IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LARRY STOCKS,

ORDER

Petitioner,

05-C-136-C

v.

JOSEPH SCIBANA,

Respondent.

- -

This is a petition for a writ of habeas corpus. Petitioner Larry Stocks, 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. Respondent Joseph Scibana is the warden of the Oxford facility. This court has subject matter jurisdiction, 28 U.S.C. § 1331, and because petitioner's custodian is located in the Western District of Wisconsin, venue is proper. Moore v. Olson, 368 F.3d 757 (7th Cir. 2004). Petitioner has paid the $5 filing fee. In addition to respondent Scibana, petitioner named the United States Parole Commission as a respondent. Because a petition for habeas corpus under section 2241 should be brought against a petitioner's custodian, I have removed the parole commission as a respondent. 28 U.S.C. § 2242.

In his petition, petitioner alleges that an African American hearing officer who presided over his parole revocation was biased against him because she had received information from petitioner's parole officer that petitioner made racial slurs against blacks during his interview with the parole officer. In addition, petitioner alleges that the hearing officer deprived him of a meaningful parole revocation hearing because she predetermined the outcome before holding the hearing. A decision whether to issue an order to show cause with respect to petitioner's latter claim will be stayed, because it is not clear that petitioner has exhausted his administrative remedies with respect to the claim. As for petitioner's claim that his hearing officer was biased against him because she was aware of petitioner's slurs against persons of her race, the petition will be dismissed. Nothing in petitioner's petition or the attachments to the petition shows that the hearing officer placed any weight on petitioner's racist remarks. Even if she did, I conclude that a hearing officer is entitled to consider a petitioner's self-professed racist views in determining whether he is suited for release on parole.

In his unverified petition, petitioner alleges the following facts.

ALLEGATIONS OF FACTS

Petitioner Larry Stocks is a federal inmate currently incarcerated at the Federal Correctional Institution in Oxford, Wisconsin. On July 13, 2004, while petitioner was on

parole, he was arrested for failing to comply with conditions of aftercare drug programming, using habit forming drugs and committing an assault without serious bodily injury, in violation of the conditions of his parole. The following day, Michael Brogla, a federal probation officer, conducted an interview with petitioner at which petitioner made numerous racial slurs. In his evaluation report, Brogla noted these slurs and commented that petitioner's "attitude toward the African-American community" was of particular concern. In recommending revocation, Brogla noted also that petitioner had admitted to two of the alleged parole violations, showed no regard for his parole conditions and had expressed disdain toward the federal government for placing limitations on him.

On October 20, 2004, a parole revocation hearing was held before an African American hearing officer. At the hearing, the officer noted that she was aware of Brogla's interview evaluation report and petitioner's negative beliefs about African Americans and that she had made the decision to revoke petitioner's parole before the hearing began. In her report, the hearing officer explained that revocation was justified because of petitioner's admission of three parole violations: (1) failure to comply with conditions of his required drug after care programming; (2) use of dangerous and habit forming drugs; and (3) committing assault without bodily injury. In addition, she noted that petitioner had been convicted of the assault charge. As the hearing officer explained, petitioner's violations were rated as category two criminal conduct and he was given a salient factor score of two. (A

prisoner with a higher salient factor score is considered a better parole risk and vice versa. The scoring sheet petitioner attached to his petition indicates that he has at least five prior commitments and at least four prior convictions or adjudications.) Finally, the hearing officer noted that under the commission's guidelines, petitioner's scores call for a 16-22 month revocation period. Accordingly, she formally revoked petitioner's parole, penalizing him with 22 months' incarceration and loss of street time. She made no mention of petitioner's racial remarks or beliefs in her report.

On December 17, 2004, petitioner appealed the revocation determination. In rejecting his appeal, the United States Parole Commission stated that petitioner had no constitutional right to have a hearing officer of a particular race preside at his hearing.

DISCUSSION

A. Exhaustion

I understand petitioner to raise two claims in his petition: (1) the hearing officer predetermined the outcome of his parole revocation hearing in violation of his right to a meaningful revocation hearing; and (2) the hearing officer considered petitioner's racial slurs in reaching her decision to revoke petitioner's parole, in violation of petitioner's right to a neutral decision maker.

A petitioner seeking habeas corpus relief must exhaust his administrative remedies

before filing in federal court absent a showing of cause and prejudice. Sanchez v. Miller, 792 F.2d 694, 697 (7th Cir. 1986) (ordinarily, federal prisoners are required to exhaust administrative remedies before filing petition for writ of habeas corpus); Del Raine v. Carlson, 826 F.2d 698, 703 (7th Cir. 1987) (federal prisoner seeking federal habeas corpus "is required to exhaust his federal administrative remedies, which is to say his remedies within the prison system"). The relevant provision applicable to inmates challenging an action by the U.S. Parole Commission is 28 C.F.R. §2.26. That provision reads in part:

> (a)(1) A prisoner or parolee may submit to the National Appeals Board a written appeal of any decision to grant (other than a decision to grant parole on the date of eligibility), rescind, deny, or revoke parole . . . .
>
> (2) The appeal must be filed on a form provided for that purpose within thirty days from the date of entry of the decision that is the subject of appeal. The appeal must include an opening paragraph that briefly summarizes the grounds for the appeal. The appellant shall then list each ground separately and concisely explain the reasons supporting each ground. . . .
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> (c) . . . Decisions of the National Appeals Board shall be final.

The principle behind the exhaustion doctrine is that the agency should be afforded a chance to correct its own mistakes and complete its decision-making procedures before judicial intervention.

Petitioner asserts in his petition that he has exhausted his administrative remedies before the parole commission. However, he does not include with his petition a copy of the appeal he filed with the National Appeals Board. Instead, he has submitted a copy of the

National Appeals Board's ruling on his appeal, which states

> Your claim on appeal is rejected. You have no constitutional right to have a hearing examiner of a particular race preside at your hearing.

This response to petitioner's appeal appears to suggest that petitioner presented his claim of racial bias to the National Appeals Board, but not his claim that he had been denied a meaningful hearing because the outcome had been determined in advance of the hearing. If petitioner raised the predetermination issue in his appeal and the appeals board ignored it, then I will consider that he has done everything he can to exhaust his administrative remedies with respect to this claim. Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) (available administrative remedies exhausted when time limits expire for prison's response set forth in prison grievance procedures). However, if petitioner did not make clear in his appeal that he believed the outcome of his hearing had been predetermined, then this claim will have to be dismissed for his failure to exhaust it. I will give petitioner until April 22, 2005, in which to submit a copy of the appeal he filed with the National Appeals Board.

B. Merits of Racial Bias Claim

Once a prisoner is released on parole, the due process clause does require certain procedural protections before the parole may be revoked, including a hearing before a neutral

and detached body. Morrissey v. Brewer, 408 U.S. 471, 489 (1972). Because Congress has granted the United States Parole Commission wide latitude in making parole revocation determinations, federal court review is limited. Slader v. Pitzer, 1007 F.3d 1243, 1246 (7th Cir. 1997); Walrath v. Getty, 71 F.3d 679, 684 (7th Cir. 1995). In most cases, habeas relief is available only where no rational basis for the commission's conclusion can be found in the record; a court need not find that the decision is supported by a preponderance of the evidence or even substantial evidence. Id.; Solomon v. Elsea, 676 F.2d 282, 290 (7th Cir. 1982). As a result, habeas corpus relief is available only in "extremely limited circumstances." Luther v. Molina, 627 F.2d 71, 75-76 (7th Cir. 1980).

Petitioner admits that he committed several parole violations; he has been committed on at least five prior occasions and has had at least four prior convictions or adjudications. Given the severity of his admitted parole violations and his numerous past convictions, adjudications and commitments as reflected in his salient factor score, the Parole Commission's guidelines prescribe a 16-22 month revocation period. 28 C.F.R. § 2.20; see also Wilden v. Fields, 510 F. Supp. 1295, 1304 (W.D. Wis. 1981) (citing Garcia v. United States Board of Parole, 557 F.2d 100, 107 (7th Cir. 1977) ("severity of offense is a proper ground for denial for parole"). Petitioner does not suggest that the commission erred in determining that he had violated multiple conditions of his parole, rating his parole violations, determining his salient factor score or concluding that a 16-22 month revocation

period would be appropriate. The documentation petitioner submitted with his petition shows that there is a rational basis for the commission's decision to revoke parole.

Notwithstanding the deferential standard of review applicable in most cases, the Court of Appeals for the Seventh Circuit has recognized that there may be a narrow class of claims that are not adequately analyzed under a rational basis standard. Phillips, 912 F.2d at 192 ("While the Commission has wide discretion in making its determinations . . . its determinations must be made with the procedural safeguards called for by 18 U.S.C. § 4207 and 4208.") Unlike the typical challenge to the Parole Commission's analysis or consideration of certain evidence, this narrow class consists of claims that the Parole Commission failed to provide certain procedural safeguards to which the individual is entitled under federal law. E.g., Barnard v. Henman, 89 F.3d 373 (7th Cir. 1996) (challenge to timeliness of revocation hearing); Phillips, 912 F.2d 189 (habeas relief may be warranted if commission failed to provide access to evidence used against parolee at revocation hearing even if commission's decision would have been justified by evidence that was made available); Hanahan v. Luther, 693 F.2d 629, 633 (7th Cir. 1982) (applying deferential standard of review to merits of revocation decision; giving separate, less deferential review to claim that parolee was not appraised of evidence against him); Solomon, 676 F.2d 286-87 (analyzing challenge to sufficiency of written explanation of reasons for parole denial independently of abuse of discretion review of merits of denial); see also Turner v. United

States Parole Commission, 810 F.2d 612, 615 n.6 (7th Cir. 1987) ("Parole decisions are reviewed by the courts under habeas corpus, but only for constitutional challenges or abuse of discretion."); Schiselman v. United States Parole Commission, 858 F.2d 1232, 1237 (7th Cir. 1988) (decision of Parole Commission may not be reversed "unless, *absent procedural or legal error*, it is capricious." (Internal citations and punctuation omitted, emphasis added).

Recognizing this exception to the general standard for these kinds of procedural challenges is consistent with the rationale for deferential review. As the court reasoned in Luther, 627 F.2d 75-76, federal courts are limited in their review of habeas petitions challenging parole decisions in light of the substantial discretion Congress has bestowed upon the Parole Commission to make those determinations, but the Parole Commission has no discretion to determine whether an individual should be provided certain procedural safeguards such as written notice of the claimed parole violations, disclosure to the parolee of the evidence against him, an opportunity to be heard and present evidence before a detached decision maker and a written explanation of the reasons for revocation. These are procedures to which a parolee is constitutionally entitled. Morrissey, 408 U.S. at 471.

In this case, petitioner's allegations implicate his due process right to a hearing before a "neutral and detached" hearing officer. Petitioner appears to be suggesting that his hearing officer considered his racial slurs in deciding to revoke parole. But the facts he alleges in his unverified petition and the attached documents do not show this claim to be anything more

than unsubstantiated speculation. The court of appeals has held that "[u]nless the Commission explicitly relies upon a particular item of information, we will not presume that any significance was attached to it." Phillips, 912 F.2d at 192. The hearing officer's report makes no mention of petitioner's racial epithets. The allegations in the petition show only that she acknowledged that she was aware of his comments.

Furthermore, petitioner's is wrong in assuming that the hearing officer was prohibited from considering his racial slurs. The Parole Commission "may consider an extremely broad range of information" in making decisions affecting parole. Phillips v. Brennan, 912 F.2d 189, 191 (7th Cir. 1990). As the Supreme Court noted in Morrissey, 408 U.S. at 483,

> The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts.

Certainly, it is probative of petitioner's proclivity for antisocial acts that he would make racially derogatory comments to his parole officer. In addition, petitioner's admitted and open disdain for a substantial portion of society bodes poorly for his prospects of reintegrating into a racially integrated society successfullty. Cf. United States v. Showalter, 933 F.2d 573 (7th Cir. 1991) (prohibiting inmate on supervised release from associating with skinheads and neo-Nazis is valid). It is not improper bias to consider this kind of relevant information.

ORDER

IT IS ORDERED that petitioner's claim that he was denied an impartial decision maker at his parole revocation hearing is DISMISSED for petitioner's failure to show that he is in custody in violation of the Constitution or laws of the United States. I will refrain from deciding whether to issue an order to show cause on petitioner's claim that he was denied a meaningful parole revocation hearing until petitioner has filed a copy of the appeal he filed with the National Appeals Board. Petitioner may have until April 22, 2005, in which to submit a copy of his appeal. If, by April 22, 2005, petitioner fails to submit a copy of the appeal, the claim will be dismissed.

Entered this 5th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge