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United States District Court, N.D. California.

Michael RHINEHART, Plaintiff,
v.
James GOMEZ and Charles Marshall, Defendants.

Nos. C 90–2335 BAC, C 92–0240. | July 5, 1994.

Opinion

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CAULFIELD, District Judge.

***1** Plaintiff, a California state prisoner, filed a *pro se* civil rights complaint under 42 U.S.C. § 1983, stating claims against defendants Gomez and Marshall for denial of exercise in violation of his Eighth Amendment rights, and for denial of due process by his retention in administrative segregation.

Defendants Gomez and Marshall filed a special report and a motion for summary judgment, asserting that plaintiff has received constitutionally adequate opportunity for exercise, and that there is sufficient evidence for and compliance with all due process requirements in retaining plaintiff in administrative segregation. For the following reasons, the court GRANTS defendants' motion for summary judgment as to plaintiff's claim regarding the denial of exercise. Defendants' motion is DENIED as it relates to plaintiff's due process claim regarding administrative segregation.

A. *Exercise*

Courts generally recognize that some form of outdoor exercise may be required by the Eighth Amendment. *E.g., Spain v. Procunier,* 600 F.2d 189, 190 (9th Cir.1979).[1] At least in the Ninth Circuit, the decisions recognizing this rule typically involve penal facilities in which inmates are confined in their cells for extended periods of time. *Toussaint v. Yockey,* 722 F.2d 1490, 1492–1493 (9th Cir.1984); *Spain,* 600 F.2d at 199–200.

In *Spain,* for example, the Ninth Circuit approved an order requiring one hour of exercise per day, five days per week. *Spain,* 600 F.2d at 199–200. In a similar case, the Ninth Circuit affirmed a preliminary injunction requiring limited outdoor exercise for inmates assigned to segregation. *Toussaint v. Yockey,* 722 F.2d at 1492.[2] The temporary denial of exercise, however, due to disciplinary or security reasons probably does not violate the Eighth Amendment. *Hayward v. Procunier,* 629 F.2d 599, 603 (9th Cir.1980), *cert. denied,* 451 U.S. 937; *Toussaint v. McCarthy,* 579 F.Supp. 1388, 1412 (N.D.Cal.1984). Furthermore, it is not cruel and unusual punishment to limit outdoor exercise to small, enclosed yards. *Peterkin v. Jeffes,* 855 F.2d 1021, 1031 (3d Cir.1988); *see also Sostre v. McGinnis,* 442 F.2d 178, 186 (2d Cir.1971) (en banc), *cert. denied,* 404 U.S. 1049 (1972).

Pelican Bay State Prison's Operational Procedures require that inmates in the Secure Housing Unit ("SHU") be allowed one and one-half hours of outdoor exercise per day. The provision of one and one-half hours of outdoor exercise per day, totaling ten and one-half hours per week, surpasses the figures found constitutional by other courts. *Spain v. Procunier,* 600 F.2d at 199–200; *Toussaint v. McCarthy,* 579 F.Supp. at 1412. Although plaintiff has chosen not to exercise, he has had the opportunity to do so. Defendants have not deprived plaintiff of his opportunity to exercise, and, indeed, have provided him with more than the constitutionally approved time to exercise if he wishes.

B. *Administrative Segregation*

***2** When prison officials initially determine to confine a prisoner to administrative segregation, the prisoner is entitled to several procedural due process protections. The inmate must receive an informal, non-adversarial review (within a reasonable time) of the available evidence before the decision to confine him to administrative segregation. He must also receive some notice of the charges against him and an opportunity to present his views to prison officials. *Hewitt v. Helms,* 459 U.S. 460, 476 (1983); *Toussaint v. McCarthy,* 801 F.2d 1080, 1100 (9th Cir.1986). In *Hewitt,* the Supreme Court held that a lesser quantum of process is due when a prisoner is placed in administrative segregation than is required by *Wolff.*[3] *Toussaint v. McCarthy,* 801 F.2d at 1099 (citations omitted).

Decisions to segregate prison gang members for an indeterminate term are subject to periodic review. It has been held that a review every 120 days satisfies due process concerns. *Toussaint v. McCarthy,* 926 F.2d 800, 803 (9th Cir.1990).

In *Toussaint v. McCarthy,* 801 F.2d at 1104, the court held that the decision to retain a prisoner in administrative segregation must be supported by the "some evidence" standard articulated in *Superintendent v. Hill,* 472 U.S.

445 (1985). There, the Supreme Court held that the findings of a prison disciplinary board resulting in the loss of a protected liberty interest must be supported by "some evidence in the record." *Id.* at 454. The *Hill* requirement is minimal. The Court stated that "the relevant question is whether there is *any* evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* at 455–56. The Ninth Circuit has followed the requirements of *Hill* and added that "there must be some indicia of reliability of the information that forms the basis for prison disciplinary actions." *Cato v. Rushen,* 824 F.2d 703, 705 (9th Cir.1987). The court also held that due process does not require the disclosure of the identity of any person providing information leading to the placement of a prisoner in segregation. *Toussaint v. McCarthy,* 801 F.2d at 1101.

Finally, use of a polygraph examination did not violate prisoners' due process rights and was held to be a useful tool in determining gang membership where the exam was not the sole basis for a segregation decision and was not treated as unfailingly accurate. *Toussaint v. McCarthy,* 926 F.2d at 802–803. The *Toussaint* cases thus circumscribe the constitutional entitlements of prisoners segregated from the prison population for an indefinite time due to prison gang affiliation.

Current state regulations governing the placement and retention of prison gang members in segregated housing provide procedures in excess of those required by the Constitution.[4] California Code of Regulations, title 15 ("CCR"), section 3321, also defines and provides for the use of confidential information. The California Department of Corrections uses a Confidential Information Disclosure form (Form 1030) to inform an inmate of the existence and reliability of confidential information. The criteria for establishing the reliability of a confidential source on the Form 1030 are derived from CCR section 3321(c).

***3** The California Department of Corrections prohibits gang membership and activities in prison. CCR, section 3032. It is undisputed that the segregation of prison gang members serves a legitimate penological purpose. Gang members engage in narcotics trafficking, fatal stabbings and other acts of premeditated violence in prison. These groups have been determined to have a serious and detrimental effect on prison security. *See e.g., Turner v. Safley,* 482 U.S. 78, 91–92 (1987).

It would appear that plaintiff has been in administrative segregation for a number of years because defendants believe him to be a gang member. In opposition to the current motion, plaintiff denies membership in a gang. Defendants have put forth no specific evidence supporting their claim that plaintiff is a gang member. Defendants contend that such evidence is contained in the prison logs, which are by and large illegible.[5] If facts which support defendants' position are contained in the logs, it would be in defendants' interests to have the logs transcribed in a legible form with copies of the originals attached. Summary judgment cannot be granted on the record currently before the court.

CONCLUSION

For the foregoing reasons,

1. Defendants motion for summary judgment is GRANTED as to plaintiff's exercise. Plaintiff's exercise claim is DISMISSED.

2. Defendant's motion for summary judgment is DENIED as to plaintiff's due process claim.

3. On February 11, 1994, plaintiff filed a motion for discovery order. It is not clear from plaintiff's filing whether or not he served a discovery request on defendants or otherwise sought to informally resolve discovery disputes. In the interest of moving this matter along, however, the court will construe plaintiff's filing as a motion to compel. Accordingly, plaintiff's motion is GRANTED with respect to interrogatories 2, 7, 12 and 15. Plaintiff's request is DENIED as to all other interrogatories. Plaintiff's motion to compel as to the request for admissions is DENIED. Plaintiff's questions are not in the form of admissions. Plaintiff's request for documents is GRANTED as to requests 1, 4 and 8. Plaintiff's requests are DENIED as to all other requests for the production of documents. Defendants are to respond to plaintiff's discovery request within twenty (20) days from the date of this order.

4. Plaintiff's *ex parte* request, filed March 24, 1994, regarding access to the prison law library is DENIED.

5. These two cases raise substantially the same or overlapping claims. Accordingly, the clerk of the court is directed to close the file in case no. C 92–0240 BAC.

6. No later than sixty (60) days from the date of this order, defendants may file a renewed motion for summary judgment setting forth the factual support for plaintiff's administrative segregation as outlined above.

IT IS SO ORDERED.

Footnotes

[1] The discussion in *Spain* regarding exercise has been interpreted to require an *opportunity* for exercise during confinement. *McKinney v. Anderson,* 924 F.2d 1500, 1507 (9th Cir.1991). Other circuits have similarly held. *Mitchell v. Rice,* 954 F.2d 187, 192 (4th Cir.1992); *Anderson v. Coughlin,* 757 F.2d 33, 35 (2d Cir.1985); *Patterson v. Mintzes,* 717 F.2d 284, 289 (6th Cir.1983); *Ruiz v. Estelle,* 679 F.2d 1115, 1152 (5th Cir.1982).

[2] When the district court in *Toussaint* issued its permanent injunction, it required a minimum of eight hours per week of outdoor exercise for segregation prisoners. *Toussaint v. McCarthy,* 579 F.Supp. 1388, 1412, 1424, *rev'd on other grounds,* 801 F.2d 1080 (9th Cir.1986), *cert. denied,* 181 U.S. 1069 (1987). The district court suggested that outdoor exercise might not have been required if the segregation prisoners were "free to exercise or even walk about indoors for any significant period of time each day...." *Id.,* at 1412.

[3] The *Wolff* procedures apply when the state withdraws sentence reduction credits earned by a prisoner for disciplinary reasons.

[4] State regulations provide for written notice of the reasons for segregation, assistance from an investigative employee under certain circumstances, the opportunity to request witnesses at a classification hearing, and a written classification decision. *See* Cal.Code Regs., tit. 15, §§ 3336(d), 3337(a), 3337(b) and 3338(i). These practices exceed the protections required by the Constitution.

[5] The prison logs are attached as exhibits to the declaration of Azar Bolandgray; they do not specifically make such a contention.