UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

EDDIE JEROME MILLS, Petitioner	)	CIVIL NO. 1:18-cv-2368
v.	)	(RAMBO, D.J.)
DAVID J. EBBERT, Respondent	)	(ARBUCKLE, M.J.)

REPORT AND RECOMMENDATION

I. INTRODUCTION

Eddie Jerome Mills ("Petitioner"), a federal inmate formerly incarcerated at USP Atwater and USP Lewisburg[1], initiated this action by filing a Petition for Writ of Habeas Corpus (Doc. 1) under 28 U.S.C. § 2241, challenging the loss of "good time" credits. The matter has been referred to me to draft a Report and Recommendation. For the reasons below, I RECOMMEND that the Petition be DISMISSED WITHOUT PREJUDICE.

II. FACTUAL AND PROCEDURAL HISTORY

Petitioner was a prisoner at USP Atwater. (Doc. 7-1, p. 8). On June 12, 2017, an incident report was created regarding Petitioner's apparent misconduct. *Id.* The initial incident report stated:

> This incident report is written following an investigation regarding inmate Mills, Eddie, Reg. No. 13251-040, and his attempt to introduce Suboxone and a cell phone SIM card into USP Atwater.

[1] Petitioner has since been transferred to USP Allenwood. (Doc. 15).

> On 5-10-17, at approximately 10:00 a.m., Mail Room Staff located 282 full strips of Suboxone and an AT&T cell phone SIM card in incoming mail addressed to Staff. During the course of this investigation it was determined [Redacted Inmate's Identification] . . . and Mills, Eddie . . . coordinated to have this contraband mailed to a Staff member, to then be retrieved by [Redacted Inmate's Identification]. . . .

Id.

The first incident report included the following charges: Attempted Drug Introduction, Criminal Phone Abuse, and Criminal Mail Abuse. *Id.* The same day that Petitioner received the first incident report, the disciplinary process was suspended due to a referral to the FBI for investigation. *Id.* at p. 21. Petitioner was provided a copy of the first incident report nonetheless. *Id.* On January 17, 2018, the FBI released the incident report to USP Atwater for processing. *Id.* On January 24, 2018, the incident report was re-written. *Id.*

On January 25, 2018, at 11:30 a.m., Petitioner was provided a re-written incident report. *Id.* at p. 10. Petitioner was also provided with a form advising him of the reason for the incident report delay. *Id.* at p. 9. The form explained to Petitioner that he would not receive his Unit Discipline Committee hearing within five (5) work days, as required by BOP policy. *Id.* This form indicated: "This report has been delayed due to being re-written and was pending an FBI investigation." *Id.*

The re-written incident report differs from the first incident report in that it notes that the mailed substance was "identified as Buprenorphine by Medical Staff."

See id. at pp. 8,10. The re-written incident report contained an additional charge: "Attempted Introduction Hazardous Tool." *Id.* at p. 7. The re-written report also includes conversations made by Petitioner and an unnamed inmate to individuals outside the prison. *See id.* at pp. 12-16.

On January 30, 2018, Petitioner appeared before the Unit Discipline Committee ("UDC"). *Id.* at p. 18. The UDC referred the incident to the Discipline Hearing Officer ("DHO") for a hearing. *Id.* In response, Petitioner provided a "Statement for UDC." *Id.* at p. 19. In that response, Petitioner argued that he did not timely receive the re-written incident report and that changes had been made from the first incident report. *Id.*

The DHO held its hearing on February 12, 2018. *Id.* at p. 20. The DHO hearing was held eighteen (18) days after Petitioner received the re-written incident report. *See id.* at p. 20. During the hearing, the DHO confirmed that Petitioner understood his rights, received advanced written notice of the charges against him, waived staff representation, did not want to call any witnesses, and was ready to proceed with the hearing. *Id.* The DHO outlined noted how the first incident report was suspended for the referral to the FBI. *Id.* at p. 26. Petitioner argued that he did not timely receive the re-written incident report and that the re-written incident report was not the same as the first incident report. *Id.* The DHO noted that the re-written report stated that it was delivered at 11:30 a.m. on January 25, 2018, making it timely. *Id.* The DHO

also noted that there was no evidence that Petitioner did not receive a full copy of the incident report. *Id.* After consideration of all the evidence[2], the DHO found that based upon the greater weight of the evidence, that Petitioner had committed the prohibited acts of Attempted Introduction of Narcotics and Attempted Introduction of a Hazardous Tool. *Id.* As a sanction, Petitioner lost 41 days of good time on each charge. *Id.* Petitioner also lost prison privileges—including visitation, telephone, and commissary privileges. *Id.* at p. 2.

According to his Petition, Petitioner had an issue with the incident report while at USP Atwater. (Doc. 1, pp. 6-7). Petitioner did not receive the incident report until almost 25.5 hours after it was drafted. *Id.* at p. 6.

Petitioner sought relief from the BOP Western Regional Office, arguing that the rewritten incident report was untimely delivered to Petitioner. *Id.* at p. 2. Petitioner noted that the incident report clearly stated that it was delivered to him at 11:30 a.m., when it was actually delivered to him at 1:00 p.m. *Id.* at pp. 2-3. The BOP Western Regional Office denied his appeal. *Id.* at p. 2.

Petitioner then sought relief from the BOP Central Office. *Id.* at p. 3. In that appeal, Petitioner argued that the rewritten incident report was untimely delivered,

[2] The DHO considered the officer's written report, SIS report, photographs of the Suboxone and AT&T card, supporting memorandum from a medical technician, recorded telephone call lists, internal prison emails, Petitioner's disciplinary record, and Petitioner's written and verbal statements. (Doc. 7-1, pp. 25-26).

violating his due process rights. *Id.* Petitioner asked the BOP Central Office to expunge the incident report and restore his good time credits. *Id.* The BOP Central Office denied the appeal. *Id.*

After denial from the BOP Central Office, Petitioner filed an informal resolution attempt through USP Lewisburg's internal grievance system. *Id.* at p. 14. Petitioner stated that he was "trying to appeal [his] administrative remedy denial from the [BOP] Central Office that [he] previously filed at [the] last institution [he was incarcerated at]." *Id.* Petition explained that he did not receive the receipt from the Central Office for his appeal, even after asking multiple members of prison staff for assistance. *Id.* Petitioner also requested copies of the documentation that was "relevant to this appeal." *Id.*

On December 13, 2018, Petitioner filed a Petition for Writ of Habeas Corpus (Doc. 1). Petitioner argues that his due process rights were violated because he did not timely receive the incident report. As relief, Petition seeks expungement of the incident report and restoration of his good time credits and prison privileges. *Id.* at p. 8.

III. DISCUSSION

A. PROCEDURAL REQUIREMENTS

Under Section 2241, a federal prisoner may challenge the execution of his sentence—such as a claim concerning the denial or revocation of parole, or the loss

of good-time credits—in the district court for the federal judicial district where the prisoner is in custody. *See* 28 U.S.C. § 2241(a); *Rumsfeld v. Padilla*, 542 U.S. 426, 443-44 (2004); *Coady v. Vaughn*, 251 F.3d 480, 485 (3d Cir. 2001). "Federal prisoners are ordinarily required to exhaust their administrative remedies before petitioning for a writ of habeas corpus pursuant to § 2241." *Moscato v. Fed. Bureau of Prisons*, 98 F.3d 757, 760 (3d Cir. 1996). Respondents do not contend that Petitioner failed to exhaust his administrative remedies before filing his federal habeas petition. Exhaustion is not an issue.[3] Thus, I can proceed to addressing the merits of Petitioner's federal habeas petition.

B. THE PETITION FAILS ON THE MERITS

Federal inmates possess a liberty interest in good-time credit. *Wolff v. McDonnell*, 418 U.S. 539, 555-57; *Young v. Kann*, 926 F.2d 1396, 1399 (3d Cir. 1991). "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff*, 418 U.S. at 557. However, the Supreme Court has recognized that when confronted with a prison disciplinary proceeding that potentially infringes on a cognizable liberty interest, there are certain procedural due process rights that must be given to

[3] According to the Petition, Petitioner appealed the decision of the DHO to the Western Regional Director, who denied his appeal. (Doc. 1, p. 2). Petitioner then appealed to the BOP Central Office. *Id.* at p. 3.

an inmate. *See id.* at 556-567. These minimum due process protections include: (1) a right to appear before an impartial decision-making body; (2) written notice of the charges at least 24 hours in advance of the disciplinary hearing; (3) an opportunity to call witnesses and present documentary evidence in his defense when consistent with institutional safety or correctional goals; (4) assistance from an inmate representative if charged inmate is illiterate or complex issues are involved; and (5) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. *Id.* at 563-67. This Court's scope is limited to confirming that the inmate received these minimum procedural due process protections and that the disciplinary decision was supported by "some evidence." *See Hill*, 472 U.S. at 457.

Here, Petitioner argues that he received ineffective notice of the incident report. However, an inspection of the incident report reveals that the incident report was returned to Petitioner within twenty-four (24) hours of prison staff writing the incident report. (Doc. 7-1, p. 10). The report was written on January 24, 2018, at 11:40 a.m. and given to Petitioner on January 25, 2018, at 11:30 a.m. *Id.* Petitioner argues that the time was incorrectly stated on the incident report but fails to provide any evidence to support this claim.

Even assuming arguendo that Petitioner did not receive the incident report within twenty-four (24) hours of it being written, Petitioner's due process rights were not violated.

BOP inmate disciplinary procedures are codified at 28 C.F.R. § 541. Pursuant to these regulations, prison staff shall prepare an incident report when there is reasonable belief that an inmate has violated BOP regulations. See 28 C.F.R. § 541.5. 28 C.F.R. § 541.5(a) states:

> Incident Report. The discipline process starts when staff witness or reasonably believe that you committed a prohibited act. A staff member will issue you an incident report describing the incident and the prohibited act(s) you are charged with committing. You will **ordinarily** receive the incident report within 24 hours of staff becoming aware of your involvement in the incident.

28 C.F.R. § 541.5(a) (emphasis added).

In accord with *Wolff*, the Code of Federal Regulations, in pertinent part, requires the DHO to proceed as follows:

> (a) The Warden shall give an inmate advance written notice of the charge(s) against the inmate no less than 24 hours before the inmate's appearance before the Discipline Hearing Officer . . .
> (b) The Warden shall provide an inmate the service of a full time staff member to represent the inmate at the hearing before the Discipline Hearing Officer should the inmate so desire. . . .
> (c) The inmate is entitled to make a statement and to present documentary evidence in the inmate's own behalf. An inmate has the right to submit names of requested witnesses and have them called to testify and to present documents in the inmate's behalf, provided the calling of witnesses or the disclosure of documentary evidence does not jeopardize or threaten institutional or an individual's security. . . .
> (d) An inmate has the right to be present throughout the DHO hearing except during a period of deliberation or when institutional security would be jeopardized. . . .
>
> . . . .

> (f) The DHO shall consider all evidence presented at the hearing. The decision of the DHO shall be based on at least some facts . . .
> (g) The Discipline Hearing Officer shall prepare a record of the proceedings which need not be verbatim. . . . The DHO shall give the inmate a written copy of the decisions and disposition, ordinarily within 10 days of the DHO's decision.

18 C.F.R. § 541.17.

A prisoner's procedural due process rights do not include a requirement that he receive the incident report within a twenty-four (24) hour period. *See Wolff*, 418 U.S. at 556-67.

Petitioner also claims that the incident report was re-written after being submitted to the FBI. Specifically, Petitioner argues that the returned incident report was not "the same incident report that was suspended on [June 12, 2017] at 9:50 a.m. pending FBI referral." (Doc. 1, p. 11). Petitioner also notes that he was not provided a "full" copy of the re-written incident report. *Id.* The re-written incident report differs from the first incident report in that it notes that the substance was "identified as Buprenorphine by Medical Staff." *See id.* at pp. 8,10. The first incident report and the re-written incident report included charges of: "Attempted Drug Introduction," "Criminal Phone Abuse," and "Criminal Mail Abuse." *Id.* The re-written report contained an additional charge of "Attempted Introduction Hazardous Tool." *Id.* The re-written report also included conversations made by Petitioner and an unnamed inmate to individuals outside the prison. *See id.* at pp. 12-16.

Although there were changes from the first incident report to the re-written incident report, Petitioner's due process rights were not violated. Nothing in the BOP policy prohibits the institution from seeking more information regarding an incident report that is written. Further, the record indicates that Petitioner received timely notice of the charges against him. The DHO held its hearing eighteen (18) days later, on February 12, 2018—affording Petitioner more than the required twenty-four (24) hours before a DHO hearing is held. *See id.* at p. 20. Petitioner received more time than required by due process to prepare for the hearing.

It is clear that Petitioner received all of the due process required under *Wolff*. Because Petitioner was afforded all of his procedural rights, the only remaining issue is whether there was sufficient evidence to support the decision by the DHO. Petitioner did not allege that the DHO's decision was unsupported by sufficient evidence.

The DHO need not accept what the inmate perceives to be the "best" or most persuasive set of facts. Rather, there need only be "some evidence" to support the disciplinary decision. *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 555-56 (1985). This standard is satisfied where "there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* A disciplinary committee's resolution of factual disputes should not be subject to review where the standard in *Hill* is satisfied. *Id.*

Here, the record clearly reveals the existence of submitted evidence from the hearing to allow the DHO to conclude that the greater weight of the evidence supported a finding of guilt. As noted above, the DHO considered the officer's written report, SIS report, photographs of the Suboxone and AT&T card, supporting memorandum from a medical technician, recorded telephone call lists, internal prison emails, Petitioner's disciplinary record, and Petitioner's written and verbal statements. (Doc. 7-1, pp. 25-26).

Finally, I find that the sanctions imposed by the DHO were within the limits permitted by statute. Petitioner was found guilty of two 100-level prohibited acts.[4] Pursuant to 28 C.F.R. § 541.3, forfeiting or withholding 100% of good time credits is an available sanction for 100-level offenses. Thus, the sanctions imposed by the DHO in the present case were consistent with the severity level of the prohibited act and within the maximum available to the DHO. Accordingly, the petition should be denied.

IV. PETITIONER'S CLAIMS REGARDING PRISON PRIVILEGES

In his Petition, Petitioner also argues that in addition to losing good time credits, he was wrongfully denied access to telephone usage, visits, and the

[4] Petitioner was found guilty of Attempted Introduction of Narcotics (Code 111A) and Attempted Introduction of a Hazardous Tool (Code 108A). (Doc. 7-1, p. 26).

commissary. These claims are better suited in a civil rights claim, as they are outside the scope of a federal habeas petition under Section 2241. I express no opinion as to the merits, if any, of any civil rights claim Petitioner may file based upon the facts asserted in the instant petition.

V. RECOMMENDATION

Based on the foregoing, IT IS HEREBY RECOMMENDED that Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be DISMISSED WITHOUT PREJUDICE to his right to pursue this claim in a properly filed civil rights action.

Date: December 16, 2019

BY THE COURT:

s/ William I. Arbuckle
William I. Arbuckle
U.S. Magistrate Judge

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NOTICE OF LOCAL RULE 72.3

NOTICE IS HEREBY GIVEN that any party may obtain a review of the Report and Recommendation pursuant to Local Rule 72.3 which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses, or recommit the matter to the magistrate judge with instructions.

Date: December 16, 2019

BY THE COURT

s/William I. Arbuckle
William I. Arbuckle
U.S. Magistrate Judge