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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT
U.S. DISTRICT COURT
HARTFORD, CONN.

JOHN M. BACH, FATHER PHILIP BERRIGAN :
S.S.J., JOHN THEODORE GLICK, THOMAS
R. HOSMER, KEVIN B. JONES, DAVID
MALAMENT, prisoners presently incar- :
cerated at the Federal Correctional
Institution, at Danbury, Connecticut; :
JOHN HALLORAN, JOHN J. PHILLIPS,
WILLIAM T. IRELAND, MITCHELL SNYDER, :
prisoners presently incarcerated at :
the Medical Center for Federal Prisoners,
Springfield, Missouri; and EDWARD A.
GERSH, presently incarcerated at Lewis- :
burg Federal Penitentiary :

-vs-

Civil No. *10000*
B-376

JOHN MITCHELL, Attorney General of the :
United States; NORMAN CARLSON, Director
of the Federal Bureau of Prisons; JOHN
J. NORTON, Warden of the Federal Correc- :
tional Institution, Danbury, Connecticut; :
DR. CICCONE, Director of the Springfield
Medical Center for Federal Prisoners;
GEORGE J. REED, Chairman of the United :
States Board of Parole, and all members :
of the United States Board of Parole,
WILLIAM F. HOWLAND, JR., GERALD E.
MURCH, WILLIAM E. AMOS, MAURICE H.
SIGLER, PAULA A. TENNANT, CURTIS C. :
CRAWFORD, WILLIAM T. WOODWARD, JR.; and :
RICHARD HEANEY, Assistant Director,
United States Bureau of Prisons

MEMORANDUM OF DECISION

I.

Nature of Action and Jurisdiction

This action had its genesis in events which occurred at the Federal Correctional Institution, at Danbury, Connecticut, (Danbury Correctional Institution) in early August of 1971. At that time, the original eleven plaintiffs in the

instant action,^{1/} who were federal prisoners incarcerated in the Danbury Correctional Institution, distributed leaflets criticizing the practices and procedures of the United States Board of Parole (Parole Board) and organized and participated in a work stoppage and hunger strike. Subsequently, various disciplinary actions were allegedly taken against them including the Parole Board's rescission of its orders admitting certain plaintiffs to parole on specified dates in the future, the transfer of certain plaintiffs from the Danbury Correctional Institution, and the placement of plaintiffs in segregated confinement and the withholding of "good time" from them. Defendants, who are officials or officers of the Department of Justice, the Bureau of Prisons, the Danbury Correctional Institution, the Medical Center for Federal Prisoners at Springfield, Missouri, (Springfield Medical Center) and the Parole Board, are sued in their official and individual capacities.

The jurisdiction of this court is invoked under 28 U.S.C. § 1331 (federal questions), 28 U.S.C. § 1361 (mandamus against federal officials), 28 U.S.C. § 2201 (declaratory judgments), 28 U.S.C. § 2241 (habeas corpus), and 5 U.S.C. § 702 (Administrative Procedure Act).

^{1/}

The instant action was originally brought by eleven plaintiffs. However, in an affidavit dated December 7, 1971, one of the original plaintiffs, John J. Phillips, states that he wishes to withdraw as a plaintiff from the instant action.

On October 26, 1971, the defendants filed a motion for summary judgment pursuant to Fed.R.Civ.P. 56. On November 9, 1971, the plaintiffs filed a motion for an order dismissing the defendants' motion for summary judgment. On November 15, 1971, after oral argument on these motions, the court reserved decision.

Disposition of the defendants' motion is complicated by the presence of a number of plaintiffs with many different claims, some of which overlap and some of which do not. These claims fall into three basic categories: (1) the Parole Board's rescission of its orders to grant plaintiffs Bach and Snyder parole; (2) the transfer of plaintiffs from the Danbury Correctional Institution; and (3) the placement of the plaintiffs in segregated confinement and the withholding of good time from them. The common issue presented by all these claims is whether the sanctions imposed upon the plaintiffs for their participation in certain activities were in violation of their constitutional rights.

II.

Facts

There are no genuine issues of material fact. The relevant facts are set forth below.^{2/}

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The facts recited are derived from the complaint and the answer and various exhibits submitted by the plaintiffs and the defendants. The facts recited are based in part on defendants' Exhibit 2, which consists of a report, dated

Distribution of Leaflets

On August 6, 1971, plaintiffs Bach, Gersh, Glick, Hosmer and Malament distributed leaflets to other prisoners at the Danbury Correctional Institution; and on August 9, 1971, plaintiffs Snyder, Berrigan, Phillips, Halloran, Jones and Ireland attempted to distribute these leaflets to other prisoners. The leaflets listed grievances relating to (1) the treatment of prisoners in South Vietnam; (2) the denial of parole to plaintiff Berrigan and to his brother, Daniel Berrigan; and (3) lack of procedural rights and safeguards afforded prisoners before the Parole Board. The leaflets

August 16, 1971, from J.R. Johnson, Chief Correctional Supervisor of the Danbury Correctional Institution, to J.B. Bogan, Assistant Director of the Institutional Services Division. An affidavit submitted with this report from John J. Norton, the Warden of the Danbury Correctional Institution, states that the report is an official record of the Institution and is "a true and correct factual account" of the events and circumstances described therein. The facts recited are also based in part on defendants' Exhibit 4, an affidavit from Norman A. Carlson, the Director of the Bureau of Prisons. The plaintiffs have attacked Exhibit 2 on the ground that it is not presented in the form of an affidavit and contend that as a consequence it cannot be considered in connection with a motion for summary judgment under Fed.R.Civ.P. 56. The plaintiffs' objection in this regard is merely a technical one inasmuch as they do not challenge the authenticity of the report. The evidentiary value of the report is not vitiated by the fact it is not in the form of an affidavit. It is obviously a part of the administrative record and only serves to underscore the plaintiffs' own allegations. Plaintiffs also attack Exhibit 2 and Exhibit 4 on the ground that they contain conclusory statements and hearsay statements. The exhibits in question contain factual statements which are based on personal knowledge. To the extent that these exhibits contain some conclusory statements, the court has disregarded them. To the extent they contain hearsay statements, the court has not accepted them as tending to show the truth of the matters asserted therein.

made various demands in connection with these grievances and advocated and urged the prisoners to engage in a work stoppage and hunger strike in support of these demands.^{3/}

Work Stoppage

On Friday, August 6, members of the staff of the Institution reported that the prisoner population was "tense and uneasy." On Monday, August 9, staff members reported that the prisoner population was in a "confused state" and were reluctant to move to work at work-call. Staff members circulated among the prisoners urging them to go to work. Although many did go to work, some refused.

Hunger Strike

On August 6, a hunger strike was also commenced by plaintiffs Bach, Gersh, Glick, Hosmer and Malament. On that date, after distributing the leaflets, the above named plaintiffs began a fast. Similarly, on August 9, after distributing the leaflets, plaintiffs Snyder, Berrigan, Halloran, Ireland, Jones and Phillips began a fast. Plaintiffs were joined in their hunger strike by some other prisoners.

It appears that a total of 33 prisoners participated

^{3/}
The leaflets stated:

"We ask you, our brother inmates, to consider joining us by refusing to work, refusing to eat or by joining us in the hole as free men."

in a hunger strike. Later, however, when they were brought before the institution's Adjustment Committee for disciplinary proceedings, all but 16 prisoners terminated their strike, and of these 16, eleven were the original plaintiffs in this case.

Total Effect of Plaintiffs' Activities

The aforementioned events occurred over a period of approximately six days. It is unclear precisely how many prisoners besides the plaintiffs participated in the hunger strike and work stoppage, but it is not denied that approximately 50 prisoners joined the plaintiffs in a work stoppage and hunger strike. As a result of these activities, the staff of the institution put in a number of hours of overtime work.

Segregated Confinement and
Withholding of Good Time

On August 6, 1971, after distributing leaflets, plaintiffs Bach, Gersh, Glick, Hosmer and Malament were placed in the Intensive Treatment Unit, a segregated status which the plaintiffs refer to as solitary confinement. On August 9, 1971, after distributing leaflets, plaintiffs Snyder, Berri-
gan, Halloran, Jones, Phillips and Ireland were placed in the Intensive Treatment Unit. On August 10, 1971, disciplinary hearings were initiated by the institution's Adjustment

Committee concerning the plaintiffs' involvement in the distribution of leaflets and the subsequent work stoppage and hunger strike. As a result of these hearings, good time for the month of August was withheld from the plaintiffs because of their involvement in the aforementioned activities. The plaintiffs did not appeal their segregated confinement or the withholding of good time from them to the Director of the Bureau of Prisons.

Transfers

On August 11, 1971, the plaintiffs were transferred from the Danbury Correctional Institution to the Springfield Medical Center pursuant to a Bureau of Prisons policy statement. The policy statement provides that a prisoner on a hunger strike is to be immediately admitted to the hospital and to remain there until he is no longer on a hunger strike and the medical staff recommends that he be released. The reason for this policy is that "there is the possibility that the individual (on a hunger strike) may . . . require close medical supervision." Bureau of Prisons Policy Statement No. 7400.7 (March 19, 1969).

The facilities of the hospital at the Danbury Correctional Institution were not adequate to care for the number of prisoners who were on a hunger strike because the hospital had only 14 beds, and at the time in question there was already one prisoner in the hospital with a case of infecti-

ous hepatitis. Since the Danbury medical facilities were inadequate, Norman A. Carlson, the Director of the Bureau of Prisons, decided to transfer to the Springfield Medical Center those prisoners on a hunger strike who appeared firmly resolved to persist in the strike. On August 11, the plaintiffs, who seemed determined to continue their hunger strike until their demands were met, were transferred to the Springfield Medical Center. The other prisoners on a hunger strike terminated their strike the day following the transfer of the plaintiffs to Springfield.

On September 20, 1971, plaintiffs Bach, Berrigan, Glick, Hosmer, Jones and Malament were transferred back to the Danbury Correctional Institution. Before they were returned to Danbury, they had terminated their hunger strike, and it had been determined that they were medically fit to return to their regular institution status.

Five of the original eleven plaintiffs who were transferred from the Danbury Correctional Institution to the Springfield Medical Center were not transferred back to Danbury. Gersh was transferred instead to the United States Penitentiary at Lewisburg, Pennsylvania (Lewisburg Penitentiary). He had originally been sent to Danbury for evaluation with a view to his possible participation in the narcotic addict treatment program there, but he was found to be unsuitable for the program. It was decided to send him to Lewisburg where there is a voluntary drug abuse program in which he could participate if he wished and where there was

the further possibility of transfer to Lewisburg's satellite minimum security camp at Allenwood, Pennsylvania.

Snyder and Halloran have remained at the Springfield Medical Center. Snyder and Halloran, like Gersh, had originally been sent to Danbury for evaluation with a view to possible participation in the drug addict treatment program there, but were found to be unsuitable for the program. It was decided that Lewisburg Penitentiary was the most appropriate institution for Snyder. It was decided that the Federal Correctional Institution at Milan, Michigan, an institution for youthful offenders, was the most appropriate institution for Halloran because of his youth and record. When, however, Snyder and Halloran learned that they were not to be transferred back to Danbury, they resumed their hunger strike. They have been kept at the Springfield Medical Center because of their hunger strike.^{4/}

Ireland and Phillips have also remained at Springfield Medical Center because they indicated that they would like to enroll in special training programs there.

Parole Recision

On July 19, 1971, the Board of Parole ordered the release of Bach on parole, effective September 20, 1971, and

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An affidavit from Norman A. Carlson, Director of the Bureau of Prisons, states that plaintiff Halloran has now ended his hunger strike but he has not been moved from Springfield Medical Center because of the pendency of the instant litigation.

on August 9, 1971, it ordered the release of Snyder on parole, effective January 5, 1972. On August 25, 1971, the Parole Board rescinded these orders. No reason for the Board's decision was set forth in the notices of the decision which were sent to Bach and Snyder. The defendants, however, have submitted affidavits from James R. Pace, the Board's Parole Executive, which state in effect that the full Board voted to rescind the parole grants to Bach and Snyder because of their participation in the distribution of the previously described leaflets calling for a work stoppage and hunger strike.

Before considering whether to rescind the orders granting parole to Bach and Snyder, the Board did not notify them of any charges against them. They were not given a hearing by the Board on this matter, and it follows that they were not accorded the right to counsel, to cross-examination of witnesses, to present favorable evidence, and to compel the attendance of favorable witnesses.

By letter dated September 24, 1971, to the Chairman of the Parole Board, Attorney William C. Cunningham, acting as counsel for Bach and Snyder, requested that the Board hold an immediate review hearing on its decision. Shortly thereafter, the instant action was initiated.^{5/} As of this date,

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On October 1, 1971, the complaint in the instant action was filed in the United States District Court for the District of Columbia. On October 4, 1971, the court ordered the action to be transferred to the United States District Court for the District of Connecticut.

the Board has not officially responded to the request for a review hearing.

III.

Claims Relating to Recision of Parole Orders

The first claims considered are those of plaintiffs Bach and Snyder relating to the Parole Board's recision of its orders admitting them to parole on specified dates in the future.

Exhaustion of Administrative Remedies

Before turning to the merits of the claims of Bach and Snyder with respect to the Parole Board's recision of its order granting them parole, it is necessary to determine whether judicial review of these claims is precluded because of a failure by them to exhaust administrative remedies.

The doctrine of exhaustion of administrative remedies is well established. McKart v. United States, 395 U.S. 192, 193 (1969); see generally, 3 K.Davis, Administrative Law Treatise, §§ 20.01 et seq. (1958 ed. 1970 Supp.) and cases therein cited. Under the exhaustion doctrine "no one is entitled to judicial review for a supposed or threatened injury unless the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

However, exhaustion of administrative remedies is not

required where such remedies are inadequate. See, e.g., NLRB v. Marine Workers, 391 U.S. 418, 425 (1968); Greene v. United States, 376 U.S. 149, 162-64 (1964); McNeese v. Board of Educ., 373 U.S. 668, 674-76 (1963); Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir.), cert. denied, 400 U.S. 841 (1970). Nor is exhaustion of administrative remedies required where it is probably or certainly futile. See, e.g., King v. Smith, 392 U.S. 309, 319 n.4 (1968); Houghton v. Shafer, 392 U.S. 639, 640 (1968); Damico v. California, 389 U.S. 416 (1967); Eisen v. Eastman, supra; United States v. Zmuda, 423 F.2d 757, 761 (3d Cir.), cert. denied, 398 U.S. 960 (1970).

Application of these principles dictates the conclusion that judicial consideration of the claims at issue is not precluded by failure to exhaust administrative remedies. The rules of the Parole Board specifically provide for a review hearing on the Board's decisions upon submittal of a letter or memorandum requesting such a hearing from an attorney, relative, or other interested party to the Board at its headquarters in Washington, D.C. Attorney Cunningham did send a letter requesting a review hearing on the Board's recision of its grant of parole to Bach and Snyder, but the instant action was started shortly thereafter prior to a response from the Board. Since the Board has not yet passed on the request for a review hearing, it is possible to argue, as the defendants do, that Bach and Snyder have not exhausted their administrative remedies.

The Board's rules, however, specifically state that approval of a request for a review hearing "is based on receipt of significant new information sufficient in the judgment of the Board, to justify the reopening of the case." Rules of the United States Board of Parole, Effective January 1, 1971, at 20. Attorney Cunningham's letter does not set forth any "significant new information." The grounds for a review hearing asserted in the letter relate solely to the failure of the Board to afford Bach and Snyder procedural due process in connection with its rescission of parole grants. Since the grounds asserted are insufficient to obtain review under the rules of the Board, the apparent futility of pressing for the kind of review the plaintiffs sought is sufficient to overcome the bar to judicial review raised by the exhaustion doctrine.

The Parole Board and the
Scope of Judicial Review

Turning to the merits of the claims of Bach and Snyder relating to the Board's rescission of its orders granting them parole, it is useful at the outset to briefly describe the place and authority of the Board in the federal penal system and note the scope of judicial review of Parole Board decisions. The Board possesses independent status and is vested with broad discretion in matters relating to parole. United States v. Frederick, 405 F.2d 129, 133 (3d Cir. 1968).

The Board has the discretionary power to authorize the release of a federal prisoner on parole once he becomes eligible for parole after serving a designated portion of his sentence. 18 U.S.C. § 4203. Prior to the release of a prisoner on the effective date of his parole, the Board may rescind the parole. United States Board of Parole Rules at 16-17 (1971). However, once a prisoner has been released on parole, the Board may revoke his parole only if he violates the conditions of his parole. 18 U.S.C. § 4205. In this case, the Board had decided to grant Bach and Snyder parole and set the parole date, but had not actually released them on parole, and their status as incarcerated prisoners was still unchanged when their cases were reconsidered by the Board. Thus, the Board's decision not to allow their release on parole constituted a "recision," not a "revocation" of parole.

It has frequently been stated by federal courts that parole decisions are wholly within the discretion of the Board. Menechino v. Oswald, 430 F.2d 403, 408 (2d Cir. 1970); Tompkins v. United States Board of Parole, 427 F.2d 222, 223 (5th Cir. 1970); United States v. Frederick, supra at 133; Cagle v. Harris, 349 F.2d 404 (8th Cir.), cert. denied, 382 U.S. 965 (1965). The statute which vests the Board with broad discretion in matters relating to parole does not specifically provide for judicial review of the Board's parole determinations. It has been broadly stated that it is not the function of the federal courts to review the

Board's exercise of its discretion. Tarlton v. Clark, 441 F.2d 384, 385 (5th Cir.), cert. denied, 91 Sup. Ct. 2263 (1971). See Cagle v. Harris, supra at 405; Brest v. Ciccone, 371 F.2d 981, 982 (8th Cir. 1967).

The Board's discretion, however, is not entirely unbridled, and its actions may be reviewed for abuse of discretion. Cf. Littell v. Morton, 445 F.2d 1207, 1211 (4th Cir. 1971); Creek v. Stone, 379 F.2d 106, 111 (D.C. Cir. 1967); Wong Wing Hang v. Immigration & Naturalization Serv., 360 F.2d 715, 717-19 (2d Cir. 1966). I take the scope of this limited review to be that enunciated by Judge Friendly in Wong Wing Hang, supra at 719:

"Without essaying comprehensive definition, we think denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis . . . or . . . on other 'considerations Congress could not have intended to make relevant.'" (citations omitted).

Cf. Littell v. Morton, supra at 1211.

Infringement of First Amendment Rights

The primary claim of Bach and Snyder is that the Parole Board's decision to rescind its orders granting them parole was in the nature of an impermissible sanction for the exercise by them of their rights of freedom of expression guaranteed by the first amendment. Although the granting of parole is a matter almost wholly within the discretion of the Board, it could not condition the exercise

of its discretion on the surrender by Bach and Snyder of constitutionally protected rights. Cf. Frost & Frost Trucking Co. v. Railroad Comm., 271 U.S. 583, 592 (1926); McLaughlin v. Tilendis, 398 F.2d 287, 289 (7th Cir.), cert. denied, 385 U.S. 1003 (1968); Johnson v. Branch, 364 F.2d 177, 180 (4th Cir.), cert. denied, 385 U.S. 1003 (1967).

Since it is clear that the Board did in fact decide to rescind its orders granting Bach and Snyder parole because of their participation in the distribution of the leaflets, the inquiry here is whether their activities were protected by the first amendment. Distribution of literature has traditionally been considered a form of "speech," the freedom of which is guaranteed by the first amendment. See, e.g., Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938). But the right of freedom of speech is not absolute. See, e.g., Cox v. Louisiana, 379 U.S. 556, 558 (1965); Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion of Brandeis, J.).

Although an individual is incarcerated in a penal institution, he does not forfeit all his constitutional rights. Brown v. Peyton, 437 F.2d 1228, 1230 (4th Cir. 1971); Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968); Sostre v. Otis, 330 F.Supp. 941, 944 (S.D. N.Y. 1971); Fortune Society v. McGinnis, 319 F.Supp. 901, 903 (S.D. N.Y. 1970); Carothers v. Follette, 314 F.Supp. 1014, 1023 (S.D. N.Y. 1970); see Cooper v. Pate, 378 U.S. 546 (1964)(per curiam); Pierre v.

LaVallee, 293 F.2d 233, 235 (2d Cir. 1961). Among the rights retained by prisoners are first amendment rights, and restrictions imposed by prison authorities on the exercise of such rights have been subjected to close scrutiny by the courts. See, e.g., Nolan v. Fitzpatrick, 10 Crim.L.Reptr. 2106 (1st Cir., Nov. 17, 1971); Sostre v. McGinnis, 442 F.2d 178, 199-203 (2d Cir. 1971); Walker v. Blackwell, 411 F.2d 23, 28-29 (5th Cir. 1966); Palmigiano v. Travisono, 317 F.Supp. 776 (D. R.I. 1970); Fortune Society v. McGinnis, supra; Carothers v. Follette, supra at 1020-26.

But the rights of a prisoner to free expression are not precisely the same as those of non-prisoners. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnson, 334 U.S. 266, 285 (1948). In Sostre v. McGinnis, 334 F.2d 906, 908 (2d Cir.), cert. denied, 379 U.S. 892 (1964), Judge Hays has stated the rule: "A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline." And after explaining the rationale for this rule he succinctly summed up:

"In other words the nub of this whole situation is not to be found in the existence of theoretical rights, but in the very practical limitations on those rights which are made necessary by the requirements of prison discipline." Id. at 911.

The balance to be struck is between a prisoner's assertion

of the right to freedom of expression and the curtailment of such freedom which is needed to forestall a clear and present danger of a breach of prison discipline or security, or some substantial interference with orderly prison administration. See Long v. Parker, 390 F.2d 816, 822 (3d Cir. 1968); Sostre v. Otis, supra at 944; Seale v. Manson, 326 F.Supp. 1375, 1382 (D. Conn. 1971); Wilson v. Prasse, 325 F.Supp. 9, 12 (W.D. Pa. 1971); Fortune Society v. McGinnis, supra at 904; Carothers v. Follette, supra at 1024.

Applying these principles to the instant case the Parole Board did not overstep the bounds of its discretion by rescinding its orders granting Bach and Snyder parole because of their distribution of leaflets advocating a hunger strike and work stoppage. The distribution of these leaflets caused a "substantial interference with orderly institutional administration." It is difficult to believe that the plaintiffs who organized this strike in order to dramatize their demands and compel the prison authorities to comply with them were not fully aware from the start that their conduct would cause a disruption of internal order. In any event, such a disruption did occur. The normal routine of the institution which includes work assignment for prisoners was interrupted by the work stoppage. Performance of assigned work by prisoners is a long established practice at penal institutions. Going on strike in defiance of work assignments in a prison is clearly non-verbal conduct and

is not activity protected by the first amendment. Cf. Roberts v. Peppersack, 256 F.Supp. 415, 429 (D. Md. 1966). Likewise, the normal routine of the institution was disrupted by the hunger strike which had the effect of placing an added burden on the institution's hospital facilities which were inadequate for the purpose of caring for those on a hunger strike. Undoubtedly, these activities created tension in the institution. While these activities were conducted in a nonviolent manner, even peaceful defiance of the prison authorities serves to undermine prison discipline and can precipitate a more violent reaction in the context of a prison environment. See Roberts v. Peppersack, supra at 29-30. See also, Kritsky v. McGinnis, 313 F.Supp. 1247, 1249 (N.D. N.Y. 1970).

Denial of Substantive Due Process

Bach and Snyder also claim that the Parole Board's decision "was in fact arbitrary since it was executed in the absence of rational or clearly stated standards." Although they do not specifically take the position that the decision constituted a denial of substantive due process in violation of the fifth amendment, this appears in essence to be their claim.

The Board is not, as Bach and Snyder contend, wholly devoid of standards and criteria upon which to base a decision. 18 U.S.C. § 4203 provides:

"If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole."

The Rules of the Board also provide:

"When an effective date has been set by the Board, release on that date is conditioned upon the maintenance of good prison conduct and the completion of a satisfactory plan for supervision. The Board may reconsider any case prior to release on its own motion, and may reopen and advance, postpone, or deny a parole which has been granted.

"In any case in which the institution is informed of the paroling of a prisoner who has engaged in a conduct violation subsequent to the date of his parole hearing or review, the Board should be apprised promptly of such violation." Rules of the United States Board of Parole, Effective January 1, 1971, at 16-17.

Although the Board's functions and the nature of parole, which have been previously discussed, make detailed standards

regarding parole recision both unnecessary and undesirable, in this case there was a pertinent rule of the Board that release on parole "is conditioned upon the maintenance of good prison conduct." That is a rational and clearly stated standard. It is immaterial that the defendants have not pointed to specific rules and regulations which the conduct of Bach and Snyder violated because the conduct itself was such as to put them on notice that it was not "good prison conduct." Cf. Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969); Simard v. Board of Educ., Civ. No. 14,379, Ruling on Motion for Preliminary Injunction, at 18 (D. Conn. July 30, 1971).

Denial of Procedural Due Process

Finally, Bach and Snyder claim that the process by which the Parole Board reached its decision to rescind its orders granting them parole, as distinguished from the decision itself, denied them procedural due process and the right to counsel. They contend that they were entitled to the following: (1) notice of the charges against them; (2) a full trial-type hearing, including the right to the assistance of counsel, to confront and cross-examine witnesses, to present favorable witnesses, and to compel the attendance of favorable witnesses; and (3) specification

of the grounds and underlying facts upon which the Board's decision was based. The Board concedes that it did not afford Bach and Snyder these procedural protections.

Bach and Snyder take the position that the procedural due process to which they claim that they are entitled is mandated by the fifth and sixth amendments.

The leading case regarding Board procedures in connection with a parole recision is Koptik v. Chappel, 321 F.2d 388, 392 (1963), in which the United States Court of Appeals for the District of Columbia held that the Board had the power without notice or hearing "to reopen, advance, postpone, or deny" a parole to a prisoner who had not yet been released from prison. Accord, United States ex rel. Felder v. United States Board of Parole, 307 F.Supp. 159 (D. Conn. 1969); see also, United States ex rel. Mitchell v. Shuttleworth, 196 F.Supp. 1013 (N.D. Fla. 1952).

Bach and Snyder do not cite any decisions dealing with parole recision in support of their position that procedural due process is constitutionally mandated in connection with a parole recision determination by the Parole Board. Rather, they cite decisions dealing with other processes of the criminal justice system such as sentencing, probation and parole revocation proceedings and juvenile delinquency hearings in which courts have held that a defendant and/or prisoner is entitled to various procedural protections. They argue that a parole recision determina-

tion is analogous to these other processes.

The closer analogy, however, is to an initial determination by the Board as to whether parole should be granted. In Menechino v. Oswald, supra, the Court of Appeals for the Second Circuit held that a prisoner had no constitutionally protected right to procedural due process at a parole release hearing. See also, Schwartzberg v. United States Board of Parole, 399 F.2d 297 (10th Cir. 1968); Briguglio v. New York State Board of Parole, 24 N.Y.2d 21, 298 N.Y.S. 2d 704, 246 N.E.2d 512 (1969). The Court of Appeals so held because "some of the essential conditions for requiring procedural due process as a matter of right are missing." Menechino v. Oswald, supra at 407.

In the instant case "the essential conditions" for requiring procedural due process as a matter of right are missing.

First, in determining whether to rescind an order granting a prisoner parole, just as in determining whether to grant a prisoner parole in the first instance, the Parole Board does not act as his adversary. As the court pointed out in Menechino, "the Board has an identity of interest with . . . (the prisoner) to the extent that it is seeking to encourage and foster his rehabilitation and readjustment to society." Id. at 407. The questions to be resolved by the Board in determining whether to rescind an order admitting a prisoner to parole are essentially those it considers

initially. As the court stated in Menechino, the Board's function is to "make the broad determination of whether rehabilitation of the prisoner and the interests of society generally would best be served by permitting him to serve his sentence beyond the confines of prison walls rather than by being continued in physical confinement." Id. The court also stated that "in making that determination the Board is not restricted by rules of evidence or procedures developed for the purpose of determining legal or factual issues." Id. at 408. In this regard, it should be noted that in the instant case there were no factual disputes for the Board to resolve. The facts upon which it based its decision to rescind the orders granting Bach and Snyder parole, namely their distribution of leaflets advocating a work stoppage and hunger strike, are not challenged by them. Hence, the adequacy of the Board's procedures with respect to its determination of those facts is quite irrelevant.

Second, Bach and Snyder had no "presently enjoyed" private interest in parole which would qualify for due process protection. A prisoner who has been favorably considered for parole but who has not been released has not yet been accorded the status of a parolee and is no different from any other incarcerated prisoner. A prisoner is entitled to be released only after full service of his maximum sentence, less good time. Bach and Snyder do not presently enjoy freedom from confinement, nor are they entitled to it. See Menechino v.

Oswald, supra at 408-09; Walker v. Oswald, 449 F.2d 481 (2d Cir. 1971).

Bach and Snyder also take the position that certain procedural provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. are applicable to Parole Board proceedings and require the procedural due process to which they claim they are entitled. It, however, has been held that specific procedural provisions of the Administrative Procedure Act are inapplicable to Parole Board proceedings. Hyser v. Reed, 318 F.2d 225, 236 (D.C. Cir.), cert. denied sub nom. Thompson v. United States Board of Parole, and Jamison v. Chappell, 375 U.S. 957 (1963); see Hiatt v. Compagna, 178 F.2d 42, 44 (5th Cir.), aff'd, 340 U.S. 880 (1950). In any event, in view of the Parole Board's specialized nature and functions, the court is of the opinion that Congress did not intend for the procedural provisions of the Administrative Procedure Act to govern the Board's procedures.

To sum up, the decisions of the Parole Board to rescind its orders to grant parole to Bach and Snyder were not so wanting in rationality as to constitute an abuse of discretion, nor so lacking in procedural safeguards as to deny them due process.

IV.

Claims Relating to Administrative Transfers

Another set of claims of the plaintiffs to be con-

sidered are those relating to their transfers from the Danbury Correctional Institution. Here again, the plaintiffs contend that they were improperly transferred from the Danbury Correctional Institution to the Springfield Medical Center by prison authorities in order to punish them for their participation in activities allegedly protected by the first amendment, namely the distribution of leaflets and the subsequent work stoppage and hunger strike. They also contend that the transfers, made without notice or hearing, denied them due process of law and the right to counsel in violation of the fifth and sixth amendments. They further contend that they were singled out for transfer from other prisoners on a hunger strike and thus were denied "equal protection of the laws" in violation of the fifth amendment.^{6/}

The initial question is whether the plaintiffs have exhausted their administrative remedies with respect to their transfers from the Danbury Correctional Institution. The management and regulation of federal penal correctional

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The invocation by plaintiffs of "equal protection of the laws" obviously refers to the equal protection clause of the fourteenth amendment, which is applicable to the states. While the fifth amendment, which is applicable to the federal government, contains a due process clause, it does not contain an equal protection clause. "But the concepts of equal protection and due process both stemming from our American ideal of fairness, are not mutually exclusive." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Although the two concepts are not interchangeable, "discrimination may be so unjustifiable as to be violative of due process." Id. at 499. See Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

institutions is delegated by statute to the Bureau of Prisons under the direction of the Attorney General. 18 U.S.C. §§ 4001, 4042. Before appealing to the courts for relief, a prisoner who has a complaint concerning his treatment must exhaust his administrative remedies by writing directly to the Director of the Bureau of Prisons or through a similar procedure. See, e.g., Vida v. Cage, 385 F.2d 408 (6th Cir. 1967); Smoake v. Willingham, 359 F.2d 386, 387 (10th Cir. 1966); Green v. United States, 283 F.2d 687, 688 (3d Cir. 1960). While the plaintiffs have not attempted to pursue their complaint regarding their transfer through administrative channels, an affidavit from defendant Norman A. Carlson, the Director of the Bureau of Prisons, states that he personally decided to transfer the plaintiffs. Under these circumstances, the plaintiffs were not required to perform "the meaningless and plainly futile gesture" of appealing their transfers to defendant Carlson in order to maintain this suit. Sostre v. McGinnis, supra, 442 F.2d at 182; see Houghton v. Shafer, supra; Eisen v. Eastman, supra.

Consideration of the merits of the plaintiffs' claims relating to their administrative transfers must start with the federal statute which gives the Attorney General authority to transfer federal prisoners at any time. 18 U.S.C. § 4082. This authority has been redelegated to the Director of the Bureau of Prisons. 28 C.F.R. § 0.96(c). The courts will not interfere with the authorized exercise of the dis-

cretion to transfer in the absence of a showing that the transfer was so arbitrary and capricious as to be an abuse of discretion. Lawrence v. Willingham, 373 F.2d 731, 732 (10th Cir. 1967); see Chapman v. Scott, 10 F.2d 156, 159 (D. Conn. 1925), aff'd, 10 F.2d 690 (2d Cir.), cert. denied, 270 U.S. 657 (1926); Rodriguez-Sandoval v. United States, 409 F.2d 529, 532 (1st Cir. 1969); see also, Darsey v. United States, 318 F.Supp. 1346 (W.D. Mo. 1970).

The transfers of plaintiffs from Danbury to Springfield did not constitute an abuse of discretion. While the plaintiffs contend that they were transferred as a disciplinary measure, the record does not support this contention. To the contrary, it indicates that plaintiffs could not be hospitalized at Danbury pursuant to a Bureau of Prisons policy requiring hospitalization of prisoners on a hunger strike due to the fact that the hospital facilities there were inadequate for this purpose, and that in consequence of that inadequacy they were transferred for hospitalization to Springfield, where the hospital facilities were adequate for this purpose. Without speculating about the plaintiffs' motives for engaging in a hunger strike, the prison authorities could not sit idly by while the plaintiffs, in a headlong rush toward martyrdom, revelled in their self-inflicted risk to their health. The authorities took the action called for in this situation - the hospitalization of the plaintiffs. Since the plaintiffs were not transferred

as a disciplinary measure, there was certainly no necessity to provide them with notice of and a hearing concerning the transfers. The mere fact that the other prisoners on a hunger strike were not transferred falls far short of demonstrating that the prison authorities improperly discriminated against the plaintiffs by singling them out for punitive transfers. In determining the prisoners to be transferred, the sole distinction made by the prison authorities was between those who appeared firmly resolved to continue the hunger strike and those who did not. Such a distinction was not unreasonable in view of the time, effort and expense which transferring prisoners from Danbury to Springfield undoubtedly involved. Cf. Sharp v. Sigler, 408 F.2d 966, 972 (8th Cir. 1969). The plaintiffs were the only prisoners on a hunger strike who were transferred because they alone seemed determined to persist in the strike.

Nor can it be said that the failure to return five of the original plaintiffs to the Danbury Correctional Institution was not a proper exercise of discretion. One was transferred from the Springfield Medical Center to the Lewisburg Penitentiary rather than to Danbury because it was decided that Lewisburg was a more appropriate institution for him. Two others were kept at Springfield due to the fact that they resumed their hunger strike. The remaining two were kept at Springfield because they wanted to

enroll in certain programs there.

In short, the prison authorities did not abuse their discretion by transferring the plaintiffs from the Danbury Correctional Institution.

V.

Claims Relating to Segregated Confinement and Withholding of Good Time

There remain to be considered the claims of the plaintiffs relating to their segregated confinement and the withholding of good time from them.^{7/} The plaintiffs contend that their placement in segregated confinement and the withholding of good time from them by the Danbury Correctional Institution authorities, like the Parole Board's decision to rescind its orders granting plaintiffs Bach and Snyder parole, was an impermissible sanction imposed on them for the exercise of first amendment rights.

It is undisputed that after the plaintiffs were stopped from distributing leaflets, they were placed in the institution's Intensive Treatment Unit, a segregated status. It is also undisputed that hearings were subsequently held before the institution's Adjustment Committee concerning the plaintiffs' participation in the distribution of leaflets, the work stoppage and hunger strike, and that as a result of these hearings good time for the month of August was withheld from the plaintiffs because of their participation

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Under 18 U.S.C. § 4161, an inmate is entitled to the good conduct allowance when "he has faithfully observed all rules, and has not been subjected to punishment."

in the aforementioned activities.

There has been no showing that the plaintiffs exhausted their administrative remedies with respect to their segregated confinement and the withholding of good time from them. Before a prisoner can avail himself of judicial review for loss of good time, he must first exhaust his administrative remedies by applying to the Director of the Bureau of Prisons to restore his good time. Williams v. United States, 431 F.2d 873, 874 (5th Cir. 1970); Smoake v. Willingham, supra. A Bureau of Prisons policy statement specifically provides that prisoners shall be informed of their right to appeal a decision to withhold good time to the Director of the Bureau of Prisons. Bureau of Prisons Policy Statement No. 7400.6, at 3 (December 1, 1966). See also, 18 U.S.C. § 4166. Similarly in the case of a complaint by a prisoner concerning segregated confinement as well as in the cases involving other grievances of prisoners regarding their treatment by local prison administrators, resort must be had in the first instance to the Bureau of Prisons through available administrative channels. See Light v. United States, 430 F.2d 932, 933 (5th Cir. 1970); Paden v. United States, 430 F.2d 882, 883 (5th Cir. 1970); Vida v. Cage, supra at 409; Green v. United States, supra at 688. In the absence of a showing by the plaintiffs that they have made use of the available administrative channels in order to obtain redress of their alleged grievances regarding their place-

ment in segregated confinement and the withholding of good time from them, their application for relief in this regard cannot be entertained by the court.

VI.

Conclusion

Evidentiary matter outside the pleadings having been presented to the court without objection other than as noted, and not excluded; and the court having fully reviewed the pleadings, affidavits, briefs and other appropriate papers filed herein; and there appearing of record no genuine issue of material fact pertinent to the actions of the defendants complained of, for the reasons set forth above, the court holds that the moving defendants are entitled to judgment as a matter of law under the settled principles governing review of administrative action for abuse of discretion.

Accordingly, enter judgment for the defendants on all claims of all plaintiffs against all defendants, except that the claims of the plaintiffs relating to segregated confinement and withholding of good time are dismissed for failure of the plaintiffs to exhaust administrative remedies, with leave to renew them when they have.

SO ORDERED.

Dated at Hartford, Connecticut, this 27th day of December, 1971.


M. Joseph Blumenfeld
Chief Judge

DISTRICT OF CONNECTICUT

FIELD

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U.S. DISTRICT COURT
: NEW HAVEN, CONN.

-VS-

CIVIL ACTION NO.
B-376

JOHN MITCHELL, Attorney General of the
United States; NORMAN CARLSON, Director
of the Federal Bureau of Prisons; JOHN
J. NORTON, Warden of the Federal
Correctional Institution, Danbury,
Connecticut; DR. CICCONE, Director of
the Springfield Medical Center for
Federal Prisoners; GEORGE J. REED,
Chairman of the United States Board of
Parole, and all members of the United
States Board of Parole, WILLIAM F.
HOWLAND, JR., GERALD E. MURCH, WILLIAM
E. AMOS, MAURICE H. SIGLER, PAULA A.
TENNANT, CURTIS C. CRAWFORD, WILLIAM T.
WOODWARD, JR.; and RICHARD HEANEY,
Assistant Director, United States Bureau
of Prisons

JUDGMENT

This cause came on to be heard on defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56 and the plaintiffs' motion for an order dismissing the defendants' motion for summary judgment, all parties appearing by counsel, and the Court having fully reviewed the pleadings, affidavits, briefs and other appropriate papers on file in the case;

And the Court having filed its Memorandum of Decision on December 28th, 1971, holding that there is no genuine issue as to any material fact pertinent to the actions of the defendants complained of, and that the moving defendants are entitled to judgment as a matter of law under the settled principles governing review of administrative action for abuse of discretion;

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered for the defendant on all claims of all plaintiffs against all defendants on the merits, except that the claims of the plaintiffs relating to segregated confinement and withholding of good time are dismissed for failure of the plaintiffs to exhaust administrative remedies.

Dated at New Haven, Connecticut, this 7th day of January, 1972.



Clerk, United States District Court