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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000200-MR

DAVID L. TRAVIS — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 16-CI-00500

AARON SMITH, KSR, WARDEN AND
WILLIAM HOLLKEMP, CAPTAIN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: David L. Travis, *pro se*, appeals from the order of the Oldham Circuit Court dismissing his petition for a declaration of rights regarding his prison disciplinary proceedings. Travis argues his due process rights were violated where the same person who signed his disciplinary report as supervisor was also his hearing officer. He also argues that his rights were violated where he

properly requested camera footage of the incident, but he was not allowed to see the footage and the adjustment officer did not view the footage before finding Travis guilty of the infraction.

On July 5, 2016, Officer David McCoy observed Travis acting suspiciously and called him into his office. He observed Travis drop a small bag as he walked toward his office. Officer McCoy retrieved the bag and Lieutenant Ronnie Whittaker opened it. Inside the bag, they found two individual glove fingers. When Lieutenant Whittaker opened the first glove finger, he observed a green leafy substance that appeared to be marijuana. Lieutenant Whittaker transferred the bag to Lieutenant Joshua Schank who tested it with the Duquenois-Levine Reagent Test, which came back positive for marijuana. Captain Thomas Noonan opened the other glove finger and found six suspected Suboxone strips inside.

Sergeant Matthew Moore read the disciplinary report to Travis and then questioned him about it. Travis denied being in possession of anything other than steak hoagies. Sergeant Moore reviewed the camera footage and recounted that Travis entered the dorm foyer with a bag, exited without a bag and after Officer McCoy instructed him to return to the wing, the footage showed Travis removing something from his waist band. Travis requested the camera footage.

Officer McCoy was the reporting employee with Sergeant Moore conducting the investigation and Captain William J. Hollkemp signing as supervisor.

After a hearing at which Officer McCoy testified, Captain Hollkemp found Travis guilty of possession or promoting of dangerous contraband based on Officer McCoy observing Travis drop the item that turned out to contain marijuana and suboxone strips. Although the camera is listed as a witness, the adjustment officer did not reference in writing either viewing the camera footage or why he could not do so. Travis states that during his hearing, he was told the footage was unavailable. Travis was penalized with thirty days of segregation with credit for time served for twenty-one days and the loss of sixty days of good time.

Travis sought review from the warden on the basis that his due process rights were violated where: (1) Captain Hollkemp should have been disqualified from serving as an adjustment officer because he participated as an investigating officer by serving as the supervisor who began the investigation and (2) although he requested the video footage, he was told the footage was not available during his hearing. The warden concurred with the decision of the adjustment committee.

Travis filed a two-page petition for a declaration of rights against Aaron Smith, the Warden at the Kentucky State Reformatory and against the

adjustment hearing officer, Captain William Hollkemp. A motion to dismiss was filed and the circuit court dismissed the petition.

As an inmate undergoing a disciplinary hearing, the procedural process Travis was entitled to receive is limited, as is our role in reviewing whether the evidence was sufficient for a finding of guilt. While due process applies to prison disciplinary hearings which could result in the loss of good time credit, inmates are not entitled to the same protections as during a criminal prosecution because a balance must be reached between the prison's need for security and the inmate's constitutional rights. *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). Under these circumstances, inmates are entitled to:

> (1) advance[d] 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 Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky.App. 1997) (applying these requirements in Kentucky). They are also entitled to a sufficiently impartial fact-finder. *Wolff*, 418 U.S. at 571, 94 S.Ct. at 2982.

The United States Supreme Court and the Kentucky Supreme Court have determined "the implementation of procedural safeguards in the punishment for rule infractions must be tempered by the serious concern for prison security and the safety of both inmates and staff." *Webb v. Sharp*, 223 S.W.3d 113, 118 (Ky. 2007). Minimum due process requirements are met if "the findings of the prison disciplinary board are supported by some evidence in the record." *Hill*, 472 U.S. at 454, 105 S.Ct. at 2773.

The Kentucky Corrections Policies and Procedures (CPP) implements the requirement that inmates have a suitably impartial fact finder through CPP 15.6(II)(A)(4), which states as follows:

> Disqualification
>
> a. A committee member, Adjustment Officer or Unit Hearing Officer shall be disqualified in every case in which he has:
>
> (1) Filed the complaint or witnessed the incident;
>
> (2) Participated as an investigating officer; or
>
> (3) Been assigned the subsequent review of the decision.

We agree with the appellees that Travis cannot establish that by serving as the supervisor who signed the disciplinary report Captain Hollkemp "[p]articipated as an investigating officer" pursuant to CCP 15.6(II)(A)(4)(a)(2)

and was thereby disqualified from serving as the adjustment officer in his disciplinary hearing. Captain Hollkemp's role as the signing supervisor was limited to reviewing the completed disciplinary report to make sure that it contained all pertinent data promptly and signing it upon completion. CPP 15.6(II)(C)(3); CPP 15.6(II)(C)(4)(a)(1)-(3).

CPP 15.6(II)(C)(4), entitled "Investigation," distinguishes between a supervisor's review and an investigator's review. The investigator is tasked with many important responsibilities including collecting evidence, assigning the most appropriate violation, advising the inmate of his right to consult with a legal aide and completing the investigation and determining whether there is sufficient evidence to proceed. CPP 15.6(II)(C)(4)(b)(2)-(3). Because their roles are strikingly different, we hold that a supervisor who reviews a disciplinary report is not an investigating officer.

This is consistent with our previous opinions in which we have declined to interpret the disqualification provisions of CPP 15.6(II)(A)(4) in an expansive manner. *See Evans v. Litteral*, No. 2016-CA-001466-MR, 2018 WL 297272, 3 (Ky.App. 2018) (unpublished) (holding no violation of the right to an impartial decision maker where the adjustment officer may have been the brother-in-law of the reporting officer as this relationship did not come within the categories requiring disqualification and the inmate failed to offer any evidence

demonstrating prejudice); *Williams v. Howard*, No. 2013-CA-002017-MR, 2015 WL 136617, 2 (Ky.App. 2015) (unpublished) (determining no evidence inmate's right to an impartial decision maker was violated where his adjustment officer was the same person who responded to calls for assistance regarding a stabbing and handcuffed him as this did not show the adjustment officer fell within any of the disqualification categories).[1]

As to Travis's claim that his due process rights were violated where he properly requested camera footage of the incident but he was not allowed to see the footage and the adjustment officer did not view the footage before finding Travis guilty of the infraction, we disagree with Travis that his rights were violated.

> CPP 15.6(II)(B)(1)(b) provides that an adjustment officer:
>
> > Shall review all available video and consider as documentary evidence in making the final decision, if an inmate requests as an exhibit a video recording of the incident giving rise to the institutional charge. Any video evidence considered shall remain confidential and shall not be shown or provided to the inmate without written approval from the warden.

[1] Pursuant to Kentucky Rules of Civil Procedure 76.28(4)(c), these unpublished appellate decisions may be considered because there are no published opinions that would adequately address this issue.

In *Ramirez v. Nietzel*, 424 S.W.3d 911 (Ky. 2014), the Kentucky Supreme Court made an important ruling regarding how video surveillance footage should properly be reviewed during a prison disciplinary hearing:

> [It held] that an AO [adjustment officer] must review surveillance footage, or similar documentary evidence, if requested by the prisoner in a disciplinary proceeding. The AO may review the documentary evidence in camera if there are concerns about institutional safety or other obstacles to the proper operation of penal institutions. In refusing to allow the inmate to view the documentary evidence, the AO—as with denying witness testimony—must simply provide a reason "logically related to preventing undue hazards to institutional safety or correctional goals."

Id. at 915 (quoting *Ponte v. Real*, 471 U.S. 491, 497, 105 S.Ct. 2192, 85 L.Ed.2d 553 (1985)). The Kentucky Supreme Court explained:

> We emphasize that it is entirely appropriate for prison officials to view inmate-requested footage in camera. It is difficult for us to comprehend a security risk arising from an AO viewing security footage outside the presence of an inmate.
>
> But, importantly, the inmate himself does not necessarily possess the right to review the videotape. If disclosure of such requested exculpatory evidence would not be unduly hazardous to the security of the institution, the evidence should be disclosed to the inmate. An AO may, however, articulate a legitimate reason for denying the inmate access to the evidence. For example, in the case of security footage, as we have here, there may be a legitimate security concern in disclosing the video footage because prison officials do not "want the offenders to know the capabilities of the cameras for security reasons." [*Gaither v. Anderson*, 236 F.3d 817,

> 820 (7th Cir. 2000).] . . . [T]he justification offered by the AO for denying the inmate access to the documentary evidence must be "logically related to preventing undue hazards to institutional safety or correctional goals." [*Ponte*, 471 U.S. at 497, 105 S.Ct. at 2196 (internal quotation marks omitted).] Accordingly, the inmate has no unlimited constitutional right to *view* the footage. The inmate only has a right to have the AO view the footage and, in turn, consider its weight in making her finding of guilt or innocence.
>
> . . . "When a prisoner maintains that he was denied a meaningful opportunity to present a defense due to [an AO's] refusal to consider exculpatory evidence, then procedural due process requires a [circuit] court to conduct an *in camera* review of the evidence[,]" [*Felder v. McBride*, 121 Fed.Appx. 655, 656-57 (7th Cir. 2004),] to determine whether it was indeed exculpatory and whether, in light of the new evidence, "some evidence" existed for the AO's finding of guilt.

Id. at 920 (footnotes omitted).

However, there is no *Ramirez* error if the video footage requested no longer exists or the adjustment officer cannot obtain it from an outside entity, and the adjustment officer properly documents the reason why the video footage was not viewed. *See Stinson v. Rowkette*, No. 2016-CA-000525-MR, 2017 WL 1829712, 2 (Ky.App. 2017) (unpublished) (no access to video gathered and maintained by outside entities); *Kirk v. Commonwealth*, No. 2014-CA-000947-MR, 2015 WL 1188633, 5 (Ky.App. 2015) (unpublished) (no access to recorded telephone conversations).

Pursuant to *Ramirez* and CPP 15.6(II)(B)(1)(b), the only right Travis had regarding the video was for the adjustment officer to view it, if available, before reaching a decision. Travis had no right to view it unless permission from the warden was granted, due to security concerns. As Travis admits, the video was unavailable. While it would be the better practice for the hearing officer to specifically document the unavailability of the footage in his decision and the reason for the unavailability of the footage, Travis was not prejudiced. The hearing officer neither discussed nor relied on the investigator's summary of the video footage in his decision and there was some evidence to find that Travis committed the infraction based upon the eyewitness testimony of Officer McCoy which connected Travis with the bag containing the drugs.

Accordingly, we affirm the order of the Oldham Circuit Court dismissing Travis's petition for a declaration of rights regarding his prison disciplinary proceedings.

MAZE, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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