

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>MICHAEL R. SHUCK, II,</b>	)	
<b>Petitioner,</b>	)	
	)	
v.	)	<b>Case No. 7:05-CV-00167</b>
	)	
<b>WARDEN BLEDSOE,</b>	)	<b>By: Michael F. Urbanski</b>
<b>Respondent.</b>	)	<b>United States Magistrate Judge</b>

**REPORT AND RECOMMENDATION**

Petitioner Michael R. Shuck, II brings this action as a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2241 challenging the conditions under which he is confined. Petitioner is currently confined at the United States Penitentiary in Lee County, Virginia (“USP Lee”). Petitioner is currently serving a 51-month term for a violation of 21 U.S.C. § 922(g)(1), being a felon in possession of a firearm.

Petitioner’s challenges surround a disciplinary hearing in which he was convicted of offenses that have resulted in the loss or denial of good time credit. Petitioner alleges that prison officials were under an obligation to locate several men he wanted to call as witnesses at his disciplinary hearing even though the only description he provided of them was that they were “three African-American men.”

After reviewing the record, the undersigned recommends that respondent’s motion to dismiss be granted. Because the right to call witnesses is qualified, Wolff v. McDonald, 418 U.S. 539 (1974), and because prison officials made reasonable efforts to identify petitioner’s witnesses, but were not able to do so, petitioner’s constitutional rights were not violated. It is patently unreasonable to require prison officials to compare images of the three men pictured on a security videotape against the prison’s intake photographs of inmates as petitioner suggests. As such, it is recommended that the court grant respondent’s motion for summary judgment.

## I

Although petitioner's initial filing contained a large number of claims having to do with several incidents, the principal remaining claim has to do with a charges of disobeying an officer and being insolent resulting from an incident on June 29, 2004. (Pet. at 17.) Petitioner states that the involved officer sexually assaulted him during the incident, and that in an effort to protect the officer, he was deprived the opportunity to call witnesses in his defense. Further, he contends that prison officials presented false testimony against him. Id. at 18-19.

A review of the videotape by petitioner's staff representative indicated that three unnamed African-American inmates witnessed the incident between petitioner and the officer. Petitioner asked prison officials to locate these men, but they were not able to do so. Petitioner's staff representative reviewed the videotape but could not ascertain the identity of the three men. While prison officials contend petitioner waived his right to have these witnesses present, petitioner disputes this claim and refused to sign a waiver form at the time of the hearing. Given the posture of the case, the court must assume that petitioner did not waive his right to have these witnesses present. The question therefore is whether petitioner's rights were violated because prison officials did not take further steps to identify and locate these witnesses.

## II

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56. Upon motion for summary judgment, the court must view the facts, and the inferences to be drawn from those facts, in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Rule 56(c) mandates entry of summary judgment against a party who "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case,

and on which that party will bear the burden of proof at trial.” Celotex v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

Ordinarily, a prisoner proceeding pro se in an action filed under § 1983 may rely on the detailed factual allegations in his verified pleadings in order to withstand a motion for summary judgment by the defendants that is supported by affidavits containing a conflicting version of the facts. Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979). Thus, a pro se plaintiff’s failure to file an opposing affidavit is not always necessary to withstand summary judgment. While the court must construe factual allegations in the nonmoving party's favor and treat them as true, however, the court need not treat the complaint's legal conclusions as true. See, e.g., Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994); Custer v. Sweeney, 89 F.3d 1156, 1163 (4th Cir. 1996) (court need not accept plaintiff's "unwarranted deductions," "footless conclusions of law," or "sweeping legal conclusions cast in the form of factual allegations") (internal quotations and citations omitted).

### III

Inmates are entitled to some due process when faced with a loss of statutory good-time credits. Those protections include advanced, written notice of the charges, written findings, and a right to call witnesses. Wolff v. McDonald, 418 U.S. 539 (1974). Additionally, there must be “some evidence” to support the disciplinary board’s conclusions. Superintendent v. Hill, 472 U.S. 445 (1985). In this case, petitioner alleges that on June 29, 2004, he was sexually assaulted by a guard and was, himself, given three charges. Shuck alleges that he was given notice of the charge on July 9, 2004, and that a hearing was held on July 22, 2004. During the hearing, a videotape of the incident was shown and petitioner was found guilty of two of the charges based

on statements of the correctional officer. Shuck states that he lost good conduct time as a result of these charges.

The issue in this case is whether the prison's efforts to locate the three unidentified African-American males on the videotape were constitutionally sufficient. Although the government admits that petitioner had the right to call witnesses, it states that it had no obligation to go to the extreme measures he suggests to locate witnesses for his case. See Soto v. Runnels, 2002 WL 31236204 (N.D. Cal. Oct. 2, 2002); Dixon v. Goord, 224 F. Supp. 2d 739, 746 (S.D.N.Y. 2002).

The right to call witnesses discussed in Wolff is not unrestricted: "Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution." Id. Further, the Supreme Court in Wolff explained that "we should not be too ready to exercise oversight and put aside the judgment of prison administrators . . . we must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some account of flexibility and accommodation is required." Id.; see also Scott v. Kelly, 962 F.2d 145, 147 (2d Cir. 1992) (stating that a request for witnesses "can be denied on the basis of irrelevance or lack of necessity"); Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 (2d Cir. 1991) (stating that the right to call witnesses is subject to the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution") (quoting Wolff, 418 U.S. at 566). Emphasizing the caution that courts should exercise before challenging disciplinary hearings, the Supreme Court instructs, "prison officials must have the necessary discretion to keep a prison disciplinary hearing within reasonable limits and ... to limit access to other inmates to collect statements or to compile other documentary evidence. Wolff, 418 U.S.

at 566. Deference to prison administrators may mean upholding a denial of a request even in situations where the “denied witness *might* have provided testimony to exculpate [the inmate],” or where the reviewing court might have ruled differently had it been conducting the hearing. Afrika v. Selsky, 750 F. Supp. 595, 601 (S.D.N.Y. 1990) (emphasis in original). The Supreme Court has thus created a flexible, discretionary standard governing a hearing officer’s right to limit an inmate’s ability to call witnesses at his hearing. The question before the court is whether the requirements of this flexible standard were met in this case based on the uncontested facts in the record.

Here, petitioner sought to call three men seen on the videotape of the incident as witnesses. He did not know who these men were, and following his staff representative’s review of the videotape, all that was known about them was that they were “three unidentified black males.” (Pet. Second Traverse, at 4.) Neither petitioner nor his staff representative were able to identify these witnesses themselves.

Petitioner asserts that inmate identities are readily available through picture card files and through an inmate computer database called SENTRY. (Traverse, at 2-3.) Respondent states that to use the relevant SENTRY system to identify the three inmate witnesses relevant to petitioner’s case, staff would have to enter every inmate’s register number into the computer system and search the system, inmate by inmate, for all 1,500 inmates. Even were this effort to be undertaken, it is possible that staff would be unable to match the images of the inmates visible on the videotape with the electronic pictures of them in the system which were taken upon their arrival at USP Lee. (Resp. Exh. A, at 1-2.)

The Supreme Court requires that “prison officials ... explain, in a limited manner, the reason why witnesses were not allowed to testify” either at the time of the request or later when the decision is challenged. Ponte v. Real, 471 U.S. 491, 497 (1985); see also Russell v. Selsky,

35 F.3d 55, 58 (2d Cir. 1994). Prison officials are not required to exhaust all possible avenues of locating the witness suggested by the inmate. See Soto v. Runnels, 2002 WL 31236204 (N.D. Cal. Oct. 2, 2002) (holding that prison officials were neither required to show an inmate photographs of all black officers working on the prison yard, nor to review the daily reports of all officers working on the prison yard). While the Disciplinary Hearing Officer did not explain the reason why the three witnesses were not called to testify at the hearing in his April 11, 2005 declaration, it is clear that the witnesses were not called due to the fact that they could not be identified. The affidavit from petitioner's staff representative indicated that while he viewed the videotape, he was unable to identify any of the potential witnesses. (Pl.'s Aff. ¶ 5) (Included as Exh. G to Pl.'s June 9, 2005 Traverse.)

Petitioner's discussion of Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 (2d Cir. 1991), does not compel a contrary result. In Kingsley, the identities of the witnesses plaintiff sought to call were readily ascertainable by prison officials because they were taken to an office to provide a urine sample. Id. at 31. Further, inmate Kingsley's inability to identify them was understandable given that he had only arrived at the prison five days earlier. Id. Here, in contrast, there is no suggestion that identifying the three witnesses is reasonably practicable. The prison officials made an effort to identifying the prospective witnesses by having petitioner's staff representative view the videotape, but he did not recognize the three witnesses. Due process does not require that the prison compare the figures on the videotape to the intake photos of all 1,500 prisoners at USP Lee in an effort to identify the witnesses. Given the scant description provided by petitioner and the efforts already made by the prison to identify the witnesses, to require the prison to do more under these facts would constitute an unnecessary and inappropriate intrusion into the discretion afforded prison administrators under Wolff.

As such, it is the recommendation of the undersigned that respondent's motion to dismiss be granted and this case stricken from the active docket of the court.

#### **IV**

The Clerk is directed to immediately transmit the record in this case to the Honorable Glen E. Conrad, United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note objections, if they have any, to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by the reviewing court as a waiver of such objection. Further, the Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

**ENTER:** This 3<sup>rd</sup> day of August, 2005.

/s/ Michael F. Urbanski  
UNITED STATES MAGISTRATE JUDGE