

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

BADI A. SALAMA,

Petitioner,

v.

JOSEPH SCIBANA,

Respondent.

ORDER

04-C-783-C

Petitioner Badi A. Salama has filed a pleading styled as a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. In this pleading, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

In February 2004, petitioner was assaulted by two federal inmates at the Metropolitan Correctional Center in Chicago, Illinois. Two witnesses advised correctional officers that they had seen one of the inmates kick petitioner. Under Bureau of Prisons procedure, if an inmate is issued a written incident report, it must be served on the inmate within 24 hours. A Unit Disciplinary Committee is to review the report and hold a hearing within 72 hours. Petitioner received an incident report, but his hearing was not held until

four days after the incident. Petitioner was innocent of the charges. Nevertheless, he was found guilty and received a punishment that included an increase in his security level. Respondent Joseph Scibana has the authority to investigate the facts of petitioner's case and overrule the committee's decision.

OPINION

Although petitioner presents his claim in a petition for a writ of habeas corpus, he is not seeking relief cognizable in a habeas corpus action, despite his contentions to the contrary. Petitioner suggests that respondent Joseph Scibana has violated his rights under the Administrative Procedure Act and the United States Constitution because he failed to overturn a prison disciplinary committee's finding of guilt. In particular, petitioner appears to be arguing that by holding his disciplinary hearing outside the 72-hour time limit established under Bureau of Prisons policy, respondent Scibana established a new rule of procedure without the notice and comment required under the Administrative Procedure Act. In addition, petitioner argues that respondent Scibana's failure to overturn the disciplinary committee's decision violated an unspecified constitutional right (presumably his Fourteenth Amendment right to due process). Even if I were to rule in favor of petitioner on one or both of these claims (and I express no opinion whatsoever at this time whether I would do so), the only relief petitioner could obtain is an order directing respondent to submit the alleged new rule for notice and comment or hold a new disciplinary hearing that

included the procedural due process rights petitioner may have been denied. I would not order petitioner's release or a shortening or modification of his sentence, which is the only relief available to petitioner in habeas corpus. Therefore, I will dismiss this petition without prejudice to petitioner's refileing his pleading as a civil action brought under this court's general jurisdiction statute, 28 U.S.C. § 1331, and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

Petitioner should bear in mind that if he wishes to pursue his claims in a non-habeas corpus civil action, his complaint will be subject to the 1996 Prison Litigation Reform Act. This means that before he can file his complaint in this court, he will have to exhaust his administrative remedies on his claims pursuant to 42 U.S.C. § 1997e. Once he files his complaint, he will have to pay the full \$150 filing fee or request leave to proceed in forma pauperis under 28 U.S.C. § 1915, which is supported by a trust fund account statement for the six-month period immediately preceding the filing of his complaint. 28 U.S.C. § 1915(a)(2). If petitioner requests pauper status, the court will first determine whether he has three strikes under 28 U.S.C. § 1915(g). If he does not, the court will determine his financial ability to pay the filing fee and assess an initial partial payment pursuant to § 1915(b). Whether petitioner pays the full filing fee or obtains permission to proceed after payment of a portion of the fee, petitioner's complaint will be screened under either §§ 1915(e)(2) or 1915A and be dismissed if the court finds that the action is legally frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages

against a defendant who is immune from such relief. If petitioner's complaint is dismissed for any one of these reasons, petitioner will receive a strike under § 1915(g).

ORDER

IT IS ORDERED that this 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 laws of the United States.

Entered this 1st day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge