STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
LOCATION: AUGUSTA
Docket No. AP-14-57

DOUGLAS BURR,

Petitioner,

v.

RODNEY BOUFFARD, et al,

Respondent.

ORDER ON RESPONDENTS' MOTION TO DISMISS

Respondents Maine Department of Corrections ("Department"), David Allan, Harold Abbott, Kenneth Vigue, Mark Engstfield, Troy Ross, and Rodney Bouffard move to dismiss the Petition for Review and Complaint of Petitioner Douglas Burr. Count I of the Petition is styled as a M.R. Civ. P. 80C appeal, which requests that the court find the Respondents have continuously and systemically violated the polices and procedures of the Maine Department of Corrections ("Department") and requests that: 1) Mr. Burr be re-classified to medium custody, removed from the Special Management Unit ("SMU"), and transferred to the Windham Correctional Center, 2) have his contact visits re-instated, 3) have his good time re-instated, 4) have the disciplinary infraction expunged from his file, and 5) award him costs and attorney's fees. Count II of the Petition is a "42 U.S.C. § 1983" claim against the Respondents seeking injunctive relief to transfer Mr. Burr from SMU to the Maine Correctional Center. Count II also seeks the payment of Mr. Burr's attorney's fees incurred in bringing the present action. Count III is another 42 U.S.C. §

1983 claim asserted against respondent Mark Engstfield, a corporal at the Maine State Prison, claiming he falsified a disciplinary report causing injury to Mr. Burr.

Respondents assert Count I of the Petition should be dismissed as moot because the Department decided to reverse its decision, restore Mr. Burr's lost good time, refund the fine imposed against him, and expunge his disciplinary record. In other words, Respondents claim the matter is moot because Mr. Burr received all possible relief requested. Respondents also assert that Count II of the Petition fails to state a claim upon which relief can be granted because the disciplinary proceedings and sanctions imposed on Mr. Burr do not implicate his due process rights.[1]

Mr. Burr contends the appeal is not moot because the Department continues to hold him in the SMU based upon the now expunged disciplinary complaint. Mr. Burr further claims his 42 U.S.C. § 1983 claim survives because his confinement in the SMU constitutes an "atypical and significant hardship" triggering the due process clause.

I. Background

Mr. Burr is an inmate at the Maine State Prison. On or about June 12, 2014, Deputy Warden Troy Ross directed that Mr. Burr be removed from the general population at the Maine State Prison and placed on Emergency Observation Status ("EOS") in the SMU. Mr. Burr contends that SMU is the euphemistic name for solitary confinement at the Maine State Prison. Later that day, at 5:45 p.m. Corporal Engstfield allegedly wrote a disciplinary report at the request of Deputy Warden Ross, which ostensibly identified the reasons why Mr. Burr was to be placed in the SMU. Mr. Burr alleges he was not provided a copy of the paperwork placing him on EOS in the SMU

[1] Respondents do not move to dismiss Count III of the Petition and Complaint.

and did not sign any paperwork acknowledging that he was being placed on EOS in violation of Department Policy 20.1. Respondents contend Mr. Burr was written up for the disciplinary offense of trafficking.

Mr. Burr also alleges the Shift Supervisor, Captain Ken Vigue, did not acknowledge Corporal Engstfield's report until June 19, 2014 at 18:30 hours. This was more than 168 hours after the alleged behavior was observed or discovered and in violation of Policy No. 20.1.

Corporal Engstfield's report allegedly identified Mr. Burr's Housing Unit as MSP/SMU/B Pod/B122/B, but Mr. Burr was not assigned to that unit until five days after Corporal Engstfield wrote the report. Furthermore, Corporal Engstfield allegedly based the evidence supporting his report as stemming from a "Confidential Report." Corporal Engstfield, however, indicated that he secured the "Confidential Report" on June 19, 2014, the same date the disciplinary report was acknowledged as received by Captain Vigue. Mr. Burr contends that given the timing of the events, it appears that Corporal Engstfield falsified the information on the June 12, 2104 disciplinary report, which led to Mr. Burr's placement in the SMU.

Respondents contend that a disciplinary hearing was held on June 20, 2014, at which Mr. Burr was found guilty of trafficking and sanctioned the loss of 20 days good time, 20 days disciplinary cell restrictions, and fined $100.00. Mr. Burr timely appealed the decision pursuant to the Administrative Procedures Act, 5 M.R.S. § 11001 and M.R

Civ. P. 80C.[2] Mr. Burr contends the untimely nature of this hearing required Captain Vigue to dismiss the Disciplinary Report under Policy No. 20.1.

Following Captain Vigue's review of the Disciplinary Report, the Department scheduled a disciplinary hearing for July 8, 2014. The hearing was subsequently postponed until July 14, 2014, but Mr. Burr allegedly did not receive a continuance form. The hearing officer unit manager David Allan, who allegedly had not received the required training by the State of Maine Attorney General's Office, conducted the hearing. Hearing Officer Allan and Captain Harold Abbot allegedly refused to provide Mr. Burr an opportunity to review and contest the evidence used against him. Hearing Officer Alan subsequently found Mr. Burr guilty of a disciplinary infraction.

Mr. Burr timely appealed the July 14, 2014 decision and on August 8, 2014, Deputy Warden Troy Ross denied Mr. Burr's appeal and affirmed the recommended decision of the disciplinary officer. As noted above, Mr. Burr contends Deputy Warden Ross was the individual who had directed that a disciplinary report be brought against him in the first place. Mr. Burr timely appealed Deputy Warden Ross's decision.

Following the appeal, the Department decided to reverse the aforementioned decision. The Department contends that it restored Mr. Burr's lost good time, refunded the fine imposed, and expunged the discipline from Mr. Burr's record.[3] Furthermore, the Department contends it will reimburse Mr. Burr's filing fee if the case is dismissed. The Department has not, however, permitted Mr. Burr's wife to visit, or moved him out of SMU. As of February 3, 2015, Mr. Burr remained in the SMU and Respondents' counsel

[2] Mr. Burr does not mention the June 20, 2014 disciplinary hearing, but does not dispute it took place.

[3] In the process of expunging Mr. Burr's disciplinary record, the Department claims it expunged the underlying administrative record.

indicated there were no plans to remove Mr. Burr therefrom. To the contrary, counsel for Respondents represented that Mr. Burr could be held in the SMU indefinitely.

II. Argument

Respondents move to dismiss Mr. Burr's Petition and Complaint, "[h]owever, if a party files a motion to dismiss and documents outside the pleadings are presented to, and not excluded by, the trial court, [it is] treat[ed] as one for a summary judgment." *Libner v. Maine County Comm'rs Ass'n*, 2004 ME 39, ¶ 7, 845 A.2d 570. Here, while the Respondents did not submit any documents outside the pleadings, their entire motion to dismiss is premised on a contention that is outside the pleadings. Namely, that following Mr. Burr's appeal, the Department decided to reverse its decision imposing disciplinary sanctions on him. Because Mr. Burr does not dispute that the Department reversed its decision, the court will accept this fact as true for purposes of the present motion.

Accordingly, Mr. Burr must establish a prima facie case for each element of his claims in order to survive Respondents' motion. *Bonin v. Crepeau*, 2005 ME 59, ¶ 8, 873 A.2d 346. In adjudicating Respondents motion, the court views the evidence in the light most favorable to Mr. Burr and must draw all reasonable inferences in his favor. *Inkel v. Livingston*, 2005 ME 42, ¶ 4, 869 A.2d 745.

A. Whether Count I of the Petition is Moot

Respondents contend the Petition is moot because the Department restored the lost good time, refunded the fine imposed, and expunged Mr. Burr's disciplinary record. The Department also notes that it will reimburse Mr. Burr for any filing fee he has paid. Accordingly, the Department contends Mr. Burr's Petition is moot as he received all the relief the court could have ordered.

Mr. Burr counters that the Petition is not moot because he remains in the SMU and has not been allowed to see his wife for over 180 days. He challenges the Department's alleged justification for continuing to impose restrictions under Department Policy No. 20.1, which provides, in pertinent part:

> Conduct constituting a disciplinary violation may result in changing a prisoner's custody level, housing status and/or programs, or the taking of any other action based on a determination that such action is in the interest of the prisoner, the interest of the prison population, or the interest of safety, security, or orderly management of the facility, regardless of whether the disciplinary process is initiated and if initiated, regardless of whether the conduct leads to an informal resolution or formal resolution of the violation. A dismissal or a finding of not guilty does not preclude taking such action. Such action is not in the nature of punishment.

03-201 C.M.R. ch. 20, §20.1, Procedure F. Mr. Burr contends that regardless of what the Department calls the continued restrictions allegedly imposed under Policy No. 20.1, they constitute punishment.

Mr. Burr further contends that the court need not reach the aforementioned issue because it is sufficient that the Department "expunged" the discipline from Mr. Burr's record, but continues to impose the aforementioned restrictions. If the event was expunged, and thus never happened, there is no basis for the Department's continued imposition of restrictions.

Respondents reply that the continued restrictions are permissible because 34-A M.R.S. § 3032 only requires that documentation of a disciplinary complaint be expunged if the prisoner is found not guilty or the complaint is otherwise withdrawn. Respondents contend Mr. Burr's argument that when the Department expunges a disciplinary complaint it is required to treat the incident as if it never happened represents a "somewhat naïve view of the necessities of prison management." Accordingly, the

Department contends the restrictions are warranted and supported by Department Policy No. 20.1.

The Law Court has stated that courts "should decline to decide issues which by virtue of valid and recognizable supervening circumstances have lost their controversial vitality." *Eastern Maine Medical Center v. Maine Health Care Fin. Comm'n.*, 601 A.2d 99, 101 (Me. 1992) (quotation omitted). "An issue is deemed to be 'moot' when there is no 'real and substantial controversy, admitting of specific relief through a judgment of conclusive character.'" *Anthem Health Plans of Maine, Inc. v. Superintendent of Ins.*, 2011 ME 48, ¶ 4, 18 A.3d 824 (quotation omitted). "When determining whether a case is moot, [the court] examine[s] whether there remain sufficient potential effects flowing from resolution of the litigation to justify application of the court's limited resources." *Id.* (quotation omitted).

The relief available to Mr. Burr in the present matter is governed by the Administrative Procedures Act, which provides that the court may affirm an agency's decision, remand the case for further proceedings, or reverse or modify the decision upon certain enumerated grounds. 5 M.R.S.A. § 1107(4).

Here, the determination of whether Mr. Burr's Petition is moot turns on whether he could be entitled to relief beyond that already granted by Respondents. In particular, the court must assume the allegations in Mr. Burr's Petition are true, view those allegations in the light most favorable to Mr. Burr, and determine whether the court could order Mr. Burr be removed from SMU and have his visitations with his wife reinstated. Stated differently, the court must decide whether the Department can continue to impose

the aforementioned restrictions on Mr. Burr pursuant to Policy No. 20.1.[4] For the reasons discussed below, the court finds that the Petition is not moot.

As Respondents point out, Policy No. 20.1 grants the authority to change a prisoner's custody level, housing status, or take other action—regardless of the outcome of the discipline process—if it is in the interest of the prisoner, the prison population, or in the interest of safety, security, or orderly management of the facility. Under this broad grant of discretion and authority, the Department can transfer Mr. Burr to SMU and cut off his visits with his wife if it is for one of the interests listed in Policy No. 20.1. While counsel for Respondents stated at oral argument that ending Mr. Burr's visits with his wife and placement in the SMU were carried out in the interest of safety, Respondents have failed to point to any conduct on the part of the Petitioner which justifies the continuing restrictions pursuant to Policy No. 20.1. While such a justification could emerge after factual development, the Court is not persuaded that Policy No. 20.1 on its face authorizes the Respondents to indefinitely place Mr. Burr in the SMU. Therefore, depending on factual development, the Court could have the authority to reverse the Department's actions.[5]

Further, the court is not convinced that even if Respondents presented evidence demonstrating their rationale for imposing the restrictions on Mr. Burr that this, alone, would moot Mr. Burr's Petition. This is because Policy No. 20.1 conceives of

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[4] At the hearing, counsel for Respondents went so far as to assert that Mr. Burr could be held in the SMU indefinitely, for no reason.

[5] Although not necessary for the disposition of this motion, the court agrees with respondents that 34-A M.R.S.A. § 3032(6)(I) simply requires that "all documentation relating to the complaint must be expunged" if the prisoner is "cleared of the charges in a complaint, or the complaint is withdrawn." The statute does not speak to its impact on any restrictions imposed prior to the resolution of the complaint.

disciplinary sanctions, including disciplinary segregation, as having limits. *See* 03-201 C.M.R. ch. 20, § 20.1, Procedure D. In particular, Policy No. 20.1 explains that

> The purpose of this section is to define and grade violations in order to limit official discretion and to give fair warning to the prisoner of what conduct is prohibited and what the possible consequences of disciplinary violations are. It is also the purpose of this section to prescribe punishments that are proportionate to the seriousness of the violation.

Id. at § 20.1, Procedure D(1). Policy No. 20.1 goes on to list the four classes of punishments that may be imposed upon a finding that a prisoner committed a disciplinary violation. *Id.* at § 20.1, Procedure D(8). The most serious of the classes carries with it a punishment of "[d]isciplinary segregation or disciplinary restriction or both, up to a total of thirty (30) days" and "[l]oss of privileges for no more than thirty (30) days." *Id.*[6] In light of the limitations imposed on discipline when a prisoner is found to have committed a disciplinary violation, it is debatable, certainly at this stage of the litigation and on this record, that Procedure F in Policy No. 20.1 was intended to go beyond those limitations when no violation is found. This interpretation is further supported by additional, detailed Department policies governing the placement of prisoner's in administrative segregation and/or protective custody. These policies suggest that placement in the SMU is a tightly regulated decision that cannot continue indefinitely based on an expunged disciplinary violation.

In particular, Policy No. 15.1 provides that a prisoner may be placed on administrative segregation if he or she meets one of four criteria:

a. The prisoner constitutes an escape risk in a less restrictive status;

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[6] Policy No. 20.1 does admit the possibility of disciplinary segregation lasting longer than 30 days, but that is only if the prisoner is found guilty of more than one charge and the punishments are applied consecutively. *Id.* at § 20.1, Procedure D(3).

b. The prisoner may pose a threat to the safety of others if in a less restrictive status;
c. The prisoner may pose a threat to his/her own safety if in a less restrictive status; or
d. There may be a threat to the safety of the prisoner if in a less restrictive status.

03-201 C.M.R. ch. 15, § 15.1. Procedure A(1), Procedure C(3). In addition to meeting one of the aforementioned criteria, Policy No. 15.1 lays out a number of requirements that must be met in connection with placing a prisoner on administrative segregation. These requirements include providing the prisoner with copies of the relevant paperwork supporting the prisoner's placement—and continued retention—in administrative segregation. *Id.* at § 15.1, Procedure C(5), (11), (12), (14).

Similarly, Policy No. 15.3 provides that an individual may be placed in protective custody based on:

a. Reports indicating the prisoner has been assaulted or that there is a substantial risk of the prisoner being assaulted;
b. Reports indicating that the prisoner has been threatened or harassed;
c. Reports indicating the prisoner is perceived as an informant or trial witness;
d. The circumstances of the prisoner's crime indicate that there is a substantial risk of the prisoner being threatened or harassed;
e. Reports indicating the prisoner has been or that there is a substantial risk of the prisoner being the victim of sexual assault or sexual harassment;
f. The prisoner's profile indicates that there is a substantial risk of the prisoner being victimized due to his/her chronological age or due to the prisoner's mental, psychological, social or physical level of functioning or characteristics.

03-201 C.M.R. ch. 15 § 15.3, Procedure A(4). The rationale for placing a prisoner in protective custody must be documented during the shift in which the placement occurs and, if the prisoner has not been removed from protective custody status, "the staff member who approved the placement shall ensure that the prisoner is served within seventy-two (72) hours of placement with written notification of the reasons for

placement and the date and time of the initial protective custody status review." *Id.* at § 15.3, Procedure A(5), (8). Furthermore, at a review of the prisoner's placement in protective custody by the prisoner's Unit Management, the rationale for placing the prisoner in protective custody must be read to him or her and the prisoner must be provided a copy of the Protective Custody Status Review Minutes form generated at the Unit Management team's review. *Id.* at § 15.3, Procedure A(13), (14), (17). If a decision placing the prisoner in protective custody status becomes final, the prisoner must be advised that he or she will remain on protective custody status unless the Chief Administrative Officer, or designee, decides to remove the prisoner from such status. *Id.* at § 15.3, Procedure A(18).

As noted above, Respondents cannot point to anything in the pleadings or otherwise that suggests that the above-described procedures were followed or even attempted. The Court therefore concludes that it could, depending on factual development, find that Petitioner is entitled to relief beyond what has already been afforded him by the Respondents, and that his claim under Count I is therefore not moot. Furthermore, as discussed in section B, *infra*, the Petition is not moot because Mr. Burr has made allegations, which taken as true, are sufficient to state a claim for relief for violation of his rights to due process under 42 U.S.C. §1983.

B. Whether Count II Alleges a Violation of Mr. Burr's Due Process Rights

Respondents contend that the disciplinary proceedings and sanctions imposed on Mr. Burr in this case do not implicate the protections of the Due Process Clause under *Sandin v. Conner*, 515 U.S. 472, 487 (1995) and, accordingly, fail to state a claim upon which relief can be granted pursuant to 42 U.S.C. § 1983. In support, Respondents point

to case law holding that state statutes and correctional regulations providing for notice and an opportunity to be heard in a disciplinary proceeding do not in themselves create a constitutional right in a 42 U.S.C. § 1983 action and that violation of a state law, even where arbitrary, capricious, or undertaken in bad faith does not in itself give rise to a denial of substantive due process under the Constitution.

Mr. Burr responds that *Sandin* acknowledges that solitary confinement for punitive purposes is a type of atypical, significant deprivation that triggers the Due Process Clause. Accordingly, Mr. Burr contends his confinement in the SMU implicates a liberty interest invoking the Due Process Clause and the Department's failure to comply with the mandatory prescriptions of Policy No. 20.1 deprived Mr. Burr of that interest. In addition, Mr. Burr asserts there is a significant question as to whether the extended length of his solitary confinement violates the Eighth Amendment prohibition on cruel and unusual punishment.

Respondents reply that Mr. Burr selectively cites to *Sandin*, which when read in its entirety does not acknowledge that solitary confinement for punitive purposes is a type of atypical, significant deprivation implicating a constitutional liberty interest. Indeed, in *Sandin* itself, the Supreme Court held that the prisoner's disciplinary placement in segregation in that case did not present the type of atypical, significant deprivation in which a State might create a liberty interest. *Sandin*, 515 U.S. at 485-86. Respondents also argue that a prison does not necessarily create a protected liberty interest when it adopts a mandatory policy. *Id.* at 483-84 (citations omitted).

Respondents further claim that the Supreme Court has recognized the authority of prison officials to place inmates in segregated confinement for administrative rather than

punitive reasons citing *Hewitt v. Helms*, 459 U.S. 460, 468 (1983) and *Kentucky Dep't. of Corrections v. Thompson*, 490 U.S. 454, 461 (1989)). Accordingly, Respondents contend that the Department's continued placement of Mr. Burr in the SMU and prohibition of visits from his wife do not violate his rights under the Due Process Clause and his claim under 42 U.S.C. § 1983 should be dismissed.

42 U.S.C. § 1983 provides, in pertinent part, that every person who, under color of statute, ordinance or regulation, causes any other person to suffer a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the injured party" in a lawsuit. One of the rights protected under section 1983 is the right to Due Process. The "Due Process Clause protects persons against deprivations of life, liberty or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). A liberty interest may arise from the Constitution itself, or it may arise from an expectation or interest created by state laws or policies. *Id.*

Prior to 1995, the existence and scope of an inmate's liberty interest, and therefore whether there was a due process violation, was determined by the language of the applicable regulations. *E.g. Matthews v. Wiley*, 744 F.Supp.2d 1159, 1171 (D. Colo. 2010). However, in *Sandin*, the United States Supreme Court held that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions, but whether the conditions "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. In other words, an inmate asserting a Due Process claim based on restrictive conditions of

confinement must show that the conditions constitute an "atypical and significant hardship" when compared to the ordinary incidents of prison life.

In *Sandin*, the prisoner was refused the ability to present witnesses during a disciplinary hearing and then sentenced to 30 days disciplinary segregation for his misconduct despite a regulation that instructed the committee to find guilt when a misconduct charge is supported by substantial evidence. 515 U.S. at 475-76. Applying the above-mentioned inquiry, *Sandin* determined that the prisoner's "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." *Id.* at 486. The Court explained that this was due in part to the fact that disciplinary segregation mirrored the conditions imposed on inmates in administrative segregation and protective custody. *Id.* The Court also found it noteworthy that the State expunged the prisoner's disciplinary record regarding the "high misconduct" charge nine months after the prisoner served his 30 days in segregation. *Id.* Thus, the Court found that the prisoner's confinement "did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction." *Id.* "Indeed, the conditions [at the prison] involve significant amounts of 'lockdown time' even for inmates in the general population" and as a result, the state's actions "in placing [the prisoner] there for 30 days did not work a major disruption in his environment." *Id.*; *see also Hewitt v. Helms*, 459 U.S. 460, 468 (1983) ("It is plain that transfer of an inmate to less amenable and more restrictive quarters for non-punitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence"). The Court also found some comfort in the fact that the prisoner "requested that he be placed in protective custody after he had been released from disciplinary

segregation" and that his "expectations have at times reflected a personal preference for the quietude of the [solitary confinement]." *Id.* at 486 n. 9.

In *Wilkinson*, the Supreme Court noted that courts have had a difficult time locating the appropriate baseline from which to measure what constitutes an atypical and significant hardship in a prison system under *Sandin*. 545 U.S. at 223. *Wilkinson* did not, however, resolve that issue because it found that assignment to the Ohio Supermax facility, known as the Ohio State Penitentiary ("OSP"), imposed an atypical and significant hardship under any plausible baseline. *Id.* at 223. This was because:

> For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, s reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP.

Id. at 223-24 (internal citations omitted).

Here, Mr. Burr has adequately alleged a violation of his Due Process rights regarding his continued confinement in the SMU. First, Mr. Burr has adequately alleged a liberty interest by asserting that he has been—and continues to be—held in solitary confinement since June 12, 2014.[7] The Petition categorizes Mr. Burr's placement in the SMU as equivalent to solitary confinement, but does not provide any additional details

[7] As noted, Respondents acknowledged at the hearing that Mr. Burr remains in the SMU and asserted that they could retain Mr. Burr in the SMU indefinitely.

regarding the conditions in the SMU. Department Policy Numbers 15.1 and 15.2, however, help to fill in this blank by setting forth certain conditions governing prisoners placed in administrative and disciplinary segregation. For example, similar to *Wilkinson*, the policies provide that prisoners are permitted out-of-cell exercise for only "one (1) hour per day, five (5) days per week, outdoor weather permitting, unless security or safety considerations dictate otherwise." 03-201 C.M.R. ch. 15, §§ 15.1, Procedure E(2)(i); 15.2. Procedure D(1)(i). In addition, prisoners are limited to one telephone call per week and one non-contact visit per week. *Id.* at §§ 15.1, Procedure E(2)(b), (c); 15.2, Procedure D(1)(b), (c). Unlike *Wilkinson*, and similar to *Sandin*, however, the policies provide that prisoners' living conditions in segregation shall "approximate those of general population prisoners regarding cell size, lighting, heat, and ventilation." *Id.* at §§ 15.1, Procedure E(2); 15.2, Procedure D(1). While the conditions in the SMU may not be as harsh as those in *Wilkinson*, this does not mean they do not give rise to a liberty interest because the conditions in *Wilkinson* imposed "an atypical and significant hardship under any plausible baseline." 545 U.S. at 223. In other words, *Wilkinson* does not represent a minimum standard that must be met or exceeded in order to establish an atypical and significant hardship. Instead, it represented a clear-cut case of an atypical and significant hardship. Accordingly, when the evidence is viewed in the light most favorable to Mr. Burr and all reasonable inferences are drawn in his favor, the court is satisfied that Mr. Burr's case has adequately alleged conditions which could, under *Wilkinson,* constitute an atypical and significant hardship within the correctional context. As the Supreme Court explained in *Wilkinson*, the allegedly harsh conditions of the SMU "may well be necessary and appropriate in light of the danger that [Mr. Burr]

pose[s]....That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance." 545 U.S. at 224.

Second, although not explicitly challenged by Respondents, the Petition has sufficiently alleged that the aforementioned liberty interest was deprived without sufficient process. In particular, the Petition alleges numerous violations of Policy No. 20.1 by the Respondents. For example, Mr. Burr alleges he did not have an opportunity to review and contest the alleged evidence against him and that information in the disciplinary report used against him was fabricated. Petition, ¶¶ 14-23, 28-33. Finally, as noted previously, Respondents have not articulated any reason or explanation as to why Mr. Burr continues to be held in the SMU in the wake of its decision to reverse and expunge the disciplinary proceedings against him.

Accordingly, the allegations in Count II of Mr. Burr's Petition and Complaint, taken in the light most favorable to Mr. Burr, adequately allege a constitutional claim against the Respondents under 42 U.S.C. § 1983, and are sufficient to survive Respondents' motion to dismiss.

The entry will be: Respondents' Motion to Dismiss Counts I and II is DENIED.

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to incorporate this Order by reference in the docket.

Dated: March 23, 2015

M. Michaela Murphy, Justice
Maine Superior Court

Date Filed 9/4/14 Kennebec County Docket No. AP-14-57

Action: Petition for Review 80C

J. Murphy

Douglas Burr vs. Rodney Bouffard, et al.

Plaintiff's Attorney	Defendant's Attorney
Eric Mehnert, Esq. PO Box 458 Orono, ME 0473	James Fortin, AAG 6 State House Station Augusta, ME 04333-0006

Date of Entry	
9/9/14	Petition for Review of Final Agency Action, filed (9/4/14). s/Mehnert, Esq.
11/25/14	Motion to Dismiss, filed 11/25/14. s/Fortin, AAG
12/19/14	Motion to Extend Time to File Plaintiff's Response to Defendants' Motion to Dismiss, filed. s/Mehnert, Esq.
1/7/15	ORDER, Murphy, J. (12/31/14) (re: Motion to Extend Time filed 12/19/14) Granted. Plaintiff's response to Motion to Dismiss due 1/2/15. Copy to Atty Mehnert and AAG Fortin
1/715	Petitioner's Response to Respondents' Motion to Dismiss, filed 1/5/15. s/Mehnert, Esq.
1/9/15	Hearing on Motion to Dismiss scheduled for 2/3/15 at 1:00 p.m. Notice of Hearing sent to Atty Mehnert and AAG Fortin
1/14/15	Reply to Response to Motion to Dismiss filed 1/12/15. s/Fortin, AAG
2/3/15	Hearing held, J. Murphy presiding. Eric Mehnert, Esq. and James Fortin, AAG Tape 2000, Index 4711-6490 Under advisement.
3/24/15	ORDER, Murphy, J. (3/23/15) Respondent's Motion to Dismiss counts I and II is DENIED. Copy to Atty Mehnert and AAG Fortin
3/31/15	Copy to repositories.