IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES G. DUDGEON,

Plaintiff,

v.

JOHN FIORELLO,

Defendant.

OPINION AND ORDER

06-C-563-C

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In this civil action brought under 42 U.S.C. § 1983, plaintiff James Dudgeon, a prisoner at the Thompson Correctional Center in Deerfield, Wisconsin, contends his procedural due process rights under the Fourteenth Amendment of the United States Constitution were violated when he did not receive a preliminary hearing before his parole was revoked. Jurisdiction is present. 28 U.S.C. § 1331.

Now before the court are the parties' cross-motions for summary judgment. Plaintiff argues that he was entitled to a preliminary hearing before his parole was revoked. Defendant John Fiorello contends that plaintiff was not entitled to a preliminary hearing because he admitted in writing to violating conditions of his parole; alternatively, defendant contends that he is not liable because he is protected by qualified immunity and the denial

of the hearing was "random and unauthorized." Because plaintiff admitted to violating the terms of his parole, I conclude that he had no constitutionally protected right to a preliminary hearing and defendant's motion will be granted.

From the parties' proposed findings of fact and admissible supporting materials, I find the following facts to be material and undisputed.

FACTS

Plaintiff James Dudgeon is a prisoner who is presently incarcerated at the Thompson Correctional Center in Deerfield, Wisconsin. Plaintiff was incarcerated previously, after he was convicted of Theft and Theft–False Representation and Issuance of Worthless Checks. Plaintiff was released from prison and placed on parole supervision. Prior to his release from prison, he received and signed a copy of the rules of his community supervision. Among other things, the rules prohibited him from accepting money from any person without his parole agent's approval.

Defendant John Fiorello is a parole and probation agent for the Wisconsin Department of Corrections. He was assigned to supervise plaintiff as his parole officer.

In the course of an investigation that began on November 30, 2004, defendant found that plaintiff had engaged in discussions between August and November 2004 in which plaintiff indicated that he had a client or was involved with a joint venture that was

interested in purchasing the Rio Grande Golf Club in Colorado for $15,000,000. In these discussions, plaintiff represented himself as the President and CEO of Ballantradoch Properties, LLC. On November 11, 2004, plaintiff sent a request for an Initial Operating Line of Credit to an individual with whom he had been having discussions about the purchase of the golf course. The request outlined the ways in which plaintiff and his joint venture would use the requested line of credit.

For allegedly engaging in violations of his terms of parole, plaintiff was taken into custody and placed at the Dane County jail. (Neither party identifies the date on which this occurred. The "Violation/Revocation Summary" describing plaintiff's alleged violations indicates that plaintiff was placed in custody on December 23, 2004.)

On January 6, 2005, defendant met with plaintiff at the Dane County jail. In a signed, written statement, plaintiff answered several questions posed by defendant. Question #4 was "On or about 11/11/04, did you send an Operating Line of Credit Request to Tom Waller and/or anyone else? What did it consist of?" Plaintiff answered "I believe it was an outline yes. It consists of soft costs fees that would not be required et. [sic] closing fees."

After consulting with his supervisor, defendant decided to seek revocation of plaintiff's parole because of the alleged violations of his conditions of supervision. Sometime between January 14 and 21, 2005, plaintiff was served with and signed a document titled

Notice of Violation, Recommended Action and Statement of Hearing Rights. It stated that no preliminary hearing was required before plaintiff's parole was revoked because plaintiff had given a signed statement in which he admitted to violating terms of his parole. Among other listed violations, the notice stated

> The Division of Community Corrections has recommended revocation of your probation/parole/extended supervision based on the following allegations:
>
> . . . .
>
> 6. On or about 11/11/04 James Dudgeon sent Tom Waller a short term credit line request. This behavior is in violation of rule #41 a[n]d 43 of the Rules of Community Supervision that Mr. Dudgeon signed on 3/9/04.

On January 18, 2005, a correctional field supervisor sent plaintiff a letter, stating that defendant had initiated revocation of plaintiff's parole as a result of his violations of parole terms. Specifically, the letter stated "A preliminary hearing is not required in your case because under DOC 332.04(2) you admitted in a signed statement to #6 allegation(s)."

At no time did defendant conduct a preliminary hearing with an impartial third party regarding the revocation of plaintiff's parole.

OPINION

An individual on parole has a protected liberty interest associated with his status as a parolee. Morrissey v. Brewer, 408 U.S. 471, 482 (1972). Consequently, parole may not

be revoked without providing the parolee due process of the law. Id. In Morrissey, the United States Supreme Court held that persons detained because of suspected parole violations are entitled to two separate hearings under the due process clause of the Fourteenth Amendment: a preliminary hearing soon after the individual's initial detention and a hearing before a final decision is made on revocation. Id.

In Morrissey, the Supreme Court stated that the purpose of the preliminary hearing is "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." Id. at 485. The hearing must occur "as promptly as convenient after arrest" and that "someone not directly involved in the case" make the probable cause determination. Id.

However, the right to a preliminary hearing is not absolute. In the wake of Morrissey, courts have highlighted several exceptional situations in which a preliminary hearing is not required. See, e.g., United States v. Sciuto, 531 F.2d 842, 846 (7th Cir. 1976) (preliminary hearing required only where probationer held in custody pending final revocation hearing); United States v. Saykally, 777 F.2d 1286, 1287 n.2 (7th Cir. 1985) (preliminary hearing not required if notice of revocation is filed while probationer is detained pursuant to another criminal charge or sentence imposed for subsequent offense); United States v. Holland, 850 F.2d 1048, 1050-51 (5th Cir. 1988) (preliminary hearing not required when probationer admits commission of acts violating conditions of his probation). The relevant exception in

this case is that a parolee who admits to violating the terms of his parole is not entitled to preliminary hearing. Starnes v. Markley, 343 F.2d 535 (7th Cir. 1965).

One of the terms of plaintiff's parole was that he was not allowed to accept money from anyone without prior approval by his parole agent. In spite of this restriction, plaintiff prepared and sent a solicitation for an operating line of credit. On January 6, 2005, plaintiff admitted to sending such a request, calling it an "outline." He now disputes the characterization of the request for an operating line of credit as a request for money, suggesting that the request merely outlined how money would be spent. Plaintiff's argument is creative, but it doesn't hold water. Whether or not the credit request placed some conditions on how the money would be spent does not change the fundamental fact that plaintiff was requesting that money be advanced to him and his joint venture. A teenager who asks her parents for money to use to go to the movies is still asking for money.

Next, plaintiff attempts to demonstrate that defendant's asserted reason for failing to provide him with a preliminary hearing kept changing, suggesting that it was mere pretext. This is not the case. Defendant asserted consistently throughout the process that the reason plaintiff did not receive a preliminary hearing was his admission that he violated certain terms of his parole. In particular, the Notice of Violation sent to plaintiff states that he will not receive a preliminary hearing because plaintiff admitted to "6. On or about 11/11/04 James Dudgeon sent Tom Waller a short term credit line request." The January 18, 2005

letter from the correctional field supervisor also refers to plaintiff's admission, stating that "A preliminary hearing is not required in your case because under DOC 332.04(2) you admitted in a signed statement to #6 allegation(s)."

Next, I turn to defendant's argument that he would also be entitled to summary judgment on the basis of qualified immunity. Governmental actors performing discretionary functions are entitled to qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). See also Malley v. Briggs, 475 U.S. 335, 341 (1986) ("the qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law"); Pourghoraishi v. Flying J, Inc., 449 F.3d 751, 761 (7th Cir. 2006) ("the doctrine of qualified immunity leaves ample room for mistaken judgments by police officers" (citations and quotation marks omitted)). So long as "officers of reasonable competence could disagree on [an] issue, immunity should be recognized." Malley, 475 U.S. at 341; Wollin v. Gondert, 192 F.3d 616, 625-26 (7th Cir. 1999).

As discussed above, a parolee has a clearly established right to a preliminary hearing before his parole is revoked, except in certain circumstances. Morrissey, 408 U.S. at 482. These circumstances include when the parolee's admits to violations of terms of his parole. See, e.g., Starnes, 343 F.2d 535. Even if defendant reached the wrong conclusion about

plaintiff's written statement, his conclusion was not unreasonable and does not indicate a knowing violation of the law. Therefore, defendant would be entitled to summary judgment on the basis of qualified immunity as well.

Finally, I note that I have not considered plaintiff's arguments related to his lack of an attorney when he admitted to violating the terms of his parole and defendant's alleged violations of state regulations. Neither issue is part of this lawsuit. In addition, I have not considered defendant's argument related to "random and unauthorized conduct." I have strong reservations about whether the doctrine would apply in a case such, but I need not explore that question. Defendant is entitled to summary judgment in any event.

ORDER

IT IS ORDERED that defendant John Fiorello's motion for summary judgment is GRANTED with respect to plaintiff James Dudgeon's claim that he was unconstitutionally denied a preliminary hearing before his parole was revoked. Plaintiff's motion for summary judgment is DENIED. The clerk of court is directed to enter judgment for defendant and

close this case.

Entered this 24th day of August, 2007.

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