UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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ANTHONY OLIPHANT              :
     Plaintiff,               :
                              :
v.                            :    Civil No. 3:99CV01894(AWT)
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GEORGE WEZNER, et al.         :
     Defendants.              :
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RULING ON MOTION FOR SUMMARY JUDGMENT

The plaintiff, Anthony Oliphant ("Oliphant"), is a prisoner within Connecticut's correctional system. He brings this action against various officials of the Connecticut Department of Correction ("DOC"), alleging that the defendants have violated his constitutional rights in several ways in violation of 42 U.S.C. § 1983. The defendants have moved for summary judgment on all of the plaintiff's remaining claims, which are as follows: (1) that the defendants transferred him to more restrictive confinement in violation of his procedural due process rights; (2) that the defendants deprived him of access to legal counsel; (3) that the defendants deprived him of his right to appeal disciplinary reports filed against him; and (4) that the defendants violated DOC rules and regulations governing the terms and conditions of the plaintiff's

confinement. For the reasons set forth below, the defendants' motion for summary judgment is being granted as to all of the plaintiff's claims.

I. **FACTUAL BACKGROUND**

The plaintiff has a history of confinement in and transfers between Connecticut's various prisons dating back to 1984, and he has a prison disciplinary history that dates back to 1993. The plaintiff has been confined pursuant to his current sentence since 1995, and he was confined at Cheshire Correctional Institution ("CCI") from April 28, 1998 to June 4, 1999. During this most recent stay at CCI, DOC officials filed a total of four disciplinary reports against the plaintiff, including one in 1998 for disobeying a direct order and three during the period from April 5, 1999 to May 6, 1999; one of the three was for making threats, and the other two were for disobeying a direct order.

Each of the plaintiff's offenses during this period constituted violations of the Code of Penal Discipline, which is part of the DOC's Administrative Directive 9.5. Inmates against whom disciplinary reports have been filed are entitled to a hearing under Administrative Directive 9.5, which carries with it procedural guarantees, such as the availability of an advocate upon request, adequate time to prepare a defense, the

opportunity to conduct an independent investigation, and the ability to call witnesses. If the hearing officer determines that the inmate is guilty, then she can impose various enumerated sanctions depending upon the classification of the offense charged; these sanctions include loss of credit for good time, loss of certain privileges, and punitive segregation. Section 39 of Administrative Directive 9.5 entitles the sanctioned inmate to appeal the hearing officer's decision.

During his most recent stay at CCI, the plaintiff was found guilty of the charges in each of the four disciplinary reports filed against him, and he was sanctioned. The record shows that no appeal was filed with respect to any of these convictions. The plaintiff cites the absence of an appeal in these particular situations as an example of denial of due process, but he offers no specific facts that would support that claim. The record reflects only that he simply failed to file an appeal.

The DOC's Administrative Directive 9.4 (Restrictive Status) provides for the designation of an inmate to Restrictive Housing Status, which authorizes prison officials under certain circumstances to closely regulate an inmate's conditions of confinement and separate the inmate from the

general population. One category of Restrictive Housing Status is Close Custody for Chronic Discipline ("Chronic Discipline"), which applies to inmates with repetitive or serious disciplinary behavior. For example, Section 10.B.3. provides for automatic consideration for Chronic Discipline where an inmate has been convicted of a combination of three or more Class A or Class B offenses within a 180-day period. The plaintiff was convicted of two Class A offenses and one Class B offense within a period of just over 30 days.

Section 11 of Administrative Directive 9.4 requires that before an inmate can be placed in Chronic Discipline, he must receive a hearing with all of the procedural safeguards provided by Administrative Directive 9.5 relating to disciplinary reports. The hearing officer is required to make findings and a recommendation as to whether the inmate should be placed in Chronic Discipline. However, the ultimate decision as to whether to place the inmate in Chronic Discipline rests with the Director of Offender Classification and Population Management. Directive 9.4 does not provide for any appeal from that decision.

The plaintiff received a Restrictive Status Hearing on June 1, 1999, while he was at CCI. The record shows that he refused the assistance of an advocate. As a result of this

hearing, the plaintiff was transferred to a Chronic Discipline Unit ("CDU") at Northern Correctional Institute ("NCI") on June 4, 1999. Attachment A to Administrative Directive 9.4 is a table that describes the differences in conditions of confinement among the various levels of Restrictive Housing. Generally, inmates assigned to a CDU are separated from the general population; are allowed outside of their cells only once per day, five days per week; have limited, exclusively in-cell access to programs; can keep only limited types of personal property; can make only one 15-minute telephone call per week, but are allowed two legal telephone calls per month; and are allowed two 30-minute visits per week from pre-approved immediate family members only.

After he had been confined at NCI for six months, the plaintiff received another Restrictive Status Hearing on December 9, 1999. During that six-month period, at least six disciplinary reports were filed against the plaintiff for various Class A and Class B offenses, which included assaulting a corrections officer and another inmate. A hearing was held on each disciplinary report, and the plaintiff used an advocate in all but one instance. The plaintiff was convicted each time, and each time he exercised his right to appeal, albeit unsuccessfully. After the December 9, 1999 Restrictive Status

Hearing, the plaintiff was placed in Administrative Segregation, which is the most restrictive of the classifications in Administrative Directive 9.4.

Administrative Segregation is reserved for those inmates "whose behavior or management factors pose a threat to the security of the facility or a risk to the safety of staff or other inmates and . . . [who] can no longer be safely managed in general population." Administrative Directive 9.4, § 3.B. The record shows that the plaintiff was placed in Administrative Segregation because it was determined that his poor disciplinary history while in the CDU threatened the safety of others and the security of the facility.

Attachment A to Administrative Directive 9.4 shows that conditions of confinement in Administrative Segregation are even more severe than in Chronic Discipline. For example, there are more frequent random cell searches; only one 30-minute immediate family member visit per week is allowed; and an inmate may have personal property only in the form of the most basic necessities.

The plaintiff maintains that his transfer to Chronic Discipline at NCI and the subsequent placement into Administrative Segregation were performed in violation of his rights to due process.

The plaintiff also contends that the defendants have restrained him with handcuffs that are too small for his wrists, in violation of a prison staff medical "order" that states that the plaintiff should have larger cuffs. On August 11, 1999, a medical staff memorandum was written for the plaintiff, stating that he "should be allowed to have large wrist cuffs during movement and recreation due to his large wrists." (Ex. A to Pl.'s Opp. Mem.) However, the document in question is not a doctor's order, but rather a "temporary nursing measure." On May 16, 2002, in response to a complaint by the plaintiff that his handcuffs were too tight, a team including a medical doctor, a registered nurse, and a corrections officer examined the plaintiff's handcuffs. On that day, the plaintiff's handcuffs were actually larger than required under the DOC's standards. While the DOC protocol calls for a space of 1 1/2 to 2 fingers between the cuff and the wrist, the width between plaintiff's cuffs and his wrists was 2 to 2 1/2 fingers. The team determined that there was no medical necessity for the plaintiff to have larger cuffs.

The plaintiff also claims that the defendants denied him access to legal counsel. According to a letter dated April 17, 2002, written by Attorney Kenneth Speyer to the plaintiff, Attorney Speyer had written to the plaintiff in November 2000,

apparently in response to the plaintiff's contacting him earlier about a legal matter during the plaintiff's confinement at NCI. The plaintiff never responded to that letter, and, as a result, Attorney Speyer believed the "problem" had been resolved. The plaintiff points to this 1 1/2-year delay in responding to Attorney Speyer as a denial of his access to counsel, but fails to set forth any facts that could explain how his failure to respond was caused by the defendants.

With regard to the plaintiff's final claim, i.e. that the defendants violated their own rules and regulations governing the plaintiff's confinement, the plaintiff provides no facts.

II. LEGAL STANDARD

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223 (2d Cir. 1994). Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322.

When ruling on a motion for summary judgment, the court must respect the province of the jury. The court, therefore, may not try issues of fact. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987); Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). It is well-established that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." Anderson, 477 U.S. at 255. Thus, the trial court's task is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined . . . to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224.

Summary judgment is inappropriate only if the issue to be resolved is both genuine and related to a material fact. Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. An issue is "genuine . . . if the evidence is such that a reasonable jury could

return a verdict for the nonmoving party." Anderson, 477 U.S. at 248 (internal quotation marks omitted). A material fact is one that would "affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. As the Court observed in Anderson: "[T]he materiality determination rests on the substantive law, [and] it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Id. at 248. Thus, only those facts that must be decided in order to resolve a claim or defense will prevent summary judgment from being granted. When confronted with an asserted factual dispute, the court must examine the elements of the claims and defenses at issue on the motion to determine whether a resolution of that dispute could affect the disposition of any of those claims or defenses. Immaterial or minor facts will not prevent summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990).

When reviewing the evidence on a motion for summary judgment, the court must "assess the record in the light most favorable to the non-movant and . . . draw all reasonable inferences in its favor." Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990)). Because

credibility is not an issue on summary judgment, the nonmoving party's evidence must be accepted as true for purposes of the motion. Nonetheless, the inferences drawn in favor of the nonmovant must be supported by the evidence. "[M]ere speculation and conjecture" is insufficient to defeat a motion for summary judgment. Stern v. Trs. of Columbia Univ., 131 F.3d 305, 315 (2d Cir. 1997) (quoting W. World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d. Cir. 1990)). Moreover, the "mere existence of a scintilla of evidence in support of the [nonmovant's] position" will be insufficient; there must be evidence on which a jury could "reasonably find" for the nonmovant. Anderson, 477 U.S. at 252.

Finally, the nonmoving party cannot simply rest on the allegations in its pleadings since the essence of summary judgment is to go beyond the pleadings to determine if a genuine issue of material fact exists. See Celotex Corp., 477 U.S. at 324. "Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact," Weinstock, 224 F.3d at 41, if the movant demonstrates an absence of such issues, a limited burden of production shifts to the nonmovant, which must "demonstrate more than some metaphysical doubt as to the material facts, . . . [and] must come forward with specific facts showing that

there is a genuine issue for trial." Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993) (quotation marks, citations and emphasis omitted). Furthermore, "unsupported allegations do not create a material issue of fact." Weinstock, 224 F.3d at 41. If the nonmovant fails to meet this burden, summary judgment should be granted. The question then becomes whether there is sufficient evidence to reasonably expect that a jury could return a verdict in favor of the nonmoving party. See Anderson, 477 U.S. at 248, 251.

III. DISCUSSION

A. Due Process

The plaintiff contends that there are genuine issues of material fact as to whether the defendants denied him due process when transferring him from CCI to the more restrictive setting at NCI, where he was first put into a Chronic Discipline Unit and thereafter confined in Administrative Segregation, all allegedly without a hearing. The plaintiff also claims due process violations based on the defendants' alleged refusal to provide him with larger handcuffs. The court agrees with the defendants that there are no genuine issues of material fact with respect to these claims, and that the defendants are entitled to judgment as a matter of law.

"[T]o present a due process claim, a plaintiff must establish (1) that he possessed a liberty interest and (2) that the defendant(s) deprived him of that interest as a result of insufficient process." Giano v. Selsky, 238 F.3d 223, 225 (2d Cir. 2001) (internal citation and quotation marks omitted). While the Due Process Clause itself does not provide convicted state prisoners with a liberty interest in being free from intrastate prison transfers, see Meachum v. Fano, 427 U.S. 215, 224 (1976), a state may create a protectible liberty interest where, for example, the state enacts statutes or promulgates prison regulations that entitle prisoners to certain procedural protections. See Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974). However, not all state-created liberty interests in freedom from restraint receive the protection of the Due Process Clause. In particular, liberty interests created by prison regulations

> will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Sandin v. Conner, 515 U.S. 472, 484 (1995). Thus, in order for the plaintiff here to properly present a due process claim, he must not only establish the existence of a liberty interest in

being free from the restrictions attendant to Chronic Discipline and Administrative Segregation, but he must also demonstrate that the restrictions in question impose an atypical and significant hardship on him in relation to the ordinary incidents of prison life. See Frazier v. Coughlin, 81 F.3d 313, 317 (2d Cir. 1996).

1. Transfer to NCI

Pursuant to Administrative Directive 9.4, Connecticut has afforded its prisoners, including the plaintiff, with certain procedural guarantees prior to classification, transfer, or discipline.[1] Section 11 of Administrative Directive 9.4 states

[1]The court notes that in their memorandum in support of the instant motion the defendants cite to Conn. Gen. Stat. § 18-100(e) for the proposition that the Commissioner may transfer prisoners at his discretion, thereby precluding the creation of a protectible liberty interest to the plaintiff. But that statute is inapposite because it addresses the narrow category of transfers of inmates participating in work-release and education-release programs. The better citation would be to Conn. Gen. Stat. § 18-86, which permits the Commissioner to

> transfer any inmate of any of the institutions or facilities of the department to any other such institution or facility, irrespective of the institution to which the inmate was originally committed or the length of his sentence, when it appears to the commissioner that the best interests of the inmate or the other inmates will be served by such action.

While this language clearly grants the Commissioner broad discretion in the transfer of inmates -- even to the point where, under Meachum v. Fano, 427 U.S. 215 (1976), the plaintiff would have no protectible liberty interest -- the

that "[a]n inmate shall not be placed in Chronic Discipline without a hearing." Likewise, Section 12.A. of Administrative Directive 9.4 entitles inmates to a hearing prior to placement in Administrative Segregation. Moreover, the Directive describes in some detail the characteristics of the process to which an inmate is entitled, including timely and meaningful notice and the opportunity to request representation by an advocate empowered to call witnesses for the inmate. See Administrative Directive 9.4, §§ 11-12.

It is not clear that the plaintiff can show that the restrictions in question -- namely, the initial classification and transfer to Chronic Discipline and later to Administrative Segregation -- rise to the level of an atypical and significant hardship. However, assuming arguendo that the plaintiff has sufficiently established a protectible liberty interest, his due process claim nonetheless fails because he has failed to create a genuine issue as to whether the process provided him -- namely, the Restrictive Status Hearings -- was insufficient.

The plaintiff simply asserts that "at no time during his confinement at [NCI], was he given a hearing to determine his

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procedural guarantees set forth in the Administrative Directives demonstrate that the Commissioner has chosen to circumscribe her discretion by guaranteeing certain procedural protections.

suitability for a Level 5 facility." (Pl.'s Opp. Mem. at 3.) This assertion is in total contradiction to the record. The record shows that prior to the plaintiff being transferred from CCI to the CDU at NCI, he received a Restrictive Status Hearing. Within two weeks following that hearing, the plaintiff was transferred to NCI. Just over six months after his transfer to NCI, the plaintiff received another Restrictive Status Hearing to determine whether he should then be placed in Administrative Segregation, which is where "Level 5" security risk inmates are placed. (See Aff. of Joseph O'Keefe, Ex. 1 to Defts.' Reply Mem. at 2.) While the plaintiff declined to use an advocate in the first hearing, he did use one in the second hearing. The plaintiff has failed to provide evidence of any facts that would create a genuine issue as to whether he received the process due him. Thus, a reasonable jury could not find for the plaintiff on this issue, and the defendants are entitled to judgment as a matter of law.

2. Handcuffs

In his opposition memorandum the plaintiff rounds out his due process claim with one line asserting that the defendants disregarded an "order" from the prison medical staff that the plaintiff be fitted with larger handcuffs. (See Pl.'s Opp. Mem. at 3.) It is unclear whether the plaintiff intends this

allegation to be further support of a claim of atypicality as required under Sandin regarding his restrictive status, or whether by this assertion the plaintiff seeks to state a separate due process violation. Assuming the plaintiff seeks to state a separate claim, that claim fails. DOC protocol provides for leaving a 1 1/2- to 2-finger space between the inmate's hand-cuff and the wrist. (Aff. of Patricia Wollenhaupt, R.N., Ex. 7 to Defts.' Reply Mem. ¶ 12.) During an inspection by a medical doctor, a registered nurse, and a DOC officer, it was determined that the space between the plaintiff's handcuffs and his wrists was a 2- to 2 1/2-finger space, which exceeded the minimum space required by the protocol. (Id. ¶ 14.) The defendants deemed the plaintiff's requests not to be medically necessary. Moreover, the "order", which had been documented nearly three years prior to the above-described inspection, was not a doctor's order, but a mere temporary nursing measure. (Id. ¶¶ 7-8.) Because the plaintiff has failed to offer evidence upon which a reasonable jury could base a conclusion that larger cuffs were medically necessary, the defendants are entitled to judgment as a matter of law.

B. Access to Legal Counsel

The plaintiff contends that he was there are genuine issues of material fact as to whether the defendants unconstitutionally deprived him of adequate legal counsel while confined at CCI and NCI. In civil cases like this one, there is no constitutional right to counsel. See, e.g., McKenna v. Wright, No. 01 Civ. 6571(WK), 2003 WL 302225, at *1 (S.D.N.Y. Feb. 11, 2003) (quoting Edmonds v. Greiner, No. 99 Civ. 1681(KNF), 2002 WL 131527, at *1 (S.D.N.Y. June 14, 2002)). Thus, the court construes the plaintiff's claim as one that there was a violation of his constitutional right of access to the courts. See Bounds v. Smith, 430 U.S. 817, 821 (1977). In civil cases such as this one, prisoners have a fundamental constitutional right of access to courts, which "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate legal assistance from persons trained in the law." Id. at 828. Thus, adequate access to legal counsel is merely one among other alternatives that the DOC might employ to satisfy its constitutional obligation to provide prisoners with access to the courts. Furthermore, Lewis v. Casey, 518 U.S. 343 (1996), limited the holding in Bounds by stating that it "did not create an

abstract, freestanding right to a law library or legal assistance." Lewis, 518 U.S. at 351. Rather, "meaningful access to the courts is the touchstone" of Bounds, and the inmate must prove actual injury. Id. In other words, the prisoner "must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Id. See also Monsky v. Moraghan, 127 F.3d 243, 247 (2d Cir. 1997) ("plaintiff must demonstrate that a defendant caused actual injury, i.e., took or was responsible for actions that hindered a plaintiff's efforts to pursue a legal claim") (citing Lewis, 518 U.S. at 351) (internal quotation marks and citations omitted).

Here, the plaintiff merely makes a conclusory assertion that the defendants have systematically deprived him of any sort of legal counsel. His only support for this assertion is the mere fact that it took the plaintiff over one and one-half years to reply to the letter of a lawyer who was responding to an earlier inquiry by the plaintiff. One cannot reasonably infer from the plaintiff's assertion either that the plaintiff's delay in responding to the attorney hindered his pursuit of a legal claim, or that the defendants were somehow responsible for the delay. Thus, the plaintiff has failed to

create a genuine issue as to whether he suffered any actual injury as the result of a supposed denial of access to the courts. Moreover, the fact that the defendant has been able to file several federal civil suits against various defendants during his period of confinement, which involved the filing of a total of hundreds of documents in court -- nearly a third of which were made during the period of alleged deprivation (see Defts.' Reply Mem. at 6) -- demonstrates that the plaintiff's access to the courts has not been hindered. See Gittens v. Sullivan, 848 F.2d 389, 390 (2d Cir. 1988) (per curiam) ("The number of actions filed by the plaintiff [prisoner] as well as the avalanche of papers submitted by plaintiff in the instant suit indicate that the procedures followed by the defendants have been sufficient to provide plaintiff with meaningful access to the courts.") The court concludes that the defendants are entitled to judgment as a matter of law on this claim.

C. Right to Appeal Disciplinary Reports

The plaintiff argues that there exists a genuine issue of material fact as to whether he was given the right to appeal his disciplinary reports. However, the defendants' papers show that of the 30 disciplinary reports attached, the plaintiff filed an appeal with respect to 17 and pled guilty to 2. The

plaintiff emphasizes that there was no appeal recorded for the other 11 disciplinary reports and asserts in conclusory fashion that "[h]is appeal rights were trampled upon." (Pl.'s Opp. Mem. at 4.) In addition, the plaintiff's Local Rule 56(a)2 Statement denies the defendants' assertion that appeal was available to him and that in some instances he actually did appeal guilty findings.

The record demonstrates that the plaintiff had an opportunity to appeal and in fact exercised that right on many occasions, and the defendants are entitled to judgment as a matter of law on this claim.

D. Violation of Administrative Directives

Finally, the plaintiff asserts in conclusory fashion that the defendants have regularly violated their own Administrative Directives governing the terms and conditions of his confinement. He fails to go beyond this conclusory assertion to provide any factual allegation or evidentiary support or description of the manner in which the defendants have allegedly violated the DOC's regulations. The court concludes that the defendants are entitled to judgment as a matter of law on this claim.

IV. Conclusion

For the reasons stated above, the defendants' Motion for Summary Judgment (Doc. No. 103) is hereby GRANTED.

It is so ordered.

Dated this 27th day of April 2005, at Hartford, Connecticut.

/s/
Alvin W. Thompson
United States District Judge