

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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KENNETH FORTUNE,

FILED

Plaintiff

AUG 30 1993

v.

PER

CIVIL ACTION NO. 92-1624

JOSEPH D. LEHMAN, et al.,

DEPUTY CLERK

(CONABOY, J.)

Defendants

(DURKIN, M.J.)

REPORT AND RECOMMENDATION

This case is before the court on the defendants' motion for summary judgment. (Doc. No. 10).

The plaintiff, an inmate at the State Correctional Institution, Huntingdon, PA, filed this civil rights action pursuant to 42 U.S.C. § 1983, alleging a violation of his constitutional rights. Financial information having been received, the plaintiff was permitted to proceed in forma pauperis and process was issued. (Doc. No. 5).

The plaintiff names as defendants Joseph D. Lehman, Commissioner of the Pennsylvania Department of Corrections; William J. Love, Superintendent of SCI-H; A.S. Williamson, Deputy Superintendent of SCI-H; Major J. H. Brown of SCI-H; S.G. Polte, Director of Education at SCI-H; L.R. Heaster, Correctional Counselor Supervisor at SCI-H; C. Martin, an Accountant at SCI-H and Dean Quinn, a Corrections Counselor II at SCI-H.

On January 11, 1993, the defendants filed an answer to the plaintiff's complaint. (Doc. No. 8). On June 1, 1993, after a period of inactivity, the magistrate judge issued an order directing that dispositive motions be filed within thirty days of

the date of the order or it would be recommended that the case be set down for trial. (Doc. No. 9). On August 2, 1993, the defendants filed a motion for summary judgment, along with a brief in support of said motion. (Doc. Nos. 10 & 11).

Although the plaintiff was advised by practice order dated November 24, 1992, of the procedures to be followed in responding to motions filed in this case, and the consequences of failing to do so, (Doc. No. 4), as of the date of this report, the plaintiff has neither filed a brief in opposition to the defendants' motion for summary judgment, nor requested an extension of time within which to do so. Thus, the plaintiff has failed to properly oppose the defendants' motion.

It is noted, however, that the motion for summary judgment is well-taken. The plaintiff alleges that he received "other" report on September 10, 1992. He states that "at the other report hearing [on September 15, 1992] plaintiff had requested representation and witnesses which was turned into Block Officer on 9/10/92 at 5:23 p.m." Plaintiff claims, however, that he was "not permitted and/or allowed to be represented and to present testimony from requested witnesses", and "was placed on Administrative Custody". (Doc. No. 1).

The plaintiff claims that he appealed the decision of his placement on Administrative Custody to defendant, Superintendent William J. Love, which was upheld. He further states that on October 14, 1992, he received a Program Review Committee monthly review at which was determined that plaintiff needed to be

continued in Administrative Custody. Plaintiff states that he does not belong in Administrative Custody and that he is being continued there "for no other reason but to punish plaintiff beyond the permissible sanction issue for the misconduct(s)". Thus, plaintiff seeks injunctive relief as well as compensatory and punitive damages. (Id.).

To pierce these allegations, the defendants' statement of facts and supporting affidavit and documentation, which has not been adequately controverted by the plaintiff, as required by Fed.R.Civ.P. 56(e), indicates that on September 10, 1992 the plaintiff was interviewed by Mr. Cooper in preparation for his upcoming regular monthly review by the Program Review Committee (PRC). During the interview, it was established that the PRC wanted to remove plaintiff from Disciplinary Custody (DC) status to Administrative Custody (AC) status. However, the PRC was not ready to move him directly to general population. Mr. Cooper wrote Other Report #519559 to memorialize this interview on September 10, 1992. The plaintiff was then placed on Administrative Custody at this time until he was to be seen by the PRC. Although this review was to be only a monthly PRC review, the plaintiff wanted to call witnesses and asked for representation by another inmate. These requests were denied because this was not a disciplinary hearing. (Doc. No. 10, Statement of Material Facts).

The PRC review hearing was held on September 15, 1992 and the plaintiff attended in person. Concerns about the plaintiff's aggressive action, poor adjustment, two incidents of mental

decomposition and periods of mental instability were noted and because of them the PRC placed the plaintiff in Administrative Custody. (Id).

The PRC has reviewed his status on October 14, 1992 and approximately every thirty days since. On May 19, 1993, the plaintiff was transferred to SCI-Graterford. (Id.).

With respect to the plaintiff's allegation that he was denied the opportunity to be represented or to call witnesses, the only time that an inmate may seek assistance from another inmate or from a staff member or seek to call witnesses on his own behalf is at a misconduct proceeding where his limited liberty interests are implicated. See Wolff v. McDonnell, 418 U.S. 539 (1974). Here, not only was the plaintiff's liberty not threatened, it was expanded. He was released from disciplinary custody to administrative custody.

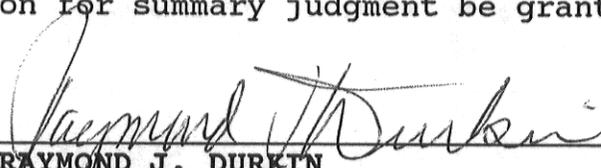
The PRC reports and the Affidavit of Melvin P. Cooper, the Inmate Program Manager at SCI-Huntingdon show that the plaintiff has been rightly kept in administrative custody. Aggressive action, poor adjustment and mental instability are more than sufficient reasons to keep him in administrative custody. There is nothing arbitrary or capricious about the PRC's decision and, therefore, it must be respected by the court. Edwards v. White, 501 F. Supp. 8, 11 (M.D. Pa. 1979), affirmed, 633 F.2d 209 (3d Cir. 1983). Subjective evaluations of an inmate's risk to security may justify continued A.C. confinement. Mims v. Shapp, 744 F.2d 954 (3d Cir. 1984).

Moreover, this Court has held that the DOC's regulations pertaining to administrative custody which have been in effect at all times relevant here did not create any constitutionally protected liberty interest and, therefore, no process is due relating to placement or retention in that custodial status. Wright v. Lehman, et al., No. 3:CV-92-0662 (M.D. Pa.) (Memorandum and Order of Judge Conaboy dated March 11, 1993) (Doc. No. 11, copy attached). Thus, the uncontroverted documentation submitted by the defendants clearly demonstrates that there is no triable issue of facts, and that the defendants did not violate the plaintiff's constitutional rights.

On the basis of the foregoing,

**IT IS RESPECTFULLY RECOMMENDED THAT**

the defendants' motion for summary judgment be granted.

  
\_\_\_\_\_  
RAYMOND J. DURKIN  
United States Magistrate Judge

Dated: August 27, 1993

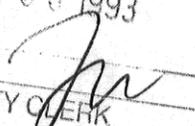
IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KENNETH FORTUNE, :  
Plaintiff :  
v. : CIVIL ACTION NO. 92-1624  
JOSEPH D. LEHMAN, et al., : (CONABOY, J.)  
Defendants : (DURKIN, M.J.)

NOTICE

TO: Jerome Foerster, Deputy Attorney General  
Office of Attorney General  
Strawberry Square--15th Floor  
Harrisburg, PA 17120

Kenneth Fortune, AY-9297  
SCI-Huntingdon  
Drawer R  
Huntingdon, PA 16652

FILED  
SCANTON  
AUG 30 1993  
PER   
DEPUTY CLERK

NOTICE IS HEREBY GIVEN that the undersigned has entered  
the following: Report and Recommendation of Magistrate  
Judge Durkin dated 8/27/93.

Any party may obtain a review of the magistrate judge's above  
proposed determination pursuant to Rule 904.2, M.D.PA, which  
provides: 904.2 Review of Case-Dispositive Motions and Prisoner  
Litigation - 28 U.S.C. Sec. 636(b)(1)(B).

Any party may object to a magistrate judge's proposed  
findings, recommendations, or report, under subsections 901.4,  
.5, and .6 of these rules, supra, within ten (10) days after  
being served with a copy thereof. Such party shall file with the  
Clerk of Court, and serve on the magistrate judge and all  
parties, written objections which shall specifically identify the  
portions of the proposed findings, recommendations or report to  
which objection is made and the basis for such objections. The  
briefing requirements set forth in Rule 904.1 shall apply. A  
judge shall make a de novo determination of those portions of the  
report or specified proposed findings or recommendations to which  
objection is made and may accept, reject, or modify, in whole or  
in part, the findings or recommendations made by the magistrate  
judge. The judge, however, need conduct a new hearing only in  
his discretion or where required by law, and may consider the  
record developed before the magistrate judge, making his own

determination on the basis of that record. The judge may also receive further evidence, recall witnesses, or recommit the matter to the magistrate judge with instructions.

  
RAYMOND J. DURKIN  
United States Magistrate Judge

Dated: August 27, 1993

UNITED STATES DISTRICT COURT  
FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

\* \* MAILING CERTIFICATE OF CLERK \* \*

Re: 3:92-cv-01624 Fortune v. Lehman

True and correct copies of the attached were mailed by the clerk  
to the following:

Kenneth Fortune  
SCI-H  
SCI at Huntingdon  
AY-9297  
Drawer R  
1100 Pike Street  
Huntingdon, PA 16654-1112

Jerome Thomas Foerster, Esq.  
Office of Attorney General  
Strawberry Square  
15th Floor  
Harrisburg, PA 17120

cc:

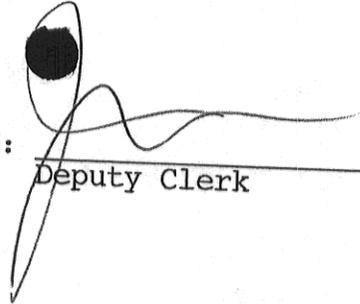
Judge	( )	
Magistrate Judge	( )	
U.S. Marshal	( )	
Probation	( )	
U.S. Attorney	( )	
Atty. for Deft.	( )	
Defendant	( )	
Warden	( )	
Bureau of Prisons	( )	
Ct Reporter	( )	
Ctroom Deputy	( )	
Orig-Security	( )	
Federal Public Defender	( )	
Summons Issued	( )	with N/C attached to complt. and served by: U.S. Marshal ( ) Pltf's Attorney ( )
Order to Show Cause	( )	with Petition attached & mailed certified mail to: US Atty Gen ( ) PA Atty Gen ( ) DA of County ( ) Respondents ( )
Other_____	( )	

LANCE S. WILSON, Clerk

DATE:

8/30/93

BY:

  
Deputy Clerk