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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

REGINALD WHEELER,
Plaintiff,
v.
M. HODGES, et al.,
Defendants.

No. 2:13-cv-2526 MCE KJN P

ORDER and FINDINGS AND
RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, proceeding pro se, with a civil rights action pursuant to 42 U.S.C. § 1983. On June 29, 2015, plaintiff filed a motion for temporary restraining order and preliminary injunction. Plaintiff contends that he has an upcoming parole hearing on October 8, 2015, and argues that if the rules violation report (“RVR”) at issue is allowed to be among the factors considered at such hearing, the Board could set his next parole consideration hearing from three to 15 years from now. As set forth below, the undersigned recommends that plaintiff’s motion be denied, but finds that in light of the delays in addressing plaintiff’s claims, a more expedited scheduling of the case may be warranted.

II. Background

On December 6, 2013, this action was removed from San Joaquin County Superior Court. (ECF No. 1.) Defendants waived personal service of summons on August 7, 2014, and on

1 September 8, 2014, filed a motion to stay. (ECF Nos. 21, 22.) On March 11, 2015, this action
2 was stayed pending resolution of plaintiff's petition for writ of habeas corpus in Wheeler v. Price,
3 Case No. 2:14-cv-0521 MCE KJN (E.D. Cal.). (ECF No. 28.)¹ On May 28, 2015, the Court of
4 Appeals for the Ninth Circuit clarified that claims challenging prison disciplinary proceedings are
5 cognizable in habeas only if such claims would necessarily spell speedier release. Nettles v.
6 Grounds, 2015 WL 3406160, at *1 (9th Cir. May 28, 2015). Thus, the undersigned recommended
7 that plaintiff's habeas petition be dismissed for lack of habeas jurisdiction. Price, 2:14-cv-0521
8 MCE KJN (ECF No. 21). On June 18, 2015, the stay in the instant action was lifted, and
9 defendants were directed to file a responsive pleading within thirty days. (ECF No. 29.) On June
10 29, 2015, plaintiff filed the instant motion.

11 Plaintiff is serving a sentence of life with the possibility of parole based on his conviction
12 for kidnap for the purpose of robbery and robbery. The inmate locator website for the California
13 Department of Corrections and Rehabilitation ("CDCR") reflects that he was admitted to CDCR
14 custody on August 31, 1982. Plaintiff has had at least two parole consideration hearings, one in
15 March of 2007, and another on November 15, 2012, at which it appears he stipulated to a three
16 year continuance of the hearing. Price, Case No. 2:14-cv-0521 MCE KJN (ECF No. 10 at 4-5.)

17 On January 23, 2012, plaintiff received an RVR, Log #12-03-35-P-4, for introduction of
18 dangerous contraband to a state prison -- possession of cell phones. He was found guilty of the
19 RVR and assessed a 90 day loss of credit. In the second amended complaint, plaintiff alleges that
20 defendants Vivero and Cano violated plaintiff's procedural due process rights in connection with
21 the RVR hearing held on April 3, 2012.

22 III. Standards for Injunctive Relief

23 Plaintiff seeks a temporary restraining order. A temporary restraining order is an
24 extraordinary and temporary "fix" that the court may issue without notice to the adverse party if,
25 in an affidavit or verified complaint, the movant "clearly show[s] that immediate and irreparable

26
27 ¹ A court may take judicial notice of court records. See, e.g., Bennett v. Medtronic, Inc., 285
28 F.3d 801, 803 n.2 (9th Cir. 2002) ("[W]e may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue") (internal quotation omitted).

1 injury, loss, or damage will result to the movant before the adverse party can be heard in
2 opposition.” Fed. R. Civ. P. 65(b)(1)(A). The purpose of a temporary restraining order is to
3 preserve the status quo pending a fuller hearing. See Fed. R. Civ. P. 65. It is the practice of this
4 district to construe a motion for temporary restraining order as a motion for preliminary
5 injunction. Local Rule 231(a); see also Aiello v. OneWest Bank, 2010 WL 406092 at *1 (E.D.
6 Cal. Jan. 29, 2010) (“Temporary restraining orders are governed by the same standard applicable
7 to preliminary injunctions.”) (internal quotation and citations omitted).

8 The party requesting preliminary injunctive relief must show that “he is likely to succeed
9 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that
10 the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v.
11 Natural Res. Def. Council, 555 U.S. 7, 20 (2008). The propriety of a request for injunctive relief
12 hinges on a significant threat of irreparable injury that must be imminent in nature. Caribbean
13 Marine Serv. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

14 Alternatively, under the so-called sliding scale approach, as long as the plaintiff
15 demonstrates the requisite likelihood of irreparable harm and can show that an injunction is in the
16 public interest, a preliminary injunction may issue so long as serious questions going to the merits
17 of the case are raised and the balance of hardships tips sharply in plaintiff’s favor. Alliance for
18 Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-36 (9th Cir. 2011) (concluding that the “serious
19 questions” version of the sliding scale test for preliminary injunctions remains viable after
20 Winter).

21 The principal purpose of preliminary injunctive relief is to preserve the court’s power to
22 render a meaningful decision after a trial on the merits. See 9 Charles Alan Wright & Arthur R.
23 Miller, Federal Practice and Procedure § 2947 (3d ed. 2014). Implicit in this required showing is
24 that the relief awarded is only temporary and there will be a full hearing on the merits of the
25 claims raised in the injunction when the action is brought to trial. In cases brought by prisoners
26 involving conditions of confinement, any preliminary injunction “must be narrowly drawn,
27 extend no further than necessary to correct the harm the court finds requires preliminary relief,
28 and be the least intrusive means necessary to correct the harm.” 18 U.S.C. § 3626(a)(2).

1 IV. Analysis

2 A. Success on the Merits

3 Plaintiff refers to a “defective” RVR, and contends the “tainted material” should not be
4 allowed to be used at the upcoming parole hearing, or allowed to “enter into other documents,”
5 but he fails to show how his procedural due process rights were violated, and why he believes he
6 will succeed on the merits. (ECF No. 30 at 1-2.) Plaintiff states that there “has now been enough
7 information and material presented related to this matter.” (ECF No. 30 at 1.) While many
8 documents were submitted in his habeas action, such documents have not been filed in this case.
9 None of the defendants in this action were named in the habeas action and do not have benefit of
10 such filings. Defendants are represented by different counsel than respondent in the habeas
11 action. In addition, the instant action is a civil rights action, with different procedures, standards,
12 and scheduling than those governing the habeas action. Moreover, this case is in the beginning
13 stage -- indeed, defendants have not yet filed a responsive pleading. It is too early in these
14 proceedings for the court to determine whether plaintiff will succeed on the merits of his due
15 process claims, and plaintiff’s motion fails to demonstrate that he will.

16 B. Irreparable Injury

17 Plaintiff’s primary focus in his motion is the alleged injury he will suffer if his motion is
18 not granted. Plaintiff argues that if he is not granted injunctive relief, he will suffer another
19 postponement of his parole hearing, and, liberally construed, any hearing would be prejudiced by
20 the Board’s review of the allegedly defective RVR. Plaintiff suggests that once the Board
21 considers the RVR at issue here, it will impact future parole hearings, and may cause him to be
22 incarcerated longer.

23 The Supreme Court’s “frequently reiterated standard requires plaintiffs seeking
24 preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.”
25 Winter, 555 U.S. at 22; American Trucking Ass’ns v. City of Los Angeles, 559 F.3d 1046, 1052
26 (9th Cir. 2009) (“a plaintiff must show that an irreparable harm is likely, not merely possible,
27 before a preliminary injunction may be issued.”), reversed on other grounds, American Trucking
28 Ass’ns v. City of Los Angeles, 596 F.3d 602 (9th Cir. 2010).

1 California's parole scheme contemplates that a prisoner sentenced to a term of life with
2 the possibility of parole must be found suitable for parole before a parole date can be set.
3 California Penal Code § 3041(b), and related implementing regulations, set forth criteria for
4 determining whether a prisoner is suitable for parole. See Cal. Code Regs. tit. 15, § 2402. The
5 prisoner must be found unsuitable and denied a parole date if, in the judgment of the panel, he
6 will pose an unreasonable danger to society if released. Cal. Code Regs. tit. 15, § 2402(a).
7 Section 2402(c) sets forth the circumstances tending to show unsuitability, which includes such
8 factors as: the commitment offense, which includes evaluation of how the victim was injured,
9 how the offense was carried out, and the motive for the crime; previous record of violence;
10 unstable social history; psychological factors; and the prisoner's institutional behavior. Cal. Code
11 Regs. tit. 15, § 2402(c). Section 2402(d) sets forth the circumstances tending to indicate
12 suitability and states that "[t]he circumstances are set forth as general guidelines; the importance
13 attached to any circumstance or combination of circumstances in a particular case is left to the
14 judgment of the panel." Cal. Code Regs. tit. 15, § 2402(d). These circumstances include no
15 juvenile record, a stable social history, signs of remorse, the prisoner's motivation for the crime,
16 lack of criminal history, age, understanding and future plans, and institutional behavior. Id. The
17 Board enjoys wide discretion in determining whether and when plaintiff will be released on
18 parole. Skinner v. Switzer, 562 U.S. 521, 535 n.13 (2011).

19 Because there are multiple factors that the Board takes into account in deciding whether or
20 not plaintiff is suitable for parole, the undersigned cannot find that plaintiff will suffer irreparable
21 injury if his motion for injunctive relief is not granted. Plaintiff has not addressed the above
22 factors and shown that if the instant RVR were expunged his institutional record would be
23 positive and it is likely that he would be found suitable for parole. Indeed, at the November 15,
24 2012 Board hearing, the District Attorney noted that plaintiff's psychological evaluation and the
25 counselor's report both "talk[] about three CDC 115s that the inmate ostensibly got in 2010,"
26 one of which was appealed. (ECF No. 30 at 7.) Thus, even if the 2012 RVR were expunged, the
27 record reflects plaintiff has sustained at least two other RVRs.

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1 In addition, plaintiff previously stipulated to a three year continuance of his 2012 parole
2 hearing so that he could challenge the instant RVR. There is no indication that resolution of the
3 2012 RVR was required for him to proceed with the 2012 parole hearing. Plaintiff points to
4 nothing that would prevent him from proceeding with the October 8, 2015 parole hearing, and
5 inform the Board that his challenge to the 2012 RVR was delayed due to circumstances beyond
6 his control. Finally, as noted by plaintiff’s counsel at the 2012 Board hearing (ECF No. 30 at 6),
7 plaintiff could seek to advance a future parole hearing if the 2012 RVR is successfully expunged
8 through this action after October 8, 2015. Gilman v. Schwarzenegger, 638 F.3d 1101, 1105 (9th
9 Cir. 2011) (“a prisoner may request an advance hearing by submitting a written request that
10 ‘set[s] forth the change in circumstances or new information that establishes a reasonable
11 likelihood that consideration of the public safety does not require the additional period of
12 incarceration,’” quoting Cal. Code Regs. tit. 15, § 3041.5(d)(1).).

13 For all of the above reasons, plaintiff has not made a clear showing that irreparable injury
14 is likely absent preliminary injunctive relief.

15 C. Conclusion

16 Because plaintiff fails to demonstrate success on the merits or irreparable injury, the court
17 declines to address the remaining prongs of Winter, and finds that plaintiff’s motion for
18 preliminary injunctive relief should be denied.² Given the nature of these proceedings, absent a
19 dramatic change in circumstances, plaintiff may not file another motion for a preliminary
20 injunction or temporary restraining order in this action.

21 V. Future Scheduling

22 The record reflects that plaintiff first filed his civil rights complaint challenging the 2012
23 RVR on August 23, 2013, in the San Joaquin County Superior Court. (ECF No. 1-2 at 2.)
24 Through no fault of plaintiff, almost two years have passed. Thus, it appears that some form of
25 expedited scheduling may be in order, absent objections by the parties. Given the straightforward

26 ² Plaintiff included a notice claiming that a hearing on his motion “will be possibly held on
27 Monday, 7/27/15, at 9:30 am, or whatever time that the Court deems appropriate.” (ECF No. 30-
28 1 at 1.) Plaintiff is advised that all motions are heard on the papers, without oral argument, unless
the court orders otherwise. Local Rule 230(1); see also ECF No. 18 at 3. No hearing will be held.

1 nature of plaintiff's due process claims against defendants Cano and Vivero, the nature and scope
2 of discovery is unclear, and if the parties anticipate filing dispositive motions, it may be that the
3 filing of such motions could be advanced. Therefore, defendants are directed to file a status
4 report addressing such issues along with their responsive pleading. Thereafter, plaintiff shall file
5 a status report addressing such issues.

6 V. Conclusion

7 In accordance with the above, IT IS HEREBY ORDERED that:

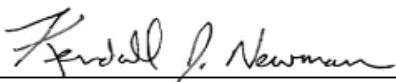
8 1. On or before July 20, 2015, defendants shall file a status report addressing the nature
9 and scope of discovery, and the time needed in which to complete it; and whether a pretrial
10 motion is contemplated and, if so, the type of motion and the time needed to file the motion and
11 complete the time schedule set forth in Local Rule 230(l); and

12 2. Twenty-one days after defendants file their status report, plaintiff shall file his status
13 report addressing the same issues.

14 IT IS RECOMMENDED that plaintiff's motion for injunctive relief (ECF No. 30) be
15 denied.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
21 objections shall be filed and served within fourteen days after service of the objections. The
22 parties are advised that failure to file objections within the specified time may waive the right to
23 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24 Dated: July 6, 2015

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27 KENDALL J. NEWMAN
28 UNITED STATES MAGISTRATE JUDGE

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