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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MONTE L. HANEY
Plaintiff,
v.
M. P. HERNANDEZ, et al.,
Defendants.

CASE NO. 1:10-cv-02134-LJO-BAM PC
FINDINGS AND RECOMMENDATIONS
RECOMMENDING GRANTING
DEFENDANTS’ MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM
(ECF Nos. 36, 40, 42)
/ OBJECTIONS DUE WITHIN THIRTY DAYS

Findings and Recommendations on Defendants’ Motion to Dismiss

I. Procedural History

Plaintiff Monte L. Haney is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action was filed on May 10, 2010. (ECF No. 1.) On February 10, 2012, Plaintiff’s complaint was screened and an order issued recommending dismissing certain claims and defendants. (ECF No. 26.) On March 27, 2012, an order issued adopting the findings and recommendations; and Plaintiff was granted thirty days in which to file an amended complaint. (ECF No. 27.) Plaintiff filed a first amended complaint on April 4, 2012; and on April 6, 2012, an order issued finding service of the complaint appropriate. (ECF No. 28, 31.) On July 3, 2012, Defendants filed a motion to dismiss for failure to state a claim and a request for judicial notice. (ECF NO. 36, 37.) Plaintiff filed an opposition on July 23, 2012; and Defendants filed a reply on August 2, 2012. (ECF Nos. 40, 42.)

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1 **II. Allegations in First Amended Complaint**

2 Plaintiff's first amended complaint states:

3 On 1-23-07 [sic] Defendant M.P. Hernandez "intentionally" refused to
4 give me a witness for a CDC Administrative 115 then falsely documented
5 on the 115 did [sic] I did not request a witness in violation of 15 CCRS
6 335(e) and CA Penal Code 3118.1. As a result of the Defendants conduct
7 my due process rights were violated because I was found guilty of a 115
8 without a witness present at my hearing to give a statement on my behalf.
9 On 2-8-07 [sic] I requested again that the Defendant allow me to have a
witness but the Defendant refused again. On 2-21-07 [sic] Plaintiff
informed Defendant D.J. Ruiz that Defendant M.P. Hernandez refused to
question my witness and previous to the 115 hearing I requested a witness
attend the hearing but Defendant D.J. Ruiz found me guilty of the 115 on
2-21-07 [sic] despite the fact I informed him Defendant M.P. Hernandez
refused to question my witness.

10 (Am. Compl. 4,¹ ECF No. 28.)

11 **III. Motion to Dismiss**

12 **A. Motion to Dismiss Legal Standard**

13 In considering a motion to dismiss for failure to state a claim, the court generally considers
14 only the pleadings and must accept as true the allegations in the complaint. Marder v. Lopez, 450
15 F.3d 445, 448 (9th Cir. 2006); Shaver v. Operating Engineers Local 428 Pension Trust Fund, 332
16 F.3d 1198, 1201, 1203 (9th Cir. 2002). A court may consider evidence that the complaint relies on,
17 where the complaint refers to a document that is central to the complaint and no party questions the
18 authenticity of the document. Marder, 450 F.3d at 448; see United States v. Ritchie, 342 F.3d 903,
19 908 (9th Cir. 2003). Additionally, the court is to "construe the pleading in the light most favorable
20 to the party opposing the motion, and resolve all doubts in the pleader's favor." Watison v. Carter,
21 668 F.3d 1108, 1112 (9th Cir. 2012); Hebbe v. Pliler, 627 F.3d 338, 340 (9th Cir. 2010). Pro se
22 pleadings are held to a less stringent standard than those drafted by attorneys. Hebbe, 627 F.3d at
23 342.

24 A motion to dismiss for failure to state a claim is properly granted where the complaint lacks
25 "a cognizable legal theory" or "sufficient facts alleged under a cognizable legal theory."
26 Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting Balistreri v. Pacifica

27 _____
28 ¹All references to pagination of specific documents pertain to those as indicated on the upper right corners
via the CM/ECF electronic court docketing system.

1 Police Dep't., 901 F.2d 696, 699 (9th Cir. 1988)). There are two requirements to survive a motion
2 to dismiss for failure to state a claim under Rule 12(b)(6). While accepting factual allegations in the
3 complaint as true, the court is not required to accept legal conclusions as true, and the factual
4 allegations must state a plausible claim for relief. Davis v. HSBC Bank of Nevada, N.A., 691 F.3d
5 1152 (9th Cir. 2012); Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011).

6 **B. Defendants' Position**

7 Defendants argue that Plaintiff has failed to identify a liberty interest for which the protection
8 of the Due Process Clause is sought. (Memorandum of Points and Authorities in Support of Motion
9 to Dismiss 7, ECF No. 36-1.) Additionally, even if a liberty interest were to exist, Plaintiff received
10 all procedural protections required to satisfy due process. Plaintiff received written notice of the
11 charges at least 24 hours before the hearing; the hearing officer provided written notice of the
12 reasons for the guilty finding ; and Plaintiff indicated that he understood the charges and was ready
13 to proceed at the hearing. (Id. at 4-5.) The right to call witnesses at a rule violation hearing is not
14 absolute and Defendant Ruiz determined that the witness statements had been considered and there
15 was no need for the witnesses to be present. Finally, the report reflects there was some evidence of
16 Plaintiff's guilt. (Id. at 5.)

17 **C. Plaintiff's Position**

18 Plaintiff argues that Defendant Hernandez specifically told him that he could not have a
19 witness present at the hearing and was required to interview his witnesses which she did not do.
20 (Opp. 5, ECF No. 40.) Plaintiff claims a state created liberty interest due to the state regulations.
21 Plaintiff argues that Mrs. Lever overheard a conversation with another inmate and mistakenly
22 thought that Plaintiff had called her a derogatory word. (Id. at 7.) Plaintiff requested the inmate he
23 was having a conversation with be present at the hearing. (Id. at 7-8.) Plaintiff alleges that the rule
24 violation report will be permanently in his Central File ("C-file"), he is serving a life sentence, and
25 this could be used as an excuse to deny his parole. (Id. at 8, 17.)

26 Plaintiff claims the failure to call his key witness violates due process. (Id. at 10, 13-14.)
27 Further, Defendant Hernandez falsified the report because she lied by stating that Plaintiff did not
28 request his witness. (Id. at 11.) Plaintiff contends that even though two witnesses were interviewed

1 the failure to interview his key witness violates due process. (Id. at 15.)

2 **D. Discussion**

3 **1. Due Process Legal Standard**

4 Prisoners retain rights that are not inconsistent with incarceration, including the right to due
5 process. Wolff v. McDonnell, 418 U.S. 539,555-56, 94 S. Ct. 2963, 2974 (1974). The Due Process
6 Clause protects against the deprivation of liberty without due process of law. Wilkinson v. Austin,
7 545 U.S. 209, 221, 125 S. Ct. 2384, 2393 (2005). In order to state a cause of action for a deprivation
8 of due process, a plaintiff must first identify a liberty interest for which the protection is sought.
9 Wilkinson, 545 U.S. at 221, 125 S. Ct. at 2393. The Due Process Clause does not confer a liberty
10 interest in freedom from state action taken within a prisoner’s imposed sentence. Sandin v. Conner,
11 515 U.S. 472, 480, 115 S. Ct. 2293, 2298 (1995). However, a state may “create liberty interests
12 which are protected by the Due Process Clause.” Sandin, 515 U.S. at 483-84, 115 S. Ct. at 2300.
13 A prisoner has a liberty interest protected by the Due Process Clause only where the restraint
14 “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of
15 prison life.” Keenan v. Hall, 83 F.3d 1083, 1088 (9th Cir. 1996) (quoting Sandin, 515 U.S. at 484,
16 115 S. Ct. at 2300).

17 **2. Liberty Interest**

18 Plaintiff has failed to allege a liberty interest to implicate the protections of the Due Process
19 Clause. Plaintiff contends that the rule violation report contains a false statement, however the Due
20 Process Clause itself does not contain any language that grants a broad right to be free from false
21 accusations, but guarantees certain procedural protections to defend against false accusations.
22 Freeman v. Rideout, 808 F.2d 949, 951 (2nd Cir. 1986). Plaintiff does not have a liberty interest
23 against false statements in the report.

24 Plaintiff claims that he has a liberty interest in having a witness at the hearing based upon the
25 language of the statute, however a state created liberty interest only exists where the deprivation
26 “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of
27 prison life.” Keenan, 83 F.3d at 1088. In Wolff, the Supreme Court recognized that the right to call
28 witness is not unfettered and prison officials have the discretion to refuse to allow witnesses at prison

1 disciplinary hearings. Wolff, 418 U.S. at 566-67, 94 S. Ct. at 2980. While the limited right to call
2 witness exists as a procedural component of due process it is not a liberty interest in itself. See
3 Serrano v. Francis, 345 F.3d 1071, 1078 (9th Cir. 2003) (procedural protections of due process apply
4 only where the disciplinary action implicates a protected liberty interest).

5 Nor has California created a liberty interest in an inmate being allowed to call witnesses at
6 a rule violation hearing.² Plaintiff's is incorrect that Wilkinson v. Austin, 545 U.S. 209, 125 S. Ct.
7 2384 (2005), stands for the proposition that after Sandin a liberty interest can be created by a state
8 based upon the language of the statute. The issue in Wilkinson was the process due to an inmate
9 before being placed in a super max facility which imposed more severe restrictions on the inmate.
10 Wilkinson, 545 U.S. at 220, 125 S. Ct. at 2393. In Wilkinson, the Supreme Court stated that after
11 Sandin, it is not the language of the statute that creates a liberty interest, but whether the conditions
12 the inmate is subjected to "impose atypical and significant hardship on the inmate in relation to the
13 ordinary incidents of prison life." Wilkinson, 545 U.S. at 223, 125 S. Ct. at 2394. In the prison
14 context, these interests are generally those that pertain to an inmate's liberty. See Sandin 515 U.S.
15 at 483-484, 115 S. Ct. at 2300 (transfer to mental hospital, involuntary medication of psychotropic
16 drugs). Plaintiff does not have a liberty interest in having witnesses at a rule violation hearing.

17 Finally, Plaintiff argues that a liberty interest exists because this rule violation report shall
18 be included in his C-file and could potentially be used in a parole determination. However, in
19 deciding whether to release an inmate on parole, the parole board considers a myriad of
20 considerations and the chance that a rule violation will be used in the consideration is too attenuated
21 to invoke the procedures of due process. Sandin, 515 U.S. at 487, 115 S. Ct. a 2302; Meachum v.
22 Fano, 427 U.S. 215, 229 n.8, 96 S. Ct. 2532 (1976). The possibility that an inmate may be denied
23 parole at some later date is too speculative and does not rise to the denial of a liberty interest.
24 Burnsworth v. Gunderson, 179 F.3d 771, 774 n.3 (9th Cir. 1999); Arroyo v. Grounds, No. 4:10-cv-
25 01007-SBA (PR), 2011 WL 4726465, at *4 (N.D.Cal. Sept. 30, 2011).

27 ²The regulations state that "[a]n inmate may request that friendly and adverse witnesses attend the hearing."
28 Cal. Code Regs., tit. 15 §3315(e). However, the hearing officer may deny the request where the witness would be
endangered, has no relevant or additional information, or is unavailable. Cal. Code Regs., tit. 15 § 3315(e)(1)(A-C).

1 Plaintiff has failed to allege a liberty interest to invoke the protections of due process and
2 Defendants' motion to dismiss for failure to state a claim should be granted.

3 **3. Rule Violation Hearing**

4 Further, in this instance Plaintiff received the process that he was due in this instance.
5 "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights
6 due a defendant in such proceedings does not apply." Wolff, 418 U.S. at 556, 115 S. Ct. at 2975.
7 To comply with due process, the prisoner must be provided with 1) written notice of the charges
8 against him prior to the hearing; 2) a brief period, at least twenty four hours, to prepare for the
9 hearing; 3) a written statement by the factfinder regarding the evidence relied on and the reason for
10 the finding; and 4) an opportunity to seek assistance where the inmate is illiterate or the issues are
11 complex. Wolff, 418 U.S. at 563-70, 94 S. Ct. at 2978-82. At issue here is Plaintiff's allegation that
12 he was not allowed a specific witness at the rule violation hearing.

13 As a general rule, the court may not consider any material outside the pleadings in ruling on
14 a Rule 12(b)(6) motion. United States v. Corinthian Colleges, 655 F.3d 984, 998 (9th Cir. 2011).
15 However, material that is attached to the complaint may be considered, as well as "unattached
16 evidence on which the complaint 'necessarily relies' if : (1) the complaint refers to the document;
17 (2) the document is central to plaintiff's claim; and (3) no party questions the authenticity of the
18 document." Corinthian Colleges, 655 F.3d at 999. The Court shall incorporate by reference the rule
19 violation report and hearing report which Plaintiff attached as an exhibit to his original complaint
20 and includes with his objection.

21 Plaintiff alleges, without identifying the inmate, that he requested an inmate be interviewed
22 and called to testify at the hearing. The record indicates that Plaintiff was questioned by Defendant
23 Hernandez for the rule violation investigation and stated he wanted every inmate in the library on
24 the day in question to be called as witnesses at the rule violation hearing. Two witnesses were
25 interviewed in preparing the rule violation report. (ECF No. 40 at 33.)

26 Defendant Hernandez interviewed two inmates as part of the investigation. Inmate Glass
27 stated that Plaintiff was talking to another inmate and not to the law librarian. Inmate Parks stated
28 that Plaintiff was just asking for supplies and the law librarian began yelling. (Id. at 34.) Contrary

1 to Plaintiff's assertion that the hearing officer failed to state why the witnesses were not called at the
2 hearing, the hearing officer considered the statements of each of the inmate witnesses and determined
3 that they did not have any additional information to offer. For this reason, Defendant Ruiz denied
4 the request to call the witnesses at the hearing. (Id. at 31.)

5 Plaintiff also argues that the failure to allow live witnesses at the hearing violated his due
6 process rights. Plaintiff's reliance on Mitchell v. Dupnik, 75 F.3d 517 (9th Cir. 1996), is misplaced.
7 In Mitchell the prisoner was a pretrial detainee and alleged that the jail had a de facto policy of
8 denying inmate witnesses at rule violation hearings. Mitchell, 75 F.3d at 520-21. The court found
9 that although the jail policy stated that witnesses were to be called at hearings the jail officials always
10 refused to call witness inmates, and a blanket denial of permission is impermissible. Id. at 525.
11 Wolff requires that the request for witnesses be considered on a case by case analysis of the
12 witnesses and the institutional security concerns involved. Id. Similarly, Bartholomew v. Watson,
13 665 F.2d 915 (9th Cir. 1982), dealt with a policy that was a blanket prohibition against calling a
14 certain category of witnesses at a rule violation hearing. Bartholomew, 665 F.2d at 918.

15 In the instant case, the denial of Plaintiff's witnesses was made on a witness by witness basis
16 and Defendant Ruiz stated his reason for the denial of the witness on the hearing report. The denial
17 of live witnesses at the hearing was not the result of a policy, but was based on the determination
18 of the hearing officer that the witnesses had no further information. Due process requires allowing
19 witnesses when permitting the inmate to present witnesses will not be unduly hazardous to
20 institutional safety or correctional goals. Wolff, 418 U.S. at 566, 94 S. Ct. at 2980. The prison
21 official has the discretion to refuse to call witnesses, "whether it be for lack of relevance, lack of
22 necessity, or the hazards presented in individual cases." Wolff, 418 U.S. at 566, 94 S. Ct. at 2980.

23 Plaintiff states that he was denied his key witness at the hearing. Although Plaintiff claims
24 that he requested the inmate that he was speaking to at the time of the incident be interviewed, the
25 report indicates that he wanted all inmates in the law library the day of the incident to be called as
26 witnesses. (ECF No. 40 at 34.) Neither the reports nor Plaintiff's opposition identify any inmate
27 that was requested and not called at the hearing. To the extent that Plaintiff is alleging that
28 Defendant Hernandez was required to conduct a further investigation to determine who his witness

1 was, this is beyond what due process requires. See Gastellum v. Sandor, No. 5:10-cv-00152-DDP,
2 2011 WL 7962488, at *6 (C.D.Cal. Mar. 30, 2011) (no constitutional requirement for investigative
3 officer to investigate the matter to inmate’s satisfaction to comply with due process); Low v. Stanton,
4 No. 2:05-cv-02211-MCE-DAD, 2009 WL 737053, at *7 (E.D.Cal. Mar. 19, 2009) (denying inmate’s
5 broad request to call all inmates housed in the housing unit as witnesses was reasonable and
6 appropriate where inmate failed to identify specific inmate witnesses); Soto v. Runnels, No. 3:02-cv-
7 0109-MMC (PR), 2002 WL 31236204, at *2 (N.D.Cal. Oct. 2, 2002) (finding prison officials are
8 not required to locate a witness).

9 Further, this inmate would not provide any additional information than was already before
10 the hearing officer. Plaintiff testified that he used the language at issue but it was directed to another
11 inmate. This was the testimony of inmate Glass. The witness that Plaintiff states he wanted to have
12 present would not have offered any additional pertinent information and the hearing officer had the
13 discretion to refuse to call witnesses where the testimony would be repetitive and the witness would
14 have nothing further to add. Bostic v. Carlson, 884 F.2d 1267, 1271-72 (9th Cir. 1989). The hearing
15 officer accepted the testimony of the two witnesses included in the rule violation report. Plaintiff
16 was not denied due process by the failure to call his unidentified witness at the hearing.

17 **4. Some Evidence Standard**

18 Finally, in order to meet the minimum requirements of procedural due process there must be
19 some evidence to support the findings of the disciplinary board. Superintendent v. Hill, 472 U.S.
20 445, 454, 105 S. Ct. 2768, 2773 (1985). The some evidence standard is met if there is “any
21 evidence in the record that could support the conclusion reached by the disciplinary board.” Hill,
22 472 U.S. at 455-56, 105 S. Ct. at 2774.

23 In this instance, there is some evidence of the rule violation in the record. Plaintiff admitted
24 that he used the language at issue, but disputed that it was directed at the law librarian. (ECF No.
25 40 at 31.) The law librarian stated that she was “100 percent absolutely certain” that Plaintiff
26 directed the language at her. (Id. at 33-34.) Plaintiff was ultimately found guilty of disrespect
27 toward staff. (Id. at 32.) Because Plaintiff received the process that was due and there is some
28 evidence of Plaintiff’s guilt, Plaintiff’s claim for a violation of due process is unable to be cured by

1 amendment, and Defendants' motion to dismiss for failure to state a claim should be granted,
2 without leave to amend.

3 **IV. Conclusion and Recommendation**

4 The Court finds that Defendants' motion to dismiss for failure to state a claim should be
5 granted. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely
6 given when justice so requires," Fed. R. Civ. P. 15(a), and "[l]eave to amend should be granted if
7 it appears at all possible that the plaintiff can correct the defect," Lopez v. Smith, 203 F.3d 1122,
8 1130 (9th Cir. 2000) (internal citations omitted). However, the Court finds that the deficiencies
9 outlined above are not capable of being cured by amendment, and therefore leave to amend should
10 not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Noll v. Carlson, 809 F. 2d 1446, 1448-49 (9th Cir.
11 1987).

12 Accordingly, IT IS HEREBY RECOMMENDED that Defendants' motion to dismiss, filed
13 July 3, 2012, be GRANTED, and this action be dismissed for failure to state a claim upon which
14 relief could be granted.

15 These findings and recommendations will be submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30)
17 days after being served with these findings and recommendations, Plaintiff may file written
18 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
19 Findings and Recommendations." The parties are advised that failure to file objections within the
20 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d
21 1153 (9th Cir. 1991).

22 IT IS SO ORDERED.

23 **Dated: October 24, 2012**

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE