

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

KEVIN HUGHES,

Petitioner,

v.

CAROL HOLINKA,

Respondent.

ORDER

11-cv-219-wmc

Petitioner Kevin Hughes is a prisoner at the Federal Correctional Institution in Oxford, Wisconsin (FCI-Oxford). Petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2241 to challenge the result of a disciplinary proceeding. In that disciplinary proceeding, prison officials revoked 40 days of credit for good conduct (*i.e.*, good-time credit), and imposed other sanctions, after petitioner was found guilty of possessing a cell phone charger, in violation of Bureau of Prisons Prohibited Acts Code 108.

Petitioner argues that he was charged with violating Code 108 improperly, which resulted in greater punishment without due process. Code 108 prohibits inmates from possessing, manufacturing, or introducing a “hazardous tool,” which is defined as “[t]ools most likely to be used in an escape or escape attempt or to serve as weapons capable of doing serious bodily harm to others; or those hazardous to institutional security or personal safety; *e.g.*, hack-saw blade.” 28 C.F.R. § 541.13 tbl. 3. He argues that the offense should have been governed Code 305, which prohibits the possession of contraband or “anything not authorized for retention or receipt by the inmate, and not issued to him through regular channels.” 28 C.F.R. § 541.13 tbl. 3. While a Code 108 violation is a disciplinary infraction of the “greatest severity,” a Code 305 violation is only a “moderate” infraction. *See id.*

Petitioner seeks relief from the disciplinary conviction and reinstatement of his lost good-time credits on the following grounds:

- (1) Petitioner was denied the right to due process because he was not given fair notice that possession of a cell phone or related equipment was proscribed by Code 108;
- (2) The disciplinary hearing officer violated the Administrative Procedures Act, 5 U.S.C. § 551, and the prohibition against arbitrary rule making by interpreting the possession of a cell phone charger as a “hazardous tool” within Code 108, and not contraband for purposes of Code 305;
- (3) Code 108, which does not explicitly include a cell phone charger within the definition of a hazardous tool, is “void for vagueness”; and
- (4) Petitioner’s punishment violates the Equal Protection Clause because other inmates charged with possessing a cell phone under Code 108 have had their disciplinary convictions expunged.

In accordance with Rule 4 of the Rules governing Section 2254 Cases in the United States District Courts, which is applicable to § 2241 cases through Rule 1(b), this court has examined the petition and determined dismissal prior to submission of an answer and the record is not warranted. Therefore,

IT IS ORDERED that:

1. The clerk’s office will provide a copy of this order to the parties. For the sake of expediency, the clerk’s office will send a copy of the petition and this order to Warden Carol Holinka at FCI-Oxford, the local United States Attorney and the United States Attorney General by certified mail in accordance with Fed. R. Civ. P. 4(i).
2. Within 60 days from the date of service of the petition, respondent Holinka shall file an answer, motion or other responsive pleading and shall forward a copy to the petitioner. The

answer, motion or other responsive pleading shall state the statutory authority for petitioner's detention in compliance with 28 U.S.C. § 2243. The answer, motion or responsive pleading must comply with Rule 5 of the Rules Governing Section 2254 Cases and must show cause, if any, why this writ should not issue. To the extent that records are necessary, the respondent need only supply the court with a copy of records that are relevant to the challenged disciplinary conviction.

3. Whether respondent files an answer, a motion or other response, petitioner may have 30 days from the date shown on the certificate of service in which to file a reply or traverse.

4. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

5. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 23rd day of April, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge