

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001381-MR

ELBERT ESTEP

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL LONG, JUDGE
ACTION NO. 98-CI-00078

GEORGE MILLION

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, DYCHE, and GARDNER, Judges.

COMBS, JUDGE: Elbert Estep, acting *pro se*, appeals from an order of the Morgan Circuit Court entered on May 20, 1998, denying his petition for declaratory judgment brought pursuant to KRS 418.040. We affirm.

Estep is an inmate at the Eastern Kentucky Correctional Complex. In January 1998, a prison official observed an inmate, Anthony Allen, pass "something" to Estep. As a result, both inmates were patted down. A jar of coffee and boxes of detergent were recovered from Estep. After the initial investigation, a disciplinary report was filed charging Estep with unauthorized transfer of property, a violation of corrections policy. On

February 9, 1998, the Adjustment Committee found Estep guilty and imposed penalties including the forfeiture of 60 days' good time credit. Upon internal appeal, George Million, the prison warden, affirmed the Adjustment Committee's decision.

In April 1998, Estep filed a petition for declaratory judgment alleging that he had been denied due process of law. On May 8, 1998, Million filed a response to the petition, accompanied by the affidavit of Paul Fugate, chairman of the Adjustment Committee. On May 20, 1998, having determined that no due process violation had been shown, the circuit court dismissed the action. This appeal followed.

Estep contends that the disciplinary action violated procedural due process on the following grounds: 1) his hearing before the Adjustment Committee was joined with the disciplinary hearing of inmate Allen; 2) he was refused the right to present two witnesses at the hearing; and 3) he was charged before an adequate investigation had been conducted.

A petition for declaratory judgment pursuant to KRS 418.040 has become the vehicle whereby inmates may seek review of their dispute with the Corrections Department whenever *habeas corpus* proceedings are inappropriate. Polsgrove v. Kentucky Bureau of Corrections, Ky., 559 S.W.2d 736 (1977); Graham v. O'Dea, Ky. App., 876 S.W.2d 621 (1994). While technically original actions, such inmate petitions share many of the attributes of appeals. They invoke the circuit court's authority to act as a court of review, and the review afforded is limited to the administrative record. The circuit court's determinations

generally being strictly matters of law, we review the decision de novo. City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964).

In Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), the United States Supreme Court held that prison inmates may not be deprived of statutory good time without first having been provided a meaningful opportunity to contest the deprivation. While not subject to a full range of procedural safeguards, inmates are entitled to certain minimum requirements of procedural due process, including advanced written notice of the disciplinary charges, a written statement by the fact-finders of the evidence relied upon and the reasons for the disciplinary actions, and an impartial decision-making tribunal. Wolff, 418 U.S. at 563-567, 94 S.Ct at 2978-2982; see also Hewitt v. Helms, 459 U.S. 460, 465, 103 S.Ct. 864, 868, 41 L.Ed.2d 935 (1983). The Court also held that an inmate should be allowed the opportunity to call witnesses and to present documentary evidence subject to restrictions within the prison officials' discretion based on institutional safety and correctional goals. Wolff 418 U.S. at 566, 94 S.Ct at 2979.

Without explaining how he was prejudiced, Estep argues that he was deprived of due process by the joinder of his disciplinary hearing with that of inmate Allen. The committee chairman's affidavit explains that Estep never objected to this procedure; on the contrary, Estep expressly agreed to have his hearing joined with that of inmate Allen. Estep has not alleged that he made the Adjustment Committee aware of his objection to

this approach nor does he deny that he agreed to the process. The failure to raise an issue before the administrative body precludes a litigant from asserting that issue in an action for judicial review of the agency's action. O'Dea v. Clark, Ky. App., 883 S.W.2d 888 (1994).

Next, Estep argues that the Adjustment Committee deprived him of due process by refusing him the right to present two witnesses at the hearing. On the Write Up and Investigation portion of the Department of Corrections Disciplinary Report Form, Estep indicated that he would request two corrections officers as witnesses at his hearing. However, Estep admitted in his petition that these witnesses were not called at the hearing "nor did the appointed and/or assigned (sic) legal aide object or demand said witnesses on [his] behalf. . . ." Again, issues not raised before the administrative body may not be considered by the reviewing court. O'Dea v. Clark, supra.

Finally, Estep argues that the Department's failure to investigate adequately the incident before charging him with a violation deprived him of due process. Estep has failed to identify an administrative right to a particular investigatory procedure. The regulations he cites are intended to provide guidance to prison personnel and do not confer rights on inmates. Sandin v. Conner, 515 U.S. _____, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Estep has not alleged that the failure to investigate resulted in his being denied notice of the charges against him. Nor has he explained how the allegedly cursory investigation prevented him from offering evidence. He has failed to assert

any deprivation of his right to due process under the criteria of Wolff, supra.

We conclude that Estep has failed to state a claim for the relief he seeks. Consequently, we affirm the order of the Morgan Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

Elbert Estep
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