

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

ANTONIO DIAZ,

Petitioner,

v.

JOSEPH SCIBANA,

Respondent.

ORDER

03-C-356-C

This is a petition for a writ of habeas corpus. Petitioner Antonio Diaz, an inmate at the Federal Correctional Institution in Oxford, Wisconsin, claims that he is in custody in violation of the laws or Constitution of the United States. 28 U.S.C., § 2241. Petitioner has paid the \$5 filing fee.

Petitioner alleges that respondent Joseph Scibana violated his procedural due process rights when a disciplinary hearing officer found petitioner guilty of destroying government property in excess of \$100.00. As a consequence of the finding, the hearing officer took away 27 days of his good time credit, thereby pushing back his release date. Petitioner asserts that the hearing officer failed to provide him with documentary evidence showing that the damage he caused to a vending machine exceeded \$100.00 and therefore the

punishment the officer imposed upon him was arbitrary and capricious. Because I conclude that the hearing officer met the requirements of due process when conducting a disciplinary hearing, the petitioner will be dismissed for petitioner's failure to show that he is in custody in violation of the Constitution or the laws of the United States.

From petitioner's petition and accompanying exhibits, I find the following facts.

FACTS

Petitioner was convicted of conspiracy to distribute and deliver cocaine and sentenced to 43 months in prison. Petitioner arrived at Oxford Prison Camp on November 27, 2001 and has been there ever since. Respondent Joseph Scibana is the warden of the Oxford Prison Camp. Petitioner's original release date was January 3, 2005 (with good time credit). He was scheduled to go to a halfway house on September 12, 2004.

On September 15, 2003 at approximately 10:00 p.m. in the Oxford visiting room, petitioner pushed in the glass of a vending machine with his foot in an effort to shake loose a \$2.50 mozzarella cheese product. An outside vendor, J&H Enterprises, owned the machine. Petitioner did not intend to push in the glass. Respondent charged petitioner with violating the Bureau of Prisons' offense code 218, a violation found at 28 C.F.R. § 541.13, Table 3, that prohibits acts that relate to:

Destroying, altering or damaging government property or the property of

another person having a value in excess of \$100.00 or destroying, altering or damaging life-safety devices (e.g., fire alarms) regardless of financial value.

A disciplinary hearing officer held a disciplinary hearing on the violation on October 2, 2003. At the hearing, petitioner admitted damaging the machine. Petitioner's staff representative, Mike Brandt, stated that he had observed the damage to the machine and that "[t]he glass was pushed in about one-half inch on the lower right corner." Inmate Christian Markeiwicz-Lane testified at the hearing that the "black panel" was broken on the machine but that the machine was working after petitioner damaged it. Inmate John Villa-Gomez told the Unit Hearing Team that the vending machine continued to work "fine" after the damage done to it.

Despite this testimony, the hearing officer found that petitioner had committed the act charged and eliminated 27 days of petitioner's good time credit. In addition, the hearing officer ordered petitioner to pay restitution in the amount of \$1300. Petitioner first heard about the extent of damages to the machine at his hearing; he has never been given documentary proof of the damages claimed. The hearing officer based the damage amount on a telephone call and a September 23, 2004 memorandum from Kristine McElligott, an Inmate Services Supervisor. Petitioner never received a copy of the memorandum. Because of the elimination of his good time credit, petitioner's release date has been pushed back to January 26, 2005 and his opportunity to go to a halfway house has been pushed back to

October 6, 2004. To comply with the hearing officer's order to pay restitution, petitioner is paying monthly installments of \$55.00.

Although petitioner accepts responsibility for his action, respondent has never demonstrated to him that the damage to the vending machine exceeded the \$100.00 threshold for a finding of guilt under code 218. Without knowing the extent of damages to the machine, petitioner has been unable to provide documentary evidence to dispute the hearing officer's findings. Furthermore, the machine was not government property.

Petitioner appealed the result of the disciplinary hearing to the regional Bureau of Prisons' office on December 22, 2003. The regional office denied his appeal on February 18, 2004. He then appealed to the central office on March 9, 2004. To date he has not received a response from the central office regarding his appeal. Pursuant to 28 C.F.R. 542.18, petitioner considers the lack of a response a denial of his appeal.

DISCUSSION

Petitioner contends that respondent violated his procedural due process rights when the hearing officer found him guilty of destroying government property in excess of \$100.00. Petitioner argues that because he was never shown proof that the damage he caused exceeded \$100.00, the decision to find him guilty of a violation of Offense Code 218 is arbitrary and capricious.

When the loss of good-time credit is a sanction for a violation of prison rules, an inmate is entitled to receive the procedural safeguards during prison disciplinary proceedings, including “(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 admits that respondent provided him advance written notice of the disciplinary charges, that he had an opportunity to call witnesses and present documentary evidence in his defense and that he received a written statement by the hearing officer of the evidence on which she relied and the reasons for the disciplinary action. Petitioner complains that he did not receive a copy of the memorandum from McElligott. However, due process does not require respondent to furnish petitioner with every piece of evidence

used to make a decision. The only requirement is that petitioner receive a written statement by the hearing officer outlining the evidence on which she relied when imposing the punishment. Respondent satisfied this requirement by notifying petitioner in the hearing officer's report that the officer had relied on McElligott's memorandum.

As to petitioner's concern that he was unable to present documentary evidence to rebut the damage amount to the machine, petitioner was well aware from the outset that respondent was charging him with violating code 218, which addresses damage to property in excess of \$100.00. (Petitioner alleges that the vending machine was not government property but owned by an outside vendor, J&H Enterprises. Offense Code 218 prohibits acts that relate to damage to government property "or the property of another person." Therefore, regardless who owns the vending machine, the hearing officer had enough evidence to find petitioner guilty of violating Offense Code 218.) Petitioner could have presented documentary evidence at the disciplinary hearing showing that the damage did not exceed \$100.00, if he had any. If petitioner truly believed that the damage did not exceed \$100.00, petitioner did not need to know the exact amount of the damage to make such a showing.

To the extent that petitioner is challenging the precise amount of restitution he has to pay for breaking the vending machine, he can make such a challenge using the post-deprivation procedures that are available to him. Filing an action under 28 U.S.C. § 2241

is not the appropriate avenue for challenging the amount of restitution imposed. Because petitioner fails to show that respondent violated his due process rights, petitioner's claim under 28 U.S.C. § 2241 will be dismissed with prejudice.

ORDER

IT IS ORDERED that petitioner Antonio Diaz's writ for habeas corpus is DISMISSED and the clerk of court is directed to enter judgment for respondent Joseph Scibana and close this case.

Entered this 28th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge