

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY J. COOK,  
Plaintiff,

vs.

MATTHEW CATE, et al.,  
Defendants.

No. C 12-06265 EJD (PR)

ORDER OF DISMISSAL WITH LEAVE  
TO AMEND

Plaintiff, a state prisoner at Pelican Bay State Prison, filed the instant civil rights action in pro se pursuant to 42 U.S.C. § 1983. Plaintiff’s motion for leave to proceed in forma pauperis will be granted in a separate written order.

**DISCUSSION**

**A. Standard of Review**

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is

1 immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be  
2 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
3 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
5 elements: (1) that a right secured by the Constitution or laws of the United States was  
6 violated, and (2) that the alleged violation was committed by a person acting under the  
7 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

8 **B. Plaintiff's Claims**

9 Plaintiff was validated as a gang member in 2011. Plaintiff does not challenge that  
10 validation, rather an active/inactive review of his gang membership in 2012, that involved  
11 a cell search where his address book was confiscated and not returned. As a result,  
12 Plaintiff remains in the Secured Housing Unit. Plaintiff states two pieces of evidence  
13 were used in the revalidation process, he was allowed to offer a written rebuttal to the  
14 evidence and there was an interview and later various classification hearings and gang status  
15 updates. Plaintiff alleges the evidence used was insufficient, and was actually just one  
16 piece of evidence, the hearings are conducted in a rote fashion and the confiscation and  
17 use of his address book was improper and violated his right to communicate with family  
18 and friends.

19 Changes in conditions of confinement may amount to a deprivation of a state-  
20 created and constitutionally-protected liberty interest, provided the liberty interest in  
21 question is one of “real substance,” see Sandin v. Conner, 515 U.S. 472, 477, 484-87  
22 (1995), and, in particular, where the restraint “imposes atypical and significant hardship  
23 on the inmate in relation to the ordinary incidents of prison life,” see id. at 484. In  
24 Superintendent v. Hill, 472 U.S. 445, 455 (1985), the Supreme Court held that  
25 disciplinary proceedings do not satisfy due process requirements unless there is “some  
26 evidence” in the record to support the findings of the prison disciplinary board. The  
27 Ninth Circuit requires that “some evidence” also support a decision to place an inmate in  
28 segregation for administrative reasons. See Toussaint v. McCarthy, 801 F.2d 1080, 1104

1 (9th Cir. 1986). This standard applies to placement in a SHU for gang affiliation. Bruce  
2 v. Ylst, 351 F.3d 1283, 1287-88 (9th Cir. 2003) (noting that any one of three pieces of  
3 evidence -- a sheriff's department report that prisoner was a gang member, a probation  
4 report that prisoner's codefendant was a gang member, and a statement from a prison  
5 informant -- would constitute "some evidence"). The standard is met if there was some  
6 evidence from which the conclusion of the administrative tribunal could be deduced. See  
7 Toussaint, 801 F.2d at 1105 (citing Hill, 472 U.S. at 455). Ascertaining whether the  
8 standard is satisfied does not require examination of the entire record, independent  
9 assessment of the credibility of witnesses or weighing of the evidence. See id. Instead,  
10 the relevant question is whether there is any evidence in the record that could support the  
11 conclusion reached. See id.

12 The Ninth Circuit also requires that the evidence relied upon by prison disciplinary  
13 boards contain "some indicia of reliability," Cato v. Rushen, 824 F.2d 703, 705 (9th Cir.  
14 1987), but has not directly considered whether a corresponding need for evidentiary  
15 reliability exists when prison officials segregate an inmate for administrative reasons.<sup>1</sup>  
16 Some district courts have extended the reliability requirement to the administrative  
17 context, however, holding that "the evidence relied upon to confine an inmate to the SHU  
18 for gang affiliation must have 'some indicia of reliability' to satisfy due process  
19

---

20  
21 <sup>1</sup> If the information relied upon by the disciplinary committee are the statements of an  
22 unidentified informant, due process requires that the record contain: (1) some factual  
23 information from which the committee can reasonably conclude that the information was  
24 reliable and (2) a prison official's affirmative statement that safety considerations prevent  
25 the disclosure of the informant's name. See Zimmerlee v. Keeney, 831 F.2d 183, 186  
26 (9th Cir. 1987), cert. denied, 487 U.S. 1207 (1988). Reliability may be established by: (1)  
27 the oath of the investigating officer appearing before the committee as to the truth of his  
28 report that contains confidential information, (2) corroborating testimony, (3) a statement  
on the record by the chairman of the committee that he had firsthand knowledge of  
sources of information and considered them reliable based on the informant's past record,  
or (4) in camera review of the documentation from which credibility was assessed. See  
id. at 186-87.

1 requirements.” Madrid v. Gomez, 889 F. Supp. 1146, 1273-74 (N.D. Cal. 1995); see  
2 Jones v. Gomez, No. C 91-3875 MHP, 1993 WL 341282, \*3-4 (N.D. Cal. Aug. 23, 1993)  
3 (order denying summary judgment) (due process requires indicia of reliability due to high  
4 risk of false information by informants, inherent prisoner conflicts and necessity for  
5 independent factfinding by prison officials).

6 In this case Plaintiff has not identified any atypical and significant hardships that  
7 would call into question a constitutionally-protected liberty interest. Simply stating he  
8 was revalidated and remained in the Secured Housing Unit is insufficient. Moreover, the  
9 complaint describes in detail all the due process Plaintiff was provided and while he  
10 disagrees with the evidence there appears to be “some evidence” for the revalidation.

11 **CONCLUSION**

12 For the foregoing reasons, the Court orders as follows:

13 1. The complaint is DISMISSED with leave to amend. Within **twenty-eight (28)**  
14 **days** of the date this order is filed, Plaintiff shall file an amended complaint using the  
15 court’s form complaint. The amended complaint must include the caption and civil case  
16 number used in this order and the words “AMENDED COMPLAINT” on the first page  
17 and write in the case number for this action, Case No. C 12-06265 EJD (PR). Plaintiff  
18 must answer all the questions on the form in order for the action to proceed.

19 **Failure to respond in accordance with this order by filing an amended**  
20 **complaint will result in the dismissal of this action without prejudice and without**  
21 **further notice to Plaintiff.**

22 The Clerk shall include two copies of the court’s complaint with a copy of this  
23 order to Plaintiff.

24  
25 DATED: 2/26/2013

26   
EDWARD J. DAVILA  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY J. COOK,  
Plaintiff,

Case Number CV 12-06265 EJD (PR)

vs.

**CERTIFICATE OF SERVICE**

MATTHEW CATE, et al.,  
Defendants

\_\_\_\_\_/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 2/27/2013, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) inter-office delivery receptacle located in the Clerk's office.

**Timothy J. Cook**  
E40919  
Pelican Bay State Prison  
P.O. Box 7500  
Crescent City, CA 95532

DATED: 2/27/2013

Richard W. Wieking, Clerk  
/s/ By: Elizabeth Garcia, Deputy Clerk