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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NEXIS RENE GOMEZ,  
Plaintiff,

v.

V. GARCIA, et al.,  
Defendants.

Case No. 22-cv-05310 BLF (PR)

**ORDER OF DISMISSAL WITH  
LEAVE TO AMEND**

Plaintiff, a California inmate, filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against prison officials at Soledad State Prison (“SSP”) where he was previously incarcerated.<sup>1</sup> Plaintiff’s motion for leave to proceed *in forma pauperis* will be addressed in a separate 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

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<sup>1</sup> The matter was reassigned to this Court on September 26, 2022. Dkt. Nos. 5, 6.

1 governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any  
 2 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim  
 3 upon which relief may be granted or seek monetary relief from a defendant who is immune  
 4 from such relief. *See id.* § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally  
 5 construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

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

10 **B. Plaintiff's Claims**

11 Plaintiff filed this lawsuit against Defendants Correctional Officer V. Garcia and Lt.  
 12 Steve Pedon for their actions against him at SSP. Dkt. No. 1 at 2. Plaintiff claims that on  
 13 December 28, 2021, SSP's Investigative Unit Services ("ISU") conducted an investigation  
 14 into Plaintiff's housing unit regarding allegations of altered "Hiteker tablets." *Id.* at 3, ¶ 1.  
 15 Defendant Garcia searched Plaintiff's Hiteker tablet and found some thumbnail images on  
 16 the hard drive. *Id.* at ¶ 2. Plaintiff claims Defendant Garcia immediately concluded that  
 17 the tablet was altered from its original state "without testing the device in a laboratory."  
 18 *Id.* Defendant Garcia issued a rules violation report ("RVR") for "possession of a wireless  
 19 device component," which constitutes a serious offense under the state regulations. *Id.* at ¶  
 20 3. On January 16, 2022, Plaintiff appeared before the hearing officer, Defendant Lt.  
 21 Steven Pedone, for the RVR issued by Defendant Garcia. *Id.* at ¶ 4. Plaintiff argued at the  
 22 hearing that Defendant Garcia was not legally qualified to make the final conclusion that  
 23 the tablet was altered or to determine that it qualified as a "wireless device component"  
 24 because she lacks foundation of personal knowledge. *Id.* Defendant Pedone found  
 25 Plaintiff guilty of the charge based on Defendant Garcia's report and the evidence of the  
 26 thumbnail images. *Id.* As a result of the guilty finding, Plaintiff was put on C-status for  
 27 30 days, which involved loss of privileges from the canteen, phone, yard, dayroom, and  
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1 packages, as well as being deprived of electronic devices including TV, radio, and a fan for  
2 his cell. *Id.* at ¶ 5.

3 Plaintiff appealed the guilty finding, which was granted at the last level of review  
4 because the examiner found a due process violation. *Id.* at ¶ 7. The RVR was reissued and  
5 another hearing was ordered. *Id.* At the rehearing on July 22, 2002, Officer C. Whitman  
6 found Plaintiff guilty of the same charge based on the same evidence. *Id.* at ¶ 8. Plaintiff  
7 was against assessed 30-days on C-Status and deprived of the same privileges as the first  
8 time.

9 Plaintiff claims that the Defendant Garcia’s evidence used at the disciplinary  
10 hearing does not satisfy “Daubert” or the Federal Rules of Evidence, and therefore  
11 constitutes inadmissible evidence to support the guilty finding of the RVR. Dkt. No. 1 at  
12 5. He contends that Defendant Garcia did not possess the expertise, knowledge, training,  
13 or qualifications under the Rules to conclude that his tablet was altered, or to make the  
14 final determination that his tablet is a wireless device component. *Id.* at 6. He asserts that  
15 she essentially fabricated a report “that lacks authentication.” *Id.* Lastly, he contends that  
16 Defendant Garcia generated the report involving her lay opinion “with the only purpose to  
17 obtain a RVR conviction relying testimonial hearsay in violation of the due process of  
18 law.” *Id.* at 7. Plaintiff seeks declaratory relief, injunctive relief in dismissing the RVRs  
19 in full, the return of the tablet or reimbursement for its value, and cost of suit. *Id.* at 3.

20 Prisoners retain their right to due process subject to the restrictions imposed by the  
21 nature of the penal system. *See Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). Thus  
22 although prison disciplinary proceedings are not part of a criminal prosecution and the full  
23 panoply of rights due a defendant in such proceedings does not apply, where serious rules  
24 violations are alleged and the sanctions to be applied implicate state statutes or regulations  
25 which narrowly restrict the power of prison officials to impose the sanctions and the  
26 sanctions are severe, the Due Process Clause requires certain minimum procedural  
27 protections. *See id.* at 556-57, 571-72 n.19. The placement of a California prisoner in  
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1 isolation or segregation, or the assessment of good-time credits against him, as a result of  
 2 disciplinary proceedings, for example, is subject to *Wolff's* procedural protections if (1)  
 3 state statutes or regulations narrowly restrict the power of prison officials to impose the  
 4 deprivation, and (2) the liberty in question is one of “real substance.” *See Sandin v.*  
 5 *Conner*, 515 U.S. 472, 477-87 (1995). “Real substance” will generally be limited to  
 6 freedom from (1) restraint that imposes “atypical and significant hardship on the inmate in  
 7 relation to the ordinary incidents of prison life,” *id.* at 484,<sup>2</sup> or (2) state action that “will  
 8 inevitably affect the duration of [a] sentence,” *id.* at 487.

9 Plaintiff’s allegations, taken as true, fail to state a due process violation. First of all,  
 10 Plaintiff was not placed in segregation or assessed good-time credits which clearly  
 11 implicate liberty interests. Rather, Plaintiff alleges that he suffered the temporary loss of  
 12 privileges. However, the temporary loss of access to phone, yard, dayroom, packages, and  
 13 electronics does not amount to an “atypical and significant hardship on the inmate in  
 14 relation to the ordinary incidents of prison life.” *Sandin*, 515 U.S. at 484. “Privileges”  
 15 simply do not constitute liberties of “real substance” that are entitled to procedural  
 16 protections. Secondly, Plaintiff alleges that the guilty finding “could potentially affect” his  
 17 suitability for parole at future parole hearings, but “potentially” is not sufficient to amount  
 18 to a state action that will “inevitably affect” the duration of his sentence. *Id.* at 487.  
 19 Accordingly, Plaintiff’s allegations are insufficient to establish that he is entitled to *Wolff's*  
 20 procedural protections for the challenged disciplinary actions.

21 Even if the deprivations alleged were protected liberty interests, the allegations do  
 22 not establish that Plaintiff was deprived of any of *Wolff's* protections. *Wolff* established  
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24 <sup>2</sup> Whether a restraint is “atypical” under *Sandin* is not a purely empirical question, but  
 25 rather one of the measure of a restraint in relation to an inmate's limited liberty rights. *See*  
 26 *Carlo v. City of Chino*, 105 F.3d 493, 498-99 (9th Cir. 1997); *see, e.g., Resnick*, 213 F.3d  
 27 443, 448-49 (9th Cir. 2000) (placement in SHU detention pending disciplinary hearing did  
 28 not give rise to a liberty interest where plaintiff failed to allege that his conditions of  
 confinement were materially different from those imposed on inmates in administrative  
 segregation or in the general population).

1 five procedural requirements. First, “written notice of the charges must be given to the  
2 disciplinary-action defendant in order to inform him of the charges and to enable him to  
3 marshal the facts and prepare a defense.” *Wolff*, 418 U.S. at 564. Second, “at least a brief  
4 period of time after the notice, no less than 24 hours, should be allowed to the inmate to  
5 prepare for the appearance before the [disciplinary committee].” *Id.* Third, “there must be  
6 a 'written statement by the factfinders as to the evidence relied on and reasons' for the  
7 disciplinary action.” *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). Fourth,  
8 “the inmate facing disciplinary proceedings should be allowed to call witnesses and  
9 present documentary evidence in his defense when permitting him to do so will not be  
10 unduly hazardous to institutional safety or correctional goals.” *Id.* at 566. Fifth, “[w]here  
11 an illiterate inmate is involved . . . or where the complexity of the issues makes it unlikely  
12 that the inmate will be able to collect and present the evidence necessary for an adequate  
13 comprehension of the case, he should be free to seek the aid of a fellow inmate, or . . . to  
14 have adequate substitute aid . . . from the staff or from a[n] . . . inmate designated by the  
15 staff.” *Id.* at 570. The complaint contains no allegation that Plaintiff did not receive all  
16 these protections.

17 Furthermore, Plaintiff’s challenge to the quality of the evidence used to support the  
18 guilty finding does not establish a due process claim. In *Superintendent v. Hill*, 472 U.S.  
19 445, 454 (1985), the Court held that the revocation of good-time credits does not comport  
20 with the minimum requirements of procedural due process in *Wolff* unless the findings of  
21 the prison disciplinary board are supported by some evidence in the record. The standard  
22 for the modicum of evidence required is met if there was some evidence from which the  
23 conclusion of the administrative tribunal could be deduced. *See id.* at 455. An  
24 examination of the entire record is not required nor is an independent assessment of the  
25 credibility of witnesses or weighing of the evidence. *See id.* The relevant question is  
26 whether there is any evidence in the record that could support the conclusion reached by  
27 the disciplinary board. *See id.* The Court reiterated that revocation of good-time credits is  
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1 not comparable to a criminal conviction and neither the amount of evidence necessary to  
 2 support such a conviction, nor any other standard greater than some evidence, applies in  
 3 this context. *See id.* at 456. Assuming that *Hill's* some evidence standard applies to  
 4 Plaintiff's case even though there was no revocation of good-time credits, the standard was  
 5 satisfied. Plaintiff asserts that he was wrongfully found guilty of the RVR based on the lay  
 6 opinion of Defendant Garcia that his tablet was altered. However, Defendant Garcia's  
 7 testimony constitutes "some evidence" which supported the conclusion reached by the  
 8 disciplinary board in both hearings. 472 U.S. at 455. Lastly, Plaintiff's claim that  
 9 Defendant Garcia's testimony did not satisfy "Daubert" or the Federal Rules of Evidence  
 10 is unavailing because no other standard greater than some evidence applies to his case. *Id.*  
 11 at 456.

12 Plaintiff shall be granted leave to amend to attempt to state sufficient facts to  
 13 establish a due process claim in light of the foregoing discussion. Plaintiff must allege  
 14 sufficient facts to show that he was deprived of a liberty of "real substance" under *Sandin*  
 15 and that he was denied one or more of the procedural protections under *Wolff*.

## 17 CONCLUSION

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

19 1. The complaint is **DISMISSED with leave to amend**. Within **twenty-eight**  
 20 **(28) days** of the date this order is filed, Plaintiff shall file an amended complaint to correct  
 21 the deficiencies described above. The amended complaint must include the caption and  
 22 civil case number used in this order, Case No. 22-cv-05310 BLF (PR), and the words  
 23 "AMENDED COMPLAINT" on the first page. If using the court form complaint, Plaintiff  
 24 must answer all the questions on the form in order for the action to proceed. The amended  
 25 complaint supersedes the original, the latter being treated thereafter as non-existent.  
 26 *Ramirez v. Cty. Of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015). Consequently,  
 27 claims not included in an amended complaint are no longer claims and defendants not  
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1 named in an amended complaint are no longer defendants. *See Ferdik v. Bonzelet*, 963  
2 F.2d 1258, 1262 (9th Cir.1992).

3           2.       **Failure to respond in accordance with this order in the time provided**  
4 **will result in the dismissal with prejudice of this action for failure to state a claim,**  
5 **without further notice to Plaintiff.**

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

8           **IT IS SO ORDERED.**

9 Dated:   January 17, 2023  

  
BETH LABSON FREEMAN  
United States District Judge

United States District Court  
Northern District of California

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