

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

THOMAS SIMMONS,

Petitioner,

v.

STEPHEN HOBART,

Respondent.

ORDER

05-C-510-C

Petitioner Thomas Simmons, 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. From the petition, it appears that petitioner is seeking reinstatement of 41 days of good time credit and a one-year reduction in his sentence for completion of a drug treatment program. Petitioner has paid the \$5.00 fee for filing his petition.

Petitioner alleges in his petition that his due process rights were violated. In support of his claim, he alleges one fact: “The DHO packet sent to the Regional Director and Notice of Charge were filed untimely.” Because it is not possible to understand from this vague assertion specifically what happened to petitioner to make him believe his due process rights have been violated, I have looked to documents petitioner attached to his petition that reveal

the following.

On February 11, 2005, Michael K. Nalley, Regional Director of the Federal Bureau of Prisons, responded to an appeal petitioner made from a November 8, 2004 decision of a disciplinary body that petitioner had violated “Code 112,” prohibiting “Use of Narcotics, Marijuana, Drugs, or related Paraphernalia not Prescribed for the Individual by the Medical Staff. In the response, Nalley wrote,

... In your complaint, you contend that the DHO packet sent to the Regional Director and Notice of Charge were untimely. You also contend that you are currently taking medication that would cause you to test positive for Benzodazepines, confirmed as Oxazepam. Therefore, you are requesting the Good Conduct Time (GCT) and 3621E be reinstated.

We have reviewed your appeal in conjunction with Program Statements 7300.08, Community Corrections Manual, and 5270.07, Inmate Discipline and Special Housing Units. Although there were delays during the discipline process, we find no evidence showing these delays hindered you in any way, or that you suffered any appreciable harm. In addition, we find staff adequately described the nature of your offense sufficiently to enable you to marshal a defense.

In reference to you taking medication that would cause you to receive a positive test result, this is a correct statement. However, you were prescribed medication on November 17, 2004, and you were asked to submit a urine sample on October 29, 2004, which is prior to your prescription.

Based on the above information, your Regional Administrative Remedy Appeal is denied.

On February 28, 2005, petitioner filed an appeal from Nalley’s decision stating,

My appeal argument is that I was denied due process. Proper procedure was

not done in accordance with CDC for my alleged actions – there was an unjust delay in the following protocol of the discipline process. Additionally, I did suffer appreciable harm – I was sanctioned for more than offense, therefore, receiving and/or more than one punishment for the offense.

On May 17, 2005, Harrett Watts, Administrator of National Inmate Appeals, responded to petitioner's appeal stating,

You appeal the CDC's decision of November 8, 2004, for Use of any Narcotics, Marijuana, Drugs, or related Paraphernalia not Prescribed for the Individual by the Medical Staff, Code 112. You contend that the DHO packet sent to the Regional Director and Notice of Charge were untimely. You also contend that you are currently taking medication that would cause you to test positive for Benzodazepines, confirmed as Oxazepam. As relief, you request that the incident report be expunged.

Our review reveals substantial compliance with Program Statement 5270.07, Inmate Discipline and Special Housing Units. The CDC detailed in Section V of the CDC report the specific evidence relied upon to support a finding that you committed the prohibited act of Use of any Narcotics, Marijuana, Drugs, or related Paraphernalia not Prescribed for the Individual by the Medical Staff, Code 112, and we agree that it is reasonable to make that finding. Subsequently, the DHO concurred with the CDC's findings and imposed applicable sanctions in accordance with P.S. 7300.09, Community Corrections Manual, and P.S. 5270.07. As noted in your response form [sic] the Regional Director, there were delays during the discipline process, we find no evidence showing these delays hindered you in any way, or that you suffered any appreciable harm. We agree staff described the nature of your offense sufficiently to enable you to marshal a defense. In reference to you taking medication [sic] that would cause you to receive a positive test result, this is a correct statement. However, you were prescribed medication on November 17, 2004, and you were asked to submit a urine sample on October 29, 2004, which is prior to your prescription. Therefore, based on our review, we find that the required disciplinary procedures were substantially followed, the greater weight of the evidence supports the decision, and the sanctions imposed were appropriate for the offense and in compliance with policy. Your

appeal is denied.

OPINION

It is clear that petitioner is alleging that he was denied procedural due process in connection with a disciplinary proceeding that resulted in the loss of good time credit. To make out a due process claim, petitioner must show that he was deprived of a liberty interest and 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). 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)).

Petitioner has not alleged clearly the precise grounds for his claim. The lone factual

allegation in his petition, “The DHO packet sent to the Regional Director and Notice of Charge were filed untimely,” is susceptible to more than one reasonable interpretation and the documents attached to petitioner’s petition do not shed any light on the grounds for his claim. On one hand, petitioner could be alleging that he was denied procedural due process because he was not given timely notice of the charges against him. Under Wolff, 418 U.S. at 564, prison officials must given an inmate at least 24 hours notice before a hearing to satisfy due process. A regulation governing the Bureau of Prisons incorporates this 24-hour notice period. 28 C.F.R. § 541.11 Table 2.

However, it is possible that petitioner is alleging a technical violation of a statute or regulation that would not support a due process claim. For example, the same regulation that imposes a 24-hour period between an inmate’s receipt of notice of a charge and the disciplinary hearing states that staff ordinarily provide the inmate notice of a charge within 24 hours of learning of the inmate’s involvement in an incident. 28 C.F.R. § 541.11 Table 2. However, providing notice within 24 hours of learning of an inmate’s involvement is not required to satisfy due process. 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)).

A third possibility is that petitioner is alleging that a packet of information from the disciplinary hearing officer, which included a copy of the Notice of Charge, was not sent to the Regional Director in a timely manner as part of petitioner's appeal. This would amount to a technical violation insufficient to sustain a due process claim. Because it is unclear what the ground for petitioner's claim is, I will stay a decision whether to issue an order to show cause and allow petitioner a short amount of time to supplement his petition with a statement declared to be true under penalty of perjury describing precisely the basis for his claim. As noted above, unless petitioner's claim is that prison officials failed to give him notice of the charges against him at least 24 hours before his disciplinary hearing was held, then he will not have stated a claim of constitutional proportion and his petition will have to be dismissed. Therefore, he need not respond to this order unless it is to clarify that he did not receive notice of the charges against him in advance of his disciplinary hearing. If he received advance notice but not the full 24-hour notice provided for in the regulations, he should explain that and advise the court when he did receive notice. If he did not receive notice of the charges against him until the time of his disciplinary hearing, he should explain that.

ORDER

IT IS ORDERED that a decision whether to issue an order to show cause in this petition for a writ of habeas corpus is STAYED until November 1, 2005, to allow petitioner to file a supplement to his petition describing in greater detail the basis for his claim. If, by November 1, 2005, petitioner fails to file a supplement to his petition that contains averments establishing that he was not given reasonable notice of the charges against him prior to his disciplinary hearing, then I will dismiss this petition for petitioner's failure to show that his constitutional right to due process rights was violated.

Entered this 19th day of October, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge