IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAY M. BARTLEY,

OPINION AND ORDER

Plaintiff,

07-C-143-C

v.

STATE OF WISCONSIN DEPT. OF CORRECTIONS; MATTHEW J. FRANK; MARK HEISE; JUDY P. SMITH and CHRIS A. KRUEGER,

Defendants.

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Plaintiff Jay M. Bartley filed his complaint in this case on March 14, 2007. He is represented by counsel and paid the full filing fee. Nevertheless, because plaintiff is a prisoner at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, the case is subject to the 1996 Prison Litigation Reform Act. This means that the complaint must be screened pursuant to 28 U.S.C. § 1915A. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages

from a defendant who is immune from such relief. 42 U.S.C. § 1915(e).

Plaintiff contends that defendants violated his right to due process by delaying his consideration for parole, denying him entry in a sex offender treatment program and refusing to correct his clinical records. Because I conclude that the due process clause did not entitle plaintiff to greater procedural protections, this case will be dismissed.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Jay M. Bartley is a prisoner at the New Lisbon Correctional Institution in New Lisbon, Wisconsin.

Defendant State of Wisconsin Department of Corrections is a department of the executive branch of the State of Wisconsin. Defendant Matthew J. Frank is the Secretary of the State of Wisconsin Department of Corrections. Defendant Mark Heise is the Director of the Bureau of Offender Classification and Movement in the Division of Adult Institutions. Defendant Judy Smith is the warden of the Oshkosh Correctional Institution. Defendant Chris A. Krueger is the Director of the Sex Offender Treatment Program at the Oshkosh Correctional Institution.

B. Sex Offender Treatment Program

Since August 7, 1990, plaintiff has been serving a fifty-seven year sentence for first degree sexual assault among other crimes. His mandatory release date is November 3, 2027 and his parole eligibility date was January 16, 2004.

On July 12, 1996, plaintiff successfully completed a sex offender program at the Green Bay Correctional Institution. The "Sex Offender Treatment Program Report" signed and filed on July 22, 1996, by Janet Page Hill, Ph.D. and Christopher P. Snyder, Psy.D., the therapists in charge of the program, indicated "Program Requirements Met." After completing this program, plaintiff continued to participate in it. However, in September 1997, plaintiff told Dennis Mosher, one of the therapists who had replaced Drs. Hill and Snyder, that he wished to stop participating in the program. Mosher was displeased and responded negatively to plaintiff's request. Thereafter, Mosher became excessively critical of plaintiff in group therapy sessions and turned the other members of the group against plaintiff. On October 14, 1997, Mosher abruptly terminated plaintiff from the program.

On February 25, 1998, Mosher and Lori Pierquet, Ph.D., the other therapist in charge of the program, signed and filed a "Sex Offender Program Report," indicating that plaintiff had been terminated from the program on October 14, 1997, without meeting the program requirements. The report listed Dennis Mosher and Lori Pierquet as well as C. Snyder and Dr. Hill as plaintiff's therapists. The report that had been filed earlier by Drs. Hill and

Snyder indicating that plaintiff had successfully completed the program was removed from plaintiff's clinical file. Plaintiff believes that Mosher and Pierquet, as well as other employees of the Wisconsin Department of Corrections unknown to plaintiff, were responsible for removing the earlier report from his file.

On April 11, 2002, plaintiff appeared before the Green Bay Correctional Institution Program Review Committee. At that time, he learned that Mosher and Pierquet had caused the original report to be removed from his clinical file and replaced with a report falsely indicating that he had failed to meet the program requirements. Up until April 11, all of plaintiff's program review summaries had indicated that he had completed sex offender treatment, effective July 16, 1996. However, the April 11 summary indicated that plaintiff's sex offender treatment had been "terminated - disciplinary" on October 14, 1997. Plaintiff attempted to challenge the entry but the program review committee advised plaintiff to pursue his concerns once he arrived at the Oshkosh Correctional Institution, where the committee was recommending plaintiff be transferred.

Following his transfer to Oshkosh, plaintiff contacted staff to challenge the error on his program review committee report. He corresponded with a Department of Corrections classification specialist, who wrote that she believed the report was correct.

On August 23, 2002, plaintiff reviewed his clinical file. Plaintiff told Sandy Hendrickson, the person monitoring plaintiff while he was reviewing his file, that the

original Sex Offender Program Report had been removed from his file and replaced with the report signed by Mosher and Pierquet. Hendrickson told plaintiff that she had never heard of such a thing happening before, and advised plaintiff to take the matter to his social worker, which plaintiff did. Plaintiff's social worker, Myra Smith, then took the matter to Linda Thompson, a classification specialist at Oshkosh, who wrote to Molly Sullivan Olson, Section Chief for the department's Bureau of Offender Classification and Movement.

On September 4, 2002, Olson notified Smith by email that, "We are not going to question the SOT final program code of term disc from 1997." Smith provided a copy of Olson's email to plaintiff. Plaintiff has requested that the falsified information in his record be corrected but defendants have refused the request.

Plaintiff's institutional conduct has been positive; he has not received a major conduct report in more than nine years. Before he can be paroled, plaintiff must complete the Sex Offender Treatment Program. The program is offered only at Oshkosh Correctional Institution and lasts two to three years. Plaintiff has applied for entry into the program on numerous occasions since June of 2002, but his entry is denied on the ground that he is too far from his mandatory release date. Defendant Chris Krueger confirmed with the other defendants that the only inmates admitted to the program are inmates who are within three or four years of their mandatory release dates.

On December 3, 2003, the parole commission issued an action report recommending

that plaintiff be enrolled in the sex offender treatment program before his next parole consideration date of January 16, 2006. On December 2, 2005, the parole commission issued a report stating again, "The parole commission strongly endorses enrollment in OSCI-SOTP prior to next parole consideration, 11/06." On November 8, 2006, the commission repeated its strong endorsement that plaintiff be enrolled in the sex offender treatment program. However, defendants have not given plaintiff the opportunity to participate in the program.

At some point, defendants notified plaintiff that he is to be transferred from Oshkosh to another correctional institution which does not offer a sex offender treatment program. Plaintiff is presently 59 years old and will be seventy-nine years old on his mandatory release date. He suffers from significant health problems related to his heart. He has been incarcerated for more than 17 years for his offenses. Under present practice, plaintiff cannot expect defendants to allow him admission to the SOTP program until he is well into his seventies. This means that plaintiff has no meaningful opportunity to be considered for parole so long as defendants refuse to admit him to the sex offender treatment program.

OPINION

Plaintiff argues that defendants are violating his procedural and substantive due process rights by refusing him entry into the sex offender treatment program at Oshkosh

Correctional Institution or, alternatively, by failing to grant him parole in the absence of completion of the program. In addition, plaintiff argues that his procedural due process rights were violated when defendants failed to correct information in plaintiff's clinical file that had been falsified by Mr. Mosher and Dr. Pierquet.

A. Claims for Relief

As an initial matter, I note that plaintiff seeks injunctive relief requiring defendants to 1) admit him to the sex offender treatment program immediately; 2) replace in plaintiff's official record his certificate of completion of the Sex Offender Treatment Program at Green Bay Correctional Institution on July 12, 1996; and 3) remove any and all statements from plaintiff's record that inaccurately reflect that he was terminated from the program for disciplinary reasons; or 4) remove the requirement that plaintiff complete a sex offender treatment program as a condition for his release. As yet another alternative form of relief, plaintiff asks that he be released on parole with the condition that he participate in an appropriate sex offender treatment program in the community to which he is released.

Plaintiff's alternative request for release on parole is not a form of relief that this court may consider in the context of a civil action brought under 42 U.S.C. § 1983. Preiser v. Rodriguez, 411 U.S. 475 (1973), holds that persons bringing § 1983 claims to challenge the fact of their confinement and who are seeking release from that confinement must pursue

their claims through the remedy of habeas corpus. See Preiser, 411 U.S. at 488-90; see also Heck v. Humphrey, 512 U.S. 477, 481 (1994). Therefore, plaintiff's complaint will be dismissed as to his request for release on parole because the request is not properly raised in a § 1983 action.

B. Procedural Due Process

1. Liberty interests generally

A due process violation occurs when a state actor deprives an individual of a protected liberty or property interest without providing adequate process. The first question in any due process analysis is whether a protected liberty or property interest has been infringed. In the prison context, liberty interests can be created by state law or by the due process clause itself. Thielman v. Leean, 282 F.3d 478, 480 (7th Cir. 2002). Regardless of the source of the protected interest, however, the focus is on the severity of the deprivation suffered by the inmate. Lekas v. Briley, 405 F.3d 602, 607 (7th Cir. 2005).

In this case, I understand plaintiff to argue that both the United States Constitution and state law, in particular, Wis. Stat. § 304.06, Wis. Admin. Code § DOC 302.21 and the Wisconsin state constitution, grant him a liberty interest in being considered for parole.

1. Liberty interest in parole

Plaintiff is wrong that he has a liberty interest in parole that arises under the Fourteenth Amendment's due process clause. In Sandin v. Conner, 515 U.S. 472, 483-84 (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).

States may create liberty interests in being granted parole. Felce v. Fielder, 974 F.2d 1484, 1490 (7th Cir. 1992). However, Wisconsin has not created such an interest in Wis. Stat. § 304.06 or in any other statute presently affecting plaintiff. Wis. Stat. § 304.06(1)(b) provides that "the parole commission *may* parole an inmate . . . when he or she has served 25% of the sentence imposed. . . ." (Emphasis added). Under the statute's non-mandatory terms, the parole commission has complete discretion to grant or deny parole. Discretionary parole schemes do not create protected liberty interests. Heidelberg v. Illinois Prisoner Review Board, 163 F.3d 1025, 1026 (7th Cir. 1998) ("A state creates an expectation of release that rises to the level of a liberty interest within the meaning of the Due Process Clause if its parole system *requires* release whenever a parole board or similar authority

determines that the necessary prerequisites exist.") (Emphasis added).

By contrast, Wisconsin's mandatory release statute provides that "each inmate is *entitled* to mandatory release on parole by the department [when he has completed two-thirds of his sentence]," Wis. Stat. 302.11(1) (emphasis added). The Court of Appeals for the Seventh Circuit has concluded that this language creates an expectation of release that implicates a liberty interest. Felce, 974 F.2d at 1491-92. However, plaintiff admits that he is not yet eligible for mandatory release and does not expect to be eligible until November 3, 2027, when he is 79 years old. Therefore, the decision whether to grant him parole at this time is governed by Wis. Stat. § 304.06(1)(b). Because a decision under that statute is discretionary, plaintiff does not have a liberty interest arising from that statute that would entitle him to procedural due process protections.

Wis. Admin. Code § DOC 302.21 provides a timetable and guidelines for computing an inmate's parole eligibility and mandatory release dates following sentencing and for advising an inmate of the computations. In addition, it states in relevant part that

> [a]n inmate who committed a crime on or after November 3, 1983, shall be eligible for parole when 25% of the sentence imposed, or 6 months, whichever is greater, less all credit to which the inmate is entitled pursuant to s. 973.155, Stats., has been served. However, in no case may any inmate be eligible for parole before 60 days has elapsed from the date of the inmate's arrival at the institution. If an inmate was sentenced for more than one crime, he or she shall be eligible for parole on each sentence in order to be considered for parole. If an inmate has received a consecutive sentence, the inmate may not begin serving the consecutive sentence for purposes of parole eligibility until

the person has become eligible for parole on the first sentence.

This quoted provision in the regulation, the only provision relating to plaintiff's claim, does nothing more than reiterate the time period established in Wis. Stat. § 304.06 within which an inmate in the custody of the State of Wisconsin becomes eligible for parole consideration. It does not alter the discretionary nature of the parole decision established in Wis. Stat. § 304.06. Therefore, Wis. Admin. Code § DOC 302.21 does not grant plaintiff a protected liberty interest requiring procedural due process protections.

Finally, although plaintiff suggests that the Wisconsin Constitution grants him a liberty interest in consideration for parole, he does not suggest what portion of the state constitution grants him such an interest and I am aware of none.

2. Liberty interest in admission into sex offender treatment program

Plaintiff contends that defendants' refusal to permit him to enter a sex offender treatment program offends the Fourteenth Amendment's procedural due process clause. It is true that petitioner's prospects for parole are bleak unless he completes sex offender programming. However, the Court of Appeals for the Seventh Circuit has held repeatedly that prisoners do not have a liberty interest in rehabilitative or educational programs. Stanley v. Litscher, 213 F.3d 340, 342 (7th Cir. 2000) (no liberty interest in rehabilitation program for sexual offenders); Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996) (no

liberty interest in educational programs, even where participation might lead to accrual of good time credits). Despite plaintiff's concern that he may die from his heart condition before he will become eligible for admission back into the program, his inability to gain immediate admission does not constitute an "atypical and significant hardship" as envisioned in Sandin v. Connor, particularly in light of the fact that plaintiff has no protected interest in obtaining the tangible reward the program promises, which is the possibility of parole.

3. Liberty interest in correction of plaintiff's clinical file

As noted above, liberty interests are limited to freedom from "atypical and significant hardships" in relation to the ordinary incidents of prison life. An incomplete clinical file or one that contains information with which a prisoner disagrees does not fall within that exceptional category. Even if it did, plaintiff does not suggest that defendants have prevented him from challenging the content of his file. It is safe to assume that he has challenged at his parole hearings the requirement that he complete what he perceives to be a second round of sex offender treatment programming. Moreover, plaintiff himself alleges that he has called the content of his file into question through his case worker and by asking defendants to correct the record. That he has been unsuccessful in obtaining the particular correction he wants does not mean that he has been deprived of an opportunity to be heard or any other procedural right.

B. Substantive Due Process

Plaintiff asserts in his complaint that his "liberty interest in the opportunity to be considered for parole as alleged [in his complaint] is substantive and, as such, is guaranteed by the substantive due process protections provided in the Fifth and Fourteenth Amendments. . . ." In addition, he alleges that defendants' refusal to admit him into a sex offender treatment program violates his substantive due process rights. Unfortunately, plaintiff misunderstands the law.

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 addressing a substantive due process challenge. Albright v. Oliver, 510 U.S. 266, 273 (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.'" Id. (citing Graham v. Connor, 490 U.S. 386, 395 (1989)). In this case, plaintiff's allegations that he has a liberty interest in consideration for parole, admission into a sex offender treatment program and correction of his clinical file were properly analyzed under the procedural due process clause. Therefore, plaintiff's substantive due process claim will be dismissed.

ORDER

IT IS ORDERED that

1. Plaintiff's request for release on parole is DISMISSED on the ground that the request cannot be heard in context of a civil action brought pursuant to 42 U.S.C. § 1983.

2. Plaintiff's remaining claims are DISMISSED pursuant to 28 U.S.C. § 1915A because they are legally meritless.

3. The clerk of court is directed to enter judgment for defendants and close this case.

4. 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 habeas corpus claim is a part of the action and the court did not dismiss it for one of the reasons enumerated in § 1915(g), a strike will not be recorded against petitioner under § 1915(g).

Entered this 5th day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge