IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY P. SULASKI,

OPINION and ORDER

Petitioner,

05-C-746-C

v.

STEPHEN HOBART,

Respondent.

- -

This is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Petitioner Jeffrey Sulaski is currently detained at the Federal Correctional Institution in Oxford, Wisconsin. He seeks reinstatement of 56 days of good time credit that he lost after he was found guilty on four occasions of refusing to accept program assignments and obey orders. He contends that the disciplinary hearings that preceded his losses of good time credit violated the due process clause of the Fifth Amendment. In addition, petitioner seeks an adjustment of his security classification and an order directing respondent Stephen Hobart to transfer him to a minimum security institution. He has paid the $5.00 filing fee for his petition.

In his petition, petitioner provides no facts to support his claim. However, he refers

to an accompanying document entitled "Memorandum of Law In Support of 28 U.S.C. § 2241," which contains allegations of fact relevant to his claim. Attached to this document are exhibits that appear to be documents generated in the course of petitioner's disciplinary hearings. Also, petitioner has filed an affidavit in support of his petition that contains more allegations and exhibits. I will construe these documents together as his petition. In addition, petitioner has filed a document entitled "Petitioner's Affidavit In Support of Motion To Show Cause - Preliminary Injunctive Relief," which I will construe as a motion for preliminary injunction. Because none of petitioner's allegations suggest that he was deprived of good time credits in violation of the due process clause or federal law, I will dismiss his petition. Petitioner's motion for preliminary injunction will be denied as moot.

From petitioner's petition and the accompanying documents, I find that he has alleged the following facts.

ALLEGATIONS OF FACT

Petitioner Jeffrey Sulaski is incarcerated at the Federal Correctional Institution in Oxford, Wisconsin.

A. Refusals to Leave Special Housing Unit

On November 21, 2004, petitioner asked to be placed in the special housing unit

because he perceived threats to his physical safety. Approximately five weeks later, on December 27, 2004, correctional officer Johnson told petitioner he was being released from the special housing unit. Petitioner asked to speak with someone from his unit team. Several minutes later, Captain Salas arrived. Petitioner told Salas that he had not spoken to any staff member about his situation since his voluntary move into the special housing unit and asked Salas about "any potential video tape" from petitioner's unit that would support his contention that his physical safety would be in jeopardy if he were released into the general population. Salas told petitioner that he and Lieutenant Moore, a member of the Special Investigation Section, had looked into petitioner's situation and concluded that "there was nothing to it." In addition, Salas told petitioner that if he refused to leave the special housing unit, he would receive an incident report. Captain Salas was the only correctional officer petitioner spoke with in the 36 days immediately following his voluntary placement in the special housing unit.

On January 13, 2005, petitioner received an incident report for refusing to accept a program assignment. He refused to return to general population because of threats of physical harm. On March 8, 2005, he appeared before a discipline hearing officer. According to the hearing officer's report, petitioner admitted his guilt and stated that he did not want to go back into the general population because of threats that were made against him. Joetta Terrell, the hearing officer, told petitioner that she had reviewed an investigation

of petitioner's allegation that concluded that there was no basis for his allegation that his safety was in jeopardy. Terrell stated that the only threat concerning petitioner had been made by a quadriplegic inmate who was confined to a wheel chair. Petitioner did not request any witnesses at the hearing. Terrell found petitioner guilty of refusing to accept a program assignment on the basis of petitioner's admission that he had refused to be removed from the special housing unit and a memorandum from case manager R. Laabs, in which Laabs stated that there was no basis for petitioner's allegation that his safety was in jeopardy. Petitioner was sanctioned to fourteen days disallowed good conduct time, fifteen days in disciplinary segregation and suspension of his telephone, visitation and commissary privileges.

On March 24, 2005, petitioner received another incident report for refusing to accept a program assignment and refusing to obey an order to return to general population. Petitioner appeared before the discipline hearing officer on April 7, 2005. Again, petitioner admitted that he was guilty of the charged offenses and did not ask to present any witnesses. Terrell found petitioner guilty of refusing to accept a program assignment but dismissed the charge of refusing to obey. She cited petitioner's admission of guilt and a memorandum from case manager R. Laabs stating that there was no basis for petitioner's allegation that his safety was in jeopardy. Terrell sanctioned petitioner to fourteen days' disallowed good conduct time, twenty-one days in disciplinary segregation and temporary suspension of his

telephone, visitation and commissary privileges.

On April 27, 2005, petitioner received an incident report for refusing to accept a program assignment. Once again, he refused to return to general population because of threats of physical harm. Petitioner appeared before a discipline hearing officer on May 26, 2005 and requested that his staff representative, Mr. Svetly, speak on his behalf. At that time, Svetly explained that petitioner believed that the officials who had investigated his allegations in November 2004 had not conducted a proper investigation and that his safety was still in jeopardy. Svetly requested that the hearing officer view the videotape from the Adams unit that petitioner had asked to be reviewed earlier. Terrell postponed the hearing pending review of the videotape. On June 9, 2005, Terrell reconvened the hearing and read a memorandum that had been submitted by Lt. Williams. Williams wrote that the videotape had been recorded over, according to a policy that preserves such videotape only if the Special Investigation Section is told not to record over it. Petitioner did not ask to present any witnesses. Terrell found petitioner guilty of refusing to accept a program assignment on the basis of the incident report, which indicated that petitioner had refused to leave the special housing unit. Terrell noted also that the videotape petitioner had requested was unavailable, that R. Laabs had written a memorandum in which he stated that there was no basis for petitioner's belief that his safety was in jeopardy and that petitioner had stated to Terrell that he refused to "go back to the compound." Terrell sanctioned

petitioner to fourteen days' disallowed good conduct time, twenty-one days in disciplinary segregation and temporary suspension of his telephone, visitation and commissary privileges.

On June 29, 2005, petitioner received another incident report for refusing to accept a program assignment and refusing to obey an order to return to general population. Petitioner appeared before a discipline hearing officer on August 18, 2005. According to the disciplinary hearing officer's report, petitioner's staff representative, Svetly, stated that petitioner had been accorded all of his rights. The hearing officer informed petitioner that she had a statement from his witness and asked him if he would like the witness to appear in person at the hearing. According to the report, petitioner waived the presence of his witness and accepted the written statement. The hearing officer read the witness' statement. Petitioner informed the hearing officer that the charge of refusing to obey an order had been dismissed at his hearing on April 7, 2005. The hearing officer replied that each incident report has its own evidence. The hearing officer found petitioner guilty of refusing to obey an order. According to the report, the hearing officer relied on 1) the reporting officer's statement that petitioner refused to submit to hand restraints to be moved from the special housing unit to the compound; 2) the fact that petitioner's witness had stated that he did not know petitioner until he talked to him in the special housing unit; and 3) petitioner's statement that he had said "no" in response to the reporting officer's question whether he wanted to go to the compound. The hearing officer sanctioned petitioner to fourteen days'

disallowed good conduct time and fifteen days in disciplinary segregation.

On November 23, 2005, petitioner received an incident report for refusing to accept a program assignment.

B. Incident with Inmate Huff

On October 4, 2005, while petitioner was housed in the special housing unit, he wrote a request to the institution's chief psychologist, Dr. Ramsden, expressing concern for his physical safety because his cell mate, Leo Huff, was taking medication for mood swings and had "displayed outbursts of rage." Petitioner asked Dr. Ramsden to speak with Lt. Turvey about moving petitioner to another cell. The next day, Huff struck petitioner from behind as petitioner was washing his hands at the sink in his cell. Petitioner's head hit a wall to the left of the sink. He lost consciousness for a few seconds and fell to the floor. When he regained consciousness, petitioner looked in a mirror and discovered a large bump approximately the size of a quarter on the left side of his forehead and a similar bump on the right side which was bleeding. He looked to his cell door and saw Huff leaning against a wall. Huff began speaking to two other inmates, telling them, "I took care of business, it should have been done along [sic] time ago!" Several moments later, petitioner told Huff, "You may not believe me, but I forgive you, and I'll even tell'em that I slipped!" Petitioner packed his belongings and waited on his bunk for a staff member to walk by. He did not

attempt to hit Huff.

Approximately one hour later, Officer Geist walked by and petitioner asked to be moved to another cell. Geist never looked at petitioner and kept walking. The next time he passed petitioner's cell, petitioner moved to his cell door and asked again to be moved. Geist saw petitioner's injuries and called Lt. Turvey on the radio. When Turvey arrived, petitioner told him that he had slipped. Petitioner made this statement because Huff was still in the cell. Petitioner wanted to speak about the incident in private because he had already been called a "rat."

Turvey told Geist to take petitioner to an office. After taking petitioner to the office, Geist asked petitioner what had happened. Petitioner replied that he had slipped. Geist repeated his question and petitioner said that he wanted to speak with Turvey in private. Several minutes later, the on-duty nurse arrived and began filling out an injury assessment form. She asked petitioner what happened and Geist informed her that petitioner wanted to speak with Turvey in private about the incident.

When Turvey came to the office, he asked petitioner what had happened. Petitioner tried to explain that he had been subjected to hostility ever since his placement in the special housing unit. Inmates had verbally harassed petitioner, which petitioner believed had motivated Huff to attack him. After his injuries were videotaped, petitioner was placed in a cell on A-range by himself. The nurse bandaged his injuries and completed the injury

assessment form.

On October 6, 2005, Dr. Svetly came to petitioner's cell to check on his condition. Petitioner described the assault in great detail and Dr. Svetly mentioned that he would write a report. Also on that day, petitioner received an incident report, written by Geist, for violating Code 405 - self-mutilation. Petitioner received the report at 9:25 a.m. In the report, Geist wrote that petitioner had told him both that he was assaulted by Huff and that he had slipped. Geist accused petitioner of intentionally injuring himself in order to be moved to a single cell. The disciplinary hearing for the incident report was scheduled initially for October 11, 2005. It began after 9:25 a.m. on October 11 and was suspended and reconvened on October 21, 2005.

Earlier, on October 11 or 12, 2005, petitioner heard two inmates say that Huff's cellmate "didn't take the heat" and that Huff had received an incident report. On October 13, 2005, as petitioner was moving to another cell, he heard Huff say that he would "beat" his incident report because another inmate would testify for him. On October 20, 2005, an inmate called for Huff and Huff's new cell mate replied that he had been transferred that morning.

On October 21, 2005, at petitioner's disciplinary hearing, Sproul found petitioner guilty of violating Code 405. According to the incident report, petitioner lost commissary privileges for sixty days as a sanction. Petitioner appealed the finding of guilt on November

9, 2005. On November 29, 2005, unit manager Robinson and counselor Dauman approached petitioner and told him that they wanted to talk with him about his appeal. Robinson said that Sproul "would like this to disappear" and asked petitioner what he wanted. Robinson and petitioner agreed that the incident report would be expunged and the sanction removed. Petitioner wrote this on the bottom half of the BP-9 appeal form he had filed and he and Robinson signed it.

On December 1, 2005, petitioner received his copy of the incident report, which included Sproul's findings from the disciplinary hearing. On December 2, 2005, Robinson told petitioner that the incident report had been expunged from his file and the sanction removed.

DISCUSSION

Petitioner contends that he was deprived of due process in his disciplinary hearings. The first question is whether a liberty interest was at stake in the hearings. In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's

sentence.

When the loss of good time credit is a sanction for a violation of prison rules, the due process clause requires that an inmate receive the following procedural safeguards during prison disciplinary proceedings: "'(1) advance written notice of the disciplinary charges; (2) an opportunity . . . to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.'" McPherson v. McBride, 188 F.3d 784, 785-86 (7th Cir. 1999) (quoting Superintendent, Mass. Correctional Institution v. Hill, 472 U.S. 445, 454 (1985)). In addition, a finding of guilt cannot be arbitrary. In this regard, the Supreme Court has held that "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits." Hill, 472 U.S. at 455. The "some evidence" standard requires nothing more than a decision that is not arbitrary or lacking support in the record. McPherson, 188 F.3d at 786.

Petitioner argues that the disciplinary hearings that took place on March 8, 2005, April 7, 2005, June 9, 2005 and August 18, 2005 violated due process and 28 C.F.R. § 541.17 because he was unable to present documentary evidence in his defense. Specifically, he contends that he asked for a requested videotape to support his claim that a threat to his safety existed but did not receive it and later was told that the institution's policy is to erase videotapes after one week unless the Special Investigation Section requests otherwise.

In Piggie v. Cotton, 344 F.3d 674 (7th Cir. 2003), the court of appeals ruled that a prisoner was entitled to view a videotape that contained potentially exculpatory information unless doing so would jeopardize prison security. Piggie is inapplicable to each of petitioner's four disciplinary hearings at issue in this case.

Petitioner entered the special housing unit on November 21, 2004. According to his allegations, the first time he asked any prison official about the videotape was on December 27, 2004. At that time, Captain Salas told petitioner that he had investigated petitioner's concern and found nothing to substantiate it. The only other time petitioner alleges that he asked about the videotape was at his May 26, 2005 disciplinary hearing. At that time, Joetta Terrell, the hearing officer, adjourned the hearing to follow up on petitioner's request. When she reconvened the hearing on June 9, 2005, she stated that she had learned from another official that the videotape had been recorded over pursuant to an institution policy whereby videotape is erased unless a specific request is made to preserve it. Thus, the videotape petitioner contends he was prevented from presenting had been erased by the time he asked about it in December 2004 and surely by the time of his first disciplinary hearing on March 8, 2005. Without any videotape to review, petitioner was not denied due process at any of his disciplinary hearings because he was unable to present it.

Aside from the videotape, petitioner has not alleged any other violations of his due process rights in connection with his disciplinary hearings. The facts indicate that he

received all of the process that was due to him at each of the hearings. He was given advance notice of the charges against him with respect to each incident because the incident reports were given to him more than 24 hours before his disciplinary hearings. Also, at each hearing, petitioner was given the opportunity to call witnesses and was given a statement of reasons why the hearing officer had found him guilty. Because he was accorded all of the process he was due at each hearing and because the hearing officer's findings in each hearing were supported by substantial evidence, petitioner has not alleged a violation of his due process rights.

Petitioner contends that the hearing officer at his August 18, 2005 disciplinary hearing acted arbitrarily and capriciously by sentencing petitioner to fifteen days in disciplinary segregation and taking away 15 days of good time credit. He argues that the incident report at issue in the August 18, 2005 hearing was more vague than the incident report at issue in petitioner's April 7, 2005 disciplinary hearing. Petitioner does not expand on this allegation and the incident reports appear to be similar in all material respects. Each report lists the offenses petitioner was charged with, the date and time on which he committed the alleged offenses and provides a brief description of the conduct that prompted prison officials to issue each report. Petitioner notes also that the charge of refusing to obey an order was dropped at his April 7, 2005 hearing but not at his August 18, 2005 hearing. The fact that a charge was dropped in one hearing but not in another does

not suggest that petitioner's due process rights were violated.

Finally, petitioner contends that the incident report written by Geist on October 6, 2005 contained untrue allegations and that unit manager Sproul violated 28 C.F.R. § 541.15 because he held the Unit Disciplinary Committee hearing on the report more than three days after petitioner received the incident report. Petitioner's allegation fails to state a due process claim because the incident report concerning the charge of self-mutilation indicates that his sanction for this offense was the loss of commissary privileges for sixty days. Moore v. Pemberton, 110 F.3d 22, 23 (7th Cir. 1997) (loss of commissary privileges does not amount to loss of liberty or property sufficient to trigger due process protections). Petitioner's allegation that unit manager Sproul violated 28 C.F.R. § 541.15 is unavailing as well because that regulation states that an inmate charged with violating a Bureau of Prisons rule is entitled to a hearing which is "*ordinarily* held within three work days from the time staff because aware of the inmate's involvement in the incident." (Emphasis added). Use of the word "ordinarily" indicates that the three working-day time period is not mandatory. In addition, petitioner has not alleged that he suffered any prejudice because unit manager Sproul missed the three working-day boundary by a few hours.

ORDER

IT IS ORDERED that the petition for a writ of habeas corpus pursuant to 28 U.S.C.

§ 2241 filed by petitioner Jeffrey Sulaski is DISMISSED. Petitioner's motion for preliminary injunction is DENIED as moot. The clerk of court is directed to close this case.

Entered this 3rd day of February, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge