

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JEFFREY J. NESPOR,

Petitioner,

v.

J.T. O'BRIEN, Warden, Federal Correctional
Institution - Oxford,

Respondent.

ORDER

00-C-0416-C

In an order dated August 25, 2000, I denied petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2241. Judgment was entered on that same day. Now petitioner has filed a notice of appeal. Because petitioner has not paid the \$105 fee for filing his appeal, I construe his notice to include a request for leave to proceed on appeal in forma pauperis.

Proper petitions for writs of habeas corpus pursuant to 28 U.S.C. § 2241 are not civil actions subject to the 1996 Prison Litigation Reform Act. Walker v. O'Brien, 216 F.3d 626, 632 (7th Cir. 2000). Nevertheless, because petitioner paid the \$5 fee for filing his petition, I cannot grant his request for leave to proceed in forma pauperis on appeal unless I

determine that he qualifies for indigent status. 28 U.S.C. § 1915.

In determining whether a petitioner is eligible for indigent status on appeal under § 1915, the court must find both that the petitioner does not have the means to pay the \$105 fee for filing his appeal and that the appeal is taken in good faith. See 28 U.S.C. § 1915(a)(1) and (3). Petitioner has not submitted a certified copy of his trust fund account statement for the six-month period immediately preceding the filing of his notice of appeal. Therefore, I cannot determine whether he has the means to pay some or all of the appellate filing fee. This is of no import, however, because I must certify that petitioner's appeal is not taken in good faith.

In determining whether an appeal is taken in good faith, a district court must find that "a reasonable person could suppose that the appeal has some merit." Walker v. O'Brien, 216 F.3d at 631, citing Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000). Here, such a finding is not possible.

In his petition, petitioner challenged the decision of a disciplinary committee to find him guilty of fighting with another inmate. The facts petitioner alleged in his petition showed that some evidence had been introduced at the disciplinary hearing from which a finding could be made that petitioner had participated in the altercation. Nevertheless, it was petitioner's view that he should have been found innocent of the charges because the greater weight of the

evidence showed that the other inmate had started the fight and that he had walked away.

In the August 25 opinion and order dismissing petitioner's petition, I advised petitioner that the United States Supreme Court had ruled long ago that in cases such as his, the only relevant question is whether there was *some* evidence to support the finding of guilt. Superintendent, Massachusetts Correctional Institution at Walpole v. Hill, 472 U.S. 445, 455 (1985). Petitioner does not contend that no evidence exists to support the disciplinary committee's finding of guilt. He simply wishes to persist on appeal in his argument that his case was the stronger one. A reasonable person could not suppose that this appeal has merit.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on appeal is DENIED and I certify that petitioner's appeal is not taken in good faith.

Entered this 18th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge