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## Konopka v. McGrew

United States District Court for the Central District of California

February 9, 2015, Decided; February 9, 2015, Filed

Case No. CV 13-9370-VAP (SP)

### Reporter

2015 U.S. Dist. LEXIS 36230 \*

JOSEPH KONOPKA, Petitioner, v. LINDA T. MCGREW,  
Warden, Respondent.

**Subsequent History:** Adopted by, Petition dismissed by  
Konopka v. McGrew, 2015 U.S. Dist. LEXIS 36225 (C.D.  
Cal., Mar. 20, 2015)

### Core Terms

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disciplinary hearing, incident report, prison,  
RECOMMENDATION, confiscated, electronic, hazardous,  
inmate, good time credit, prohibited act, due process,  
disciplinary, impartial, witnesses, trained, staff

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**Judges:** SHERI PYM, UNITED STATES MAGISTRATE  
JUDGE.

**Opinion by:** SHERI PYM

### Opinion

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#### REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the  
Honorable Virginia A. Phillips, United States District Judge,  
pursuant to the provisions of 28 U.S.C. § 636 and General  
Order 05-07 of the United States District Court for the Central  
District of California.

I.

#### INTRODUCTION

On December 20, 2013, petitioner Joseph Konopka, a federal  
prisoner proceeding pro se, filed a Petition for Writ of Habeas  
Corpus pursuant to 28 U.S.C. § 2241 ("Petition"). In the  
Petition, petitioner contends that his March 5, 2013  
disciplinary hearing did not comport with due process and he  
is entitled to relief because: (1) the Disciplinary Hearing  
Officer ("DHO") was not impartial; (2) the DHO and the  
Correctional Counselor who served on the Unit Discipline  
Committee ("UDC") were not qualified; (3) petitioner was not  
allowed to examine the evidence against [\*2] him; and (4)  
the Bureau of Prisons ("BOP) did not apply the correct  
disciplinary standard. Pet. at 3-4.

On February 18, 2014, respondent filed an Answer, arguing  
that petitioner received all due process to which he was  
entitled at the disciplinary hearing and "some evidence"  
supports the DHO's decision. Ans. at 5-10. For the reasons set  
forth below, the court agrees with respondent that petitioner's  
due process rights were not violated during the disciplinary  
hearing. Accordingly, it is recommended that the Petition be  
denied and this action be dismissed with prejudice.

II.

#### BACKGROUND

##### A. Petitioner's Incarceration

Petitioner was sentenced to a 240-month term of  
imprisonment for two separate convictions: (1) possession of  
chemical weapons in violation of 18 U.S.C. § 229(a)(1) (case  
no. 02-CR-224-1, Northern District of Illinois); and (2) eleven  
separate counts including interception of electronic  
communications in violation of 18 U.S.C. § 2511(1)(a),

transmission of a program causing damage in excess of \$5000 to a protected computer in violation of 18 U.S.C. § 1030(a)(5)(A), willful damage to property of an energy facility in violation of 18 U.S.C. § 1366(b), and interference with telephone system/radio station in violation of 18 U.S.C. § 1362 (case no. 02-CR-87, Eastern District of Wisconsin). Elliott [\*3] Decl. ¶4. During all relevant times, petitioner was incarcerated at the United States Penitentiary ("USP") in Victorville, California. Petitioner is currently incarcerated at the United States Penitentiary, Administrative Maximum, in Florence Colorado. Docket no. 7. His projected release date is August 24, 2019. Elliott Decl. ¶4(C).

### **B. Petitioner's Disciplinary Incident and Hearing**

On January 22, 2013, F.L. Aguilar, a Vocational Training Instructor at USP Victorville, conducted a random pat search of petitioner. Elliott Decl. ¶5. During the search, Aguilar found an altered electrical device in petitioner's right hand. *Id.* When asked what the device was, petitioner remained silent. *Id.* Aguilar confiscated the device. *Id.* Later, Keith Shaner, a contract educator who taught an ASE Automotive Class and who had witnessed the event, told Aguilar that petitioner had shown him the device during class and claimed it was a voltage meter. *Id.*

On January 23, 2013, Aguilar filed an incident report, charging petitioner with violating Prohibited Act Code 108, Possession and Manufacture of Electronic Device. *Id.*, ¶5, Ex. B. Lieutenant R. Citron delivered a copy of the incident report to petitioner that [\*4] same day. *Id.* ¶6, Ex. B. Lieutenant R. Citron then began his investigation into the charge. *Id.*, ¶6. Lieutenant Citron advised petitioner of his rights during the investigation, including the right to remain silent. *Id.* Petitioner declined to make a statement during the investigation. *Id.* Lieutenant Citron completed his investigation on January 23, 2013 and forwarded the incident report and his investigation to the Unit Discipline Committee for an initial hearing. *Id.*

On January 25, 2013, Correctional Counselor W. Chandlee, with petitioner present, conducted a UDC review of the incident report and investigation. *Id.* ¶7 Petitioner had no comment for Chandlee. *Id.* Petitioner then signed a form acknowledging that he had been informed of his rights at the hearing before the DHO. *Id.* ¶8, Ex. C. He also signed a form waving his right to a staff representative and to call witnesses at the hearing. *Id.* ¶9, Ex. D.

Due to the severity of the charge against plaintiff, the UDC was required to refer the incident to report to the DHO. *Id.* ¶7 (citing 28 C.F.R. § 541.7(a)(4)). On February 20, 2013, DHO Diana Elliott conducted petitioner's disciplinary hearing. *Id.*

¶10. Prior to beginning the hearing, DHO Elliott reviewed [\*5] petitioner's rights with him and confirmed that he did not want to call any witnesses or present any documentary evidence, and that he did not want a staff representative. *Id.* Petitioner made the following statement at the hearing in his defense: "What's written on the shot is accurate. It's a voltage meter I use it for working on radios. It was originally a radio and clock parts. I reconfigured it to read voltage." *Id.* ¶11, Ex. E at 22. DHO Elliott considered this statement as well as Aguilar's description of the incident, supporting memorandum submitted by contract educator Shaner, photographs of the device, an email from the institution's Communications Technician and SIS Technician regarding the device and its capabilities, and petitioner's presentence report. *Id.* ¶12, Ex. E at 23. DHO Elliott concluded that petitioner had violated Prohibited Act Code 108, Possession of a Hazardous Tool or Electronic Device. *Id.* ¶13, Ex. E at 23. In support of this finding, DHO Elliott relied on the fact that petitioner admitted to possessing the device. *Id.* ¶13, Ex. E at 24. Furthermore, although petitioner maintained that the device was a voltage meter, the SIS Technician and Communications [\*6] Technician both confirmed that the items recovered included "electronic components capable of programming, memory to execute timed functions capable of enabling or disabling a particular operation, creating a trigger or warning, or disrupting the operation of components or systems," all of which "pose a significant threat to institution security devices." *Id.* Given plaintiff's "history of causing significant property/infrastructure damage, combined with his skill and experience with computer systems," DHO Elliott concluded that petitioner's possession of the confiscated device potentially allowed petitioner "to create a diversion or to disable institution security devices for criminal purposes." *Id.*

As a result, petitioner was sanctioned with the loss of 41 days of Good Conduct Time, 60 days of disciplinary segregation, 60 days loss of personal property, and one year loss of commissary and e-mail privileges. *Id.* ¶14, Ex. E at 25.

### **III.**

#### **STANDARD OF REVIEW**

Habeas corpus relief extends to a person in custody under the authority of the United States. *See* 28 U.S.C. § 2241. Relief is available if a federal prisoner can show he is "in custody in violation of the Constitution or laws or treaties of the United [\*7] States." 28 U.S.C. § 2241(c)(3). A § 2241 petition is the proper vehicle for seeking relief where, as here, a federal prisoner claims that he has been denied good time

credits without due process of law. Preiser v. Rodriguez, 411 U.S. 475, 487-88, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973); Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989).

#### IV.

#### DISCUSSION

Petitioner argues that he was denied due process of law guaranteed by the *Fourteenth Amendment* during his disciplinary hearing. Pet. at 3-4. He argues that: (1) DHO Elliott was not impartial because she acted as DHO while simultaneously acting as a Unit Manager with responsibility for the Unit Team committee that reviewed the incident report for referral to the DHO; (2) DHO Elliott was not trained and certified to act as DHO and Correctional Counselor Chandlee was not certified to serve on the UDC; (3) DHO Elliott relied on documentary evidence to establish the hazardous nature of the confiscated item, but petitioner was not permitted to examine the item itself; and (4) the confiscated item did not meet the definition of a "hazardous tool." *Id.*

The Constitution does not guarantee good time credits for satisfactory behavior in prison, but if a state has created a protected liberty interest in good time credits, the deprivation of credit based on misconduct allows a prisoner to challenge such deprivation through a [\*8] habeas petition to ensure that the state-created right has not been arbitrarily abrogated. Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); see Superintendent v. Hill, 472 U.S. 445, 453, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985) ("due process requires procedural protections before a prison inmate can be deprived of a protected liberty interest in good time credits"). Similarly, federal law has given federal prisoners a liberty interest in receiving good time credits. Bostic, 884 F.2d at 1269; see 18 U.S.C. § 3624(b).

Wolff set forth the constitutionally-required procedures that satisfy due process in prison disciplinary proceedings, including: (1) written notice of the charged misconduct at least 24 hours before the hearing; (2) a "sufficiently impartial" hearing body that does not present "a hazard of arbitrary decisionmaking"; (3) an opportunity to present witnesses and documentary evidence; (4) assistance as may be necessary from prison staff or from a "sufficiently competent inmate designated by the staff" for illiterate inmates or in complex cases; and (5) a written statement of the evidence relied upon and reasons for the sanction. Wolff, 418 U.S. at 563-71. In addition to the aforementioned procedural protections, due process requires that the decision of the prison disciplinary authority be supported by "some evidence" in the record. Hill,

472 U.S. at 454. As the Supreme Court has explained, [\*9] this standard is deferential, requiring only a "modicum" of evidence supporting the decision. *Id.* at 455. It does not require the federal court to re-weigh evidence or set aside decisions of prison administrators that have "some basis in fact." *Id.* at 455-56.

The only right under Wolff that plaintiff contends was denied is his right to an impartial hearing body. See Pet. at 3-4. Plaintiff's claim is unpersuasive. First, there is no evidence that DHO Elliott was biased because of her role as DHO and Unit Manager overseeing the Unit Team committee that reviewed the incident report and referred it to the DHO. An inmate has a right to a hearing before an impartial decisionmaker. Wolff, 418 U.S. 539, 570-71, 94 S. Ct. 2963, 41 L. Ed. 2d 935. To succeed on a biased adjudicator claim, petitioner must "overcome a presumption of honesty and integrity in those serving as adjudicators." See Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). Petitioner has failed to overcome that presumption here. DHO Elliott had no knowledge or involvement in the underlying incident, nor did she participate with the UDC in the investigation or preparation of the incident report. Elliott Decl. ¶16(A). Plaintiff's conclusory allegation, without more, is insufficient. As such, this claim fails.

Second, petitioner's claim that neither DHO Elliott [\*10] nor Correctional Counselor Chandlee were trained and certified is without merit. DHO Elliott received special training and passed a certification test in October 2013 and has been regularly re-certified since that time. Elliott Decl. ¶16(B). Indeed, the BOP prohibits DHOs from conducting hearings unless they have received the requisite certification and training. *Id.* (citing Program Statement 5290.09, p. 27). Similarly, Correctional Counselor Chandlee was qualified to sit on the UDC, having completed the mandated self-study program for UDC certification. *Id.* Moreover, respondent correctly notes that even if plaintiff's allegation that Elliott and Chandlee were uncertified was true, it would not entitle petitioner to relief because the certification requirement is imposed by BOP, not the constitution. See Reeb v. Thomas, 636 F.3d 1224, 1227 (9th Cir. 2011) ("A habeas claim cannot be sustained based solely on the BOP's purported violation of its own program statement because noncompliance with a BOP program statement is not a violation of federal law.").

Petitioner's next claim, that he was not afforded the opportunity to examine the evidence against him, likewise does not merit habeas relief. There is no requirement that an inmate be [\*11] afforded the opportunity to examine the evidence against him. Petitioner here was given notice of the charges against him, an opportunity to present witnesses and documentary evidence (which he waived), the opportunity to

have a staff representative assist him (which he waived), and a copy of DHO Elliott's report detailing the evidence she relied upon. Elliott Decl. ¶¶ 6, 8-10, 13, 15, Exs. B, C, D, E. This is all that is required. See Wolff, 418 U.S. at 563-71.

/s/ Sheri Pym

SHERI PYM

UNITED STATES MAGISTRATE JUDGE

Finally, petitioner contends that the confiscated device was ~~X~~ not "inherently dangerous or likely to be used in escape" pursuant to Prohibited Act Code 108, citing the fact that this device is "widely available to inmates with no accountability." Pet. at 4. Under Prohibited Act Code 108, prohibited acts include, among other things:

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[p]ossession, manufacture, introduction, or loss of a hazardous tool (tools most likely to be used in an escape or escape attempt or to serve as weapons capable of doing serious bodily harm to others; or those hazardous to institutional security or personal safety; e.g., hack-saw blade, body armor, maps, handmade rope, or other escape paraphernalia, portable telephone, pager, or other electronic device).

28 C.F.R. § 541.3. DHO Elliott relied on information [\*12] from two technicians that the confiscated device had "electronic components capable of programming, memory to execute timed functions . . . , creating a trigger or warning, or disrupting the operation of components or systems," all of which "pose a significant threat to institution security devices." Elliott Decl., Ex. E at 24. She considered this information in light of petitioner's conviction for crimes involving his use of sophisticated computer skills to carry out cyber attacks. *Id.* As such, this information constitutes at least "some evidence" to support the DHO's determination here. See Hill, 472 U.S. at 454. It is not for this court to re-weigh the evidence or set aside the DHO's supported decision. *Id.* at 455-56.

In sum, the court finds that petitioner's disciplinary hearing satisfied the due process requirements under the *Fourteenth Amendment*, and that the DHO's decision was supported by some evidence.

V.

### RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: February 9, 2015