

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

LAMONT BULLOCK,	:	
	:	NO: 3:CV-99-1402
Plaintiff,	:	
	:	
vs.	:	(Judge Caputo)
	:	
MARTIN F. HORN, et al.,	:	
	:	
Defendants.	:	

**MEMORANDUM**

Plaintiff Lamont Bullock is currently an inmate at the State Correctional Institution at Greene (SCI-Greene). He filed the present §1983 action on his own behalf, claiming that various prison officials acted unlawfully to deprive him of personal property, to deny him the use of funds deposited in his prison account, and to convert funds from that account to their own use. (Amended Complaint, Doc. 15.) Plaintiff asserts various constitutional violations including violation of his right of access to the courts, since depriving him of legal materials allegedly led to the dismissal of various lawsuits he was prosecuting *pro se*; violation of his First Amendment right to free exercise of his religion, since religious materials were allegedly among those taken by Defendants; violation of his Fourteenth Amendment right not to be deprived of property without due process of law; and violation of his right to assert his constitutional rights without suffering retaliation. (Doc. 15.)

Defendants removed this action from state court on August 6, 1999, (Petition for Removal, Doc. 1), and moved to dismiss the amended complaint on February 14, 2000, (Motion to Dismiss, Doc. 28). On February 3, 2000 Plaintiff requested a preliminary injunction requiring Defendants to return to him the disputed items of personalty. (Motion and Memorandum of Law in Support of Motion, Doc. 24.) Magistrate Judge J. Andrew Smyser has recommended that Plaintiff's motion for a preliminary injunction be denied, (Report and Recommendation, Doc. 70), and that Defendants' motion to dismiss be denied except as to Defendant D'Eletto, (Report and Recommendation, Doc. 53). Upon due consideration, I shall adopt the magistrate judge's recommendations in most respects. However, I will dismiss Plaintiff's claims against Defendants Horn and Franks, and will not dismiss the claims against Defendant D'Eletto.

#### **STANDARD OF REVIEW**

Where a magistrate judge makes a finding or ruling on a motion or issue, his determination should generally become that of the court unless a specific objection is filed within the prescribed time. See Thomas v. Arn, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472-74 (1985). Though, absent objections, the district court need only review the record for plain error or manifest injustice, Garcia v. INS, 733 F. Supp. 1554, 1555 (M.D. Pa. 1990), it is within the sound discretion of the district court to provide a more searching review of the magistrate judge's findings and conclusions. See Thomas, 474 U.S. at 154. Because the authority and responsibility to make a final, informed decision remains with the district judge, it is often appropriate for the

court "to afford some level of review to dispositive legal issues raised by the report."  
Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987) (quotations omitted).

## **DISCUSSION**

A. Preliminary Injunction. To obtain a preliminary injunction the moving party must show 1) a reasonable probability of eventual success in the litigation and 2) that it will be irreparably injured *pendente lite* should preliminary relief be denied. See Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994) (citing Delaware River Port Authority v. Transamerica Trailer Transport, 501 F.2d 917, 920 (3d Cir. 1974)) (quotations omitted). Further, while the moving party must make the above two "requisite showings," the court should also consider, when relevant, 3) the possibility of harm to other interested persons from the grant or denial of the injunction, and 4) the public interest. Id.

In the present case, Defendants assured the magistrate judge in a letter dated June 28, 2000 that if Plaintiff signed a cash slip for the costs of shipping his property, the costs would be deducted from his prison account and his property would be shipped to him. (Doc. 70 at 5.) However, Plaintiff has indicated that he will accept shipment of his personalty only if he is permitted to open the boxes in open court. As Plaintiff has no constitutional right to receive his goods via a particular shipping arrangement, I must conclude, with the magistrate judge, that any harm Plaintiff may suffer during the course of this litigation from the denial of his preliminary injunction will be self-inflicted. "If the harm complained of is self-inflicted, it does not qualify as irreparable." Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 839

(3d Cir. 1995). Therefore I shall adopt the Report and Recommendation of the magistrate judge, (Doc. 70), and deny Plaintiff's motion for a preliminary injunction.

B. Motion to Dismiss Under § 1997e(a). 42 U.S.C. § 1997e(a) requires a prisoner to exhaust all administrative remedies before bringing a § 1983 claim. See generally Nyhuis v. Reno, 204 F.3d 65 (3d Cir. 2000). The Pennsylvania Department of Corrections has adopted a grievance system, governed by Administrative Directive 804 (DC-ADM 804), which requires inmates to first present their grievances to a prison grievance coordinator. Defendants aver that Plaintiff failed to appeal the initial denial of his grievance and, as a consequence, that he has not exhausted his administrative remedies. (Brief in Support of Defendants' Motion to Dismiss, Doc. 30.) Plaintiff replies that his grievances were returned unprocessed and without grievance numbers, making appeal impossible. (Doc. 15.)

In a motion to dismiss, the allegations in the pleadings must be accepted as true and the plaintiff must receive the benefit of all inferences reasonably drawn from them. See Breyer v. Meissner, 214 F.3d 416, 421 (3d Cir. 2000). Here Plaintiff has alleged that Defendants' actions prevented him from being able to pursue his grievances beyond the initial stage. (Doc. 15.) Accepting this as true for purposes of the motion to dismiss, I find that Plaintiff has substantially complied with the requirements of the grievance system, and that his claims should not be dismissed under § 1997e(a) for failure to exhaust administrative remedies. See Nyhuis, 204 F.3d at 77-78 ("compliance with the administrative remedy scheme will be

satisfactory if it is substantial"). Therefore the magistrate judge's § 1997e(a) analysis will be adopted.

C. Failure to State a Claim. Defendants have also requested that Plaintiff's claims be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (Docs. 28, 30.) However, as the magistrate judge has amply shown, Plaintiff has alleged facts sufficient to support his free exercise, access to the courts, and retaliation claims. (Doc. 53 ¶¶ 7-16.) Defendants' arguments concerning the merits of these claims are misplaced, (Doc. 30), since for purposes of the motion to dismiss Plaintiff's allegations must be taken as true<sup>1</sup>, see Breyer, 214 F.3d at 421. Accordingly, these three claims will not be dismissed and the relevant portion of the magistrate judge's report will be adopted.

With regard to Plaintiff's procedural due process claim, I also find that Plaintiff has stated a claim upon which relief can be granted. In Hudson v. Palmer the Supreme Court held, in the context of a prisoner's due process claim for the deprivation of his personal property, that predeprivation process is not constitutionally required where the state cannot foresee that such deprivations are

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<sup>1</sup> That the magistrate judge found Plaintiff can have his goods shipped to him at any time does not moot this action. First, Plaintiff disputes this in his amended complaint; and in the context of Defendants' motion to dismiss – unlike in the context of Plaintiff's motion for a preliminary injunction – Plaintiff's allegations must be taken as true. Second, even if Plaintiff had already recovered his personalty, he would still have his claim for monies allegedly taken from his account, as well as a claim for damages from the temporary deprivation of his personal property.

likely to occur. 468 U.S. 517, 534, 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393 (1984).

"Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process." Id. On the other hand, when the challenged deprivation stems from an "established state procedure," the state is able to anticipate the deprivation and is obligated to afford the prisoner predeprivation process. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 436, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982); Hicks v. Feeney, 770 F.2d 375, 378 (3d Cir. 1985). In short, the state must provide predeprivation process wherever it is feasible to do so.

Once it is determined that a predeprivation procedure is not feasible, and thus not required, the question remains whether the state has provided an adequate postdeprivation procedure.<sup>2</sup> See Hudson, 468 U.S. at 534, 104 S.Ct. at 3204. The Fourteenth Amendment does not require that this procedure be a formal judicial hearing conducted according to the Federal Rules of Evidence and the Federal Rules of Civil Procedure. See Holman v. Hilton, 712 F.2d 854, 863 (3d Cir. 1983) (citing Goldberg v. Kelly, 397 U.S. 254, 266-68, 90 S.Ct. 1011, 1019-21, 25 L.Ed.2d 287; Logan, 455 U.S. at 437, 102 S.Ct. at 1158-59). "What the Fourteenth Amendment does require, however, is an opportunity granted at a meaningful time and in a

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<sup>2</sup> Whether a particular procedure is constitutionally required is determined by balancing 1) the magnitude of the protected liberty or property interest and 2) the probable increase in the accuracy of the determination should the procedure be used, against 3) the government's interest, including its interest in avoiding additional fiscal and administrative burdens. See Mathews V. Eldridge, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976).

meaningful manner for a hearing appropriate to the nature of the case." Logan, 455 U.S. at 436, 102 S.Ct. at 1158 (quotations omitted). In Hudson, the availability of a state tort suit not barred by sovereign immunity was sufficient for due process. Id. at 535. It is likewise clear that an administrative grievance system like DC-ADM 804 may qualify as an adequate postdeprivation remedy. See Austin v. Lehman, 893 F.Supp. 448, 454 (E.D.Pa. 1995) ("this internal grievance procedure [DC-ADM 804] constituted an adequate post-deprivation remedy").

In the present case, it is unclear whether Plaintiff has alleged that his personalty and funds were taken from him in accordance with official policies, or whether he alleged that individual state officers acted independently. Some portions of the amended complaint seem to state or imply that certain defendants were acting on their own initiative, perhaps even in violation of official policy. (See, e.g., Doc. 15 ¶¶ 48-49.) Yet elsewhere Plaintiff expressly alleges that the challenged actions were taken pursuant to institutional policy. (See, e.g., Doc. 15 ¶ 67.) Construing the amended complaint generously, as is especially appropriate when the nonmovant is before the court *pro se*, I find that Plaintiff has alleged that the deprivation was effected pursuant to established state procedure, so that any postdeprivation process available to Plaintiff would be constitutionally insufficient under Hudson and Logan. Consequently, the existence of a postdeprivation procedure such as a grievance system does not mean that Plaintiff's claim must necessarily fail.

Further, even on the assumption that a postdeprivation procedure would have been sufficient here, Plaintiff has alleged that the prison grievance system, though

theoretically available to him, did not in fact provide him with a meaningful opportunity to be heard. Moreover, Defendants have not argued, let alone proved as a matter of law, that a state tort action would qualify as an adequate postdeprivation remedy.<sup>3</sup> As a consequence, even if it is supposed that a postdeprivation procedure could have satisfied the requirements of due process, Plaintiff has properly alleged that he was never afforded an adequate postdeprivation remedy. Accordingly, Plaintiff has successfully stated a Fourteenth Amendment claim, and Defendants' motion to dismiss this claim will be denied.<sup>4</sup>

D. Lack of Personal Involvement Finally, Defendants' request that Plaintiff's claims be dismissed on the grounds that Plaintiff has failed to allege facts showing that each defendant was personally involved in the alleged wrongdoing. "A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely upon the operation of respondeat superior." Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) (citing Parratt v. Taylor, 451 U.S. 527, 537 n. 3, 101 S.Ct. 1908, 1913 n. 3, 68 L.Ed.2d 420 (1981); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976)). To survive a motion to dismiss, Plaintiff must allege with "appropriate particularity" that

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<sup>3</sup> It is notable, however, that Pennsylvania has waived sovereign immunity as to tort claims arising from state care, custody or control of personal property. See 42 Pa.C.S.A. § 8522(b)(3).

<sup>4</sup> As I have made my own analysis of the Fourteenth Amendment claim, and have reached the same conclusion as the magistrate judge, there is no need to adopt that portion of his Report and Recommendation.

the defendant directly participated in, or had knowledge of and acquiesced in, the alleged wrongs. See Rode, 845 F.2d at 1207. Accord Laudenberger v. Sciotti, 2000 WL 1130092, \*4 (E.D.Pa.); Pearson v. Vaughn, 102 F.Supp.2d 282, 289 (E.D.Pa. 2000). Cf. Haberstick v. Nesbitt, 1998 WL 472447, \*4 (E.D.Pa.) (supervisor liable "if he knows about the conduct and facilitates it, approves it, condones it, or turns a blind eye to it") (citing Vance v. Peters, 97 F.3d 987 (7th Cir. 1996)).

Here, as the report of the magistrate judge indicates, Plaintiff has made satisfactory allegations of personal involvement on the part of Defendants Price, Mazukuliyak, Martin, Hollibaugh, Kapolka, Zamborowski and Orndoff. (Doc. 53 at 23-24.) Therefore I will adopt the magistrate judge's report with respect to these Defendants, and decline to dismiss Plaintiff's claims against them. However, I will not adopt the magistrate judge's recommendations with respect to Defendants Horn and Franks, since I find Plaintiff has not alleged facts indicating their personal involvement, nor with respect to Defendant D'Eletto, since I find that Plaintiff *has* properly alleged her involvement.

Plaintiff has alleged that D'Eletto refused to process grievances he filed concerning the taking of his property. (See Doc. 15 ¶¶ 77-81, 106-08, 136-143.) The magistrate judge reasoned that, since prisoners have no constitutional right to a grievance mechanism, Plaintiff cannot bring a civil rights claim against D'Eletto for denying him access to Pennsylvania's prison grievance system. (See Doc. 53 at 24-25.) This, however, misconstrues the nature of Plaintiff's due process claim. Plaintiff cannot claim that the taking of his property was one constitutional violation,

the refusal to process his grievance another. Rather, Plaintiff must claim that the two instances of misconduct operated in conjunction to deprive him of property without due process of law. D'Eletto's alleged actions are central to Plaintiff's claim, since without her participation Plaintiff presumably would have had his meaningful opportunity to be heard. Therefore I find that Plaintiff has sufficiently alleged Defendant D'Eletto's personal involvement, and I will deny the motion to dismiss Plaintiff's claims against her.

With regard to Defendants Horn and Franks, who are Secretary of the Pennsylvania Department of Corrections and Superintendent of SCI-Huntington, respectively, I find that Plaintiff has not alleged personal involvement with the requisite particularity. Plaintiff's allegations regarding these two defendants are limited to conclusory statements -- such as bare claims that Horn "acquiesced in" and "enforced" the challenged actions -- and to claims that Plaintiff sent them various letters informing them of his grievances and requesting assistance. (See Doc. 15 ¶¶ 4, 22-29, 83, 91, 98, 118, 130-31, 134.) However, in order to survive a motion to dismiss, a plaintiff must allege *particular facts* which indicate that each defendant directly participated in, or knew of and acquiesced in, the unconstitutional conduct. See Rode, 845 F.2d at 1207. Merely asserting that Plaintiff sent letters to these two defendants will not suffice. Indeed, it would be anomalous to suggest that a prisoner could name as a Defendant any governmental official whatsoever, no matter how far removed in the chain of authority from the actual conduct in question, simply by sending that official a letter. Therefore, with respect to Defendants Horn and Franks,

I will grant Defendants' motion to dismiss for failure to properly allege personal involvement.

An appropriate order will follow.

October 31, 2000

Date

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A. Richard Caputo  
United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

LAMONT BULLOCK,	:	
	:	NO: 3:CV-99-1402
Plaintiff,	:	
	:	
vs.	:	(Judge Caputo)
	:	
MARTIN F. HORN, et al.,	:	
	:	
Defendants.	:	

**ORDER**

**NOW**, this 31st day of October, 2000 IT IS HEREBY ORDERED that:

1. The Report and Recommendation of Magistrate Judge J. Andrew Smyser (Doc. 70) is **ADOPTED**;
2. Plaintiff's Motion for a Preliminary Injunction (Doc. 24) is **DENIED**;
3. The Report and Recommendation of Magistrate Judge J. Andrew Smyser (Doc. 53) is **ADOPTED IN PART**, with regard to:
  - a) Defendants' motion to dismiss under § 1997e(a);
  - b) Defendants' motion to dismiss Plaintiff's free exercise, access to the courts, and retaliation claims for failure to state a claim upon which relief may be granted;
  - c) Defendants' motion to dismiss Plaintiff's claims against Defendants Price, Mazukuliyak, Martin, Hollibaugh, Kapolka, Zamborowski and Orndoff for failure to properly allege personal involvement;
4. Defendants' motions to dismiss under § 1997e(a) and for failure to state a claim upon which relief can be granted (Doc. 28) are **DENIED**;
5. Defendants' motion to dismiss Plaintiff's claims against Defendants Price, Mazukuliyak, Martin, Hollibaugh, Kapolka, Zamborowski, Orndoff and D'Eletto for failure to properly allege personal involvement (Doc. 28) is **DENIED**;
6. Defendants' motion to dismiss Plaintiff's claims against Defendants Horn and Franks for failure to properly allege personal involvement (Doc. 28) is **GRANTED**;

7. This case is to be recommitted to Magistrate Judge Smyser for further proceedings.

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A. Richard Caputo  
United States District Judge

Filed 10/31/2000