IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHAN J. PETTIGREW,

Petitioner,

OPINION and ORDER

v.

3:07-cv-00690-bbc

MATTHEW FRANK, DOC Secretary
and ALFONSO GRAHAM, Parole Commissioner,

Respondents.

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Petitioner Nathan Pettigrew has filed a proposed complaint under 42 U.S.C. § 1983 seeking declaratory, injunctive and monetary relief. In his complaint, petitioner contends that respondents are violating his rights under the Fourteenth Amendment due process clause by refusing to find him eligible for a sex offender treatment program which, in turn, makes him ineligible for parole. In addition, petitioner raises a number of state law claims. He requests leave to proceed in forma pauperis and has paid the initial partial payment of the $350 filing fee as required under 28 U.S.C. § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). When the litigant is a prisoner, the

court must dismiss the complaint if the claims contained in it are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a respondent who is immune from such relief. 28 U.S.C. § 1915A.

Because petitioner has no liberty interest in sex offender treatment or parole release, he will be denied leave to proceed on his Fourteenth Amendment due process claims. Because I am dismissing petitioner's federal law claim, I decline to exercise supplemental jurisdiction over petitioner's state law claims. These claims will be dismissed without prejudice to petitioner's raising them in state court.

From petitioner's complaint, I understand him to be alleging the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Nathan Pettigrew is a prisoner currently confined at the Racine Correctional Institution in Sturtevant, Wisconsin.

Respondent Rick Raemisch is the Secretary of the Department of Corrections for the State of Wisconsin. Respondent Alfonso Graham is Chairman of the Wisconsin Parole Commission.

Petitioner's Sentence

On August 23, 1995, a jury found petitioner guilty of first degree sexual assault in violation of Wis. Stat. § 940.225(1)(b). On September 25, 1995, petitioner was sentenced to a term of imprisonment not to exceed sixteen years, minus 130 days for time served. The sentence did not include any requirement that petitioner participate in a treatment program as a condition for his release on parole. The Department of Corrections established petitioner's "mandatory release date" as January 16, 2006. Petitioner's maximum discharge date is May 18, 2011.

C. Access to Programming

On April 8, 1999, petitioner appeared before the parole board. In a document titled "Parole Commission Action" dated that same day, the commission deferred petitioner for parole consideration until May 18, 2003, stating,

> You have not served sufficient time for punishment noting that you are serving a 16 year sentence for a violent sexual assault of an adult victim. You adamantly deny that you committed this crime and maintain that your case is in appeal. You have been recommended for long term [Sex Offender Treatment Program] based upon your conviction but given your adamant denial of the offense you will not be involved in treatment programming. As we discussed today, your lack of completion of offense related treatment will pretty much guarantee that you serve to your [mandatory release] date but possibly you will have a change of heart regarding this depending upon what transpires with your appeal. Your institution conduct record has been positive. Your parole plan will require final agent approval. The risk of your

> release is clearly unreasonable at this juncture as you are an untreated sex offender.

Two months before reaching his January 16, 2006 "mandatory release date," petitioner again appeared before the parole commission. This time, in a document titled "Parole Commission - Presumptive Mandatory Release Review," parole commissioner F. Paul wrote,

> You remain an untreated sex offender with a substance abuse problem. You have essentially refused all recommended programs that have been offered to you. Your excuse was that your case is still in the appeal process. You are encouraged to reconsider your position on this and enroll in programming that would help to reduce your risk level. You admit to having a substance abuse problem prior to your incarceration. You questioned the authority of the Parole Commission over your case as you claim that your offense does not fall under the PMK law. You were referred to the record office for clarification. This is your lst incarceration for lst Sexual Assault. In 5/95 you forced a female acquaintance to perform oral sex on you while holding a knife to her back. You have served 10.6 on 16 years. Your prior record includes a 1974 burglary PTHC and a 1994 D.C. Until you successfully complete your essential offense related programming, you are an extreme risk to re-offend and must remain incarcerated for the protection of the public.

On October 16, 2007, petitioner forwarded respondent Rick Raemisch a letter asking for special action to release him on the ground that he had served a sentence past his mandatory release date. Respondent Raemisch has not granted petitioner's request.

DISCUSSION

A. Due Process

Although petitioner contends that respondents have violated several state laws, his central complaint is that respondents are violating his constitutional right to due process because they will not find him eligible for parole until he completes a sex offender treatment program and because they will not allow him entry into such a program unless he accepts responsibility for the crime for which a jury found him guilty.

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV. 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.

Therefore, 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 are "generally

limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose [ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. at 484. In other words, liberty interests are implicated when a prisoner's sentence is prolonged or he is subjected to conditions that are not the typical ones encountered by prisoners.

Contrary to petitioner's belief, he does not have a liberty interest in parole. Wisconsin prisoners like petitioner, who are serving sentences for crimes committed before December 31, 1999, generally become eligible for parole after serving 25% of their sentences. Wis. Stat. § 304.06(1)(b). Parole is discretionary from 25%-66% of an inmate's sentence, and therefore does not create any liberty interest. See, e.g., Heidelberg v. Illinois Prisoner Review Board, 163 F.3d 1025, 1026 (7th Cir. 1998). Normally, once an inmate has served two-thirds of his sentence, Wis. Stat. § 302.11(1) mandates that the inmate be released from confinement to serve the remainder of his sentence under parole supervision. However, there are several exceptions to mandatory release. One of these exceptions is relevant to petitioner's case. Wisconsin Statutes § 302.11(1g) provides that inmates convicted of certain enumerated felonies are entitled only to "presumptive mandatory release." For these inmates, the parole commission may deny release if it finds that release would endanger public protection or that the inmate has refused to participate in recommended counseling

or treatment while incarcerated. Wis. Stat. § 302.11(1g)(b). Because release is discretionary for these inmates, they do not have a protected liberty interest in obtaining parole.

Although petitioner insists that he was entitled to release on parole on January 16, 2006, he acknowledges that he is subject to § 302.11(1g)(b). Furthermore, he concedes that he has been found ineligible for parole because he has not completed sex offender programming and is considered a risk to the community. Because Wisconsin's statutes make it clear that petitioner's parole date is not mandatory, respondents' decision to deny him parole does not implicate a liberty interest and thus does not violate petitioner's due process rights.

In addition to challenging the decision to deny him parole on the ground that it violates his constitutional right to due process, petitioner challenges the denial as violating several state laws. Because I am denying petitioner's federal law claim, I decline to exercise supplemental jurisdiction over his state law claims. Petitioner is free to raise any such claims he might have in state court.

Finally, to the extent that petitioner might believe that he has a constitutional right to enroll in a sex offender treatment program without meeting the prerequisites set by the respondents, he is wrong. Although it may be desirable to provide prisoners with access to sex offender programming, incarcerated persons have no constitutional right to such programming, even if it is a prerequisite to parole as in petitioner's case. Richmond v. Cagle,

920 F. Supp. 955 (E.D. Wis. 1996) (no right to sex offender treatment programs). Denying prisoners access to rehabilitative programs is simply not an "atypical and significant hardship" under Sandin.

ORDER

IT IS ORDERED that:

1. Petitioner Nathan Pettigrew's request to proceed in forma pauperis is DENIED with respect to his claim that respondents are violating his Fourteenth Amendment due process rights by refusing to find him eligible for parole or for entry into a sex offender treatment program. This claim fails to state a claim upon which relief may be granted.

2. Because I am dismissing petitioner's federal law claim, I decline to exercise supplemental jurisdiction over his state law claims.

3. The unpaid balance of petitioner's filing fee is $326.44; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. A strike will be recorded against petitioner pursuant to § 1915(g) because one or more of his claims was dismissed for one of the reasons enumerated in § 1915(g).

5. The clerk of court is directed to close the file.

Entered this 28th day of January, 2008.

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