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

JUAN LUIS ARELLANO,
Petitioner,

v.

MICHAEL L. BENOVA, Administrator,
Respondent.

Case No. 1:13-cv-00558 AWI MJS (HC)
FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

Petitioner is a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Petitioner raises two claims challenging a disciplinary hearing in which he suffered a loss of good time credit. First, he asserts that the Disciplinary Hearing Officer ("DHO"), an employee of a privately-run correctional institution, did not have authority to discipline him. Second, he asserts that his right to due process was violated when discipline was imposed by the DHO since the DHO was not an independent and impartial decision-maker. (Pet. at 3, ECF No. 1.)

Petitioner filed his petition on April 18, 2013. Respondent filed an answer to the Petition on July 25, 2013. (Answer, ECF No. 16.) Petitioner filed a traverse to the answer on August 15, 2013. (Traverse, ECF No. 18.)

1 **I. FACTUAL BACKGROUND**

2 Petitioner is serving an aggregated 158-month term of imprisonment for various
3 offenses involving the possession and distribution of methamphetamine. (See Decl. of
4 Jennifer Vickers ("Vickers Decl.") ¶ 2, Attach. 1.) On March 14, 2008, Petitioner arrived
5 at Taft Correctional Institution ("TCI") in Taft, California, for service of a federal term of
6 imprisonment. (Id. ¶ 3, Attach. 3.) TCI is a "federal facility operated by a private
7 company."¹ Since that time, Petitioner has received six incident reports resulting in the
8 loss of 147 days of good conduct time. (Id. ¶¶ 4-9, Attachs. 4, 5, 8, 9, 11, 12, 14, 15, 17,
9 18, 20, 21.)

10 Specifically, on August 28, 2010, Petitioner was found with a black cord split with
11 two exposed wires attached to a headphone jack and a memory chip. For the wires and
12 headphone jack, Petitioner was charged with a violation for possession of something not
13 authorized. (Id. ¶ 4, Attachs. 4-7.) On October 7, 2010, a disciplinary hearing was held
14 and Petitioner was found to have committed the prohibited act and was sanctioned a loss
15 of 13 days good conduct time. (Id.) For the memory card, Petitioner was charged with
16 possession of a hazardous tool. (Id. ¶ 5, Attachs. 8-10.) On October 14, 2010, a
17 disciplinary hearing was held and Petitioner was found to have committed the prohibited
18 act and was sanctioned a loss of 40 days good conduct time. (Id.)

19 On August 31, 2010, Petitioner was found with a piece of paper with a bank
20 account number and admitted to gambling. He was charged with giving money or a
21 thing of value to another inmate or person without staff authorization. (Id. ¶ 6, Attachs.
22 11-13.) On October 7, 2010, a disciplinary hearing was held and Petitioner was found to
23 have committed the prohibited act and was sanctioned a loss of 13 days good conduct
24 time. (Id.)

25 On September 9, 2010, Petitioner received an incident report for use of the
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27 ¹ See Minneci v. Pollard, 132 S. Ct. 617, 620 (2012). Taft Correctional Institution is a private prison
28 currently owned by Management and Training Corporation which contracts with the Bureau of Prisons to
house federal inmates.

1 telephone for abuses other than criminal activity. (Id. ¶ 7, Attachs. 14-16.) On October 7,
2 2010, a disciplinary hearing was held and Petitioner was found to have committed the
3 prohibited act and was sanctioned a loss of 27 days good conduct time. (Id.)

4 On December 23, 2010, Petitioner was overheard engaging in a three-way
5 telephone conversation and received an incident report for use of the telephone for
6 abuses other than criminal activity. (Id. ¶ 8, Attachs. 17-19.) On January 27, 2011, a
7 disciplinary hearing was held and Petitioner was found to have committed the prohibited
8 act and was sanctioned a loss of 13 days good conduct time. (Id.)

9 Finally, on May 14, 2012, Petitioner admitted that he had possessed a cellphone
10 and he was given an incident report for possession of a hazardous tool. (Id. ¶ 9, Attachs.
11 20-22.) On June 14, 2012, a disciplinary hearing was held and Petitioner was found to
12 have committed the prohibited act and was sanctioned a loss of 41 days good conduct
13 time. (Id.)

14 In the case of each of the disciplinary hearings, the DHO's report and findings
15 were reviewed by Bureau of Prisons ("BOP") staff, the findings were certified, and the
16 recommended sanctions were imposed. Petitioner challenges the results of each hearing
17 by claiming that the DHO was not authorized to impose sanctions because regulations
18 governing disciplinary hearings authorize only BOP staff to sanction inmates. He also
19 claims that the DHO was not impartial.

20 **II. STANDARD OF REVIEW**

21 Writ of habeas corpus relief extends to a person in custody under the authority of
22 the United States. See 28 U.S.C. § 2241. Writ of habeas corpus relief is available if a
23 federal prisoner can show he is "in custody in violation of the Constitution or laws or
24 treaties of the United States." 28 U.S.C. § 2241(c)(3). Petitioner's claims are proper
25 under 28 U.S.C. § 2241 and not 28 U.S.C. § 2255 because they concern the manner,
26 location, or conditions of the execution of Petitioner's sentence and not the fact of
27 Petitioner's conviction or sentence. Tucker v. Carlson, 925 F.2d 330, 331 (9th Cir.1990)
28 (stating that a challenge to the execution of a sentence is "maintainable only in a petition

1 for habeas corpus filed pursuant to 28 U.S.C. § 2241"); Montano-Figueroa v. Crabtree,
2 162 F.3d 548, 549 (9th Cir. 1998).

3 Further, Petitioner is challenging the execution of his sentence at TCI in Taft,
4 California, which is within the Fresno Division of the Eastern District of California;
5 therefore, the Court has jurisdiction over this petition. See Brown v. United States, 610
6 F.2d 672, 677 (9th Cir. 1990).

7 **II. REVIEW OF THE PETITION**

8 **A. Exhaustion of Administrative Remedies**

9 "As a prudential matter, courts require that habeas petitioners exhaust all
10 available judicial and administrative remedies before seeking relief under § 2241."²
11 Ward v. Chavez, 678 F.3d 1042, 1045-1046 (9th Cir. 2012). The exhaustion requirement
12 in § 2241 cases is not required by statute nor a "jurisdictional" prerequisite. It is a
13 prudential limit on jurisdiction and can be waived "if pursuing those [administrative]
14 remedies would be futile." Id.; Castro-Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir.
15 2001), abrogated on other grounds, Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006);
16 Fraley v. U.S. Bureau of Prisons, 1 F.3d 924, 925 (9th Cir. 1993).

17 Petitioner did not appeal and exhaust his administrative remedies regarding the
18 disciplinary findings. Petitioner argues, however, that any administrative appeal would
19 have been futile since the outcome was based on a BOP policy. (Traverse at 3.) A
20 March 30, 2007, BOP memorandum regarding inmate discipline at private operated
21 facilities authorized private prison employees to serve as DHOs and discipline inmates.
22 (Decl. of Jennifer Vickers ("Vickers Decl.") ¶ 4, ex. 6.) Administrative appeals presenting
23 a challenge to the authority of an employee of a private prison have been denied based
24 on the 2007 memorandum. See e.g., Garcia v. Benov, E.D. Cal. Case No. 1:13-cv-
25 00550-LJO-JLT, ECF No. 13-1 at 40-42; Torres-Sainz v. Benov, E.D. Cal. Case No.
26 1:13-cv-00896-LJO-SKO, ECF No. 14-1 at 32-36; Kasirem v. Benov, E.D. Cal. Case No.

27 _____
28 ² By contrast, 28 U.S.C. § 2254, which governs habeas corpus petitions filed by petitioners in state
custody, specifically requires that petitioners exhaust other avenues of relief. See 28 U.S.C. § 2254(b)(1).

1 1:13-cv-01026-LJO-MJS, ECF No. 13-1 at 35-38.³ Because any attempt to exhaust
2 administrative remedies would be denied based on the BOP memorandum authorizing
3 private prisons to conduct disciplinary proceedings, exhaustion is futile. Ward v. Chavez,
4 678 F.3d at 1045-1046 (citing, as examples, Fraley, 1 F.3d at 925; Sours v. Chavez, No.
5 2:08-cv-01903-SRB, Dkt. No. 22, 2009 U.S. Dist. LEXIS 76743 at *2 (D. Ariz. June 17,
6 2009)); see also McCarthy v. Madigan, 503 U.S. 140, 148 (1992), (superseded by
7 statute) (Exhaustion not required where the administrative body is shown to be biased or
8 has otherwise predetermined the issue before it.). In light of the futility of pursuing
9 administrative remedies, the exhaustion requirement is waived, and the Court shall
10 review the merits of the petition.

11 **B. Claim One – Lack of Authority of DHO**

12 **1. Authority Under the Prior Version of the Regulations**

13 Petitioner, in his first claim, asserts that the DHO lacked authority to discipline
14 Petitioner as the DHO was not an employee of the BOP as required by applicable
15 Federal Regulations. As described above, Petitioner was found to have committed six
16 disciplinary infractions while at Taft Correctional Institution. Of the six disciplinary
17 findings at issue, five of the hearings occurred prior to the revision of the regulations on
18 June 20, 2011. 76 Fed. Reg. 11078 (March 1, 2011). Accordingly, the Court shall
19 separately analyze the claims relating to the five disciplinary proceedings under the
20 previous regulation and then analyze the last disciplinary proceeding under the current
21 regulations.

22 In support of his claim, Petitioner relies on a recent unpublished Ninth Circuit case
23 in which the same DHO that disciplined Petitioner was found to lack authority under the
24 previous version of the regulation to sanction inmates. See Arredondo-Virula v. Adler,
25 510 Fed. Appx. 581, 582 (9th Cir. 2013). The Ninth Circuit held:

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27 ³ A court may take judicial notice of court records. See Barron v. Reich, 13 F.3d 1370, 1377 (9th
28 Cir. 1994); MGIC Indem. Co. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986). Accordingly, the Court takes
judicial notice of documents filed in related habeas challenges.

1 Logan [the DHO] was not an employee of the Bureau of Prisons
2 (the B.O.P.) or Federal Prison Industries, Inc. as required by the
3 applicable regulation in place at the time. 28 C.F.R § 541.10(b)(1) (2010).
4 The regulation provided: "only institution staff may take disciplinary
5 action." Staff was defined as "any employee of the Bureau of Prisons or
6 Federal Prison Industries, Inc." 28 C.F.R. § 500.1(b). We note that 28
7 C.F.R § 541.10(b)(1) is no longer in force.

8 [Respondent] concedes that [the DHO] was not an employee of the
9 B.O.P. or Federal Prison Industries, Inc. At oral argument, his counsel
10 suggested that [the DHO] was "an officer". He was not an officer of the
11 B.O.P.

12 A significant difference exists between employees and independent
13 contractors. Minneci v. Pollard, 132 S. Ct. 617, 623, 181 L. Ed. 2d 606
14 (2012) (federal inmates have no federal Bivens cause of action for
15 damages against privately-run prison workers because these workers are
16 not federal employees), see also Allied Chem. & Akali Workers of Amer.,
17 Local Union No. 1 v. Pittsburgh Plate Glass Co. et al., 404 U.S. 157, 167,
18 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971). Under the plain meaning of the
19 law, [the DHO] was not authorized to discipline [Petitioner].

20 Arredondo-Virula, 510 Fed. Appx. at 582.

21 a. Collateral Estoppel

22 Respondent, or in this case his predecessor, have previously had the opportunity
23 to litigate the issue, and the Ninth Circuit issued an unpublished case based on the
24 merits of the petition. See Arredondo-Virula, 510 Fed. Appx. at 582. While unpublished
25 dispositions and orders of Ninth Circuit are not usually considered precedent, they are
26 "when relevant under the doctrine of law of the case or rules of claim preclusion or issue
27 preclusion." 9th Cir. Rule 36-3(a). It is noted that principles of res judicata are "not
28 wholly applicable to habeas corpus proceedings." See Preiser v. Rodriguez, 411 U.S.
475, 497 (1973). However, the reasoning for the inapplicability of res judicata to state
and federal convictions to allow habeas review is not at issue in the present situation. Id.
("Hence, a state prisoner in the respondents' situation who has been denied relief in the
state courts is not precluded from seeking habeas relief on the same claims in federal
court.").

The Ninth Circuit has found collateral estoppel where: (1) the issue necessarily
decided at the previous proceeding is identical to the one that is currently sought to be
relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the

1 party against whom collateral estoppel is asserted was a party or in privity with a party in
2 the first proceeding. Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1021 (9th Cir.
3 2012); Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006).

4 Here, the issue decided in Arredondo-Virula is identical to the one presented
5 here. This petition involves the exact same regulations and procedures implemented by
6 the same correctional institution. The Ninth Circuit decided the issue on the merits, and
7 Respondent, as the subsequent warden or administrator of the facility at which Petitioner
8 is housed, is the same defendant or in privity with the prior respondent. Should issue
9 preclusion apply to habeas proceedings, this Court finds that it should apply to prevent
10 Respondent from relitigating this issue that has previously been adjudicated at the cost
11 of significant judicial resources.

12 While a Court may sua sponte raise issue preclusion, the parties must be
13 provided an opportunity to be heard on the issue. See Headwaters Inc. v. United States
14 Forest Serv., 399 F.3d 1047, 1054-1055 (9th Cir. 2005). Respondent shall have the
15 opportunity to respond to explain why issue preclusion should not apply in his objections
16 to the findings and recommendation.

17 b. Merits

18 Regardless of issue preclusion, the Court finds that the regulations at issue do not
19 provide authority for an employee of a private corporation to sanction Peittioner.

20 i. Legal Standard for Review and Application of Federal
21 Regulations

22 To resolve the present claims of Petitioner, the Court must interpret the meaning
23 of the regulations and determine whether the BOP is bound by the regulations. The
24 standards for review and application of federal regulations are well established under
25 federal law.

26 With respect to interpretation of federal regulations, the agency's interpretation of
27 ambiguous regulations is provided deference. Christopher v. SmithKline Beecham Corp.,
28 132 S. Ct. 2156, 2166 (2012). "It is well established that an agency's interpretation need

1 not be the only possible reading of a regulation--or even the best one--to prevail."
2 Decker v. Northwest Env'tl. Def. Ctr., 133 S. Ct. 1326, 1337 (2013). Under Auer v.
3 Robbins and Seminole Rock, a court will defer to an agency's interpretation of its
4 regulations, "even in a legal brief, unless the interpretation is plainly erroneous or
5 inconsistent with the regulations or there is any other reason to suspect that the
6 interpretation does not reflect the agency's fair and considered judgment on the matter in
7 question." Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2260-2261 (2011)
8 (citation omitted); Chase Bank USA, N. A. v. McCoy, 131 S. Ct. 871, 881 (2011); Auer v.
9 Robbins, 519 U.S. 452, 461 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S.
10 410, 411 (1945); Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Rels.,
11 730 F.3d 1024, 2013 U.S. App. LEXIS 19255 (9th Cir. 2013). "This is generally called
12 Seminole Rock or Auer deference." Decker, 133 S. Ct. at 1339 (Scalia, J., dissenting.)
13 Justice Scalia summarized Auer deference as follows:

14 In practice, Auer deference is Chevron deference applied to
15 regulations rather than statutes. See Chevron U.S. A. Inc. v. Natural
16 Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L.
17 Ed. 2d 694 (1984). The agency's interpretation will be accepted if, though
18 not the fairest reading of the regulation, it is a plausible reading--within the
19 scope of the ambiguity that the regulation contains.

20 Id. at 1339-1340.

21 With respect to the inquiry whether the interpretation does not reflect the agency's
22 fair and considered judgment on the matter in question, "[i]ndicia of inadequate
23 consideration include conflicts between the agency's current and previous
24 interpretations; signs that the agency's interpretation amounts to no more than a
25 convenient litigating position; or an appearance that the agency's interpretation is no
26 more than a post hoc rationalization advanced by an agency seeking to defend past
27 agency action against attack." Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820,
28 830 n.4 (9th Cir. 2012) (en banc) (citing Bowen v. Georgetown Univ. Hosp., 488 U.S.
204, 213 (1988) and Auer, 519 U.S. at 462).

Where a court declines to give an interpretation Auer deference, it accords the

1 agency's "interpretation a measure of deference proportional to the 'thoroughness
2 evident in its consideration, the validity of its reasoning, its consistency with earlier and
3 later pronouncements, and all those factors which give it power to persuade."
4 Christopher, 132 S. Ct. at 2169 (quoting United States v. Mead Corp., 533 U.S. 218, 228
5 (2001)); Indep. Training & Apprenticeship Program, 2013 U.S. App. LEXIS 19255 at *27.
6 This amount of consideration will "vary with circumstances" and may be "near
7 indifference," such as has been given in some cases when considering an "interpretation
8 advanced for the first time in a litigation brief." Mead, 533 U.S. at 228 (citing Bowen, 488
9 U.S. at 212-13).

10 With respect to the application of federal regulations generally, the government is
11 bound by the regulations it imposes on itself. United States v. 1996 Freightliner FLD
12 Tractor, 634 F.3d 1113, 1116 (9th Cir. 2011); (citing United States ex rel. Accardi v.
13 Shaughnessy, 347 U.S. 260, 265 (1954)). "Where the rights of individuals are affected, it
14 is incumbent upon agencies to follow their own procedures. This is so even where the
15 internal procedures are possibly more rigorous than otherwise would be required."
16 Morton v. Ruiz, 415 U.S. 199, 235 (1974); Alcaraz v. INS, 384 F.3d 1150, 1162 (9th Cir.
17 2004).

18 Having chosen to promulgate a regulation, the agency must follow that regulation.
19 Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 852 (9th Cir. 2003). The Ninth
20 Circuit explained the rationale for the Accardi principle:

21 An agency's failure to follow its own regulations "tends to cause
22 unjust discrimination and deny adequate notice" and consequently may
23 result in a violation of an individual's constitutional right to due process.
24 NLRB v. Welcome-American Fertilizer Co., 443 F.2d 19, 20 (9th Cir.
25 1971); see also United States v. Newell, 578 F.2d 827, 834 (9th Cir.
26 1978). Where a prescribed procedure is intended to protect the interests
27 of a party before the agency, "even though generous beyond the
28 requirements that bind such agency, that procedure must be scrupulously
observed." Vitarelli, 359 U.S. at 547 (Frankfurter, J., concurring); see also
Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev.
629, 630 (1974) (observing that agency violations of regulations
promulgated to provide parties with procedural safeguards generally have
been invalidated by courts).

Sameena Inc. v. United States Air Force, 147 F.3d 1148, 1153 (9th Cir. 1998).

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ii. Analysis

The Ninth Circuit explained in Arredondo-Virula that 28 C.F.R § 541.10(b)(1) provided that: "only institution staff may take disciplinary action." 510 Fed. Appx. at 582. Further, staff was defined as "any employee of the Bureau of Prisons or Federal Prison Industries, Inc." 28 C.F.R. § 500.1(b). Id. Accordingly, the Ninth Circuit found that under the plain meaning of the law, the DHO was not authorized to discipline Petitioner. Id. This Court finds the reasoning of Arredondo-Virula persuasive. The plain meaning of the regulations, when taking into account the meaning of 'staff' as defined by the BOP in the regulation, only allows BOP employees to take disciplinary action.

Respondent argues that "[A] plain reading of the regulation clearly permits 'institution authorities' and 'institution staff' to impose discipline pursuant to the confines of the program. Therefore, interpreting 'staff' as a reference only to BOP staff circumvents the purpose and scope of the inmate discipline program." (Answer at 8.) While Respondent asserts that interpreting 'staff' to only include BOP staff circumvents the purpose of the discipline program, Respondent does not claim that the plain reading of the regulation requires BOP employees to impose discipline, or that the regulation is ambiguous regarding whether non-BOP employees may discipline inmates. The BOP, in promulgating the regulation choose to define the term 'staff' as only BOP employees, and further chose to use the term in stating that "only institution staff may take disciplinary action." The plain meaning of the regulation is clear, and as such, Respondent's interpretation is not entitled to Auer deference.

The Court finds that the regulation is unambiguous. Adopting Respondent's contrary interpretation would "permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 882 (2011); Christensen, 529 U.S. at 588. Respondent's alternative interpretation is "plainly erroneous or inconsistent" with the regulation and not entitled to Auer deference. Id.

The regulations require the BOP to provide inmates with disciplinary hearings

1 before a DHO employed by the BOP. The BOP is bound by the regulations it imposes on
2 itself and was not authorized to allow staff of a privately run prison to discipline
3 Petitioner. See United States v. 1996 Freightliner FLD Tractor, 634 F.3d at 1116. The
4 fact that the BOP issued a memorandum creating a disciplinary procedure different than
5 that authorized does not alleviate Respondent's responsibility to follow the regulations.
6 See Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 852 (9th Cir. 2003) ("Having
7 chosen to promulgate a regulation, the agency must follow that regulation.") As
8 Respondent's conduct was not authorized, Petitioner is entitled to habeas corpus relief
9 with regard to the first five disciplinary violations challenged.

10 **2. Authority Under the Current Version of the Regulations**

11 Petitioner's last disciplinary hearing was conducted under the current version of
12 the regulations. In order to properly address whether the present regulations allow for a
13 private employee to discipline prisoners, it is necessary to review the prior regulatory
14 framework and the revisions and comments provided in enacting the current regulations.

15 Congress has provided broad authority to the BOP for the "management and
16 regulation of all Federal penal and correctional institutions" including providing suitable
17 quarters and for the safekeeping, care, and subsistence of federal prisoners. See 18
18 U.S.C. § 4042(a). The BOP is also authorized to provide "discipline of all persons
19 charged with or convicted of offenses against the United States." Id.

20 a. Regulations Prior to June 20, 2011

21 Prior to June 20, 2011, the regulations promulgated by the BOP governing inmate
22 discipline described the purpose of the regulation: "So that inmates may live in a safe
23 and orderly environment, it is necessary for institution authorities to impose discipline on
24 those inmates whose behavior is not in compliance with Bureau of Prisons rules." 28
25 C.F.R. § 541.10(a). The regulation "appl[ied] to all persons committed to the care,
26 custody, and control (direct or constructive) of the Bureau of Prisons." Id. Furthermore,
27 the regulation explained that "[o]nly institution staff may take disciplinary action." 28
28 C.F.R. § 541.10(b). The definition section of the regulations stated that staff "means any

1 employee of the Bureau of Prisons or Federal Prison Industries, Inc." 28 C.F.R. § 500.1.

2 Based on the former statutory language, the Ninth Circuit in Arredondo-Virula
3 found that the DHO was not an employee of the BOP and did not have the authority to
4 sanction the petitioner.

5 b. Regulations Enacted on June 20, 2011

6 The regulations were amended in 2011. The BOP amended "its inmate discipline
7 and special housing unit ("SHU") regulations (28 CFR part 541, subpart A and subpart
8 B) to streamline and clarify these regulations, eliminating unnecessary text and obsolete
9 language, and removing internal agency procedures that need not be in regulations
10 text." 75 Fed. Reg. 76263 (Dec. 8, 2010). The newly revised regulations allow "Bureau
11 staff to impose sanctions on inmates who commit prohibited acts" to "help[] ensure the
12 safety, security, and orderly operation of correctional facilities, and the protection of the
13 public." 28 C.F.R. § 541.1 The regulation "applies to sentenced and unsentenced
14 inmates designated to any prison, institution, or facility in which persons are held in
15 custody by direction of, or under an agreement with, the Bureau of Prisons." 28 C.F.R. §
16 541.2. The definition section of the regulations remained the same, explaining that staff
17 "means any employee of the Bureau of Prisons or Federal Prison Industries, Inc." 28
18 C.F.R. § 500.1.

19 c. Petitioner's Contentions

20 Petitioner contends that the regulations, as stated, only allow BOP staff to
21 discipline inmates. Accordingly, Petitioner asserts that the DHO, an employee of
22 Management and Training Corporation, was not an employee of the BOP and lacked the
23 authority to sanction Petitioner. (See generally Pet. and Traverse, ECF Nos. 1, 18.)

24 d. Respondent's Contentions

25 Respondent does not dispute, and therefore concedes, that TCI is a private prison
26 and that the DHO who conducted the discipline hearing was not a BOP employee.
27 However, Respondent presents three reasons why such sanctions were authorized.

28 First, Respondent argues that the conduct was authorized based on the language

1 of 28 C.F.R. § 541.2 which provides that the discipline program applies to "inmates
2 designated to any prison, institution, or facility in which persons are held in custody by
3 direction of, or under an agreement with, the Bureau of Prisons." Expanding on that
4 argument, Respondent argues that "[b]y explicitly including contract facilities in the
5 application of the discipline program, it is necessary that the definition of 'staff,' as the
6 term is used in Section 541 be expanded; otherwise, inmates in contract facilities would
7 never be subject to discipline." (Answer at 9.)

8 Second, Respondent relies on a BOP memorandum issued on March 30, 2007,
9 providing guidance in matters involving inmate discipline in privately operated facilities.
10 (Vickers Decl., ¶ 5, Attach 6.) This memorandum requires that "[C]ontract staff at Taft...
11 will send all DHO decisions regarding the disallowance or forfeiture of GCT [good credit
12 time], along with the recommended sanctions, to the PMB⁴ [privatization management
13 branch] DHO. The PMB DHO will review the entire discipline file and make an
14 independent decision regarding the contractor's recommendation." (*Id.*) Respondent
15 asserts that the procedure implemented by the memorandum comports with the
16 requirement of the regulation set forth in 28 C.F.R. § 541.1 which allows "Bureau staff" to
17 impose sanctions.

18 Finally, Respondent asserts that matters of inmate discipline at residential re-
19 entry centers are also subject to a procedure where private employees discipline
20 inmates subject to review by BOP staff, and that the procedure has withstood judicial
21 review.

22 e. Analysis

23 i. Interpretation of the Regulations

24 Petitioner argues that the regulations only allow BOP employees to discipline
25 inmates. See 28 C.F.R. §§ 500.1(b), 541.1. The Court agrees. Section 541.1 allows
26 "Bureau staff to impose sanctions on inmates who commit prohibited acts." As defined

27 _____
28 ⁴ Although not defined by Respondent, it appears that the PMB is located at the central office of
the BOP and serves to manage contract facilities which have agreements with the BOP.

1 by section 500.1, "staff" is any employee of the Bureau of Prisons or Federal Prison
2 Industries, Inc." Accordingly, the plain language of the regulations state that only BOP
3 staff may discipline prisoners.

4 While the sections were recently revised, nothing in the new regulations can be
5 interpreted to change the meaning of the language regarding who has the right to
6 impose sanctions on inmates. There is no significant distinction between the language of
7 the previous regulation that "[o]nly institution staff may take disciplinary action" and the
8 present regulation which "allow[s] Bureau staff to impose sanctions." Neither regulation
9 purports to extend the authority to discipline or impose sanctions to anyone besides
10 BOP staff, and the modifications are consistent with the stated purpose of streamlining
11 or clarifying the regulations, rather than changing their substantive meaning. See 75
12 Fed. Reg. 76263 (Dec. 8, 2010). Respondent comments that the regulation was
13 amended, but does not attempt to argue that the phrase "allow[s] Bureau staff to impose
14 sanctions" has a different meaning "[o]nly institution staff may take disciplinary action."

15 Instead, Respondent argues that since § 541.2 states that the inmate discipline
16 regulations apply to private facilities that contract with the BOP, it is "necessary that the
17 definition of 'staff' be expanded to apply to non-BOP employees." (See Answer at 8.
18 (citing 28 C.F.R. § 541.2 ("This program applies to... any prison, institution, or facility in
19 which persons are held in custody by direction of, or under an agreement with, the
20 Bureau of Prisons.")). It is clear from the regulations that the disciplinary procedures set
21 forth in § 541 apply to inmates at contract facilities, such as TCI. However, whether the
22 regulations are intended to apply to inmates held at contract facilities and whether
23 disciplinary sanctions can be issued by anyone but BOP staff are separate inquiries.

24 First, the former regulations apparently also indicated that the discipline process
25 was to apply to inmates at contract facilities. The former regulation "appl[ied] to all
26 persons committed to the care, custody, and control (direct or constructive) of the
27 Bureau of Prisons." See 28 C.F.R. § 541.10(a). While revised, the meaning of the former
28 regulation and § 541.2 appear substantially similar. See 75 Fed. Reg. 76263 (Dec. 8,

1 2010) (The revisions were made to streamline and clarify the regulations.). Of greater
2 importance, nothing in the language of § 541.2 either expressly or impliedly states that
3 employees of non-BOP institutions can impose sanctions on inmates. To the extent that
4 Respondent attempts to construe its meaning to allow non-BOP employees to discipline
5 inmates, he has not reconciled that with the express language of of § 541.1 which
6 expressly states "Bureau staff to impose sanctions on inmates who commit prohibited
7 acts." 28 C.F.R. § 541.1.

8 Second, Respondent claims that if only BOP staff can sanction inmates, then
9 inmates at private prisons would never be subject to discipline. (See Answer at 8.)
10 Respondent cites to representative language that states that the disciplinary process is
11 initiated when "staff witness or reasonably believe that [an inmate] committed a
12 prohibited act" and that "[a] staff member will issue [an inmate] an incident report." See
13 28 C.F.R. § 541.5.

14 While it might make disciplining inmates at contract facilities more difficult if under
15 the regulations only "staff," defined as BOP employees, can discipline, nothing in the
16 regulations prevent inmates at private facilities from being disciplined. Section 541.5
17 does not require BOP staff to witness the prohibited act. It is sufficient if they reasonably
18 believe that a prohibited act was committed. Respondent has provided nothing to
19 suggest a BOP staff person could not have a reasonable belief that a prohibited act had
20 been committed based solely on a reliable account from non-BOP staff member
21 employed by the contract facility if the latter either witnessed or investigated a prohibited
22 act. Likewise, nothing in the regulations requires that BOP staff be physically present to
23 conduct disciplinary hearings. Both regulations discussing hearings before the Unit
24 Discipline Committee ("UDC") or before the DHO state that the inmate "may appear...
25 electronically (for example, by video or telephone conferencing)" at the UDC or DHO's
26 discretion. See 28 C.F.R. §§ 541.7(d)(1); 541.8(e)(1). Accordingly, it appears that
27 discipline of inmates at contract facilities could be conducted by BOP staff located
28 elsewhere. Respondent's contention (that limiting "staff" to BOP employees means that

1 inmates at contract facilities would not be subject to discipline) is without merit.

2 Moreover, the Court does not find Respondent's assertion that the express or
3 implied language of the regulations allows non-BOP staff to impose sanctions on
4 inmates. Respondent's election not to claim that the regulatory language is ambiguous
5 renders it inappropriate to invoke Auer deference to its interpretation. See Tibble v.
6 Edison Int'l, 711 F.3d 1061, 1072 n.8 (9th Cir. 2013) (ambiguity in the regulation needs
7 to be shown to invoke Auer deference.) (citing Gonzales v. Oregon, 546 U.S. 243, 255
8 (2006). Respondent presents no argument as to why staff should be defined in a
9 different manner than as expressly described in the regulations, or how the phrase
10 "allow[s] Bureau staff to impose sanctions" is ambiguous and open to interpretation.

11 Instead, Respondent argues that 28 C.F.R. § 541.2, which states that the
12 regulations apply to private facilities with an agreement with the BOP, authorizes non-
13 BOP staff to impose sanctions. Section 541.2 cannot be read in the abstract. The
14 chapter of the regulation governing inmate discipline must be viewed as a whole, and
15 the meaning of sections of the regulation are determined based on the context of the
16 entire chapter. See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S.
17 644, 666 (2007) ("It is a fundamental canon of statutory construction that the words of a
18 statute must be read in their context and with a view to their place in the overall statutory
19 scheme.") (citations omitted). Terms of the regulation should not be read in a manner
20 that would contradict or negate other terms of the regulation. See Decker v. Northwest
21 Env'tl. Def. Ctr., 133 S. Ct. 1326, 1342-1343 (2013) (Scalia, J., dissenting.) (Applying the
22 interpretive presumption of validity - a "canon that we are to prefer the meaning that
23 preserves to the meaning that destroys.") (citing Panama Refining Co. v. Ryan, 293 U.S.
24 388, 439 (1935) (Cardozo, J., dissenting)). Based on canons of construction, it is not
25 reasonable to interpret section 541.2 in a manner that would negate the plain meaning of
26 sections 500.1(b) and 541.1 which authorize only BOP staff to impose sanctions on
27 inmates. Accordingly, the Court finds that the regulations unambiguously require BOP
28 staff to impose sanctions. No other meaning could be formed without straining the plain

1 meaning of the terms of the regulation.

2 Because the Court finds that the text of the regulation is not ambiguous and that
3 the interpretation Respondent advances in his briefs is inconsistent with the regulation,
4 the Court "does not grant deference to those views apart from their inherent ability to
5 persuade." Schwab v. Comm'r, 715 F.3d 1169, 1176 (9th Cir. 2013); Christopher, 132 S.
6 Ct. at 2169.

7 ii. March 30, 2007 BOP Memorandum

8 Respondent's second argument relies on a BOP memorandum instructing the
9 private employee DHO at TCI to send a copy of the discipline decision to a BOP staff
10 member to review and certify the decision. (See Vickers Decl., ¶ 5, Attach 6.) The
11 memorandum instructs the following procedures be followed:

12 Effective, July 1, 2007, DHO actions involving disallowance or
13 forfeiture of Good Conduct Time (GCT) for federal inmates housed at the
14 Taft and McRae facilities will be forwarded to BOP staff for certification
15 as the BOP's DHO for the purpose of reviewing and certifying DHO
16 actions for Taft and McRae. GCT will not be taken without certification.

17 (Id.) Respondent asserts that certification process comports with the requirement set
18 forth in § 541.1 requiring "Bureau staff" to impose sanctions.

19 Unfortunately, the framework created by the memorandum is inconsistent with the
20 procedures set forth by the regulations. Section 541.8 sets forth the procedure required
21 for hearings before the DHO and the resulting decision and imposition of sanctions.
22 Under § 541.8, an inmate is allowed to appear before the DHO during the hearing in
23 person or electronically unless the DHO determines the inmate's presence would
24 jeopardize institution security or the inmate waives his right to appear or has escaped or
25 is otherwise absent from custody. 28 C.F.R. § 541.8(e). Inmates are entitled to make a
26 statement and present documentary evidence to the DHO, and the DHO will consider all
27 evidence presented during the hearing and make a decision based on at least some
28 facts and, if there is conflicting evidence, on the greater weight of the evidence. 28
C.F.R. § 541.8(f). Inmates can present witnesses to appear before the DHO either in

1 person or electronically, or if the witness cannot appear, written statements of the
2 witness can be considered during the DHO's hearing. Id.

3 If the DHO determines that the inmate committed a prohibited act, he or she can
4 impose any of the available sanctions listed in § 541.3. 28 C.F.R. § 541.8(g). Finally, the
5 DHO prepares a written report of the decision which must set forth whether the inmate
6 was advised of his rights, the evidence relied on by the DHO, the DHO's decision and
7 sanction to be imposed, and the reason for the sanction imposed. 28 C.F.R. § 541.8(h).

8 The regulation requires inmates to have an opportunity to appear and present
9 evidence and witnesses to the DHO, who, upon weighing the evidence, decides if the
10 inmate committed the prohibited act and imposes the appropriate sanctions. In drafting
11 the regulations, it was clearly the intent of the BOP to designate the DHO as the person
12 to issue sanctions against inmates.⁵ See 70 Fed. Reg. 43093 (July 26, 2005).⁶ The
13 regulations therefore require the inmate to be able to appear before the DHO, who is
14 required to be an employee of the BOP, and the DHO is to issue sanctions against the
15 inmate. The policy set forth by the memorandum does not follow the procedure set forth
16 in the regulations. It either allows a DHO, who is not a BOP employee, to sanction the
17 inmate if reviewed and certified by a BOP employee or it allows a BOP employee to
18 sanction an inmate without the inmate being allowed to present his arguments and

19 ⁵ The BOP also authorizes the Unit Discipline Committee ("UDC") to issue sanctions not including
20 loss of good conduct time for lesser violations.

21 ⁶ The changes to the regulations "alter the list of possible sanctions available to allow [DHO]s
22 more flexibility in adapting the sanction to fit the seriousness of the violation." Id. The new regulations also
23 allow the DHO to impose monetary sanctions for violations. "We made this change to provide DHOs with
24 the flexibility to sanction inmates by imposing monetary fines as a punishment and deterrent to committing
25 prohibited acts. Additionally, by providing another sanctioning option, DHOs are better able to tailor the
26 discipline of individual inmates' in a manner best suited to affect behavioral changes. We also clarify that
27 the sanctions of 'make monetary restitution' and 'monetary fine' *may only be imposed by DHOs.*" 70 Fed.
28 Reg. 43093, 43096 (emphasis added). Additionally, in noting that the new regulations increased the
disciplinary segregation sanction available to DHOs the BOP commented, "DHOs will not in fact impose
the maximum amount of disciplinary segregation in every case; only in the most egregious circumstances
for the most serious offenses." Id. Finally, the BOP also changed "the rule to allow DHOs to impose
sanctions that are also available at the UDC level, since such apparently lesser sanctions may likewise be
useful in changing inmate behavior at the DHO level." Id. at 43097.

Based on the clear language of the comments to the proposed regulations, it is not possible to
construe the intent of the BOP to allow anyone besides the UDC and DHO to sanction inmates.

1 evidence directly to the BOP employee.

2 If the non-BOP employee at TCI is acting as the DHO and imposing sanctions,
3 the DHO would be complying with the procedures set forth in § 541.8 but would not be
4 authorized to impose those sanctions as he is not a BOP employee as required by §§
5 500.1(b) and 541.1. On the other hand, if the PMB staff member reviewing and certifying
6 the decision is considered the DHO and instituting disciplinary sanctions, he would be an
7 authorized BOP employee allowed to sanction inmates under §§ 500.1(b) and 541.1, but
8 the Petitioner would be deprived of his right to appear before the DHO and present
9 evidence and witnesses as required by § 541.8(g-h). Nothing in the regulations set forth
10 a certification process that would validate an otherwise unauthorized decision by
11 someone who is not an employee of the BOP. Moreover the BOP, in its memorandum,
12 makes no mention of the relevant regulations governing the disciplinary review process
13 or how the instituted polices would comply with the regulations.

14 Under Auer and Seminole Rock, This Court is required to defer to the BOP's
15 interpretation of its regulations, "unless the interpretation is plainly erroneous or
16 inconsistent with the regulations or there is any other reason to suspect that the
17 interpretation does not reflect the agency's fair and considered judgment on the matter in
18 question." Talk Am., Inc., 131 S. Ct. at 2260-2261. Respondent's interpretation based on
19 the procedure set forth in the memorandum is inconsistent with the plain meaning and
20 intent of the regulations regarding disciplinary procedures before a DHO. It is also
21 inconsistent with the comments of the BOP in enacting the regulations. See 70 Fed.
22 Reg. 43093. The regulations set forth who has the authority to sanction inmates and the
23 rights and procedures that inmates have before the DHO. As described above, either
24 alternative proposed by Respondent – that the definition of 'staff' should be enlarged to
25 cover private employees or that the PMB DHO was the actual DHO - poses problematic
26 interpretations of the relevant regulations.

27 Respondent's interpretation is not entitled to Auer deference. However, the Court
28 must still provide the "interpretation a measure of deference proportional to the

1 'thoroughness evident in its consideration, the validity of its reasoning, its consistency
2 with earlier and later pronouncements, and all those factors which give it power to
3 persuade.'" Christopher, 132 S. Ct. at 2169. The interpretation presented by Respondent
4 in the March 30, 2007 memorandum and its answer to the petition neither addresses,
5 nor reconciles, the inconsistencies between the active policy and the requirements of the
6 relevant regulations. Respondent's policy does not explain how it complies with the
7 requirements set forth in § 541, requiring only staff to sanction an inmate, and how the
8 DHO, whom the inmate has the right to appear personally before, is the party to sanction
9 the inmate. Likewise, Respondent in his briefing urges the Court to either expand the
10 definition of staff or consider the PMB DHO as the actual DHO, without presenting
11 persuasive arguments about how that is authorized by the regulations. Respondent's
12 claims that a contrary interpretation would be a hardship to the BOP, while possibly true,
13 provides little guidance to the Court in interpreting what the BOP is authorized by
14 regulation to do.

15 As Auer deference does not apply to Respondent's interpretation of the
16 regulations, the Court "must employ traditional tools of interpretation" in reviewing the
17 language of the governing statute and regulations to determine their meaning.
18 Christopher, 132 S. Ct. at 2170. Congress provided broad authority to the BOP to
19 manage correctional institutions and to provide discipline to inmates. See 18 U.S.C. §
20 4042(a). It is possible that the statutory grant of authority by Congress would allow the
21 BOP to delegating the authority to discipline inmates to private contractors. See
22 Chevron, U.S.A., Inc., 467 U.S. at 844. Regardless, the statute is silent regarding any
23 delegation, and is of little assistance in interpreting the language of the regulations
24 promulgated by the BOP, which are more detailed and onerous than the statute. See
25 Alcaraz v. INS, 384 F.3d at 1162.

26 The regulations clearly define the definition of staff: "Staff means any employee of
27 the Bureau of Prisons or Federal Prison Industries, Inc." 28 C.F.R. § 500.1(b). Under
28 rules of statutory construction, "we must follow that definition, even if it varies from that

1 term's ordinary meaning." Stenberg v. Carhart, 530 U.S. 914, 942 (2000). The regulation
2 states what the term staff means, and "[a]s a rule, 'a definition which declares what a
3 term "means" . . . excludes any meaning that is not stated." Id. (citing Colautti v. Franklin,
4 439 U.S. 379, 392-393, n. 10 (1979).

5 The regulations further explain that Bureau staff may impose sanctions, and that
6 the DHO is the staff member to impose sanctions. See 28 C.F.R. §§ 541.1; 541.8. The
7 regulations provide an extensive discussion regarding the disciplinary process before the
8 UDC and DHO and subsequent administrative appeals of any sanction imposed by the
9 DHO. However, the regulations do not mention procedures where a BOP staff member
10 can certify the decision to impose sanctions made by an employee of a privately run
11 institution. Respondent's contentions that the policy set forth in the BOP memorandum
12 are authorized fail to address the problems and inconsistencies with the procedure set
13 forth in the memorandum and those required by the regulation. As Respondent has not
14 addressed basic issues such as interpretation of the language of the regulation,
15 Respondent's interpretation, while considered, is of little weight. Christopher 132 S. Ct.
16 at 2169; Mead, 533 U.S. at 228.

17 iii. RCC Disciplinary Procedure and Other Relevant
18 Caselaw

19 Respondent, in his last argument, asserts that the current policy of the BOP
20 complies with Petitioner's due process rights because matters involving inmate discipline
21 in Residential Re-entry Centers ("RRC") are subject to a similar protocol. Respondent
22 cites to several decisions where courts have upheld RRC decisions as satisfying due
23 process requirements. See Answer at 9-10 (citing Flores v. Thomas, No. 3:11-cv-355-
24 MA, 2012 WL 70575, at *3 (D. Or. Jan. 5, 2012); Dickerson v. Thomas, No. 11-cv-744-
25 MA, 2011 WL 3704264, at *4 (D. Or. Aug. 22, 2011); Stevens v. Thomas, No. 11-cv-790-
26 MA, 2011 WL 3563131, at *3 (D. Or. Aug. 10, 2011); Harris v. Norwood, No. CV 07-
27 2588-SGL, 2008 WL 5377647, at *1 (C.D. Cal. Dec. 16, 2008)). The Court does not find
28 the cases provided by Respondent persuasive. The cases, while finding that the

1 inmates' due process rights were observed, do not address the issue presented here,
2 i.e., whether the regulations authorize someone who is not an employee of the BOP to
3 impose sanctions on inmates.

4 In Flores v. Thomas, No. 3:11-cv-355-MA, 2012 WL 70575, at *3 (D. Or. Jan. 5,
5 2012), the inmate was transferred from an RRC to a federal prison where he was
6 disciplined. It does not appear that the petitioner was disciplined by a private employee,
7 nor does the petitioner present a claim on that ground.

8 In Dickerson v. Thomas and Stevens v. Thomas, the court denied the petitioners'
9 claims that due process required inmates have the opportunity to argue directly to the
10 DHO rather than the discipline committee at the contract facility at which he was housed.
11 The court rejected the argument based on both the BOP's policy statement allowing
12 discipline at contract facilities to be held before non-BOP staff if reviewed by a BOP staff
13 member and the fact the petitioners did not have a due process right under Wolff v.
14 McDonnell, 418 U.S. 539 (1974) to a hearing before the DHO. See Dickerson, 2011 WL
15 3704264, at *4 ("Wolff does not mandate that petitioner be granted two hearings, one
16 before the CDC and one before the DHO.") (citations omitted); Community Corrections
17 Manual, BOP Program Statement 7300.09, p. 18- 19. Neither rationale addresses the
18 issues presented here. Despite the fact that the regulations apply to such facilities, the
19 petitioners did not raise the argument, nor did the court mention the regulations in its
20 decision. 28 C.F.R. § 541.2. Whether due process under Wolff was satisfied is a
21 separate inquiry from whether the BOP followed its own regulations. See 1996
22 Freightliner FLD Tractor, 634 F.3d at 1116; Nat'l Ass'n of Home Builders v. Norton, 340
23 F.3d at 852. As Dickerson and Stevens did not address the questions raised here, their
24 holdings and rationale are not persuasive.

25 Finally, in Harris v. Norwood, 2008 U.S. Dist. LEXIS 105248 (C.D. Cal. 2008), the
26 court found no due process violation, but did not address issues regarding the authority
27 to sanction the inmate or the interplay between the regulations and the BOP program
28 statement authorizing discipline by employees at contract facilities. Nothing in the

1 decision addresses, let alone questions, the issues raised here. The court provides the
2 decision little weight.

3 In summary, while there are similar policy statements regarding the procedure of
4 disciplining inmates at RCCs, the policies and cases upholding those decisions do not
5 address the relevant regulation at issue here, i.e., that requiring a DHO, employed by the
6 BOP, to be the party to impose sanctions on inmates. The decisions do not explain why
7 the BOP would not be "bound by the regulations it imposes on itself." 1996 Freightliner
8 FLD Tractor, 634 F.3d at 1116.

9 Other courts have addressed this issue, but have not addressed the concerns
10 raised above based on the interpretation of the meaning of the regulations. In Sejour v.
11 Sanders, 2012 U.S. Dist. LEXIS 52483 (C.D. Cal. Jan. 18, 2012), the court found that
12 the DHO, an employee of a private prison, had the authority to discipline inmates.
13 However, the analysis only addressed whether the statutory grant of authority by
14 Congress authorized the conduct under Chevron, U.S.A., Inc. v. Natural Resources
15 Defense Council, Inc., 467 U.S. 837, 844 (1984). The court failed to address the
16 language of the regulations promulgated by the BOP and the limitations imposed by the
17 regulations. Even if the statute would allow the conduct in question, the BOP is bound by
18 the more limiting language of the regulations. See Morton v. Ruiz, 415 U.S. at 235;
19 Alcaraz v. INS, 384 F.3d at 1162. As Sejour did not address the language of the
20 regulations, the Court does not find its reasoning persuasive.

21 In Hilario-Paulino v. Pugh, the Eleventh Circuit dealt with a similar argument in
22 determining if the BOP violated the regulation set forth in 28 C.F.R. § 0.97 which allows
23 the Director of the Bureau of Prisons to redelegate authority, functions or duties vested
24 in him to employees of the Department of Justice. 194 Fed. Appx. 900 (11th Cir. Ga.
25 2006) (unpublished).⁷ The court held that BOP's interpretation that the regulation was

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27 ⁷ While unpublished and not considered binding precedent, the case may be cited as persuasive
28 authority. See 11th Cir. Rule 36-3.

1 not violated because of the ability of BOP employees to review the disciplinary decision
2 of a private employee was entitled to substantial deference. Id. at 903-04. Nothing in the
3 Hilario-Paulino decision discusses the other regulations, including the rights of prisoners
4 to appear and present their claims before a DHO employed by the BOP. That lack of
5 discussion of other relevant regulations makes the reasoning of Hilario-Paulino non-
6 persuasive here. The language of the regulations regarding re-delegation of authority
7 under § 0.97, like the regulations authorizing discipline, are both limited by their plain
8 language to “BOP employees”. Furthermore, the process allowed by internal policy
9 memos would contradict and negate the language of § 541.8 which allows an inmate to
10 present his case to the person issuing the disciplinary decision. As the decision does
11 not thoroughly discuss the issues presented by redelgation of authority or by considering
12 staff of private prisons staff of the BOP, the decision is not entitled to deference.⁸
13 Christopher, 132 S. Ct. at 2169; see also Minneci v. Pollard, 132 S. Ct. 617, 623 (2012)
14 (employment status of employees of a private prison rather than employees of the BOP
15 makes "a critical difference" in Bivens actions.) .

16 The Court finds that the regulations require that an inmate have an opportunity to
17 appear before a DHO employed by the BOP. See 28 C.F.R. §§ 500.1, 541.2, 541.8.
18 Furthermore, the regulations only authorize the DHO to impose sanctions. Id. The
19 subparts of the regulations, when read together, are unambiguous. Adopting
20 Respondent's contrary interpretation would “permit the agency, under the guise of
21 interpreting a regulation, to create de facto a new regulation.” Chase Bank USA, N.A. v.
22 McCoy, 131 S. Ct. 871, 882 (2011); Christensen, 529 U.S. at 588. Respondent's
23 alternative interpretation is "plainly erroneous or inconsistent" with the regulation and not
24

25 ⁸ Likewise, the decisions of the lower courts which determined the redelegation was authorized
26 without addressing contrary language in the regulations are not persuasive. See Gallo v. Pugh, 2005 U.S.
27 Dist. LEXIS 17589 (S.D. Ga. 2005); Rivera v. Pugh, 2005 U.S. Dist. LEXIS 41262 (S.D. Ga. 2005); Revelo
28 v. Pugh, 2006 U.S. Dist. LEXIS 17792 (S.D. Ga. 2006); Diaz v. Pugh, 2006 U.S. Dist. LEXIS 66415 (S.D.
Ga. 2006); Duy v. Fed. Bureau of Prisons, 2006 U.S. Dist. LEXIS 95405 (D.S.C. 2006); Saleem v. Wells,
2010 U.S. Dist. LEXIS 85386 (S.D. Ga. 2010); Pena-Morfe v. Wells, 2010 U.S. Dist. LEXIS 86847, 17-18
(S.D. Ga. 2010).

1 entitled to Auer deference. Id.

2 The regulations require the BOP to provide inmates with disciplinary hearings
3 before a DHO employed by the BOP. The BOP is bound by the regulations it imposes
4 on itself and was not authorized to allow staff of a privately run prison to discipline
5 Petitioner. See United States v. 1996 Freightliner FLD Tractor, 634 F.3d at 1116. The
6 fact that the BOP issued a memorandum creating a disciplinary procedure different than
7 that authorized does not alleviate Respondent's responsibility to follow the regulations.
8 See Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 852 (9th Cir. 2003) ("Having
9 chosen to promulgate a regulation, the agency must follow that regulation.") As
10 Respondent's conduct was not authorized, Petitioner is entitled to habeas corpus relief
11 with regard to his sixth disciplinary violation.

12 **IV. RESERVATION OF REMAINING CLAIM**

13 Petitioner is entitled to relief on his first claim that the employee of TCI did not
14 possess the proper authority under the regulations to sanction Petitioner. Accordingly, a
15 determination of Petitioner's second claim, namely, that the hearing officer was not
16 impartial, is unnecessary. In granting the petition on claim one, the Court is providing
17 Petitioner the relief requested. See e.g., Blazak v. Ricketts, 971 F.2d 1408, 1413 (9th
18 Cir. 1992) (A district court order requiring the state to retry the Petitioner was final
19 because it "left nothing to be done but the execution of the judgment," "disposed of all
20 the conviction related claims," and "granted all the relief requested."); Buckley v.
21 Terhune, 266 F. Supp. 2d 1124, 1144 (C.D. Cal. 2002) (Further, "[e]ven if petitioner
22 prevailed on one or more of his other claims, he could obtain no greater relief than that
23 to which he already is entitled."). The Court therefore reserves judgment on the
24 remaining claim. Blazak, 971 F.2d at 1413 ("[W]hen habeas is granted on a conviction
25 issue rather than a sentencing issue, requiring the district court to resolve at one time all
26 the issues raised in the petition could actually delay the proceedings unnecessarily and
27 waste the district court's scarce judicial resources.").

28 ///

1 **V. RECOMMENDED RELIEF**

2 It is well established that federal district courts have broad discretion in
3 conditioning a judgment granting habeas relief. Hilton v. Braunskill, 481 U.S. 770, 775
4 (1987). Pursuant to 28 U.S.C. § 2243, federal courts are authorized to dispose of
5 habeas corpus matters "as law and justice require." "In modern practice, courts employ a
6 conditional order of release in appropriate circumstances, which orders the
7 [Government] to release the petitioner unless the [Government] takes some remedial
8 action, such as to retry (or resentence) the petitioner." Harvest v. Castro, 531 F.3d 737,
9 741-742 (9th Cir. 2008) (citing Wilkinson v. Dotson, 544 U.S. 74, 89 (2005) (Kennedy, J.,
10 dissenting); Herrera v. Collins, 506 U.S. 390, 403 (1993); Hilton v. Braunskill, 481 U.S. at
11 775 ("[T]his Court has repeatedly stated that federal courts may delay the release of a
12 successful habeas petitioner in order to provide the State an opportunity to correct the
13 constitutional violation found by the court."); In re Bonner, 151 U.S. 242, 259-60 (1894)).

14 Accordingly the Court recommends that Petitioner's good credit time relating to
15 each of the disciplinary violations challenged be reinstated within thirty days of the
16 adoption of the instant Findings and Recommendation by the District Court Judge unless
17 Respondent notifies the Court of the Government's intent to provide Petitioner new
18 disciplinary hearings within ninety days.

19 **VI. CONCLUSION AND RECOMMENDATION**

20 Accordingly, IT IS HEREBY RECOMMENDED that the Court find that Petitioner is
21 entitled to relief with regard to the first claim of the Petition for Writ of Habeas Corpus
22 and that Petitioner's good credit time be restored or Petitioner be granted new
23 disciplinary hearings.

24 This Findings and Recommendation is submitted to the assigned District Judge,
25 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1) and Local Rule 304. Within
26 fourteen (14) days after being served with the Findings and Recommendation, any party
27 may file written objections with the Court and serve a copy on all parties. Such a
28 document should be captioned "Objections to Magistrate Judge's Findings and

1 Recommendation." Any reply to the objections shall be served and filed within fourteen
2 (14) days after service of the objections.

3 The parties are advised that failure to file objections within the specified time may
4 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th
5 Cir. 1991).

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IT IS SO ORDERED.

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Dated: March 26, 2014

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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