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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GREGORY BONAPARTE,

Petitioner,

v.

PAUL COPENHAVER, Warden,

Respondent.

Case No. 1:14-cv-00850-LJO-GSA-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. Respondent is represented in this action by Mia Giacomazzi, Esq., of the United States Attorney’s Office.

I.

BACKGROUND

Petitioner is in the custody of the Federal Bureau of Prisons (BOP) at United States Penitentiary-Atwater in Atwater, California, pursuant to a judgment of the Middle District of Florida for Distribution of Cocaine Base. On August 2, 2013, Petitioner received an incident report for assaulting without serious injury (attempted), in violation of Prohibited Act Code 224(a). On September 11, 2013, E. Carrero, the Disciplinary Hearing Officer (DHO), conducted a hearing on Petitioner’s disciplinary charge, but suspended the hearing to determine whether an investigation report existed that Petitioner did not receive. On September 13, 2013, the DHO

1 continued the hearing and informed Petitioner that no other investigative report was located.
2 After the DHO took testimony from some of Petitioner's witnesses, the staff representative had
3 to leave, so the hearing was continued. On September 28, 2013, the DHO continued the hearing
4 and found Petitioner guilty of assaulting without serious injury (attempted), in violation of
5 Prohibited Act Code 224(A). Petitioner was sanctioned with 27 days loss of good conduct time,
6 30 day disciplinary segregation, 180 days loss of commissary privileges, 180 days loss of
7 TRULINCS privileges, 60 days loss of mp3 player privileges, 180 days loss of phone privileges,
8 and 180 days loss of visiting privileges. Petitioner was provided a copy of the DHO report on
9 October 26, 2013.

10 On November 13, 2013, Petitioner appealed to the Southeast Region. The Southeast
11 Region sent Petitioner a rejection notice that advised him that he failed to provide a copy of the
12 DHO report and failed to identify the charges and date of the DHO action he sought to appeal.
13 On November 18, 2013, Petitioner sent in another appeal which included the DHO report. On
14 November 26, 2013, this appeal was rejected because the hand-written submission was not
15 legible and Petitioner was given 10 days to resubmit a legible copy of the appeal. On January
16 13, 2014, the BOP received Petitioner's resubmission and it was rejected as untimely. Petitioner
17 then appealed directly to the Office of General Counsel, the final level of agency review, but the
18 appeal was rejected and Petitioner was advised that he must resubmit his appeal to the region
19 first. On April 8, 2014, Petitioner submitted another appeal to the Southeast Region, but it was
20 rejected as untimely between November 26, 2013, and January 13, 2014.

21 Petitioner alleges in the instant petition that he was not afforded an impartial hearing
22 officer, he was denied adequate access to exculpatory video evidence, and that the false incident
23 report was written in retaliation.

24 II.

25 DISCUSSION

26 A. Exhaustion of Administrative Remedies

27 Prior to filing a petition for writ of habeas corpus, a federal prisoner challenging any
28 circumstance of imprisonment must first exhaust all administrative remedies. Martinez v.

1 Roberts, 804 F.2d 570, 571 (9th Cir. 1986); Chua Han Mow v. United States, 730 F.2d 1308,
2 1313 (9th Cir. 1984); Ruwiwat v. Smith, 701 F.2d 844, 845 (9th Cir. 1983). The requirement that
3 federal prisoners exhaust administrative remedies before filing a habeas corpus petition was
4 judicially created; it is not a statutory requirement. Brown v. Rison, 895 F.2d 533, 535 (9th Cir.
5 1990). Thus, “because exhaustion is not required by statute, it is not jurisdictional.” Id. If
6 Petitioner has not properly exhausted his claims, the district court, in its discretion, may either
7 “excuse the faulty exhaustion and reach the merits or require the petitioner to exhaust his
8 administrative remedies before proceeding in court.” Id.

9 The BOP has established an administrative remedy procedure governing prisoner
10 complaints. With regard to disciplinary matters, in order to exhaust administrative remedies, an
11 inmate must raise his or her complaint first to the Regional Director. 28 C.F.R. §§ 542, et seq. If
12 relief is denied, an inmate may appeal to the National Inmate Appeals Administrator in the
13 Central Office of the BOP. Id. No administrative remedy appeal is considered to have been
14 finally exhausted until it is reviewed by the BOP’s Central Office.

15 Respondent argues that Petitioner’s claims are procedurally defaulted, because Petitioner
16 did not exhaust his administrative remedies. See Answer, Attachment 1, Declaration of Glenda
17 Dykes, Exhibit C, Administrative Remedy Generalized Retrieval. Respondent alleges that
18 Petitioner has not properly presented his claim to the Regional Director or the Office of General
19 Counsel. Petitioner argues that waiver of the administrative exhaustion requirement is
20 appropriate in this case because he made substantial efforts to exhaust his administrative
21 remedies and the untimely return of his illegible form barred him from exhausting his
22 administrative remedies.

23 Petitioner may not have had an adequate opportunity to present his claims to the Regional
24 Director, because he did not receive the second rejection notice regarding the illegibility of his
25 second submission until the deadline for resubmission had already passed. Petitioner was unable
26 to comply with the 10 day deadline because of circumstances that were beyond his control.
27 Petitioner did attempt to resubmit his appeal after the 10 day deadline had expired. The
28 Southeast Region received Petitioner’s resubmission on January 13, 2014. Petitioner’s

1 resubmission was rejected as untimely by the Southeast Region. Petitioner then appealed to the
2 Office of General Counsel, but that appeal was denied. The Office of General Counsel advised
3 Petitioner that he had to resubmit the appeal to the region first. Petitioner then attempted to
4 again resubmit his appeal to the Southeast Region, but it was once again denied as untimely for
5 the time period between November 26, 2013, and January 13, 2014.

6 The Court finds that after Petitioner’s administrative appeal was returned to him from the
7 Southeast Region for being illegible, Petitioner acted diligently in attempting to resubmit his
8 appeal to the Southeast Region. It appears that Petitioner was unable to exhaust his
9 administrative remedies because of circumstances beyond his control. Therefore, the Court finds
10 that, under these circumstances, it is appropriate to excuse the administrative exhaustion
11 requirement in the present case. Thus, the Court will address Petitioner’s claims on the merits.

12 **B. Merits**

13 1. Procedural Due Process Protections

14 Prisoners cannot be entirely deprived of their constitutional rights, but their rights may be
15 diminished by the needs and objectives of the institutional environment. See Wolff v.
16 McDonnell, 418 U.S. 539, 555 (1974). Prison disciplinary proceedings are not part of a criminal
17 prosecution, so a prisoner is not afforded the full panoply of rights in such proceedings. Id. at
18 556. Thus, a prisoner’s due process rights are moderated by the “legitimate institutional needs”
19 of a prison. Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989) (citing Superintendent, etc.
20 v. Hill, 472 U.S. 445, 454-455 (1984)).

21 However, when a prison disciplinary proceeding may result in the loss of good time
22 credits, due process requires that the prisoner receive: (1) advance written notice of at least 24
23 hours of the disciplinary charges; (2) an opportunity, when consistent with institutional safety
24 and correctional goals, to call witnesses and present documentary evidence in his defense; and
25 (3) a written statement by the factfinder of the evidence relied on and the reasons for the
26 disciplinary action. See Hill, 472 U.S. at 454; Wolff, 418 U.S. at 563-567.

27 In this case, Petitioner was given advance written notice of the charged misconduct on
28 August 1, 2013 and August 2, 2013, by receiving written copies of the incident reports detailing

1 the allegations. Therefore, Petitioner received advanced written notice well in advance of the
2 first attempted hearing in this matter on September 11, 2013. See Answer, Attachment 2,
3 Declaration of E. Carrero, Exhibit 9, Discipline Hearing Officer Report. In any event, Petitioner
4 does not contend that he was not given proper notice.

5 In Wolff, the Court held that with certain exceptions, in prison disciplinary proceedings, a
6 prisoner is entitled to the right to go call witnesses and present documentary evidence. See
7 Wolff, 418 at 556. However, it is clear that prisoners are not entitled to the same evidentiary
8 standards in prison disciplinary proceedings as those guaranteed to a defendant in a criminal
9 proceeding. Id.

10 Contrary to Petitioner’s claim, he was not denied the right to present evidence. Petitioner
11 claims that prison officials refused to give him videotape evidence that would have supported his
12 version of the incident. However, after attempting to review video footage involving this
13 incident, the investigating lieutenant, J. Kackenmeister, found that there “were no cameras facing
14 the direction of I/M Bonaparte.” See Answer, Attachment 2, Declaration of E. Carrero, Exhibit
15 8, Memorandum dated 9/20/2013 to E. Carrero from J. Kackenmeister. As no video evidence
16 existed, the BOP justified to the DHO why it was unable to give any video evidence to
17 Petitioner. Thus, Petitioner received all of the due process guarantees entitled to him with regard
18 to the presentation of evidence.

19 Under Wolff, a prisoner is entitled to an impartial hearing body to conduct the
20 disciplinary proceedings. See Wolff, 418 U.S. at 559-560. BOP regulations require that the
21 DHOs who preside over disciplinary proceedings not be a “reporting officer, investigating
22 officer, or Unit Discipline Committee (UDC) member, or a witness to the incident, or play any
23 significant part in having the charge(s) referred to the DHO.” 28 C.F.R. § 541.16(b).
24 Petitioner’s hearing was conducted by DHO Carrero, who was not involved in the incident or
25 investigation of the incident, and was not a member of the UDC. See Answer, Attachment 2,
26 Declaration of E. Carrero at 2. Petitioner claims that DHO Carrero was biased against him
27 because Petitioner has filed civil lawsuits against the prison and officers at the prison. However,
28 there is no evidence that Petitioner has filed a civil lawsuit against DHO Carrero. Furthermore,

1 there is no evidence that DHO Carrero was unable to impartially preside over Petitioner’s
2 disciplinary proceeding because of Petitioner’s civil lawsuits against other personnel at the
3 prison. Therefore, Petitioner’s hearing was conducted in accordance with procedural due
4 process.

5 Petitioner also tries to argue that he was denied due process because the investigating
6 officer was involved in reporting the incident, but it is clear that the original report and the
7 rewritten report were by Alvarez. Lieutenant Kackenmeister reviewed the original incident
8 report and had Alvarez rewrite the incident report. However, Lieutenant Kackenmeister did not
9 report the incident and he was not involved in the incident.

10 At the conclusion of the disciplinary hearing, the DHO found that Petitioner committed
11 the misconduct outlined in the incident report, namely, attempted assaulting without serious
12 injury, in violation of prohibited act code 224A. On October 26, 2013, Petitioner was provided
13 with a copy of the written decision outlining the evidence relied upon and the reasons for the
14 decision. Thus, it is apparent that Petitioner received all of the procedural due process
15 protections set forth in Wolff, and there was no due process violation.

16 2. Substantive Due Process

17 Prisoners possess a liberty interest in their statutorily provided good time credits. Wolff,
18 418 U.S. at 557. Therefore, a prisoner may not be deprived of the credits without due process of
19 law. Due process requires that the decision be supported by “some evidence.” Hill, 472 U.S. at
20 455, citing United States ex rel. Vatauer v. Commissioner of Immigration, 273 U.S. 103, 106
21 (1927). The decision to revoke a prisoner’s good time credits need only be supported by “some
22 evidence,” even if that evidence might be characterized as meager. See Superintendent, Mass.
23 Corr. Inst., Walpole v. Hill, 472 U.S. 445, 455 (1985). “Ascertaining whether this standard is
24 satisfied does not require examination of the entire record, independent assessment of the
25 credibility of witnesses, or weighting of the evidence. Instead, the relevant question is whether
26 there is any evidence in the record that could support the conclusion reached by the disciplinary
27 board.” Hill, 472 U.S. at 455-456. “The fundamental fairness guaranteed by the Due Process
28 Clause does not require courts to set aside decisions of prison administrators that have some

1 basis in fact.” Id. at 456. A due process violation can be shown if after a review of the record in
2 the light most favorable to upholding the agency’s decision is devoid of evidence to support the
3 decision to revoke the good time credits. Id. at 457.

4 In this case, there is some evidence to support the DHO’s finding of guilt. The DHO
5 considered the incident report written by staff member Alvarez, staff memoranda, and the
6 testimony of witnesses Ronald Samuels and Christopher Hemmings. The regulatory language
7 describing a Code 224 violation explains that “a charge at this level is used when less serious
8 physical injury or contact has been attempted or accomplished by an inmate.” See 28 C.F.R. §
9 541.3, Table 1. In the incident report, Alvarez detailed the specific incident and quoted
10 Petitioner’s exact language. Alvarez stated that Petitioner got within inches of him and said,
11 “What you didn’t see me at the door? You weren’t going to door?” Alvarez wrote in his incident
12 report that he felt threatened by Petitioner’s demeanor and body stance and felt that Petitioner
13 was challenging him.

14 Petitioner contends that he is actually innocent of the infraction because the incident
15 report is retaliation for his civil complaints against prison officers. Petitioner fails to set forth
16 any evidence, beyond his mere assertion, that he is actually innocent of the offense. Petitioner’s
17 two witnesses did not provide a defense for him. Inmate Samuels testified that Petitioner and
18 Alvarez were face to face with one another during the incident. Inmate Hemmings only testified
19 that Petitioner had requested the videotape of the area. Petitioner’s aggressive move toward
20 Alvarez is “some evidence” that Petitioner attempted less serious physical contact. The DHO
21 properly considered the evidence and the weight to give Petitioner’s statement and Alvarez’s
22 statement. Disciplinary decisions do not require that the supporting evidence outweigh the
23 evidence to the contrary. Hill, 472 U.S. at 455. Due process only requires that there be “some
24 evidence.” Id. Therefore, there is “some evidence” supporting the disciplinary decision.

25 Petitioner contends he has been subjected to acts of retaliation by certain BOP staff
26 members, which appears to be a challenge to the conditions of his confinement. Because this
27 claim involves the conditions of Petitioner’s confinement, he cannot proceed by way of a petition
28 for writ of habeas corpus and must pursue his claims in a Bivens action. In Bivens v. Six

1 Unknown Named Agents of Federal Bureau of Narcotics, 408 U.S. 388 (1971), the United States
2 Supreme Court established a federal counterpart to a 42 U.S.C. § 1983 action and established a
3 right to sue a federal employee for a civil rights action. Therefore, the Court must dismiss
4 Petitioner’s challenge to the conditions of his confinement without prejudice to allow Petitioner
5 to re-file pursuant to Bivens.

6 **III.**

7 **FINDINGS AND RECOMMENDATION**

8
9 Accordingly, the Court HEREBY RECOMMENDS that the petition for writ of habeas
10 corpus be DENIED and that Petitioner’s retaliation claim be DISMISSED without prejudice.

11 This Findings and Recommendation is submitted to the assigned United States District
12 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
13 Rules of Practice for the United States District Court, Eastern District of California. Within
14 thirty (30) days after service of the Findings and Recommendation, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the objections
17 shall be served and filed within fourteen (14) days after service of the objections. The Court will
18 then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are
19 advised that failure to file objections within the specified time may waive the right to appeal the
20 District Court’s order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
21 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22 IT IS SO ORDERED.

23
24 Dated: March 3, 2015

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE