IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PAUL A. FARRELL,

Petitioner,

ORDER

03-C-698-C

v.

UNITED STATES PAROLE COMMISSION,

Respondent.

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This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner Paul A. Farrell is an inmate at the Federal Correctional Institution in Oxford, Wisconsin. Petitioner contends that he is being imprisoned beyond his required prison term because the United States Parole Commission denied him credit for his participation in educational and vocational programs under 28 U.S.C. § 2.60. The $5.00 filing fee has been paid in full. Petitioner has attached documents to his petition showing that he has exhausted his administrative remedies. Clemente v. Allen, 120 F.3d 703, 705 (7th Cir. 1997).

A claim of improper denial of credit for time served is not cognizable under 28 U.S.C. § 2255. Petitioner has chosen the proper vehicle for his challenge to the parole commission's

decision to deny him credit for his program participation. See In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998) (prisoner may resort to § 2241 only when motion under § 2255 is "inadequate or ineffective to test the legality of his detention"). In addition, because petitioner's custodian is located in the Western District of Wisconsin, this court has jurisdiction over his petition. Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494-96 (1973); Hanahan v. Luther, 760 F.2d 148, 151 (7th Cir. 1985).

FACTS

Petitioner is serving a sentence at Oxford Correctional Institution in Oxford, Wisconsin. His presumptive parole date is September 18, 2006. He has not received an incident report since April 1994. From 1999 until April 2001, petitioner had logged 6,000 hours of educational and vocational programs. In April 2001, petitioner appeared before respondent United States Parole Commission at the Fairton Correctional Institution in Fairton, New Jersey. At that time, petitioner hoped to be granted a twelve month reduction of his presumptive release date because of his institutional record and superior programming achievements. (28 C.F.R. § 2.60(e) permits a twelve-month reduction of the presumptive release date if the total months required by the original presumptive date are at least 85.) Instead, the commissioner denied the reduction and made the following recommendations to petitioner:

1) Get accepted to and complete the advanced culinary arts program; and

2) Keep a good institutional record.

Over the next two-year period, petitioner fulfilled the commissioner's recommendations, logging an additional 4,000 hours of programming. In July 2003, petitioner appeared before the commission for another hearing. Petitioner drew respondent's attention to the recommendations he had been given at the April 2001 hearing and informed respondent that he had completed the recommended work. Petitioner presented a certificate from the United States Department of Labor as proof of completion of the advanced culinary arts program. He asked respondent to play the recorded minutes of the 2001 hearing so that it could verify the recommendations. Respondent did not replay the recorded minutes. At the end of the hearing, the commissioner stated that the commission found no reason to advance petitioner's parole date and that petitioner was to continue to his presumptive release date.

Petitioner appealed respondent's decision to the National Appeals Board. On October 16, 2003, the board affirmed respondent's decision, finding no merit in petitioner's claim that the hearing examiner was vindictive or that petitioner was unreasonably denied an advancement for superior program achievement. The board found respondent's decision reasonable in light of the seriousness of petitioner's offense.

DISCUSSION

Petitioner argues that when the 2003 parole commission denied him a reduction in his presumptive parole date, it "knowingly and wilfully disregarded the rules and regulations set forth by Congress" and violated his Fifth Amendment rights. Specifically, petitioner argues that respondent violated:

1) 28 C.F.R. § § 2.26(e)(3) & (5). Under 28 C.F.R. § 2.26(e)(3), prisoners *may* appeal a parole commission decision to the National Appeals Board if "especially mitigating circumstances (for example, facts relating to the severity of the offense or the prisoner's probability of success on parole) justify a different decision." Under 28 C.F.R. § 2.26(e)(5), prisoners may appeal a decision if the commission "did not follow correct procedure in deciding the case, and a different decision would have resulted if the error had not occurred;"

2) 28 C.F.R. § 2.24(b)(2), which states the Regional Commissioner *may*, on his own motion, "modify the recommendation of a hearing examiner panel to bring the decision to a date not to exceed six months from the date recommended by the examiner panel" (emphasis added);

3) 28 C.F.R. § § 2.60(a) & (b). 28 C.F.R. § 2.60(a) states that "[prisoners who demonstrate superior program achievement (in addition to a good conduct record) *may* be considered for a limited advancement of the presumptive date previously set, according to the schedule below" (emphasis added). 28. C.F.R. § 2.60(b) states that superior program

achievement may be demonstrated in areas such as educational, vocational, industry or counseling programs;

4) 28 C.F.R. §§ 2.19(b)(4) & (c), which *permit* the commission to review recorded audio and visual material "only if there is no adequate substitute to permit a finding of the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances. Otherwise, recorded audio and visual material should be submitted prior to the hearing for review and summarization . . ." (emphasis added);

5) the Fifth Amendment, because the commission is holding petitioner for the same amount of time as his co-defendant, who unlike petitioner, has completed very little, if any, programs and because the commission is not following its own rules.

Relying on these alleged violations, petitioner asks the court to nullify the commission's July 2003 decision denying him parole, order the commission to release him from prison immediately and grant any and all appropriate relief.

A. Standard of Review

Courts may review parole decisions only for constitutional violations or abuse of discretion. Turner v. United States Parole Commission, 810 F.2d 612, 615 n.6 (7th Cir. 1987). A decision of the parole commission may not be reversed "'unless, absent procedural or legal error, it is capricious.'" Schiselman v. United States Parole Commission, 858 F.2d

1232, 1237 (7th Cir. 1988) (internal citations omitted).

B. Parole Commission's Violations

Petitioner's primary contention is that despite his extensive educational and vocational achievements, respondent did not reduce his presumptive release date for superior program achievement, violating its own regulations and the Fifth Amendment. Petitioner argues that respondent would have reduced his sentence by 12 months had it followed certain prison regulations, such as those that account for mitigating circumstances and allow the commission to review audio records. However, the regulations at issue are discretionary. For example, petitioner is correct in stating that the commission may advance a prisoner's presumptive date for demonstrated "superior program achievement." 28 C.F.R. § 2.60. Section 2.60(a) states that "[p]risoners who demonstrate superior program achievement (in addition to good conduct) *may* be considered for a limited advancement of the presumptive date previously set." (Emphasis added). Because of the permissive language of the regulation, courts have held that advancement of a prisoner's release date is not mandatory even if the prisoner has shown superior program achievement. Briggs v. United States Parole Commission, 611 F. Supp. 306, 308 (N.D. Ill. 1984) (also relying on the administrative history of regulation); see also Kele v. Carlson, 877 F.2d 775, 776 (9th Cir. 1989); Otsuki

v. United States Parole Commission, 777 F.2d 585, 587 (10th Cir. 1985). Regulations 28 C.F.R. § 2.24(b)(2) and 28 C.F.R. 2.19(b)(4) & (c) contain permissive language as well.

The National Appeals Board affirmed the commission's decision because it was reasonable to weigh the seriousness of petitioner's offense against his excellent institutional record. In doing so, the commission acted within its discretion under § 2.60 when it denied him a 12-month advancement of his presumptive parole date for superior program achievement. Briggs, 611 F. Supp. at 309 ("The most reasonable reading of the regulations, in light of their history, is that the Parole Commission is to balance the prisoner's achievement against the other factors that enter into the decision whether to release on parole. And it is clear from the history of the regulations that the major factor . . . is to remain the seriousness of his offense."). Petitioner fails to show that respondent violated 28 C.F.R. 2.26(e). That regulation does not *require* the National Appeals Board to consider mitigating circumstances. It merely provides grounds upon which a prisoner may appeal a decision by the parole commission.

Even if the regulations were not discretionary, petitioner may not seek to enforce the commission's compliance with such regulations through a petition for habeas relief. Turner v. Henman, 829 F.2d 612, 614 (7th Cir. 1987). "[T]he Commission's failure to follow administrative rules and regulations does not entitle a prisoner to habeas relief unless the failure to follow the rules or regulations also violates some constitutional provision." Id. In

other words, unless the parole commission used unconstitutional procedures when it reviewed petitioner's presumptive release date, petitioner does not state a Fifth Amendment claim. Id. at 614-15 (Constitution does not require that all procedures be complied with but requires only that procedures actually used comport with Constitution). The Fifth Amendment prevents the federal government from depriving someone of life, liberty or property without due process of law, usually in the form of notice and some kind of hearing. Petitioner does not allege that respondent failed to give him notice of their decision or the chance to voice his concerns. Therefore, respondent did not violate the Fifth Amendment when it denied him a twelve-month advancement on his sentence.

Petitioner argues that respondent violated his Fifth Amendment right to fairness or equal protection when it failed to consider the lack of educational and vocational programming achievement by his co-defendant. However, the commission is under no obligation to consider the progress or lack of progress of others when making parole decisions about a particular inmate.

Even if one could characterize the 2001 parole commission's recommendations as a promise of early release, petitioner would still not state a Fifth Amendment claim. As long as the rules upon which the parole commission relied are discretionary, petitioner does not have a protected liberty interest derived from any "mutually explicit understandings" between him and the parole commission. Jago v. Van Curen, 454 U.S. 14, 19 (1981) ("We

would severely restrict the necessary flexibility of prison administrators and parole authorities were we to hold that any one of their myriad decisions with respect to individual inmates may, as under the general law of contracts, give rise to protected 'liberty' interests which could not thereafter be impaired without a constitutionally mandated hearing under the Due Process Clause."). Accordingly, petitioner has failed to show that respondent committed a constitutional error when it denied him a twelve-month reduction in his presumptive release date.

Because nothing in petitioner's petition and exhibits allows an inference to be drawn that he is in custody in violation of the Constitution or laws of the United States, his petition for a writ of habeas corpus will be dismissed.

ORDER

IT IS ORDERED that petitioner Paul A. Farrell's petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241 is DISMISSED for petitioner's failure to show that

he is in custody in violation of the Constitution or the laws of the United States.

Entered this 30th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge