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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/27/2012
RUTH A. WILLINGHAM,
CLERK
BY: s/s

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MATTHEW RONALD CREAMER,) 1 CA-CV 11-0510
)
Plaintiff/Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
STATE OF ARIZONA; CHARLES L.) (Not for Publication -
RYAN; ARIZONA DEPARTMENT OF) Rule 28, Arizona Rules of
CORRECTIONS,) Civil Appellate Procedure)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. LC2011-000162-001

The Honorable John R. Hannah, Jr., Judge

VACATED AND REMANDED

Matthew Ronald Creamer Tucson
In Propria Persona

Thomas Horne, Attorney General Phoenix
By Katherine E. Watanabe, Assistant Attorney General
Attorneys for Defendants/Appellees

H A L L, Judge

¶1 Matthew Ronald Creamer (Creamer) appeals an order denying special-action relief against the State of Arizona, Arizona Department of Corrections, and Director Charles Ryan

(collectively, DOC). For the reasons stated below, we vacate the superior court order and remand.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Creamer claims his due-process rights were violated by the manner in which DOC conducted a disciplinary proceeding against him. During an intake property inventory, DOC discovered several items of contraband in Creamer's property. He was placed on report for a Class B felony violation. Pursuant to DOC policy, prisoners charged with Class B violations are to be served with a written copy of the charge no later than forty-eight hours before the disciplinary hearing. DOC Department Order 803 § 803.06 (1.3.4). Creamer was orally notified of the charge and signed the disciplinary report. Although Creamer's signature acknowledged that he received a copy of the disciplinary charge, it is undisputed that the disciplinary coordinator did not provide Creamer with a written copy of the charge because there was no copy machine available at the time Creamer signed the notice. The disciplinary coordinator had a practice of making copies of all charges each day at the end of her shift and relying on other officers to distribute these copies to the prisoners. DOC does not dispute that Creamer did not receive his own written copy of the disciplinary charge at any time before the hearing.

¶13 Creamer's disciplinary hearing was held on October 8, 2010. Creamer provided two witness statements and, apparently, admitted to possessing some of the contraband. The hearing officer found Creamer guilty. As with the disciplinary charge, Creamer signed the Result of Disciplinary Hearing form, but did not receive a copy at that time due to the lack of a copy machine. DOC policy requires that the disciplinary hearing officer inform the prisoner of its decision in writing and orally. See DOC Department Order 803 § 803.07 (1.13.2).

¶14 Creamer did not have written copies of the charges or the hearing results when he submitted his level one appeal to the deputy warden. See DOC Department Order 803 § 803.09 (1.2.4) (authorizing level one appeal to deputy warden). Creamer's appeal raised the failure to provide him a written copy of the charges and hearing result. The disciplinary decision was upheld on appeal. Creamer obtained written copies of the charges and the hearing results *after* the first appeal was denied. Creamer then submitted a level two appeal, raising the same issues, including the lack of written copies. See DOC Department Order 803 § 803.09 (1.2.5) (authorizing level two appeal to director). His second appeal was also denied. As a result, Creamer was placed on Parole Class III status for sixty

days, given thirty days extra duty, and loss of privileges for thirty days.

¶15 Creamer filed a special-action petition in superior court alleging the disciplinary proceedings violated his due-process rights. DOC moved to dismiss the special action. The superior court accepted special-action jurisdiction, but denied relief. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (2012).¹

DISCUSSION

¶16 The superior court denied special-action relief, finding that the disciplinary process was not "so unfair as to warrant relief." When the superior court accepts special-action jurisdiction and rules on the merits, this court reviews to determine if the superior court abused its discretion in granting or denying relief. *Files v. Bernal (State)*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001). Creamer contends that

¹ Although Creamer filed a notice of appeal from an unsigned minute entry order, the superior court subsequently filed a signed judgment in favor of DOC. We may, therefore, properly exercise jurisdiction over the appeal. See *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13, 253 P.3d 624, 626 (2011) (recognizing "limited exception to the final judgment rule that allows a notice of appeal to be filed after the superior court has made its final decision, but before it has entered a formal judgment, if no decision of the court could change and the only remaining task is merely ministerial." (Emphasis in original) (citations omitted)).

DOC's failure to follow its own regulations violated due process and justifies relief.

¶17 If a disciplinary proceeding may result in the loss of a prisoner's good time credits, due process requires that the prisoner receive (1) twenty-four hours advance written notice of the violation charged; (2) an opportunity to be heard, including the ability to call witnesses, unless doing so would unduly jeopardize institutional safety or correctional goals; and (3) a written statement by the fact finder detailing the evidence relied on and the reasons for the disciplinary action taken. *Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1974). In accordance with these due-process requirements, DOC policy requires that a prisoner receive a written copy of the disciplinary charge no later than forty-eight hours before the disciplinary hearing. See DOC Department Order 803 § 803.06 (1.3.4). More specifically, written DOC policy states that "[t]he Disciplinary Coordinator shall . . . [s]erve the charge in writing to the inmate no later than 48 hours before the hearing." *Id.*

¶18 DOC concedes that although Creamer had the opportunity to review the written notice of the disciplinary charge, he was not served with a written copy of the disciplinary charge prior to the hearing (i.e., did not receive a timely written copy of the charge prior to the hearing). Accordingly, DOC properly

does not attempt to argue that Creamer was served with the charge as required by DOC's regulations. Creamer contends that because he never received a written copy of the disciplinary report he was unable to "properly marshal the facts and present a defense at his hearing or prepare his appeal." See *Wolff*, 418 U.S. at 564.

¶9 Given DOC's own regulations requiring service, the admitted lack of service of the charge is akin to lack of service in a civil case. In that context, "[i]f a defendant has not been properly served, and the defect in service has not been waived, any resulting judgment is void and must be vacated on request." *Ariz. Real Estate Inv., Inc. v. Schrader*, 226 Ariz. 128, 129 ¶ 6, 244 P.3d 565, 567 (App. 2010). As applied, the State admits it did not serve Creamer with the charge in writing; Creamer consistently objected to the lack of service and the State has not argued that he waived the issue. Accordingly, the resulting disciplinary order and appeal was void for lack of jurisdiction and, given Creamer's request, must be vacated. *Id.* This result is consistent with the requirements of DOC regulations and due process.

¶10 Merely obtaining Creamer's signature on the written notice, without providing him a written copy in advance did not satisfy the due-process requirements set forth in *Wolff* or DOC's

own regulations. Due process requires advance written notice of the claimed violation in order to clarify the charges and allow the prisoner to prepare a defense. *Wolff*, 418 U.S. at 564. Advance written notice of the charges also prevents any change in the charges between the time the prisoner is orally notified and the hearing. *Id.* A prisoner is denied a fair chance to prepare a defense "if the written charges are quickly taken away from the [prisoner] and he is forced to prepare his defenses based largely on his memory of the factual details alleged and regulatory provisions invoked." *Benitez v. Wolff*, 985 F.2d 662, 665 (2d Cir. 1993); see also *In re Bobby F.*, 970 N.E.2d 25, 32-33 (Ill. App. 2012) ("Written notice takes on great importance because it provides the respondent with the opportunity to review the information at a time and in a manner of his choosing.").

¶11 We also reject DOC's attempt to place the onus of obtaining a written notice on Creamer. Due process places this obligation squarely on DOC, not the prisoner. See generally *Wolff*, 418 U.S. at 564.

¶12 DOC argues that it complied with due-process requirements by placing a copy of the disciplinary report into the prison mail system. DOC argues that placing the written notice into the prison mail system is analogous to civil

litigants "assuming that the other party has received documents served by mail unless they are notified otherwise." This analogy is unpersuasive. As noted above, and particularly given the requirements of DOC regulations, the written notice of disciplinary charges is similar to a summons and complaint which require personal service absent waiver. See Arizona Rules of Civil Procedure 4.1. DOC's reliance on the prison mail system to effect service (without corresponding proof of actual receipt) is insufficient to satisfy the dictates of due process in prison disciplinary cases. *Cf. Endishee v. Endishee*, 141 Ariz. 77, 79, 685 P.2d 142, 144 (App. 1984) ("Proper service of process is essential for the court to obtain jurisdiction over a party[.]").

¶13 DOC argues that its failure to provide Creamer with the required pre-hearing due process is excused because Creamer admitted to possessing some of the contraband, which, constitutes "some evidence" supporting the disciplinary action. DOC misunderstands the requirements of due process. In addition to the requirements set forth in *Wolff* and DOC regulations, the disciplinary decision must be supported by some evidence in the record to comport with due process. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997). It is not sufficient that the decision

was supported by some evidence; Creamer was entitled to the protections detailed in *Wolff* and DOC regulations.

¶14 Finally, DOC argues that A.R.S. § 31-201.01(L) (Supp. 2011) bars Creamer's claim. Creamer, however, did not bring a claim. Creamer is merely defending DOC's claim brought against him. We therefore conclude there is no merit to this argument.

¶15 We vacate the order denying special-action relief and remand for a new disciplinary proceeding that comports with due process. Because we conclude that the initial disciplinary hearing was without jurisdiction and violated Creamer's due-process rights, we need not decide whether DOC's failure to provide a written copy of the hearing report prior to Creamer's level one appeal violated due process.

CONCLUSION

¶16 We vacate the order denying special-action relief and remand for a new disciplinary proceeding following proper service on Creamer of the charge in writing no later than forty-eight hours before a new disciplinary hearing.

_____/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Judge

_____/s/_____
SAMUEL A. THUMMA, Judge