IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARSHALL ZAMOR,

ORDER

Petitioner,

06-C-567-C

v.

RICARDO MARTINEZ, Warden,

Respondent.

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This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner Marshall Zamor, a prisoner at the Federal Correctional Institution in Oxford Wisconsin, received a one-year sentence reduction from the Bureau of Prisons after he successfully completed a drug treatment program. 18 U.S.C. § 3621(e). This decision was later rescinded after petitioner committed a disciplinary violation. Petitioner contends that he was denied a second hearing in violation of his rights under the due process clause and 28 C.F.R § 541.17 and that a similarly situated prisoner was permitted to keep his sentence reduction despite his disciplinary infractions, in violation of petitioner's right to equal protection under the Fifth Amendment. In addition, petitioner contends that respondent subtracted more good conduct time from him than is permitted under a Bureau of Prisons

program statement. Petitioner has paid the filing fee.

All of petitioner's claims will be dismissed with the exception of his equal protection claim. With respect to his claim that the amount of good conduct time subtracted was excessive, petitioner may not rely on a BOP program statement as a basis for a habeas corpus petition. Further, neither the due process clause nor § 541.17 entitled petitioner to an additional hearing before the disciplinary hearing officer. Although the petition does not include enough facts on petitioner's equal protection claim to warrant the issuance of an order to show cause, I will give petitioner an opportunity to amend his petition in order to explain the factual basis for his claim.

I note that petitioner has not verified that the statements made in his petition are being made under penalty of perjury, as is required by 28 U.S.C. § 2242. Petitioner does include this statement with his certificate of service, but it is not clear whether it applies to the petition or just to the certificate. If petitioner chooses to file an amended petition, he should be sure to include a statement on the signature page of the petition that "The statements in the petition are true and correct under penalty of perjury."

From petitioner's petition and its attachments, I understand petitioner to be alleging the following facts.

FACTS

In April 2003, petitioner Marshall Zamor was sentenced to seventy-seven months in federal prison for a drug-related crime. While in prison, petitioner was accepted into the residential drug abuse treatment program and completed it successfully. As a result, the Bureau of Prisons reduced by one year the time that petitioner was required to serve on his sentence. In December 2005, he was sent to a community corrections center to serve the remaining six months of his sentence. He received a projected release date of May 22, 2006.

At the community corrections center, petitioner violated a rule when he failed to return from work at the required time. After receiving written notice, petitioner received a hearing in front of the center discipline committee. He was given the opportunity to have a staff representative, call witnesses and present evidence, but he waived these rights. Instead, petitioner made a statement admitting that he violated the rule. The committee recommended that he lose forty days' good conduct time and his one-year sentence reduction and be transferred to a secure facility. After reviewing the record to insure that petitioner received the process to which he was entitled before the committee, the disciplinary hearing officer accepted the committee's recommendation.

On February 6, 2006, petitioner was transferred to the Federal Correctional Institution in Oxford, Wisconsin, where he remains today. He never received a hearing before the disciplinary hearing officer.

One resident of the community corrections center was treated less harshly despite

receiving a similar incident report. The other resident was allowed to stay at the communication corrections center and kept his sentence reduction under § 3621(e).

DISCUSSION

A. § 2241 vs. Civil Action

Petitioner identifies three problems with the disciplinary decision in this case: (1) the disciplinary hearing officer failed to provide him with a hearing before accepting the committee's recommendation, in violation of the due process clause and 28 C.F.R § 541.17; (2) another similarly situated prisoner kept his credit and lost less good conduct time despite disciplinary infractions; and (3) the forty-day loss of good conduct time exceeded the punishment allowed by Program Statement 5270.7.

An initial question is whether these claims were properly brought under §2241. That statute permits district courts to grant relief to prisoners "in custody in violation of the Constitution or laws or treaties of the United States." Thus, to proceed under §2241, a petitioner's claim must be challenging the legality of his custody. In Richmond v. Scibana, 387 F.3d 602, 605 (7th Cir. 2004), the court held that §2241 was not an appropriate vehicle in a case in which "victory . . . would not entitle [the petitioner] to any change in the duration or even the location of his confinement." In other words, an attempt to remove a barrier to release is not sufficient to proceed under § 2241. The prisoner must show that his

success would entitle him to release from custody or a shorter duration of confinement. Hill v. McDonough, 126 S. Ct. 2096, 2101 (2006) (habeas is appropriate vehicle when judgment in prisoner's favor would "necessarily imply" that conviction was invalid). However, relief under the habeas statutes does not disappear simply because prison officials may avoid releasing the prisoner by re-trying him. Wilkinson v. Dotson, 544 U.S. 74, 83 (2005) ("the fact that the State may seek a new judgment (through a new trial or a new sentencing proceeding) is beside the point"). Rather, the question is whether success would require that the decision be set aside.

Certainly, petitioner satisfies this standard with respect to his equal protection claim. If respondent revoked petitioner's sentence credit in violation of his equal protection rights, a ruling in petitioner's favor in this case would necessarily imply the invalidity of the decision to revoke his sentence reduction. Lusz v. Scott, 126 F.3d 1018, 1022-23 (7th Cir. 1997) (if prisoner was successful on claim that prison officials found him guilty because of his sexual orientation, disciplinary conviction would have to be set aside).

It is less obvious whether §2241 is the appropriate method to challenge a failure to provide a hearing before revoking sentence credit. In many cases, a challenge to the procedures employed rather than to the decision itself should be brought as a civil action, not as a petition for a writ of habeas corpus. See, e.g., Wilkinson, 544 U.S. at 82 (civil action appropriate vehicle to challenge procedures determining parole eligibility); Wolff v.

McDonnell, 418 U.S. 539, 554 (1979) (suit challenging validity of procedures in disciplinary hearing properly brought as civil rights action). Despite Wolff, however, the Supreme Court has made clear that some procedural challenges *must* be brought under the habeas statutes, particularly in the context of challenges to disciplinary proceedings.

In Edwards v. Balisok, 520 U.S. 641, 646 (1997), the Court held that a challenge to the procedures in disciplinary proceedings should be brought under the habeas statutes "if the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the judgment." The prisoner in that case alleged that he was denied any opportunity to call witnesses at a disciplinary hearing and that the hearing officer was biased against him. The Court held that, if these allegations were true, it would "necessarily imply the invalidity of the deprivation of his good-time credits." Id. at 646.

The Court of Appeals for the Seventh Circuit has extended the holding in Edwards to cover other situations. In Walker v. O'Brien, 216 F.3d 626, 629 (7th Cir. 2000), the court held that habeas was the proper avenue in a situation in which the prisoner alleged a failure to provide representation at a disciplinary hearing and a refusal to call a particular witness. In Lusz,126 F.3d at 1022, the court held that habeas was the proper route for a claim that the petitioner was denied a drug test before a disciplinary hearing. See also Piggie v. Cotton, 344 F.3d 674 (7th Cir. 2003) (analyzing under habeas statute claim that prisoner was denied due process because he was not allowed to call witness); Jackson v. Carlson, 707

F.2d 943 (7th Cir. 1983) (concluding that § 2241 was appropriate vehicle to challenge lack of adequate procedures in prison disciplinary proceedings). In fact, with respect to disciplinary decisions that resulted in longer confinement, I have not uncovered any cases decided after Edwards in which the court of appeals concluded that a challenge to procedures used in reaching that decision should be brought as a civil action rather than under one of the habeas corpus statutes. Given the court of appeals' expansive approach, I conclude that petitioner may proceed under § 2241 with his claim that the disciplinary hearing officer failed to provide him with an additional hearing.

A separate but related question is whether a federal regulation (28 C.F.R § 541.17) and a program statement (BOP Program Statement 5270.7) are "laws" within the meaning of § 2241. There is a surprising lack of authority on this question. In cases brought under 28 U.S.C. § 2255, the Supreme Court has limited significantly what constitutes a federal law. Even federal statutes may not be enforced under § 2255 unless the alleged error represents a "fundamental defect which inherently results in a complete miscarriage of justice." Reed v. Farley, 512 U.S. 339, 354 (1994) (internal quotations omitted). However, as the court of appeals has pointed out, this standard is driven largely by disfavor for collateral attacks on criminal judgments, a concern not present in cases brought under §2241. Waletzki v. Keohane 13 F.3d 1079, 1081 (7th Cir. 1994). Thus, at least in cases involving statutes, the court of appeals concluded that § 2241 would be an appropriate

vehicle to challenge custody except "for harmless, technical violations — the sort of thing that in a system of money damages might get the plaintiff a few dollars, or even just a few cents." Id.

_____I am not aware of any decision extending Waletzki to federal regulations, but I see no reason not to do so here. Regulations have the full force of law in situations in which they are promulgated under authority properly delegated by Congress. See, e.g. United States v. Mead Corp., 533 U.S. 218, 231-32 (2001). I have no reason to believe that the regulation at issue here does not meet that criterion. Further, although petitioner admitted guilt, I cannot conclude that a failure to provide a hearing would be a "harmless or technical" violation. Presumably, petitioner sought to convince the disciplinary hearing officer through evidence or argument that the recommended punishment was too severe, particularly in light of treatment of a similarly situated prisoner. Without a hearing, petitioner was deprived of any opportunity for doing that.

However, unlike many federal regulations, BOP program statements do not carry with them the force of law. Miller v. Henman, 804 F.2d 421, 426 (7th Cir.1986) (holding that BOP program manual "not promulgated under the Administrative Procedure Act or published in the Code of Federal Regulations . . . does not create legally enforceable entitlements"). See also Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("policy statements, agency manuals, and enforcement guidelines, all . . . lack the force of law").

Because Program Statement 5270.7 is not a federal "law" within the meaning of § 2241, petitioner's claim that respondent subtracted his good conduct time in violation of this program statement will be dismissed.

B. Equal Protection

Turning to the merits, I understand petitioner to contend that he was disciplined more harshly than another similarly situated prisoner, in violation of his right to equal protection under the Fifth Amendment. Even after incarceration, prisoners retain their right to equal protection of the laws, which entitles them to be treated the same as other like individuals. However, the level of scrutiny that courts give to differential treatment changes depending on the reason for it. Petitioner does not allege that he was treated differently because of his race or another factor that receives heightened scrutiny, so I assume that petitioner is alleging that he was treated differently not because of a group to which he belongs but for reasons unique to him. Olech v. Village of Willowbrook, 528 U.S. 562 (2000) (recognizing "class of one" equal protection claims). Thus, to prove his equal protection claim, petitioner must show that there was no rational basis for treating him differently or that the harsher treatment was caused by "illegitimate" dislike for him. Lunini v. Grayeb, 395 F.3d 761, 768 (7th Cir. 2005).

In his petition, petitioner names one other person who he says had a "similar"

incident report but nevertheless was allowed to keep his sentence reduction and remain at the community corrections center. This allegation might have been enough to state a claim in a civil action under 42 U.S.C. § 1983 or Bivens, but it is far from adequate to justify issuing an order to respondent to show cause why the petition should not be granted. Petitions for writs of habeas corpus are subject to heightened pleading requirements: "the habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claims." McFarland v. Scott, 512 U.S. 849, 860 (1994) (O'Connor, J., concurring in the judgment in part). An allegation that one other prisoner received better treatment is not enough to show an equal protection violation, particularly when petitioner includes no allegations regarding *how* the other prisoner's circumstances were similar to his.

There are numerous reasons why the other prisoner may not have been disciplined as severely as petitioner. The other prisoner may have had a less extensive disciplinary record, his infraction may have been less serious, he may have taken greater responsibility or shown more remorse for his actions or he simply may have had a different committee decide his case. Even in criminal cases where the stakes can be much higher, mere disparity in sentencing is not enough to show a violation of equal protection. See, e.g., Russell v. Collins, 998 F.3d 1287, 1294 (5th Cir. 1993) (rejecting claim that petitioner's right to equal protection was violated when he received death sentence and codefendant convicted of same crime received sentence of imprisonment); Powell v. Ducharme, 998 F.2d 710, 716 (9th Cir.

1993). Particularly with respect to a discretionary decision like the one at issue here, petitioner must allege facts suggesting that the disparity does not have a rational explanation.

However, before I dismiss the claim, I will give petitioner an opportunity to file an amended petition to include the factual basis for his claim. Petitioner may have until November 13, 2006, in which to file an amended petition that includes an explanation made under oath for his belief that he was denied equal protection. In particular, petitioner should include facts describing how his circumstances were substantially similar to other prisoners receiving lighter treatment. If petitioner is unable to make these allegations and affirm under oath that they are true, he cannot proceed on this claim.

C. Failure to Provide a Hearing

Petitioner contends that the disciplinary hearing officer was required by the due process clause and 28 C.F.R. § 541.17 to provide a hearing before accepting the center disciplinary committee's recommendation to revoke the one-year sentence reduction that had been granted to petitioner under 18 U.S.C. § 3621(e). With respect to the due process clause, courts have held uniformly that prisoners are not entitled to any process when they are denied a sentence reduction after completing the drug program under § 3621(e) because the statute grants the BOP discretion to grant or withhold a reduction as it sees fit. See, e.g, Fristoe v. Thompson, 144 F.3d 627, 630 (10th Cir. 1998); Wottlin v. Fleming, 136 F.3d

1032 (5th Cir. 1998); Jacks v. Crabtree, 114 F.3d 983, 986 n.3 (9th Cir. 1997). Cf. Lopez v. Davis, 531 U.S. 230 (2001) (§ 3621 gives BOP to discretion to make categorical rather than individualized determinations regarding eligibility for sentence reduction).

This case is different because the BOP already granted petitioner a sentence reduction, so the situation may be more akin to a loss of good time credits, for which federal prisoners are entitled to due process. Dawson v. Smith, 719 F.2d 896, 898 (7th Cir.1983) ("[A]ny procedure depriving a federal prison inmate of earned statutory good time credits must comport with the due process requirements of the Constitution."). In any event, petitioner did lose good conduct time, so he was entitled to some procedural protections.

However, I cannot conclude that petitioner was entitled to a hearing before the disciplinary hearing officer. Petitioner concedes in his petition that he had already received a full hearing before the disciplinary committee and he does not identify any deficiencies in the process he received there. Although petitioner was entitled to *a* hearing, I can find no authority suggesting he was entitled to more than that. Even criminal defendants are not entitled under the Constitution to evidentiary hearings on appeal and the requirements of due process for disciplinary hearings are significantly less stringent. Generally, a prisoner is entitled to advance written notice of the charges, the chance to present testimony and documentary evidence to an impartial decision maker and a written explanation, supported by at least "some evidence" in the record, for any disciplinary action taken. Lagerstrom v.

Kingston, 463 F.3d 621, 624 (7th Cir. 2006). Petitioner does not suggest that he failed to receive any of these rights before the center discipline committee.

Petitioner contends also that a second hearing in front of the disciplinary hearing officer was mandated by 28 C.F. R. § 541.17. However, that regulation contains no such requirement. Section 541.17 describes the conduct of hearings before the disciplinary hearing officer; it does not outline when those hearings are required. Section 541.15 does describe instances in which a disciplinary matter may be referred to the disciplinary hearing officer, but that provision applies only to those in custody at a prison and who had a hearing before the Unit Discipline Committee. There are no requirements in the regulation for prisoners residing at community corrections centers. Instead, BOP Program Statement 7300.09 is the only authority in the record that details the proper procedure for disciplinary proceedings for residents of a community corrections center. Section 5.7 of the Program Statement affirms the process that occurred in this case: a hearing provided by the center discipline committee followed by a paper review by the disciplinary hearing officer. Petitioner's claim that he was unlawfully denied a second hearing must be dismissed.

ORDER

IT IS ORDERED that

1. Petitioner Marshall Zamor's claims that he lost good conduct time in violation of

Bureau of Prison Program Statement 5270.7 is DISMISSED because it is not cognizable under 28 U.S.C. § 2241.

2. Petitioner's claim that he was denied a hearing in violation of the due process clause and 28 C.F.R. § 541.17 is DISMISSED because neither required the hearing petitioner sought.

3. Petitioner may have until November 13, 2006, in which to file an amended petition that includes (1) the factual basis for his claim that he was denied equal protection and (2) a verification that the allegations in the petition were made under penalty of perjury.

Entered this 30th day of October, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge