

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

JEROME PATRICK BETHEA,

Petitioner,

v.

RICHARD L. STIFF,

Respondent.

ORDER

03-C-0015-C

On January 9, 2003, I dismissed petitioner Jerome Bethea's 28 U.S.C. § 2241 petition for a writ of habeas corpus for lack of subject matter jurisdiction. I construed his petition as challenging the validity of a sentence that had been imposed by another district court. Such a petition can be filed only in the sentencing court. 28 U.S.C. § 2255. On January 13, 2003, final judgment was entered. On January 16, 2003, petitioner filed a Rule 59 motion to alter or amend the judgment. He argues that his petition relates to the loss of good-time credit in a disciplinary matter and, therefore, it was an error to dismiss his case for lack of subject matter jurisdiction. Petitioner is correct and his Rule 59 motion will be granted. Petitioner alleges that he has exhausted his administrative remedies.

Because petitioner has alleged facts that show he may be entitled to relief, I will issue

an order to show cause why petitioner's petition should not be granted on his claims that (1) prison officials denied him exculpatory evidence in violation of due process; (2) his staff representative failed to call Montez as a witness and failed to present or review favorable evidence in violation of the Code of Federal Regulations; and (3) prison officials failed to give him a written copy of the charge within 24 hours or an initial hearing within three days in violation of the Code of Federal Regulations. Petitioner's remaining claims will be dismissed because of his failure to show that prison officials violated the Constitution or the laws of the United States.

The following material allegations of fact are drawn from petitioner's petition and accompanying exhibits.

ALLEGATIONS OF FACT

Petitioner Jerome Bethea is an inmate at the Federal Correctional Institution in Oxford, Wisconsin. Respondent Richard Stiff is the warden of the prison.

On January 27, 2002, Officer Montez found a small ziplock bag containing a green, leafy substance on the floor in the exact location where petitioner had been standing. The bag was small enough to be concealed in a person's hand. That same day, Montez wrote a memorandum recounting his version of the incident. Petitioner was placed in segregation and gave a urine sample for drug testing.

The substance in the bag tested positive as marijuana. Officer Sadowski conducted the test and wrote a memorandum on January 28, 2002.

On February 11, 2002, petitioner received an incident report for possession of marijuana. Officer Moore wrote the incident report on the basis of the memorandums written by Montez and Sadowski. Petitioner received two disciplinary hearings, one on February 14, 2002, and another on February 28, 2002.

Petitioner chose to have a staff representative. At his second disciplinary hearing, Correctional Counselor M. Klawitter represented him. (It is unclear whether petitioner had a staff representative for his first hearing.) The disciplinary committee report notes that the committee considered Montez's and Sadowski's memorandums in reaching its decision that petitioner was guilty of possession of marijuana. Petitioner lost 18 months of visiting privileges and 41 days' good-time credit.

Klawitter did not fulfill his duties. Petitioner asked Klawitter to view the surveillance video and to call Montez as a witness. Klawitter failed to interview or call Montez as a witness and failed to review the fingerprint analysis results and the lab results regarding the substance and urine sample tests. According to the disciplinary hearing report, Klawitter stated at the hearing, "I attempted to get the visual off of the monitor cameras, but it wasn't there. We have no other evidence to present." (It is unclear whether the videotape was no longer available or whether there was nothing relevant to be seen on the videotape.)

Petitioner informed Captain Salas, Special Investigator Moore and the discipline committee of his request for exculpatory evidence, including the staff memorandums by Sadowski and Montez of the alleged incident, fingerprint analysis results of the bag, urinalysis results, lab reports demonstrating the weight and identity of the alleged marijuana, and the viewing and preservation of the entrance surveillance videotape of the alleged incident. Salas told petitioner that (1) fingerprint and lab analysis is standard procedure in an incident involving a controlled substance and (2) the fingerprint, lab analysis and documents would be available to petitioner's staff representative. Moore told petitioner that the documents would not be disclosed to him or his staff representative. Petitioner received only the incident report.

DISCUSSION

Although petitioner alleges that he has exhausted his administrative remedies, it is unclear exactly what issues petitioner pursued or whether he has exhausted his remedies completely. See Sanchez v. Miller, 792 F.2d 694, 697 (7th Cir. 1986) (federal prisoners are required to exhaust administrative remedies before petitioning for writ of habeas corpus); Del Raine v. Carlson, 826 F.2d 698, 703 (7th Cir. 1987) (same). However, for the purpose of this order, petitioner's allegations of exhaustion will suffice.

When the loss of good-time credit is a possible sanction, an inmate must 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)). Also, if institutional safety requires the omission of certain evidence, the inmate must be provided a statement indicating the fact of such omission. Wolff v. McDonnell, 418 U.S. 539, 565 (1974). “[T]he 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 contends that prison officials denied him his right to due process or violated federal law because (1) they denied him the ability to review exculpatory evidence, including staff memorandums of the alleged incident, fingerprint analysis of the bag, urinalysis results, lab reports and the viewing or preservation of the surveillance videotape of the alleged incident; (2) his staff representative failed to present the information he requested, failed to become familiar with all reports and memoranda, failed to assist petitioner in his defense and failed to present information that could have resulted in the

imposition of lesser sanctions; (3) the disciplinary hearing officer failed to consider the substance of his defense in good faith; (4) the greater weight of evidence does not support a finding of guilt; and (5) petitioner's incident report and disciplinary proceedings were untimely.

A. Exculpatory Evidence

According to the Court of Appeals for the Seventh Circuit, a disciplinary committee “may not refuse to consider exculpatory evidence simply because other evidence in the record suggests guilt.” Piggie v. McBride, 277 F.3d 922, 925 (7th Cir. 2002) (regarding surveillance videotape) (internal quotation omitted). “[P]risoners are entitled to have exculpatory evidence disclosed unless its disclosure would unduly threaten institutional concerns.” Id. Accordingly, respondent will be directed to show cause why petitioner's petition should not be granted because prison officials denied him access to allegedly exculpatory evidence.

B. Staff Representative

Petitioner argues that when a staff member agrees to assist an inmate but does little or nothing to help, such a failure to assist is a denial of due process. In support of this contention, petitioner cites Miller v. Duckworth, 963 F.2d 1002 (7th Cir. 1992). However, petitioner is incorrect; Miller does not stand for this proposition. In Miller, the court held

that “due process does not require that the prisoner be appointed a lay advocate, unless ‘an illiterate inmate is involved . . . or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case.’” Id. at 1004 (quoting Wolff, 418 U.S. at 570). From his petition it is clear that petitioner is not illiterate and that the issues are not so complicated that he cannot collect and present necessary evidence. Because due process does not required prison officials to provide petitioner a staff representative, the fact that he opted for an advocate and is unhappy with the advocate’s performance does not rise to the level of a due process violation.

Petitioner argues alternatively that his staff representative’s performance violated federal law. This argument carries more weight. Federal law provides that a “staff representative shall be available to assist the inmate if the inmate desires by speaking to witnesses and by presenting favorable evidence to the [disciplinary hearing officer] on the merits of the charge(s) or in extenuation or mitigation of the charge(s).” 28 C.F.R. § 541.17(b) Because petitioner alleges that his staff representative failed to call Montez as a witness and failed to present or review favorable evidence, respondent will be directed to show cause why petitioner’s petition should not be granted on this claim.

C. Good Faith and Evidentiary Standard

Petitioner argues that the disciplinary hearing officer failed to consider the substance of his defense in good faith and that the greater weight of evidence does not support a finding of guilt. As discussed earlier, the evidentiary standard is “some evidence,” not a greater weight of the evidence. McPherson, 188 F.3d at 786 (“‘some evidence’ is less exacting than the preponderance of the evidence standard”). In any event, petitioner merely argues that because the disciplinary officer did not accept his version of the events, the officer did not act in good faith. This argument is unpersuasive. The disciplinary hearing report provided “some evidence” in the form of Montez’s statement that petitioner was the owner of the bag of marijuana found on the floor. Petitioner’s claims that disciplinary hearing officer failed to consider the substance of his defense in good faith and that the greater weight of evidence does not support a finding of guilt will be dismissed. Petitioner has failed to show that his constitutional rights or his rights under federal law were violated.

D. Untimeliness

Finally, petitioner argues that prison officials were late in giving him his incident report and holding his disciplinary hearing in violation of the Code of Federal Regulations. The incident occurred on January 27, 2002. Montez wrote a memorandum recounting the incident that same day. On February 11, 2002, Moore wrote an incident report. Petitioner

received a copy of Moore's report that same day. Petitioner had an initial hearing on February 14, 2002 and a second hearing on February 28, 2002. According to federal law, prison officials are to give the inmate a written copy of the charge against him "ordinarily within 24 hours of the time staff became aware of the inmate's involvement in the incident" and are to give the accused an initial hearing "ordinary held within three work days from the time staff became aware of the inmate's involvement in the incident." 28 C.F.R. § 541.15(a) and (b). Because petitioner alleges that he failed to receive a written copy of the charge within 24 hours or an initial hearing within three days, respondent will be directed to show cause why petitioner's petition should not be granted on this claim.

ORDER

IT IS ORDERED that

1. The court's January 9, 2003 order and judgment of dismissal is VACATED;

2. Respondent Richard L. Stiff 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 Jerome Bethea's claims that: (a) prison officials denied petitioner exculpatory evidence in violation of due process; (b) his staff representative failed to call Montez as a witness and failed to present or review favorable evidence in violation of the Code of Federal Regulation; and (c) prison officials failed to give him a written copy of the charge within 24 hours or an initial hearing within three days in violation of the Code of Federal Regulation;

2. Petitioner's remaining claims are DISMISSED for his failure to show that the alleged procedural faults violated the Constitution or the laws of the United States;

3. Respondent is requested to advise the court in its response whether in respondent's opinion petitioner has exhausted his administrative remedies as required by Sanchez v. Miller, 792 F.2d 694, 699 (7th Cir. 1986). Also, respondent is to furnish the court with records and transcripts relevant to the question of exhaustion in order to enable the court to reach a determination of that question. If respondent cannot furnish such records and transcripts within the 20-day period allowed for the filing of the response, he to advise the court, in the response, when he can make such papers available to the court; and

4. Petitioner 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 27th day of January, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge