

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GILBERT JAY PALIOTTA,
Appellant,
vs.
ELDON K. MCDANIEL, IN HIS
INDIVIDUAL CAPACITY; RENEE
BAKER, IN HER OFFICIAL CAPACITY;
DEBRA BROOKS, IN HER OFFICIAL
CAPACITY; CLAUDE WILLIS, IN HIS
OFFICIAL CAPACITY; ADAM
WATSON, IN HIS OFFICIAL
CAPACITY; AND THE STATE OF
NEVADA ON RELATION OF THE
NEVADA DEPARTMENT OF
CORRECTIONS,
Respondents.

No. 66805

FILED

NOV 19 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a civil rights and state torts action. Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

Appellant Gilbert Jay Paliotta, an inmate, was placed in disciplinary segregation for a number of years for killing his cellmate. Respondents, the Nevada Department of Corrections and certain of its employees (NDOC), later moved Paliotta to administrative segregation in January 2006. Although he returned to disciplinary segregation a few times in the interim, Paliotta has continuously remained in administrative segregation since approximately March 2011. At no time since his original removal to disciplinary segregation has Paliotta been returned to general population. After Paliotta unsuccessfully pursued an administrative

grievance in an effort to be moved back to general population, he filed the underlying complaint in district court.

Paliotta's first amended complaint asserted violations of his due process rights and his right to equal protection pursuant to the Fourteenth Amendment to the United States Constitution, as well as a claim for negligence under state torts law. All three of Paliotta's claims stemmed from allegations that the NDOC was improperly housing him in administrative segregation and refusing to return him to general population. The NDOC later moved to dismiss the complaint, asserting that Paliotta failed to state a claim upon which relief could be granted for both his civil rights claims and his state torts claim. The district court granted the motion to dismiss over Paliotta's opposition. In so doing, the district court held that the NDOC had provided adequate due process to Paliotta based on the allegations contained in the first amended complaint; that it had a rational basis for their treatment of Paliotta, thus negating any equal protection claim; and that it had discretionary immunity from the state torts claim. After the district court dismissed appellant's complaint, this appeal followed.¹

This court reviews a district court order granting a motion to dismiss under NRCP 12(b)(5) de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Dismissal will be affirmed when the complaint's factual allegations, even when recognized as true, do not entitle the plaintiff to relief under the claims being asserted. *Id.*

Appellant's first argument on appeal is that he properly stated a claim for a violation of his right to due process by alleging he was kept in

¹Appellant does not challenge the dismissal of his state torts claim on appeal, thus it is not addressed in this order.

administrative segregation for so long and without a proper basis that it created a significant and atypical hardship as to his confinement. Administrative segregation is “well within the terms of confinement ordinarily contemplated by a prison sentence,” and, therefore, freedom from administrative segregation is not, in and of itself, “an interest independently protected by the Due Process Clause.” *Hewitt v. Helms*, 459 U.S. 460, 468 (1983), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). The United States Supreme Court has recognized, however, that, under certain circumstances, states may “create liberty interests which are protected by the Due Process Clause.” *Sandin*, 515 U.S. at 483-84.

The Supreme Court went on to clarify that

these interests 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.

Id. at 484 (internal citations omitted). In determining whether a state has created a liberty interest, courts must look to whether the state created an interest of “real substance.” *See id.* at 480 (referring to the ability to earn good time credits towards an early release as an example of a liberty interest of “real substance”). But in *Sandin*, the Supreme Court concluded that the prison’s placement of inmates in disciplinary segregation did not create a liberty interest of real substance because disciplinary segregation did not “present a dramatic departure from the basic conditions of [the inmate’s] indeterminate sentence,” *id.* at 485, and, thus, placement in disciplinary segregation did not impose an atypical and significant hardship on inmates’ prison life. *See generally id.* at 484-87.

The case here differs from *Sandin*, however, because Paliotta's complaint focused on his time in administrative, rather than disciplinary, segregation; the conditions in administrative segregation here may be more restrictive than those discussed in *Sandin*; and Paliotta has spent a significantly longer time in segregation than the 30-day segregation period addressed in *Sandin*. *See id.* at 486. Nevertheless, we need not address these distinctions because, even assuming that a state-created liberty interest did exist,² we conclude that Paliotta received all process that would be due to him.

When a protectable liberty interest is identified, it is a matter of federal law what process is due to protect that interest under the United States Constitution's Due Process Clause. *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 375 (1990) ("The elements of, and the defenses to, a federal cause of action are defined by federal law."); *Quick v. Jones*, 754 F.2d 1521, 1523 (9th Cir. 1985) (explaining that what process is due to protect a liberty interest is a question of law). And the United States Court of Appeals for the Ninth Circuit has held that, when prison officials are initially determining whether an inmate should be administratively segregated, due process requires that the inmate be informed of the charges against him or the reasons for segregation, that prison officials hold an informal nonadversary hearing within a reasonable time following segregation, and that the inmate be allowed to present his views. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir. 1986) ("*Toussaint I*"), *overruled in part on other grounds by Sandin*, 515 U.S. 472.

²Our treatment of this issue should not be construed as a determination that inmates have a state-created liberty interest in being released from administrative segregation back into general population under the circumstances presented by this case.

Due process also requires periodic review of the segregation decision, but the intervals at which that review occurs is at the discretion of prison officials, and the Ninth Circuit has upheld periodic reviews that occurred every 120 days as comports with due process. *Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990) ("*Toussaint II*"), cert. denied, 502 U.S. 874 (1991). Further, due process does not require, as is pertinent here, a detailed written notice of the charges, representation by counsel or other inmates, or an opportunity to present witnesses. *Toussaint I*, 801 F.2d at 1100-01.

On appeal, Paliotta does not challenge the NDOC's initial decision to place him in administrative segregation, but rather, argues that it violated his due process rights by not conducting meaningful periodic reviews of its decision to keep him in administrative segregation. Thus, we only address whether the NDOC's periodic review comports with the due process requirements enunciated by the Ninth Circuit.

In his civil appeal statement Paliotta concedes, and the record supports, that the NDOC conducted periodic reviews of its decision to keep him in administrative segregation nearly every 30 days and gave him written notice of its decisions.³ The record also shows that Paliotta submitted numerous kites⁴ requesting to return to general population and that the NDOC reviewed and ultimately denied these requests. Thus, the NDOC has afforded Paliotta all process that was due under the Ninth

³Most of these decisions indicated that Paliotta would not be returned to general population due to safety and security concerns because, in general population, he would have to be housed with another cellmate.

⁴Kites are informal letters that inmates send to prison officials.

Circuit's decisions in *Toussaint I* and *Toussaint II*.⁵ Furthermore, Paliotta's arguments that he was not allowed to attend the periodic reviews or informed of steps he could take to have a better chance of being placed in general population fail to show a violation of due process because the law does not require that prison officials offer those processes. See *Toussaint II*, 926 F.2d at 803 (indicating that due process requires affording inmates the opportunity to be heard regarding why they should not be transferred to administrative segregation, but not imposing that same requirement or any other requirements on the periodic reviews of that decision). Accordingly, for the reasons set forth above, we affirm the district court's dismissal of appellant's due process claims as he failed to state a claim upon which relief could be granted.⁶ See *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

With regard to Paliotta's equal protection claim, while the record shows he alleged that he was treated differently than other inmates by continuously having his requests to return to general population

⁵Although the caselaw is unclear regarding whether the requirements that an inmate must be informed of the reasons for segregation and have an opportunity to be heard in relation to the initial decision to place the inmate in administrative segregation, see *Toussaint I*, 801 F.2d at 1100, also apply to the prison officials' periodic review of the segregation decision, see *Toussaint II*, 926 F.2d at 803, we need not decide that issue in this appeal. The record demonstrates that respondents satisfied due process even if the additional processes of *Toussaint I* are found to apply to prison officials' periodic review of segregation decisions.

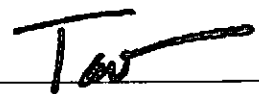
⁶We affirm this decision even though the district court incorrectly based its dismissal of the due process claims on holdings in *Hewitt*, 459 U.S. 460, which were later abrogated by *Sandin*, 515 U.S. 472, because the district court ultimately came to the correct conclusion. See *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that an appellate court may affirm a district court decision for reaching the correct result, even if for the wrong reason).

denied, he failed to allege that there was no rational basis for that treatment. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (providing that, in order to establish a class-of-one equal protection claim, a plaintiff must show that he has been “intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment”). Thus, the district court correctly concluded appellant failed to state an equal protection claim.

Under these circumstances, we conclude that the district court properly dismissed Paliotta’s complaint for failure to state a claim for which relief could be granted. See *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Gary Fairman, District Judge
Gilbert Jay Paliotta
Attorney General/Carson City
White Pine County Clerk