IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

EARL DIEHL,

Petitioner, ORDER

v. 08-cv-0133-bbc

MICKEY MCCASH, Warden,
Oregon Correctional Center,

Respondent.

Earl Diehl, an inmate at the Oregon Correctional Center in Oregon, Wisconsin, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the five dollar filing fee. The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner is challenging his custody resulting from an administrative decision by the Wisconsin Division of Hearings and Appeals revoking his probation. Petitioner exhausted his state court remedies by filing a petition for a writ of certiorari in the Circuit Court for Dane County and then appealing the denial of that decision to the Wisconsin court of appeals and supreme court.

For the most part, petitioner does not challenge the substance of the department's decision. Instead, he contends that the Wisconsin Department of Corrections and the Division of Hearings and Appeals violated several of their procedural rules during the revocation process. More specifically, petitioner alleges that the department violated its rules when it:

> failed to allow petitioner to make a statement about the alleged probation violations when it placed him in custody on March 2, 2005 (Ground 2);
>
> failed to hold a preliminary hearing on the violations (Ground 3); and
>
> failed to forward to the Division of Hearings and Appeals a signed and dated written authorization or request to hold a hearing (Ground 4).

He alleges that the division violated its rules when it:

> scheduled a final revocation hearing in the absence of a signed and dated authorization or request from the department (Ground 5);
>
> held a final revocation hearing in the absence of a signed and dated authorization or request from the department (Ground 6);
>
> failed to hold a final revocation hearing within 50 calendar days (Ground 7);
>
> failed to hold a final hearing within a reasonable amount of time (Ground 8); and
>
> based its revocation decision on "previously disposed/defunct" allegations (Ground 9).

Petitioner contends that he was denied his constitutional right to procedural due process as a result of these administrative rules violations. In addition, he alleges that the department violated the bar against double jeopardy when it incarcerated him twice for the same probation violations (Ground 1). Finally, he alleges that the state circuit court and court of appeals violated his right to due process when they "abused their discretion" in the manner in which they adjudicated his case (Grounds 10 and 11).

These last two allegations are insufficient to show that petitioner is in custody in violation of the laws or Constitution of the United States. The fact that petitioner disagrees with the manner in which the courts decided his case does not implicate his constitutional rights.

As for petitioner's challenges to the revocation decision, an agency's failure to follow its own rules does not automatically amount to a deprivation of due process. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). In *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), the Supreme Court stated that due process requires that a parolee be given:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached"

> hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finder as to the evidence relied on and reasons for revoking parole.

Although *Morrissey* involved a parole revocation, the Supreme Court extended these protections to probation revocation proceedings in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Clearly, some of the department's rules violations did not deny petitioner of the protections conferred by *Gagnon*. In particular, the division did not violate petitioner's due process rights when it scheduled and convened a hearing even though no one from the department signed the hearing request form. However, petitioner's allegations that the department denied him the opportunity to make a statement, failed to hold a preliminary hearing, failed to hold a final hearing in a timely manner and based its decision on invalid allegations are sufficient to raise a colorable claim that petitioner was denied his rights to due process and to warrant a response from the state. His double jeopardy claim also is sufficient to warrant a response from the state.

ORDER

IT IS ORDERED that:

1. Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on Warden McCash.

2. The state shall file a response to the petition not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that any of petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations or without prejudice on grounds of failure to exhaust, then it should file a motion to dismiss and all supporting documents within its 30-day deadline. If relevant, the state must address in its supporting brief the issue of cause, prejudice and staying this action while petitioner exhausts his state court remedies. Petitioner shall have 20 days following service of any such motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-day deadline the state must file and serve not only its substantive legal response to petitioner's claims, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claims. The state also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims was unreasonable in light of the facts presented. 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed.

Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

3. Once the state has filed its answer or other response, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or consider any submission that has not been served upon the state. Petitioner should include on each of his submissions a notation indicating that he served a copy of that document upon the state.

4. The federal mailbox rule applies to all submissions in this case.

Entered this 20th day of March, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge