

RENDERED: JUNE 27, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001048-MR

MARK JENKINS

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 13-CI-00061

DON BOTTOMS,  
WARDEN OF NORTHPOINT TRAINING CENTER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, JONES, TAYLOR, JUDGES.

JONES, JUDGE: This appeal arises from an order of the Boyle Circuit Court denying Mark Jenkins's petition for declaration of rights. For the reasons more fully explained below, we AFFIRM.

## I.

Jenkins was incarcerated at the Northpoint Training Facility on October 19, 2012, when he was involved in an incident with Corrections Officer Matthew Hughes. On that date, Hughes was supervising Jenkins's work in the academic building when Jenkins became argumentative and confrontational. During the confrontation, Jenkins turned and pushed his chest towards Hughes in what Hughes perceived to be a threatening manner. As a result of the encounter, Hughes initiated a disciplinary write-up and the incident was subsequently investigated by Lieutenant Robert Humfleet. Following his investigation, Lieutenant Humfleet charged Jenkins with attempting to engage in a physical action against an employee or non-inmate, in violation of Corrections Policies and Procedure<sup>1</sup> (CPP) 15.2 II (C) Category VII Item 1. Jenkins was presented with a copy of the write-up and investigation on November 14, 2012, to which he entered a plea of not guilty.

Correctional Lieutenant Jason Perkins conducted a hearing on November 29, 2012. Written testimony of Officer Hughes and a video of the incident were presented as evidence. Jenkins requested inmate Jason Wright and Corrections Officer Hovious as witnesses. Wright's written testimony was presented, but Officer Hovious was unavailable to testify. Jenkins was found guilty of the charged violation, for which he received a loss of 730 days of non-restorable good time and 180 days of disciplinary segregation. Jenkins appealed

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<sup>1</sup> CPP incorporated by 501 Kentucky Administrative Regulations (KAR) 6:020.

the decision of the hearing officer to Warden Don Bottom, seeking a reduction or dismissal of the charge. Warden Bottom then amended the charge to engaging in a violent demonstration in violation of CPP 15.2 II (C) Category V Item 12, and reduced Jenkins' penalty to a loss of 90 days good time and 60 days disciplinary segregation.

On February 11, 2013, Jenkins filed a petition for declaratory judgment with the Boyle Circuit Court, in which he sought to have his charge dismissed/expunged from his prison files. Therein, Jenkins argued that that he was unfairly denied the opportunity to present Officer Hovious as a witness; that he was denied the opportunity to review the camera footage; and that Warden Bottoms's charge amendment was inconsistent with the evidence presented. Jenkins also filed a motion for production of discovery and motion for production of witnesses for deposition. On April 25, 2013, the circuit court's order, which denied Jenkins' petition and motions, was entered.

This appeal followed.

## II.

### A. Protected Liberty or Property Interest

Without a protected liberty or property interest, a prisoner cannot successfully maintain a claim under the Due Process Clause. “Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.” *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct.1741, 1748, 75 L.Ed.2d 813 (1983). Thus, the first issue we must decide is whether Jenkins asserted a cognizable due process claim.

With respect to constitutional due process protections, the Fourteenth Amendment's Due Process Clause does not protect every change in the conditions of confinement having an impact on a prisoner. *See Meachum v. Fano*, 427 U.S. 215, 225, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976) (“[T]o hold ... that any substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.”) Rather, a prisoner is entitled to the protections of the Due Process Clause only when the alleged deprivation imposes an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293, 2300, 132 L.Ed.2d 418 (1995).

Jenkins's disciplinary proceeding resulted in disciplinary segregation and revocation of good-time credits. Standing alone, placement in segregation is

not enough to trigger due process protection because such a placement does not impose any atypical or significant hardship on the prisoner. *Id.* However, revocation of earned good-time credits is a different matter. *See Marksberry v. Chandler*, 126 S.W.3d 747, 752 (Ky. App. 2003). Where a state has created a right to good-time credit that shortens a prison sentence and provides that the credit is revocable only upon an inmate's serious misconduct, he has an interest of “real substance” subject to procedural due process protection. *See Wolff v. McDonnell*, 418 U.S. 539, 556–57, 94 S.Ct. 2963, 2974–75, 41 L.Ed.2d 935 (1974). Here, Jenkins's disciplinary proceeding resulted in the revocation of good-time credit. As such, we have no difficulty concluding that Jenkins has alleged an interest protected by the Due Process Clause.

Having concluded that Jenkins was entitled to some process under the Due Process Clause, we must next determine how much process he was due under the circumstances.

#### **B. Process Due Jenkins**

It is well settled 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*, 418 U.S. at 556, 94 S.Ct. at 2975. When a protected liberty or property interest is at stake a prisoner is entitled to: “(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.”

*Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 454, 1055 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985). “The due process requirements set out in *Hill* have been recognized and applied in Kentucky.” *Webb v. Sharp*, 223 S.W.3d 113, 118 (Ky. 2007).

Nonetheless, unlike in a criminal proceeding, due process does not require that a guilty finding in a prison disciplinary proceeding be supported by evidence establishing guilt beyond a reasonable doubt or even substantial evidence. Rather, due process dictates simply that in establishing guilt the disciplinary body must rely on “some evidence” it has determined to be reliable. *Hill*, 472 U.S. at 454–57, 1055 S.Ct. at 2773–75.

On appellate review, ascertaining whether the “some evidence” standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. *Id.* at 456, S.Ct. at 2774. Rather, the applicable question for the appellate court is simply whether the circuit court correctly determined there to be “some evidence” that the fact-finder reasonably relied upon in determining guilt. *Houston v. Fletcher*, 193 S.W.3d 276, 279 (Ky. App. 2006). A reviewing court must also determine whether the fact-finder's written findings indicate that he or she *independently* assessed the reliability of the evidence relied upon. *Haney v. Thomas*, 406 S.W.3d 823, 826 (Ky. 2013).

While a prisoner has a due process right to call witnesses and produce evidence, it is not an unfettered right. Rather, the prisoner's rights must be balanced against the legitimate institutional needs of assuring safety and control of inmates. *Hill*, 472 U.S. 445, S.Ct. at 2769.

Jenkins's first argument to this Court is that he was denied due process when Officer Hovious was not called as a witness. While the *Wolff* Court noted that it would be useful for a hearing committee to state its reasons for refusing to call a witness, "whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases," it is not mandated. *Wolff*, 418 U.S. at 566. Here, the prison disciplinary hearing report indicated that Officer Hovious was no longer employed with the Department of Corrections ("DOC") and could not be contacted. Jenkins has failed to cite any authority which would require the DOC to locate Officer Hovious and compel his attendance. Accordingly, Jenkins's argument is without merit.

Jenkins's next argument is that he was denied due process when his hearing was unlawfully delayed. Jenkins references the fifteen day delay between his write-up/investigation report and his hearing. We first note that Jenkins has failed to cite to wherein the record he has preserved this argument. It does not appear as though this argument was presented to either the prison disciplinary hearing officer or the circuit court. Indeed, the circuit court's order makes no adjudication of the issue. In any event, any such delay does not amount to a denial of due process. The CPP states:

[t]he hearing shall be held within seven (7) working days after the completion of the investigation. A delay beyond this time shall be justified and documented in writing on Part II of the report. *This time limitation is to benefit staff and does not constitute a time in which the inmate has a right to a hearing.*

CPP 15.6 II (D) Item 1 (emphasis added). Thus, it appears that any requirement pertaining to the timeliness of the hearing is an administrative function and not an application of due process. Accordingly, Jenkins's argument is without merit.

Jenkins's final argument is that the circuit court abused its discretion when it affirmed the amended charge without any supporting evidence. We disagree. The disciplinary hearing report indicated "[t]he video was viewed and Inmate Jenkins is seen turning on Officer Hughes and intentionally bump[ing] into Officer Hughes." After its review, the circuit court stated "[t]he evidence submitted at the hearing is sufficient to meet the 'some evidence' standard." We find no error with this conclusion.

For the foregoing reasons, the April 25, 2013 order of the Boyle Circuit Court is affirmed.

ALL CONCUR.

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