

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

RICHARD BAYS

Petitioner,

-v-

WARDEN, Ohio State Penitentiary

Respondent.

Case No. 3:08-cv-076

Judge Thomas M. Rose

Magistrate Judge Michael R. Merz

**ENTRY AND ORDER OVERRULING THE WARDEN'S OBJECTIONS
(Doc. #71) TO THE MAGISTRATE JUDGE'S DECISION AND ORDER
GRANTING BAYS' MOTION FOR AN EVIDENTIARY HEARING (Doc.
#54)**

This matter comes before the Court pursuant to the Warden's Objections (doc. #71) to Magistrate Judge Michael R. Merz's Decision and Order (doc. #65). In this Decision and Order, the Magistrate Judge granted Petitioner Richard Bays' ("Bays") Bays' Motion for an Evidentiary Hearing on his First, Second and Sixth Grounds for Relief.

The Warden has objected to the Magistrate Judge's decision granting a hearing on Bays' First Ground for Relief. The Warden has not objected to the Magistrate Judge's decision granting a hearing on Bays' Second and Sixth Grounds for Relief. Bays has responded to the Warden's Objection and the Warden has replied. This matter is, therefore, ripe for review by the District Court Judge.

Bays' Motion for an Evidentiary Hearing is a nondispositive matter. Federal Rule of Civil Procedure 72(a) provides that a district court must modify or set aside any part of a nondispositive order that is clearly erroneous or is contrary to law. *American Coal Sales Co. v. Nova Scotia Power, Inc.*, No. 2:06-cv-94, 2009 WL 467576 at *13 (S.D. Ohio Feb. 23,

2009)(citing Fed. R. Civ. P. 72(a)). Thus, a “clearly erroneous” standard applies only to factual findings made by the magistrate judge. *Id.* Legal conclusions are reviewed under the more lenient “contrary to law” standard. *Id.* Both of these standards provide considerable deference to the determinations made by the magistrate judge. *Id.* (citing *In re Search Warrants Issued August 29, 1994*, 889 F. Supp. 296, 298 (S.D. Ohio 1995)).

A magistrate judge’s factual findings are considered clearly erroneous if, on the entire evidence, the court is left with the definite and firm conviction that a mistake has been committed. *Id.* The test is whether there is evidence in the record to support the magistrate judge’s finding and whether the magistrate judge’s construction of that evidence is reasonable. *Id.* (citing *Heights Community Congress v. Hilltop Realty Corp.*, 774 F.2d 135, 140 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986)). A legal conclusion is contrary to law if the court determines that the magistrate judge’s legal conclusions “contradict or ignore applicable precepts of law....” *Id.*(citing *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992).

In this case, this District Court Judge has reviewed the Magistrate Judge’s factual findings and finds that they are not clearly erroneous. This District Court Judge has also reviewed the Magistrate Judge’s conclusions of law and finds that they do not contradict or ignore applicable law.

Therefore, the Warden’s Objections to the Magistrate Judge’s Decision and Order on Bays’ Motion for an Evidentiary Hearing are OVERRULED. Bays is entitled to an evidentiary hearing on his First, Second and Sixth Grounds for Relief.

DONE and ORDERED in Dayton, Ohio, this Fourth day of October, 2010.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record