UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JOSEPH LOCHUCH EWALAN, Plaintiff, v. SERGEANT HUGGINS, HEARING OFFICER PIUS, and SUPERINTENDENT DONALD HOLBROOK, Defendants.	NO: 4:21-CV-05030-RMP **ORDER DISMISSING ACTION** **1915(g)**

BEFORE THE COURT is Plaintiff's Second Amended Complaint, ECF No. 14. Plaintiff Joseph Lochuch Ewalan, a prisoner at the Washington State Penitentiary, is proceeding *pro se* and *in forma pauperis*. Defendants have not been served.

SECOND AMENDED COMPLAINT

As a general rule, an amended complaint supersedes the original complaint and renders it without legal effect. *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012). Therefore, "[a]ll causes of action alleged in an original complaint which

are not alleged in an amended complaint are waived." *King v. Atiyeh,* 814 F.2d 565, 567 (9th Cir. 1987) *overruled in part by Lacey,* 693 F.3d at 928 (any claims voluntarily dismissed are considered to be waived if not re-pled). Furthermore, defendants not named in an amended complaint are no longer defendants in the action. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Liberally construing the Second Amended Complaint in the light most favorable to Plaintiff, the Court finds that it fails to state a claim upon which relief may be granted.

In Count I, Plaintiff asserts that his Eighth Amendment rights, as well as his rights under the Due Process and Equal Protection Cause of the Fourteenth Amendment were violated. ECF No. 14 at 6. He states that he shared a cell with a prisoner who was released from prison but expected to return. *Id.* Plaintiff assets that property officers failed in their duty to ensure that the former cellmate "pack-out" all his belongings and leave nothing behind. *Id.* at 7. Nevertheless, the former cellmate left a television in the cell. *Id.*

Plaintiff contends that because the former cellmate threated to "require from [Plaitniff] when he returns," Plaintiff had "no responsibility of handing-over personal property to the administration." ECF No. 14 at 7. Plaintiff assets that the former cellmate had written "DON'T TOUCH" below his television which "prove[d] he did not leave his T.V in custody of Mr. Ewalan." *Id.* at 8. Plaintiff avers that the officers who "discovered" the television, did not conduct a cell search, but "came for the T.V. because they knew [the former cellmate] did not take his T.V. with him." *Id.*

Plaintiff states that he did not obstruct them from taking the television because it was not in his custody. *Id.*

Plaintiff asserts that Defendant Sergeant Huggins accused him of "stealing, being in possession of [the former cellmate's television]." *Id.* at 8. Plaintiff argues about the proper definitions of the terms "stealing" and "possession" and contends that the initial serious infraction report is a "draconian law." *Id.* at 8–9. Again,

In addition, Plaintiff claims that he was subjected to discrimination. He asserts that another prisoner, who is white, was found with a television that did not belong to him, and although the white prisoner was initially infracted with the same infraction as Plaintiff and sanctioned with 10 days confinement to his cell as was Plaintiff, the white prisoner neither lost his job, nor was he sent to close custody as Plaintiff, who is black, was. ECF No. 14 at 9, 13. Although granted the opportunity to do so, Plaintiff did not allege any facts from which the Court could infer that he and this white prisoner were "similarly situated" and that there was no rational basis for the difference in their treatment.

Specifically, Plaintiff did not state how possessing another prisoner's property is the same conduct as possessing a rented item, or that he had the same custody points and infraction history as the white prisoner who did not receive a custody demotion or loss of employment. *See* ECF No. 10 at 5. In his First Amended Complaint, Plaintiff acknowledged that the white prisoner was found with an unauthorized *rental* television, and Plaintiff already knew that another prisoner could

not rent a television on his behalf because he had previously attempted this. ECF No. 8 at 3, 8. Plaintiff has not plausibly alleged that either their conduct or their circumstances, including their infraction history and other behavior, were similar. Therefore, his conclusory assertion of an equal protection violation, without supporting factual allegations, is insufficient to state a claim upon which relief may be granted. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

Under Count II, Plaintiff accuses Defendant Pius, a Hearing Officer and Grievance Coordinator, of violating his right to due process. ECF No. 14 at 17. Plaintiff claims that he was "disciplined" when he was moved from a medium security unit to a close custody unit where he remained for 280 days. *Id.* Plaintiff presents no facts from which the Court could infer that Defendant Pius made this classification decision.

Regardless, a prisoner's reclassification from one custody level to another does not trigger the protections of the federal Due Process Clause because it involves transfers to and from locations that are all among the ordinary incidents of prison life. *See Sandin v. Conner*, 515 U.S. 472, 484 (1995); *see also Meachum v. Fano*, 427 U.S. 215, 225 (1976) (no liberty interest created when prisoners transferred from medium security facility to maximum security facility).

In some circumstances, transfers might require prior notice and an opportunity to be heard, *see, e.g., Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005) (indefinite

placement in a supermax facility with only an annual review, where almost all human contact is prohibited, there is constant illumination and exercise in limited to a small indoor room for one hour per day, and such placement disqualifies an otherwise eligible prisoner for parole consideration). Here, Plaintiff states that he was "locked for 23 hours 7 for close to ten months June-2020, – February 2021 without penological reasons whatsoever except for hatred and discrimination." ECF No. 14 at 20.

Plaintiff does not describe any of the conditions of his close custody confinement, let alone any remotely compared to those in *Wilkinson*. The Court takes judicial notice of the fact that during the timeframe alleged, a global pandemic was underway that placed restrictions on everyone. Plaintiff's conclusory assertions of "hatred and discrimination" are unsupported by any factual allegations.

Prison officials are given full discretion to control prisoner classification, and neither the Due Process Clause nor Washington State law creates a liberty interest in a particular classification. *See Moody v. Daggett,* 429 U.S. 78, 88 n. 9 (1976); *Lucero v. Russell*, 741 F.2d 1129, 1129 (9th Cir. 1984); *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987) (a state prisoner does not have a liberty interest in a particular classification status). Plaintiff does not allege that the close custody demotion has adversely affected his eligibility for parole or good time credits. Although granted the opportunity to do so, Plaintiff has failed to state due process claims against Defendants Huggins and Pius upon which this Court may grant relief.

Furthermore, Plaintiff has no federal constitutional liberty or property interest in prison employment. *See Bauman v. Arizona Dep't of Corr.*, 754 F.2d 841, 846 (9th Cir. 1985) (denial of work and home furlough does not implicate constitutional interests because there is no state created liberty interest). The denial of a prison job does not "impose[] atypical and significant hardship" on an inmate "in relation to the ordinary incidents of prison life" and therefore under *Sandin* does not implicate a state created liberty interest. *See* 515 U.S. at 484.

In addition, Plaintiff's repeated assertions that prison policies were violated also fail to state a claim upon which relief may be granted. ECF No. 14 at 20. The failure to comply with a stated prison policy is not a *per se* violation of a clearly established constitutional right. *See Davis v. Sherer*, 468 U.S. 183, 193–95 (1984); *Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009).

Under Count III, Plaintiff asserts that Defendant Holbrook violated his Eighth Amendment and Equal Protection rights when he denied Plaintiff's appeal of his infraction for possessing his former cellmate's television. ECF No. 14 at 23–26. Plaintiff claims that "Defendants conduct was the proximate cause of plaintiffs psychic injury, and [] plaintiffs emotional distress was serious kind of such a nature that no reasonable person could be expected to endure it." *Id.* at 25 (as written in original).

To establish an Eighth Amendment violation in a conditions of confinement case, the prisoner must show that the prison official acted with deliberate indifference

to plaintiff's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). Deliberate indifference exists when the prison official "acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id*. at 842.

Under the Eighth Amendment, the pertinent inquiry is (1) whether the alleged violation constitutes an infliction of pain or a deprivation of the basic human needs, such as adequate food, clothing, shelter, sanitation, and medical care, and (2) if so, whether prison officials acted with the requisite culpable intent such that the infliction of pain is "unnecessary and wanton." *Farmer,* 511 U.S. at 834. Prison officials act with the requisite culpable intent when they act with deliberate indifference to the inmates= suffering. *Id.*; *Wilson v. Seiter*, 501 U.S. 294, 302–03 (1991); *Jordan v. Gardner*, 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc).

The test for whether a prison official acts with deliberate indifference is a subjective one: the official must "know[] of and disregard[] an excessive risk to inmate health and safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

Plaintiff asserts that the WSP Superintendent's conduct was "outrageous and extremely and beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community." ECF No. 20 at 25. He claims the Superintendent "knew Defendant Huggins treated plaintiffs differently"

and he "knew Defendant Pius Hearing officer understands the department policy." *Id.* at 25–26. Apart from his conclusory assertions, Plaintiff has presented no facts from which the Court could infer that Defendant Holbrook has acted with a sufficiently culpable state of mind and that any alleged wrongdoing was objectively harmful enough to establish a constitutional violation. *See Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (*citing Wilson*, 501 U.S. at 298). Plaintiff has alleged no facts from which the Court could infer an Eighth Amendment violation.

Although granted numerous opportunities to amend his complaint to state a claim upon which relief may be granted, Plaintiff has failed to do so. The Court finds that further amendment would be futile. Accordingly, **IT IS ORDERED** that this action is **DISMISSED with prejudice** for failure to state a claim upon which relief may be granted under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1).

Pursuant to 28 U.S.C. § 1915(g) a prisoner who brings three or more civil actions or appeals which are dismissed as frivolous or for failure to state a claim will be precluded from bringing any other civil action or appeal *in forma pauperis* "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). **Plaintiff is advised to read the statutory provisions of 28 U.S.C. § 1915. This dismissal of Plaintiff's complaint may count as one of the three dismissals allowed by 28 U.S.C. § 1915(g) and may adversely affect his ability to file future claims *in forma pauperis*.**

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order, enter judgment of dismissal with prejudice, provide copies to Plaintiff at his last known address, and **close the file**. The District Court Clerk is further directed to provide a copy of this Order to the Office of the Attorney General of Washington, Corrections Division. The Court certifies that any appeal of this dismissal would not be taken in good faith.

DATED September 30, 2021.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge