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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

RODNEY BUTLER,

Petitioner,

v.

AUDREY GILL, Warden,

Respondent.

Case No. 1:13-cv-02052-SKO HC

ORDER DENYING 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.<sup>1</sup> He contends that the Bureau of Prisons ("BOP") (1) violated his right to due process by failing to give him notice of new disciplinary charges at least 24 hours before his disciplinary hearing, and (2) denied him an impartial hearing because the Disciplinary Hearing Officer ("DHO") impermissibly contacted Petitioner's witnesses prior to the disciplinary hearing.

**I. Background**

On July 19, 2007, the U.S. District Court for the Eastern District of California sentenced Petitioner to 240 months' imprisonment after he pled guilty to conspiracy to possess cocaine with intent to distribute cocaine (21 U.S.C. § 846). At the time of the alleged disciplinary infractions, Petitioner, who remains in the custody of the BOP, was incarcerated at the Federal Correctional

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<sup>1</sup> Pursuant to 28 U.S.C. § 636(c)(1), both parties consented, in writing, to the jurisdiction of a United States Magistrate Judge to conduct all further proceedings in this case, including the entry of final judgment.

1 Institution, Mendota, California. His projected release date is January 31, 2022, with good conduct  
2 time.

3 According to Incident Report No. 2469971, filed July 19, 2013, and prepared by Counselor  
4 G. Pullings:

5 Correctional staff became aware of the infractions on July 19, 2013 while  
6 investigating a BP-8 from inmate Butler regarding his mail. On July 8, 2013,  
7 Butler informed me that he had sent some legal mail out certified and that it was  
8 not being delivered from the mail room to the Mendota post office in a timely  
9 manner and that he emailed his family when the letter was sent. I became aware  
10 that on June 26, 2013 inmate Butler, Rodney 91084-012 circumvented the mail  
11 procedures by violating PS 1315.07 by working on legal material for his son. In  
12 the inmates PSI it lists Rodney Butler Jr. as his only son, who was 18 in 2007. On  
13 the inmate contacts it lists David Dudley and Larry Fitzgerald as his attorneys.  
14 On June 25, 2013 Butler stated in an E-mail to Karen Starks  
15 ([babakyds@yahoo.com](mailto:babakyds@yahoo.com)) Karen I'm typing up an Affidavit for our son, he will  
16 need to get it notarized when he signs it. Then he will need to give it to the judge  
17 himself to be out in the record. That should take care of his problem. I should  
18 have it finished in a day or two." Then on June 26, 2013 inmate Butler sent out  
19 another [e]-mail to Karen Starks ([babakyds@yahoo.com](mailto:babakyds@yahoo.com)) Karen I sent that  
20 affidavit to mom's this morning so she should get it Saturday or Monday. I sent it  
21 Certified Mail. Make sure U let Ashley know what is going on with her brother.  
22 I emailed her but she doesn't check her email with me like she should. Make sure  
23 that our son gets that affidavit notarized when he signs it. I put a letter of  
24 instructions in there with it. All he has to do is trust me and he can come out of  
25 this. If he has any questions let me know right away." Inmate Butler is  
26 circumventing the mail at FCI Mendota through Karen Starks. Inmate Butler has  
27 4 previous code 296 sanctions beginning May 21, 2012.

18 Doc. 11-1 at 33.

19 The incident report specified two prohibited acts: use of the mail for abuses other than criminal  
20 activity (28 C.F.R. § 541.3, Code 296) and lying or providing a false statement (28 C.F.R. § 541.3,  
21 Code 313).

22 At the Unit Committee hearing on July 23, 2013, Petitioner declined to comment on the  
23 incident. The committee referred the matter to a DHO. It recommended that if the DHO  
24 determined that Petitioner had committed the prohibited acts, he or she should impose the greatest  
25 severity of sanctions.  
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1 DHO James Dern conducted the disciplinary hearing on August 1, 2013. Petitioner was  
2 assisted by a staff representative, Case Manager P. Starks.<sup>2</sup> Petitioner requested two witnesses:  
3 Correctional Services Officer E. Avila to testify that he sent the disputed mail as certified mail, not  
4 legal mail, and Special Investigative Support (SIS) Technician S. Rositas to testify that he had  
5 examined the disputed mail and found nothing illegally sent. Neither witness was immediately  
6 available: DHO Dern did not call them since the matters to which they were to testify were not  
7 disputed. Officer Avila provided a statement and the log listing that the disputed mail was sent via  
8 certified mail. SIS Technician Rositas testified by telephone that he did not personally search the  
9 disputed item of mail. Petitioner stated, "My son's mother sent me an email stating my son had  
10 legal issues and I sent him a copy of my motion to use in court. I thought he was at home." Doc.  
11 11-1 at 8. Petitioner presented no documentary evidence.  
12

13 The DHO concluded that Petitioner had committed the prohibited act of using the mail for  
14 abuses other than criminal activity, in violation of code 296.  
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16 As a basis for this decision, I considered the following: the statement of  
17 Counselor G. Pullings; records showing that inmate Butler's son, Rodney Butler,  
18 Jr., was incarcerated at Kentucky's Murray County Jail on June 20, 2013 ten days  
19 before inmate Butler sent his son certified mail; inmate Butler's four previously  
20 sanctioned code 296 violations with the last one involving the use of legal mail to  
21 send his son's mother a letter; emails sent from inmate Butler to his son's mother;  
22 mail log records; inmate Butler's "affidavit or motion," which was designed to  
23 present his son as a Sovereign Citizen that does not recognize U.S. laws in the  
24 same mold as inmate Butler; and the statements of inmate Butler at the DHO  
25 hearing.

26 Doc. 11-1 at 8.<sup>3</sup>

27 The DHO concluded that Petitioner violated Code 296, but he expunged the  
28 alleged violation of Code 313, lying or providing a false statement. He found, "A

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26 <sup>2</sup> Petitioner first requested the assistance of staff member K. Trotter. Trotter, who was on annual leave, was not available.  
27 <sup>3</sup> The statement of Counselor G. Pullings is included in the record at Doc. 11-1 at 42-43. It is substantially consistent with  
the incident report previously quoted in this order.

28 Petitioner was previously sanctioned for violations of Code 296 which consisted of multiple attempted filings of UCC  
statements to invalidate Petitioner's judgment and conviction and to coerce court personnel to release him.  
A copy of the five-page affidavit that Petitioner prepared for his son and Petitioner's directions to his son for presenting it  
to the Kentucky court are included in the record at Doc. 11-1 at 53-58.

1 reasonable person would conclude that inmate Butler attempted to send his son mail via a  
2 third party in order to circumvent FCI Mendota's mail procedures as he is not currently  
3 authorized to correspond with this inmate." Doc. 11-1 at 30. The DHO explained his  
4 decision:

5 I found inmate Butler guilty of violating Code 296 because I was not convinced  
6 by inmate Butler's statement that he thought his son was at home when his son's  
7 mother sent him an email stating his son had legal issues. Inmate Butler could not  
8 tell me why he only communicated with his son's mother if he thought his son  
9 was in legal trouble. Nor could inmate Butler tell me why he never tried to  
10 contact his son at home by e-mail or telephone. Inmate Butler provided me no  
11 explanation for addressing a legal affidavit intended for his son to "Moms" give  
12 his son was allegedly living at home with his mother.

13 Doc. 11-1 at 10. *See also* Doc. 11-1 at 29-30.

14 The DHO imposed the following sanctions: forfeiture of 27 days of good conduct time; loss of 180  
15 days of telephone and visiting; and loss of one year of e-mail access.

16 After exhausting his administrative appeals, Petitioner filed the pending petition for writ of  
17 habeas corpus on December 17, 2013. Respondent answered on March 3, 2014; Petitioner filed a  
18 reply brief on March 17, 2014. The parties do not dispute venue, service, exhaustion, or subject  
19 matter jurisdiction.

## 20 **II. Alleged Violation of Due Process Rights**

21 Procedural due process of law requires inmates subject to the loss of conduct credits to be  
22 given advance written notice of the claimed violation, a right to call witnesses and present  
23 documentary evidence where it would not be unduly hazardous to institutional safety or  
24 correctional goals, and a written statement of the finder of fact setting forth the evidence relied  
25 upon and the reasons for the disciplinary action taken. *Wolff v. McDonnell*, 418 U.S. 539, 563-64  
26 (1974). If the inmate is illiterate, or if the issue is so complex that it is unlikely that the inmate will  
27 be able to collect and present the evidence necessary for adequate comprehension of the case, the  
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1 inmate should be given access to help from staff or a sufficiently competent inmate designated by  
2 staff. Confrontation, cross-examination, and counsel are not required. *Id.* at 568-70.

3 Petitioner contends that his right to advance written notice of the claimed violation was  
4 violated when he was not given notice of the amendment of the disciplinary charge from Code 313,  
5 Lying or Providing a False Statement, to Code 296, Use of the Mail for Abuses other than Criminal  
6 Activity. His claim is without factual support in the record.

7 As detailed in the background statement, the charges against Petitioner were never  
8 amended. Incident Report No. 2469971, filed July 19, 2013, and addressed at the Unit Committee  
9 Meeting on July 23, 2013, alleged two violations: Code 313, Lying or Providing a False Statement,  
10 and Code 296, Use of the Mail for Abuses other than Criminal Activity. These were the same  
11 charges that the DHO addressed on August 1, 2013. The DHO concluded that Petitioner violated  
12 code 296 but not code 313.

14 Acquittal on one of the two grounds alleged as disciplinary charges is not tantamount to an  
15 amendment of the charges. In fact, as Respondent points out, the DHO's finding that Petitioner  
16 committed only one of the two charges was a positive outcome for Petitioner.

17 Petitioner's claim that he was not provided with written notice of the amendment of the  
18 charges against him is without merit.

20 **III. The Effect of the DHO's Investigation on his Impartiality**

21 Petitioner contends that because the DHO investigated the case before the hearing,  
22 Petitioner was denied an impartial decision maker. Respondent maintains that the DHO satisfied  
23 the requirement of an impartial hearing officer. The Court agrees with Respondent.

24 The right to be heard by an impartial disciplinary committee is "[b]asic to an accused  
25 prisoner's constitutional guarantee of an accurate and fair fact finding determination prior to the  
26 imposition of sanctions." *Clutchette v. Procunier*, 497 F.2d 809, 820 (9<sup>th</sup> Cir. 1974), *modified*, 510  
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1 F.2d 613, *rev'd on other grounds sub nom., Baxter v. Palmigiano*, 425 U.S. 308 (1976). Although  
2 most prison officials are likely to know of significant disciplinary infractions within the prison, no  
3 disciplinary hearing officer should also participate in the action as an investigating or reviewing  
4 officer, or as a witness with personal knowledge of the facts of the accused inmate's participation in  
5 the alleged infraction. *Id.* Generally, a prison official who is not directly involved or personally  
6 interested in the outcome of the disciplinary hearing will satisfy the due process requirement of a  
7 neutral and detached hearing officer. *Id.* "[D]ue process is satisfied as long as no member of the  
8 disciplinary board has been involved in the investigation or prosecution of the particular case, or  
9 has any other form of personal involvement in the case." *Wolff*, 418 U.S. at 592 (Marshall, J.,  
10 concurring). Consistent with these principles, applicable regulations provide that "[t]he DHO will  
11 be an impartial decision maker who was not a victim, witness, investigator, or otherwise involved  
12 in the incident." 28 C.F.R. § 541.8(b).

14           Petitioner contends that DHO Dern was not impartial because he investigated the incident  
15 by contacting Petitioner's witnesses Wilders, Rositas, and Avila prior to the hearing. The facts  
16 regarding the DHO's contacting those individuals indicate that his activities were not consistent  
17 with an investigation of the incident, which had already been fully detailed in the incident report.  
18 Instead, his actions addressed the regulatory requirement that the DHO determine whether  
19 witnesses will appear at the hearing based on their being reasonably available, possessing  
20 information directly relevant to the pending charges, unlikely to jeopardize institutional security,  
21 and necessary to present evidence that is not repetitive of the incident report or other investigation  
22 materials. 28 C.F.R. § 541.8(f). As DHO Dern did that, Petitioner was not denied an impartial  
23 hearing officer.  
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1 **IV. 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, the Court declines to issue a certificate  
5 of appealability.

6 **IV. Conclusion and Order**

7 The Court hereby ORDERS that:

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- 9 1. The petition for writ of habeas corpus is DENIED;
  - 10 2. The Clerk of Court is DIRECTED to enter judgment for Respondent; and
  - 11 3. The Court DECLINES to issue a certificate of appealability.
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13 IT IS SO ORDERED.

14 Dated: June 30, 2015

15 /s/ Sheila K. Oberto  
16 UNITED STATES MAGISTRATE JUDGE