UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

TROY HEWES, Petitioner,	:	
v.	:	C.A. No. 01-054T
A. T. WALL, et al., Respondents.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge.

This matter is again before the court on the pro se application of Petitioner Troy Hewes ("Petitioner" or "Hewes") for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("the Petition"). The State of Rhode Island ("the State") has objected to the Petition. This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and Local R. 32(c). The court conducted a hearing on March 3, 2003.[1] For the reasons explained below, I recommend that the Petition be dismissed.

Facts and Travel

Petitioner was convicted in December, 1993, of conspiracy to commit murder and in December, 1994, of receiving stolen goods. See Petition at 2.[2] He was sentenced to consecutive sentences of ten years and one year, respectively. See id. He appealed the conspiracy conviction to the Rhode Island Supreme

[1] Petitioner did not appear for the hearing despite notice having been sent to him at the last address which he provided to the court: 180 Aqueduct Road, Cranston, RI 02910. See Objection to Magistrate Report and Recommendation at 3.

[2] The first page of the Petition is numbered 2 because the cover sheet is numbered 1.

Court, which affirmed. See State v. Hewes, 666 A.2d 402 (R.I. 1995).

On March 31, 2000, while he was serving his sentences at the Adult Correctional Institutions ("A.C.I"), Petitioner appeared before the prison disciplinary board, see Petitioner's Memorandum ("Petitioner's Mem.") at 10,[3] and was found guilty of a March 24,[4] 2000, charge of "[r]eceiving class 3 contraband while on an outside job site," Petitioner's Mem., Exhibit ("Ex.") I (copy of A.C.I. Disciplinary Report for Booking #200). For this infraction Petitioner received, among other punishments, loss of thirty days good time. See Petitioner's Mem. at 11.

On April 4, 2000, Petitioner again appeared before the prison disciplinary board and was adjudged guilty of two other infractions, a March 24, 2000, charge of giving false information to a department employee, see id., Ex. II (copy of A.C.I. Disciplinary Report for Booking #211) and a charge of making unauthorized telephone calls, see id., Ex. III (copy of A.C.I. Disciplinary Report for Booking #212). His punishment for these two latter offenses included loss of another ten days good time for each charge. See id. at 11. The punishments were made to run consecutively, resulting in a total loss of good time of fifty days. Petitioner unsuccessfully appealed within the prison system the guilty findings and the punishments imposed. See id. at 13-14.

A third disciplinary hearing about which Petitioner

---

[3] Petitioner's Memorandum ("Petitioner's Mem.") begins with page 8, apparently because it is attached to the Petition which consists of six pages preceded by a cover sheet.

[4] Petitioner states that the date of the alleged infraction was "March 24, 2000, not March 17, 2000, as was incorrectly typed in on the disciplinary report, A.K.A booking ...." Petitioner's Mem. at 9.

complains occurred on December 19, 2000. See Supplemental Memorandum ("Petitioner's Supp. Mem.") at 37. That hearing involved a charge or charges which arose from a December 12, 2000, search of the room which Petitioner and another prisoner, Rene Santiago, occupied. See Petitioner's Supp. Mem. at 36. A legal pad "with alleged gambling paraphernalia written on it [and] 10 packs of cigarettes that the officer could not account for" were removed from the room. Id. Both Petitioner and Santiago were charged with possession of gambling paraphernalia.[5] See id., Ex. XI (A.C.I. Disciplinary Report for #5395[6]). Both were found guilty of the charge. See Petitioner's Supp. Mem. at 37. As a result, Petitioner lost seven days good time. See id., Ex. XI.

On or about February 1, 2001, Petitioner filed the instant Petition, alleging that he was being detained illegally after his sentence had expired.[7] See Cover Sheet to

---

[5] Petitioner alleges that he was also charged with "possession of cigarettes without accounting for them." Petitioner's Supplemental Memorandum ("Petitioner's Supp. Mem.") at 36. In the A.C.I. Disciplinary Report, the possession of cigarettes charge appears to be subsumed within the charge of possession of gambling paraphernalia. See id., Exhibit ("Ex.") XI (A.C.I. Disciplinary Report for Booking # 5395). The court notes that the booking number is not clear on Ex. XI and could be either 5345 or 5395.

[6] See n.5.

[7] Prior to filing this Petition, Hewes had filed an action under 42 U.S.C. §§ 1983 and 1985 against several employees of the Rhode Island Department of Corrections, seeking damages for alleged violations of his federal constitutional rights in connection with the three March 2000 bookings which resulted in the loss of good time. See Hewes v. R.I. Dep't of Corr., et al., C.A. 00-205S. On February 11, 2003, Senior Magistrate Judge Jacob Hagopian issued a Report and Recommendation in that matter, recommending that the motion to dismiss which had been filed by the defendants be granted. See id. (Report and Recommendation dated Feb. 11, 2003)(Hagopian, M.J.).

Petition (page 1). The basis for this claim was that the disciplinary proceedings at the prison had resulted in his losing a total of fifty[8] days of good time credit. See Petitioner's Mem. at 11-12. Petitioner contended that the manner in which the hearings were conducted violated his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Unites States Constitution and also violated the Morris Rules.[9] See Petitioner's Mem. at 8. The Petition was subsequently referred to this Magistrate Judge for findings and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(c).

The State of Rhode Island's Objection to Petitioner's Writ of Habeas Corpus ("Objection") was filed on March 28, 2001. In its Objection, the State noted that Petitioner had been released from the A.C.I. on March 19, 2001.[10] See Memorandum of Law in Support of State of Rhode Island's Objection to Petitioner's Writ of Habeas Corpus ("State's Mem.") at 1.

On November 21, 2001, this Magistrate Judge directed Petitioner to show cause "why his petition should not be dismissed as moot by filing a written submission with the

---

[8] Although the loss of seven days good time resulting from the December 19, 2000, disciplinary hearing would seemingly make the total loss of good time fifty-seven days, Petitioner uses the figure fifty days. See Petitioner's Mem. at 12.

[9] For an explanation of the Morris Rules and their origin, see Cugini v. Ventetuolo, 781 F.Supp. 107, 109-112 (D.R.I. 1992).

[10] Petitioner remains on probation. See Memorandum of Law in Support of State of Rhode Island's Objection to Petitioner's Writ of Habeas Corpus ("State's Mem.") at 1; see also Letter from Virginia M. McGinn, Special Assistant Attorney General, to Magistrate Judge David L. Martin of 11/6/01 at 1 (noting that Petitioner remains on probation until March 20, 2010).

court on or before Thursday, January 3, 2002, setting forth all grounds why the petition should not be dismissed." Order dated 11/21/01 (Martin, M.J.). Petitioner on December 28, 2001, filed a Motion for Continuance to January 25, 2002, stating that he had "just been informed of the January 4th [sic], 2002[,] date and was not provided with the defendants[']s reply when released from prison where I believe the reply was sent." Motion for Continuance dated 12/28/01. Petitioner also stated that "[i]t should be further noted that [Petitioner] has misplaced all original filings and other documents that are related to this cause of action and needs said continuance to do additional research to present a proper defense." Id. On January 8, 2002, the court granted Petitioner's Motion for Continuance.

Despite being granted additional time in which to a provide a response to the court's order, Petitioner failed to do so. Accordingly, on February 22, 2002, this Magistrate Judge issued a Report and Recommendation, recommending that the Petition be dismissed. Petitioner filed an Objection to Magistrate Report and Recommendation ("Petitioner's Objection") on March 6, 2002. On that same date, he also filed Petition[er']s Submission to Show Cause ("Petitioner's Response").

Chief Judge Ernest C. Torres found that Hewes' tardiness was, "at least partially, attributable to his own lack of diligence in monitoring his case and informing the clerk of his change of address ...." Order dated 2/4/03 (Torres, C.J.) at 2. However, Judge Torres excused Petitioner's delay in responding to the show cause order and considered Petitioner's response on its merits. See id. Noting that Hewes asserted that his probationary period had been unlawfully extended by

the alleged loss of good time, Judge Torres found that Hewes had shown cause why the Petition should not be dismissed. See id. (citing Goodell v. Trombley, Civ. No. 01-10103-BC, 2002 WL 1041734, at *2 (E.D. Mich. May 23, 2002)(holding habeas petition not moot where a retroactive award of sentence credits would shorten petitioner's time on probation). Accordingly, Judge Torres rejected the recommendation for dismissal and referred the Petition back to this Magistrate Judge for a report and recommendation regarding the Objection. See id. at 2.

Petitioner's Claims

Petitioner alleges that Respondents violated his constitutional rights at the March 2000 disciplinary board hearings by not allowing him to call witnesses, see the evidence, or defend himself. See Petitioner's Mem. at 9. In the case of the first booking, he alleges that he twice requested that he be allowed to call Robert Lamoreaux, a R.I. Department of Corrections ("R.I.D.O.C.") employee, as a witness. See id. at 9-10. Lamoreaux's testimony presumably would have been relevant because the A.C.I. Disciplinary Report regarding the incident states that Petitioner admitted to Lamoreaux that the box of contraband was intended for Petitioner. See Petitioner's Mem., Ex. I. Petitioner asserts that if Lamoreaux had been called as a witness he would have contradicted this statement. See Plaintiff's Mem. at 10. Petitioner also complains that he was never told the nature of the contraband which he was accused of possessing and that the disciplinary board found him guilty even though the board members were similarly ignorant about its nature as evidenced by the fact that one of them asked Petitioner what the contraband was. See id. at 11.

Petitioner contends that the other two March 2002 bookings arose out of the same incident as the first booking and that "they should have been merged with the previous booking and dealt with accordingly." Id. The second booking charged Petitioner with falsely denying that he had any knowledge of who had brought the contraband into the prison and falsely denying that he made telephone calls from "industries staff telephones," see id., Ex. II, to his brother, Tim Hewes, whom a subsequent investigation "proved ... brought the contraband into correctional industries," id. The third booking charged Petitioner with making unauthorized telephone calls from his work station at correctional industries to his mother's telephone number. See id., Ex. III.

With reference to the December 12, 2000, booking, Petitioner alleges that he heard a lieutenant yelling at Santiago, during Santiago's hearing before the disciplinary board, that "the legal pad came from your footlocker and it is in your handwriting." Petitioner's Supp. Mem. at 37. Petitioner states that he told the disciplinary board at his hearing, which immediately followed Santiago's, that it was his understanding that the legal pad came from Santiago's footlocker. See id. Regarding the cigarettes, Petitioner told the board that he purchased them from the prison store and that this could be verified by checking the records. See id. Despite Petitioner's offerings, the board found him guilty. See id. Petitioner appealed the guilty finding, but the appeal was denied. See id. at 44.

Petitioner complains that the disciplinary board made no attempt to verify his claim that he legitimately purchased the cigarettes, see id., Ex. XII (Letter from Troy Hewes to Warden

Gadsen), that his inmate ledger showed he had spent $31.50 on December 1, 2000, see id., that the records, presumably from the prison store or inmate accounts, would show he purchased cigarettes every month, see id., and that his appeal was denied even though Petitioner submitted a photocopy of a store order showing that he had placed an order for one carton of Marlboro cigarettes on November 23, 2000, see id. He further complains that he was found guilty of possessing the gambling paraphernalia even though it was found in Santiago's locker and nothing was found in Petitioner's property. See id.

Construing his filings liberally, Petitioner claims that these disciplinary proceedings and the denial of his appeals violated his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See Petitioner's Mem. at 8, 17. In addition, he claims that they violated the Morris Rules, see Petitioner's Mem. at 8 (citing Morris v. Travisano, 499 F.Supp. 149, 161 (D.R.I. 1980)), and R.I.D.O.C. policies, see id. Regarding the latter claim, Petitioner identifies specific portions of the Morris Rules and R.I.D.O.C policies which were allegedly violated by Respondents. See id. at 16-19.

Lastly, Petitioner asserts that Respondents have a "common scheme, plan and design to continually violate the guidelines of Morris and the[ir] own policy." Petitioner's Supp. Mem. at 39. As evidence of this claim, Petitioner cites the fact that the December 2002 booking occurred in a different facility and involved different R.I.D.O.C. employees. See id.

Succinctly stated, Petitioner's overall claim is that he was found guilty of the four bookings "without supporting

facts nor substantial evidence," Petitioner's Supp. Mem. at 36, in violation of the Morris Rules and R.I.D.O.C policy, see id., and that he suffered a loss of good time as result, see Petitioner's Mem. at 12. This delayed his release from prison, which in turn delayed the start of the probationary period of his sentence. As a result, his period of probation will extend at least fifty days longer than it would have otherwise extended if Petitioner had not lost this good time.

Discussion

As an initial matter, to the extent that Petitioner's claims are based on alleged violations of the Morris Rules, those claims must be rejected. See Doctor v. Wall, 143 F.Supp.2d 203, 204 (D.R.I. 2001)(holding that the Morris "Rules are *state* rules and regulations that govern the conduct of classification and disciplinary proceedings at the ACI, and are to be enforced, if at all, by state machinery."); see also Cugini v. Ventetuolo, 781 F.Supp. 107, 113 (D.R.I. 1992)("[S]tate prisoner actions alleging violations of the Morris rules or seeking enforcement of those rules properly belong in state court because the rules were promulgated under state law and were meant to be dealt with by state machinery."). "[D]iscipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene." Johnson v. Avery, 393 U.S. 483, 486, 89 S.Ct. 747, 749, 21 L.Ed.2d 718 (1969). Thus, if Petitioner is to be granted any relief in this court, it must be based on a finding that his federal constitutional or statutory rights have been violated and not on the basis of a claimed violation of the Morris Rules. See Doctor v. Wall, 143 F.Supp.2d at 204.

Although the proper vehicle to challenge a loss of good time credits is a habeas corpus action, see Edwards v. Balisok, 520 U.S. 641, 643-44, 117 S.Ct. 1584, 1586, 137 L.Ed.2d 906 (1997) ("the sole remedy in federal court for a prisoner seeking restoration of good-time credits is a writ of habeas corpus") (citing Preiser v. Rodriguez, 411 U.S. 475, 500, 93 S.Ct. 1827, 1841, 36 L.Ed.2d 439 (1973)), a state prisoner must first seek relief in a state forum, if a state remedy is available, see Preiser v. Rodriguez, 411 U.S. at 489, 93 S.Ct. at 1836. In other words, Petitioner must exhaust his state remedies before seeking relief in this court. See McCambridge v. Hall, 303 F.3d 24, 34 (1st Cir. 2002)("A habeas petitioner must ... have fairly presented his claims to the state courts and must have exhausted his state court remedies.")(citing 28 U.S.C. § 2254(b)(1)(A)).

Although Petitioner claims to have exhausted his administrative remedies within the Department of Corrections, see Petitioner's Mem. at 14, Respondent correctly notes that Hewes has not presented his claims of constitutional violations to any state court, see Respondents' Objection at 2. "[T]o excuse procedural default habeas corpus petitioners must show cause and prejudice for failing to present their claims to the state courts or that a fundamental miscarriage of justice will occur." McAtee v. Cowan, 250 F.3d 506, 509 (7th Cir. 2001)(citing Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991)). Petitioner has made neither showing.

Admittedly, it is not clear that a state court remedy is available to Petitioner. In L'Heureux v. State Department of Corrections, 708 A.2d 549, 550 (R.I. 1998), the Rhode Island Supreme Court held that the provisions of the Rhode Island

Administrative Procedures Act, R.I. Gen. Laws. §§ 42-35-1 to 42-35-18 (1993 Reenactment), are not applicable to review of disciplinary or classification hearings.[11] The Court noted that it had decided earlier in Bishop v. State, 667 A.2d 275, 277-79 (R.I. 1995), that the applicable statutes governing the classification process did not give rise to any statutory inmate liberty interest in the prison classification system, and, therefore, classification "decisions were not reviewable by the Superior Court," L'Heureux, 708 A.2d at 551 (citing Bishop, 667 A.2d at 277-79). The Court had similarly held in Barber v. Vose, 682 A.2d 908 (R.I. 1996), that Rhode Island's good time credit statute is discretionary in its application, see id. at 912.

> Because the department of corrections officials designated in § 42-56-24 are vested with discretion in granting or refusing to grant good-behavior and institutional industries time credits, depending upon the inmate's monthly record of conduct, the predicate for [petitioner's] invocation of the Fourteenth Amendment protection as construed and applied in Wolff [v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974),] is totally nonexistent.

Barber v. Vose, 682 A.2d at 912.

This holding was reiterated in Leach v. Vose, 689 A.2d 393
(R.I. 1997):

> Because, as we said in Barber, **there is no liberty interest created by our good time and industrial time credit statute since it is completely discretionary, the department's modification of its manner of**

[11] At the hearing on March 3, 2003, counsel for Respondent, in response to a question from the court, suggested that Petitioner may be able to obtain review in the state court by way of an application for post conviction relief.

> **calculating good time and industrial time credits does not implicate the due-process clause**. The Department can decide, within its discretion, whether to award good time and industrial time credits at all, so an inmate cannot claim a violation of his or her liberty interests when the Department decides to change the actual method of calculation.

Id. at 398 (bold added).

The L'Heureux, Barber, and Leach opinions at least suggest that Hewes may not have a state court remedy for his claimed constitutional violations, especially in view of the holding in Barber that no liberty interest is created by the state's good time and industrial time credit statute. Cf. McGuiness v. Dubois, 75 F.3d 794, 798 n.3 (1st Cir. 1996)("if a state statutory provision create[s] a liberty interest *in a shortened prison sentence* which results from good-time credits, revocable only if the inmate is guilty of serious misconduct, that inmate is entitled to the procedural protections outlined in Wolff [v. McConnell, 418 U.S. 539, 564-66, 94 S.Ct. 2963, 2978-79, 41 L.Ed.2d 935 (1974)])(interpreting Sandin v. Conner, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995)).

On the other hand, none of the Rhode Island Supreme Court decisions squarely address the circumstances presented by Hewes' claims. This court is not certain that the Rhode Island Supreme Court would rule that Hewes has no available avenue of state relief. Cf. Harris v. Duckworth, 909 F.2d 1057, 1058 (7th Cir. 1990)("[W]e are certain that Indiana courts now decline to review any individual decisions of the prison disciplinary system."). Cases involving circumstances considerably more egregious than those presented by Petitioner can be envisioned. Cf. Edwards v. Balisok, 520 U.S. 641, 647, 117 S.Ct. 1584, 1588, 137 L.Ed.2d 906 (1997)("The due process

requirements for a prison disciplinary hearing ... are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence."). If there is no state remedy for Hewes, then there also may be no state remedy for an inmate with claims like those in Edwards.

In light of the uncertainty about this matter and the fact that Hewes has ample time to raise these claims in state court, the court is unwilling to conclude that he has no available state remedy. Accordingly, the court finds that Petitioner has not exhausted his state remedies and that the Petition should be dismissed for that reason.

Conclusion

For the reasons explained above, this court recommends that Petitioner's application for a writ of habeas corpus be dismissed. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within ten (10) days of its receipt. See Fed. R. Crim. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

DAVID L. MARTIN
United States Magistrate Judge
Date: March 12, 2003