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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000724-MR

ANTHONY PETTY

APPELLANT

APPEAL FROM MUHLENBERG CIRCUIT COURT
v. HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 06-CI-00599

PATTI R. WEBB, WARDEN, (GRCC)

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES,¹ SENIOR JUDGE.

CLAYTON, JUDGE: Anthony Petty appeals from an order of the Muhlenberg Circuit Court dismissing his action for declaratory judgment. Appellant asserts that his due process rights were violated in a prison disciplinary proceeding. For the reasons stated below, we affirm.

¹ Senior Judge John W. Graves, 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

On August 27, 2006, appellant Anthony Petty was being escorted to med watch² by two deputies, Robert Reynolds and Donivin Good, and became disrespectful toward Reynolds. At this point, Good attempted to escort appellant to lock down. As Good reached for appellant, appellant slapped Good's hand away, and raised his fists. At this point, both deputies had to restrain appellant, wrestling him to the ground while handcuffing him. During this altercation, both deputies received minor abrasions to their hands. As a result of this incident, appellant was charged with a violation of CPP³ 15.2, Category VII-1, "Physical action against an employee or non-inmate." This charge carried a maximum penalty of up to 180 days in disciplinary segregation and up to two years loss of non-restorable good time.

The incident was reviewed by the deputies' supervisor and an investigation was conducted. The results of this were given to appellant on October 13, 2006, along with notification of the hearing for the charge, which was set for October 26, 2006.

Prior to the hearing, appellant pled not guilty and requested Chris Hardy, an inmate who witnessed the incident as his sole witness. Hardy gave a written statement, and was not called to testify at the hearing. At the hearing, the charge was amended to a Category VII-4 charge, "Physical action resulting in the

² Both parties use this term to describe the destination to which prison personnel were escorting inmate Petty. While not entirely clear from the briefs, we presume that the term "med watch" refers to the infirmary.

³ Kentucky Corrections Policies and Procedures

death or injury of an employee or non-inmate.” The charge was amended pursuant to CPP 15.6(II)(B)(1)(b)(2), which allows for a charge to be amended “to conform to the evidence presented.” Based on the evidence presented at the hearing, namely the written statements of both deputies involved and the written statement of witness Hardy, appellant was found guilty of the Category VII-4 charge. Appellant was given the maximum sentence that this charge carried, 365 days of disciplinary segregation and the loss of four (4) years non-restorable good time.

Appellant appealed this finding to the warden, appellee, who affirmed the decision. Appellant then sought judicial review of this decision in Muhlenberg Circuit Court and filed an action for declaratory judgment on November 20, 2006. Appellee filed a motion to dismiss, and on March 2, 2007, the action was dismissed.

Appellant now seeks review of the motion to dismiss. The issue on appeal is whether the circuit judge erred in finding that appellant failed to demonstrate a procedural or substantive due process violation in connection with the disciplinary proceedings at issue. The standard of review for a prison disciplinary proceeding is whether the findings of fact are supported by some evidence. *Smith v. O'Dea*, 939 S.W.2d 353 (Ky. App. 1997). In that case, this Court held that it should focus on “the administrative record already in existence.” *Id.* at 356.

The Supreme Court has stated that “though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner

is not wholly stripped of constitutional protections when he is imprisoned.” *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 555 (1974). In that case, the Court also 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.” *Id.* at 556. Accordingly, the Court held that due process is satisfied in the context of prison disciplinary proceedings as long as the inmate receives:

- (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, 105 S. Ct. 2768, 454 (1985), *citing Wolff* at 563-567.

Appellant initially argues that his due process right was violated when he was charged without a “fair investigation” being made. Appellant asserts that, because the investigating officer relied solely on written statements, he was not acting in good faith. CPP 15.6(II)(C)(4) details the requirements for an investigation. Under this regulation, an investigation consists of two parts: the supervisor’s review and the investigator’s review. Appellant takes issue with the investigator’s review. According to CPP 15.6(II)(C)(4)(b)(2)(b)(c), the investigator shall “collect evidence, documents and statements” and “interview witnesses.” Appellant argues that, without interviewing all witnesses, the

investigation was improper. We cannot agree. The written statement of Good and Reynolds, along with the statement of inmate Hardy, are more than sufficient to satisfy the “good faith” investigation requirement set out in *Ivey v. Wilson*, 577 F. Supp. 169, 172 (WD Ky. 1983). Appellant offers no hint of what a fuller investigation might have uncovered, and clearly prison officials have no duty to engage in a “fishing expedition” in an effort to uncover exculpatory evidence. We therefore find no violation of the written policy concerning investigation, or the *Ivey* requirement of good faith.

Appellant also argues that his right to due process was violated when the Adjustment Committee Officer denied allowing appellant to question his witness, inmate Hardy. However, the Supreme Court has stated that “it does not appear that confrontation and cross-examination are generally required in this context.” *Wolff*, 418 U.S. 539 at 568. Because prison disruptions are a cause of concern to prison administrators, the Court has stated that allowing an inmate to cross-examine a fellow inmate poses a problem, as substantial feelings of resentment may persist after the confrontation. *Id.* at 569. As the record indicates that inmate Hardy submitted a written statement of the incident, we hold there was no error in the Adjustment Committee’s refusal to allow appellant to cross-examine his own requested witness.

Appellant contends that the failure of the Adjustment Committee Officer to justify his refusal in writing on Part II of the report to allow appellant to call and confront the reporting employee, pursuant to CPP 15.6(II)(D)(2)(g)(2), is

reversible error. While no justification was listed on Part II of the report, this was harmless error – appellant’s due process rights were not affected by this omission, as under the standard in *Wolff*, appellant was not entitled to call or confront Good. *Wolff*, 418 U.S. 539 at 568.

Thirdly, appellant argues that his right to due process was violated by the amended charge. Appellant asserts that this violated his rights due to insufficient evidence or denial of a continuance to allow him 24 hours to prepare a defense.

Regarding appellant’s contention of insufficient evidence, the Supreme Court has held that:

[T]he requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if “there was some evidence from which the conclusion of the administrative tribunal could be deduced.”

MCI v. Hill, 472 U.S. 445 at 455 citing *United States ex rel Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106. The Court went on to state that “the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.” *MCI v. Hill*, 472 U.S. 445 at 455-56. Kentucky has adopted this standard in *Smith*. The record indicates that the evidence used to discipline appellant was the written statements of both deputies involved in the incident and the written statement of the inmate who witnessed the incident. While appellant takes issue with the credibility of the evidence presented, it is not for this Court to weigh the credibility of the evidence.

As there is evidence in the record, under the standard of review of “some evidence” we hold that there was sufficient evidence to support the conclusion reached by the Adjustment Committee.

Appellant argues that, because the charge was amended from Category VII-1 to Category VII-4, he should have been granted a continuance to prepare a defense to the greater charge. Appellant argues that this was an arbitrary action by the state, and that constituted a due process violation. We are unable to agree with appellant. The charge was amended to conform to the evidence in the case. CPP 15.6(II)(B)(1)(b)(2) provides that “nothing . . . shall prohibit a charge from being amended to conform to the evidence presented.” CPP 15.6(II)(B)(1)(b)(1) states that, if a charge is amended, a continuance shall be granted if the Committee “is convinced the amendment shall alter the inmate’s defense to the amended violation[.]” The record indicates that appellant received a copy of the Disciplinary Report Form on October 13, 2006. This form stated that both deputies had sustained minor abrasions during the incident. Appellant had notice that the deputies had been injured. Furthermore, the same operative set of facts supported both charges. Appellant has not demonstrated that he would have defended the amended charge any differently or more vigorously had the continuance been granted. The Committee was convinced that the amendment would not alter appellant’s defense, and as there is some evidence to support this finding, we agree.

Finally, appellant argues that his right to due process was violated when he was denied the Adjustment Hearing tape. The Supreme Court has held that “there must be a ‘written statement by the factfinders as to the evidence relied on and reasons’ for the disciplinary action.” *Wolff*, 418 U.S. 539 at 564. The record indicates that appellant received both Disciplinary Report Form Part I (Write Up and Investigation) and Part II (Hearing/Appeal). This is sufficient to satisfy the *Wolff* standard.

Appellant contends that he was entitled to a copy of the hearing tape pursuant to CPP 15.6(G), which governs inmate access to hearing tapes. KRS 197.025 deals with restrictions on access to inmate records and appeal procedure. In pertinent part, this statute states:

[N]o person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person.

The denial of appellant’s request stems from the fact that audiotapes are not permitted within the segregation unit, pursuant to Kentucky State Penitentiary (KSP) policy. Because KSP was not obligated to provide appellant a copy of the audiotape under its own administrative policies, we hold that denying appellant this tape did not violate his right to due process.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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