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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KEENAN T. HOLMES,)	1:12cv01769 LJO DLB PC
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS
)	REGARDING DISMISSAL OF ACTION
vs.)	WITHOUT PREJUDICE
)	
ROBERT E. MCFADDEN, et al.,)	TWENTY DAY OBJECTION DEADLINE
)	
Defendants.)	

Plaintiff Keenan T. Holmes (“Plaintiff”) is a federal prisoner proceeding pro se and in forma pauperis. He filed this civil action on October 30, 2012, pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which provides a remedy for violation of civil rights by federal actors. He names Bureau of Prison’s (“BOP”) Western Regional Director Robert McFadden, USP Atwater Warden Paul Coppenhaver, USP Atwater Hearing Officer D. Lorance and USP Atwater Case Manager C. Wolff-Would as Defendants.

A. LEGAL STANDARD

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are

1 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
2 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
3 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
4 paid, the court shall dismiss the case at any time if the court determines that . . . the action or
5 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C.
6 § 1915(e)(2)(B)(ii).

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8 A complaint must contain “a short and plain statement of the claim showing that the
9 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
10 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
11 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing
12 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient
13 factual matter, accepted as true, to ‘state a claim that is plausible on its face.’” Id. (quoting
14 Twombly, 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are
15 not. Id.

16 Bivens actions and actions under 42 U.S.C. § 1983 “are identical save for the
17 replacement of a state actor under § 1983 by a federal actor under Bivens.” Van Strum v. Lawn,
18 940 F.2d 406, 409 (9th Cir.1991). Under Bivens, a plaintiff may sue a federal officer in his or her
19 individual capacity for damages for violating the plaintiff’s constitutional rights. See Bivens,
20 403 U.S. at 397. To state a claim a plaintiff must allege: (1) that a right secured by the
21 Constitution of the United States was violated, and (2) that the alleged violation was committed
22 by a federal actor.

23
24 Plaintiff must also demonstrate that each defendant personally participated in the
25 deprivation of his rights. Id. at 1949. This requires the presentation of factual allegations
26 sufficient to state a plausible claim for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret
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1 Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of
2 meeting this plausibility standard. Iqbal, 129 S.Ct. at 1949-50; Moss, 572 F.3d at 969.

3 **B. SUMMARY OF PLAINTIFF’S ALLEGATIONS**

4 Plaintiff is incarcerated at USP Lewisburg, in Lewisburg, Pennsylvania. The events at
5 issue occurred while Plaintiff was housed at USP Atwater.

6 On April 4, 2012, at or about 8:30 a.m., Plaintiff was placed in the Special Housing Unit
7 (“SHU”) for possession of a weapon. At 6:20 p.m. that evening, Plaintiff received a copy of the
8 incident report related to the alleged offense. Exh. C.

9 On April 5, 2012, at approximately 9:30 a.m., Plaintiff was escorted to a disciplinary
10 hearing conducted by Discipline Hearing Officer (“DHO”) Defendant Lorance. Defendant
11 Lorance asked why Plaintiff was in the SHU, and Plaintiff responded, “I have a 104 shot.”
12 Defendant Lorance then asked Plaintiff if the weapon was his, and Plaintiff stated, “No
13 comment.” Defendant Lorance asked Plaintiff how he would plead, and Plaintiff stated that he
14 had no plea. Defendant Lorance told Plaintiff that she could tell him what sanctions she would
15 impose, explaining that if she found him guilty, he would receive a term in disciplinary
16 segregation and a loss of privileges and good time credit. Plaintiff alleges that the April 5, 2012,
17 hearing occurred less than 24 hours after he received notice of the alleged offense.¹ He contends
18 that Defendant Lorance found him guilty, and imposed sanctions, at a procedurally improper
19 hearing. He was also later approved for placement in the Special Management Unit (“SMU”).
20

21 Plaintiff also states that Defendant Lorance took these actions in the absence of any facts,
22 as the charging incident report had yet to be referred to Defendant Lorance by the Unit
23 Discipline Committee (“UDC”).² Plaintiff states that the incident report was not referred to the
24 DHO until 1:36 p.m. on April 5, 2012, almost an hour *after* the conclusion of the DHO hearing.
25

26 ¹ Plaintiff cites 28 C.F.R. § 541.8(c), which requires that notice of the charges be given at least 24 hours in advance
27 of the DHO hearing.

28 ² Plaintiff cites 28 C.F.R. § 541.8, which states that the DHO will only conduct a hearing on the incident report if
referred by the UDC.

1 At that time, Defendant Wolff-Would conducted Plaintiff's UDC hearing. When Defendant
2 Wolff-Would came to Plaintiff's cell, Plaintiff told her that he had already seen the DHO, and
3 Defendant Wolff-Would responded, "she (DHO) can't do that." Compl. 8. Defendant Wolff-
4 Would decided to go ahead with the UDC hearing and asked Plaintiff if he had any witnesses or
5 a staff representative. Plaintiff advised Defendant Wolff-Would that he had a staff representative
6 that he wanted, but Defendant Wolff-Would, "Since you've already been seen by the DHO, I'm
7 going to put down you have no witnesses or staff representative." Compl. 8. Plaintiff contends
8 that a staff representative would have helped him gather information to prove his lack of
9 knowledge as to what was placed in his pocket.
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11 Plaintiff also states that he did not waive his right to a preliminary hearing by the UDC,
12 as required by the BOP's Program Statement prior to any hearing by the DHO.³ Plaintiff argues
13 that the preliminary hearing would have allowed him to name and call witnesses and request a
14 staff representative, to provide a statement in his defense, to be advised of his rights before the
15 DHO and recommended sanctions, and to have the incident report referred to the DHO. Plaintiff
16 states that he did not receive a preliminary hearing until after the DHO hearing.
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18 Plaintiff further contends that Defendant Lorange covered up her mistakes by submitting
19 a fraudulent DHO report, which states that the hearing was conducted on April 6, 2012, at 9:00
20 a.m., and that Plaintiff admitted guilt. Exh. C. Plaintiff also attaches a Staff Signature Sheet
21 showing that for the week of April 1 through April 7, 2012, Defendant Lorange was a DHO only
22 on April 5, 2012, at 9:00 a.m. to 12:00 p.m. Exh. B.
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24 Upset with how the disciplinary hearings were handled, Plaintiff wrote a letter to
25 Defendant McFadden seeking assistance. Exh. D. Defendant McFadden did not take corrective
26 action.
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28 ³ 28 C.F.R. § 541.7 states that the UDC will review the incident report once the staff investigation is complete. A
prisoner is entitled to attend the UDC hearing, or an appearance may be waived.

1 Plaintiff also informed Defendant Coppenhaver of the issue, verbally and by letter, but he
2 failed to remedy the issue. Exh. E.

3 Finally, Plaintiff contends that Defendant Wolff-Would violated his due process rights
4 when she prepared a memo referring Plaintiff for placement in the SMU and failed to provide
5 Plaintiff with a copy. Exh. F. Plaintiff states that the referral he received cited only the
6 possession of weapon charge. However, at the July 5, 2012, hearing, Plaintiff was given a copy
7 of the Hearing Administrator's Report on Referral for Designation to a SMU, and it cites
8 possession of a dangerous weapon, possession of stolen property and assault. Exh. G. Plaintiff
9 states that he was denied the right to prepare a defense to the additional charges, which he had
10 never been charged with or found guilty of.
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12 Plaintiff received a loss of 41 days good-time credits and SMU confinement. He argues
13 that no evidence exists in the record which can support a finding of guilt.

14 Based on these facts, Plaintiff alleges the following violations of due process under the
15 Fifth Amendment: (1) denial of the right to call witnesses or name a staff representative; (2)
16 denial of the right to have the incident report referred by the UDC to the DHO prior to any
17 hearing by the DHO; (3) denial of the right to at least 24 hour notice prior to the DHO hearing;
18 (4) denial of the right to a preliminary hearing prior to the DHO hearing; (5) denial of the right to
19 be free of fraudulent statements and reports by the DHO; and (6) denial of the right to receive a
20 copy of the complete SMU referral.
21

22 As relief, Plaintiff seeks immediate release back to the general population, a reversal of
23 the DHO's finding of guilt and an award of punitive damages.

24 **C. DISCUSSION**

25 Plaintiff's allegations are related to a disciplinary hearing and the resulting penalties,
26 including a loss of good time credits. He alleges a denial of due process and requests that the
27 decision of the DHO be invalidated.
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1 In Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court held that “in order to
2 recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm
3 caused by actions whose unlawfulness would render a conviction or sentence invalid, a section
4 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal,
5 expunged by executive order, declared invalid by a state tribunal authorized to make such
6 determination, or called into question by a federal court's issuance of a writ of habeas corpus.”
7 Heck, 512 U.S. at 486-487. A civil rights damages claim challenging the legality of a conviction
8 or the length of confinement that has not been so invalidated is not cognizable. Heck, 512 U.S.
9 at 486-487; Cunningham v. Gates, 312 F.3d 1148, 1153 (9th Cir.2002), cert. denied, 538 U.S.
10 960 (2003).

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12 Relying on Heck, the Supreme Court held in Edwards v. Balisok, 520 U.S. 641, 648
13 (1997), that an inmate may not bring a civil rights claim challenging the validity of procedures
14 utilized during a prison disciplinary hearing that resulted in the deprivation of good conduct time
15 credits unless the disciplinary convictions leading to the loss of credits have been invalidated.
16 See Edwards, 520 U.S. at 643.

17 Here, a judgment in Plaintiff's favor would necessarily imply the invalidity of a
18 disciplinary conviction that resulted in the loss of good time credits. The sole remedy in federal
19 court for a prisoner seeking restoration of good time credits is a writ of habeas corpus. Edwards,
20 520 U.S. at 643; see also Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir.1989) (habeas corpus is
21 available pursuant to § 2241 for claims concerning denial of good time credits or subjection to
22 greater restrictions of liberty, such as disciplinary segregation, without due process of law).
23 Similarly, Plaintiff is not entitled to damages because the disciplinary finding has not been
24 invalidated. Heck, 512 U.S. at 486-487.
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1 Plaintiff's complaint therefore fails to state a claim for which relief may be granted. The
2 Court recommends dismissal, without prejudice. Plaintiff may refile this action as a petition for
3 writ of habeas corpus.

4 **D. FINDINGS AND RECOMMENDATIONS**

5 Accordingly, based on the above, it is HEREBY RECOMMENDED that Plaintiff's
6 action BE DISMISSED WITHOUT PREJUDICE for failure to state a claim for which relief may
7 be granted.

8
9 These Findings and Recommendations will be submitted to the United States District
10 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
11 twenty (20) after being served with these Findings and Recommendations, Plaintiff may file
12 written objections with the Court. Such a document should be captioned "Objections to
13 Magistrate Judge's Findings and Recommendations." The Court will then review the Magistrate
14 Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). Plaintiff is advised that failure to file
15 objections within the specified time may waive the right to appeal the Order of the District
16 Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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18 IT IS SO ORDERED.

19 Dated: April 30, 2013

20 /s/ Dennis L. Beck
21 UNITED STATES MAGISTRATE JUDGE
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