IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DOMINGO MARTINEZ-DELEÓN,

OPINION and ORDER

Petitioner,

09-cv-501-bbc

v.

CAROL HOLINKA, Warden FCI Oxford,

Respondent.

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Petitioner Domingo Martinez-Deleón, a prisoner at the Federal Correctional Institution in Oxford, Wisconsin, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He contends that prison officials violated his right to due process when they held a disciplinary hearing at which he lost good-time credits and denied him the right to be present or offer a defense on his behalf. Petitioner is asking for reinstatement of good-time credits he lost at this disciplinary hearing and expungement from his record of the related incident report.

On August 25, 2009, I screened the verified petition. I determined from the facts petitioner asserted that he was charged with making, possessing or using intoxicants on April

8, 2009. On April 21, 2009, a disciplinary hearing was held regarding this incident, but petitioner was not present and did not have the opportunity to present witnesses or offer a defense. As a result of the hearing, petitioner lost good-time credits. On the basis of these factual averments, I directed respondent Carol Holinka to file a response showing cause, if any, why petitioner's writ should not be granted.

On October 30, 2009, the government responded, dkt. #11, contending that petitioner was not entitled to a hearing before a disciplinary officer on April 21, 2009 because a center disciplinary hearing was held on April 9, 2009, at which petitioner was present and made a statement. The government cited the center disciplinary committee report and the affidavit of the disciplinary hearing officer who reviewed the report.

In his traverse, dkt. #14, petitioner alleged that he was not at the center disciplinary hearing committee on April 9, 2009 because he was in the Hidalgo County jail on this date. Petitioner attached a letter from the Hidalgo County Sheriff's department, stating that petitioner was incarcerated at the county jail from April 8 to April 30, 2009.

After considering the parties' submissions, I concluded in an order dated November 24, 2009, dkt. #15, that respondent had not established that petitioner was present at the April 9, 2009 hearing. Also, I concluded that petitioner had not established that his due process rights were violated because he had not explained what evidence or witnesses he would have presented had he attended the April 9 hearing. I gave petitioner until December

8, 2009 to supplement his petition with this information. Petitioner has supplemented his petition, providing documents and the names of witnesses he would have called at a disciplinary hearing.

Now before the court is respondent's motion for clarification or reconsideration, dkt. #18, of the November 24, 2009 order in which I determined that petitioner may be entitled to relief. Respondent moves for reconsideration on four grounds. She contends that: (1) petitioner's submissions indicate that he received a hearing at the Hidalgo County jail; (2) petitioner failed to exhaust his claim that he did not receive a center disciplinary hearing on April 9, 2009; (3) whether petitioner received a center disciplinary hearing on April 9, 2009 was beyond the scope of the show cause order, and thus, respondent did not know that she needed to present evidence that petitioner was present at the April 9, 2009 hearing; and (4) petitioner waived his right to request more time to prepare a defense. Respondent has submitted evidence regarding the April 9, 2009 hearing. (Respondent also moves for clarification of the November 24 order on the basis that I incorrectly assumed that respondent had received service of the petition and had filed an untimely response. Although the petition and show cause order should have been served by certified mail, it appears that respondent was never served. On October 30, 2009, respondent waived service. I do not need to address this further because I denied petitioner's motion for entry of default and made no order prejudicial to respondent on the basis of this discussion.)

Respondent requests that I deny petitioner's petition for writ of habeas corpus based on the new evidence she has submitted. I will deny respondent's motion, but I note that respondent's new evidence raises issues to which petitioner must respond. I agree with respondent that the show cause order did not put her on notice that petitioner's presence at the April 9, 2009 hearing would become the focus of this case. Not until petitioner filed his traverse did it became apparent that the main issue in the case was whether petitioner was present at a center disciplinary committee hearing on April 9, 2009. Thus, I agree that respondent should now have the opportunity to address this issue. After considering the evidence that respondent has submitted regarding the April 9 hearing, I conclude that there is a factual dispute about whether petitioner attended this hearing. There is also a dispute about whether petitioner exhausted his administrative remedies regarding the hearing. I will give petitioner the opportunity to supplement his petition with an affidavit describing the events of April 9, 2009 and detailed information about the administrative grievances he has filed.

DISCUSSION

A. April 9, 2009 Hearing

In his traverse, petitioner alleges that he was not present at the center disciplinary committee hearing on April 9, 2009 at which he was found guilty of making, possession or

using intoxicants and lost good-time credits. In particular, he states:

> Now was Petitioner before the Center's Discipline Committee? No Petitioner was Not. . . . Petitioner is in the Hidalgo County Jail and Detention Center on April 9, 2009, a location and facility 8 to 10 miles away from the location and facility of the Halfway House. . . . Petitioner could of Not been before any Discipline Committee. . . . [T]he ("C.D.C") Hearing was held on 4-9-09 at 2:45. Now was Petitioner Present in these Hearings? No Petitioner was Not Present. Because Petitioner is sitting in the County Jail, wondering what was going on, or how did this happen.

In her motion for clarification or reconsideration, however, respondent alleges that petitioner attended the center disciplinary hearing on April 9, 2009. Respondent has submitted an affidavit from George Lopez, the case manager at Mid Valley halfway house who investigated petitioner's intoxication charge. In his affidavit, Lopez explains that after petitioner was accused of being intoxicated at the halfway house, he was taken to the Hidalgo County jail. Lopez traveled to the jail with the center disciplinary committee chairperson, J. Corona, to conduct an investigation of the incident, explain petitioner's rights to him and give petitioner notice of a possible center disciplinary hearing. (Lopez explains that the "notice of center discipline committee hearing" form states that the hearing was to be held at Mid Valley halfway house only because he failed to change the location on the form.) Petitioner wished to proceed immediately with the hearing and signed a "waiver of 24 hour notice," indicating that he had wished to "proceed with the Center Disciplinary Committee hearing at this time." According to Lopez, Corona conducted the hearing with

petitioner at the county jail.

Respondent argues that petitioner's own submissions, including his admission that J. Corona was at the Hidalgo County jail on April 9, indicate that petitioner received a hearing at the jail. However, petitioner's admissions indicate only that he met with two case managers from the halfway house and that he talked to Corona. Petitioner has not conceded that a center disciplinary committee hearing was held and that he was present for it. Thus, I conclude that a genuine dispute remains as to this point.

Also, respondent contends that petitioner waived his right to call witnesses or request more time to prepare a defense. When Lopez gave petitioner notice of the hearing, petitioner had the chance to provide names or witnesses he wished to call in his defense. He offered no names. I stated in the November 24, 2009 order that petitioner's failure to offer names did not necessarily mean that he waived his right to call witnesses, because due process requires that a prisoner be given a "reasonable time to plan his defense." Miller v. Duckworth, 963 F.2d 1002, 1005 n.2 (7th Cir. 1992). However, I was assuming that petitioner had not attended the April 9, 2009 hearing. If, as respondent alleges, petitioner agreed to hold the hearing at the county jail immediately following the completion of Lopez's investigation, and petitioner actually attended the hearing, I agree with respondent that petitioner waived his right to more time to plan his defense. Domka v. Portage County, 523 F.3d 776, 781-82 (7th Cir. 2008) ("It is without question that an individual may waive

his or her procedural due process rights.") Moreover, if petitioner agreed to hold a disciplinary hearing at the jail on April 9, and actually attended the hearing, he waived his opportunity to call witnesses. Sweeney v. Parke, 113 F.3d 716, 720 n.5 (7th Cir. 1997) (prisoners cannot wait until time of hearing to call witnesses), overruled on other grounds by White v. Indiana Parole Bd., 266 F.3d 759 (7th Cir. 2001). However, if petitioner did not attend the hearing on April 9, 2009, he did not waive his right to call witnesses for a hearing scheduled on a later date. Miller, 963 F.2d at 1005 n.2.

I will give petitioner an opportunity to submit an affidavit explaining his version of the events and responding to the new evidence submitted by respondent.

B. Exhaustion

Although § 2241 does not include an exhaustion rule, the Court of Appeals for the Seventh Circuit applies one under common law. Sanchez v. Miller, 792 F.2d 694, 697 (7th Cir. 1986). To meet the exhaustion requirement, a prisoner must utilize the administrative remedies offered by the Bureau of Prisons before filing a petition for writ of habeas corpus. For an appeal of a disciplinary action, such as the one in this case, the Bureau of Prisons grievance system requires inmates to submit an appeal to the regional director (BP-10), 28 C.F.R. § 542.14, and then submit an appeal to the general counsel (BP-11), 28 C.F.R. § 542.15.

When petitioner filed his petition, he indicated that he was waiting for a response to his administrative grievances. He attached copies of his BP-10 and BP-11. In her motion for clarification or reconsideration, respondent contends that petitioner failed to exhaust his administrative remedies for two reasons.

First, respondent contends that petitioner's BP-10 and BP-11 address only whether petitioner received a hearing before a disciplinary hearing officer on April 21, 2009. Respondent contends that petitioner's grievances did not raise the issue whether petitioner received a center disciplinary hearing on April 9, 2009, and thus did not put respondent on notice that petitioner was alleging that he did not receive such a hearing. However, in his BP-10, petitioner states in part:

> [O]n 4-8-09 at 10:47 a.m. I was accused of a 222 series violation and taken to jail. However at the jail I never had a hearing on the loss of my good time and disciplinary transfer.

Although petitioner refers to the hearing as a "D.H.O." hearing, his grievance is sufficiently broad to notify the Bureau of Prisons that he is challenging the lack of any hearing. Moreover, in the regional director's response to petitioner's BP-10, he explained that petitioner had been given a center disciplinary hearing on April 9, 2009 that was conducted in accordance with Bureau of Prison's policy. This indicates that the bureau was on notice that the April 9, 2009 hearing was relevant to petitioner's administrative grievance.

However, petitioner's grievance challenges only whether a hearing was conducted; it does not challenge the adequacy of such hearing or whether petitioner waived his right to call witnesses and present evidence. Thus, unless petitioner has filed separate grievances in which he argues that the April 9, 2009 hearing was procedurally deficient, he has not exhausted his administrative remedies as to such a challenge.

Respondent's second exhaustion argument is that petitioner did not follow the proper procedure in filing his administrative appeals because he filed his BP-11 without first receiving a response on his BP-10. 28 C.F.R. § 542.15(a) (requiring an inmate to wait for a response to the BP-10 before filing a BP-11). From the materials submitted by respondent, it appears that petitioner's BP-11 was rejected because petitioner had not attached the regional director's response to his BP-10 as required by 28 U.S.C. § 542.15. According to respondent, petitioner has not resubmitted his BP-11.

If petitioner has not filed and received a response to a BP-11 regarding his presence at the April 9, 2009 disciplinary hearing, he has not exhausted his administrative remedies and cannot receive relief in this court. Therefore, I will give petitioner an opportunity to supplement his petition with his exhaustion materials.

ORDER

IT IS ORDERED that

1. Respondent Carol Holinka's motion for clarification or reconsideration, dkt. #18, is DENIED.

2. Petitioner Domingo Martinez-Deleón may have until December 28, 2009 to supplement his petition for a writ of habeas corpus with his exhaustion materials and a sworn affidavit that responds to respondent's version of the April 9, 2009 hearing. If petitioner does not supplement his petition by December 28, 2009, his petition for writ of habeas corpus will be dismissed.

Entered this 14th day of December, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge