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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARIANO TORRES-SAINZ,

Petitioner,

v.

MICHAEL L. BENOVA,

Respondent.

Case No. 1:13-cv-00896-LJO-SKO HC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT THE
COURT DENY THE 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. He contends that his due process rights were violated when his disciplinary hearing was conducted by a Disciplinary Hearing Officer ("DHO") employed by the contract (non-Bureau of Prisons) institution in which he was confined.

I. Background

On February 15, 2006, the U.S. District Court for the District of Arizona sentenced Petitioner to 210 months' imprisonment for possession with intent to distribute methamphetamine (21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(viii)). Petitioner is currently in the custody of the Bureau of Prisons ("BOP") at the Taft Correctional Institution, Taft, California ("Taft"). His current projected release date is November 21, 2018, with good conduct time.

During a routine search of Petitioner's personal property on October 2, 2012, correctional staff found two altered plastic knives and one-half of a pair of tweezers, sharpened to a point. The

1 following day, staff filed a disciplinary report charging Petitioner with possession of a sharpened
2 instrument, weapon, code 104. When Petitioner appeared before the DHO on December 7, 2012,
3 he admitted possession, but contended that he retained the three instruments to slice foodstuffs
4 purchased in the commissary and that he was unaware that possessing them was a disciplinary
5 violation. The DHO found that Petitioner had violated code 104 and recommended three months of
6 disciplinary segregation and disallowance of 41 days of good conduct time. On December 28,
7 2012, the BOP Privatization Management Branch ("PMB") certified the DHO's findings and
8 imposed the recommended sanctions. Petitioner's two subsequent administrative appeals, to the
9 PMB and to the National Inmate Appeals Administrator, were denied.

10 On June 13, 2013, Petitioner filed the pending petition for writ of habeas corpus, contending
11 that his due process rights were violated during the disciplinary process when a DHO not employed
12 by the BOP disallowed 41 days of good conduct time. Respondent answered on September 20,
13 2013; Petitioner filed a traverse on October 4, 2013. The parties do not dispute jurisdiction, venue,
14 or exhaustion.

15 **II. Discipline of Federal Prisoners in Contract Facilities**

16 Petitioner contends that his due process rights were violated when his disciplinary hearing
17 was conducted by a DHO who was an employee of the nongovernmental entity running Taft rather
18 than a DHO employed by the BOP. Petitioner argues that a contracted DHO cannot be impartial
19 since extending Petitioner's prison term would be financially advantageous to the private employer.

20 In an unpublished case, *Arredondo-Virula v. Adler*, 510 Fed.Appx. 581, 582 (9th Cir. 2013),
21 the court examined 28 C.F.R. § 541.10(b)(1) (2010), which provided that "only institutional staff
22 may take disciplinary action." The then-applicable regulation defined institutional staff as "any
23 employee of the Bureau of Prisons or Federal Prison Industries, Inc." *Arredondo-Virula*, 510
24 Fed.Appx. at 582 (citing 28 C.F.R. § 500.1(b)). Accordingly, the Ninth Circuit concluded that
25 since contract prison employees were not staff under the then-applicable federal regulations, a DHO
26 employed by a private contractor was not authorized to take disciplinary action against a federal
27 prisoner. Petitioner argues that *Arredondo-Virula* requires this Court to grant his habeas petition,
28 invalidate the DHO's disciplinary finding, and reinstate the disallowed good conduct time.

1 *Arredondo-Virula* is distinguishable from this case. On June 20, 2011, 28 C.F.R.
2 § 541.10(b)(1) (2010) was repealed. The sections of the Code of Federal Regulations governing
3 prisoner discipline were revised to apply the regulatory inmate discipline program to all prisoners in
4 BOP custody, including those held in a contract facility. *See* 28 C.F.R. § 541.2 (applying the
5 disciplinary program to all prisoners held in custody "by direction of, or under an agreement with,
6 the Bureau of Prisons"). The regulations no longer define a DHO as a BOP employee, but as "an
7 impartial decision maker who was not a victim, witness, investigator, or otherwise involved in the
8 incident." 28 C.F.R. § 541.8(b). Since Petitioner's discipline arose from an October 2012
9 infraction, the revised regulations applied.
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11 Despite the 2011 amendments, the regulatory purpose statement still prescribes a BOP role
12 in the disciplinary process:

13 This subpart describes the Federal Bureau of Prisons' (Bureau) inmate discipline
14 program. This program helps ensure the safety security, and orderly operation of
15 correctional facilities, and the protection of the public, *by allowing Bureau staff to*
16 *impose sanctions on inmates who commit prohibited acts.* Sanctions will not be
imposed in a capricious or retaliatory manner. The Bureau's inmate discipline
program is authorized by 18 U.S.C. 4042(a)(3).

17 28 C.F.R. § 541.1 (*emphasis added*).

18 To comply with the regulatory purpose statement, before sanctions are imposed at
19 a contract facility, a BOP staff member must review and certify the DHO's determination,
20 and impose sanctions as appropriate. By retaining the final power to control disciplinary
21 findings and the imposition of sanctions, the BOP retains its authority over the inmates
22 committed to its care, custody, and control. Because Petitioner's disciplinary proceedings
23 fully complied with the regulations applicable on the date of his infractions, they did not
24 violate Petitioner's due process rights.
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1 **III. Certificate of Appealability**

2 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district
3 court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v. Cockrell*,
4 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate
5 of appealability is 28 U.S.C. § 2253, which provides:

6 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
7 district judge, the final order shall be subject to review, on appeal, by the court of
8 appeals for the circuit in which the proceeding is held.

9 (b) There shall be no right of appeal from a final order in a proceeding to test the
10 validity of a warrant to remove to another district or place for commitment or trial
11 a person charged with a criminal offense against the United States, or to test the
12 validity of such person's detention pending removal proceedings.

13 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
14 appeal may not be taken to the court of appeals from—

15 (A) the final order in a habeas corpus proceeding in which the detention
16 complained of arises out of process issued by a State court; or

17 (B) the final order in a proceeding under section 2255.

18 (2) A certificate of appealability may issue under paragraph (1) only if the
19 applicant has made a substantial showing of the denial of a constitutional
20 right.

21 (3) The certificate of appealability under paragraph (1) shall indicate which
22 specific issues or issues satisfy the showing required by paragraph (2).

23 If a court denies a petitioner's petition, the court may only issue a certificate of appealability
24 "if jurists of reason could disagree with the district court's resolution of his constitutional claims or
25 that jurists could conclude the issues presented are adequate to deserve encouragement to proceed
26 further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although the
27 petitioner is not required to prove the merits of his case, he must demonstrate "something more than
28 the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at
338.

1 In the present case, the Court finds that reasonable jurists would not find the Court's
2 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or
3 deserving of encouragement to proceed further. Petitioner has not made the required substantial
4 showing of the denial of a constitutional right. Accordingly, undersigned recommends that the
5 Court decline to issue a certificate of appealability.

6 **IV. Conclusion and Recommendation**

7 The undersigned RECOMMENDS that the Court deny with prejudice the petition for
8 habeas corpus and decline to issue a certificate of appealability.

9 These findings and recommendations are submitted to the Honorable Lawrence J. O'Neill,
10 United States District Judge, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty (30)**
11 **days** after being served with these Findings and Recommendations, either party may file written
12 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
13 Findings and Recommendations." Replies to the objections, if any, shall be served and filed within
14 **fourteen (14) days** after service of the objections. The parties are advised that failure to file
15 objections within the specified time may result in a waiver of the right to appeal the District Court's
16 order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).
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20 IT IS SO ORDERED.

21 Dated: June 11, 2015

22 /s/ Sheila K. Oberto
23 UNITED STATES MAGISTRATE JUDGE
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