

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001402 -MR

JONATHAN HACK

APPELLANT

v. APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 08-CI-00034

MARLO FANNIN AND
GREGORY S. HOWARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

CLAYTON, JUDGE: Jonathan Hack appeals from an order of the Elliott Circuit
Court dismissing his action for declaratory judgment. Hack asserts that his due

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

process rights were violated in a prison disciplinary proceeding. For the reasons stated below, we affirm.

On June 30, 2007, Jonathan Hack was being escorted to his prison cell by Officer Robert Newsome. According to the Disciplinary Report form, the following incident occurred: After Sergeant Riggs removed Hack's leg restraints; Officer Newsome escorted Hack to his cell door. As Officer Newsome began to remove Hack's hand restraints, Hack yelled, "Get off me" and elbowed Officer Newsome in the stomach. Hack tried to pull away from Officer Newsome forcing Newsome's left arm into the top of a food port. Officer Newsome suffered a minor abrasion to his left forearm. During the investigation, Hack denied elbowing or placing his hands on Officer Newsome, but Hack admitted that he jerked his hands away when Officer Newsome was removing his hand restraints. Hack was charged with a "physical action against an employee or non-inmate," a category VII, item 1 infraction.

A prison disciplinary hearing was held on July 10, 2007. At the hearing, the Adjustment Officer, Sergeant Fannin, found Hack guilty of the charged violation based upon Officer Newsome's report and Hack's statement that he jerked his hand away, which resulted in Officer Newsome scraping his arm on the food port. For the violation, Sergeant Fannin assigned Hack to disciplinary segregation for a period of 180 days and assessed a forfeiture of 360 days of good time. Hack appealed the findings to the Deputy Warden, Gregory S. Howard. On

July 19, 2007, Deputy Warden Howard concurred with the Adjustment Committee's ruling and denied Hack's appeal.

Hack then sought judicial review of the decision in Elliott Circuit Court and filed an action for declaratory judgment on April 4, 2008. Hack challenged the adjustment committee's findings that he committed the charged infraction and alleged that his due process rights were violated. In particular, Hack argued that his due process rights were violated by the refusal to allow properly requested staff to testify during the hearing, by the improper and inadequate written summary of the evidence upon which the decision and subsequent discipline were based, and by a decision, which was based upon evidence that did not comport with the "some evidence" standard of *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). Appellees filed a motion to dismiss. And, on February 27, 2009, the Elliott Circuit Court entered an order sustaining appellees' motion to dismiss and dismissing Hack's petition for declaration of rights. Hack then filed this appeal of the court's decision.

The issue on appeal is whether the circuit judge erred in dismissing Hack's petition claiming his due process rights were violated in connection with the disciplinary proceedings at issue. Hack argues that his due process rights were violated in two ways. First, Hack claims that a violation occurred when Sergeant Fannin denied Hack the right to question Sergeant Riggs and Officer Newsome during his prison disciplinary hearing. Second, Hack claims that the written

summary of the evidence provided by Sergeant Fannin did not meet minimum due process requirements.

Prison disciplinary proceedings are administrative rather than criminal hearings. As such, prisoners are entitled to due process of law under the United States and Kentucky constitutions, but these rights are greatly lessened in prison disciplinary proceedings. *Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky. App. 1997). Both federal and Kentucky due process standards are satisfied if there is "some evidence" on the administrative record to support the prison's disciplinary decision. *Id.* at 356-58. Accordingly, on appellate review the standard of judicial review for a prison disciplinary committee's findings is the "some evidence" standard of review. *Id.* The some evidence standard of review does not require that an adjustment committee's fact-finding be supported by compelling evidence; just evidence that will support a reasonable inference of guilt. *Id.* at 357. Finally, determining whether the "some evidence" standard has been satisfied does not necessitate an examination of the entire record or weighing the credibility of the evidence. *Walpole*, 472 U.S. at 455-456. The Court need only review the record for "some evidence" sufficient to uphold a decision of the fact-finder. [*Yates v. Fletcher*, 120 S.W.3d 728 \(Ky. App. 2003\)](#).

With regard to the level of due process required in prison disciplinary hearings, the United States Supreme Court has stated that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell*, 418

U.S. 539, 556 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The Court, however, stated that prisoners are not fully stripped of their constitutional protections while in prison. *Id.* at 555. *Wolff* held that:

[w]here a prison disciplinary hearing may result in the loss of good time credits, . . . the inmate must receive: (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.

Walpole, 472 U.S. at 454, *citing Wolff* 418 U.S. at 563-567.

In the case at hand, Hack first argues that his right to due process was violated when Sergeant Fannin denied Hack the right to question two witnesses, Sergeant Riggs and Officer Newsome, during his prison disciplinary hearing. Although Hack claims that he submitted a written request for witnesses, the record does not support this assertion. The Write Up and Investigation portion of the Disciplinary Report form does not contain a request to call such witnesses. Additionally, the Hearing/Appeal portion of the Disciplinary Report form does not reflect any request to call such witnesses. Included in the record is a handwritten note from Hack that is signed and dated July 3, 2007, but the handwritten note shows no signs of ever being received or reviewed by Sergeant Fannin. Since none of the evidence supports Hack's contention that he properly identified Sergeant Riggs and Officer Newsome as witnesses, no evidence exists that his request to call them was denied.

Moreover, as the Elliot Circuit Court determined, even if a timely request for witnesses had been received, Hack does not have an absolute right to call witnesses at a prison disciplinary hearing. As stated above, the full panoply of rights due to a defendant in criminal proceedings is not applicable to prison disciplinary proceedings. *Wolff*, 418 U.S. at 556. Further, an inmate does not have an unrestricted right to call witnesses from the prison population and prison officials must have necessary discretion in this area. *Id.* at 566-567. Both the witnesses that Hack requested at the time of the hearing were correctional officers. To have both correctional officers appear at the hearing could result in an interruption to prison operations, and such an occurrence could pose a safety risk. In fact, prison officials can deny prisoners the right to call witnesses during disciplinary hearings if the request would be “unduly hazardous to institutional safety or correctional goals.” *Id.* at 566. So, even if Hack had notified Sergeant Fannin prior to the hearing of his desire to call the witnesses, Sergeant Fannin had discretion to deny such a request under the holding in *Wolff*. Here, we agree with the Elliot Circuit Court that Hack’s due process rights were not violated with regard to the testimony of these witnesses at the disciplinary hearing.

Next, Hack asserts that his due process rights were violated because the written summary of the evidence provided by Sergeant Fannin did not meet minimum due process requirements. In order to meet the due process requirements guaranteed by *Wolff*, an inmate must be provided with a written statement by the fact finder as to the evidence relied upon for the finding of guilt. *Id.* at 540. And

the Sixth Circuit held that “[a] prisoner does not receive a statement of the ‘evidence relied on’ if he receives only a reference to an investigative report that contains statements of ten different witnesses. The hearing report must refer to ‘each item’ of evidence.” *King v. Wells*, 760 F.2d 89, 94 (6th Cir. 1985).

Relying on *Wells*, Hack argues that an inmate has not received a statement of the evidence relied on for disciplinary action if he receives a written summary by the fact finder which only makes a reference to the reporting employee’s report or investigative reports that contain statements of witnesses. He goes on to maintain that Sergeant Fannin only referenced Officer Newsome’s report and therefore his written statement did not meet minimum due process requirements.

But Hack’s reliance on *Wells* is incorrect. First, our Court has not found that due process violations occur when written findings incorporate by reference the facts provided in the reporting employee’s report. When this incorporation occurs, the information from the reporting employee’s report becomes part of the written findings of the adjustment officer. *Yates*, 120 S.W.3d at 731. Second, Sergeant Fannin’s written summary referenced both the reporting employee’s report and Hack’s statement. It did not merely reference the report. And finally, Sergeant Fannin determined that Hack’s action of jerking his arm away caused the injury sustained by Officer Newsome. Therefore, Sergeant Fannin found that Hack committed the violation based upon Officer Newsome’s report *and* based upon Hack’s statement. Because Sergeant Fannin’s report

contained all of the evidence relied upon during the hearing, the due process requirements guaranteed by *Wells* and *Wolff* were satisfied.

Additionally, Hack is disputing a finding of fact made by Sergeant Fannin. A determination of guilt or innocence is not made by this Court, for “[t]he courts only *review* the decisions of the Adjustment Committee and prison officials are afforded broad discretion.” *Id.* Moreover, this Court must affirm if there is “some evidence” supporting the charge. *Smith*, 939 S.W.2d at 353. Thus, Sergeant Fannin’s findings shall not be disturbed.

To summarize, Hack’s due process rights were not violated when Sergeant Fannin denied Hack the right to question Sergeant Riggs and Officer Newsome during his prison disciplinary hearing. Additionally, the written summary of the evidence provided by Sergeant Fannin did meet the minimum due process requirements guaranteed by *Wells* and *Wolff*; therefore, Hack’s due process rights were not violated at any time during his disciplinary hearing.

For the foregoing reasons, the judgment of the Elliot Circuit Court is affirmed.

ALL CONCUR.

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