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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT BASQUE,

Petitioner,

No. CIV S-07-0258 GEB KJM HC

vs.

TERESA SCHWARTZ, Warden, et al,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a parolee proceeding with counsel on a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He alleges that his rights under the Americans With Disabilities Act (ADA) and the Fourteenth Amendment’s equal protection and due process clauses were violated by his exclusion from placement at a fire camp during his term of incarceration in the California Department of Corrections and Rehabilitation (CDCR), because he is HIV positive.

I. Procedural Background

Petitioner originally brought his concerns to this court in a civil rights action under 42 U.S.C. § 1983, seeking an injunction directing the defendant prison officials to transfer him to a conservation camp or grant him the same increased credit earning status as an inmate actually placed in a camp, among other things. See Basque v. Schwarzenegger, Civ. No. S-05-1612 FCD KJM P. In that case, the court granted defendants’ motion to dismiss, reasoning

1 that if it were to grant plaintiff's request for additional good time, plaintiff would gain a speedier
2 release from prison, a remedy available only in a habeas action. See id. (Order Filed December
3 20, 2005).

4 Petitioner turned to the state courts and filed habeas petitions in Solano County
5 Superior Court, the Court of Appeal for the First Appellate District, and the Supreme Court, all
6 of which were denied. Pet., Exs. I, M & N.

7 Petitioner filed his federal petition here on February 9, 2007. He alleges that
8 because of his HIV status, as a matter of policy, he was denied a chance to be assigned to the fire
9 camp, where he could earn additional work-time credits and thus reduce his term of
10 imprisonment. He argues that this work assignment policy violates his rights to due process and
11 equal protection and also violates the ADA.

12 Respondent filed a motion to dismiss for lack of jurisdiction. On October 17,
13 2007, this court issued findings and recommendations recommending that the motion be denied;
14 the district court adopted this recommendation on December 27, 2007. Docket Nos. 15, 16. The
15 court directed respondent to file an answer.

16 Respondent filed a second and supplemental motion to dismiss on April 15, 2008.
17 In support of this motion, respondent argued that petitioner's release on parole renders his habeas
18 petition moot in accordance with established Supreme Court and Ninth Circuit precedents. On
19 January 20, 2009, this court recommended that the motion be denied; the district court adopted
20 that recommendation on April 24, 2009 and directed respondent to file an answer. Docket Nos.
21 27, 28.

22 After the answer and traverse were filed, petitioner filed a motion for an
23 evidentiary hearing. This court granted the motion and held an evidentiary hearing on November
24 23, 2009. Steven Sanders, Esq., appeared for petitioner; Robert Cross, Deputy Attorney General
25 appeared for respondent. Docket Nos. 45, 47.

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1 Petitioner relied on his own testimony, while respondent called Douglas Peterson,
2 a physician with the CDCR. In addition, the parties agreed to use respondent’s exhibits and
3 stipulated to their authenticity. These were entered into evidence as a whole without objection.
4 RT 2, 5-6.¹

5 II. CDCR Fire Camps

6 Conservation camps or centers are creatures of California Penal Code section
7 6200, which establishes three such centers: Sierra Conservation Center, the North Coast
8 Conservation Center and the Southern Conservation Center, which is based at the California
9 Institute for Men. Cal. Penal Code § 6203. A network of branches or “permanent, temporary,
10 and mobile camps” extends from each center. Cal. Penal Code § 6202; see CDCR Department
11 Operations Manual (DOM) § 51130.5 (listing the camps). The work of the centers includes:

12 public conservation projects, including, but not limited to, forest
13 fire prevention and control, forest and watershed management, soil
14 recreational area development, fish and game management, soil
15 conservation, and forest watershed revegetation.

15 Cal. Penal Code § 6202.

16 According to 15 Cal. Code Regs. § 3355(c):

17 Inmates shall be personally screened by a medical officer before
18 receiving medical clearance for assignment to a camp or fire
19 fighting assignment. Such inmate shall be in generally good health
20 and physically capable of strenuous and prolonged heavy labor
21 without danger to the inmate's health and safety or the safety of
22 others when involved in hazardous work such as forest firefighting.
23 Exceptions: an inmate may be assigned to light duty non-hazardous
24 work in camp if a department physician specifically approves such
25 assignment.”

22 In 2002, the California Legislature enacted Penal Code section 2933.3, which
23 permits inmates assigned to fire camps to “earn two days of worktime credit for every one day of
24 service” for work performed after January 1, 2003. Regulations adopted in the wake of this

26 ¹ All exhibits are referenced herein simply as “Ex. ____.”

1 change established a new work group F, for inmates assigned to “full-time conservation camp
2 work,” who “shall be awarded two days credit for each day of qualifying performance.” 15 Cal.
3 Code Regs. § 3044 (b)(1). “[A]ll assignments or reassignments of an inmate to a work/training
4 incentive group shall be made by a classification committee in accordance with this section.” Id.;
5 see also DOM §§ 51130.8 (Classification Committee evaluates escape potential when
6 considering camp placement), 62010.3.2 (duties of Associate Warden, member of Classification
7 Committee, include approval of camp placement), 62010.8 (duties of Institution Classification
8 Committees include program participation and transfer) & 62010.8.4 (duties of Unit
9 Classification Committee (UCC) include program and transfer).

10 III. Evidentiary Record

11 A. Key Exhibits

12 In a memorandum concerning the implementation of the new Work Group F dated
13 January 24, 2003, W.A. Duncan, CDCR’s Deputy Director of the Institutions Division, discussed
14 the criteria for camp placement in wake of changes to California Penal Code § 2933.3. In the
15 memorandum, Duncan wrote:

16 Effective immediately, during RC [Reception Center] processing
17 and during regular GP Classification Committees (initial, annual,
18 program reviews, etc) inmates shall be evaluated for Camp
placement utilizing this criteria.

19 Ex. A at 36-37; see also RT 88.

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1 In December 2003, Roseanne Campbell, then the Director of CDCR's Health Care
2 Services Division, issued a memo about the medical criteria for camp placement. It read in part:

3 To be medically cleared for Grade/EFF or Camp Skills, inmates
4 must be physically and mentally capable of completing their
5 assigned duties safely and effectively, without being placed at risk
6 by individual medical conditions when they work in remote
7 locations without prompt access to emergency medical or
8 definitive medical care, or when they work under severe and
9 possibly adverse environmental conditions including but not
10 necessarily limited to, exposure to: extreme heat, cold, rain, snow
11 and /or high-pressure water, high altitude (above 5,000 feet),
12 potentially toxic inhaled particulate and gasses, or wildfires.

13 Ex. C (12/3 memo at 3).

14 In addition to this somewhat general standard, the CDCR promulgated camp
15 criteria to be listed on posters to be placed in medical clinics conducting camp screenings.
16 Among the conditions listed were "no reportable or acutely contagious infectious disease" and
17 "R/C BP: No higher than 150/95." Ex. C (poster criteria); RT 16-17. Petitioner relied on the
18 criteria listed on the posters in examining witnesses at the evidentiary hearing. See RT 14-15,
19 98. The court relies on the undisputed complete criteria in its ultimate factual findings. These
20 provide in part:

21 NO hypertension currently requiring treatment with more than two
22 (2) permitted antihypertensive medications, or with a loop diuretic:
23 . . .

24 Resting seated blood pressure no higher than:

25 Systolic: no greater than 140 mm Hg
26 Diastolic: no greater than 90 mm Hg

Patients on loop diuretics may be cleared for Camp if their blood
pressure has normalized and remained stable over the last 6
months, but must have a CDC 128-C medical chrono restricting
them to Camp and denying them permission to go to a Fire Line.

Ex. C (criteria at 9). The complete criteria concerning infectious disease provided:

NO reportable or currently contagious infectious disease requiring
assessment by nursing staff (RN or MTA) more often than every
sixty (60) days.

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NO contagious or reportable infectious disease requiring assessment by a physician or ancillary provider more often than every four (4) months.

NO contagious or reportable infectious disease requiring specialist assessment or follow up more often than every twelve (12) months.

Id. In addition, the criteria concerning medication provide:

ELIGIBLE IF:

NO more than two (2) prescription drugs for any one condition;
NO more than four (4) prescription drugs at any one time because there is an increased risk of unpredictable drug interactions with more than four (4) prescription drugs.

.....
.....

NO anticonvulsant other than Neurontin (gabapentin) and that ONLY if prescribed for control of chronic pain.

Id. (criteria at 12-13). In addition, the criteria for musculoskeletal impairment provide:

ELIGIBLE IF:

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NO condition limiting the ability to walk moderate distances at altitudes above 5,000 ft. and/or over rough or uneven terrain, without or without medication, treatment or reasonable accommodation.

NO condition limiting the ability to perform Camp SPECIAL SKILLS assignments, with or without medication, treatment or reasonable accommodation.

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1 Medically indicated prostheses, orthoses, assistive devices and/or
2 adaptive equipment (with all related harnesses and accessories)
3 must be appropriately fitted, functional, and in good condition or
4 repair, on a Fire Line and must not create safety issues. Inmates
5 possessing equipment felt to create or to pose a risk of creating
6 such issues must be issued a CDC 128-C chrono restricting them to
7 Camp and prohibiting them from going to a Fire Lane.

8 Id. (criteria at 14-15). Finally, the criteria concerning HIV provide:

9 ELIGIBLE:

10 In accordance with departmental housing policy.

11 Id. (criteria at 11).

12 The parties presented two housing policies for HIV positive inmates. The first,
13 contained in Administrative Bulletin 91/29, issued September 20, 1991, provides that HIV
14 positive inmates in “group 2 and 3 do not usually require other than routine medical care” could
15 be housed at institutions where hospital care is available for progressive medical care . . . the
16 California Medical Facility (CMF) . . . and California Institution for Men (CIM). Ex. B at 2.
17 This document references an attachment described as outlining exceptions to this policy, but the
18 attachment has not been provided. Id. CIM is the satellite institution for a number of camps.
19 Cal. Penal Code § 6203. Nothing in the policy directly addresses whether CIM placement might
20 extend to any of its satellite camps and the parties have not otherwise addressed this question.
21 The parties have presented no evidence showing that the 1991 policy was in fact in effect when
22 petitioner was in prison.

23 The second, 2008 policy provides that HIV Category I inmates shall be eligible for
24 camp placement. Ex. D at 2.

25 B. Testimony

26 Petitioner was diagnosed with HIV in 1985 and at first just hoped to stay healthy.
RT 4.² In 1996, he began to take protease inhibitors, which allowed him to live a more normal

² RT refers to the Reporter’s Transcript of the evidentiary hearing, held November 23, 2009.

1 life. Id. His HIV positive status does not cause problems in his daily life. RT 49. In addition,
2 petitioner has suffered from hypertension since he was twenty-one, but has controlled it with
3 medication. RT 7.

4 On April 23, 2003, petitioner was driving while intoxicated and caused an
5 accident, which killed two people. RT 4, 37. He injured his ankle in the accident and, as a
6 result, had four different surgeries, including one to lengthen his Achilles tendon in order to
7 speed healing; his Achilles tendon did not rupture. RT 38, 97. The pins initially put in his ankle
8 could be removed, but petitioner did not want to undergo further surgery. RT 38, 98.

9 In March 2004, he was sentenced to a term of six years in prison following his
10 conviction on two counts of vehicular manslaughter. RT 4; Ex. A at 43. Before he went to
11 prison, petitioner learned that inmates assigned to fire camp received two days credit for each day
12 served. RT 26. Because he wanted to shorten his sentence, he wanted to be assigned to camp
13 and felt he was able to handle a light duty assignment. RT 21.

14 When petitioner arrived at the North Kern State Prison reception center on March
15 30, 2004, he disclosed his HIV status to prison authorities. RT 5. The “Standardized Bus
16 Screening Form” describes petitioner as under a doctor’s care for HIV and hypertension. Ex A at
17 183; RT 6.³ His blood pressure was recorded as 136/88 and remained in that general range
18 during his stay at the reception center. Ex. A at 184, 251.

19 The reception center medical clearance/restriction chrono dated April 2, 2004,
20 notes that petitioner was cleared for full duty, was not camp or CCF eligible, is in Chronic
21 Infectious Disease Group II, and needs medication for his hypertension. Ex. A at 21; RT 19.
22 Petitioner informed those conducting the evaluation that he had had an ankle injury, but the box
23 for “mobility impaired” was not checked. RT 20; Ex. A at 21. The record of the reception center

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25 ³ The form includes “bipolar” as one of petitioner’s medical diagnoses. Ex. A at 183.
26 Petitioner explained that after the accident, he saw psychiatrists and psychologists, who
mentioned bipolar disorder as a possibility. He was never put on medication and was never
officially diagnosed as bipolar. RT 7.

1 medical exam, dated the same day, also notes petitioner’s hypertension and HIV diagnoses, but
2 cleared him for full duty. Ex. A at 182. According to Dr. Peterson, this medical examination was
3 the initial determination of petitioner’s fire camp eligibility. RT 88.

4 Upon his arrival at CMF on June 2, 2004, petitioner had a classification score of
5 thirteen, a privilege and work group of A1A, but a medical override that caused him to be housed
6 at a higher security facility. Ex. A at 15. Around the time of his arrival, petitioner asked to be
7 assigned to fire camp, but was told he would not be considered because he has HIV. RT 21-22.

8 Petitioner attended his initial review at CMF on June 10, 2004. RT 22. The
9 committee recorded that petitioner was medically cleared for full duty, “noting CID Group II per
10 CDC 128C-1 dated 4-2-04.” Ex. A at 16. The committee also found that petitioner “remains
11 ineligible for CCF, MCCF, CAMP, and SAP due to CID status,” but “eligible for MSF
12 [Minimum Support Facility] placement.” Ex. A at 16; RT 23. Finally, the committee “acts to
13 accept at CMF-II Unit IV as a CID Group II case, custody established as MED A. . . .” Ex. A at
14 16. Dr. Peterson testified that the classification committee considers many factors, including
15 information received from the medical department about infectious disease, in determining an
16 inmate’s appropriate placement. RT 85. However, neither party called any witness who could
17 shed more light on the classification process or who had participated in any of the committees
18 petitioner attended.

19 After petitioner had been at CMF about thirty days, he was called into the
20 captain’s office and told that because of separate litigation, in which petitioner was not involved
21 as a party, the prison was going to be assigning HIV positive inmates to kitchen jobs. RT 57.
22 Petitioner demurred, not wanting to be the “poster child” for HIV food workers, but the captain
23 assured him things would be all right. Id. Within a week, petitioner was assigned to the kitchen.
24 Inmates knew he was HIV positive based on his housing assignment and were not happy that he
25 was cooking their food. RT 59. One inmate in particular was very vocal about his displeasure
26 with petitioner’s assignment and petitioner felt threatened. Id.

1 Instead of “snitching,” petitioner used his ankle injury to get out of the kitchen,
2 although he acknowledged that he had actually fallen twice on slippery floors. RT 38-39, 40, 60.
3 The court credits the totality of petitioner’s testimony in this regard. See Gates v. Rowland, 39
4 F.3d 1439, 1447-48 (9th Cir. 1994) (recognizing inmates’ antipathy to HIV positive inmates
5 working in food service).

6 Accordingly, he secured a medical chrono (CDC 128-C), dated August 23, 2004,
7 which said petitioner “could not work around slippery surfaces because [of] a history of complex
8 fracture of the right ankle.” Ex. A at 18. This chrono was renewed in August, 2005. Ex. A at
9 244.

10 Around the same time, petitioner filed a request for a reasonable accommodation,
11 noting that “weakness and nerve damage to right ankle” produced a “walking/climbing/mobility
12 disability,” and asked for a lower bunk. Ex. A at 47. On August 28, 2004, petitioner filed a
13 grievance asking for a lower bunk chrono because “it is very painful, as well as dangerous for me
14 to climb onto a [sic] upper bed.”

15 On September 2, 2004, another medical chrono recorded petitioner’s “history of
16 “an Achilles surgery on the right,” as well as petitioner’s claimed difficulty in climbing into an
17 upper bunk, and so prescribed a lower bunk. Ex. A at 19. Once again, petitioner testified he
18 exaggerated problems with his ankle to get a lower bunk, although he acknowledged he slipped
19 twice trying to get into the upper bunk because there was no ladder. RT 41, 64. He testified that
20 just before he asked for the accommodation, his bunk-mate on the lower bunk informed him in
21 no uncertain terms that he did not want an HIV positive bunk-mate. RT 63.

22 In late 2004, petitioner filed a grievance about his exclusion from fire camp. The
23 Director’s Level determination, issued in April 2005, said that the rejection was “based on
24 appellant’s unique health care needs as determined by the doctors responsible for his care. The
25 appellant does not meet the criteria for camp placement and therefore does not meet the criteria
26 for a sentence reduction.” Ex. A at 1. The second level decision relied on medical chronos and

1 other health information in petitioner's file to determine he was not eligible for camp. Ex. A at
2 7-8. The first level review also relied on chronos, which the reviewer characterized as showing
3 that petitioner would not meet the physical qualifications for camp. Ex. A at 12. Despite this
4 reliance on medical records, petitioner was never given a medical examination to determine
5 whether he was qualified for camp placement. RT 28.

6 On January 3, 2005, in response to petitioner's complaints about being held at a
7 higher security facility and prohibited from camp placement, Dr. Bick, the Chief Medical Officer
8 of the Outpatient Services at CMF, wrote that there were "no medical contraindications to
9 [petitioner's] being transferred to CIM, CMC, CMF or CORCORAN at that time." Ex. A at 39;
10 RT 23. These were the institutions identified in the 1991 housing policy for HIV positive
11 inmates. Ex. B at 2-3; RT 25.

12 At a program review on January 27, 2005, the UCC recognized that petitioner had
13 asked for placement at the fire camp through the grievance process and was offered placement at
14 the CIM MSF. Ex. A at 69. The committee determined that although petitioner was not
15 categorically excluded from MSF placement, his commitment offense involved the death of two
16 people and so undertook a "case by case review" to determine his eligibility. Id. It concluded
17 that petitioner's "preclusion from MSF based on this commitment offense would be
18 inappropriate," but did not order petitioner transferred at his request. Petitioner told the
19 committee that he pursued the grievance because he wanted camp placement and eligibility for
20 two for one credit. Id.

21 At a subsequent annual review, held March 30, 2005, the UCC again observed
22 that petitioner was ineligible for camp placement "due to CID status." Ex. A at 68.

23 Petitioner took a number of medications while in prison; his medication records
24 show he was consistently prescribed Tenofovir, Atenolol, Acyclovir, Combivir and on occasion
25 Rofexib. In addition, he received Gabapentin, and 800 milligrams of Ibuprofen as needed. Ex. A
26 at 149, 152, 159, 161. Petitioner took medication for high blood pressure, which remained well

1 controlled. Ex. A at 134. Most of the medications came in thirty day supplies, except for
2 Gabapentin, which was administered individually from the cart. RT 67. He took Gabapentin for
3 pain from nerve damage in his ankle and foot, stemming from the ankle and surgeries. RT 42,
4 44, 45; Ex. A at 137-138. Petitioner's medication records show, however, that he did not take
5 this medication consistently. Ex. A at 140-148, 1153-1155. In 2005, Nurse Camacho asked
6 petitioner why he was not taking his medication and petitioner said he would take it only when
7 he needed it. Ex. A at 240-241; RT 53.

8 Petitioner followed a regime of medication for his HIV, none of which produced
9 serious side effects. RT 48. At least once, he did not receive his HIV medication in a timely
10 fashion and so filed a grievance, noting that he might have serious health consequences if he was
11 consistently deprived of the medication. Ex. A at 77; RT 45. Nevertheless, he did not suffer any
12 ill effects because of the lapse in his medication. RT 69. In fact, about nine months before
13 petitioner's release, his viral load increased, which suggested that one of the medications was
14 losing its efficacy. At that point, he discontinued his HIV medication altogether, choosing to
15 wait until his release to start a new regime. RT 50.

16 Douglas Peterson, the CDCR physician, has been a regional medical director for
17 two of the institutions with satellite fire camps and was the lead physician for the reformulation
18 of CDCR's medical classification system. RT 74. He was involved in discussions of camp
19 placement criteria in 2007 and 2008. RT 74.

20 According to Dr. Peterson, the chief work of the fire camp is not in the camp itself
21 but at the site of a fire; even those not designated as firefighters are sometimes deployed to "wild
22 country" to deal with a "changing, stressful, urgent situation." RT 75. Physicians are not
23 assigned to camps, but nurses do visit intermittently. RT 75-76.

24 Before the evidentiary hearing, Dr. Peterson had reviewed petitioner's central file
25 and formed the opinion that petitioner would not have been qualified for camp placement.
26 RT 76. First, petitioner was on high intensity anti-retroviral therapy, which can create a risk to

1 health if it is interrupted and which also can produce serious side-effects. According to Dr.
2 Peterson, petitioner would need periodic monitoring of his immune status. RT 76. Second,
3 petitioner had had a complex repair to his ankle and an Achilles rupture, which might
4 compromise petitioner’s ability to move quickly away from a fire. RT 77. Dr. Peterson did not
5 believe that any competent physician would have assigned petitioner to a fire camp. RT 78. The
6 doctor also was not aware of any HIV positive inmate who had been placed at a fire camp. RT
7 79. “[T]he general feeling is . . . for people who have anti-viral therapy that camp is an
8 inappropriate and highly risky placement for those people.” RT 91. If petitioner was in the
9 chaotic environment of a fire camp, his medication delivery might be interrupted, which would
10 be risky for him. RT 92. In addition, there would be no one available to administer his pain
11 medication. Id.

12 Neither party presented any testimony or exhibits identifying and describing in
13 any meaningful detail the light-duty positions at fire camps. Dr. Peterson believed that even
14 cooks and clerks deployed to fire areas, but this belief is contradicted by several portions of the
15 medical criteria, which recognized that some inmates can be assigned to a camp, but precluded
16 from fire line. RT 93; cf. Ex. C at 14-15.

17 IV. Standards Under The AEDPA

18 An application for a writ of habeas corpus by a person in custody under a
19 judgment of a state court can be granted only for violations of the Constitution or laws of the
20 United States. 28 U.S.C. § 2254(a). Also, federal habeas corpus relief is not available for any

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1 claim decided on the merits in state court proceedings unless the state court’s adjudication of the
2 claim:

3 (1) resulted in a decision that was contrary to, or involved an
4 unreasonable application of, clearly established federal law, as
determined by the Supreme Court of the United States; or

5 (2) resulted in a decision that was based on an unreasonable
6 determination of the facts in light of the evidence presented in the
State court proceeding.

7 28 U.S.C. § 2254(d) (referenced herein in as “§ 2254(d)” or “AEDPA”).⁴ It is the habeas
8 petitioner’s burden to show he is not precluded from obtaining relief by § 2254(d). See
9 Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

10 The “contrary to” and “unreasonable application” clauses of § 2254(d)(1) are
11 different. As the Supreme Court has explained:

12 A federal habeas court may issue the writ under the “contrary to”
13 clause if the state court applies a rule different from the governing
14 law set forth in our cases, or if it decides a case differently than we
15 have done on a set of materially indistinguishable facts. The court
16 may grant relief under the “unreasonable application” clause if the
17 state court correctly identifies the governing legal principle from
18 our decisions but unreasonably applies it to the facts of the
particular case. The focus of the latter inquiry is on whether the
state court’s application of clearly established federal law is
objectively unreasonable, and we stressed in Williams [v. Taylor],
529 U.S. 362 (2000)] that an unreasonable application is different
from an incorrect one.

19 Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the
20 law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply
21 fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8
22 (2002).

23 The court will look to the last reasoned state court decision in determining
24 whether the law applied to a particular claim by the state courts was contrary to the law set forth

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26 ⁴ Title 28 U.S.C. § 2254(d) establishes a precondition to federal habeas relief, not
grounds for entitlement to habeas relief. Fry v. Pliler, 551 U.S. 112, 118-19 (2007).

1 in the cases of the United States Supreme Court or whether an unreasonable application of such
2 law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002), cert. dismissed, 538 U.S.
3 919 (2003). Where the state court fails to give any reasoning whatsoever in support of the denial
4 of a claim arising under Constitutional or federal law, the Ninth Circuit has held that this court
5 must perform an independent review of the record to ascertain whether the state court decision
6 was objectively unreasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In other
7 words, the court assumes the state court applied the correct law, and analyzes whether the
8 decision of the state court was based on an objectively unreasonable application of that law.

9 It is appropriate to look to lower federal court decisions to determine what law has
10 been “clearly established” by the Supreme Court and the reasonableness of a particular
11 application of that law. “Clearly established” federal law is that determined by the Supreme
12 Court. Arredondo v. Ortiz, 365 F.3d 778, 782-83 (9th Cir. 2004). At the same time, it is
13 appropriate to look to lower federal court decisions as persuasive authority in determining what
14 law has been "clearly established" and the reasonableness of a particular application of that law.
15 Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 1999); Clark v. Murphy, 331 F.3d 1062 (9th
16 Cir. 2003), overruled on other grounds, Lockyer v. Andrade, 538 U.S. 63 (2003); cf. Arredondo,
17 365 F.3d at 782-83 (noting that reliance on Ninth Circuit or other authority outside bounds of
18 Supreme Court precedent is misplaced).

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1 In Taylor v. Maddox, the Ninth Circuit examined the application of the
2 “unreasonable determination” standard in the context of factual findings. It concluded that in
3 several situations, a state court’s factual determinations would not be entitled to deference. The
4 court observed:

5 Closely related to cases where the state courts make factual
6 findings infected by substantive legal error are those where the
7 fact-finding process itself is defective. If, for example, a state court
8 makes evidentiary findings without holding a hearing and giving
9 petitioner an opportunity to present evidence, such findings clearly
10 result in an “unreasonable determination” of the facts.

11 366 F.3d 992, 1001 (9th Cir. 2004); see also Killian v. Poole, 282 F.3d 1204, 1208 (9th Cir.
12 2002) (“[h]aving refused Killian an evidentiary hearing . . . , the state cannot argue now that the
13 normal AEDPA deference is owed the factual determinations of the California courts”); Green v.
14 White, 232 F.3d 671, 676 (9th Cir. 2000) (no deference to state court factual determination based
15 on speculation rather than on testimony).

16 V. State Court Decision

17 The last reasoned decision from the state courts in this case was the decision on
18 the petition filed in Solano County Superior Court:

19 In a Petition for a Writ of Habeas Corpus filed with this Court on
20 March 14, 2006, Petitioner, Robert Basque, alleges that the
21 Department of Corrections has improperly refused to place him in
22 a camp or fire fighting assignment based solely on his disability of
23 being infected with HIV. Petitioner alleges Due Process and Equal
24 Protection violations, as well as violations of the Americans with
25 Disabilities Act and California Civil Code section 54(c).

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1 enough not to pose a danger to themselves or others. Petitioner's
2 medical chronos indicate that he could not be cleared for camp
3 placement not just because of Petitioner's HIV infection, a chronic
4 infectious disease, but also due to his heart disease, his history of
5 ankle fracture and his Achilles surgery. Petitioner fails to establish
6 that his medical problems do not make him any less capable of
7 performing the work or subject him to a heightened need for
8 medical supervision than those inmates who are medically cleared
9 for light duty non-hazardous work.

6 Even if the Court determined that Petitioner is being treated
7 unequally from other similarly situated inmates, the decision to
8 deny camp placement is rationally related to the Department's
9 legitimate interest in maintaining Petitioner's health and safety
10 while under its custody. (*City of Cleburne v. Cleburne Living Ctr.*
11 (1985) 473 U.S. 432, 439.) As indicated by Department Officials,
12 Petitioner's infection with HIV and his heart disease constitute
13 medical concerns that require continuing monitoring and
14 intervention by medical staff that is not available in a camp
15 situation.

12 Petitioner has not demonstrated a heightened need for judicial
13 scrutiny. Classifications based on disabilities are not suspect and
14 do not require a more exacting standard of judicial review than is
15 normally accorded economic and social legislation. (*Cleburne,*
16 *supra*, 473 U.S. at 442; *see Doe v. Wigginton* (6th Cir. 1994) 21
17 F.3d 733, 739; *Doe v. Univ. Of Md. Medical Sys. Corp.* (4th Cir.
18 1995) 50 F.3d 1261, 1267.) Moreover, allowing inmates to reduce
19 their total term of commitment by application of work time credit
20 is a privilege, not a fundamental or constitutionally protected right.
21 (Pen. Code § 2933(b); *Wolff v. McDonnell* (1974) 418 U.S. 539,
22 557. . . .)

18 Petitioner also claims an arbitrary deprivation of a constitutional
19 right in violation of the Due Process Clause. Given that a lawful
20 conviction permits a State to commit a prisoner in any of its
21 prisons, regardless of whether one institution imposes a more
22 onerous term of confinement than another, it is doubtful that
23 Petitioner has been denied a constitutional right. (*Meachum v.*
24 *Fano* (1976) 427 U.S. 215, 224.) Regardless, assuming that failure
25 to assign Petitioner to a camp assignment somehow violated a
26 constitutional right retained upon conviction, judicial review is
again limited to determining whether the Department's action is
rationally related to a legitimate state interest. (*Turner v. Safley*
(1978) 483 U.S. 78, 89-90.)

24 Petitioner also fails to state a prima facie case under the Americans
25 with Disabilities Act. Under the ADA, Petitioner must allege that
26 he is otherwise qualified for the benefit he seeks and that his
exclusion, denial of benefits, or discrimination was by reason of
the disability. (42 U.S.C. § 12132, *Thompson v. Davis* (9th Cir.

1 2002) 295 F.3d 890, 895; *Weinreich v. Los Angeles County Metro*
2 *Transp. Auth.* (9th Cir. 1997) 114 F.3d 976, 978.) A person is
3 otherwise qualified if he meets the essential eligibility
4 requirements for participation in spite of his handicap. (42 U.S.C.
5 § 1213(2) [sic]; *School Bd. of Nassau County v. Arline* (1987) 480
6 U.S. 273, 288.) Though the Court must consider whether a
7 reasonable accommodation would enable a handicapped person to
8 perform those functions, accommodation is not reasonable if it
9 requires a fundamental alteration of the nature of the program.
10 (*Arline*, 480 U.S. at 288).

11 Petitioner fails to provide specific facts and documentary evidence
12 establishing that, but for his HIV infection, he is qualified for
13 placement in camp. (*Duvall, supra*, 9 Cal. 4th at 475.) The fact
14 that he was cleared for full duty at an institution with the qualified
15 medical personnel to monitor his HIV infection and heart condition
16 does not necessarily mean that he was qualified for camp.
17 Petitioner makes no showing that he meets the Department's
18 criteria for camp placement, even for light duty work, or that the
19 Department could have reasonably provided accommodation that
20 would not change the fundamental nature of the program.
21 Moreover, although Petitioner states that his HIV infection was the
22 only basis for his denial his medical chronos indicate he had
23 additional health problems that contributed to the Department's
24 decision. His ankle fracture and Achilles surgery rendered him
25 unable to work around slippery surfaces and made climbing
26 difficult. His heart disease requires medication and monitoring.
These problems likely contributed to the decision to deny camp
placement.

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18 Pet., Ex. 4.

19 VI. Underground Regulation and California's Administrative Procedures Act

20 Petitioner argues in part that his exclusion from consideration for fire camp was
21 based on an "underground regulation," adopted in derogation of California's Administrative
22 Procedures Act. Pet., Points and Authorities (Mem. P. & A.) at 14-16. However, federal habeas
23 corpus does not lie to address errors of state law and procedure. Estelle v. McGuire, 502 U.S. 62,
24 67 (1991) ("We have stated many times that federal habeas corpus relief does not lie for errors of
25 state law." (internal quotation marks and citation omitted)).

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1 VII. Due Process

2 The Due Process Clause of the Fourteenth Amendment protects persons against
3 deprivations of life, liberty or property. Wilkinson v. Austin, 545 U.S. 209, 221 (2005). Those
4 who seek to invoke the procedural protections of the Due Process Clause must establish that one
5 of these interests is at stake. Id. “A liberty interest may arise from the Constitution itself . . . , or
6 it may arise from an expectation or interest created by state laws or policies.” Id.

7 There is no constitutional right to a particular classification or custody status, to
8 be housed in a particular prison, or to have a job. Olim v. Wakinekona, 461 U.S. 238, 244-45
9 (1983) (no constitutional right to be housed in any particular prison); Moody v. Daggett, 429
10 U.S. 78, 88 n.9 (1976) (classification and programs); Vignolo v. Miller, 120 F.3d 1075, 1077
11 (9th Cir. 1997) (no right to prison job). Petitioner has not identified those state policies or laws
12 that might give right to a liberty interest in camp placement. See Mem. P. & A. at 25-28.
13 Instead, he appears to assume there is a liberty interest and argues that his exclusion from camp
14 without procedural protections thus is arbitrary. This unsupported argument is insufficient to
15 support his request for relief.

16 This court cannot find that the superior court applied federal law unreasonably in
17 rejecting petitioner’s due process claim.

18 VIII. Equal Protection

19 Petitioner also argues the refusal to assign him to camp or otherwise to give him
20 the same credits as those assigned to camp violated his right to equal protection. He argues that
21 the exclusion must be evaluated under the strict scrutiny test.

22 The essence of the Equal Protection Clause is that “the State must govern
23 impartially.” Jones v. Helms, 452 U.S. 412, 423 (1981). Accordingly, the clause “provides a
24 basis for challenging legislative classifications that treat one group of persons as inferior or
25 superior to others, and for contending that general rules are being applied in an arbitrary or
26 discriminatory way.” Id. at 423-24. The equal protection guarantee “is essentially a direction

1 that all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living
2 Center, 473 U.S. 432, 439 (1985). However, “the Constitution does not require things which are
3 different in fact or opinion to be treated in law as though they were the same.” Plyler v. Doe,
4 457 U.S. 202, 216 (1982).

5 If a particular legislative classification is based on an inherently suspect
6 classification or impinges on the exercise of a fundamental right, then the state must show that
7 the classification is precisely tailored to serve a compelling governmental interest. Id. at 216-17;
8 Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001). Disability and HIV status are not
9 protected classifications. City of Cleburne, 473 U.S. at 444-46; Doe v. City of Chicago, 883
10 F.Supp. 1126, 1140-41 (N.D. Ill. 1994). “[A] classification neither involving fundamental rights
11 nor proceeding along suspect lines is accorded a strong presumption of validity.” Heller v. Doe,
12 509 U.S. 312, 319 (1993). As the Supreme Court has explained:

13 equal protection is not a license for courts to judge the wisdom,
14 fairness, or logic of legislative choices. In areas of social and
15 economic policy, a statutory classification that neither proceeds
16 along suspect lines or infringes fundamental constitutional rights
 must be upheld against equal protection challenge if there is any
 reasonably conceivable state of facts that could provide a rational
 basis for the classification.

17 Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307, 313
18 (1993). Moreover, “it is entirely irrelevant for constitutional purposes whether the conceived
19 reason for the challenged distinction actually motivated the legislature.” Id. at 315.

20 In this case, the officials at the reception center and on the classifications
21 committees could rationally have rejected plaintiff from camp placement out of a concern for his
22 health. In addition, prison officials could rationally exclude a person from earning the additional
23 work credits if that person did not face the danger and rigor of camp placement. The Superior
24 Court did not apply federal law unreasonably in reaching the same conclusion.

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1 IX. ADA

2 Title II of the ADA provides:

3 ... [N]o qualified individual with a disability shall, by reason of
4 such disability, be excluded from participation in or be denied the
5 benefits of the services, programs, or activities of a public entity, or
6 be subjected to discrimination by any such entity.

7 42 U.S.C. § 12132. Respondent does not dispute that conservation camps are programs or
8 activities of the CDCR, which is a public entity within the meaning of the ADA. Pennsylvania
9 Department of Corrections v. Yeskey, 524 U.S. 206, 210, 211 (1998).

10 To prove a Title II claim, a plaintiff must show:

11 (1) the plaintiff is an individual with a disability; (2) the plaintiff is
12 otherwise qualified to participate in or receive the benefit of some
13 public entity's services, programs, or activities; (3) the plaintiff was
14 either excluded from participation in or denied the benefits of the
15 public entity's services, programs, or activities, or was otherwise
16 discriminated against by the public entity; and (4) such exclusion,
17 denial of benefits, or discrimination was by reason of the plaintiff's
18 disability.

19 Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002).

20 There are two other ways in which a person claiming the protection of the ADA
21 may prove that he is a person with a disability: by offering proof of a history of an impairment
22 that limits him in a major life activity or evidence that he was regarded as having such a limiting
23 impairment. Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 798 (9th Cir. 2001),
24 opinion clarified by 292 F.3d 1045 (9th Cir. 2002).

25 Petitioner has offered no evidence that his HIV status limits him in a major life
26 activity; to the contrary, he testified that his condition does not cause him problems in his daily
life. RT 49. See Bragdon v. Abbott, 524 U.S. 624, 641-42, (1998) (declining to consider
whether HIV infection is a *per se* disability under the ADA). He has presented evidence that he
was regarded as having such an impairment. In fact, the evidence shows that prison officials
regarded him as disabled because of his HIV positive status; on that basis the Classification

1 Committees excluded him from camp placement and housed him in a more secure institution
2 than his classification score warranted. Ex. A at 16, 39, 68, 69. This is sufficient to satisfy his
3 burden of showing that the institution treated him as disabled. Harris v. Thigpen, 941 F.2d 1495,
4 1524 (11th Cir. 1991) (institution that segregated HIV positive inmates treated them as disabled
5 within the meaning of the ADA); Dean v. Knowles, 912 F.Supp. 519, 522 (S.D. Fla. 1996) (issue
6 of fact whether jail treated HIV positive inmates as disabled). Petitioner also has presented
7 evidence that officials at the Reception Center and thereafter on the Classification Committees
8 refused to consider him for camp based on his “CID status.” See Ex. A at 21, 23, 68, 69.

9 The Superior Court found that petitioner would not have otherwise qualified for
10 camp placement because of his hypertension and ankle injury. This finding is not entitled to
11 deference because the Superior Court did not consider the camp medical criteria quoted at length
12 above: neither petitioner’s hypertension nor his ankle injury would necessarily have precluded
13 him from camp placement. Moreover, the Superior Court relied on this rationale as it was
14 presented at the various levels of the grievance process, whereas those involved in institutional
15 appeals were not the officials entrusted with the decision to place an inmate in camp. 15 Cal.
16 Code Regs. § 3044 (b)(1).

17 This court similarly does not place considerable weight on Dr. Peterson’s
18 opinion, for he apparently did not consider that even with petitioner’s ankle injury, he could be
19 assigned a position away from the fire line. The doctor also apparently misunderstood the nature
20 of the repair to petitioner’s Achilles tendon. See Ex. C at 14-15; RT 77. In addition, he relied on
21 the fact that no one would be available to administer the Gabapentin even though the criteria
22 does not exclude someone taking this drug from camp placement. Finally, Dr. Peterson appeared
23 to be aware that several classes of inmates, not only those with mobility impairments, but also
24 those with some blood pressure problems, could be assigned to camp but exempted from fire line
25 duty. Ex. C at 9.

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1 Nevertheless, petitioner has not borne his burden of showing he was otherwise
2 qualified for camp placement. To make such a showing, petitioner must show that he met the
3 other medical requirements for camp placement. Thompson v. Davis, 295 F.3d 890, 896 (9th
4 Cir. 2002). The exhibits submitted without objection contain petitioner's medication records,
5 which show that during most of his incarceration, he was taking five prescription drugs. See Ex.
6 A at 140-148, 153-155. Petitioner did testify that he stopped taking his HIV drugs when he was
7 nine months away from his release date, but this testimony does not establish that he would have
8 been eligible for camp when he had such little time remaining on his term. RT 50. In addition,
9 he has presented nothing suggesting that inmates assigned to light duty positions in camp would
10 be exempt from the medication restrictions. He has not borne his burden of demonstrating his
11 entitlement to relief.

12 IT IS THEREFORE RECOMMENDED that the petition for a writ of habeas
13 corpus be denied.

14 These findings and recommendations are submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
16 one days after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised
19 that failure to file objections within the specified time may waive the right to appeal the District
20 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: January 6, 2010.

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24 _____
25 U.S. MAGISTRATE JUDGE
26