

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-000601-MR

WILLIE WARD

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 04-CI-00168

COMMONWEALTH OF KENTUCKY,  
JUSTICE & PUBLIC SAFETY CABINET<sup>1</sup>

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>2</sup>

SCHRODER, JUDGE: This is an appeal from an order dismissing an inmate's petition for declaration of rights alleging that the prison disciplinary proceedings against him violated his due process rights and constituted double jeopardy. We agree with the lower court that appellant was not denied due process and

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<sup>1</sup> The "Notice of Appeal" lists Joel Dunlap, et al as the appellees. The appellant's pro se brief lists Joe Stuart, et al as appellee. We corrected the caption to show the real party in interest.

<sup>2</sup> Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that the disciplinary proceedings did not constitute double jeopardy. Thus, we affirm.

On July 22, 2004, corrections officer Tony Gray filed a disciplinary report against appellant, Willie Ward, an inmate at the Kentucky State Penitentiary ("KSP"). The report alleged that Ward had physically assaulted him on that date (physical action against an employee - a category 7-4 offense) when he and other officers entered Ward's cell to remove him for an earlier violation. According to Ward, he went before the Adjustment Committee on August 4, 2004 and the charge was dismissed based on conflicting evidence. The disciplinary hearing form dated August 4, 2004 stated in its findings, "[d]ismissed - conflict in evidence," and was signed by the chairman of the Adjustment Committee and the two other committee members. There was no signature by the Warden or indication that the matter had been reviewed by the Warden. Thereafter, on August 6, 2004, Joel Dunlap, investigator of internal affairs, filed a second disciplinary report against Ward based on his viewing of a videotape of the July 22 incident, again charging Ward with physical action resulting in injury to an employee (Gray), a category 7-4 offense. On August 16, 2004, a hearing was held on the second disciplinary report after which the Adjustment Committee found Ward guilty and assessed a penalty of one-year disciplinary segregation and forfeiture of two years of non-

restorable good time credits. On appeal to the Warden, the acting Warden concurred with the Adjustment Committee, stating "[b]ased on the new information provided by Mr. Dunlap, I find the charge to be appropriate and the penalty is within the approved range." Ward then filed a petition for declaratory relief in the Lyon Circuit Court challenging KSP's disciplinary proceedings against him. On February 16, 2005, the Lyon Circuit Court entered its order dismissing the petition. This *pro se* appeal by Ward followed.

Ward argues that KSP violated his due process rights when they did not follow their own policy. Specifically, Ward complains that KSP violated Corrections Policies and Procedures (CPP) 15.6(VI)(F)(6)(a) which provides, "The Warden or his designee shall not during his administrative or appellate review order a rehearing if the action has been dismissed." Ward maintains that when the first charge relative to the July 22 incident was dismissed because of conflicting evidence, another hearing on the same charge could not be held under the above provision. In our view, the above CPP provision was not violated in Ward's case because neither the Warden nor his designee ordered a rehearing in this case. The first charge was dismissed by the Adjustment Committee and never came before the Warden for review. While it is true that a second disciplinary report was filed relative to the same charge that had been

previously dismissed, it is well established that the Double Jeopardy Clause does not apply to prison disciplinary proceedings. Meeks v. McBride, 81 F.3d 717, 722 (7<sup>th</sup> Cir. 1996); Garrity v. Fiedler, 41 F.3d 1150, 1152-53 (7<sup>th</sup> Cir. 1994), cert. denied, 514 U.S. 1044, 115 S. Ct. 1420, 131 L. Ed. 2d 303 (1995); United States v. Brown, 59 F.3d 102, 104-06 (9<sup>th</sup> Cir. 1995). Prison disciplinary proceedings are not criminal prosecutions. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). All that due process requires in a prison disciplinary proceeding which results in a loss of good time is: 1) notice of the grounds for the discipline; 2) an evidentiary hearing; 3) a neutral decision maker; 4) an opportunity to be present, heard and confront witnesses; and 5) written findings and conclusions by the decision maker sufficient for meaningful judicial review. Id. Ward was afforded all of the above in this case.

Ward also argues that KSP violated his due process rights when Officer Dunlap was permitted to file the second disciplinary report when he did not personally witness the July 22 incident. Ward maintains that under CPP 15.6, the individual who writes up the disciplinary report must personally witness the incident. CPP 15.6(VI)(C)(1)(a) actually provides, "The Disciplinary Report shall be clear, concise and contain only the facts the reporting employee has personally witnessed or

otherwise verified, including a statement of how verification is made." Hence, the witness need not personally witness the incident if he can verify the facts alleged and state how the facts were verified. In the disciplinary report filed by Officer Dunlap, Dunlap stated that he watched a videotape of the incident and described the events he saw on the videotape. In our view, this was sufficient verification of the facts.

Ward next argues that one of the adjustment officers, Lt. Jay Jones, who sat on the hearing on the second disciplinary report on August 16, 2004, also sat on the Adjustment Committee on the first disciplinary report in violation of CPP 15.6(VI)(A)(4)(a)(3). Our review of the record indicates that Lt. Jones sat on the Adjustment Committee for the hearing on the second charge only. Hence, this argument is devoid of merit.

Ward also raises the argument that he was denied due process when he lost good time credit that he had not yet earned. This argument was not raised before the Lyon Circuit Court. Accordingly, it was not preserved and is precluded from our review. CR 59.06; Kaplon v. Chase, 690 S.W.2d 761 (Ky.App. 1985).

Ward's remaining argument is that the evidence before the Adjustment Committee was insufficient to support the finding that he was guilty of physical action resulting in an injury to an employee. The requirements of due process are satisfied in

prison disciplinary decisions if there is some reliable evidence to support them. Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985); Smith v. O'Dea, 939 S.W.2d 353 (Ky.App. 1997). Here, the Adjustment Committee based its decision on the viewing of the videotape of the incident and the facts provided by Officer Dunlap - that Ward hit Officer Gray's taser shield when officers attempted to extract Ward from his cell, which caused Officer Gray to be struck in the head either by Ward or the taser shield and resulted in Officer Gray suffering a sore neck. We believe this to be sufficient reliable evidence to support the Adjustment Committee's findings.

For the reasons stated above, the order of the Lyon Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Willie Ward, *pro se*  
Eddyville, Kentucky

NO BRIEF FOR APPELLEE JUSTICE  
& PUBLIC SAFETY CABINET