IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEROME PATRICK BETHEA,

OPINION AND ORDER

Petitioner,

03-C-0015-C

v.

RICHARD L. STIFF,

Respondent.

- -

Petitioner Jerome Patrick Bethea, an inmate 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. Petitioner challenges prison disciplinary proceedings that resulted in the loss of 41 days of good time credit.

On January 28, 2003, I ordered respondent to show cause why petitioner's petition should not be granted on petitioner's claims that: (1) prison officials denied him exculpatory evidence in violation of due process; (2) his staff representative failed to call Officer 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 failed to conduct an initial hearing within three days in violation of the

Code of Federal Regulations. Respondent filed a timely response to the order.

Now petitioner has filed a "motion for leave to file reply motion out of time," which I construe as a motion for enlargement of time to file his traverse (which accompanied the motion). On February 7, 2003, petitioner was transferred unexpectedly to a federal correctional facility in Ashland, Kentucky and, as a result, did not receive respondent's answer to the court's show cause order until March 20, 2003. The motion for leave to file a late reply will be granted.

Because I conclude that petitioner has failed to show that he is in custody in violation of the Constitution or laws of the United States, his petition for a writ of habeas corpus will be dismissed.

I find the following facts from the record pursuant to 28 U.S.C. § 2248.

FACTS

Petitioner Jerome Patrick Bethea is now an inmate at the Federal Correctional Institution in Ashland, Kentucky. At all relevant times to this petition, petitioner was an inmate at the Federal Correctional Institution in Oxford, Wisconsin. Respondent Richard Stiff is the warden of the federal prison in Wisconsin.

On January 27, 2002, Officer Montez found a small ziplock bag containing a green, leafy substance outside the entrance to the Sauk unit in the exact location where petitioner

had been standing. The surveillance video records only the area inside the entrance to the unit. The bag was small enough to be concealed in a person's hand. That same day, Officer Montez wrote a memorandum recounting the incident to Lieutenant Sadowski, as follows:

> Sir, on January 27, 2002, at approximately 11:50am, while performing duties as the Sauk House Unit Officer, I was conducting a pat search of Inmate Bethea #16472-057. Upon completion of the pat search, I told Bethea to show me his hands. Bethea withdrew his hands into the sleeves of his jacket and stated, "I don't have anything." I again told Bethea to open his hands and show them to me. He again stated, "I don't have anything." I asked Bethea if he was refusing my order and he stated, "No, I just don't have anything in my hands." At this time, a number of inmates approached the unit. Not wanting to create an incident in front of these inmates, I advised Bethea to stand where he was and I conducted pat searches of these inmates. I turned back to face Bethea and observed his hands behind his back. (Inmate Bethea was on the North side of the walkway at the entrance at this time.) I told Bethea to remove his jacket and conducted another pat search, to include a hand sweep through his pockets. At this time Bethea was willing to show me his open hands. Bethea was then directed to enter the unit and I secured the entrance doors at 11:57 AM. No other inmates entered the unit, exited the unit or were allowed in the area.
>
> At approximately 12:03pm, I opened the entrance door for an inmate to depart the unit on Chapel movement. As I stepped out through the door, I noticed a small plastic ziplock bag laying on the ground, on the North side of the walkway at the entrance. The plastic bag was folded small enough to be concealed in a person's hand. This was the exact place where I observed Inmate Bethea standing, with his hands behind his back. I picked up the bag, unfolded it and saw a green, leafy, seedy substance. I immediately secured the entrance door and contacted [Lieutenant Sadowski].
>
> At approximately 12:18pm, Officers S. Dittman and R. Shumway escorted Inmate Bethea and the plastic bag contain[ing] the green leafy substance was transported to the Lieutenant's Office and tested positive for marijuana.

Aff. of M.E. Doucette-Lunstrum, dkt. #11, Attachment 5.

Petitioner was placed in segregation and gave a urine sample for drug testing. The substance in the bag tested positive as marijuana. On January 28, 2002, Officer Sadowski wrote a memorandum to Captain Salas, as follows:

> On January 27, 2002 at 12:15pm, Officer Montez notified the Lieutenants Office he discovered a green leafy substance outside the entrance doors to Sauk unit.
>
> Officer Shumway retrieved the unknown substance from Officer Montez and brought it to the Lieutenants Office.
>
> I tested the unknown substance using the NIK Narcotics Identification System test "E". I received a positive reading for marihuana.
>
> Officer Montez informed me, he conducted a pat search of inmate BETHEA, Jerome #16472-057 at the same location 5 minutes earlier.
>
> BETHEA was ordered to provide a urine sample and he was placed in the Special Housing Unit.
>
> I placed the marihuana in the evidence night drop box.

On February 11, 2002, Special Investigative Supervisor Michael Moore wrote an incident report in reliance on memoranda written by Officers Montez and Sadowski. Investigator Moore did not write the report directly after the incident because he was engaged in the investigation of a major confrontation between Native American and Hispanic inmates, which had affected the overall security of the institution. That same day, February 11, Lieutenant Turvey delivered to petitioner the incident report charging him with possession of marijuana. No fingerprint analysis was done on the bag because prison

officials did not anticipate a criminal proceeding. The urinalysis results were not provided to petitioner because he was charged with possession of marijuana, not illegal use.

On February 12, 2002, Lieutenant Kelly advised petitioner of his rights and began an investigation. Lieutenant Kelly's report indicates that petitioner displayed a poor attitude, asserted that the incident report was "not true" and "requested no witnesses." Lieutenant Kelly determined that petitioner had been "appropriately charged" and referred the case to the unit disciplinary committee.

On February 14, 2002, petitioner appeared before the unit disciplinary committee. Petitioner did not make a statement. The unit disciplinary committee referred the charges to the disciplinary hearing officer. At that time, petitioner was given written notice of the pending hearing, advised of his rights and provided with the "Inmate Rights at Discipline Hearing" form, which he signed. On the form, petitioner requested a staff representative, but declined to call witnesses at the upcoming disciplinary hearing. Michael Klawitter, correctional counselor, was appointed to represent petitioner.

On February 28, 2002, petitioner appeared before the disciplinary hearing officer. He was advised of his rights again. At the hearing, petitioner denied the charge and stated, "It's not true. I never had my hands behind my back. There were no other inmates, just me and him out there. He told me to empty my pockets and open my hands and I did." Klawitter stated that he had "attempted to get the visual off of the monitor cameras, but it

wasn't there. We have no other evidence to present." Neither petitioner nor Klawitter called witnesses.

The disciplinary hearing officer found that petitioner committed the prohibited act of possession of marijuana. The disciplinary hearing officer relied on the written report by Investigator Moore, petitioner's statement that he made during the disciplinary hearing and the January 27 and 28, 2002 memoranda written by Montez and Sadowski. The disciplinary hearing officer viewed Officer Montez's and Sadowski's memoranda as supporting evidence, confirming the written statement by Investigator Moore. Petitioner lost 18 months of visiting privileges and 41 days of good-time credit.

At the conclusion of the hearing, petitioner was advised of the disciplinary hearing officer's findings, the specific evidence relied upon, the action and the reasons for the action. Petitioner was advised of his right to appeal the decision within 20 calendar days following receipt of the disciplinary hearing report. Petitioner received a copy of the report on April 2, 2002.

DISCUSSION

Respondent agrees that petitioner has exhausted his administrative remedies concerning the conduct report for possession of marijuana and concomitant loss of 41 days of good time credit. 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). Therefore, I will turn to the merits of petitioner's claims.

A. Exculpatory Evidence

When the loss of good-time credit is a sanction for a violation of prison rules, 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.

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. Petitioner alleges that he was denied exculpatory evidence including Officer Montez's and Sandowski's memorandum of the incident, fingerprint analysis of the bag, urinalysis results and the surveillance videotape of the incident.

First, other than arguing that the Montez and Sadowski staff memoranda are "exculpatory," petitioner does not point to any specific statements in the memoranda that support this conclusion. Moreover, a quick reading of the documents indicate they are *inculpatory* rather than *exculpatory*. Second, no fingerprint analysis was done on the bag because prison officials did not anticipate pursuing a criminal proceeding. Therefore, respondent had no fingerprint evidence to provide to petitioner. Third, urinalysis results were not provided to petitioner because he was not charged with *illegal use* but rather with *possession* of marijuana. The result of such a test has no bearing on petitioner's *possession* charge. Finally, the monitoring camera covers only the area *inside* the entrance doors of the housing unit. Officer Montez reported that the incident occurred *outside* the entrance to the housing unit. Thus, no videotape existed that could be disclosed to petitioner. Petitioner has failed to show that prison officials deprived him of his right to due process by denying

him exculpatory evidence.

B. Staff Representative

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).

First, all of the "evidence" petitioner points to either does not exist or is not favorable to him. Thus, there is no merit petitioner's allegation that his staff representative failed to present favorable evidence. Second, under federal constitutional law, petitioner does not have the right to call adverse witnesses, such as officer Montez. Because cross-examination of an unfriendly witness such as a corrections officer who has accused an inmate of conduct violations may be tense and lead to violence or other forms of retaliation, the United States Supreme Court has declined to find that inmates have a right to call and question adverse witnesses. Wolff v. McDonnell, 418 U.S. 539, 567-68 (1974); see also Rasheed-Bey v. Duckworth, 969 F.2d 357, 361 (7th Cir. 1992)("[i]nmates have no right to confront and cross-examine adverse witnesses"). Finally, 28 C.F.R. § 541.17(b) does not require the petitioner's staff representative to "call witnesses" but rather requires him to "speak to witnesses." (It is worth noting that on petitioner's "Inmate Rights at Discipline Hearing"

form, petitioner himself declined to call witnesses.) Petitioner has failed to show that his representation violated federal law.

C. Untimeliness

The incident occurred on January 27, 2002. Officer Montez wrote a memorandum recounting the incident that same day. On February 11, 2002, Investigator Moore wrote an incident report. Petitioner received a copy of Investigator 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 "*ordinarily* 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). The adverb "ordinarily" is provided for just this situation. Investigator Moore did not write the report directly after the incident because his office was engaged in the investigation of a major confrontation between Native American and Hispanic inmates, which affected the overall security of the institution. This is reasonable. Petitioner argues that "respondent has no justifiable reason why [petitioner] was not given an incident report within 24 hours." He is wrong. Moore had a valid reason for his delay.

In sum, "some evidence" supports the decision made by the prison disciplinary officer. Prison officials met the requirements of due process and federal law. Accordingly, petitioner's petition will be dismissed for his failure to show that his custody term has been extended in violation of the Constitution or federal law.

ORDER

IT IS ORDERED that

1. Petitioner Jerome Patrick Bethea's motion for an enlargement of time in which to file his traverse is GRANTED;

2. Petitioner's petition for a writ of habeas corpus is DISMISSED; and

3. The clerk of court is directed to close this case.

Entered this 22nd day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge