IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LAYETTE WILLIAMS,

Petitioner,

v.

WARDEN JOSEPH SCIBANA,

Respondent.

ORDER

04-C-349-C

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This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner Layette Williams is in an inmate at the Federal Correctional Institution at Oxford, Wisconsin. Petitioner contends that he was deprived of a liberty interest without due process of law. He seeks reinstatement of good conduct credits that he lost after he was found to have possessed marijuana and disobeyed a staff order. Petitioner contends that the procedures leading up to this punishment were flawed because the initial incident report did not contain allegations relating to every element of the charged offense and the report was not amended to include these allegations for nine days during which time the hearing was suspended. The petition will be dismissed; petitioner has failed to show that the alleged procedural faults violated the Fifth Amendment's due process clause or his rights under

federal law. Therefore, he has not established that his custody will be illegal if his good conduct time is not restored.

From the petition and its attachments, I understand petitioner to allege the following facts.

ALLEGATIONS OF FACT

On September 12, 2003, senior officer specialist G. Robinson filed an incident report, stating that earlier that day at 4:15 pm,

> Officer Burmeister and myself were to conduct a cell search of Inmate Williams 09188-040 and Stevens 07196-032 who are currently housed in Cell 20 on 1 East in the Special Housing Unit. Shortly after securing the two inmates in the shower on 1 East, inmate Williams during a visual search, inadvertently displayed several small bags of an unknown substance cupped in his right hand. I immediately gave Williams a Direct Order to give me the items in his hand. Inmate Williams refused the order and then proceeded to walk to the back of the shower and stuff the items in both floor drains. Inmate Stevens had no contraband on himself and was escorted back to his cell, and inmate Williams was escorted to the 1West shower to be visually searched again. Inmate Williams had no further contraband on himself and Officer Burmeister was able to retrieve two small plastic bags of the unknown substance.

Officer Robinson stated that petitioner's actions violated code 113, possession of narcotics, marijuana, drugs or related paraphernalia, and code 307, refusing to obey an order of any staff member. A hearing on these charges was suspended to allow time for a new incident

report to be written. The rewritten version was completed on September 21, 2003 and contained two changes: (1) the time of the incident was reported as 5:30 p.m. instead of 4:15 p.m., as shown on the first report; and (2) a sentence was added, stating that "[t]he substance was tested by Lieutenant Magulick using NIK Test Kit E and resulted in a positive test for marijuana."

On October 9, 2003, a discipline hearing officer found petitioner guilty of possessing narcotics not prescribed by medical staff and refusing to obey an order in violation of codes 113 and 307. On October 15, 2003, petitioner received a copy of the discipline hearing officer's report. In this report, the hearing officer outlined the evidence that he relied on in finding petitioner guilty, which included one of the incident reports and investigation, a memo from Burmeister, a memo from Lieutenant Magulick and a photo of the test kit that Magulick had used and which had shown the substance to be marijuana. The hearing officer acknowledged petitioner's denial of the charges but stated that he found the statement of the reporting staff to be more credible. Petitioner's staff representative argued that petitioner had not been provided with written notice of the delay in violation of Program Statement § 5270.07, which requires that an inmate receive written notice of any delay exceeding five days. In his report, the hearing officer responded to this argument by noting that the discipline hearing office had taken administrative notice that the incident report remained in "suspended" status. As punishment, petitioner lost 27 days of earned good

conduct credits, 131 days of non-vested good conduct credit and 365 days of visitation.

DISCUSSION

A. Preliminary Matters

28 U.S.C. § 2241 permits district courts to grant relief to prisoners "in custody in violation of the Constitution or laws or treaties of the United States." When a petitioner mounts a due process challenge to a disciplinary procedure that resulted in a denial of good conduct credit to which the petitioner was statutorily entitled, the suit may be maintained as a petition for habeas corpus. Jackson v. Carlson, 707 F.2d 943, 946 (7th Cir. 1983). This is because the petitioner is seeking relief at an earlier date even though he is not seeking immediate release. Id. Thus, petitioner has properly brought his claim under § 2241.

Federal prisoners are required to exhaust the administrative remedies available to them. Sanchez v. Miller, 792 F.2d 694, 697 (7th Cir. 1986); Del Raine v. Carlson, 826 F.2d 698, 703 (7th Cir. 1987). The administrative procedure for a federal inmate challenging the decision of a disciplinary hearing officer consists of the inmate's submitting a BP-10 form to the appropriate regional director and a BP-11 form to the Bureau of Prisons' General Counsel according to the timetable set out in 28 C.F.R. § 542.15. 28 C.F.R. § 541.19. Petitioner has attached to his petition copies of his appeal to the regional administrative remedy appeal board, the board's denial, his appeal to the Bureau of Prisons' General

Counsel and its denial. Thus, petitioner has exhausted his administrative remedies.

B. Violation of Program Statement and Code of Federal Regulations

Petitioner claims that the hearing that resulted in the loss of good time credits was defective because (1) the first incident report failed to indicate that the substance obtained was marijuana; (2) it was suspended to allow time for preparation of a revised version; (3) the revised report was not complete until nine days after the incident; and (4) petitioner's hearing was not held within three days of the incident. According to petitioner, these shortcomings violated the Bureau of Prisons' program statement § 5270.07 and 28 C.F.R. § 541.15, which he contends require that incident reports contain all elements of the alleged violation, rewrites be complete within twenty-four hours, suspensions of reports be made only to allow criminal investigations and hearings be held within three days of the time that the prison staff first become aware of petitioner's involvement in the alleged incident.

The Court of Appeals for the Seventh Circuit has held that "[t]he BOP's program statements are internal agency interpretations of its statutory regulations." Parsons v. Pitzer, 149 F.3d 734, 738 (7th Cir. 1998); see also Koray v. Sizer, 21 F.3d 558, 562 (3d Cir. 1994), *rev'd on other grounds sub nom.*, Reno v. Koray, 515 U.S. 50 (1995) ("The Bureau's interpretation is recorded in its 'Program Statements,' which are merely internal agency guidelines and may be altered by the Bureau at will."). They do not create a federal cause

of action for a prisoner but instead serve as internal guidelines. See Miller v. Henman, 804 F.2d 421, 426 (7th Cir. 1986) ("The manual was not promulgated under the Administrative Procedure Act or published in the Code of Federal Regulations, and therefore it does not create legally enforceable entitlements."). Because the policy statements are not binding, petitioner has no legal remedy for their violation.

Petitioner argues that these procedural flaws also violate 28 C.F.R. § 541.15, which provides in relevant part,

> (a) Staff shall give each inmate charged with violating a Bureau rule a written copy of the charge(s) against the inmate, *ordinarily* within 24 hours of the time staff became aware of the inmate's involvement in the incident.
> (b) Each inmate so charged is entitled to an initial hearing before the UDC, *ordinarily* held within three work days from the time staff became aware of the inmate's involvement in the incident. This three work day period excludes the day staff became aware of the inmate's involvement in the incident, weekends, and holidays.
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> . . .
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> (k) The UDC may extend time limits imposed in this section for a good cause shown by the inmate or staff and documented in the record of the hearing.

(Emphasis added). The provision does not set out any requirements with respect to the necessary content of an incident report or provide any guidelines with respect to the propriety of rewriting them.

Petitioner misreads § 541.15(a) as requiring that revisions to incident reports be made within twenty-four hours from the time that a staff member learns of an inmate's involvement in the relevant incident. First, this subsection applies to the time that an inmate should be provided with a written copy of the charge against him and not to the time for making adjustments to incident reports. Second, the statute says that this notice will *ordinarily* be provided within twenty-four hours; it does not create a hard and fast rule that it *must* be provided within this time. Similarly, subsection (b) provides that an initial hearing will *ordinarily* be held within three days; it does not mandate this time frame. Moreover, subsection (k) provides for extensions to time limits for good cause set out in the record. In this case, the record indicates that there was a delay while the substance recovered was tested so that it could be determined that it was contraband. Certainly, testing the substance to ensure that it was in fact contraband constitutes good cause. Even if § 541.15 had been violated petitioner has not shown that it would warrant reinstatement of the good time credit that he lost. In his report, the disciplinary hearing officer concluded that the "delay neither hindered your ability to marshal a defense nor affects your appeal rights through the administrative remedy process."

C. Due Process Violation

In order to make out a due process claim, petitioner must show first that he was

deprived of a liberty interest and second, that this deprivation took place without the procedural safeguards necessary to satisfy due process. The Court of Appeals for the Seventh Circuit has held repeatedly that prisoners have a protected liberty interest in good time credit that they have earned. See, e.g., Thomas v. McCaughtry, 201 F.3d 995, 999 n.4 (7th Cir. 2000); Sweeney v. Parke, 113 F.3d 716, 718 (7th Cir. 1997); Meeks v. McBride, 81 F.3d 717, 719 (7th Cir. 1996).

Even if petitioner were correct that the alleged shortcomings violated program statement § 5270.07 and 28 C.F.R. § 541.15, the procedural shortcomings he alleges are not of constitutional import. Although the Fifth Amendment's due process clause provides federal inmates with certain minimum procedural safeguards, it does not create a right to procedural perfection. "'[A] prisoner must show that his continued custody is a violation of the Constitution, and the violation of an administrative rule is not the same thing as a violation of the Constitution." White v. Henman, 977 F.2d 292, 295 (7th Cir. 1992) (quoting Kramer v. Jenkins, 806 F.2d 140, 142 (7th Cir. 1986)). When the loss of good-time credit is a possible sanction, an inmate must receive the following procedural safeguards during prison disciplinary proceedings in order to satisfy the requirements of due process: "'(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)).

None of the shortcomings to which petitioner objects suggest that he was deprived of these minimum procedures. He does not contend that he was not provided with advance written notice of the charges or deprived of an opportunity to present a defense. Petitioner does argue that the disciplinary hearing officer's conclusions were insufficient because he should not have relied on the incident report, but the disciplinary hearing officer's report, which petitioner attached to his petition, indicates that in addition to the incident report, the hearing officer relied on a memo from Burmeister in which Burmeister stated that he had seen petitioner with several small packets cupped in his right hand that petitioner tried to place in the floor drain when he was ordered to surrender them. In addition, the report indicates that the hearing officer relied on a memo written by Lieutenant Magulick, stating that he had tested the green leafy substance in the packets recovered from the drain and discovered that the substance tested positive as marijuana.

"[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. Thus, even if petitioner were correct that the alleged procedural errors made in preparing the incident

report rendered the report itself unfit as evidence of the violation, the decision of the hearing officer satisfied the "some evidence" standard. Because there is no indication that petitioner was deprived of the minimal procedural safeguards provided by the due process clause, his petition will be dismissed.

ORDER

IT IS ORDERED that petitioner's claim that he was deprived of good conduct credits without due process and in violation of the Bureau of Prisons' program statement § 5270.07 and 28 C.F.R. § 541.15 is DISMISSED for petitioner's failure to show that the alleged procedural faults violated the Constitution or the laws of the United States.

Entered this 3rd day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge