

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANIEL DONOVAN,)
)
 Plaintiff)
)
 v.) Civil No. 04-102-B-W
)
 MARTIN MAGNUSSON, et al.,)
)
 Defendants)

**ORDER ON MOTION FOR SANCTIONS AND
RECOMMENDED DECISION AND PROPOSED FINDINGS OF FACT
ON MOTION AND RENEWED MOTION FOR PRELIMINARY INJUNCTION**

This matter is before the court on plaintiff Daniel Donovan's Motion for Preliminary Injunction (Docket No. 9) and Renewed Motion for Preliminary Injunction (Docket No. 35). Because of the complicated procedural history of this matter, a brief recap of the proceedings is in order.

In December 2003 Daniel Donovan began this litigation against various Department of Corrections employees by filing his first lawsuit, Donovan v. Magnusson, CV-03-226. That case was ultimately dismissed on August 4, 2004, as a result of the District Court Judge's order affirming a decision that I issued on June 7, 2004, recommending that the action be dismissed without prejudice because Donovan had not fully exhausted the prison grievance process at the time he filed the initial complaint. At the time he filed his first suit Donovan was an inmate at Charleston Correctional Facility ("Charleston").

On June 15, 2004, even prior to the District Court's order affirming my recommendation, Donovan filed this second lawsuit, alleging that he had now fully

exhausted the prison grievance process as to those claims he chose to bring forth in the new complaint. I had anticipated in the earlier recommended decision that Donovan might pursue this course of action. The subject matter of both lawsuits relates in one way or another to the actions of correctional officials vis-à-vis the claimed unauthorized opening and otherwise tampering with Donovan's mail, including privileged legal correspondence.

On July 27, 2004, Donovan filed a motion for a preliminary injunction in this case, claiming that Rick Laliberte, a captain at Charleston, had threatened to retaliate against Donovan for filing numerous lawsuits and grievances by removing him from Charleston and transferring him to a facility that would be a higher security unit and would cause Donovan to lose the ability to continue to earn good time credits. Donovan currently has an anticipated release date in December 2004. As of September 2, 2004, when Donovan filed his reply to the defendants' response to his motion for preliminary injunction, he was still housed at Charleston. Donovan also requested in that reply that I hold an expedited hearing on his motion for preliminary injunction. Rather than do that, I issued a decision (Docket No. 20) recommending that the court deny the motion for preliminary injunction because it did not appear to me that an imminent threat of a retaliatory transfer existed because Donovan had been housed at Charleston for almost one year while this litigation was pending.

Within a week after I issued my recommended decision, Donovan notified the court that he had indeed been transferred to the Maine State Prison facility ("MSP") in Warren, Maine; that his opportunity to earn good time had been taken away from him; and that he was denied access to his legal materials and a computer. Donovan asked for

additional time to file his objections to the recommended decision. I immediately scheduled a telephone conference with counsel for the defendants and Donovan. As a result of that conference, I issued an order granting Donovan additional time to object to the original recommended decision. The defendants' attorney represented that issues regarding computer access at the MSP would be addressed in accordance with departmental policy and that Donovan would be treated equitably with all other prisoners. She also represented that Donovan's legal materials were already in route and that he would receive access to them in accordance with departmental policy.

Donovan then filed a letter request asking that I reconsider the prior recommended decision. (Docket No. 31.) I responded by scheduling the entire matter vis-à-vis the preliminary injunction for an evidentiary hearing at the MSP. (Docket No. 32.) Donovan then filed a renewed motion for a preliminary injunction (Docket No. 35) and withdrew his objection to the prior Recommended Decision (Docket No. 34). I withdrew the prior recommended decision in order to be able to better address the issues after the evidentiary hearing. (Docket No. 36.)

Donovan seeks various remedies in his renewed motion for injunctive relief. First, he wants the court to provide "retroactive" relief for the prior loss of good time he suffered in April 2003 when he was transferred from Bolduc Correctional Facility ("Bolduc") to the MSP and for the loss of good time from the September 21 transfer to the present date. He also wants prospective relief in that he wants the court to issue an injunction that would force correctional personnel to transfer him to a lower security facility other than the MSP. He claims the transfer to MSP was made in retaliation for the lawsuits and grievances he filed while at Charleston, but those claims are not the

underlying basis of this particular lawsuit and the complaint has not been amended to incorporate formal claims for retaliation against Laliberte; indeed, Laliberte is not a defendant in this action.¹ Donovan also claims that his ability to proceed with the litigation continues to be hampered because of lack of access to a word processor and his legal materials since his arrival at the MSP. He wants the court to provide injunctive relief on this score as well. He also requests that I do something about his inability to earn money because his “negotiated” transfer to Bolduc has been thwarted and he therefore is unable to participate in any program that allows him to generate income.

Having held a two and one-half hour evidentiary hearing at the MSP on October 21, 2004, I am now prepared to enter the following proposed findings of fact and a recommended decision denying injunctive relief.

Proposed Findings of Fact

Daniel Donovan was transferred to the Charleston Correctional Facility on September 28, 2003. Charleston is an institution with low security and Donovan was given security clearances for all activities at the facility, including working off the grounds. His living accommodations were “dormitory” style, sharing a room with up to three other roommates. Donovan had, if not limitless certainly, abundant access to a word processor and legal research materials while housed at Charleston. He spent a large portion of his time engaged in the pursuit of personal litigation. This case represents only one aspect of that endeavor, his other legal work including state court civil and post-conviction cases and at least one other federal civil rights case.

¹ As should be apparent from the history of this litigation and as is obviously understood by Donovan, any attempt to amend his complaint to allege retaliatory transfer by Laliberte and name Laliberte or other Charleston correctional officers as defendants in this case would most likely result in another motion to dismiss for failure to exhaust administrative procedures because Donovan admits that he has not done so as to this claim of retaliation.

Immediately before coming to Charleston last year Donovan had been housed at the MSP, a more secure facility. However, prior to that, between August 2002 and April 28, 2003, Donovan was housed at Bolduc, a facility similar to Charleston but apparently having the added benefit of a program where prisoners can actually earn income while working on approved job sites. While the reasons for Donovan's April 2003 transfer from Bolduc to the MSP were not fully developed on this record, Susan Dumond, classification officer at Bolduc, indicated that sometime in July of this year she was contacted by other prison officials about the possibility of Donovan returning to Bolduc. At that time she recalls overhearing a conversation between Albert Barlow, one of the defendants in this case alleged to have been involved in an unconstitutional policy of opening Donovan's legal mail, and McCaffrey, another Bolduc official, wherein the two men were discussing the fact that Donovan had been transferred out of Bolduc because of "bullying and threatening" other prisoners. According to Dumond, Donovan did not come to Bolduc in July of this year because of medical issues, but in light of the alleged reasons for the April 2003 transfer to MSP Donovan could not return to Bolduc even if the medical issues were resolved. Therefore, whatever agreement Donovan believes was negotiated to allow him to return to Bolduc, that agreement is not in play at this time.

According to Rick Laliberte, Sam Bradean, and Katherine Priest, Charleston's classification board, Donovan's tenure at that facility was a rocky one as well. However, neither Charleston nor Bolduc personnel ever took disciplinary action against Donovan for threatening, harassing, or bullying other inmates. Laliberte, Bradean, and Priest, with varying degrees of credibility, all report that Donovan did not get along well with his roommates and that certain inmates refused to room with him, inviting disciplinary

sanctions to be brought against those inmates for failing to follow direct commands from correctional officers to room with Donovan.

I found the testimony of Katherine Priest on this issue to be the most credible and persuasive regarding the relationships between Donovan and his roommates. Priest reported that she had personal conversations with at least one other inmate wherein that inmate reported to her that Donovan, who was upset by “behaviors” of the other inmate, had barred the other inmate from entering his room and had behaved in a generalized threatening way toward the inmate. Priest indicated that concerns about Donovan’s behavior were elevated the weekend before his transfer to the MSP when one of his roommates was taken to a local hospital complaining of chest pains. Medical personnel thought the chest pains were stress related and could have stemmed from interpersonal relationships with Donovan. The record does not reveal whether the inmate who spoke confidentially with Priest is the same inmate as the one taken to the hospital because the defendants insisted upon having the names of these various “informers” kept confidential. Hence, it is really impossible to assess the magnitude of Donovan’s disruptive influence at Charleston. However, Priest’s testimony provides credible evidence that there was a genuine concern about Donovan’s interactions with his fellow inmates.

Sam Bradean and Rick Laliberte added little of substance to the factual recitation provided by Priest, but collectively the three members of the classification board were the decision makers responsible for Donovan’s return to the MSP and they all agreed that Donovan’s conduct vis-à-vis other inmates was the motivating factor behind that decision, not retaliation for lawsuits and grievances. Donovan, on the other hand, presents an array of circumstantial evidence that might support the conclusion that the

move was based upon retaliatory motives on the part of Laliberte, and/or Commissioner Magnusson, one of the defendants in this case.

Donovan points first, and most emphatically, to the evidence of the timing of the transfer. Beginning in early July, Donovan claims that Laliberte threatened him with a retaliatory transfer if he did not mend his ways and stop his complaining. When I recommended denial of his initial request for injunctive relief, the Commissioner gave the almost immediate go-ahead, approving a transfer to MSP sought by Laliberte. (See Ex. 8, e-mail message from Commissioner's office to Laliberte, approving transfer).² The exhibits establish the chain of events leading to the transfer, particularly the two memos dated September 20, 2004. (Ex. 1 & 2.) Furthermore, Sam Bradean testified at the evidentiary hearing that Laliberte knew that he had been named in some manner in Donovan's lawsuit prior to the board making the decision about Donovan's transfer. Laliberte, on the other hand, hedged his testimony about whether he knew anything at all about his alleged role in this particular lawsuit. Bradean clearly remembered Laliberte receiving a message during an earlier classification board hearing and announcing to those in the room that Donovan had brought some sort of allegations against him. This report would be consistent with the July 27 time frame when Donovan first brought his motion for preliminary injunction alleging that Laliberte had threatened to retaliate

² This e-mail only came to light at the evidentiary hearing and it has become the subject of Donovan's latest motion for sanctions against the defendants and their counsel. (Docket No. 42.) The crux of this spat, as I understand it, is that counsel for the defendants argued in her response to Donovan's initial motion for preliminary injunctive relief (Docket No. 16, August 20, 2004) that he could not obtain injunctive relief against Laliberte because Laliberte was not a party to this litigation and none of the named defendants had anything to do with the transfer decision. I have not decided this motion based upon Laliberte's status as a nonparty to this litigation. If I had found this to be a purely retaliatory transfer, the relief that Donovan seeks, transfer to a less restrictive facility, could be accomplished by the Commissioner, most certainly a party to this litigation. The fact that the Commissioner approved the original transfer helps rather than hurts Donovan's claim and the defendants' counsel should not be sanctioned for supplying it to Donovan and the court when its relevance became apparent. The motion for sanctions (Docket No. 42) is **DENIED**.

against him by moving him to the MSP. Donovan also points to the similar “suspicious” transfer from Bolduc to the MSP in April 2003 as further evidence of the defendants complicity in retaliatory measures being taken against him. According to Donovan’s theory of the case, I should not accept the bald assertion of the classification board, based upon the alleged hearsay complaints of other inmates, that Donovan’s transfer came about because of his own failure to “get along with” the other inmates.

If I did not have Katherine Priest’s testimony to consider, I might be inclined to agree with Donovan that the primary motivation for this transfer was retaliation for Donovan’s litigation.³ However, her testimony corroborates Laliberte’s position that Donovan was transferred primarily because of concerns about his interaction with other prisoners. I am satisfied that there were legitimate reasons connected to the operation of the institution for Donovan’s transfer from Charleston. At Charleston the open dormitory living arrangements make it impractical to merely separate inmates one from the other. They would inevitably come into contact with each other.

It is clear that Donovan’s conditions of confinement at the MSP are much more restrictive than they were at either Bolduc or Charleston. Furthermore it is also clear that he cannot earn the “good time” associated with confinement in the other institutions because MSP does not have the same opportunities to engage in work programs that offer these credits. Also, at MSP Donovan has less access to a computer and therefore is able to spend less time writing and reviewing pleadings in word processing format. He is forced to write some or all of his pleadings in longhand. Of course that process is

³ Even if I were able to make such a factual finding based upon the evidence, I am not suggesting that as a matter of law Donovan would be entitled to all, or even some, of the injunctive relief he is requesting. As I discuss below, obtaining preliminary injunctive relief in the face of retaliatory conduct against prison officials in a case procedurally postured as this one is would be difficult.

frustrating to Donovan (and this court), but it does not represent an atypical infringement on his right of access to the courts. There is nothing to suggest that Donovan cannot obtain legal research materials and some limited assistance with word processing problems. There has been no unconstitutional deprivation of access to the courts or legal research materials since the transfer to MSP.

Discussion

The procedural posture of Donovan's request for preliminary injunctive relief, coming as it does almost one year after litigation began on the underlying suit and relating to conduct that had not yet occurred at the time of the original complaint, presents many procedural difficulties, not the least of which is the requirement under 42 U.S.C. § 1997e(a) that all such prison condition complaints must be subject to exhaustion within the administrative structure before being filed in court. Furthermore, to the extent that Donovan seeks injunctive relief vis-à-vis the retrospective restoration of good time, the remedy he seeks directly relates to the length of his state sentence and therefore might arrive in this court not as civil rights litigation, but rather pursuant to 28 U.S.C. § 2254,⁴ habeas corpus relief, a procedure that carries with it its own doctrines regarding exhaustion of state remedies. See Richmond v. Scibana, ___ F.3d ___, 2004 WL 2339763 (7th Cir. Oct. 19, 2004) (Easterbrook, J.) (discussing, in the context of a federal prisoner's 28 U.S.C. § 2241 petition, the "hazy" line between a prisoner claiming the right to release under § 2241 (federal prisoner seeking habeas relief) or § 2254 (state

⁴ The assistant attorney general for the Department of Corrections suggested at the evidentiary hearing that any relief Donovan sought regarding the length of his sentence would have to be obtained through application of the state's post-conviction remedies statute, 15 M.R.S.A. § 2124. Even assuming that the state court has jurisdiction pursuant to title 15 to consider this sort of complaint, the practical difficulties are enormous given that Donovan does not have that much time left to serve on his original sentence and might well be discharged before the state court could ever consider a post-conviction petition. Whether Donovan has any viable state claims under Maine Rule of Civil Procedure 80C is an issue I need not, and cannot, explore. See Fleming v. Comm'r, Dept. of Corr., 2002 ME 74, 795 A.2d 692.

prisoner seeking habeas relief) and a prisoner claiming officials have used incorrect rules involving future applications for release, who must use the Administrative Procedures Act, if a federal prisoner, or 42 U.S.C. § 1983, if a state prisoner).

Given these huge procedural hurdles regarding the claimed right to injunctive relief regarding retrospective application of good time credits, it is abundantly clear that Donovan is not entitled to relief at this time on that portion of his motion. That leaves me with the question of whether he is entitled to any injunctive relief vis-à-vis his transfer to the MSP and his access to a word processor. As a legal matter, there is no case ever, anywhere, that I could find, that says there is a constitutional right to a word processor that formats documents in Microsoft Word. As a factual matter, I do not find any evidence that Donovan's constitutional right to access the courts has been infringed by prison authorities in retaliation for his numerous lawsuits or for any other reason. He has been able to access legal research materials at the MSP and has been able to file numerous pleadings with this court. The difficulties he faces are technical in nature and involve application of word processing programs and time allowed at the computer, hardly matters of constitutional significance.

That leaves Donovan's claim that he was transferred to the MSP in retaliation for his litigation activities and is therefore entitled to injunctive relief that would return him to a prison setting where he could continue to earn good time credits and personal income in a less restrictive setting.

"A prisoner does not have a right to a hearing before being transferred; indeed he can be transferred for no reason at all." McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979) (citing Montanye v. Haymes, 427 U.S. 236, 242-43, (1976)). However, he may

nevertheless establish a claim under § 1983 if the decision to transfer him was made by reason of his exercise of constitutionally protected First Amendment freedoms. Haymes v. Montanye, 547 F.2d 188, 190-92 (2d Cir. 1976), cert. denied, 431 U.S. 967 (1977); Laaman v. Perrin, 435 F. Supp. 319, 327-28 (D. N.H.1977); cf. Mount Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 285-87 (1977) (holding that a teacher without entitlement to reinstatement may nevertheless establish a claim of retaliation if the decision not to rehire was made in retaliation for the exercise of First Amendment rights).

"While the discretion afforded prison administrators in transfer decisions is extremely broad, it 'does not swallow the inmate's fundamental right of access to the courts. Otherwise, prison administrators would be free to accomplish exactly what plaintiff alleges here, the transfer of successful and, therefore, troublesome litigants for no reason other than their legal activities.'" McDonald, 610 F.2d at 18 (quoting Laaman, 435 F. Supp. at 327). Since Donovan "does have a constitutional right to petition the courts, Bounds v. Smith, 430 U.S. 817, 821-22, (1977); Furtado v. Bishop, 604 F.2d 80[96](1st Cir. 1979), and since he alleges that the transfer was ordered in retaliation for his exercise of that right," he could properly state a cause of action on that issue. McDonald, 610 F.2d at 18. That this complaint does not allege that cause of action as its underlying claim creates yet another procedural hurdle to preliminary injunctive relief in this case. However, if Donovan did file a properly exhausted complaint stating such a cause of action, he would face a substantial burden in attempting to prove that the actual motivating factor for his transfer was as he alleges. See Laaman, 435 F. Supp. at 328 ("[O]nly substantial evidence will serve to rebut the presumption that the decision of a prison administrator is both legitimate and reasonable."). The record must establish that

Donovan would not have been transferred "but for" the alleged exercise of constitutional rights. McDonald, 610 F.2d at 18-19 (citing Mount Healthy City B. of Ed., 429 U.S. at 287). The requirement of a "but for" showing together with the wide latitude afforded prison officials in ordering transfers makes the likelihood of Donovan ever succeeding with such a claim low. In the context of the present motion for preliminary injunction, my view of the evidence is that the testimony of Katherine Priest sounds the death knell for such relief at this stage.

Conclusion

I now **DENY** Donovan's motion for sanctions. (Docket No. 42.) And, based upon the foregoing findings of fact, I recommend that the court **DENY** the motion for preliminary injunction (Docket No. 9) and the renewed motion for preliminary injunction (Docket No. 35)

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated November 4, 2004

DONOVAN v. MAGNUSSON et al
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 06/15/2004
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil
Rights
Jurisdiction: Federal Question

Plaintiff

DANIEL J DONOVAN

represented by **DANIEL J DONOVAN**
MAINE STATE PRISON
807 CUSHING RD
WARREN, ME 04864
PRO SE

V.

Defendant

MARTIN MAGNUSSON,
*Individually and in his capacity
as Commissioner of the Maine
Department of Corrections*

represented by **DIANE SLEEK**
ASSISTANT ATTORNEY
GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333-0006
626-8800
Email: diane.sleek@maine.gov
ATTORNEY TO BE NOTICED

JEFFREY MERRILL,
*Individually and in his capacity
as Warden*

represented by **DIANE SLEEK**
(See above for address)
ATTORNEY TO BE NOTICED

ALBERT BARLOW,
*Individually and in his capacity
as Deputy Warden*

represented by **DIANE SLEEK**
(See above for address)
ATTORNEY TO BE NOTICED

**RAYMOND FELT, Individually
and in his capacity as Unit
Manager**

represented by **DIANE SLEEK**
(See above for address)
ATTORNEY TO BE NOTICED

**RICHARD IVEY, *Individually
and in his capacity as Captain of
the security staff***

represented by **DIANE SLEEK**
(See above for address)
ATTORNEY TO BE NOTICED

**DAWN GEORGE, *Individually
and in her capacity as Sergeant***

represented by **DIANE SLEEK**
(See above for address)
ATTORNEY TO BE NOTICED

**EARL LITTLEFIELD,
*Individually and in his capacity
as Sergeant***

represented by **DIANE SLEEK**
(See above for address)
ATTORNEY TO BE NOTICED

**ROLAND AMES, *Individually
and in his capacity as Sergeant***

represented by **DIANE SLEEK**
(See above for address)
ATTORNEY TO BE NOTICED

JOHN DOES 1-4