

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

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MICHAEL HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,  
FEDERAL BUREAU OF PRISONS,

Respondents.

OPINION AND ORDER

07-C-286-C

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This is a proposed civil action for declaratory and monetary relief, brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Federal Tort Claims Act, 28 U.S.C. §§ 2671 – 2680 and the Administrative Procedures Act, 5 U.S.C. § 701 – 706. Petitioner, Michael Hill, who is presently confined at the Federal Correctional Institution in Oxford, Wisconsin, has made the initial partial payment of the filing fee required to be paid under the Prison Litigation Reform Act. Pursuant to the act, petitioner’s complaint requires screening. 28 U.S.C. § 1915(e)(2).

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. After examining petitioner's complaint, I conclude that his allegations are sufficient to state a claim against the United States under the Federal Tort Claims Act but that they fail to state a claim against the United States or respondent Bureau of Prisons under the due process clause of the Fifth Amendment and the Administrative Procedure Act.

In his complaint, petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

On January 19, 2007, petitioner was placed in the "special housing unit" at the Federal Correctional Institution in Oxford, Wisconsin. While he was in the special housing unit, unit officer Darcy packed all of petitioner's personal property. On January 28, 2007, while petitioner was still in the special housing unit, he received his personal property. When petitioner went through the property, he discovered that two towels, two washcloths, headphones, a photo album, an alarm clock battery, a white robe, tennis shoes, a cooler and numerous stamps were missing. Petitioner purchased these items from the institution commissary for \$200.03. He incurred \$25 in additional expenses related to these purchases.

When petitioner was released from the special housing unit on January 29, 2007, he went through his property again and the items remained missing. Petitioner never received notice that his property had been confiscated as required by program statement 5580.07 and

no one seems to know what happened to petitioner's property. Petitioner exhausted his administrative remedies. Petitioner filed a tort claim, which was denied on May 11, 2007 by Richard Schott, Regional Counsel for respondent Bureau of Prisons.

## DISCUSSION

### A. Federal Tort Claims Act

I understand petitioner to allege that respondents wrongfully confiscated his personal property sometime after he was placed in the special housing unit on July 24, 2006. The Federal Tort Claims Act, 28 U.S.C. §§ 2671 - 2680, provides in part that the United States "shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Cognizable claims under the act include those that are raised (1) against the United States; (2) for money damages; (3) for injury or loss of property; (4) caused by the negligent or wrongful act or omission of any employee of the Government; (5) while acting within the scope of his office or employment; (6) under circumstances in which the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. See 28 U.S.C. § 1346(b)(1); Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 477 (1994) (claim against United States is cognizable under Act if it alleges six elements outlined above). Petitioner has been unable to learn precisely what

happened to his property, but he appears to assume that someone at the prison ordered its destruction in violation of Bureau of Prisons regulations regarding the disposition of items seized as contraband. Fairly construed, his allegations suggest that the actions of prison officials were at least negligent if not intentional. Therefore, they are sufficient to state a claim. I note, however, that the United States is the only proper party to defend against a claim brought under the Federal Tort Claims Act. See 28 U.S.C. § 2674.

#### B. Due Process

I understand petitioner to allege that one or more prison officials failed to follow Program Statement § 5580.06 regarding the disposition of his property in violation of his due process rights under the Fifth Amendment. Setting aside the fact that petitioner has not named as a respondent any prison official he believes may have been personally involved in depriving him of his constitutional rights, his due process claim is legally meritless.

The Fifth Amendment protects petitioner from being deprived of life, liberty or property without due process of law by the federal government. Caldwell v. Miller, 790 F.2d 589, 602 (7th Cir. 1986). Before he is entitled to Fifth Amendment due process protections, petitioner must have a protected liberty or property interest at stake. Dandan v. Ashcroft, 339 F.3d 567, 575 (7th Cir. 2003). Contrary to petitioner's suggestion, the procedures for handling items seized as contraband set out in program statement 28 C.F.R. § 553.13 do not

give rise to a protected interest. Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) (“procedural protections do not in and of themselves create cognizable liberty or property interests”); Ledford v. Sullivan, 105 F.3d 354, 357 (7th Cir. 1997) (citing Cain v. Larson, 879 F.2d 1424, 1426 (7th Cir. 1989) (“to give rise to a constitutionally protected property interest, a statute or ordinance must go beyond mere procedural guarantees”). However, because I can infer from petitioner’s allegations that the missing property belonged to him up until the time he was placed in the special housing unit, I will assume he had a property interest in the items. Caldwell v. Miller, 790 F.2d at 608 (inmate had property interest in hardbound books taken from his cell during prison “lockdown”); Nance v. Vieregge, 147 F.3d 589, 590 (7th Cir. 1998) (inmate had property interest in possessions he attempted to take with him while being transferred to another prison).

The next question is what process was due. Ledford, 105 F.3d at 356. Petitioner’s allegations suggest that the destruction or loss of his property was a random and unauthorized act rather than one carried out pursuant to a policy of the institution or the Bureau of Prisons. In such a situation, pre-deprivation procedures are not required and the federal government’s provision of an opportunity for a meaningful post-deprivation remedy satisfies the fundamental requirement of due process. Hudson v. Palmer, 468 U.S. 517 (1984) (no due process claim for random and unauthorized deprivation of property, even if taking is intentional, so long as state provides inmate suitable post-deprivation remedy);

Raditch v. United States, 929 F.2d 478, 481 (9th Cir. 1991) (“Although Hudson involved § 1983 and the Fourteenth Amendment, the same due process principles apply to the federal government through the Fifth Amendment.”). The federal government has provided a meaningful post-deprivation remedy for petitioner’s loss in the form of the Federal Tort Claims Act. Del Raine v. Williford, 32 F.3d 1034, 1046 (7th Cir. 1994). Thus, petitioner’s allegations fail to state a claim under the due process clause.

C. Violation of Prison Rules and Regulations

As noted above, petitioner alleges that the confiscation of his property was not effected in accord with Bureau of Prisons Program Statement § 5580.06, which is codified at 28 C.F.R. § 553.13. Section 553.13 reads in pertinent part:

(b) Staff shall dispose of items seized as contraband in accordance with the following procedures.

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(2) Items of personal property confiscated by staff as contraband are to be inventoried and stored pending identification of the true owner (if in question) and possible disciplinary action. Following an inventory of the confiscated items, staff shall employ the following procedures.

(i) Staff shall provide the inmate with a copy of the inventory as soon as practicable. A copy of this inventory shall also be placed in the inmate's central file.

(ii) The inmate shall have seven days following receipt of the inventory to provide staff with evidence of ownership of the

listed items. A claim of ownership may not be accepted for an item made from the unauthorized use of government property. Items obtained from another inmate (for example, through purchase, or as a gift) without staff authorization may be considered nuisance contraband for which a claim of ownership is ordinarily not accepted.

(iii) If the inmate establishes ownership, but the item is identified as contraband, staff shall mail such items (other than hard contraband), at the inmate's expense, to a destination of the inmate's choice. The Warden or designee may authorize the institution to pay the cost of such mailings when the item had not been altered and originally had been permitted for admission to the institution or had been purchased from the commissary, or where the inmate has insufficient funds and no likelihood of new funds being received. Where the inmate has established ownership of a contraband item, but is unwilling, although financially able to pay postage as required, or refuses to provide a mailing address for return of the property, the property is to be disposed of through approved methods, including destruction of the property.

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(v) Staff shall prepare and retain written documentation describing any items destroyed and the reasons for such action.

Inmates have the right to expect prison officials to follow Bureau of Prisons procedures. Caldwell, 790 F.2d at 610. However, petitioner does not have a cause of action for money damages under the regulations or the program statement. His allegation that his property vanished in violation of 28 C.F.R. § 553.13 is properly construed as a claim under the Administrative Procedure Act. 5 U.S.C. § 702. Under that statute, Congress has waived the sovereign immunity of the United States with respect to claims based on an agency's

violation of its own regulations, but only as to claims seeking injunctive or declaratory relief. The waiver does not apply to claims seeking money damages. As to his contention that respondents violated a Bureau of Prisons program statement, because such statements are simply policy statements, they do not give rise to a cause of action. Miller v. Henman, 804 F.2d 421, 424-26 (7th Cir. 1986). Therefore, petitioner has failed to state a claim upon which relief may be granted with respect to his claim for money damages against respondent Bureau of Prisons.

Petitioner also seeks declaratory relief in the form of a declaration that respondents' acts "described and complaint of above violated [petitioner's] rights under the United States and Wisconsin Constitution and their laws." This claim for relief is likewise unavailing under the Act.

In order to satisfy Article III's "case or controversy" requirement for injunctive relief, petitioner must allege facts suggesting either that the injuries he complains of are continuing or that he is under the immediate threat that the injuries complained of will be repeated. Sierakowski v. Ryan, 223 F.3d 440, 444 (7th Cir. 2000) ("[I]n order to invoke Article III jurisdiction a plaintiff in search of prospective equitable relief must show a significant likelihood and immediacy of sustaining some direct injury."). As the Supreme Court explained in City of Los Angeles v. Lyons, 461 U.S. 95 (1983), "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if



unaccompanied by any continuing, present adverse effects.” Id. at 102. This rule applies to claims for declaratory as well as injunctive relief. Robinson v. City of Chicago, 868 F.2d 959, 966 n.5 (7th Cir. 1989) (“The declaratory relief statute is not an independent basis of jurisdiction and requires an ‘actual controversy’.”).

Petitioner’s allegations involve a single incident of prison officials’ alleged failure to comply with federal regulations. There is no immediate threat that petitioner is likely to suffer an injury arising out of the same circumstances again. Therefore, petitioner will be denied leave to proceed on his request for declaratory relief against respondent Bureau of Prisons because his claim for such relief is moot.

#### ORDER

IT IS ORDERED that

1. Petitioner Michael Hill’s request for leave to proceed in forma pauperis is GRANTED on his claim under the Federal Tort Claims Act against respondent United States of America.

2. Petitioner’s request for leave to proceed in forma pauperis is DENIED on his claims under the Fifth Amendment due process clause and the Administrative Procedures Act.

3. Respondent Federal Bureau of Prisons is DISMISSED from this action.

4. For the remainder of this lawsuit, petitioner must send the United States Attorney for the Western District of Wisconsin a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer in the United States Attorney's office will be representing respondent, he should serve the lawyer directly rather than the United States Attorney. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to the United States Attorney or to the lawyer assigned to represent respondent United States.

5. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. The unpaid balance of petitioner's filing fee is \$346.23; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

7. Copies of petitioner's complaint and this order are being sent today to the United States Marshal for service on the respondent.

Entered this 24th day of August, 2007.

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