

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

AARON DEROO,

Petitioner,

v.

CAROL HOLINKA, Warden FCI Oxford,

Respondent.

OPINION and
ORDER

08-cv-237-bbc

Petitioner Aaron DeRoo, a prisoner 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 and paid the \$5.00 filing fee.

Petitioner contends that prison officials at the Federal Correctional Institution in Terre Haute, Indiana, violated his constitutional right to due process when they failed to provide him an adequate opportunity to present evidence at a disciplinary hearing. In addition, he contends that when he was held in segregation between October 2006 and February 2007, prison officials failed to perform regular “segregation reviews,” another alleged violation of his due process rights. Petitioner seeks reinstatement of the 14 days of good conduct credits he lost at the disciplinary hearing and asks that this court order the

related incident report expunged from his record.

From petitioner's verified petition and the accompanying documents, I find the following facts.

ALLEGATIONS OF FACT

Petitioner Aaron DeRoo is presently incarcerated at the Federal Correctional Institution in Oxford, Wisconsin. Respondent Carol Holinka is Warden of the Oxford Federal Correctional Institution.

On October 31, 2006, when he was incarcerated at the Terre Haute Correctional Institution, petitioner received an incident report regarding his alleged involvement in a group assault on another prisoner that occurred on October 4, 2006. As a result of this incident, petitioner was held in segregation between October 4, 2006 and February 1, 2007. Petitioner asked repeatedly for a review of his placement in segregation and was told by a prison official that "we don't do seg. reviews here." No review ever took place.

In November and December of 2006, the disciplinary hearing officer at the Federal Correctional Institution in Terre Haute was more than 60 days behind in arranging disciplinary hearings. After he retired in December 2006, there was no disciplinary hearing officer at the institution until at least February 2007. As a result, a backlog of approximately 450 conduct reports accumulated. At the end of January 2007, an Officer Lacy was assigned

to the institution to help “take care” of the backlog in a few days in a “fast and dirty” manner.

On January 31, 2007, petitioner was taken from his cell for what he believed would be his disciplinary hearing. Instead, he appeared before the Segregation Housing Unit officer and informed in a summary manner of his guilt and the sanctions he would receive, one of which was the loss of 14 days of good time credit. He was never allowed an opportunity to be heard or present evidence.

In a bogus “Discipline Hearing Officer Report” the hearing officer described petitioner’s purported hearing and evidence against petitioner as follows:

V. SPECIFIC EVIDENCE RELIED ON TO SUPPORT FINDINGS (physical evidence, observations, written documents, etc.)

The DHO based his decision on the following information:

Your due process rights were reviewed with you by the DHO at the time of your hearing. You stated you understood your rights, presented no documentary evidence, requested no witnesses, and declined staff representation.

The reporting staff members documented account that on 10-31-2006 at approximately 11:00 a.m., you were positively identified as taking part in an assault of inmate Christenson, Reg. No. 08257-029, on the recreation yard 10-4-2006 at approximately 5:10 p.m. You were observed punching inmate Christenson and kicking inmate Christenson once he fell to the ground.

The inmate declines to make a statement on his behalf before the Investigating Lieutenant after being advised of his rights.

The inmate declined to make a statement before the members of his [Unit Disciplinary Committee] after being advised of his rights.

The inmate declined to make a statement before the [Disciplinary Hearing Officer].

Based upon the evidence annotated above (staff member written report) the DHO concludes there was sufficient information present in the body of the report to support the charge. Although you declined to make any statements before the Investigating Lieutenant and members of your UDC, the DHO found based on the greater weight of the evidence which the DHO found credible, he found you did commit the prohibited act of Code 224, (Assaulting without serious injury).

DISCUSSION

A. Loss of Good Time Credits

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 results in revocation of good conduct credit to which the petitioner is 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 release at an earlier date even though he is not seeking immediate release. Id.

Petitioner’s first ground for relief is that he was deprived of due process in his disciplinary hearing and that this deprivation led to the loss of 14 days of good time credits.

Thus, petitioner has properly brought his claim under § 2241. The Fifth Amendment prohibits the government from depriving “any person . . . of life, liberty or property, without due process of law.” U.S. Const. Amend. V. In order to receive protection under the Fifth Amendment, a person must have a protected liberty or property interest. Sandin v. Conner, 515 U.S. 472, 486 (1995). In the context of incarceration, protected liberty interests are generally limited to disciplinary penalties that extend a prisoner’s duration of confinement, such as the loss of “good time credits,” and to prison conditions that are “atypical and significant” deviations from those normally associated with prison life. Id.; Lekas v. Briley, 405 F.3d 602, 610 (7th Cir. 2005).

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). Petitioner has alleged that he lost 14 days’ good time credit as a result of his disciplinary violation. Therefore, petitioner has shown that he was deprived of a liberty interest.

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. When the loss of good-time credit is a possible sanction, an inmate must receive the following procedural safeguards in connection with 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)).

In this case, petitioner asserts that he was provided no opportunity to be heard or present evidence at the disciplinary hearing because prison officials were trying to clear a backlog quickly. Although “the requirements of due process are flexible” and a prisoner’s right to present evidence may be truncated in situations in which it would be “inconsistent with correctional goals” or institution safety would be compromised, Hill, 472 U.S. at 454, this right is one of the critical elements of due process and cannot be foregone entirely simply to speed the administration of disciplinary proceedings. Therefore, I will direct respondent to file a response to this petition showing cause, if any, why this writ should not issue on petitioner’s claim that he was not given an opportunity to present evidence at the disciplinary hearing.

B. Failure to Perform Periodic Reviews

Petitioner’s second ground for relief does not fare as well. He contends that when he

was housed in the segregation unit from October 4, 2006 until February 1, 2007, prison officials refused to perform periodic reviews of his placement there, which is a violation of Bureau of Prisons' regulations. Even if this failure to provide periodic reviews violated petitioner's rights in some way, past unconstitutional acts cannot provide the ground for habeas corpus relief. E.g., Moran v. Sondalle, 218 F.3d 647, 650-651 (7th Cir. 2000) (habeas petition improper vehicle for challenging constitutionality of "transfer to a new prison, administrative segregation, exclusion from prison programs, or suspension of privileges"). If petitioner wants to pursue this claim, he will have to do so in a civil action under Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). I express no opinion whether, if petitioner filed such an action, it would survive screening under 28 U.S.C. § 1915A or § 1915(e)(2).

ORDER

IT IS ORDERED that

1. Petitioner Aaron DeRoo's claim that he was held in the segregation unit from October 2006 until February 2007 without periodic reviews is DISMISSED for petitioner's failure to show that he is in custody in violation of the Constitution or the laws of the United States.

2. No later than 20 days from the date of service of the petition, respondent Carol

Holinka is to file a response showing cause, if any, why this writ should not issue with respect to petitioner's claim that he was not given an opportunity to present evidence at the disciplinary hearing at which he was disallowed 14 days of good time credits.

3. Petitioner may have 20 days from the service of the response in which to file a traverse to the allegations of the response submitted by respondent.

Entered this 9th day of June, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge