved but simply because the prison has no other space, wishes to protect some prisoners from others, wishes to keep prisoners isolated from one another in order to minimize the risk of riots or other disturbances, wishes to prevent the spread of disease, and so forth. Almost 6 percent of the nation's prison inmates are in segregation, Criminal Justice Institute, Inc., Corrections Yearbook 22 (1997), and it appears that the great majority of these are not in disciplinary segregation (see Criminal Justice Institute, Inc., Corrections Yearbook: Adult Corrections 27 (1995), showing that in 1995 almost 5 percent of all prison inmates were in nondisciplinary segregation).

In Wisconsin, the type of administrative confinement the court of appeals described in Wagner is known as “temporary lockup,” a “nonpunitive segregated status allowing an inmate to be removed from the general population pending further administrative action.” Wis. Admin Code §§ DOC 303.02(22); 303.11.

When the sanction a plaintiff challenges is solely his “confinement in disciplinary segregation for a period that does not exceed the remaining term of the prisoner's incarceration,” the court of appeals has stated that “ it is difficult to see how after Sandin it can be made the basis of a suit complaining about a deprivation of liberty.” Wagner, 128 F.3d at 1176. Plaintiff's 42-day placement in temporary lockup did not extend the overall length of his sentence. Moreover, the placement was of limited duration. There is no indication that the conditions were atypical in any way. Accordingly, plaintiff has not alleged facts from which an inference may be drawn that he was deprived of a liberty interest

when he was placed in temporary lockup. Therefore, he will be denied leave to proceed on this due process claim.

Next, I must consider whether plaintiff had a protected liberty interest in remaining in his work release program. Although plaintiff's own daily experience may have been altered significantly by the revocation of his participation in the work release program, the question under Sandin remains whether this was "an atypical or significant hardship . . . in relation to the ordinary incidents of prison life." Here, plaintiff's return to a more secure facility was not atypical or significant when compared to the experience of the large number of prisoners who spend the duration of their sentences in the customary fashion. Indeed, it is the rule of ordinary prison life, not the exception, that prisoners remain either locked in the institution around the clock or under close supervision. As the Court of Appeals for the First Circuit Court remarked, "confinement within four walls of the type plaintiff now endures is an 'ordinary incident of prison life.'" Dominique v. Weld, 73 F.3d 1156, 1160 (1st Cir. 1996) (finding prisoner had no protected liberty interest in participation in work release program); see, e.g., Callendar v. Soix City Residential Treatment Facility, 88 F.3d 666 (8th Cir. 1996) (same).

Finally, plaintiff's complaint contains no hint that his participation in the work release program was a court-ordered, guaranteed or required aspect of his sentence. Rather, it appears that Department of Corrections officials granted him "community custody"



classification and allowed him to participate in a desirable work-release program. After plaintiff's parole status changed and department officials became aware of public concerns about plaintiff's release, they changed plaintiff's placement. I do not understand plaintiff to contend that this change in his status violated a state statute or department regulations. However, if this is his contention, it would be a state law claim, over which I would decline to exercise supplemental jurisdiction.

Plaintiff's request for leave to proceed on his claim that defendants deprived him of his constitutional right to due process will be denied for plaintiff's failure to state a claim upon which relief may be granted.

#### ORDER

IT IS ORDERED that

1. This action is DISMISSED pursuant to 28 U.S.C. § 1915A because the claims in the complaint either are not cognizable in a civil action pursuant to 42 U.S.C. § 1983, fail to state a claim upon which relief may be granted or because I decline to exercise supplemental jurisdiction over the claim.

2. 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 plaintiff's state law and habeas corpus claims are part of this action

and the court did not dismiss those claims for one of the reasons enumerated in § 1915(g), a strike will not be recorded against plaintiff under § 1915(g). The clerk of court is directed to close this case.

Entered this 1st day of November, 2006.

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