

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

TAYR KILAAB AL GHASHIYAH (KHAN),
f/n/a JOHN CASTEEL,

Plaintiff,

ORDER

v.

07-C-308-C

MATTHEW FRANK, RICHARD SCHNEITER,
CHRISTINE BEERKIRCHER, JAILOR A. JONES,
GERALD KONDOZ, JAILOR SHARPE,
JAILOR HANFIELD, JAILOR PRIMMER,
JAILOR MICKELSON, JAILOR ESSER,
JAILOR SCULLION, JAILOR BEARCE,
JOHN McDONALD, JOHN POLINSKE,

Defendants.

In his original complaint, plaintiff Tayr Kilaab al Ghashiyah alleged that he had been transferred to the Wisconsin Secure Program Facility without the “required due process,” among other things. In the order screening his complaint (dkt. #3), I assumed that under Wilkinson v. Austin, 545 U.S. 209 (2005), plaintiff was entitled to process in conjunction with that transfer. However, I stayed a decision whether plaintiff could proceed with the claim because he had not provided enough information to determine whether he had stated

a claim upon which relief may be granted. I directed plaintiff to (1) identify the defendants who failed to give him process and (2) describe the process he was given so that I could determine whether he had been given all the process he was due. (I stayed a decision on several other claims for similar reasons.)

In response to the order, plaintiff filed an amended complaint in which he identified the defendants involved in the alleged due process violation. Dkt. #4. (In addition, plaintiff included clarifying allegations with respect to many of his other claims. The claims on which I allowed plaintiff to proceed are set forth below in the order.) However, plaintiff still failed to identify the process he was given, saying only that his hearing was a “sham.” I gave plaintiff one more chance to fill in the blanks. Dkt. #7.

On his third try, plaintiff has included a number of irrelevant allegations that are not responsive to the court’s order. I have disregarded these allegations. However, plaintiff also attempts to provide the information requested by the court. In paragraph 24 of his addendum, he alleges that “defendants Polinske, McDonald and Kondo failed to provide him with the reasons for his transfer prior to [the] hearing or at the hearing and/or upon his appeal process.” This suggests that plaintiff is conceding that he had a hearing of some sort and an opportunity to appeal from a decision following the hearing. However, he says that he was not given “reasons” before his hearing. I interpret this new allegation to mean that he was not given notice in advance of his hearing what would be taken under consideration

at the hearing and thus no opportunity to prepare a rebuttal.

In Wilkinson, the Court did not provide a bright line test for determining what constitutes adequate process in the context of a transfer to a supermaximum prison such as the Wisconsin Secure Program Facility. However, in concluding that the procedures provided in that case were sufficient, the Court noted favorably that the prisoners “must receive notice of the factual basis leading to consideration for . . . placement [in the supermaximum facility] and a fair opportunity for rebuttal.” Wilkinson, 545 U.S. at 225-26. Further, the Court stated that those two requirements “are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations. . . . Requiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate's being mistaken for another or singled out for insufficient reason.” Thus, the Court suggested strongly in Wilkinson that prisoners being transferred to a supermaximum facility are entitled to know the facts providing the basis for the transfer and to have a “fair opportunity” for disputing those facts.

For the purpose of this order, I need not decide when the facts must be provided, in what form they must be given or what constitutes a “fair opportunity” for rebuttal. It is also unnecessary to consider whether and to what extent due process requires either an opportunity for an administrative appeal or a periodic review after transfer, two other

aspects of the process provided in Wilkinson, 554 U.S. at 227, discussed with approval by the Court. Because plaintiff alleges that he has not received any reasons for his transfer, this is sufficient to state a claim for a violation of due process.

A few words of caution for plaintiff. I have been using the term “supermaximum facility” as short hand to describe the type of prison that triggers the procedural protections of Wilkinson. Plaintiff should not take this to suggest that all prisons labeled “supermaximum” fall under the rubric of Wilkinson or that the Wisconsin Secure Program Facility meets the Wilkinson standard. The Court did not issue a blanket ruling in that case but was considering the particular conditions of a particular prison. Ultimately, it will be plaintiff’s burden to prove that the Wisconsin Secure Program Facility “imposes 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). See also Lekas v. Briley, 405 F.3d 602 (7th Cir. 2005) (including lengthy discussion regarding how courts should determine what constitutes “atypical and significant” hardships).

ORDER

IT IS ORDERED that

1. The stay imposed in the August 1 order (dkt. #7) is LIFTED and plaintiff Tayr Kilaab al Ghashiyah is GRANTED leave to proceed on his claim that defendants Gerald

Kondo, John Polinske and John McDonald failed to provide plaintiff with due process in conjunction with his transfer to the Wisconsin Secure Program Facility.

2. Plaintiff is currently proceeding on the following claims, in addition to the due process claim identified above:

a. Defendants Gerald Kondo, Matthew Frank, Richard Schneider and Christine Beerkircher prohibited plaintiff from using his religious name on his grievances, in violation of his right to free exercise of religion under the First Amendment and the Religious Land Use and Institutionalized Persons Act, his right of access to the courts, his right to petition the government for redress of grievances and his right to equal protection of the law.

b. Defendant Taylor conducted a manual inspection of plaintiff's anus and genitals without giving him a chance to comply with a visual inspection; defendants Sharpe and Primmer ordered this inspection; defendants Jones, Bearce, Esser and Scullion were present but failed to intervene; and defendants Frank and Schneider caused the other defendants' conduct by failing to train them, in violation of the Fourth and Eighth Amendments;

c. Defendants Esser and Scullion beat plaintiff during with strip search; defendants Sharpe, Primmer, Taylor, Bearce and Jones were present but failed to intervene; defendants Frank and Schneider caused the other defendants' conduct by failing to train them, in violation of the Eighth Amendment;

d. Defendants Taylor, Jones, Bearce, Esser, Scullion, Sharpe and Primmer subjected

plaintiff to a strip search in front of other prisoners; defendants Frank and Schneiter caused the other defendants' conduct by failing to train them, in violation of the Fourth and Eighth Amendments;

e. Defendants Sharpe, Hanfield, Primmer and Mickelson placed plaintiff in a cold cell, naked and without access to a bathroom or toilet for several hours, in violation of the Eighth Amendment.

3. Plaintiff is DENIED leave to proceed on all other claims.

4. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's amended complaint, his addendum and the orders of this court are being sent today to the Attorney General for service on the state respondents.

Entered this 14th day of August, 2007.

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