RENDERED: October 3, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-1611-MR

MARSHALL WILLOUGHBY — APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 96-CI-107

MICHAEL J. O'DEA, WARDEN;
COMMONWEALTH OF KENTUCKY — APPELLEES

OPINION
AFFIRMING

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BEFORE: GUDGEL, KNOPF, and SCHRODER, Judges.

KNOPF, JUDGE: The appellant, Marshall Willoughby, is incarcerated at Eastern Kentucky Correctional Complex in West Liberty, Kentucky. On March 25, 1996, he was issued a disciplinary report based after he tested positive on a urine test for use of tranquilizers. However, the adjustment committee dismissed the disciplinary report on March 28, 1996 based upon an unspecified due process violation. No further action was taken on the report.

Nonetheless, on March 24 Willoughby received a letter

from Captain Donnie Brown informing him that his visiting privileges were being restricted. This letter was followed up by a memorandum on April 1 from Senior Captain Ernest D. Smith, stating that:

> Due to documentation received by this office involving an incident of which you used drugs, intoxicants, or other unauthorized substance, your visits are being administratively restricted to controlled visits for six months. This restriction is from March 28, 1996 until September 28, 1996.

Willoughby responded to the memorandum, noting that the disciplinary charges against him had been dismissed. Warden Michael O'Dea responded that "the restricted visits were placed on you as a security measure, not a punishment." (Emphasis in original). Willoughby then filed a declaratory judgment action in Morgan Circuit Court, seeking reversal of the prison administration's action. The trial court dismissed the petition on the Correction Department's motion. Willoughby now brings this appeal.

The Corrections Department insists that its action restricting Willoughby's visitation privileges was not a punishment, but only a security measure. The Department also argues that Willoughby has no protected liberty interest in visitation. As a result, the Department contends that Willoughby has no due process interest in this matter.

In the context of prison disciplinary proceedings, the requirements of due process are much more limited than in a

criminal trial. Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445, 454, 86 L.Ed.2d 356, 374, 105 S.Ct. 2768 (1985). The prisoner's due process interests must be accommodated in the distinctive setting of a prison, where disciplinary proceedings "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and have been lawfully incarcerated for doing so." Id. (quoting, Wolff v. McDonald, 418 U.S. 539, 561, 41 L.Ed.2d 935, 954, 94 S.Ct. 2963 (1974)). Therefore, the requirements of due process are satisfied if "some evidence" supports the decision by the prison disciplinary board to revoke good time credits. Hill, 472 U.S. at 455, 86 L.Ed.2d at 365. In light of the exceptional difficulties confronting prison administrators, a highly deferential standard of judicial review is constitutionally appropriate with respect to both the factfinding that underlies prison disciplinary decisions and the construction of prison regulations. Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 357 (1996).

Nonetheless, this minimal due process standard does not authorize punishment without any due process considerations. The Corrections Department argues that Willoughby's due process protections are not required where that administrative action does not involve a protected liberty interest. The Department cites to the United States Supreme Court decision in Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 104 L.Ed.2d

506, 109 S.Ct. 1904 (1989), as holding that prisoners have no protected liberty interest in visitation privileges. Therefore, they argue that Willoughby has no due process rights in administrative actions restricting his visitation privileges.

However, Thompson is limited to the liberty interest created by the specific regulations at issue in that case.

> Stated simply, "a State creates a protected liberty interest by placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S., at 249, 75 L.Ed.2d 813, 103 S.Ct. 1741. A State may do this in a number of ways. Neither the drafting of regulations nor their interpretation can be reduced to an exact science. Our past decisions suggest, however, that the most common manner in which a State creates a liberty interest is by establishing "substantive predicates" to govern official decisionmaking, Hewitt v. Helms, 459 U.S., at 472, 74 L.Ed.2d 675, 103 S.Ct. 864, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

Thompson, 490 U.S. at 462, 104 L.Ed.2d at 516.

After analyzing the visitation regulations at issue, the United States Supreme Court found that the regulations do not contain the "substantive predicates" which would compel a certain result in any given situation. Consequently, the Court found that the "overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions. Or, to state it differently, the regulations are not worded in such a way that an inmate could reasonably

expect to enforce them against the prison officials." Id. at 465, 104 L.Ed.2d at 518.

In this case, the prison administration was not enforcing a discretionary regulation. Rather, the administration punished Willoughby for violation of disciplinary regulations by restricting his visitation privileges. The warden admitted that it was a punishment by stating that his visitation privileges were being restricted as a result of the positive drug test. The *quid pro quo* nature of the prison administration's action is obvious. The alleged misconduct and the prison response are directly connected. It is ludicrous to suggest that the administration's action was not a punishment. We certainly agree that prison officials have wide latitude in determining what security measures are appropriate. Courts must balance the prison administration's profound interest in maintaining order against the inmate's minor interest in unrestricted visitation. Wolff v. McDonnell, 418 U.S. at 562, 41 L.Ed.2d at 954. However, while a prisoner's due process rights are minimal, the prison administration is not authorized to arbitrarily punish an inmate without a hearing or evidence. Considering the ease with which the administration can punish an inmate for violation of prison disciplinary regulations, there is no excuse for dispensing with due process altogether.

Yet while we have misgivings about the prison's action, we can find no remedy which the trial court or this court could

give Willoughby. The restriction on his visitation privileges was minimal. He was not actually denied visitation, but only limited to "controlled" or "non-contact" visits for six (6) months. This restriction has since expired. Furthermore, since the action was taken administratively, there is no evidence that Willoughby has suffered any permanent, compensable consequences, such as loss of good time credits or a record of the action in his file.[1] Consequently, we can only conclude that this issue has become moot. For this reason, we will affirm the circuit court's dismissal of the declaratory judgment action.

Accordingly, the judgment of the Morgan Circuit Court is affirmed.

SCHRODER, JUDGE, CONCURS IN RESULT.

GUDGEL, JUDGE, CONCURS IN RESULT.

[1] Indeed, under the Corrections Policies and Procedures, the disciplinary report must be removed from the inmate's file after the dismissal of the report by the adjustment committee. No further action may be taken on the report.

BRIEF FOR APPELLANT:

Marshall Willoughby, Pro Se
Eastern Kentucky Correctional Complex
West Liberty, Ky.

NO BRIEF FOR APPELLEE

ENTRY OF APPEARANCE FOR APPELLEE MICHAEL J. O'DEA:

Boyce A. Crocker
Justice Cabinet
Department of Corrections
Frankfort, Ky.