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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kenneth Burnam,)	No. 12-CV-128-PHX-PGR (MHB)
)	
Petitioner,)	
)	
v.)	ORDER
)	
Dennis R. Smith, Warden,)	
)	
Respondent.)	

Pending before the Court is Magistrate Judge Burns’ Report and Recommendation (“R & R”) (Doc. 19), which recommends the denial of Petitioner’s amended petition for writ of habeas corpus, filed March 16, 2012, pursuant to 28 U.S.C. § 2254 (Doc. 8). For the reasons set forth below, the Court will adopt the R & R.

DISCUSSION

On February 23, 2011, while Petitioner was incarcerated at the United States Penitentiary in Lompoc, California, an Incident Report was prepared charging him with Making Sexual Proposals. Ultimately, the Disciplinary Hearing Officer (“DHO”) determined that the evidence supported a different and lesser charge—Interfering with Staff in Performance of Duty—and sanctioned Petitioner accordingly. Petitioner argues that his due process rights were violated because he was not provided advance notice of the reduced charge and therefore was unable to defend himself adequately.

The R & R found that Petitioner was afforded the due process rights to which he was entitled under *Wolff v. McDonnell*, 418 U.S. 539, 563–67 (1974). (Doc. 19 at 4.) He was

1 provided a copy of the Incident Report; advised of, and waived, his right to call witnesses
2 and have the assistance of a staff representative; provided a copy of the disciplinary report;
3 and he appeared before a sufficiently impartial decision maker. (*Id.*) The R & R also found
4 that the decision of the DHO was supported by “some evidence” as required by
5 *Superintendent v. Hill*, 472 U.S. 445, 454–55 (1985). (*Id.* at 7.)

6 Having reviewed the matter *de novo* in the light of Petitioner’s objections (Doc. 20),
7 the Court agrees with Magistrate Judge Burns that Petitioner’s due process rights were not
8 violated. In concluding that Petitioner committed the lesser violation, the DHO’s detailed
9 findings took into account all of the evidence concerning to the incident, which included the
10 facts relevant to both violations. Petitioner was not deprived of the opportunity to present any
11 relevant evidence, and the evidence cited by the DOH was sufficient to support a finding of
12 Interference with Staff.

13 Accordingly,

14 IT IS HEREBY ORDERED that the Report and Recommendation (Doc. 19) is
15 ADOPTED IN FULL. The amended habeas petition (Doc. 8) is DENIED and DISMISSED
16 WITH PREJUDICE.

17 IT IS FURTHER ORDERED that a Certificate of Appealability and leave to proceed
18 *in forma pauperis* on appeal is DENIED because Petitioner has not made a substantial
19 showing of the denial of a constitutional right.

20 DATED this 7th day of October, 2013.

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24 Paul G. Rosenblatt
25 United States District Judge
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