UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAN M. GAWLIK	:	Civil No. 3:21CV01549(SALM)
v.	:	
ANGEL QUIROS, et al.	:	June 8, 2022

INITIAL REVIEW ORDER

Self-represented plaintiff Jan M. Gawlik ("Gawlik" or "plaintiff"), a sentenced inmate[1] at Cheshire Correctional Institution ("Cheshire"), brings this action relating to events allegedly occurring during his incarceration in the custody of the Connecticut Department of Correction ("DOC").

Plaintiff brings this action pursuant to 42 U.S.C. §1983, naming twenty-two individual defendants. See Doc. #1 at 1. Eighteen of those defendants are current or former DOC employees: Commissioner Angel Quiros; Commissioner Rollin Cook;

[1] The Court may take judicial notice of matters of public record. See, e.g., Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006); United States v. Rivera, 466 F. Supp. 3d 310, 313 (D. Conn. 2020) (taking judicial notice of BOP inmate location information); Ligon v. Doherty, 208 F. Supp. 2d 384, 386 (E.D.N.Y. 2002) (taking judicial notice of state prison website inmate location information). The Court takes judicial notice of the Connecticut DOC website, which reflects that Gawlik was sentenced on January 9, 2015, to a term of imprisonment that has not expired. See http://www.ctinmateinfo.state.ct.us/detailsupv.asp?id_inmt_num=138888 (last visited June 7, 2022).

District Administrator Mudano; District Administrator William Mulligan; District Administrator Nick Rodriguez; Director of Programs and Treatment Eulalia Garcia; Warden Scott Erfe; Warden Kenneth Butricks; Warden Denise Walker; Captain/Acting Warden Carlos Nunez; Administrative Remedies Coordinator Shelton; Administrative Remedies Coordinator Chad Green; Corrections Officer ("CO") Cunningham; CO Ovittore; CO Kaya; Freedom of Information ("FOI") Administrator Anthony Campanelli; FOI Liaison Linda McMahon; Captain Rodriguez. See id. The remaining four defendants, President Sean Howard, Vice President Lichwalla, Treasurer St. Pierre, and Secretary Pagoni-Ligi, are alleged to be "Corrections/Union Officers[]" of "Union #387[.]" Id.

I. STANDARD OF REVIEW

Under section 1915A of Title 28 of the United States Code, the Court must review any "complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. §1915A(a). The Court then must "dismiss the complaint, or any portion of the complaint, if" it "is frivolous, malicious, or fails to state a claim upon which relief may be granted; or ... seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. §1915A(b). Dismissal under this provision may be with or without prejudice. See Shakur v. Selsky, 391 F.3d 106, 112 (2d

Cir. 2004). Section 1915A "applies to all civil complaints brought by prisoners against governmental officials or entities regardless of whether the prisoner has paid a filing fee." Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir. 2007) (citation and quotation marks omitted).[2]

A civil complaint must include sufficient facts to afford defendants fair notice of the claims and the grounds upon which they are based and to demonstrate a plausible right to relief. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). Conclusory allegations are not sufficient. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Rather, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570.

It is well-established that "[p]ro se complaints 'must be construed liberally and interpreted to raise the strongest arguments that they suggest.'" Sykes v. Bank of Am., 723 F.3d 399, 403 (2d Cir. 2013) (quoting Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006)). However, even self-represented parties must satisfy the basic rules of pleading, including the requirements of Rule 8.[3] See, e.g., Wynder v.

[2] Plaintiff's Motion for Leave to Proceed In Forma Pauperis was denied. See Doc. #15. On February 14, 2022, plaintiff paid the full filing fee.

[3] Federal Rule of Civil Procedure 8 requires, among other things, that a Complaint contain "a short and plain statement of the

McMahon, 360 F.3d 73, 79 n.11 (2d Cir. 2004) ("[T]he basic requirements of Rule 8 apply to self-represented and counseled plaintiffs alike."). A complaint, even one filed by a self-represented plaintiff, may be dismissed if it fails to comply with Rule 8's requirements "that a complaint must set forth a short and plain statement of the basis upon which the court's jurisdiction depends and of a claim showing that the pleader is entitled to relief." Prezzi v. Schelter, 469 F.2d 691, 692 (2d Cir. 1972).

II. DISCUSSION

Plaintiff brings this "action pursuant to 42 U.S.C. §1983[.]" Doc. #1 at 4. The Court construes plaintiff's Complaint as asserting: (1) a First Amendment claim based on the

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claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). "When a complaint does not comply with the requirement that it be short and plain, the court has the power, on its own initiative or in response to a motion by the defendant, to strike any portions that are redundant or immaterial, or to dismiss the complaint. ... When the court chooses to dismiss, it normally grants leave to file an amended pleading that conforms to the requirements of Rule 8." Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988) (citations omitted). Plaintiff's complaint in this case is 92 pages, plus 176 pages of exhibits, and is repetitive. See Doc. #1 at 1-92. Plaintiff's complaints in his two previously filed cases in this District were, not including exhibits, 78 and 39 pages, respectively. See Gawlik v. Strom, 3:21CV00743(SALM), Doc. #1 at 1-78 (D. Conn. May 28, 2021); Gawlik v. Semple, 3:20CV00564(SALM), Doc. #1 at 1-39 (D. Conn. Apr. 27, 2020). The Court has reviewed plaintiff's Complaint in its entirety, though the Court is hard pressed to say it meets the "short and plain" requirements of Rule 8.

placement of plaintiff on a grievance restriction program; and (2) an Eighth Amendment conditions of confinement claim based on the denial of outdoor recreation.[4] Plaintiff brings claims

[4] Plaintiff makes passing references to many statutory and constitutional provisions:

> 42 U.S.C. §1997e(e)/physical-injury for emotional and mental damages, alleging violations of 42 U.S.C. §1985/conspiracy to interfere with civil rights, 42 U.S.C. §1986/action for neglect to prevent, retaliation, deliberate indifference, (8th) amendment, (14th) amendment, (1st) amendment, 18 U.S.C. §249/hate crimes acts, 18 U.S.C. §245/federally protected activities, malicious and sadistic conduct, supremacy clause violations, due process, torture, violation of Nelson Mandela rules of 2015, denial of liberty interests, bigotry and bias, discrimination, ADA-Americans with Disabilities Act, 42 U.S.C. §12132/prohibition against disability discrimination, 42 U.S.C. §12202/state immunity, 42 U.S.C. §12131/qualified individual with a disability, ect, equal protection clause, liberty interests.

Doc. #1 at 4. Mere passing reference to constitutional amendments and statutes is insufficient to state a claim under such provisions. See Yates v. Cunningham, No. 08CV06346(MAT), 2013 WL 557237, at *6 (W.D.N.Y. Feb. 12, 2013) ("[M]ere passing reference to a constitutional amendment is plainly insufficient to state a claim upon which relief may be granted."); Tasaka v. Bayview Loan Servicing, LLC, No. 17CV07235(LDH)(ST), 2022 WL 992472, at *8 (E.D.N.Y. Mar. 31, 2022) ("[T]he amended complaint is rife with passing references to statutes that have no connection to the alleged facts. Plaintiff simply has not pleaded any facts that would provide Defendants with notice of the grounds for a claim under most of the statutes cited in the amended complaint." (citation omitted)); Murray v. Orange Cnty., No. 18CV00442(NSR), 2020 WL 3450782, at *4 (S.D.N.Y. June 23, 2020) ("Other than to make a passing reference to several statutes ... Plaintiff fails to assert any factual allegations in support of such claims. More than mere labels, conclusions, or formulaic recitation of the elements of claim is required to assert a plausible claim.").

against all defendants in their individual and official capacities. See Doc #1 at 1.

A. Personal Involvement

Plaintiff appears to assert claims based on supervisory liability against Commissioner Angel Quiros and former Commissioner Rollin Cook. See generally Doc. #1 at 5-80.

When bringing a claim pursuant to §1983, "a plaintiff must plead and prove 'that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" Tangreti v. Bachmann, 983 F.3d 609, 618 (2d Cir. 2020) (quoting Iqbal, 556 U.S. at 676). A constitutional "violation must be established against the supervisory official directly[]" and cannot be based solely on a theory of supervisory liability. Id. In other words, a supervisory official is not personally involved in a violation of a plaintiff's constitutional rights simply "by reason of [the official's] supervision of others who committed the violation." Id. at 619.

Plaintiff alleges that he wrote letters to former Commissioner Cook on March 21, 2019, November 2, 2019, and January 1, 2020, but never received a response from him. See Doc. #1 at 13, 15, 21. Similarly, plaintiff alleges that he wrote letters to Commissioner Quiros on May 17, 2021, June 28, 2021, and August 2, 2021, but received no response. See id. at

35, 39, 49, 65-66. "The fact that a prisoner sent a letter or written request to a supervisory official does not establish the requisite personal involvement of the supervisory official." Young v. Choinski, 15 F. Supp. 3d 172, 189 (D. Conn. 2014) (collecting cases). The allegations of the Complaint are insufficient to support personal involvement of defendants of Quiros and Cook in any alleged violation. Accordingly, all claims against defendants Quiros and Cook are **DISMISSED, without prejudice.**

B. Union Defendants

Plaintiff names "Mr. Sean Howard/Officer, Union #387-President[;]" "Mr./Mrs. Lichwalla/Officer, Union #387-Vice President[;]" "Mr. St. Pierre/Officer, Union #387-Treasurer[;]" and "Mr./Mrs. Pagoni-Ligi, Officer, Union #387 Secretary[]" as defendants (the "Union defendants"), alleging them to be "Corrections/Union Officers." Doc. #1 at 1. Plaintiff provides very little information about the Union defendants, and makes only the conclusory allegation that they "have all devised a unpromulgated verbal agreement/conspiracy that denies the incarcerated outdoor exercise/freshair during winter months from November to April[]" in response to complaints from Corrections Officers. Id. at 9 (sic).

"In order to state a claim under §1983, a plaintiff must allege that he was injured by either a state actor or a private

party acting under color of state law. ... Labor unions ... generally are not state actors, and [plaintiff] does not argue otherwise." Ciambriello v. Cnty. of Nassau, 292 F.3d 307, 323 (2d Cir. 2002) (citations and quotation marks omitted). Plaintiff does not allege that the Union defendants acted "under color of state law." Id. Rather, plaintiff's allegations against the Union defendants are limited to conclusory allegations that they "conspired" with the DOC defendants.

> To state a claim against a private entity on a section 1983 conspiracy theory, the complaint must allege facts demonstrating that the private entity acted in concert with the state actor to commit an unconstitutional act. Put differently, a private actor acts under color of state law when the private actor is a willful participant in joint activity with the State or its agents. A merely conclusory allegation that a private entity acted in concert with a state actor does not suffice to state a §1983 claim against the private entity.

Id. at 324 (citations and quotation marks omitted). Because plaintiff has not alleged that the Union defendants are state actors, and has not adequately alleged that they acted jointly with state actors, all claims against the Union defendants are **DISMISSED, without prejudice.**

C. First Amendment

The Court construes plaintiff's Complaint as asserting First Amendment claims (1) against defendant Green for returning his grievances "without disposition[,]" Doc. #1 at 19; and (2) against defendants Shelton and Nunez for placing plaintiff on a

grievance restriction. See id. at 50-54. Plaintiff asserts that these actions effectively denied him access to the prison grievance system, which he contends constitutes a violation of his right to petition for redress of grievances. See id. at 51-54.

"While the First Amendment guarantees the right of access to courts, grievance programs were undertaken voluntarily and have no legal basis in the Constitution. Therefore these programs are not considered constitutional rights. Thus, courts have consistently held that violations of those procedures or the state's failure to enforce them does not give rise to a claim under §1983." Tafari v. McCarthy, 714 F. Supp. 2d 317, 349 (N.D.N.Y. 2010) (citations omitted).

1. Defendant Green

Plaintiff asserts that defendant Green denied him "1st Amendment Redress" when Green returned plaintiff's "properly filed grievances" "without disposition." Doc. #1 at 19. "[I]t is well settled that inmates have a constitutional right of access to the courts." Cooke v. Jones, No. 3:19CV00065(MPS), 2019 WL 2930009, at *6 (D. Conn. July 8, 2019) (citing Lewis v. Casey, 518 U.S. 343, 350 (1996)). However, it is also well settled that denial of access to the grievance procedure does not constitute a First Amendment violation. See, e.g., Harnage v. Faneuff, No. 3:15CV01033(AWT), 2017 WL 6629297, at *9 (D. Conn. Nov. 29,

2017) ("The Second Circuit has not held that denial of access to or interference with prison grievance procedures constitutes violation of the right to petition the government for redress of grievances. District courts in this circuit considering the issue have held that it does not, and the court agrees with the analysis in those cases." (emphasis added)); Stockwell v. Santiago, No. 3:16CV01476(VLB), 2016 WL 7197362, at *3 (D. Conn. Dec. 8, 2016) ("It is well established that inmate grievances procedures are undertaken voluntarily by the states, that they are not constitutionally required, and accordingly that a failure to process, investigate or respond to a prisoner's grievances does not in itself give rise to a constitutional claim." (citations and quotation marks omitted)) (collecting cases); Mimms v. Carr, No. 09CV05740(NGG)(LB), 2011 WL 2360059, at *10 (E.D.N.Y. June 9, 2011), aff'd, 548 F. App'x 29 (2d Cir. 2013) ("Thus, the First Amendment rights to petition the government and access the courts are not infringed where prison officials deny inmates access to grievance procedures.") (collecting cases); Braham v. Lantz, No. 3:08CV01564(DFM), 2010 WL 1240985, at *3 (D. Conn. Mar. 23, 2010) ("To the extent that the plaintiff alleges that the defendants failed to comply with the grievance procedure, this allegation, without more, does not constitute a constitutional violation.").

Even if Green did reject properly filed grievances, as plaintiff alleges, and those rejections denied plaintiff access to the grievance process, denial of access to the grievance process is not a First Amendment violation. Accordingly, the First Amendment claim against defendant Green is **DISMISSED, without prejudice.**

2. Defendants Shelton and Nunez

Plaintiff alleges that defendants Shelton and Nunez violated his First Amendment rights by placing him on a grievance restriction, dated July 28, 2021, that permitted him to file only one grievance per month for six months. See Doc. #1 at 50-54. Administrative Directive 9.6 ("A.D. 9.6")[5] permits a Unit Administrator to impose grievance restrictions when an

[5] The Court takes judicial notice of Administrative Directive 9.6, effective April 30, 2021. See State of Connecticut Department of Correction, Administrative Directive 9.6: Inmate Administrative Remedies, (April 30, 2021), https://portal.ct.gov/-/media/DOC/Pdf/Ad/AD9/AD_0906_Effective_04302021.pdf; see also Nicholson v. Murphy, No. 3:02CV01815(MRK), 2003 WL 22909876, at *7 n.2 (D. Conn. Sept. 19, 2003) ("The Administrative Directives are written guidelines, promulgated pursuant to Connecticut General Statutes §18–81, establishing the parameters of operation for Connecticut correctional facilities. ... [T]his court takes judicial notice of Connecticut Department of Correction Administrative Directive 9.6."); Baltas v. Jones, No. 3:21CV00469(MPS), 2021 WL 6125643, at *2 n.1 (D. Conn. Dec. 27, 2021) (taking judicial notice of Administrative Directive 9.4). Plaintiff has also attached a portion of the current A.D. 9.6, see Doc. #1 at 212, and an outdated portion of A.D. 9.6. See id. at 211.

inmate is deemed to be abusing the Administrative Remedies Process. See A.D. 9.6 at 3-4. A.D. 9.6 states, in relevant part:

> [ℓ]. Abuse.
>
> i. An inmate may be deemed to be abusing the Administrative Remedies Process if any of the following conditions are met:
>
> 1. an inmate files eight (8) or more requests for a grievance in any 60-day calendar period;
> 2. an inmate files repetitive requests for an administrative remedy addressing the same issue before the established time for response has elapsed;
> 3. an inmate files repetitive requests for an administrative remedy when a valid response has been provided and there has been no change in any circumstances that would affect the response; or
> 4. an inmate files harassing requests for an administrative remedy.
>
> ii. A determination of abuse shall be made by the Unit Administrator in writing and shall identify the restriction(s) imposed and its duration. Restrictions may include:
>
> 1. denial of access to the Administrative Remedies Process for a specified period of time;
> 2. a limitation on the number of requests for an administrative remedy that may be filed; and/or,
> 3. A restriction as to the subject matter that may be grieved or appealed.

Id.

"Plaintiff alleges after reviewing and inspecting Administrative Directive 9.6, Section 5([ℓ])([i]), under abuse, that there is no language that states that [he is] allowed to file (1) grievance a month, nor any language that [he can be] placed on grievance restrictions for (6) months under certain conditions." Doc. #1 at 50. This allegation is directly

contradicted by the plain language of A.D. 9.6. Plaintiff submitted ten grievances within a 60-day period, thereby permitting the DOC to deem that he was "abusing the Administrative Remedies Process[.]" A.D. 9.6 at 3, Section 5(ℓ)(i); see also Doc. #1 at 207 (memorandum from Warden Nunez to plaintiff identifying the ten grievances that were submitted between June 7, 2021, and July 28, 2021). Because plaintiff was deemed to be abusing the Administrative Remedies Process, A.D. 9.6 permitted the DOC to impose restrictions. See A.D. 9.6 at 4, Section 5(ℓ)(ii). The restriction of one grievance per month is supported by the provision of A.D. 9.6 that expressly permits "a limitation on the number of requests for an administrative remedy that may be filed[.]" Id. at 5(ℓ)(ii)(2). The six-month duration of the restriction is supported by the provision that expressly permits "denial of access to the Administrative Remedies Process for a specified period of time[.]" Id. at 5(ℓ)(ii)(1). Although A.D. 9.6 does not describe the specific penalty that Gawlik received -- a maximum of one grievance per month for six months -- it gives DOC staff the discretion to determine the appropriate penalty, and the penalty imposed on plaintiff was within the scope of that discretion.

Furthermore, the Second Circuit has held that grievance restrictions do not violate an inmate's First Amendment rights. The Court found that a district court had "properly dismissed" a

plaintiff's "claims regarding the imposition of grievance restrictions. [Plaintiff's] claim that defendants violated his due process rights by restricting his access to the prison's grievance procedures confuses a state-created procedural entitlement with a constitutional right. However, neither state policies nor state statutes create federally protected due process entitlements to specific state-mandated procedures." Riddick v. Semple, 731 F. App'x 11, 13 (2d Cir. 2018) (citation and quotation marks omitted); see also Tafari, 714 F. Supp. 2d at 350 ("Plaintiff has no right to abuse a voluntarily instituted program and delay the valid claims of other inmates. If Plaintiff had been completely prohibited from filing grievances, he may have had a claim." (emphases added)).

The restrictions placed on plaintiff were consistent with A.D. 9.6, and such restrictions do not violate the First Amendment. Accordingly, plaintiff's First Amendment claims against defendants Shelton and Nunez are **DISMISSED, without prejudice.**

D. Conspiracy -- Defendants McMahon and Campanelli

Plaintiff repeatedly refers to an alleged conspiracy among various defendants to deprive inmates of outdoor recreation. For instance, he asserts that the DOC defendants acted in conspiracy with the Union defendants to deny outdoor recreation, see, e.g., Doc. #1 at 9; that "FOI/Liaison McMahon, Administration, Union,

(Defendants), are in conspiracy/agreement to deny winter outdoor exercise," id. at 10 (sic); and that "defendant Campanelli and defendant McMahon were in conspiracy to agree together ... to violate constitutionally protected liberty rights to outdoor exercise/freshair." Id. at 15 (sic). Plaintiff also asserts that the denial of his grievances was "clearly conspiracy" under 42 U.S.C. §1985 and §1986. Id. at 21. Similar conclusory allegations of conspiracy appear throughout the Complaint.

The Court does not construe these passing references to "conspiracies" as attempting to state a separate conspiracy claim. To the extent plaintiff intended to bring a Section 1985 claim, such a claim lies only where the conspiracy is "motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus[,]" which is plainly not alleged here. Dolan v. Connolly, 794 F.3d 290, 296 (2d Cir. 2015) (citations and quotation marks omitted). "[A] §1986 claim must be predicated on a valid §1985 claim[.]" Brown v. City of Oneonta, N.Y., 221 F.3d 329, 341 (2d Cir. 2000) (citation and quotation marks omitted). Accordingly, plaintiff has not stated a claim for conspiracy under §1985 or §1986.

To the extent that plaintiff intended to bring a Section 1983 conspiracy claim, plaintiff's allegations are wholly conclusory and insufficient to state a claim. See Ciambriello, 292 F.3d at 325 ("[C]omplaints containing only conclusory,

vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." (citation and quotation marks omitted) (emphasis added)). As a practical matter, plaintiff simply asserts a "conspiracy" existed whenever he received an unfavorable response to a grievance or request. The mere fact that plaintiff received the same unfavorable response to his inquiries from multiple people does not support a claim that those people were unlawfully conspiring against him.

The allegations of the Complaint against defendants McMahon and Campanelli relate only to their participation in these insufficiently alleged "conspiracies." No independent substantive claims are brought against either of these defendants. Accordingly, any claims against defendants McMahon and Campanelli are **DISMISSED**, **without prejudice.**

E. Eighth Amendment Conditions of Confinement

The Court turns, at last, to the primary focus of plaintiff's Complaint: his Eighth Amendment conditions of confinement claim based on alleged denials of outdoor recreation. Generally, plaintiff asserts that he was denied "entitled liberty interests of outdoor exercise, fresh air, gym exercise, block residentcy courtyard exercise, ect[.]" Doc. #1

at 8 (sic). The Complaint focuses primarily on a policy that requires a minimum number of inmates[6] who wish to participate in outdoor recreation and a minimum temperature of 35 degrees Fahrenheit before the facility will permit outdoor recreation on a specific day ("the outdoor recreation policy"). See, e.g., Doc. #1 at 9, 20. Plaintiff alleges that the routine denial of outdoor recreation has persisted from 2018 to present. See id. at 8 ("4+/years of denial of winter exercise from 2018 to present[.]"). The Court construes plaintiff's Eighth Amendment conditions of confinement claim as challenging (1) the outdoor recreation policy itself and (2) the isolated instances where plaintiff was denied outdoor recreation.

"The Eighth Amendment does not mandate comfortable prisons, but prisons nevertheless must provide humane conditions of confinement[.]" Willey v. Kirkpatrick, 801 F.3d 51, 66 (2d Cir. 2015) (citations and quotation marks omitted)). The Second Circuit has held that prisoners have a right "to a meaningful opportunity for physical exercise[.]" McCray v. Lee, 963 F.3d

[6] The Complaint initially references a policy that required ten inmates interested in participating in outdoor recreation before the facility would permit outdoor recreation. See, e.g., Doc. #1 at 9. Plaintiff later references a minimum of three inmates, rather than ten, and includes an official memo dated November 14, 2019, as an exhibit that states that the policy is a minimum of three inmates. See, e.g., id. at 29, 149. This discrepancy has no bearing on the Court's analysis.

110, 120 (2d Cir. 2020) (collecting cases); see also Williams v. Greifinger, 97 F.3d 699, 704 (2d Cir. 1996) ("[S]ome opportunity for exercise must be afforded to prisoners." (citation and quotation marks omitted)).

The outdoor recreation policy that underlies plaintiff's Eighth Amendment claim states:

> [T]he units of North Blocks 1 through 4 must have a minimum of 3 inmates who wish to participate in outdoor recreation and ... the temperature [must] be a minimum of 35 degrees Fahrenheit. This policy is unique to those units within the facility, the North Block units have recreation yards inside of them which must be monitored by the housing unit offers working there for that day. For safety and security reasons, the facility has implemented this policy as not to leave the main unit understaffed while only a couple inmates wish to participate, or if the temperature is too dangerously low to remain outdoors.

Doc. #1 at 150 (letter from District Administrator Mulligan, dated March 26, 2020).

Courts in this Circuit have routinely declined to hold that denial of outdoor recreation constitutes a per se violation of the Eighth Amendment, particularly where that denial was limited in duration. See, e.g., Gawlik v. Semple, No. 3:20CV00564(SRU), 2021 WL 4430601, at *8 (D. Conn. Sept. 27, 2021) ("Gawlik cites to only one condition -- lack of access to fresh air and exercise [for a period of seven continuous days] -- in support of his claim. Although it is well-settled that the Eighth Amendment mandates that incarcerated individuals be afforded

some opportunity to exercise, courts in this Circuit have routinely held that relatively brief deprivations of the opportunity to exercise do not rise to the level of an Eighth Amendment violation." (citations omitted)); Belile v. Dominie, No. 9:15CV00423(TJM)(ATB), 2016 WL 2977170, at *5 (N.D.N.Y. Mar. 21, 2016), report and recommendation adopted, 2016 WL 2992177 (N.D.N.Y. May 20, 2016) ("At worst, in this case, plaintiff may have been exposed to stuffy air in his recreation room -- which he was allowed to use one hour each day -- for approximately one month[.]"); Phelan v. Zenzen, No. 10CV06704(CJS), 2012 WL 5420423, at *5 (W.D.N.Y. Nov. 6, 2012) ("Here, the Complaint does not allege that Plaintiff was deprived of all exercise. Instead, the Complaint alleges that, for a period of several weeks at most, Plaintiff was deprived of exercise in the prison yard as punishment for a disciplinary infraction. Such allegation fails to state an 8th Amendment claim, and will therefore be dismissed."); Shakur v. Sieminski, No. 3:07CV01239(CFD), 2009 WL 2151174, at *4 (D. Conn. July 15, 2009) ("While courts have found that denial of all opportunity to exercise violates an inmate's constitutional rights, they have found no violation where the inmate has an opportunity for exercise, either in or outside of his cell." (emphasis added) (collecting cases)); Beckford v. Portuondo, 151 F. Supp. 2d 204, 214 (N.D.N.Y. 2001) ("[T]he Court is unwilling to assume that

access to ... fresh air is constitutionally required when a disruptive prisoner is kept on 'keep lock' status for a period of six months but allowed one hour of alternative recreation time per day.").

Nonetheless, courts have commented on the importance of outdoor exercise, and some have speculated that routine denial of outdoor exercise could rise to the level of an Eighth Amendment violation, under certain circumstances. See Apodaca v. Raemisch, 864 F.3d 1071, 1077 (10th Cir. 2017) ("There is substantial agreement among the cases that some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates. But we also made clear that a denial of outdoor exercise does not per se violate the Eighth Amendment. In the absence of a per se violation, courts must examine the totality of the circumstances. These circumstances include the length of the deprivation." (citations and quotation marks omitted)); Anderson v. Colo., Dep't of Corr., 848 F. Supp. 2d 1291, 1296 (D. Colo. 2012) ("To my knowledge, however, no court has held that denial of fresh air and exercise is a per se Eighth Amendment violation. It depends on the facts of the particular case."); Richard v. Reed, 49 F. Supp. 2d 485, 488 n.5 (E.D. Va.), aff'd, 188 F.3d 503 (4th Cir. 1999) ("[I]n certain circumstances, deprivation of sunlight may well rise to the

level of an Eighth Amendment violation."); Jones v. Stine, 843 F. Supp. 1186, 1192 (W.D. Mich. 1994) ("Unnecessary or extreme restriction of inmates' opportunity for fresh air, exercise and recreation may rise to the level of an Eighth Amendment violation."); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) ("There is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates.") (collecting cases).

It is far from clear that plaintiff's allegations will prove sufficient to satisfy the high standards applicable to Eighth Amendment conditions of confinement claims. At this initial stage of review, however, the Court will permit plaintiff's Eighth Amendment claims to proceed against certain defendants, as outlined below.

1. The Outdoor Recreation Policy

The Court will permit plaintiff's challenge to the outdoor recreation policy itself to go forward against the defendants that plaintiff alleges played a role in the promulgation of the policy. Plaintiff alleges that Warden Butricks authored a memorandum articulating the outdoor recreation policy. See Doc. #1 at 20. Plaintiff further alleges that defendant Nunez sent the lieutenants a separate memo "clarif[ying]" the outdoor recreation policy. Id. at 30. Finally, plaintiff alleges that

defendant Captain Rodriguez sent a memo to the Unit Managers reiterating the outdoor recreation policy. See id. at 31. Thus, plaintiff appears to allege that defendants Butricks, Nunez, and Captain Rodriguez played a role in the promulgation of the policy.

Plaintiff also alleges that multiple supervisory DOC staff members improperly denied the grievances he filed relating to the outdoor recreation policy. "A supervisory official who reviews [a] grievance is 'personally involved' in an ongoing constitutional violation if he is confronted with a situation that he can remedy directly." Long v. Annucci, No. 9:17CV00916(GLS)(TWD), 2018 WL 4473404, at *5 (N.D.N.Y. July 26, 2018), report and recommendation adopted, 2018 WL 4473334 (N.D.N.Y. Sept. 18, 2018) (citing Harnett v. Barr, 538 F. Supp. 2d 511, 524 (N.D.N.Y. 2008)). Because plaintiff refers to the denial of outdoor exercise as continuing, see, e.g., Doc. #1 at 10, 18, 51, 55, the Court construes his allegations to be asserting an ongoing violation of his Eighth Amendment rights.

Plaintiff alleges that defendants Warden Butricks, D.A. Rodriguez, Acting Warden Nunez, D.A. Mulligan, Warden Walker, Administrative Remedies Coordinator Shelton, Program Director Garcia, D.A. Mudano, and Warden Erfe, personally responded to his grievances or letters regarding the outdoor recreation policy, but refused to change the policy. See id. at 12-13, 16,

22, 33-34, 38-39, 45-46, 57-58. Because plaintiff alleges that these defendants responded to his grievances and letters regarding the outdoor recreation policy, and that they were in positions in which they had the authority to change the policy, the Court will permit these claims to proceed at this initial stage of review. Accordingly, plaintiff's Eighth Amendment conditions of confinement claims may proceed against defendants Butricks, Captain Rodriguez, D.A. Rodriguez, Nunez, Mulligan, Walker, Shelton, Garcia, Mudano, and Erfe, in their individual capacities for damages, and defendants D.A. Rodriguez, Nunez, Mulligan, and Garcia in their official capacities for injunctive relief.[7] Plaintiff's claim may proceed against these defendants

[7] The Court takes judicial notice of the DOC website, which reflects that defendant Nunez is currently a deputy warden of Cheshire; defendant Rodriguez is the current District II Administrator; and defendants Butricks, Walker, and Erfe are former wardens of Cheshire. See https://portal.ct.gov/DOC/Facility/Cheshire-CI; https://portal.ct.gov/DOC/Org/Operations-South-District-Administrator. Defendant Mulligan is the current Deputy Commissioner of the Operations & Rehabilitative Services Division, see https://portal.ct.gov/DOC/Org/Operations-Division, and defendant Garcia is the current director of the Programs and Treatment Division. See https://portal.ct.gov/DOC/Org/Programs-and-Treatment-Division. The DOC website does not reflect the current employment status of defendants Shelton, Mundano, or Captain Rodriguez and plaintiff has not alleged that they are current employees or that they are able to provide the injunctive relief he seeks. Additionally, because defendants Butricks, Walker, and Erfe are former DOC employees, they are likewise no longer able to provide the injunctive relief plaintiff seeks. Accordingly, any claims for injunctive relief against Butricks, Walker, and Erfe are **DISMISSED, with prejudice**, because they are no longer DOC employees. Any claims

only to the extent that they are alleged to have had a role in the promulgation of the policy, or to have improperly denied plaintiff's grievances when they had the authority to remedy the alleged ongoing denial of outdoor recreation.

2. Individual Denials

Plaintiff also brings claims against individual defendants based on two specific incidents of denials of his requests for outdoor exercise.

Specifically, plaintiff alleges that on November 2, 2019, "two officers defendant Cunningham and defendant Ovittore denied" him "outside recreation early November and during this denial of the violation the weather was (60˚/degrees) outside, warm and sunny." Doc. #1 at 15 (sic). Plaintiff further alleges that on May 22, 2021, defendant Kaya "refused to allow [him] to obtain outside courtyard exercise and obtain freshair due to COVID-19 infections" even though "it was a sunny day." Id. at 44 (sic). These allegations are limited to single instances when plaintiff was not permitted to go outside. Plaintiff does not allege that he was denied the opportunity to exercise entirely on those days and indeed, even if plaintiff were denied all opportunity for recreation on those days, "[a]s a matter of law, temporary denial of ... recreation cannot provide the basis for

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for injunctive relief against Shelton, Mudano, and Captain Rodriguez are **DISMISSED, without prejudice.**

an Eighth Amendment claim." Ochoa v. Connell, No. 9:05CV01068(GLS)(RFT), 2007 WL 3049889, at *12 (N.D.N.Y. Oct. 18, 2007) (collecting cases); see also Gawlik v. Semple, 2021 WL 4430601, at *8 ("[C]ourts in this Circuit have routinely held that relatively brief deprivations of the opportunity to exercise do not rise to the level of an Eighth Amendment violation."). Thus, "the sporadic denial of" outdoor recreation on two individual occasions does not amount to an Eighth Amendment violation. Ochoa, 2007 WL 3049889, at *12. Accordingly, plaintiff's Eighth Amendment conditions of confinement claims for denial of outdoor recreation against defendants Cunningham, Ovittore, and Kaya, are **DISMISSED, without prejudice.**

V. CONCLUSION

For the foregoing reasons, the Court enters the following orders:

- All claims against defendants Quiros and Cook are **DISMISSED, without prejudice.**
- All claims against defendants Howard, Lichwalla, St. Pierre, and Pagoni-Ligi are **DISMISSED, without prejudice.**
- The First Amendment claim against defendant Green is **DISMISSED, without prejudice.**
- The First Amendment claims against defendants Shelton and Nunez are **DISMISSED, without prejudice.**

- The Eighth Amendment claims against defendants Cunningham, Ovittore, and Kaya, are **DISMISSED, without prejudice.**
- All claims against defendants McMahon and Campanelli are **DISMISSED, without prejudice.**
- Any claims for injunctive relief against defendants Butricks, Walker, and Erfe are **DISMISSED, with prejudice.**
- Any claims for injunctive relief against defendants Shelton, Mudano, and Captain Rodriguez are **DISMISSED, without prejudice.**
- The case may proceed to service on plaintiff's Eighth Amendment conditions of confinement claim against defendants Butricks, Nunez, Captain Rodriguez, D.A. Rodriguez, Mulligan, Walker, Shelton, Garcia, Mudano, and Erfe, in their individual capacities, for damages.
- This case may proceed to service on plaintiff's Eighth Amendment conditions of confinement claim against defendants Nunez, D.A. Rodriguez, Mulligan, and Garcia, in their official capacities, for injunctive relief.

Plaintiff has two options as to how to proceed in response to this Initial Review Order:

(1) If plaintiff wishes to proceed with the Complaint as against defendants Butricks, Nunez, Captain Rodriguez, D.A.

Rodriguez, Mulligan, Walker, Shelton, Garcia, Mudano, and Erfe, as outlined above, he may do so without further delay. If plaintiff selects this option, he shall file a Notice on the docket on or before **July 1, 2022,** informing the Court that he elects to proceed with service. Because plaintiff was not granted leave to proceed in forma pauperis and he has paid the filing fee, **the United States Marshal Service will not effect service.** Plaintiff is responsible for serving all defendants.

Regarding **individual capacity service,** the Federal Rules of Civil Procedure permit a party sued in their individual capacity to waive service. See Fed. R. Civ. P. 4(d). "The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons." Fed. R. Civ. P. 4(d)(1). The notice and request for waiver of service must adhere to certain requirements, outlined in Fed. R. Civ. P. 4(d)(1)(A)-(G). If plaintiff files a Notice informing the Court that he elects to proceed with service, the Court will then provide plaintiff with the necessary waiver of service forms. If any defendant fails to return a signed waiver of service of summons form, plaintiff shall request a summons from the Clerk and arrange for in-person service on that defendant in accordance with Rule 4 of the Federal Rules of Civil Procedure.

Regarding in-person service on defendants in their individual capacity, Conn. Gen. Stat. §52-64(b) "does not

authorize service through the Attorney General's office on an individual State employee in his or her individual capacity." Bogle-Assegai v. Connecticut, 470 F.3d 498, 507 (2d Cir. 2006). Connecticut law requires that defendants sued in their individual capacities "be served by leaving a true and attested copy of [the summons and complaint] with the defendant, or at his usual place of abode, in this state." Conn. Gen. Stat. §52-57(a); see also Bogle-Assegai, 470 F.3d at 507-08. Plaintiff may use any legal method for service of process, such as a private process server.

Failure to obtain timely signed waivers or to timely serve a defendant in their individual capacity will result in the dismissal of this action as to that defendant in their individual capacity.

Regarding **official capacity service**, defendants may not waive service in their official capacities; plaintiff must effect service on each defendant in their official capacity. If plaintiff files a Notice informing the Court that [s]he elects to proceed with service, the Court will then provide plaintiff with the summons for each defendant sued in their official capacity. Plaintiff may serve defendants by having a proper officer "send[] one true and attested copy of the process, including the summons and complaint, by certified mail, return receipt requested, to the Attorney General at the office of the

Attorney General in Hartford." Conn. Gen. Stat. §52-64(b). Because plaintiff is not a "proper officer" as defined by the Connecticut General Statutes, see Conn. Gen. Stat. §52-50(a), "plaintiff's own mailing ... does not qualify as proper service of process." Gooden v. Dep't of Corr., No. 3:09CV02063(RNC)(DFM), 2010 WL 4974037, at *1 (D. Conn. Dec. 2, 2010). As with individual capacity service, plaintiff may use any legal method for service of process, such as a private process server. Failure to timely serve a defendant in their official capacity will result in the dismissal of this action as to that defendant in their official capacity.

The Complaint must be served within **ninety (90) days** of the date of this Order, that is, on or before **September 6, 2022**. A signed waiver of service or a return of service as to each remaining defendant, in each capacity, must be docketed on or before **September 20, 2022**. Plaintiff shall file a Notice indicating the date on which he mailed the notice of lawsuit and waiver of service to the defendants and shall file the signed waiver of service or executed summonses when he receives them.

OR, IN THE ALTERNATIVE,

(2) If plaintiff wishes to attempt to replead his claims, he may file an Amended Complaint on or before July 1, 2022. Any such Amended Complaint must not assert any claims that have been dismissed with prejudice in this Order. An Amended Complaint, if

filed, will completely replace the Complaint, and the Court will not consider any allegations made in the original Complaint in evaluating any Amended Complaint. The Court will review any Amended Complaint after filing to determine whether it may proceed to service of process on any defendants named therein.

If plaintiff elects to file an Amended Complaint, he may not proceed to waivers or service of process on the original Complaint.

CHANGES OF ADDRESS: If plaintiff changes his address at any time during the litigation of this case, he **MUST** file a Notice of Change of Address with the Court. **Failure to do so may result in the dismissal of the case.** Plaintiff must give notice of a new address even if he remains incarcerated. He should write "PLEASE NOTE MY NEW ADDRESS" on the notice. It is not enough to just put a new address on a letter or filing without indicating that it is a new address. He should also notify the defendants or defense counsel of his new address.

Plaintiff shall utilize the Prisoner E-filing Program when filing documents with the Court. He is advised that the Program may be used only to file documents with the Court. Discovery requests and responses should **not** be filed on the docket, except when required in connection with a motion to compel or for protective order. See D. Conn. L. Civ. R. 5(f).

Discovery requests and responses or objections must be served on defendants' counsel by regular mail.

It is so ordered this 8th day of June, 2022, at Bridgeport, Connecticut.

/s/
HON. SARAH A. L. MERRIAM
UNITED STATES DISTRICT JUDGE