NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-6423

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 01, 2018
DEBORAH S. HUNT, Clerk

| | | |
|---|---|---|
| VIVEK SHAH, | ) | |
| Petitioner-Appellant, | ) | |
| v. | ) | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY |
| FRANCISCO J. QUINTANA, Warden, | ) | |
| Respondent-Appellee. | ) | |

ORDER

Before: NORRIS, ROGERS, and STRANCH, Circuit Judges.

Vivek Shah, a pro se federal prisoner, appeals the judgment of the district court denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2013, Shah was sentenced to eighty-seven months of imprisonment following his pleas of guilty to transmitting a threat in interstate commerce with the intent to extort, and seven counts of mailing threatening communications. Shah's convictions stemmed from his threats to numerous individuals that their family members would die unless they wired millions of dollars into offshore bank accounts; Shah created false online identities to carry out his crimes.

In 2015, while Shah was housed at the Federal Medical Center in Lexington, Kentucky, prison officials discovered that an inmate had breached the prison's computer security by accessing unauthorized websites through a server used by inmates who worked in the Central Accounts Payable Department. Following an investigation, officials determined that Shah was the inmate who initiated the unauthorized access. During an informal interview, Shah admitted accessing several unauthorized servers and conducting searches in an attempt to gain internet access. Officials reported that, as the result of the security breach, staff had to review all of their servers and security protocols, change numerous staff passwords, and spend numerous hours investigating whether Shah had accessed the internet or obtained any of the staff's personal identifying information. Officials also reported that the breach interfered with the ability of several staff members to concentrate on their normal duty assignments. Shah was subsequently charged with Bureau of Prisons Prohibited Act Code 198, pursuant to 28 C.F.R. § 541.3, which prohibits interfering with a staff member in the performance of duties.

At a disciplinary hearing, Shah did not submit any evidence and voluntarily waived the calling of any witnesses. The hearing officer reported that Shah admitted the violation by saying, "Yeah, it's true. Yes, I gained access to that system knowing I shouldn't, and gained information." Relying on Shah's admission, the incident report, statements from prison officials and investigators, and the information obtained from the computer server, the hearing officer concluded that Shah committed a Code 299 offense by "disrupting the secure and orderly running of the institution." *See* 28 C.F.R. § 541.3. The officer determined that he committed the offense in a way that was most like a Code 219 offense, which is defined as "[s]tealing; theft (including data obtained through the unauthorized use of a communications device, or through unauthorized access to . . . automated equipment on which data is stored)." *Id.* The hearing officer ordered that Shah lose twenty-seven days of earned good-conduct time, forfeit forty-five days of non-vested good-conduct time, be placed in disciplinary segregation for thirty days, and lose email and commissary privileges. The hearing officer's decision was affirmed on administrative appeal.

Shah initially filed a § 2241 petition in the district court while his administrative appeal was pending. Because Shah had not yet fully exhausted his administrative remedies, the district court dismissed the petition without prejudice. Shah appealed, and we affirmed. *See Shah v. Quintana*, No. 17-5053 (6th Cir. July 17, 2017) (order).

Shah has since exhausted his administrative remedies and refiled his § 2241 petition. In it, he asserts that: there was no evidence to support the hearing officer's decision; the hearing officer was not impartial and did not conduct a meaningful hearing; the hearing officer's statement of reasons was deficient; Shah was not provided notice of the charges against him, because he was charged with a Code 198 violation and found guilty of a Code 299 offense; he was denied the opportunity to present mitigating evidence—such as the fact that he reported the computer system's security vulnerabilities to the Assistant United States Attorney who prosecuted him; he was coerced into waiving his right to present witnesses; he was unable to review the evidence against him; his right to self-incrimination was violated; prison officials did not comply with certain Program Statements in connection with his hearing; the sanctions were retaliatory; and Code 299 is unconstitutionally vague and overbroad. Shah requested that his disciplinary conviction be vacated, his good-conduct time restored, and Code 299 declared unconstitutional.

The district court reviewed the petition and concluded that: there was substantial evidence supporting the hearing officer's decision; the Bureau of Prisons complied with the necessary procedural requirements; Shah provided no evidence of coercion; despite the fact that Shah was charged with a Code 198 violation and convicted of a Code 299 violation, he was aware that he was charged with breaching the security of the computer system; and relief on Shah's claim regarding the constitutionality of Code 299 was precluded by this court's prior decision. The district court therefore denied Shah's petition.

On appeal, Shah disputes that he disrupted the running of the institution by his conduct, and disputes that he "stole" any information. He asserts that he merely logged into the prison computer system, as he was allowed to, "found open back doors, viewed files, and subsequently reported the back doors to the Dep[artmen]t of Justice." He otherwise repeats the arguments raised in the district court regarding the lack of evidence to support his guilt, the inadequate notice of the charges against him, the coerced waiver of his right to present witnesses, and the unconstitutionality of Code 299. Shah has also filed a motion for injunctive relief, requesting that this court enjoin the hearing officer's finding of guilt and restore his good-conduct time.

We review de novo the denial of a § 2241 habeas petition. *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999). When a prisoner faces the loss of good-conduct time, due process requires that he receive: (1) advance "written notice of the claimed violation" at least twenty-four hours before a disciplinary hearing; (2) an opportunity, when consistent with institutional safety, "to call witnesses and present documentary evidence in his defense"; and (3) "a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." *Wolff v. McDonnell*, 418 U.S. 539, 563-66 (1974). A prison disciplinary decision comports with the requirements of procedural due process "if some evidence supports the decision by the prison disciplinary board." *Superintendent, Mass. Corr. Inst. at Walpole v. Hill*, 472 U.S. 445, 455 (1985).

Shah's due process claims do not warrant relief. Prison officials prepared an incident report on June 30, 2016, when they concluded their investigation of the security breach that occurred beginning in October 2015. That report was provided to Shah the same day, and it stated that he had interfered with staff in the performance of their duties by breaching the computer system beginning on October 19, 2015. On July 6, 2016, Shah was advised of his rights to call witnesses and to present evidence. Shah's disciplinary hearing took place on July 15, 2016—well beyond the twenty-four hours required. *See Wolff*, 418 U.S. at 564. Although Shah had previously requested that witnesses appear at the hearing, he voluntarily waived his right to call witnesses on the day of the hearing and signed a form attesting to that fact. Following the hearing, the hearing officer issued a decision based upon Shah's admission that he accessed the computer server—even though he knew he was not allowed to do so, the written statements of investigators, and the reports generated by the computer server. The record therefore demonstrates that Shah was afforded all of the applicable due process protections in this case.

The fact that Shah was found guilty of a different violation than the one he was originally charged with does not change this conclusion. Shah was notified that he was charged with breaching the prison computer system, and the regulations expressly permit a discipline hearing officer to find that an inmate "committed the prohibited act(s) charged, and/or a similar prohibited act(s) as described in the [incident report]." 28 C.F.R. § 541.8(a)(1).

Additionally, the evidence presented at the hearing was more than sufficient to satisfy the minimal "some evidence" standard. *See Hill*, 472 U.S. at 455-56; *see also Hicks v. Fed. Bureau of Prisons*, No. 16-3907, 2017 WL 3468368, at *1 (6th Cir. June 5, 2017) (holding that the "some evidence" standard was satisfied where hearing officer relied on an incident report and a prisoner's admission). On appeal, Shah does not dispute that he breached the computer system, only that his actions caused any harm.

Moreover, the district court did not err by concluding that Shah presented insufficient evidence that he was coerced into waiving his right to present witnesses or that the hearing officer was not impartial. As noted above, Shah memorialized his waiver of his right to present witnesses on the day of his hearing by signing his name next to a statement reading "voluntarily and uncoerced waived all requests for witnesses." His assertion that his waiver was coerced, minimally supported, is insufficient to find the waiver invalid.

Likewise, Shah's claim that the hearing officer was not impartial lacks evidentiary support. Although an inmate facing the potential loss of good-time credits for a disciplinary infraction is entitled to a decision by an impartial tribunal, *Woodson v. Lack*, 865 F.2d 107, 109 (6th Cir. 1989) (citing *Wolff*, 418 U.S. at 564-67), the record reveals no evidence of partiality.

Finally, Shah's claim that Code 299 is unconstitutionally vague and overbroad does not warrant relief. Shah raised this argument in his previous appeal to this court. There, he argued, as he does here, that Code 299 is "unconstitutionally vague as-applied and facially, as well as overbroad" in violation of the First and Fifth Amendments. *Shah*, slip op. at 3. This court rejected the argument, and Shah is precluded from relitigating the issue.

We **AFFIRM** the judgment of the district court. We **DENY** Shah's motion for injunctive relief.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

| | |
|---|---|
| VIVEK SHAH,<br>Petitioner,<br><br>v.<br><br>FRANCISCO J. QUINTANA, Warden,<br>Respondent. | Civil Action No. 7:17-028-KKC<br><br>**MEMORANDUM OPINION AND ORDER** |

*** *** *** ***

Vivek Shah is an inmate at the Federal Medical Center in Lexington, Kentucky. Proceeding without a lawyer, Shah filed a petition for a writ of habeas corpus pursuant to § 2241 in which he challenges the imposition of disciplinary sanctions against him. [R. 1]. For the reasons set forth below, the Court will deny Shah's petition.

In 2013, Shah pled guilty to one count of Transmitting in Interstate Commerce a Threat with the Intent to Extort in violation of 18 U.S.C. § 875(b) and seven counts of Mailing Threatening Communications in violation of 18 U.S.C. § 876(b). *See United States v. Shah*, No. 5:12-cr-172 (S.D. W. Va. 2013). In his plea agreement, Shah admitted that he threatened numerous victims with the death of their family members unless they wired millions of dollars into offshore bank accounts. *See id.* at R. 85 at 9-10. Shah also admitted that he used the Internet and created false identities and aliases in order to carry out his crimes.[1] *See id.* The trial court sentenced Shah to a total of 87 months in prison. *See id.* at R. 95.

[1] The Government stated in its sentencing memorandum that "[t]o avoid being traced when he committed criminal acts using his computer, he sought out anonymous, public Internet hotspots; altered the address associated with the computer's network card; and routed his Internet communications through special servers that camouflage users' identities. He also created numerous accounts with the U.S. Postal Service under false names." *United States v. Shah*, No. 5:12-cr-172 at R. 90 at 2 (S.D. W. Va. September 5, 2013).

The Bureau of Prisons (BOP) eventually placed Shah at FMC – Lexington and, while he was at the prison, officials determined that he breached the security of the Unicor computer system. According to a prison incident report:

> Unicor staff notified SIS [special investigative services] they had encountered an inmate who breached their computer security. SIS was then advised Central Office had contacted them in regards to suspicious activity on a server utilized by Central Accounts Payable inmates. As a result of the information received, Central Accounts IT Specialist L. Long and the Systems Administrator Linda Burch reviewed numerous logs and files and determined 'bsmart' had logged into the Central server. During a review of inmates who could have accessed the server, Ms. Burch and Ms. Long determined inmate Shah was the inmate who logged into the system. During an initial interview by the Supervisory Operating Accountant, inmate Shah admitted to accessing several unauthorized servers and to conducting searches in order to gain internet access. Due to inmate Shah's breach of security, staff in Central Office and FMC, Lexington, Unicor staff had to review all of their servers and security protocols, change numerous staff passwords, spend numerous hours to ensure inmate Shah had not obtained any personal identifying information of staff or accessed the internet. Inmate Shah's breach of the computer system greatly interfered with several staff member's ability to concentrate on their normal duty assignments. It should be noted this investigation involved the FBI and AUSA, but was determined not to rise to the level of a criminal act which could be prosecuted.

[R. 1-2 at 11]. Ultimately, a prison official completed the incident report and charged Shah with a Code 198 offense, interfering with a staff member in the performance of duties. [R. 1-2 at 11].

A disciplinary hearing was held two weeks later. [R. 1-2 at 5-10]. According to the discipline hearing officer (DHO), Shah admitted the allegations against him by saying, "Yeah, it's true. Yes, I gained access to that system knowing I shouldn't, and gained information." [R. 1-2 at 5]. The DHO also indicated that Shah "did not submit any documentary evidence" at the hearing and "voluntarily waived all witnesses." [R. 1-2 at 5-6].

The DHO concluded that Shah engaged in prohibited conduct and explained that he was relying on Shah's own statements as well as several documents, including the prison incident report, memoranda from prison officials, handwritten interview notes and statements, and computer-generated search histories and related information. [R. 1-2 at 6-9]. The DHO summarized this evidence at length and found that it established that Shah committed a Code 299 offense by "disrupting the secure and orderly running of the institution" in a way that was most like a Code 219 offense, which covers "[s]tealing; theft (including data obtained through the unauthorized use of a communications device, or through unauthorized access to . . . automated equipment on which data is stored)." [R. 1-2 at 9]. Therefore, the DHO ordered that Shah lose 27 days of good conduct time and forfeit 45 days of non-vested good conduct time. The DHO also imposed other sanctions on Shah, including time in disciplinary segregation and the loss of e-mail and commissary privileges. [R. 1-2 at 9].

Shah appealed the DHO's decision administratively within the BOP. Shah also filed an initial § 2241 petition with this Court. That matter was before Judge Reeves and, since it was apparent from the face of Shah's petition that he had not yet fully exhausted his administrative remedies, Judge Reeves dismissed the petition without prejudice. *See Shah v. Quintana*, No. 5:16-cv-472-DCR (E.D. Ky. Jan. 9, 2017). The United States Court of Appeals for the Sixth Circuit affirmed that decision. *See Shah v. Quintana*, No. 17-5053 (6th Cir. July 17, 2017).

Shah, however, filed another copy of his § 2241 petition once he fully exhausted his administrative remedies. [R. 1]. That petition is now before this Court for screening pursuant to 28 U.S.C. § 2243. Shah sets forth numerous claims and asks the Court to enter an order vacating his disciplinary conviction and restoring his good time credits. [R. 1-1 at 15-21]. More recently, Shah filed a motion asking the Court to reassign his latest petition to Judge Reeves. [R. 13].

As an initial matter, the Court will deny Shah's motion to reassign this case. To be sure, Judge Reeves handled and dismissed Shah's initial § 2241 petition without prejudice. However, that matter only involved the fact that Shah had not fully exhausted his administrative remedies;

Judge Reeves did not address the substance of Shah's petition. Thus, there would not be a substantial savings of judicial time and resources by reassigning this matter. *See* Local Rule 40.1. Since Shah has not articulated another reason that would justify reassigning his case, the Court will deny his motion.

Turning then to the merits of Shah's petition, the principal question before this Court is whether there was "some evidence" in the record to support the DHO's decision in this case. *Superintendent v. Hill*, 472 U.S. 445, 454 (1985); *Selby v. Caruso*, 734 F.3d 554, 559 (6th Cir. 2013). This is a very low threshold. Indeed, the Court does not examine the entire record or independently assess the credibility of witnesses. *Hill*, 472 U.S. at 455. Instead, the Court merely asks "whether there is *any* evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* at 455-56 (emphasis added); *see also Higgs v. Bland*, 888 F.2d 443, 448-49 (6th Cir. 1989) (discussing this standard).

There was certainly some evidence to support the DHO's decision in this case. After all, prison officials conducted an extensive investigation into the events in question and provided the DHO with numerous documents indicating that Shah engaged in the prohibited conduct. The DHO then summarized this evidence in his report and specifically relied on it in deciding that Shah committed a Code 299 offense. [R. 1-2 at 6-9]. Thus, the very low threshold set forth in *Hill* has been satisfied.

Shah, however, suggests there was *no* evidence to support the DHO's decision [R. 1-1 at 15]. But that suggestion is off base, especially since Shah essentially admitted in his previous and current § 2241 petitions that he engaged in the conduct alleged by prison officials. In fact, Shah repeatedly explained precisely how he used his prison work computer to create an account with the username "bsmart" and also access the internet and multiple servers. [R. 1-1 at 2-9]. At one point, Shah even admitted that he gained access to "BOP serves, DOJ servers, certain U.S. Department of Treasury servers . . . , all U.S. Attorneys' email accounts . . . , DOJPURS account usernames and passwords with Chase Bank, GSA WebPay account login information for Unicor employees, etc." [R. 1-1 at 7]. The Sixth Circuit highlighted this language from Shah's previous petition in its own recent decision and, in doing so, recognized that "Code 299, applying Code 219, indisputably applies to such conduct." *Shah v. Quintana*, No. 17-5053, at 3 (6th Cir. July 17, 2017). In sum, there was clearly evidence to support the DHO's decision, and Shah himself admitted that he engaged in the prohibited conduct.

Nevertheless, Shah claims he was denied certain procedural protections that he was due. Under the law, Shah was entitled to advanced notice of the charge against him, the opportunity to present evidence and witnesses in his defense, and a written decision explaining the grounds used to determine his guilt of the offense. *See Wolff v. McDonnell*, 418 U.S. 539, 563-66 (1974). Shah's submissions indicate that prison officials provided him with these procedural protections.

Still, Shah suggests that he was not provided with advance notice of the charge against him because he was initially charged with a Code 198 offense yet later convicted of a Code 299 offense. [R. 1-1 at 16-17]. The purpose of the advance notice requirement, however, "is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact." *See Wolff*, 418 U.S. at 564. And, in this case, Shah's submissions make it clear that, well in advance of the disciplinary hearing, he was fully aware that prison officials were alleging that he improperly breached the security of the Unicor computer system. [R. 1-2 at 16-17]. Thus, there is no merit to Shah's lack-of-notice claim. *See also Santiago-Lugo v. Warden*, 785 F.3d 467, 476 (11th Cir. 2015) (rejecting another petitioner's analogous argument and noting that other circuits have consistently rejected similar claims).

Shah's argument that he was denied the opportunity to present evidence and witnesses in his defense is also unavailing. [R. 1-1 at 17-18]. As an initial matter, the DHO's report indicates that Shah "did not submit any documentary evidence" at the hearing and "voluntarily waived all witnesses." [R. 1-2 at 5-6]. This is consistent with the another form submitted by Shah which appears to show that he initially requested witnesses to appear on his behalf, but then stated that he "voluntarily . . . waived all requests for witnesses." [R. 1-2 at 16]. Although Shah now claims that he was "coerced into waiving" his right to call these witnesses [R. 1-1 at 18], he offers no factual allegations to support this generic assertion. And while Shah provides a list of evidence and witnesses he would have liked to have offered at his disciplinary hearing [R. 1-3], he does not explain in any meaningful way how that evidence or those witnesses would have aided his defense, especially since he admitted that he engaged in the prohibited conduct. *See also Hatch v. Wilson*, No. 6:09-cv-109-GFVT, 2009 WL 2877222, *8 (E.D. Ky. 2009) (emphasizing that the petitioner did "not offer a particularized explanation of how the absence of . . . witnesses prejudiced his defense").

Finally, Shah asserts several other claims in his petition, including arguing that the Code 299 offense is unconstitutionally vague, the DHO prejudged his case, and the DHO's report contained "illogical jargon," among many other things. [R. 1-1 at 15-21]. However, the Sixth Circuit has already rejected Shah's vagueness argument and his other claims are either undeveloped, unsupported, contradicted by his own submissions, or plainly without merit. And even if the Court were to conclude that the procedures surrounding Shah's disciplinary hearing were somehow deficient, there is certainly no indication that any errors were of a constitutional magnitude or would otherwise justify granting Shah's habeas petition.

Accordingly, it is hereby **ORDERED** as follows:

1. Shah's motion to reassign this case [R. 13] is **DENIED**.

2. Shah's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 [R. 1] is **DENIED**.

3. All other pending motions are **DENIED AS MOOT**.

4. This action is **DISMISSED** and **STRICKEN** from the Court's docket.

5. A corresponding judgment will be entered this date.

Dated November 14, 2017.

Karen K. Caldwell

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

| | | |
|---|---|---|
| VIVEK SHAH, | ) | |
| | ) | |
| Petitioner, | ) | Civil Action No. 5: 16-472-DCR |
| | ) | |
| v. | ) | |
| | ) | |
| FRANCISCO QUINTANA, Warden, | ) | **MEMORANDUM OPINION AND ORDER** |
| | ) | |
| Respondent. | ) | |

*** *** *** ***

On December 20, 2016, federal inmate Vivek Shah filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 for the purpose of challenging a prison disciplinary conviction.[1] [Record No. 1] Documents attached to the petition showed that Shah appealed the conviction to the Bureau of Prisons' Mid-Atlantic Regional Office on August 15, 2016. After he was denied relief on October 26, 2016, Shah appealed to the BOP's Central Office on November 1, 2016. [Record No. 1-2 at 2-4, 16-17]

On December 23, 2016, the Court noted that, by regulation, Shah's appeal "is considered filed on the date it is logged into the Administrative Remedy Index as received." The same regulation provides the Central Office with forty calendar days to decide an appeal, which may be extended by twenty days if additional time is needed to properly respond. 28 C.F.R. § 542.18. While the regulation also permits an inmate to treat the

[1] Shah's petition was docketed on December 22, 2016, but a prisoner's pleading is presumptively deemed filed on the day he signs it. *Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008).

absence of a timely response to an appeal as a denial, Shah filed this action forty-nine days after he mailed his Central Office appeal, before the sixty days to which the Central Office is entitled to respond had expired. As a result, Court noted that Shah's petition was premature, and invited him to provide an explanation why his petition should nonetheless be considered on the merits. [Record No. 5]

Shah has filed a response which contains factual and legal arguments. He indicates that he has been unable to confirm that the Central Office received his appeal despite numerous checks in November. Shah expresses concern that his mailing label may have been "fried" by the X-ray or Gamma scanners used to screen mail. [Record No. 8 at 1-3] Shah also argues that he timely submitted his appeal to the Central Office and that any failure by that office to receive it and respond to his claims is not attributable to him. Therefore, Shah contends that his administrative remedies should be deemed exhausted. [Record No. 8 at 4-10]

These arguments all miss the mark: the documents Shah filed with his petition show or strongly suggest that his appeal to the Central Office was timely filed. But they also establish that he did not give the Central Office sufficient time respond to his grievance before filing his petition (assuming that it was received).

Shah also includes a grab-bag of legal theories to excuse his failure to exhaust administrative remedies. He makes a passing argument that, because his constitutional challenge to the disciplinary offense cannot be remedied through the grievance process, exhaustion is not required. [Record No. 8 at 11] That argument is without merit. *Porter* *v. Nussle*, 534 U.S. 516 (2002). Shah is correct that a court may not deny a habeas petition upon initial screening merely because the petitioner "fail[ed] to plead or attach exhibits with proof of exhaustion" to his petition. *Luedtke v. Berkebile*, 704 F. 3d 465 (6th Cir. 2013). However, the defect in Shah's petition is not what it *fails* to plead (i.e., the only question at issue in *Luedtke*), but what the petition and its exhibits plainly and affirmatively show: that he had yet to fully exhaust his administrative remedies before he filed suit on December 20, 2016.

The case law is clear and uniform that where such a defect is apparent from the pleading itself, it may be dismissed without prejudice upon initial review. *See Jones v. Bock*, 549 U .S. 199, 214-15 (2007) (district court can dismiss complaint *sua sponte* when it is apparent from the face of the complaint that claim is barred by affirmative defense); *Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007) (where complaint made clear that prisoner failed to exhaust administrative remedies, district court may dismiss it *sua sponte* for failure to state a claim); *Fletcher v. Myers*, No. 5:11-141-KKC (E.D. Ky. May 17, 2012), *aff'd*, No. 12-5630 (6th Cir. Jan. 4, 2013) ("Because Fletcher's failure to exhaust, or to attempt to exhaust, administrative remedies is apparent from the face of his complaint, the district court properly dismissed Fletcher's complaint on that basis."); *Smith v. Lief*, No. 10-08-JMH, 2010 WL 411134, at *4 (E.D. Ky. Jan. 27, 2010); *Gunn v. Ky. Dept. of Corrections*, No. 5:07CV-P103-R, 2008 WL 2002259, at *4 (W.D. Ky. May 7, 2008); *Deruyscher v. Michigan Dept. of Corrections Health*, No. 06-15260-BC, 2007 WL 1452929, at *3 (E.D. Mich. May 17, 2007).

Because Shah filed his petition before giving the BOP's Central Office sufficient time to respond, the Court will deny it as prematurely filed. This denial is without prejudice to Shah's right to file a new petition, and does not reach: (i) the merits of the petitioner's claims, or (ii) the question of whether, after the Central Office's sixty-day response window passed, Shah should be deemed to have exhausted his administrative remedies in light of the Central Office's failure to receive the Form BP-231 Shah indicates he mailed on November 2, 2016.

Accordingly, it is hereby

**ORDERED** that Shah's petition for a writ of habeas corpus [Record No. 1] is **DENIED** and this action is **DISMISSED**, without prejudice.

This 9th day of January, 2017.

**Signed By:**
*Danny C. Reeves* DCR
**United States District Judge**

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-5053

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 17, 2017
DEBORAH S. HUNT, Clerk

| | | |
|---|---|---|
| VIVEK SHAH, | ) | |
| Petitioner-Appellant, | ) | |
| v. | ) | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY |
| FRANCISCO J. QUINTANA, Warden, | ) | |
| Respondent-Appellee. | ) | |

ORDER

Before: NORRIS, GIBBONS, and SUTTON, Circuit Judges.

Vivek Shah, a federal prisoner proceeding pro se, appeals the district court's order dismissing his habeas corpus petition filed pursuant to 28 U.S.C. § 2241. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

A correctional officer filed an incident report against Shah after it was determined that Shah had breached the computer security of Federal Prison Industries. As a result, Shah was subject to a disciplinary hearing. The hearing officer found that Shah had engaged in conduct disruptive to the secure and orderly running of the institution ("Code 299"), most like stealing ("Code 219"), *see* 28 C.F.R. § 541.3, and issued sanctions against him which included, among other things, the loss of good-time credits. Shah appealed the decision to the Bureau of Prisons

("BOP") Mid-Atlantic Regional Office on August 15, 2016. After being denied relief on October 26, 2016, he appealed to the BOP's Central Office on November 1, 2016.

Not having received a response from the Central Office, Shah filed the current § 2241 petition on December 20, 2016, broadly challenging the procedures employed by BOP officials during his disciplinary proceeding and subsequent appeals. The district court dismissed the suit sua sponte without prejudice, finding that Shah had not exhausted his administrative remedies because the Central Office, as of the time Shah filed his petition, had additional time to respond to his appeal. *See* 28 C.F.R. § 542.18.

On appeal, Shah challenges the district court's exhaustion finding.

We review de novo a district court's dismissal of a habeas petition filed under 28 U.S.C. § 2241. *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999). "Federal prisoners must exhaust their administrative remedies prior to filing a habeas petition under § 2241." *Fazzini v. Ne. Ohio Corr. Ctr.*, 473 F.3d 229, 231 (6th Cir. 2006). Exhaustion is an affirmative defense, and a district court may not dismiss a § 2241 petition at the screening stage for failure to plead exhaustion or to attach exhibits with proof of exhaustion. *See Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013). However, a sua sponte dismissal, as occurred here, may be appropriate where a petitioner's failure to exhaust is apparent from the face of the pleading itself. *See Jones v. Bock*, 549 U.S. 199, 214-15 (2007); *Corey v. Daniels*, 626 F. App'x 414, 415 (4th Cir. 2015); *Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007); *Turley v. Gaetz*, 625 F.3d 1005, 1013 (7th Cir. 2010).

The district court properly dismissed Shah's petition. 28 C.F.R. § 542.18 dictates the allotted time BOP officials have to respond to prisoner complaints at various stages of the administrative appeals process. The agency's failure to respond to a complaint at any stage may be deemed a denial of the complaint, but only "[i]f the inmate does not receive a response within the time allotted for reply, *including extension*." *Id.* (emphasis added). By its terms, § 542.18 gives the BOP Central Office sixty days to respond to a complaint. *See id.* Shah filed the current action forty-nine days after filing his appeal with the BOP's Central Office and, accordingly, did not give the Central Office sufficient time to respond to his appeal. As such, he was unable to deem his appeal denied at the time he filed his § 2241 petition and therefore failed to exhaust his administrative remedies.

Shah separately argues that exhaustion would be futile in his case given that he has raised a constitutional challenge, which allegedly cannot be addressed through the administrative grievance process. We have recognized that, where colorable, "exhaustion of administrative remedies may not be required in cases of constitutional challenges to an agency's procedures." *S. Ohio Coal Co. v. Office of Surface Min., Reclamation & Enf't, Dep't of Interior*, 20 F.3d 1418, 1425 (6th Cir. 1994). But the majority of Shah's claims do not address the constitutionality of BOP's procedures. His constitutional claims, of which there are many, relate largely to alleged misapplications of agency procedures, not facial invalidity of the official procedures.

There is one exception. Shah argues that the disciplinary regulation he was charged with violating, Code 299 of 28 C.F.R. § 541.3, is "unconstitutionally vague as-applied and facially, as well as overbroad" in violation of the First and Fifth Amendments. Code 299 prohibits "[c]onduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons most like another High severity prohibited act. This charge is to be used only when another charge of High severity is not accurate. The offending conduct must be charged as 'most like' one of the listed High severity prohibited acts." In Shah's case, the hearing officer found his conduct "most like" Code 219, which covers "[s]tealing; theft (including data obtained through the unauthorized use of a communications device . . . )." Shah admits to using his prison work computer to access "BOP servers, DOJ servers, certain U.S. Department of Treasury servers . . . , all U.S. Attorneys' email accounts . . . , DOJPURS account usernames and passwords with Chase Bank, GSA WebPay account login information for Unicor employees, etc." Code 299, applying Code 219, indisputably applies to such conduct. Because the statute inarguably covers Shah himself, he cannot establish facial invalidity of the statute and thus has not raised a colorable constitutional challenge to Code 299.

Shah also alleges that the district court misconstrued *Luedtke*, arguing that *Luedtke* prohibits courts from sua sponte dismissing § 2241 petitions for failure to exhaust. As previously noted, *Luedtke* forbids a court from dismissing a § 2241 petition at the screening stage for failing to plead exhaustion or to attach exhibits with proof of exhaustion, but it does not prohibit a court from sua sponte dismissing a § 2241 petition where lack of exhaustion is apparent from the face of the pleading. *See Luedtke*, 704 F.3d at 466.

Shah also cites *Fazzini*, but does not clearly articulate how *Fazzini* works to excuse his lack of exhaustion. *Fazzini*, in fact, concerned a situation where the prisoner in question failed to attach proof of exhaustion to his § 2241 petition, which is not at issue in this case. *See Fazzini*, 473 F.3d at 233-35.

Finally, Shah appears to take issue with the fact that the district court denied his motion for partial summary judgment. District courts have a "duty to screen out [habeas petitions] which should be dismissed for lack of merit on [their] face." *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970); *see* 28 U.S.C. § 2243. The district court did not act improperly in choosing to screen and dismiss Shah's case for lack of exhaustion rather than allowing the case to proceed further. *See Allen*, 424 F.2d at 141.

Accordingly, the order of the district court is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk