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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002489-MR

MICHAEL BAYLOR APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 07-CI-00213

RON FLETCHER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

COMBS, CHIEF JUDGE: Michael Baylor, proceeding *pro se*, appeals from an order of the Lyon Circuit Court dismissing his petition for declaration of rights following a prison disciplinary proceeding. After our review, we affirm.

This case arose from an incident that took place on July 8, 2007, at the Kentucky State Penitentiary (KSP) in Eddyville, Kentucky, where Baylor is an inmate. According to the "Disciplinary Report Form PART I – Write Up and

Investigation," which was filed after the incident occurred, Officer K. Lewis overheard Baylor "yelling and talking to other inmates on the walk about trying to start a riot or a sit-in. These actions were disrupting the whole walk." According to a follow-up investigatory account contained in the same report form, Baylor denied making the statements. He claimed that he had only been telling some other inmates that they "need to make the officers use the chain of command and make the supervisors come on the walk." The report also contained statements from Anthony Davidson and Nathan Nelson, two other inmates at the prison, indicating that Baylor had said nothing about a riot or sit-in. According to Davidson, Baylor had been referring to a problem that several inmates had been having concerning being written-up for torn sheets and expressing his belief that grievances should be filed.

Baylor was subsequently charged with "inciting to riot," a Category VI, Item 1 prison disciplinary offense. On July 18, 2007, he appeared before a Department of Corrections adjustment committee for a hearing. The committee found him guilty of the charged offense, citing the disciplinary report and the testimony at the hearing of Officer Lewis that Baylor was trying to incite a riot or a sit-in. Baylor received a penalty of ninety-days' disciplinary segregation.

Baylor filed an appeal to the KSP warden. He argued that the adjustment committee erred by allowing Lewis to testify that he had recognized Baylor's voice when the "riot" comments were made. Baylor also complained that Lewis never actually saw him making the comments in question but instead

overheard them while sitting at his desk. Baylor also argued that the adjustment committee's findings of fact were not sufficiently specific. The warden denied this appeal on August 2, 2007, finding that there was sufficient evidence to support the committee's decision.

On August 24, 2007, Baylor filed a petition for declaration of rights in the Lyon Circuit Court. He alleged that he had been denied due process at the prison disciplinary hearing, arguing insufficiency of evidence that he had committed the disciplinary infraction and failure of the adjustment committee to follow its own rules and procedures. Baylor also claimed that the committee had erred by allowing Officer Lewis to testify that he had recognized Baylor's voice. Baylor finally contended that his due process rights had been violated because a member of the adjustment committee had had a "personal interest" in the outcome of his hearing. Baylor requested either a new disciplinary hearing or expungement of the disciplinary infraction from his record.

On November 1, 2007, the circuit court entered an order dismissing Baylor's petition for failure to state a claim upon which relief could be granted. The court found that he had failed to allege any facts demonstrating a violation of his right to due process and concluded that there was sufficient evidence to support the decision of the adjustment committee. This appeal followed.

Baylor raises three arguments on appeal: (1) that the committee's decision was not supported by sufficient evidence and that, therefore, it constituted a violation of due process; (2) that the circuit court erred by not finding that the

punishment of ninety-days' disciplinary segregation was a violation of due process because it was "atypical and significant" in nature; and (3) that the adjustment committee erred by failing to follow its own rules and procedures.

Baylor first argues that the disciplinary decision was not supported by sufficient evidence, thereby constituting a violation of due process. The United States Supreme Court has recognized 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 v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974); *see also Webb v. Sharp*, 223 S.W.3d 113, 117 (Ky. 2007). Nonetheless, in cases where a loss of good-time credit is at stake, inmates must receive:

> (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, Mass. Correctional Inst., Walpole v. Hill, 472 U.S. 445, 454, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985); *see also Webb*, 223 S.W.3d at 117-18. From our review of the record, it appears that all of these requirements have been satisfied. Baylor does not raise an argument to the contrary.

The U.S. Supreme Court has also held that the requirements of due process are satisfied even if "some evidence" exists to support a decision of a prison disciplinary board. *Hill*, 472 U.S. at 455, 105 S.Ct. at 2774; *see also Webb*,

223 S.W.3d at 118. Even "meager" evidence has been found to meet this burden. *Hill*, 472 U.S. at 457, 105 S.Ct. at 2775. "Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence." *Id.*, 472 U.S. at 455, 105 S.Ct. at 2774. When the "some evidence" standard is met, we are obligated to affirm the decision of the adjustment committee. *Yates v. Fletcher*, 120 S.W.3d 728, 731 (Ky.App. 2003).

Accordingly, the only relevant question for our consideration "is whether there is **any** evidence in the record that could support the conclusion reached by the disciplinary board." *Hill*, 472 U.S. at 455-56, 105 S.Ct. at 2774 (Emphasis added); *see also Webb*, 223 S.W.3d at 118. In conducting our review, we note that prison officials are granted broad discretion in prison disciplinary matters. *Id.*; *Gilhaus v. Wilson*, 734 S.W.2d 808, 810 (Ky.App. 1987).

Baylor has failed to allege or to provide evidence of any facts to substantiate that a due process violation occurred in his case. According to the committee's factual findings contained in "Disciplinary Report Form PART II-Hearing/Appeal," Officer Lewis testified that Baylor was attempting to start a riot or sit-in. These findings were not detailed, but such findings may be brief and still be deemed sufficient. *Yates*, 120 S.W.3d at 731; *Gilhaus*, 734 S.W.2d at 810.

The "Disciplinary Report Forms" contain two parts: "Disciplinary Report Form PART I – Write Up and Investigation," which contains the specific charge and the facts to support the charge; and "Disciplinary Report Form PART II

– Hearing/Appeal," which includes the findings of the adjustment committee. *Yates*, 120 S.W.3d at 731. *Yates* held that "PART II" of these report forms incorporated by reference "PART I" when the adjustment committee's factual findings made reference to an incident report. *Id.* Such was the case with Baylor's procedure. Officer Lewis's initial incident report was more detailed than the committee's subsequent findings. His report reflected that Baylor "was yelling and talking to other inmates on the walk about trying to start a riot or sit-in." When viewed together, Officer Lewis's statement and the findings of fact of the adjustment committee satisfy our conclusion that "some evidence" standard was met.

Baylor has made a number of factual assertions in his brief concerning Officer Lewis's responses to his questions during the adjustment hearing and their effect on the "some evidence" standard. However, we have not received any record – written or recorded – of the hearing other than "PART II" of the "Disciplinary Report Form." The appellant bears the burden of providing us with a reviewable record. *See Ventors v. Watts*, 686 S.W.2d 833, 835 (Ky.App. 1985). Since we have no transcript or recording of the adjustment hearing, we must conclude that the evidence presented during the hearing supported the committee's decision. *Id.*

Baylor next argues that the circuit court erred by not finding that his punishment of ninety-days' disciplinary segregation amounted to a violation of due process because it was "atypical and significant" in nature. He did not present this

argument before the KSP warden in his administrative appeal. Failure to raise an issue in the prison disciplinary proceedings constitutes a waiver that precludes judicial review for failure to exhaust administrative remedies. *Houston v. Fletcher*, 193 S.W.3d 276, 278 (Ky.App. 2006); *O'Dea v. Clark*, 883 S.W.2d 888, 892 (Ky.App. 1994); KRS 454.415(1). We also note that Baylor did not raise this argument before the circuit court. Thus, we cannot consider his claim.

Baylor's last argument is that the adjustment committee erred by failing to follow its own rules and procedures – Kentucky Corrections Policies and Procedures (CPP) 15.6 in particular. He contends that the adjustment committee failed to identify the specific evidence upon which it relied in finding him guilty and that its decision was based solely upon Officer Lewis's report. However, the committee's factual findings reflect that it relied upon Lewis's "interview during this A/C hearing that [] I/M Baylor was trying to start a riot or sit-in" along with his incident report. Thus, this argument lacks a basis in fact.

We affirm the judgment of the Lyon Circuit Court.

ALL CONCUR.

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