

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000586-MR

ERIC L. CATO

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL JR., JUDGE
ACTION NO. 09-CI-06878

MERRIDETH M. CALVERT;
LT. ERIC SIZEMORE; AND
DON BOTTOM

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: Eric L. Cato (Cato) appeals from the circuit court's order dismissing his petition for declaration of rights regarding a prison disciplinary action. On appeal, Cato argues that the correctional facility did not follow the appropriate procedures in imposing discipline, thus depriving him of due process of law. For the following reasons, we disagree and affirm.

FACTS

Cato was charged with violating telephone privileges and the investigating officer prepared a report of the incident. However, the officer did not put the date and time of the incident on the report. Prior to the presentation of evidence at his adjustment hearing, Cato objected to the proceedings and asked that the charges be dismissed because the report was not complete. The hearing officer stopped the hearing and sent the report back to the investigating officer so that the date and time could be provided. After the date and time were placed on the report, a different hearing officer conducted a full adjustment hearing, and Cato lost 30 days of good time credit.

Cato then filed a petition for declaration of rights in circuit court, arguing that he had been denied due process because the initial hearing officer should have dismissed the charges. In support of his argument, Cato cited to a provision of the Kentucky Corrections Policies and Procedures Manual (the Manual) requiring reports to have the date and time of an incident. We note that the record does not contain a copy of the Manual or of the relevant sections of the Manual; however, the Appellees have not taken issue with Cato's reading of the Manual.

The Appellees filed a response to Cato's petition and a motion to dismiss under Kentucky Rule of Civil Procedure (CR) 12.02. In their motion, the Appellees cited to another provision of the Manual which states that an investigation report may be re-investigated if necessary or appropriate.

Furthermore, the Appellees argued that, even if they did not follow the Manual, the provisions of the Manual do not create due process rights for prisoners.

Following receipt of Cato's response, the circuit court entered an opinion and order dismissing Cato's petition. In its opinion and order, the circuit court stated that, under *Wolff v. McDonald*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), the Appellees were required to provide:

(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 defense and (3) [a] written statement by the fact-finder of the evidence relied upon and the reasons for the disciplinary actions.

The circuit court found that the Appellees complied with these minimum requirements. Furthermore, the court determined that the Appellees complied with the requirements of the Manual. Cato appealed from the circuit court's opinion and order.

STANDARD OF REVIEW

A court should not grant a motion to dismiss for “failure to state a claim upon which relief can be granted” under CR 12.02(f)

unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determinations; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (footnotes and internal citations omitted). Because the issue before the circuit court was a matter of law, we review it *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

ANALYSIS

As noted above, Cato argues that the initial Report was defective and that the disciplinary proceedings against him should have been dismissed when he pointed out that defect. According to Cato, permitting the Appellees to correct the report by adding the date and time of the infraction violated his right to due process. The Appellees disagree, arguing that Cato received all of the process he was due. We agree with the Appellees for two reasons.

First, a criminal defendant in a prison disciplinary proceeding is only entitled to: written notice, a hearing, and written findings supporting the hearing officer's actions. He is not entitled to the full panoply of rights due a defendant in a criminal prosecution. *See Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). In this instance, Cato received written notice of the charges against him, twice; a hearing; and written findings of fact. Therefore, Cato received all of the process he was due.

Second, if we accept that the Manual requires a report to contain the date and time of a violation, Cato has not pointed to any provision in the Manual or in the law which prohibits the amendment of a defective report. Nor has Cato pointed to any authority stating that internal institutional policies and procedures add to the minimum process required by *Wolff*. Furthermore, as noted by the Appellees in

their motion to dismiss, the Manual provides that a report may be "re-investigated if deemed appropriate and necessary." That is what occurred here. Cato pointed out the defect in the report and the initial hearing officer requested additional information or a "re-investigation." That is within the purview of the Manual, comports with the administrative process, and is not a violation of Cato's right to due process.

CONCLUSION

For the foregoing reasons, we hold that Cato received due process and affirm the circuit court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eric L. Cato, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEES:

J. Todd Henning
Frankfort, Kentucky