

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KENNETH FERGUSON,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-07-0519
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Kenneth Ferguson’s petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 has been referred to this magistrate judge for a report and recommendation (Dkt. 3). The court recommends that Ferguson’s petition be denied with prejudice.

BACKGROUND

Ferguson is currently in the custody of the Texas Department of Criminal Justice serving a 35-year sentence for aggravated sexual assault of a child and aggravated sexual assault. Ferguson is not eligible for release to mandatory supervision due to the nature of his offenses. It is not necessary to recite the procedural history of Ferguson’s appeal and state habeas proceedings because Ferguson is challenging two disciplinary proceedings, not his conviction.

On June 19, 2006, Ferguson was found guilty of attempting to establish an inappropriate relationship with a staff member, a Level 2, Code 30.1 violation of the TDCJ-*CID Disciplinary Rules and Procedures for Offenders*, and using vulgar language, a Level

3, Code 42.0 violation.¹ The hearing officer assessed punishment as (1) 30 days loss of recreation and commissary privileges; (2) reduction in line class from S3 to L1; and (3) 10 days loss of good-time credits. His step one and step two grievances were denied.

On August 25, 2006, Ferguson was found guilty of refusing or failing to obey an order, a Level 2, Code 24.0 violation of TDCJ-CID *Disciplinary Rules and Procedures for Offenders*, and sexual misconduct, a Level 2, Code 20.0 violation. The hearing officer assessed punishment as (1) 23 days loss of recreation and 30 days loss of commissary privileges; (2) 30 days cell restriction; (3) reduction in line class from L1 to L2; and (4) 45 days loss of good time credits. His step one and step two grievances were denied.

Ferguson filed this petition for federal habeas relief on November 20, 2006. Ferguson alleges that TDCJ failed to follow its procedures and denied him due process in the two disciplinary proceedings described above.

ANALYSIS

A prisoner is entitled to federal habeas relief only when he has been deprived of some right secured by the United States Constitution or federal law. *Teague v. Quarterman*, 482 F.3d 769, 773 (5th Cir. 2007). “The Due Process Clause does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner.” *Sandin v. Conner*, 515 U.S. 472, 478 (1995). However, prisoners do not lose all constitutional rights when they are incarcerated. *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). While the

¹ An additional charge of failing to obey an order was dismissed.

Supreme Court explained in *Sandin* that states may under certain circumstances create rights that implicate Due Process, such rights are limited to freedom from restraints that impose “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” 515 U.S. at 484.

Ferguson cannot state a claim for federal relief based on his punishments of reduction in line status from S3 to L2, loss of recreation and commissary privileges, and cell restriction. A prisoner cannot state a claim for federal habeas relief based on disciplinary sanctions unless the sanctions imposed affect the fact or duration of the prisoner’s sentence. *Malchi v. Thaler*, 211 F.3d 953, 958 (5th Cir 2000). A change in good time earning classification will not “inevitably” affect the duration of a prisoner’s sentence and thus does not give rise to a claim for federal habeas relief. *Malchi*, 211 F.3d at 959; *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997); *Sandin*, 515 U.S. at 487. Moreover, restrictions such as lost privileges and cell confinement are not atypical of the hardships that commonly occur in prison life. *See Malchi*, 211 F.3d at 958 (“Clearly, . . . thirty day loss of commissary privileges and cell restriction do not implicate due process concerns”); *Madison*, 104 F.3d 765, 767 (5th Cir. 1997) (loss of commissary and cell restriction); *Pickens v. Minton*, 109 Fed. Appx. 655, 656 (5th Cir. 2004) (placement in isolation for 20 days); *Sandin*, 515 U.S. at 485-86 (segregated confinement).

Ferguson also cannot state a claim for relief based on his loss of good time credits. “The Constitution does not guarantee good time credit for satisfactory behavior while in

prison,” but the state may create such a right. *Madison v. Parker*, 104 F.3d 765, 768 (5th Cir. 1997); *Wolff*, 418 U.S. at 558. In Texas, a prisoner may become eligible for release by parole or under mandatory supervised release. Parole refers to the discretionary and conditional release of a prisoner to serve the remainder of his sentence under the supervision and control of the pardons and paroles division. Mandatory supervision refers to the release of an eligible prisoner when his actual time served plus accrued good time equals his sentence. *Teague*, 482 F.3d at 774. “There is no right or constitutional expectancy of early release on parole in Texas, because parole is within the total and unfettered discretion of the State.” *Teague v. Quarterman*, 482 F.3d 769, 776 (5th Cir. 2007); *Madison v. Parker*, 104 f.3d 765, 768 (5th Cir. 1997).

In contrast to Texas’s parole scheme, Texas’s mandatory supervision scheme, “with its narrowly limited modicum of discretion,” does create a protected liberty interest in previously earned good time credits. *Teague*, 482 F.3d at 776. However, not all prisoners are eligible for release under mandatory supervision. Texas Government Code § 508.149(a)(8) provides that an inmate may not be released to mandatory supervision if he has been convicted of an offense under TEX. PENAL CODE § 22.021 (aggravated sexual assault), as was Ferguson.² Because Ferguson is not eligible for release to mandatory supervision, he has no constitutional expectancy of early release and his disciplinary

² In his petition, Ferguson did not answer the question asking whether he is eligible for mandatory supervised release. Dkt. 1, at 5 ¶ 16. But he admits that he is in prison on a conviction for aggravated sexual assault. *Id.* at 2.

proceeding did not trigger due process protections. *See Madison*, 104 F.3d at 769 (remanding for determination whether Madison was eligible for mandatory supervision).

CONCLUSION

Ferguson cannot state a claim for federal habeas relief based on alleged constitutional defects in his disciplinary proceedings. Therefore, the court recommends that Ferguson's petition be denied with prejudice.

The court further finds that Ferguson has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on November 21, 2007.



Stephen Wm Smith
United States Magistrate Judge