UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MIGUEL ANGEL CONDE-RODRIGUEZ, Petitioner, v. NEIL H. ADLER, Respondent.	1: 09-cv—02241-LJO-SMS-HC ORDER DEEMING RESPONDENT'S MOTION TO DISMISS TO BE AN ANSWER TO THE PETITION (DOC. 10) FINDINGS AND RECOMMENDATION TO DENY THE PETITION FOR WRIT OF HABEAS CORPUS (DOCS. 1, 10)

Plaintiff is a federal prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is Respondent's motion to dismiss the petition filed on March 18, 2010. On April 19, 2010, Petitioner filed documents deemed by a previous order to have been an opposition to the motion. No reply was filed.

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I. Jurisdiction

A. Subject Matter Jurisdiction

Relief by way of a writ of habeas corpus extends to a prisoner in custody under the authority of the United States who shows that the custody violates the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241(c)(3). Although a federal prisoner who challenges the validity or constitutionality of his conviction must file a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255, a federal prisoner challenging the manner, location, or conditions of the execution of a sentence must bring a petition for writ of habeas corpus under 28 U.S.C. § 2241. Hernandez v. Campbell, 204 F.3d 861, 864-65 (9th Cir. 2000).

Here, Petitioner alleges that he was denied due process of law in connection with a prison disciplinary hearing and the resulting loss of good-time credits. A due process claim concerning parole, good time, or other rules administered by a prison or penal administrator that challenges the duration of a sentence is a cognizable claim of being in custody in violation of the Constitution pursuant to 28 U.S.C. § 2241(c)(3). See, e.g., Superintendent v. Hill, 472 U.S. 445, 454 (1985) (determining procedural due process claim concerning disciplinary procedures and findings); Wilkinson v. Dotson, 544 U.S. 74, 88 (2005) (Kennedy, J., dissenting). If a constitutional violation has resulted in the loss of time credits, it affects the duration of a sentence, and the violation may be remedied by way of a petition for writ of habeas corpus. Young v. Kenny, 907 F.2d 874, 876-78 (9th Cir. 1990).

Accordingly, the Court concludes that it has subject matter jurisdiction over the petition.

B. Jurisdiction over the Person

Title 28 U.S.C. § 2241(a) provides that writs of habeas corpus may be granted by the district courts "within their respective jurisdictions." A writ of habeas corpus operates not upon the prisoner, but upon the prisoner's custodian. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 494-495 (1973). A petitioner filing a petition for writ of habeas corpus under § 2241 must file the petition in the judicial district of the petitioner's custodian. Brown v. United States, 610 F.2d 672, 677 (9th Cir. 1990). The warden of the penitentiary where a prisoner is confined constitutes the custodian who must be named in the petition, and the petition must be filed in the district of confinement. Id.; Rumsfeld v. Padilla, 542 U.S. 426, 446-47 (2004). It is sufficient if the custodian is in the territorial jurisdiction of the court at the time the petition is filed; transfer of the petitioner thereafter does not defeat personal jurisdiction that has once been properly established. Ahrens v. Clark, 335 U.S. 188, 193 (1948), overruled on other grounds in Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. at 193, citing Mitsuye Endo, 323 U.S. 283, 305 (1944); Francis v. Rison, 894 F.2d 353, 354 (9th Cir. 1990). A failure to name and serve the custodian deprives the Court of personal jurisdiction. Johnson v. Reilly, 349 F.3d 1149, 1153 (9th Cir. 2003).

Here, at all pertinent times, Petitioner was incarcerated at the Taft Correctional Institution (TCI), which is located within the Eastern District of California. Petitioner named Neil H.

Adler, the Warden of TCI, as Respondent.

Accordingly, the Court concludes that it has personal jurisdiction over the custodian.

II. Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6)

In the motion before the Court, Respondent purports to proceed pursuant to Fed. R. Civ. P. 12(b)(6), which provides for the making of a motion to dismiss for failure to state a claim upon which relief can be granted. Such a motion tests the legal sufficiency of the claim or claims stated in the complaint. In considering a motion under Fed. R. Civ. P. 12(b)(6), a court must construe the complaint in the light most favorable to the plaintiff; accept all well-pleaded factual allegations as true; and determine whether the plaintiff can prove any set of facts to support a claim that would merit relief. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

The Federal Rules of Civil Procedure are not necessarily fully applicable to the present proceeding. The rules governing civil procedure may be applied to a proceeding governed by the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules) to the extent that they are not inconsistent with any statutory provisions or the rules governing cases brought pursuant to 28 U.S.C. §§ 2254 or 2255, and where the practice in habeas proceedings has previously conformed to the practice in civil actions. Habeas Rule 12;[1] Fed. R. Civ. P. 81(a)(4). The Advisory Committee's Notes caution that the civil rules apply only when it would be appropriate and would not be

[1] The Rules Governing Section 2254 Cases may be applied to petitions brought pursuant to § 2241. Habeas Rule 1(b).

inconsistent or inequitable in the overall framework of habeas corpus. Habeas Rule 12 advisory committee's note; Mayle v. Felix, 545 U.S. 644, 654-655 n. 4 (2005).

The Supreme Court has characterized as erroneous the view that a Rule 12(b)(6) motion is appropriate in a habeas corpus proceeding. See, Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 269 n. 14 (1978). However, in light of the broad language of Rule 4, it has been held in this circuit that motions to dismiss are appropriate in cases that proceed pursuant to 28 U.S.C. § 2254 and present issues of failure to exhaust state remedies, O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990 (a motion to dismiss for failure to raise any issue of federal law, which was based on the insufficiency of the facts as alleged in the petition to justify relief as a matter of law, was evaluated under Rule 4); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (procedural default in state court); Hillery v. Pulley, 533 F.Supp. 1189, 1194 n. 12 (E.D.Cal. 1982) (a motion to dismiss for failure to exhaust state remedies is appropriately considered after receipt of evidence pursuant to Rule 7(a) to clarify whether or not the possible defect, not apparent on the face of the petition, might preclude a hearing on the merits, and after the trial court has determined that summary dismissal is inappropriate).

In the present case, the Court has already undertaken to screen the petition pursuant to Habeas Rule 4, which requires the Court to dismiss a petition if it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court. The Court necessarily

had to screen the petition before it issued its order of January 15, 2010, directing Respondent to file a response to the petition. Thus, proceeding pursuant to Rule 12(b)(6) would be repetitive and unnecessary.

In response to the motion, Petitioner argues that the allegations of the petition are sufficient to state a claim, and he cites to cases involving civil rights claims under § 1983. (Opp. 3-4.) He does not dispute the evidence or record of the proceedings provided by Respondent in support of the motion except that contrary to the BOP's position, it was a misrepresentation of evidence that he was found with the cell phone in his possession. (Pet. 7, Opp. 6.) He also states that no evidence demonstrated that he possessed a cellular telephone. (Opp. 6-7.) However, in seeking to dispel any negative inference that he possessed a weapon, Petitioner also states in his opposition that he "established at the time of the hearing and the evidence adduced in the Incident Report" that "he utilized a cellular telephone in violation of TCI prison rules and regulations." (Opp. 3.)

In a manner inconsistent with a motion pursuant to Rule 12(b)(6), Respondent sets forth in the moving papers facts for the Court to consider in determining the motion, and Respondent submits exhibits in support of the factual assertions made in the motion consisting of a record of the disciplinary proceedings in question. (Mot. 3-4.) Respondent submitted matters extraneous to the evidence presented at the hearing, such as notices given to Petitioner in connection with the alleged violation (mot. ex. B), contractual documents concerning the hearing officer who

Petitioner argues lacked the authority to hear and determine the violation (mot. ex. F), and a certificate from the United States Department of Justice, Federal Bureau of Prisons, to the effect that the hearing officer had completed "DHO (Contract) Training" (mot. ex. G). Respondent proceeds to argue the facts as the basis for a ruling on the motion. (Mot. 6-9.)

The Court therefore concludes that Respondent is actually arguing the merits of the petition. The factual matter set forth in support of the motion to dismiss actually serves as an answer in this proceeding. Review of the all the papers reveals that Petitioner does not dispute the facts except that he asserts that there was no evidence that a cell phone was found in his possession; however, it appears that he has inconsistently admitted using a cell phone in violation of the rules. Petitioner's overarching argument, however, is that the evidence of his having engaged in some apparently unauthorized use of a telephone in prison was insufficient to constitute a violation of Prohibited Act Code (PAC) § 108, which defines the prohibited act of possessing, manufacturing, or introducing a hazardous tool to further a criminal activity, because a telephone is not a tool or weapon; further, there was no evidence that using the phone was for a criminal activity pursuant to Program Statement 5270.07. (Pet. 3-6, Opp. 3-6.)

A court has inherent power to control its docket and the disposition of its cases with economy of time and effort for both the court and the parties. Landis v. North American Co., 299 U.S. 248, 254-255 (1936); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). Given the positions of the parties, the Court

concludes that it would be wasteful of the resources of the parties and the Court simply to consider the motion to dismiss on narrow, strictly procedural grounds and then require Respondent to file an answer. It does not appear that any additional factual matter would be pertinent to the claims before the Court or that the parties desire to bring any further facts before the Court. Respondent's position is essentially that on the basis of all the evidence in the record, Petitioner received all the process that was due; Petitioner's position is that on the basis of all the evidence in the record, Petitioner's right to due process was violated by an absence of evidence to support the disciplinary finding, and the hearing officer lacked the authority to determine the violation. It does not appear that Petitioner will suffer any prejudice if the Court proceeds to determine the merits of the petition. Petitioner had a full opportunity to support his contentions in the petition and to argue the legal points in his opposition to the motion to dismiss. There does not appear to be any material dispute as to the pertinent facts; rather, the parties disagree on the legal significance of the facts.

Historically, only two types of dispositions were available for habeas petitions: either summary dismissal, or a decision after a full hearing. Hillery v. Pulley, 533 F.Supp. 1189, 1196 (D.C.Cal. 1982). However, Habeas Rule 7 permits expansion of the record by the submitting additional materials relevant to the merits of the petition, including documentary exhibits and evidentiary documents such as sworn answers to interrogatories

and affidavits. Habeas Rule 7(a), (b).[2] One purpose of expanding the record is to enable a judge to dispose of some habeas petitions that are not dismissed on the pleadings, but to do so without the time and expense required for an evidentiary hearing. Habeas Rule 7 advisory committee's note.

In this case, the Court's order directing the filing of a response resulted in the expansion of the record which, in view of the absence of a material issue of fact concerning the authenticity or contents of that record, permits consideration of the merits of the petition without delay.

Accordingly, the Court DEEMS the motion to dismiss to be an answer that responds to the petition. The Court will consider Petitioner's opposition as well as the petition.

The Court will proceed to determine the merits of the petition. It does not appear that any prejudice would result to Petitioner from proceeding to the merits.

II. Factual Summary

According to the incident report of employee K. Sy, which was dated and delivered to Petitioner on May 5, 2009, Officer M. Maness found a silver "Pantech" Cingular cell phone on another inmate, Jose Hernandez, on April 29, 2009. (Mot. Ex. A 2.) The telephone displayed a specified telephone number in its message inbox which investigation of the inmate telephone system (ITS) at TCI revealed was on Petitioner's telephone list.

[2] The party against whom the additional materials are offered must have an opportunity to admit or deny their correctness. Habeas Rule 7(c). All materials to be included in the record must be submitted to the party against whom they are to be offered. Habeas Rule 7 advisory committee's note.

Sergeant J. Ford investigated the incident. He noted that in an interview, Petitioner admitted using the cell phone several times. (Id. at 3.) During the investigation Petitioner stated that he used the cell phone only to call his wife, and he had put $25.00 on the telephone out of appreciation. (Id. at 3.) Attached to the report were photographs of the telephone and Petitioner's approved call list and telephone list. (Id.) Sy had determined that Petitioner had used a cellular telephone in violation of TCI rules and regulations. (Id. at 2.) On May 5, 2009, Sergeant Ford concluded that the incident report was correctly written, and he forwarded it to the unit discipline committee (UDC) for further action. (Id. at 3.)

The portion of the report concerning committee action reflected that Petitioner commented to the committee that the telephone was not his, and he only used it a couple of times. (Mot. Ex. A 2.) On May 7, 2009, the case was referred to the disciplinary hearing officer (DHO), and it was recommended that Petitioner lose good conduct time and receive disciplinary segregation. (Id.)

On May 7, 2010, Petitioner received notice of his rights to written notice of the charges twenty-four hours before appearing before the DHO; a full-time staff member to represent him before the DHO; call witnesses or present written statements of unavailable witnesses and documentary evidence provided institutional safety would not jeopardized; present a statement or remain silent; be present during the hearing except during deliberation or when institutional safety would be jeopardized; advice of the DHO's decision, the facts supporting the decision

except where institutional safety would be jeopardized, and the DHO's disposition in writing; and appeal the decision to the regional director after notice of the decision. (Mot. Ex. B at 8.) Petitioner was advised that the alleged violation was possession, manufacture, or introduction of a hazardous tool (cell phone) on April 29, 2009. (Id. at 9.) He did not desire a representative or witnesses. (Id. at 9.)

At the hearing held on May 12, 2009, Petitioner chose to remain silent; no witnesses were called, and the DHO considered the incident report and investigation, the photographic evidence, unspecified confidential information, and the approved telephone list for Petitioner. (Mot. ex. C 11-12.) The report of the DHO shows that he found that Petitioner had committed the act as charged in violation of PAC § 108 based on Sy's report indicating the discovery of the cellular telephone in the possession of another inmate, the recorded inbox message with a telephone number that was on Petitioner's telephone list, Petitioner's admission to using the phone several times, the photo of the recovered telephone and the approved telephone list, and an adverse inference drawn from Petitioner's silence and the absence of any evidence disputing the charges. (Id. at 12.) The DHO concluded that the "greater weight of the evidence" supported the finding that Petitioner committed the prohibited act, and he sanctioned Petitioner with the loss of twenty (20) days of good conduct time and six (6) months of telephone use. (Id.) The reason for the action was stated by DHO Logan on May 20, 2009, as follows:

These sanctions are imposed in order to stress the

> seriousness of your actions and to punish you. A cell phone can be used to arrange an escape or an escape attempt and it can be connected to the threat that illicit drugs pose to institutional security due to the inability to monitor phone calls. These pose a serious threat to the security of the institution. The sanctions imposed are to cause you to refrain from committing this, or any other prohibited act in the future. It should be noted that the amount of good conduct time was reduced due to your cooperation with the investigation.

(Id.) The findings were delivered to Petitioner on May 29, 2009. (Id.)

Petitioner appealed the findings, arguing that there was no evidence that his acts of using a cellular phone furthered a criminal activity, his sanction was excessive, and the DHO ignored unambiguous program statements, including BOP PS § 5270.07, to the contrary. (Mot. ex. D 15.) The regional administrative remedy appeal response from James E. Bunnell, Administrator of the Privatization Management Branch, dated June 25, 2009, was that the proceedings had substantially complied with Program Statement 5270.07, Inmate Discipline and Special Housing Units, because Petitioner had received notice of his rights and was allowed to make a statement, Petitioner had remained silent, and the DHO also had considered the reporting officer's written statement. (Id. at 16.) It was stated that Petitioner admitted to using the cell phone several times and that he was found with the cell phone in his possession. (Id. at 16.) Further, due process was satisfied because he received written notice of the charges, a copy of the incident report, and a hearing a week later. (Id.)

Petitioner appealed to the central office, noting the absence of evidence that he had been found in possession of the

telephone and arguing that there was no evidence of connection to a criminal activity. (Mot. ex. E at 18.) On November 3, 2009, Harrell Watts, Administrator of National Inmate Appeals, denied the appeal because Petitioner received procedural due process, he did not provide evidence of any due process violation, and the DHO's decision was based on the greater weight of the evidence, including finding a cell phone on Petitioner's person and a telephone number in it from his approved telephone list, and Petitioner's admission to using the cell phone. (Id. at 20.)

III. Legal Standards

Title 28 U.S.C. § 2241 provides that writs of habeas corpus may be granted by a district court within its jurisdiction only to a prisoner whose custody is within enumerated categories, including but not limited to custody under the authority of the United States and custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241(a), (c)(1), (3).

Procedural due process of law requires that where the state has made good time subject to forfeiture only for serious misbehavior, then prisoners subject to a loss of good-time credits must be given advance written notice of the claimed violation, a right to call witnesses and present documentary evidence where it would not be unduly hazardous to institutional safety or correctional goals, and a written statement of the finder of fact as to the evidence relied upon and the reasons for disciplinary action taken. Wolff v. McDonnell, 418 U.S. 539, 563-64 (1974). Confrontation, cross-examination, and counsel are not required. Wolff, 418 U.S. at 568-70.

Further, where good-time credits are a protected liberty interest, the decision to revoke credits must be supported by some evidence in the record. Superintendent v. Hill, 472 U.S. 445, 454 (1985). The Court in Hill stated:

> We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if "there was some evidence from which the conclusion of the administrative tribunal could be deduced...." United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S., at 106, 47 S.Ct., at 304. Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. See ibid.; United States ex rel. Tisi v. Tod, 264 U.S. 131, 133-134, 44 S.Ct. 260, 260-261, 68 L.Ed. 590 (1924); Willis v. Ciccone, 506 F.2d 1011, 1018 (CA8 1974).

Superintendent v. Hill, 472 U.S. at 455-56. The Constitution does not require that the evidence logically preclude any conclusion other than the conclusion reached by the disciplinary board; rather, there need only be some evidence in order to ensure that there was some basis in fact for the decision. Superintendent v. Hill, 472 U.S. at 457.

IV. Analysis

Preliminarily, the Court notes that although Petitioner does not claim that the procedures followed were constitutionally flawed, the Court notes the adequacy and timeliness of the notice given to Petitioner, the sufficiency of the opportunity to testify or present evidence, and the adequacy of the statement of the pertinent findings and evidence.

A. Some Evidence to Support the Disciplinary Finding

At all times pertinent to the petition, 28 C.F.R. § 541.13 has provided that prohibited acts of the greatest severity include a violation of Prohibited Act Code § 108, which is described as follows:

> Possession, manufacture, or introduction of a hazardous tool (Tools 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, tab. 3.

Here, the record contains some evidence supporting the disciplinary findings, including Petitioner's multiple admissions that he had used the cell phone to make calls, the fact that the cell phone's inbox message system contained a telephone number that was on Petitioner's approved call number list, Petitioner's admission that he had contributed money for use of the phone, and the photographs of the telephone and related evidence.

Petitioner argues that there was no evidence of his possession of the telephone, but only of his having used the telephone. Petitioner cites Wallace v. Nash, 311 F.3d 140, 145 (2nd Cir. 2002), which involved a violation of PAC § 104, possession of a weapon. There, the code required possession of a weapon, including a "gun, firearm, weapon, sharpened instrument, knife, dangerous chemical, explosive, or any ammunition." The court concluded by traditional processes of construction that the word "weapon" did not include a pool cue. 311 F.3d at 143-44.

The court in Wallace also concluded that "possession" of the weapon did not encompass "use," and the two were not interchangeable. The court reasoned that in view of the separate

sections making each act a violation, and because of the limitations on the items that could be considered weapons in the possession provision, possession of an article that could be used as a weapon was not tantamount to possession of a weapon.

Here, the item with respect to which possession was prohibited was the telephone itself, not any other thing being used as a telephone. Because it was the identity of the telephone itself as a tool for escape that made the offense as serious as it was, there was little to differentiate use of a phone on the one hand, and possession on the other, with respect to the perceived social harm of danger to institutional security. It is a reasonable inference from the evidence of Petitioner's admission of having used the telephone that he controlled or possessed the telephone at the time he used it. The fact that Petitioner admitted having paid to use the telephone strengthens the inference that Petitioner had control over the instrument. The Court concludes that because of the different code provision and evidence in the present case, this case is not analogous to Wallace v. Nash.

Petitioner also cites to Gamble v. Calbone, 375 F.3d 1021 (10th Cir. 2004), in which it was found that an intention to obtain fees for records and transcripts was reasonable, negated an intention to defraud or cheat, and did not constitute some evidence of an intent to defraud. Again, neither the code violation involved in Gamble nor the facts are similar to the situation presented by the present case, in which no specific intent was required for responsibility for the prohibited acts.

The Court is mindful that the decisions of administrators

Bunnell and Watts contained erroneous references to Petitioner's having been found with the cell phone in his possession. (Mot. ex. D 16-20.) The evidence was that the cell phone was found in another inmate's possession; thus, the administrators could not validly have relied on evidence that Petitioner was found in possession of the cell phone. However, this mistake concerning the evidence did not infect the initial finding.

Further, it did not change the result of the analysis at the later stages of the disciplinary proceedings. Even if no one ever observed Petitioner personally possessing the telephone, the record nevertheless contains some independent evidence, which was relied on by the administrators during the appeal, to support the finding, namely, the photographic evidence of the telephone equipment and numbers, Petitioner's repeated admissions that he had used the telephone more than once, and the fact that the telephone contained a number from Petitioner's approved call list. It is not necessary that a prisoner be the sole person with access to a telephone in order for responsibility for the code violation to be established. See, Flannagan v. Tamez, 2009 WL 649572, *2-3 (N. D. Tex. March 12, 2009) (finding that sufficient evidence of constructive possession was present to support a finding of violating § 108 by possessing a cellular telephone where the inmate had knowing ownership, dominion, or control over the contraband or over the premises in which the contraband was located), aff'd., Flannagan v. Tamez, 2010 WL 759159 (5th Cir. March 5, 2010); Ford v. Fondren, 2009 WL 943851, *5 (D. Minn. April 6, 2009) (holding that a violation of § 108 by possessing a telephone was sufficiently supported by some

evidence where the telephone was located at the inmate's work site, the inmate attempted to destroy the telephone, and the inmate admitted that he picked up the telephone and was in the area of the telephone).

Considering the entirety of the evidence and the findings in question, the Court concludes that Petitioner has not demonstrated that he was prejudiced by the erroneous statement concerning the telephone having been found in his possession. Further, the record of the disciplinary hearing contained some evidence to support the finding of possession of the telephone that was independent of the erroneous statement that Petitioner had been observed in possession of the telephone, and that was relied upon not only by the hearing officer but also by the staff participating in the administrative review process.

Petitioner argues that the evidence was insufficient because there was no evidence connecting his use of the telephone to criminal activity or to the promotion of an escape. However, the prohibited act which Petitioner was charged with having committed did not expressly require that the possession of the tool be connected to criminal activity; rather, it required only the conduct of possession, manufacture, or introduction of a hazardous tool. Further, of the types of hazardous tools specified, one category was tools "most likely to be used in an escape or escape attempt." 28 C.F.R. § 541.13, tab. 3, § 108. As an instrument of communication, the telephone necessarily constitutes a hazardous tool with respect to the security of the institution.

The Court notes that there is a separate section in the

listing of violations of the greatest severity that expressly proscribes the "[u]se of the telephone to further criminal activity." 28 C.F.R. § 541.13, tab. 3, § 197. Further, in the less serious categories, there are additional sections proscribing the use of the telephone for abuses other than criminal activity. See, § 297 (giving examples of the possible abuses other than criminal activity, such as circumventing telephone monitoring procedures and possession and/or use of another inmate's PIN number, third-party calling and billing, conference calling, talking in code, and using credit card numbers to place telephone calls); § 397 (listing the use of the telephone for abuses other than criminal activity, such as conference calling, possession and/or use of another inmates' PIN number, three-way calling, and providing false information for preparation of a telephone list). Id. Section 497 in the low moderate category proscribes use of the telephone for other abuses besides criminal activity, such as exceeding the fifteen-minute time limit for telephone calls, using the telephone in an unauthorized area, and placing an unauthorized individual on the telephone list.

It thus appears that institutional staff had several options with respect to selection of a charge, and that the offense with which Petitioner was charged did not expressly require that the telephone be used to further criminal activity. Therefore, the absence of a finding of use to further criminal activity and of evidence sufficient to demonstrate such use did not violate Petitioner's rights because the code violation with which Petitioner was charged did not require such evidence.

Petitioner points to a Change Notice from October 11, 2000, regarding updating the Bureau of Prison's Program Statement 5270.07, concerning inmate discipline and special housing units, in which the following was stated:

> 2. **SUMMARY OF CHANGES.** This Change Notice directs the creation of a Greatest Severity Level prohibited act (100 level offense code) for use of the telephone to further any criminal activity, the creation of a High Severity Level prohibited act (200 level offense code) for non-criminal telephone abuses, the creation of a Moderate Severity Level prohibited act (300 level offense code) for non-criminal telephone abuses, and the creation of a Low Moderate prohibited act (400 level offense code) for non-criminal telephone abuses.

Further, the change notice established the new prohibited acts offense codes of 197, 297, 397, and 497. Id.

Petitioner argues that based on this program statement, the prison staff lacked the discretion to impose punishment for an act of the greatest severity level absent a finding of furtherance of any criminal activity.

However, a program statement is an internal agency guideline that is not subject to the requirements of the APA such as public notice and comment. Reno v. Koray, 515 U.S. 50, 61 (1995). It is established in this circuit that the Administrative Procedure Act (APA) does not apply to prison discipline proceedings. Clardy v. Levi, 545 F.2d 1241, 1246 (9th Cir. 1976). Thus, program statements, policy statements, agency manuals, or enforcement guidelines lack the force of law and do not warrant Chevron-style deference. Christensen v. Harris County, 529 U.S. 576, 587 (2000). Such statements may be considered persuasive authority, but they do not impose judicially enforceable duties. Warre v. Commissioner of Social Sec. Admin., 439 F.3d 1001, 1005

(9th Cir. 2006); Lowry v. Barnhart, 329 F.3d 1019, 1023 (9th Cir. 2003).

The language in the program statement pertinent to this case thus does not provide a basis for habeas relief.

Further, it is clear that the administrators of the prison considered the conduct of the Petitioner in this case to have been extremely serious because of the threat to institutional security inherent in Petitioner's possession of the telephone. As the DHO stated, a cell phone can be used to arrange an escape or escape attempt or to bring illicit drugs into the institution. This reality was appropriately considered by the administrators of the prison, where the discipline process is not analogous to criminal charges:

> The requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action. E.g., Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily. 418 U.S., at 561, 94 S.Ct., at 2977. This interest, however, must be accommodated in the distinctive setting of a prison, where disciplinary proceedings "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." Ibid. Consequently, in identifying the safeguards required by due process, the Court has recognized the legitimate institutional needs of assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation. See, e.g., Ponte v. Real, 471 U.S. 491, 105 S.Ct. 2192, 85 L.Ed.2d 553 (1985); Baxter v. Palmigiano, 425 U.S. 308, 321-322, 96 S.Ct. 1551, 1559, 47 L.Ed.2d 810 (1976); Wolff v. McDonnell, supra, 418 U.S., at 562-563, 94 S.Ct., at 2977-2978.

Superintendent v. Hill, 472 U.S. 454-55. Here, the determination

was based on some evidence, and the prison administrator articulated a legitimate, institutional interest in security in determining the appropriate sanction for Petitioner's conduct of possessing a cellular telephone. Petitioner has not established that he was deprived of due process of law or that the prison officials' disciplinary findings were arbitrary or unsupported.

B. Authority of the Hearing Officer

Petitioner argues that the disciplinary hearing officer, DHO C. Logan (mot. ex. C 13), was not an employee of the BOP, and thus he was not authorized to impose disciplinary sanctions. Petitioner asserts that TCI is operated by a private corporation, Management Training Corporation (MTC), and that TCI merely has a contract with the BOP to house federal inmates. Petitioner relies on 28 C.F.R. § 500.1(b), which contains definitions pertinent to the BOP and Department of Justice (DOJ), and which defines "Staff" as any employee of the Bureau of Prisons or Federal Prison Industries, Inc. 28 C.F.R. § 500.1(b).

The Court has reviewed the regulations and concludes that they do not exclude delegation of the authority to discipline to contractor employees. Regulations define the purpose and scope of inmate discipline and special housing units. The regulations apply to inmates whose behavior is not in compliance with BOP rules, and to "all persons committed to the care, custody, and control (direct or constructive) of the Bureau of Prisons." 28 C.F.R. § 541.10(a). Only "institution staff" may take disciplinary action within Bureau rules and institution guidelines. 28 C.F.R. § 541.10(b)(1), (2). However, regulations require the warden to delegate to institution staff members the

authority to hold the initial hearing. 28 C.F.R. § 541.15. A discipline hearing officer (DHO) is defined by regulation as a one-person, independent, discipline hearing officer who is responsible for conducting institution discipline hearings and who imposes appropriate sanctions for incidents of inmate misconduct referred for disposition following the hearing before the unit discipline committee (UDC). 28 C.F.R. § 541.2. Each BOP institution shall have an independent DHO who must be trained and certified as a DHO and meet the other requirements. 28 C.F.R. § 541.16. The inmate may appeal a DHO's decision to the regional director for the region where the inmate is currently located. 28 U.S.C. § 542(d)(2).

The pertinent statutory framework is also consistent with the delegation of authority to institution staff. Title 18 U.S.C. § 4001(b)(2) provides that the Attorney General may establish and conduct industries, farms, and other activities, classify the inmates, and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation. Title 18 U.S.C. § 4041 provides that the Attorney General may appoint not only a director who is in charge of the BOP and who serves directly under the Attorney General, but also such additional officers and employees as the Attorney General deems necessary. Title 18 U.S.C. § 4042(a)(3) provides in pertinent part that the BOP shall have charge of the management and regulation of all federal penal and correctional institutions and provide for the discipline of all persons convicted of offenses against the United States.

From these broad, statutory grants of authority to the

Attorney General, it is clear that the Attorney General has been given by Congress the authority to appoint a director of the BOP and to delegate authority to discipline inmates to additional officers and employees. That this authority has been delegated to DHO Logan is shown by the statement of work contract submitted by Respondent as pertaining to Logan's employment. (Mot., ex. F.) Petitioner does not dispute the authenticity of this document. The provisions constitute the contract performance requirements for the "management and operation of the government owned-contractor-operated correctional institution in Taft, California." (Mot. ex. F 3.) The contractor is required to ensure that the facility is operated consistently with the BOP's mission and in compliance with the contract, the Constitution, and all applicable law and regulations. (Id. at 4, 10.) The BOP reserves the right to have staff on site to monitor contract performance. (Id. at 10.) Employment suitability is determined by using the BOP's guidelines and is subject to the approval of the BOP; authority to approve all contractor staff who work with inmates, to investigate alleged misconduct, and to withdraw final employment approval authority for any employee pursuant to specified standards, is retained by the BOP. (Id. at 15-16, 21.) All credentials are required to be kept current and maintained for the duration of the person's contract performance. (Id. at 18.)

The agreement expressly provides for a contractor employee to be a DHO. The contract describes a DHO as a "government trained and certified contractor employee responsible for conducting disciplinary hearings." (Id. at 6.) It requires the

government to "provide specialized training to assist the contractor in performing some specialized requirements," including discipline training for twenty-four (24) hours and DHO training for twenty-four (24) hours, which is "mandatory as described in Section J of the contract." (Id. at 22.) Respondent has also submitted what purports to be a certification from the United States Department of Justice, Federal Bureau of Prisons, Management and Speciality Training Center, Aurora, Colorado, of Curtis Logan's DHO (Contract) Training dated July 1, 2004. (Mot. ex. G.) Petitioner does not dispute the authenticity of the document.

The Court concludes that the authority to perform the duties of a DHO was delegated to contractor employee Logan.

Petitioner relies on 18 U.S.C. § 4013. Section 4013(a) authorizes the Attorney General to make payments from funds appropriated for federal prisoner detention for specified necessities of life for persons held in custody of a United States marshal pursuant to federal law under agreements with state or local units of government or contracts with private entities. Section 4013(c) provides requirements for private entities and procedures to be followed to effectuate the designation of districts that need additional support from private detention entities. Although the provision refers to "non-Federal" institutions, the section does not prohibit delegation of BOP functions, let alone delegation to staff at institutions like Tehachapi that are owned by the government and run by a private entity subject to extensive oversight by the BOP. (Mot. ex. F 3.)

Petitioner relies on United States v. Cardona, 266 F.Supp.2d 558, 559-62 (W.D.Tex. 2003), in which it was held that for purposes of federal criminal charges of possession of a prohibited object as an inmate in a federal prison and attempting to provide it to a fellow inmate in violation of 18 U.S.C. § 1791(a)(1) and (2), an inmate of a correctional facility that was privately owned by a corporation that subcontracted the facility to a county, which in turn contracted with the United States to house federal inmates along with local prisoners, was not an inmate of a federal prison because the facility was not a federal correctional, detention, or penal facility within the meaning of 18 U.S.C. § 1791(d)(4). The court reasoned that the mere presence of federal prisoners did not make the facility federal where control over the daily operations and management of the institution and the custody and care of federal prisoners was not in the Attorney General as set forth in 18 U.S.C. § 4001(b)(1). The court employed traditional rules of statutory construction and sought to avoid unconstitutional vagueness. Petitioner similarly relies on United States v. Rios-Flores, 318 F.Supp.2d 452 (W.D.Tex. 2003), holding that the same institution was not a federal prison within the scope of 18 U.S.C. § 1791(d)(4).

The pertinent circumstances of the institution in the present case differ from that involved in Cardona and Rios-Flores. Here, the institution is federally owned, and the government retains key elements of control over the employees and the daily operations of the institution pursuant to the contractual provisions submitted to the Court. Further, it is noted that the court in Rios-Flores expressly declined to take a

position on whether a privately run prison that contracted directly with the United States would be considered a federal penal facility. 318 F.Supp.2d at 453 n. 3.

In summary, the Court concludes that the authority to discipline inmates at TCI was delegated to DHO Logan.

V. Recommendation

The Court concludes that Petitioner has not demonstrated that the disciplinary proceedings and findings were unauthorized under federal law or violated his right to due process of law. Petitioner has not shown that he is entitled to relief pursuant to § 2241.

Accordingly, it is RECOMMENDED that the petition for writ of habeas corpus be DENIED.

These findings and recommendations are submitted to the United States District Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Replies to the objections shall be served and filed within fourteen (14) days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to

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appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: June 7, 2010

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE