

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001432-MR
NO. 1999-CA-001434-MR
NO. 1999-CA-001435-MR
NO. 1999-CA-001436-MR

MUHAMMAD THABIT RASHAD

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
CIVIL ACTION NOS. 99-CI-00045, 99-CI-00046,
99-CI-00048 AND 99-CI-00050

GEORGE R. MILLION;
RICHARD FULK;
BARBARA CONLEY; and
DONALD FANNIN

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, HUDDLESTON and SCHRODER, Judges.

HUDDLESTON, Judge: Muhammad Thabit Rashad appeals from Morgan Circuit Court orders dismissing declaratory judgment actions that he filed pursuant to Kentucky Revised Statute (KRS) 418.040.

These consolidated appeals address disciplinary proceedings filed against Rashad while he was a prisoner at the Eastern Kentucky Correctional Complex (EKCC). On November 13, 1998, Rashad verbally threatened to assault prison personnel. He

was charged with a Category IV, Item 8 violation of Corrections Policy and Procedure (CPP) – a “Nonviolent Demonstration That Could Lead To A Disruption Of Institutional Operations.”

On November 24, the EKCC Adjustment Committee found Rashad guilty of an amended charge of Category IV, Item 19, violation of the CPP – making threatening statements. The committee imposed a penalty of 45 days of disciplinary segregation and 180-day restriction on canteen privileges. Rashad filed a timely appeal with the warden, and the warden affirmed the committee’s decision. Rashad then filed a declaratory judgment action, Civil Action No. 99-CI-00045, to challenge the committee’s decision, alleging that the committee violated his due process rights. The circuit court dismissed the complaint.

The other actions are based on prison proceedings for Rashad’s illegal possession of tobacco (two instances) and obstruction of an air vent. During a search of Rashad on November 13, prison staff discovered that Rashad was concealing tobacco on his person in violation of Category IV, Item 5 of the CPP – Smuggling Contraband. The next day, prison staff again discovered tobacco on Rashad’s person, and prison officials charged him with a second Category IV, Item 5 violation.

On November 14, prison officials also charged Rashad with a Category V, Item 2 violation of the CPP – Tampering With Life Safety Equipment. Rashad allegedly obstructed an air vent by placing a piece of paper over the vent.

On November 24, the EKCC Adjustment Committee heard the three charges and found Rashad guilty. The committee imposed the penalty of 45 days of disciplinary segregation, loss of 60 days of statutory good time, and 180 days of restricted phone use for each tobacco offense, with the penalties to run consecutively. For the tampering charge, the committee imposed a sanction of 60 days of disciplinary segregation and 30 days of lost statutory good time.

Rashad filed declaratory judgment actions challenging the sanctions imposed for each of the three charges. He alleged that: (1) the committee was not impartial; (2) the warden denied him the right to appeal; (3) the committee imposed excessive and arbitrary penalties; and (4) the committee failed to consider exculpatory evidence. The circuit court dismissed the actions. This appeal followed.

First, Rashad asserts that George Million, the warden, violated his due process rights in denying Rashad's appeals from the EKCC Adjustment Committee's decisions. Rashad raises other due process claims.

In Wolff v. McDonnell¹, the United States Supreme Court said that:

[T]he fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed.

¹ 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.²

The due process rights in a disciplinary proceeding include:

- (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.³

From the record, it is clear that the EKCC Adjustment Committee gave Rashad notice of the proceedings, allowed him to present evidence, and rendered written decisions based on the evidence. The committee imposed penalties and punishment within the zone of discretion proscribed by Corrections Policies and Procedures.

Rashad takes issue with the Corrections Cabinet's classification of tobacco as contraband. Even though employees of the prison may be able to use tobacco products, as he notes, it is not unreasonable for the Corrections Cabinet to classify tobacco as contraband in maintaining order in a prison. While incarcerated,

² Id. at 556, 94 S. Ct. at 2975, 41 L. Ed. 2d at 951 (internal citations omitted). See also Standford v. Parker, Ky. App., 949 S.W.2d 616, 617 (1996) (quoting Wolff); Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 357 (citing Wolff).

³ Superintendent v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356, 364 (1985) (citing Wolff, 418 U.S. at 563-67, 94 S. Ct. at 2978-80, 41 L. Ed. 2d at 955-57).

prisoners give up rights that they enjoyed previously. It is not the responsibility of the courts to second guess reasonable policies designed to control prisoner behavior in a correctional facility.⁴

Rashad also claims that the air vent was covered when he first occupied his cell. In essence, he is contending that the committee's decision was contrary to the evidence presented and he alleges that the committee was biased. Whether the vent was previously covered is a factual question to be resolved by the committee. The committee chose to believe the prison staff's evidence over Richard's testimony, and that evidence supports the committee's findings. We find no error.

Rashad avers that the warden violated his due process right to appeal the tobacco and obstructed air vent charges. Rashad's due process rights do not include an appeal. However, because the Corrections Cabinet has created a mechanism for filing an appeal in CPP 15.6, Rashad is entitled to take an appeal if it is taken in the proscribed manner. As we noted in Belcher v. Kentucky Parole Board,⁵ "[a prisoner] has a legitimate interest in a decision rendered in conformity with the established procedures

⁴ See also Sandin v. Conner, 515 U.S. 472, 482, 115 S. Ct. 2293, 2299, 132 L. Ed. 2d 418, 429 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.") (citations omitted).

⁵ Ky. App., 917 S.W.2d 584 (1996).

and policies"⁶ If Rashad timely filed an appeal with the warden, he was entitled to have the appeal considered on its merits.

There is a factual dispute over whether Rashad took timely appeals or filed appeals at all. Factual disputes must be resolved by the warden. The warden determined that Rashad did not file appeals or that the appeals were not timely. The evidence on which Rashad relies is a document entitled "Memorandum in Support of Disciplinary Hearing on 11-24-98," which is an appeal from the life safety equipment violation. The face of the document has no indicia of filing. The warden found that Rashad had filed no appeal for three of the violations. These findings are not contrary to the evidence.

Rashad's second argument is that the EKCC Adjustment Committee applied the incorrect standard of proof in determining whether he had committed the charged acts. He claims that the correct standard is "a preponderance of the evidence."

In reviewing disciplinary proceedings, the U.S. Supreme Court has held that "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board"⁷ To resolve the question, the reviewing court must determine "whether there is any evidence in the record that could

⁶ Id. at 587.

⁷ Superintendent v. Hill, 472 U.S. 445, 455, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356, 365 (1985). See also Smith, supra, n. 2, at 356 (discussing Hill).

support the conclusion reached by the disciplinary board.”⁸ If a decision is supported by some evidence, we must not disturb the decision on review.⁹

In this case, prison officials found tobacco on Rashad’s person on two occasions. On the charge of obstructing the air vent, Rashad failed to note that the vent in his cell was covered when he moved in. In light of this evidence for each of the charges, we believe that the committee’s decisions were supported by some evidence. Thus, we conclude that the committee applied the correct standard of proof and committed no reversible errors. Even if the correct standard was a preponderance of evidence, the committee could still have found Rashad guilty of the charged acts in light of the evidence presented.

The orders dismissing Rashad’s complaints are affirmed.

ALL CONCUR.

⁸ Hill, 472 U.S. at 455-56, 105 S. Ct. at 2774, 86 L. Ed. 2d at 365 (citing United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106, 47 S. Ct. 302, 304, 71 L. Ed. 560, _____ (1927); Willis v. Ciccone, 506 F.2d 1011, 1018 (8th Cir. 1974)).

⁹ Smith, supra, n. 2, at 357 (“[I]n 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.”) (summarizing the holdings Hill and Sandin).

BRIEF FOR APPELLANT:

Muhammad Thabit Rashad, pro se
Eddyville, Kentucky

BRIEF FOR APPELLEES IN 1999-CA-
001434-MR, 1999-CA-001435-MR,
AND 1999-CA-001436-MR:

Rebecca Baylous
OFFICE OF GENERAL COUNSEL
DEPARTMENT OF CORRECTIONS
Frankfort, Kentucky