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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KAREEN JABBAR STANSBURY, SR.,

1:09-cv-00485-OWW DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

[Doc. 12]

RIOS, JR., Warden,

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

BACKGROUND

Petitioner filed the instant petition for writ of habeas corpus on March 16, 2009. (Court Doc. 1.) Petitioner filed an amended petition on July 17, 2009. (Court Doc. 12.)

In the amended petition, Petitioner challenges a rules violation report he received for violating Code 208-blocking any locking device, Code 224A-attempted assault of any person, and Code 307-refusing to obey an order. Petitioner contends he was denied the opportunity to present evidence or witnesses at his hearings, and he was denied a staff representative of his choice and the representative he received did not provide him assistance. (Amended Petition, at 2-3.)

Respondent filed an answer to the petition on January 15, 2010, and Petitioner filed a traverse on February 10, 2010. (Court Docs. 21, 22.)

1 894 F.2d 353, 354-55 (9th Cir.1990) (applying procedural default rules to administrative
2 appeals); see generally Murray v. Carrier, 477 U.S. 478, 485 (1986); Wainwright v. Sykes, 433
3 U.S. 72, 86-87 (1977); Tacho v. Martinez, 862 F.2d 1376, 1378 (9th Cir.1988). If a claim is
4 procedurally defaulted, the court may require the petitioner to demonstrate cause for the
5 procedural default and actual prejudice from the alleged constitutional violation. See Francis,
6 894 F.2d at 355 (suggesting that the cause and prejudice test is the appropriate test); Murray, 477
7 U.S. at 492 (cause and prejudice test applied to procedural defaults on appeal); Hughes v. Idaho
8 State Bd. of Corr., 800 F.2d 905, 906-08 (9th Cir.1986) (cause and prejudice test applied to pro
9 se litigants).

10 The Bureau of Prisons has established an administrative remedy procedure governing
11 prisoner complaints. The procedure is set forth at 28 C.F.R. § 542.10 et. seq. First, an inmate
12 must attempt to resolve the issue informally by presenting it to staff before submitting a Request
13 for Administrative Remedy. 28 C.F.R. § 542.13 (1999). If dissatisfied with the response, the
14 prisoner may proceed with the formal filing of an Administrative Remedy Request. 28 C.F.R.
15 § 542.14 (1999). Upon denial by the institution, the prisoner may appeal the decision by filing a
16 complaint with the Regional Director of the Bureau of Prisons. 28 C.F.R. § 542.15 (1999). The
17 Regional Director’s decision may be appealed to the General Counsel in Washington, D.C. Id.
18 Appeal to the General Counsel is the final step in the administrative remedy process. Id.

19 Respondent submits that Petitioner has exhausted all available administrative remedies,
20 and his requested relief was denied at each of level of review. (Answer, at 3, 6.)

21 IV. Applicable Law

22 Prisoners cannot be entirely deprived of their constitutional rights, but their rights may be
23 diminished by the needs and objectives of the institutional environment. Wolff v. McDonnell,
24 418 U.S. 539, 555 (1974). Prison disciplinary proceedings are not part of a criminal prosecution,
25 so a prisoner is not afforded the full panoply of rights in such proceedings. Id. at 556. Thus, a
26 prisoner’s due process rights are moderated by the “legitimate institutional needs” of a prison.
27 Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989), *citing Superintendent, etc. v. Hill*, 472
28 U.S. 445, 454-455 (1984).

1 However, when a prison disciplinary proceeding may result in the loss of good time
2 credits, due process requires that the prisoner receive: (1) advance written notice of at least 24
3 hours of the disciplinary charges; (2) an opportunity, when consistent with institutional safety
4 and correctional goals, to call witnesses and present documentary evidence in his defense; and
5 (3) a written statement by the factfinder of the evidence relied on and the reasons for the
6 disciplinary action. Hill, 472 U.S. at 454; Wolff, 418 U.S. at 563-567. In addition, due process
7 requires that the decision be supported by “some evidence.” Hill, 472 U.S. at 455, *citing* United
8 States ex rel. Vatauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927). The “some
9 evidence” standard is “minimally stringent,” and a decision must be upheld if there is any reliable
10 evidence in the record that could support the conclusion reached by the fact finder. Hill, 472
11 U.S. at 455-456; *see also* Barnsworth v. Gunderson, 179 F.3d 771, 779 (9th Cir. 1990);
12 Zimmerlee v. Keeney, 831 F.2d 183, 186 (9th Cir. 1987). Determining whether this standard is
13 satisfied does not require examination of the entire record, independent assessment of the
14 credibility of witnesses, or the weighing of evidence. Hill, 472 U.S. at 455; Toussaint v.
15 McCarthy, 801 F.2d 1080, 1105 (9th Cir. 1986).

16 V. Analysis of Petition

17 A. Opportunity to Present Evidence and Witnesses at the UDC and DHO Hearings

18 On July 15, 2008, Correctional Officer (CO) Jess Pino, was distributing food trays in the
19 D range of the Special Housing Unit (SHU) at USP Atwater. When he opened the food slot for
20 cell 202-where Petitioner was housed, Petitioner reached out through the slot and prevented the
21 trap door from being closed and secured. When Pino attempted to secure the food slot trap door,
22 Petitioner attempted to grab him, and additional staff were required to assist Pino in closing and
23 securing the food trap door. Answer, Exhibit 2, Incident Report #1755349.

24 The next day, Petitioner was issued an Incident Report charging him with violations of
25 disciplinary codes 208-blocking any locking device, 224A-attempted assault of any person, and
26 307-refusing to obey and order. Lieutenant Tim Miller was assigned to investigate the report.
27 After being advised of his right to remain silent, Petitioner denied the charges and was provided a
28 copy of the report on July 16, 2008. See Id.

1 Code 208 prohibits “[p]ossession of any unauthorized locking device, or lock pick, or
2 tampering with or blocking any lock device (includes keys), or destroying, altering, interfering
3 with, improperly using, or damaging any security device, mechanism, or procedure.” 28 C.F.R. §
4 541.13. Code 224A prohibits assaulting any person, and Code 203 prohibits threatening another
5 with bodily harm or any other offense. Id.

6 Petitioner appeared before the Unit Discipline Committee (UDC) on July 18, 2008. At
7 the hearing, Petitioner stated “[t]hey need to look at the surveillance tape. The officers assaulted
8 me. They used government equipment to conduct criminal activity. They yanked my arm. I did
9 not see medical for 17 hours[.]” See Exhibit 2, Incident Report #1755349.

10 On that same day, the UDC referred the incident report to the Discipline Hearing Officer
11 (DHO) for disposition. See Id. Petitioner was advised of his rights by Case Manager-Chris
12 Liwag. Petitioner refused to sign the acknowledgment of such rights so Liwag signed the
13 acknowledgment indicating that Petitioner was advised of his rights. Exhibit 3, Inmate Rights at
14 Discipline Hearing. Petitioner requested Captain Bill Lothrop as his staff representative for the
15 DHO hearing, and stated he did not request any witnesses. However, Petitioner again refused to
16 sign the request form. Liwag noted Petitioner’s requests, and signed the acknowledgment
17 indicating that Petitioner refused to sign. Exhibit 4, Notice of Discipline Hearing Before the
18 DHO. Captain Lothrop signed a “Duties of Staff Representative” notice, and agreed to be the
19 staff representative. Exhibit 5, Duties of Staff Representative.

20 On July 22, 2008, Petitioner appeared before the DHO-Ms. Deborah Lorange. Petitioner
21 was re-advised of his rights and did not have any documentary evidence or request any witnesses.
22 Petitioner also did not request to see the surveillance videotape or request the DHO to review the
23 videotape. Exhibit 6, Discipline Hearing Officer Report.

24 The DHO acknowledged that Petitioner had requested Captain Lothrop as a staff
25 representative, but informed Petitioner that Captain Lothrop indicated he had nothing to say
26 because Petitioner held the food trap. Petitioner was advised that members of executive staff are
27 not generally called as staff representatives. Petitioner was then advised of his option to
28 postpone the hearing to obtain another staff representative, but he did not do so. Id.

1 In this case, all of the procedural requirements afforded under Wolff were provided to
2 Petitioner. More specifically, he received advanced written notice of the incident, and the
3 hearing was held before the UDC within 3 days thereafter. Exhibit 2, Incident Report #1755349.
4 Petitioner acknowledges that he was present at the hearing, and although Petitioner contends that
5 he was not allowed to present evidence, the record does not support his claim. Petitioner made a
6 statement to the UDC, and there is no evidence that he provided, or even attempted to provide
7 any documentary evidence beyond merely suggesting that the UDC review the videotape.
8 Moreover, there was no adverse action by the UDC as it merely forwarded the incident report to
9 the DHO.

10 With regard to the DHO hearing, Petitioner was again afforded all of the procedural
11 requirements under Wolff. As previously stated, Petitioner initially received notice of the
12 charges on July 16, 2008, and again on July 18, 2008. He declined to present any witnesses, and
13 there is no evidence to support his claim that he requested the reporting officer appear as a
14 witness. Petitioner denied holding the trap door open or grabbing the officer's arm. In addition,
15 Petitioner did not request to see the surveillance videotape, nor did he request the DHO to review
16 the videotape. Exhibit 6, Discipline Hearing Officer Report. Moreover, Petitioner was provided
17 an impartial DHO, as Lorange had no involvement in the incident. Exhibit 2, Incident Report
18 \$1755349. Although Petitioner initially requested Captain Lothrop as a staff representative and
19 he agreed, he later declined stating he had nothing to say as Petitioner held the food trap.
20 Petitioner was advised that he could postpone the hearing to obtain another staff representative
21 but declined to do so. Based on the greater weight of the evidence, Petitioner was found guilty of
22 the charged violations and imposed a total of fifty-four days disallowance of good conduct time
23 and loss of communication privilege for 180 days.

24 Contrary to Petitioner's claim, there is no support that he requested the videotape of the
25 incident be reviewed. Although he suggested the UDC do so, there was no request made to the
26 DHO—who has the actual authority to sanction Petitioner. In any event, the DHO did not rely on
27 the videotape in rendering her decision. Rather, the DHO's finding of guilt was based on
28 statement from the reporting officer that he observed Petitioner place his arm in the trap to

1 prevent it from being closed and refused to remove it. Some evidence supports the DHO's
2 findings based on the factual statements in the incident report by the reporting officer. Hill, 472
3 U.S. at 455.

4 B. Request for Staff Representative of Choice

5 Petitioner contends that he was denied the right to a staff representative of his choice and
6 the staff representative present at the hearings did not protect his rights.

7 Contrary to Petitioner's claim, there is no general constitutional right to have a staff
8 representative appear on his behalf in a disciplinary proceeding. See Hudson v. Hedgepeth, 92
9 F.3d 748, 751 (8th Cir. 1996). Due process requires inmates be provided with the assistance of a
10 staff representative if the inmate is illiterate or "the complexity of the issues makes it unlikely
11 that the inmate will be able to collect and present the evidence necessary for an adequate
12 comprehension of the case. See Wolff, 418 U.S. at 570. In this instance, there is no evidence
13 that Petitioner is illiterate, nor are the issues of whether he interfered with locking a food slot,
14 attempted to assault an officer and refused to obey an order, legally or factually complex. At the
15 hearing, Petitioner acknowledged that he understood the charges against him and he was able to
16 voice his denial of the charges. See Exhibit 6, Discipline Hearing Officer Report. In addition, he
17 clearly articulated his claims at the administrative appeal level and to this Court, which belies his
18 claim that a staff representative was required.

19 In the disciplinary context, Petitioner is only entitled to the process provided under Wolff.
20 Walker v. Sumner, 14 F.3d 1415, 1420 (9th Cir. 1994). As explained above, Petitioner was
21 provided all the procedural protections set forth in Wolff, and there is no basis for relief.
22 Although Petitioner contends that he requested Counselor Daniel as a staff representative, there
23 is no evidence that such request was made during the disciplinary proceedings. The only
24 reference to the claim that he was denied the opportunity to have Counselor Daniel as a staff
25 representative was not made until his administrative appeal to the BOP Central Office. See
26 Exhibit 8, Central Office Administrative Remedy Appeal. *For the first time in his traverse*,
27 Petitioner attaches a letter he claims to have authored to the UDC, dated July 15, 2008, and
28 signed under penalty of perjury on July 17, 2008. Petitioner claims that Lieutenant T. Miller did

1 not advise him of his rights to a staff representative or to present evidence. However, the next
2 day on July 18, 2008, Petitioner was advised of his procedural rights at the DHO (the only
3 relevant authority that may impose sanctions) by case manager Chris Liwag. Nor is there any
4 evidence that Petitioner submitted or attempted to submit the letter to DHO. Thus, even if
5 Petitioner were entitled to a staff representative of his choice-counselor Daniel-there is no
6 credible evidentiary support that his request was timely or that such request was denied. Further,
7 this Court may not make its own assessment of the credibility of witnesses or re-weigh the
8 evidence. Accordingly, Petitioner's claim is without merit.

9 RECOMMENDATION

10 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 11 1. The instant amended petition for writ of habeas corpus be DENIED; and
- 12 2. The Clerk of Court be directed to enter judgment in favor of Respondent.

13 This Findings and Recommendation is submitted to the assigned United States District
14 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
15 Local Rules of Practice for the United States District Court, Eastern District of California.

16 Within thirty (30) days after being served with a copy, any party may file written objections with
17 the court and serve a copy on all parties. Such a document should be captioned "Objections to
18 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served
19 and filed within fourteen (14) days after service of the objections. The Court will then review the
20 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
21 failure to file objections within the specified time may waive the right to appeal the District
22 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 IT IS SO ORDERED.

24 **Dated: May 2, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE