

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

MICHAEL HILL,

Petitioner,

v.

STEVEN HOBART, Warden,

Respondent.

OPINION AND ORDER

06-C-57-C

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner Michael Hill is an inmate at the Federal Correctional Institution at Oxford, Wisconsin. Petitioner contends that he was deprived of a liberty interest without due process of law. He seeks expungement of an incident report and reinstatement of the good conduct credits he lost after he was found to have possessed unauthorized items. Petitioner contends that the process he received leading up to this punishment did not meet constitutional requirements because he did not have notice of the charge on which he was found guilty and because, in a prior disciplinary hearing, he had already been found not

guilty of the same charge. Because petitioner has alleged facts showing he may be entitled to relief, I will issue an order to show cause why petitioner's petition should not be granted on his claim that prison officials violated his constitutional right to due process. Also, petitioner contends that prison staff violated his First Amendment rights by infringing on his right to free speech. Petitioner's First Amendment claim will be dismissed because it is not properly raised in a habeas corpus proceeding.

Also, I note that petitioner has not verified that the statements made in his petition are being made under penalty of perjury, as is required by 28 U.S.C. § 2242. Therefore, before the court can rule on the merits of petitioner's petition, it will be necessary for him to submit a revised signature page on which he includes the statement that "The statements in the petition are true and correct under penalty of perjury."

From petitioner's petition and its attachments, I understand petitioner to be asserting the following facts.

FACTS

On March 21, 2005, petitioner received an incident report issued by Michael Klawitter, a correctional counselor at the Oxford institution, pertaining to an incident that occurred on March 16, 2005. In this incident report, petitioner was charged with two rule violations: 1) "Possession of anything not authorized" and (2) "Lying to a staff member,"

which are described in prison codes numbered “305” and “313,” respectively.

Klawitter described the incident in the report as follows:

On March 16, 2005, at 1:30pm I performed a pat search of inmate Hill in the unit team office and found him in possession of 57 \$0.37 cent stamps. Some of these stamps were wrapped in a yellow paper (NOTE, Post It Pad) containing 20 stamps, commonly used by inmates as a form of currency inside prison. Hill was asked several times during this pat search if that was all the stamps he owned and he insisted that was all of them. At 3:40pm I searched a locker in Portage cell p02-026 and found an additional 63 \$0.37 cent stamps, with 60 of them being in three unaltered sheets of 20. This locked locker was identified by it’s contents as belonging to Hill.

Subsequently, on April 4, 2005, petitioner filed a complaint against Klawitter with the Office of the Inspector General in the United States Department of Justice for Klawitter’s action in connection with an alleged locker search that Klawitter conducted on March 16, 2005. In his complaint, petitioner stated that during the search:

Mr. Klawitter took (3) books of stamps, a radio and my watch, and wallet. He also took (8) picture tickets from me and would not give them back to me. When I talked to Lt. Johnson about my things Mr. Klawitter took, he stated that he had the paper work for the stamps, watch, and radio, but no stamps or the (8) picture tickets. I believe this incident is related to the law suit I have filed.

* * *

I believe that Mr. Klawitter should also be sanction for his behavior towards me knowing that the behavior results from a law suit I filed against the B.O.P. and some of it’s employees.

On April 14, 2005, petitioner received a second incident report charging him with a violation of Code 313, “Providing a false statement.” This report was issued by M. Moore,

a special investigative supervisor at the Oxford facility.

Moore described the incident in the report as follows:

On March 16, 2005, Correctional Counselor Michael Klawitter performed a pat search of inmate Hill and an area search of Hill's assigned locker in Portage Unit, detecting inmate Hill was in possession of the following contraband items: 120 postage stamps @ 37 cents each (60 over allowed amount), 2 radios (One Coby Brand and one Sony brand), 2 watches (One from Iron Man and one Timex Indiglo brand). As documented on BP Form 402, Confiscation and Disposition of Contraband Form, inmate Hill signed claiming possession of the property on March 16, 2005. On March 17, 2005, Hill provided an address to send the excess property (one watch and one radio). This property was mailed on March 31, 2005, at Hill's expense. One watch and one radio was returned to inmate Hill. As documented on the BP Form 402, Confiscation and Disposition of Contraband Form, inmate Hill signed on March 16, 2005, 60 stamps were confiscated and 60 stamps (allowed amount) were returned to the inmate.

The 60 confiscated stamps were submitted to the SIS Office. Inmate Hill received an incident report written by Counselor Klawitter on March 17, 2005, for lying to Mr. Klawitter claiming to not have excess stamps and for possessing the contraband excess radio and watch. In a complaint dated and signed by Michael Hill on April 4, 2005 (receipted in Warden's Office April 5, 2005) inmate Hill submitted Mr. Klawitter had improperly taken Hill's watches, radios and stamps and wanted the items returned to him. The claim by inmate Hill that Mr. Klawitter had improperly confiscated the stamps, watch and radio is a false claim, documentation indicates all procedures were followed accordingly. It is viewed this false claim by inmate Hill is a retaliatory act by inmate Hill toward Mr. Klawitter.

On June 21, 2005, petitioner attended two disciplinary hearings: the first regarding the March 21 incident report and the second regarding the April 14 incident report. At the hearing on the March 21 incident report, the hearing officer asked petitioner whether he had

received authorization to possess excess stamps. Petitioner responded as follows:

Yes. When I was in the hole, they told me I had too much property and I had to mail it out, so I purchase stamps to mail out my property. Then when I got out of the hole, I purchased more stamps to mail out my legal work.

After petitioner made this statement regarding the excess stamps, and considering the report's claim that petitioner had denied having more than the 57 stamps he had in his possession when he was pat searched, the hearing officer advised petitioner that she was finding him guilty of "Code 313" only ("lying to staff member").

During the hearing pertaining to the April 14 incident report, the hearing officer heard the testimony of petitioner and his staff representative. Both petitioner's and his representative's comments related to the question whether petitioner had lied in his April 4 letter to the office of the Inspector General. However, after the hearing officer heard this testimony, she reported on the disciplinary hearing form that she

asked [petitioner] if he had "all the items [listed in the conduct report] in his property. [Petitioner] replied, 'Yes.' The DHO then advised [petitioner] that based on the elements contained withing [sic] the body of the incident report, she was finding him guilty of Code 305 - Possession of anything not authorized.

Also on the report of the hearing of the April 14 incident, the hearing officer described the evidence she relied on to find petitioner guilty of a violation of Code 305 as follows:

The reporting officer stated on March 16, 2005, Correctional Officer

Klawitter performed a pat search of inmate Hill and an area search of your assigned locker and found Hill in possession of the following contraband items: 120 postage stamps @.37 cents each (60 over allowed amount), 2 radios (one coby brand and one Sony brand), 2 watches (one Iron Man and one Timex Indiglo brand).

You denied the Incident Report to the DHO. However, the DHO took staff's statement of the incident more credible than yours, as they have a moral and legal obligation to provide truthful statements within the scope of their employment.

Based on the greater weight of evidence as annotated above, the DHO finds that you did commit the prohibited act of Code #305, Possession of Anything Not Authorized.

As punishment, the hearing officer imposed a penalty of the loss of fourteen days' good time credits and 15 days' disciplinary segregation, suspended pending 180 days of clear conduct.

On August 12, 2005, petitioner appealed the discipline hearing officer's decision to the regional director (a BP-10 appeal), pointing out that he had been charged with providing a false statement but found guilty of possession of anything not authorized. The appeal was denied as follows:

We have reviewed your appeal and find you were provided due process in accordance with Program Statement 5270.07 . . . Your complaint has been thoroughly examined and it was determined you possessed on your person and in your assigned locker the contraband items of 60 excess postage stamps as well as two radios and two watches. One watch, one radio, and 60 postage stamps were returned to you in accordance with policy on allowable inmate personal property. Further, the reporting staff member is obligated to provide an accurate account of the incident. We find the DHO met the standards of fairness, impartiality and burden of evidence on which to support the finding that you committed the prohibited act as charged. Accordingly, we support

the DHO's finding. . . .

On October 10, 2005, petitioner appealed the Regional Director's decision to the Bureau of Prisons' General Counsel (a BP-11 appeal) and this appeal, too, was denied. The denial of petitioner's BP-11 appeal states:

You state the incident report did not charge you with committing the code 305 offense. Program Statement 5270.07 provides that "the DHO shall find that the inmate either: committed the prohibited act charged and/or a similar prohibited act if reflected in the incident report; or did not commit the prohibited act charged or a similar prohibited act if reflected in the incident report." The description of the incident report contains adequate information to support the DHO's conclusion that you committed a violation of code 305.

Program Statement 5270.07 provides that appropriate sanctions for a finding of guilt on a charge of possession of anything not authorized includes the withholding of statutory good time and forfeiture of "earned statutory good time or non-vested good time up to 25% or up to 30 days, whichever is less. . . ."

DISCUSSION

A. Administrative Exhaustion

28 U.S.C. § 2241 permits district courts to grant relief to prisoners "in custody in violation of the Constitution or laws or treaties of the United States." When a petitioner mounts a due process challenge to a disciplinary procedure that resulted in a denial of good conduct credit to which the petitioner was statutorily entitled, the suit may be maintained

as a petition for habeas corpus. Jackson v. Carlson, 707 F.2d 943, 946 (7th Cir. 1983). This is because the petitioner is seeking release at an earlier date even though he is not seeking immediate release. Id. Thus, petitioner has properly brought his claim under § 2241.

Federal prisoners are required to exhaust the administrative remedies available to them. Sanchez v. Miller, 792 F.2d 694, 697 (7th Cir. 1986); Del Raine v. Carlson, 826 F.2d 698, 703 (7th Cir. 1987). The administrative procedure for a federal inmate challenging the decision of a disciplinary hearing officer consists of the inmate's submitting a BP-10 form to the appropriate regional director and a BP-11 form to the Bureau of Prisons' General Counsel according to the timetable set out in 28 C.F.R. . § 542.15. 28 C.F.R. § 541.19. Petitioner has attached to his petition copies of his appeal to the regional administrative remedy appeal board, the board's denial, his appeal to the Bureau of Prisons' General Counsel and its denial. These documents are sufficient to show petitioner has exhausted his administrative remedies on his due process claim. Petitioner has not submitted proof that he exhausted his First Amendment claim. However, that claim will be dismissed in any event because it is not properly raised in a habeas corpus action.

B. Due Process Violation

In order to make out a due process claim, petitioner must allege facts from which an

inference may be drawn that he was deprived of a liberty interest and that this deprivation took place without the procedural safeguards necessary to satisfy due process. The Court of Appeals for the Seventh Circuit has held repeatedly that prisoners have a protected liberty interest in good time credit that they have earned. See, e.g., Thomas v. McCaughtry, 201 F.3d 995, 999 n.4 (7th Cir. 2000); Sweeney v. Parke, 113 F.3d 716, 718 (7th Cir. 1997); Meeks v. McBride, 81 F.3d 717, 719 (7th Cir. 1996).

Although the Fifth Amendment's due process clause provides federal inmates with certain minimum procedural safeguards, it does not create a right to procedural perfection. "[A] prisoner must show that his continued custody is a violation of the Constitution'." White v. Henman, 977 F.2d 292, 295 (7th Cir. 1992) (quoting Kramer v. Jenkins, 806 F.2d 140, 142 (7th Cir. 1986)). When the loss of good-time credit is a possible sanction, an inmate must receive the following procedural safeguards during prison disciplinary proceedings in order to satisfy the requirements of due process: "(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)).

Petitioner contends that the April 14 incident report he received from Moore notified

him that he was being charged with “providing a false statement” when he complained that Klawitter had taken his property improperly. However, at the disciplinary hearing that followed, the hearing officer found petitioner guilty of possessing unauthorized items, relying on Moore’s statement in the incident report that when Klawitter performed a search of petitioner and his belongings on March 16, 2005, Klawitter found contraband items consisting of 120 stamps, two radios and two watches. Petitioner contends he did not have constitutionally sound notice of this charge.

The function of the notice requirement “is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact.” Wolff v. McDonnell, 418 U.S. 539, 564 (1974). There is no formula for what the notice must look like or what it must say. Some courts have held that the notice should specify the number of the prison rule the inmate is accused of violating. See, e.g., Adams v. Carlson, 375 F. Supp. 1228, 1237 (E.D. Ill. 1974). However, that is not a constitutional requirement. The Court of Appeals for the Seventh Circuit has held that in some circumstances, a disciplinary hearing officer may find an inmate guilty of a charge not specified in the notice without violating the inmate’s due process rights. See, e.g., Northern v. Hanks, 326 F.3d 909 (7th Cir. 2003). However, cases such as Northern differ from the present case.

In Northern, inmate Northern received a conduct and investigation report charging him with conspiracy for smuggling tobacco into the prison with the help of a staff member.

Id. at 910. The investigation report described a scheme whereby a staff member brought tobacco into the facility and hid it in a place to which Northern had access. Northern picked up the tobacco and distributed it to other inmates. At his disciplinary hearing, Northern was found guilty of conspiracy. He appealed and the reviewing authority changed the charge to “attempted trafficking” and found him guilty, stating that it “believed the facts as set forth in the investigation report more appropriately supported a finding that Northern [was guilty of] attempted trafficking.” Id. Northern then filed a petition for a writ of habeas corpus, arguing that without advance notice of the trafficking charge he could not mount an appropriate defense. The district court denied the petition, noting that “the reviewing authority’s modification of the charge on appeal was of ‘no consequence,’ because the evidence supported either charge.” Id. The court of appeals affirmed the denial, holding that “[b]ecause the factual basis of the investigation report gave Northern all the information he needed to defend against the trafficking charges, the reviewing authority’s modification did not deprive Northern of his due process rights.” Id. at 911 (citing Holt v. Caspari, 961 F.2d 1370, 1373 (8th Cir. 1992) (“prison disciplinary committee did not deny petitioner due process by elevating charge from ‘possession of contraband’ to ‘possession of dangerous contraband’ because the factual basis for both charges was the same”)).

The present case differs from Northern and Holt. In those cases, the modified charge related directly to the same set of facts as the original charge for which the inmate had

notice. In this case, the factual basis for the charged offense, lying, is entirely different from the factual basis for a charge of possessing unauthorized items. The facts underlying the charge of lying concerned what petitioner said about Klawitter in his April 4 complaint to the Inspector General. It is to that matter that petitioner testified at his hearing. Although petitioner conceded in response to the hearing officer's follow-up question that he had possessed more than 60 stamps, one watch and one radio, he had no reason to suspect that the hearing officer had shifted her focus to an unidentified charge of possession of anything not authorized. And, although the text of the April 14 incident report included as background information that petitioner had been found in possession of certain specified contraband, this alone would not have been enough to alert petitioner to the possibility that he was being asked to defend against a charge of unauthorized possession of contraband at the hearing pertaining to the April 14 incident report. The reasonable inference to be drawn from the April 14 incident report is that petitioner was being charged with providing a false statement only.

The same day petitioner had his disciplinary hearing concerning the April 14 incident report (June 21, 2005) he also had a hearing concerning the March 21 incident report, where he was charged with possessing contraband stamps and lying to staff but was found guilty only of lying to staff. There is no question that petitioner was on notice that on June 21, 2005, he would have to defend himself at a disciplinary hearing against the charge of

possession of contraband stamps. If, at the hearing concerning the April 14 report, the hearing officer had indicated that she was finding petitioner guilty of possessing unauthorized items based solely on petitioner's possession of excess stamps, I could conclude that petitioner's due process rights had not been violated. The fact that petitioner might have been found guilty of possessing contraband stamps during the hearing concerning the April 14 report rather than the hearing concerning the March 21 report (which is where petitioner was actually charged with possessing contraband stamps) would not have been a sufficiently serious error amounting to a due process violation because petitioner had proper notice of the charge. Moreover, the punishment petitioner received was a lawful one for possession of *anything* unauthorized, including stamps.

However, the hearing officer did not indicate that she was limiting her finding of possession of unauthorized items to petitioner's possession of excess stamps. In fact, petitioner contends that when the hearing on the April 14 incident report took place, he had already been found not guilty of possessing contraband stamps at the hearing on the March 21 report, which took place earlier in the day. At the hearing concerning the March 21 report, the hearing officer asked petitioner whether he had received authorization to possess excess stamps. After petitioner stated that he had received authorization, the hearing officer declined to find him guilty of possessing contraband stamps. Therefore, the logical inference is that, when the hearing officer found petitioner guilty of possessing contraband at the later

hearing held on the April 14 incident report, she based her ruling on the fact that petitioner possessed a contraband radio and watch; *not* on the fact that he possessed excess stamps. Because petitioner was not on notice that he would have to defend himself against the charge of possessing a contraband watch and radio, it appears that the disciplinary hearing officer found petitioner guilty and punished him with a loss of good time credits for a charge of which he had no notice. Because petitioner has alleged facts sufficient to suggest that he may be entitled to habeas corpus relief, respondent will be directed to show cause why petitioner's petition should not be granted on petitioner's claim that the hearing officer deprived him of due process on June 21, 2005, by failing to provide him notice of the charge on which he was found guilty arising out of the April 14 incident report. In his response, respondent must show whether the hearing officer's finding of guilt was based at least in part on petitioner's possession of excess stamps and, if so, provide some explanation why petitioner was cleared of the property charge at the hearing on the March 21 incident report. If the finding of guilt was based at least in part on petitioner's possession of excess stamps, then petitioner's due process claim will fail because he had notice of the charge of possession of excess stamps and the unauthorized possession of stamps alone would have been sufficient to earn him the punishment imposed. If, however, the facts ultimately reveal that the finding of guilt was based solely on petitioner's possession of a contraband radio and watch, then I will be compelled to find that the hearing officer violated petitioner's due process

rights and petitioner will be entitled to habeas corpus relief requiring that his good time credits be restored pending a disciplinary proceeding that comports with due process.

Petitioner contends also that he was subjected to double jeopardy because he had been previously found “not guilty” of possession of unauthorized items at the disciplinary hearing pertaining to the March 21 incident report. The double jeopardy clause of the Fifth Amendment prohibits multiple prosecutions for the same offense, United States v. Dinitz, 424 U.S. 600, 606 (1976), but the clause is limited to criminal prosecutions. Breed v. Jones, 421 U.S. 519 (1975). The double jeopardy clause is not applicable to a prison disciplinary proceeding because the proceeding is not a criminal prosecution and an inmate is not entitled to the same constitutional protections. Meeks v. McBride, 81 F.3d 717, 722 (7th Cir. 1996) (“an acquittal in an earlier prison disciplinary hearing is no bar to a subsequent hearing to consider the very same charge”); Gorman v. Moody, 710 F. Supp. 1256, 1266 (N.D. Ind. 1989) (rehearing of disciplinary charges does not violate double jeopardy clause even though inmate was found not guilty at first hearing). Petitioner’s double jeopardy argument is meritless and is not the basis for the order to show cause.

C. First Amendment

This lawsuit is a petition for a writ of habeas corpus. The scope of lawsuits brought under 28 U.S.C. § 2241 is limited to whether a prisoner is being held in custody in violation

of the Constitution or laws on the United States. Petitioner contends that Moore's incident report accusing petitioner of making false statements regarding Klawitter infringed on his right to free speech. This claim does not challenge the legality of petitioner's custody and therefore is not properly raised in a habeas proceeding. Petitioner is free to file a separate civil lawsuit regarding this matter if he wishes.

ORDER

IT IS ORDERED that

1. Petitioner Michael Hill may have 10 days from the date of this order in which to file a duplicate signature page for his petition on which he has verified the assertions made in his petition (the clerk's office will serve the petition on respondent only after it has received a duplicate verified signature page from petitioner);

2. Respondent Steven Hobart is to file a response to this petition no later than 20 days from the date of service of the petition, showing cause, if any, why this writ should not issue on petitioner Michael Hill's claim that he was denied due process at the June 21, 2005 hearing concerning his April 14, 2005, incident report;

3. Petitioner Michael Hill may have 20 days from the service of the response in which to file a traverse to the allegations of the response submitted by respondent.

Entered this 23d day of March, 2006.

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