

RENDERED: SEPTEMBER 5, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000106-MR

CHRIS DOUGLAS HAWKINS

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 12-CI-00276

DANIEL AKERS; SHAWN GAITHER;
COREY BROYLES; AND KENTUCKY
DEPARTMENT OF CORRECTIONS

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE; Chris Hawkins appeals from an order of the Marion Circuit Court dismissing his petition for declaratory judgment requesting review of four separate prison disciplinary actions. For the reasons stated herein, we affirm in part, reverse in part, and remand for additional proceedings.

During the time relevant to his appeal, Hawkins was an inmate at the Marion Adjustment Center, a private facility under contract with the Department of Corrections. Between April 16, 2012, and June 29, 2012, Hawkins was found guilty of committing four separate infractions of Corrections Policies and Procedure 15.2. Hawkins appealed each of these decisions to Warden Daniel Akers, who affirmed. The first infraction (“Category 5.7”), tampering with physical evidence or hindering an investigation, occurred on April 16, 2012. Hawkins was found guilty at a hearing before an adjustment officer on May 4, 2012. Hawkins was found guilty of a second violation (“Category 3.2”), abusive, disrespectful, vulgar, obscene or threatening language, at a May 7, 2012 hearing before an adjustment officer. Hawkins was found guilty of a third violation (“Category 3.21”), lying to an employee, at a hearing on May 28, 2012. A fourth infraction (“Category 4.9”), making threatening or intimidating statements, occurred on May 30, 2012. Hawkins was found guilty at a June 28, 2012 hearing.

On August 23, 2012, Hawkins filed a petition for declaratory judgment asking for relief from the four disciplinary convictions. On September 17, 2012, the Department of Corrections, Daniel Akers, Shawn Gaither, and Corey Broyles (“Appellees”) filed a response and motion to dismiss pursuant to Kentucky Rules of Civil Procedure (CR) 12.02. On December 6, 2012, the trial court issued an order dismissing Hawkins’ declaratory judgment claim. The trial court found that there was sufficient evidence to support the prison disciplinary actions.

On appeal, Hawkins argues that dismissal was not proper, and alleges various violations of his due process rights. CR 12.02(f) provides that the failure to state a claim upon which relief can be granted is a sufficient ground for dismissal of a claim. When a motion to dismiss is made, trial courts cannot grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). “In determining whether a complaint should be dismissed, the issue is a matter of law.” *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411, 417 (Ky. App. 2004).

Our standard of review of a prison disciplinary committee’s findings of fact is the “some evidence” standard. *Smith v. O’Dea*, 939 S.W.2d 353, 358 (Ky. App. 1997). Prisoners are provided only with minimum standards of due process. *Id.* at 357. The minimum due process rights of prisoners are satisfied when the inmate is provided advance written notice of his charges; provided with an opportunity to call witnesses and present evidence when consistent with institutional safety and correction goals; and provided with a written statement from the fact-finder of the evidence relied on and the reasons for the disciplinary action. *Foley v. Haney*, 345 S.W.3d 861, 863-64 (Ky. App. 2011).

Category 5.7 Conviction

Hawkins was charged with tampering with physical evidence or hindering an investigation after he was accused of concealing an object in his

mouth and swallowing it after being asked to spit it out. Relying on the statement from Supervisor Stephen Herman, the adjustment officer found Hawkins guilty and sentenced him to forty-five days of disciplinary segregation and a forfeiture of sixty days of good-time leave.

Hawkins alleges that there were various deficiencies in the Disciplinary Report pertaining to the recitation of facts, including the fact that the object was not identified, and the cell in which the incident occurred was misidentified. He argues that his due process rights were violated as a result of these deficiencies. We disagree. Hawkins had the opportunity to present his version of the facts at the May 4, 2012 hearing. The finder of fact in disciplinary proceedings need only be presented with evidence sufficient to establish a reasonable inference of a prisoner's guilt. The finder of fact considered Hawkins' statement, but found Hawkins guilty based on the statement of Supervisor Herman. Supervisor Herman's statement was "some evidence" of Hawkins' guilt.

Hawkins further alleges that a proper investigation was not conducted because the investigator did not collect statements from witnesses, including Supervisor Herman, and because the surveillance footage was not reviewed during the investigation. We find that Hawkins' due process rights were not violated as a result of the investigation. Corrections Policies and Procedures Rule 15.6(C)(4)(b)(2)(c) states that an investigator shall interview relevant witnesses and record a brief statement of what the witness reports. While it is true that the investigator's report does not mention whether he interviewed Supervisor Herman,

our Supreme Court has held that a prison official's failure to comply with the Department of Corrections' own regulations is not a *per se* denial of due process. *White v. Boards-Bey*, 426 S.W.3d 569, 575 (Ky. 2014). Supervisor Herman's statement is recorded in the initial Disciplinary Report. Both the investigator and Hawkins were aware of his account of the events. Therefore, the investigator's failure to interview him later was of little consequence. We further find no error in the investigator's failure to review the security footage, as there is no requirement that the investigator review surveillance video.

Hawkins further alleges that he was denied the opportunity to call witnesses during the hearing. However, the Disciplinary Report indicates that Hawkins did not request witnesses. While Hawkins maintains that he later requested to call witnesses in writing 24 hours prior to the hearing, no evidence of this request is included in the record. Therefore, we find that Hawkins was not denied the opportunity to call witnesses. In sum, we find that Hawkins' due process rights were not violated as a result of his Category 5.7 conviction.

Category 3.2 Conviction

Hawkins was charged with using abusive, disrespectful, vulgar, or obscene language. The incident occurred after Corrections Officer Jason Howard turned the water in Hawkins' shower off because Hawkins had been in the shower too long. Hawkins was accused of kicking the shower door and yelling obscenities at Officer Howard. He was found guilty and assessed a forfeiture of sixty days of good-time leave.

First, Hawkins argues that the investigation was inadequate because the investigator failed to interview Lt. Michael Johnson, janitor Hiawatha Baker, and “other inmates” involved in the incident. Hawkins also alleges that the investigator should have reviewed the surveillance footage of the incident. We find no error with the investigation. The investigator interviewed one inmate, Danny Angel, who witnessed the incident and gave a statement. Investigators are only tasked with interviewing relevant witnesses, and Hawkins has failed to demonstrate how Baker or Lt. Johnson is relevant to his conviction of using disrespectful language towards Officer Howard. There is no evidence that Lt. Johnson or Baker was present when Hawkins used the obscene language. Hawkins does not identify any “other inmates” involved which he believed should have been interviewed. In addition, as we discussed above, there is no requirement that the investigator review the surveillance video. Thus, we do not find that Hawkins’ due process rights were violated during the investigation of the incident.

Hawkins also alleges that he was improperly denied the opportunity to call witnesses at the hearing. The May 7, 2012 Disciplinary Report indicates that Hawkins requested to call Investigator Cox, Lt. Wilson, Lt. Johnson, Officer Howard, Officer Kelley and Danny Angel as witnesses. However, the May 28, 2012 Hearing Report indicates that Hawkins waived each of these witnesses. Although Hawkins alleges in his brief that he did not waive these witnesses, there is no evidence in the record that the representation in the Hearing Report is

incorrect. Therefore, we do not find that Hawkins was denied the opportunity to call witnesses.

Next, Hawkins argues that his due process rights were violated because the security footage of the incident was not reviewed at the hearing. Recently, our Supreme Court held that an adjustment officer conducting a hearing must review security footage and consider its weight if requested by an inmate. *Ramirez v. Nietzel*, 424 S.W.3d 911, 919-20 (Ky. 2014). However, there is no evidence in the record that Hawkins requested the security footage to be reviewed. Although Hawkins maintains in his brief that a written request was made twenty-four hours prior to the hearing, a copy of this request is not in the record. Thus, we find no due process violation.

Hawkins also alleges that the adjustment officer's findings of fact were insufficient and failed to address a statement given by inmate Angel. The investigating officer's report indicates that Angel stated Hawkins never cursed at Officer Howard and that the allegations against Hawkins were untrue. Angel's statement is not addressed in the adjustment officer's Hearing Report.

Written findings of facts relied on are required in disciplinary proceedings. *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S.Ct. 2963, 2979, 41 L.Ed.2d 935 (1974); *Foley*, 345 S.W.3d at 863-64. These findings may be brief. *Gilhaus v. Wilson*, 734 S.W.2d 808, 810 (Ky. App. 1987). An adjustment officer may incorporate by reference the findings of the investigating officer's report. *Yates v. Fletcher*, 120 S.W.3d 728, 731 (Ky. App. 2003). In this case, however,

the adjustment officer makes no mention of the investigating officer's report. Because the adjustment officer mentions neither Angel's statement nor the investigator's report, it is impossible to determine whether Angel's statement was ever reviewed or considered. As Angel's statement was direct exculpatory evidence, the adjustment officer should have addressed it either directly, or by incorporating by reference the investigator's findings. Thus, we find the minimum requirements of due process were not satisfied.

Category 3.21 Conviction

The third disciplinary conviction stems from Hawkins' allegation that an officer made an inappropriate sexual comment towards him. An investigation was conducted pursuant to the Prison Rape Elimination Act, and the allegations were determined to be unfounded. As a result of making the accusation, Hawkins was charged with "lying to an employee." At the hearing, the adjustment officer found Hawkins guilty based on the confidential investigation report and a review of the evidence. He was sentenced to forfeit sixty days of good-time leave.

Hawkins contends that his due process rights were violated because he did not have an opportunity to review the confidential investigation report. The prison disciplinary committee is not required to make confidential information received during the course of their investigation available to the inmate. Case law has recognized the legitimate use of confidential information and limited access to the identity of confidential informants in prison disciplinary actions. *Stanford v. Parker*, 949 S.W.2d 616, 617 (Ky. App. 1996)(holding there is "no violation of

appellant's due process rights in the refusal to reveal information which prison officials deemed confidential.”); *Gilhaus*, 734 S.W.2d at 810. Thus, we reject this argument.

Hawkins argues that the investigation was inadequate because the investigator failed to interview inmates Danny Angel and Nick Simpson, Officers Howard, Kelly, and Cox, two nurses, and “other inmates.”¹ Upon reviewing the investigator’s report, Hawkins is correct, and it does not appear as though the investigator interviewed any witnesses. However, as discussed above, a prison official’s failure to comply with the Department of Corrections’ own regulations is not a *per se* denial of due process. *Boards-Bey*, 426 S.W.3d at 575. Hawkins presented the testimony of Angel and Simpson at the hearing, and therefore, he cannot demonstrate how he was prejudiced by the investigator’s failure to interview them. Officer Cox’s report was also considered at the hearing, and formed the basis of the conviction. Officer Cox participated via telephone during the hearing and was available for cross-examination. Hawkins has failed to demonstrate how statements from the nurses, who allegedly treated a hand injury sustained during the incident, would have been relevant to the issue of whether an inappropriate sexual comment was made. Hawkins does not identify by name any “other inmates” he believed should have been interviewed. Thus, we do not find that Hawkins’ due process rights were violated as a result of the investigator’s

¹ Here, Hawkins is referring to the investigation into the Category 3.2 charge, as opposed to the investigation conducted by Officer Cox pursuant to the Prison Rape Elimination Act.

failure to interview witnesses. These witnesses were either irrelevant, unidentified, or were available to testify at the hearing.

Category 4.9 Conviction

Hawkins was charged with making threatening or intimidating statements. While in segregation, Hawkins told Case Manager Karis McMahon that he would refuse to be released into the general population as long as Officers Howard and Kelly were working there. McMahon advised him that his two options were to “request PC,” or refuse to be released and continue to receive disciplinary actions. Hawkins told McMahon that he could also ask to be placed under medical observation and stay there until he was transferred or completed his sentence. Hawkins was convicted at a hearing based on McMahon’s account of the incident, and was sentenced to forty-five days of disciplinary segregation and a forfeiture of sixty days of good-time leave.

Hawkins alleges that he did not make the statement in question, and even if he did, it is not threatening or intimidating. Hawkins was found guilty based on Case Manager McMahon’s written report. The finder of fact in a disciplinary hearing need only be presented with evidence sufficient to establish a reasonable inference of a prisoner’s guilt. We hold that Case Manager McMahon’s statement is “some evidence” of Hawkins’ guilt. Accordingly, the findings were sufficient and the minimum requirements of due process were satisfied.

Hawkins also argues that his due process rights were violated because the security footage of the incident was not reviewed at the hearing. Although he claims that he made a written request for the security footage to be reviewed, there is no evidence of this request in the record. Thus, we find no due process violation.

Lastly, Hawkins alleges that his due process rights were violated because Appellees had two different counsel of record. Hawkins fails to articulate how this amounts to a due process violation. Accordingly, we find no error.

Conclusion

There were no due process violations with respect to Chris Hawkins' convictions for his Category 5.7, 3.21, and 4.9 violations. Accordingly, the Marion Circuit Court's order with respect to these convictions is affirmed. We also hold, however, that the process by which Hawkins was found guilty and subject to discipline for his Category 3.2 conviction failed to comport with the minimum requirements of due process. Therefore, the order of the Marion Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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