NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0910

GARY BOUDREAUX

VERSUS

BURL CAIN, WARDEN

Judgment Rendered: February 15, 2012

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 603,295

The Honorable William Morvant, Judge Presiding

* * * * * * * * * *

Gary Boudreaux
Angola, LA

Plaintiff/Appellant,
In Proper Person

William Kline
Baton Rouge, LA

Counsel for Defendant/Appellee,
Louisiana Department of Public Safety and Corrections

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

WHIPPLE, C.J.

Petitioner, Gary Boudreaux, an inmate in the custody of the Department of Public Safety and Corrections ("the Department"), and housed at Louisiana State Penitentiary, appeals from the dismissal, without prejudice and without service, of his request for judicial review of Discipline Board Appeal No. LSP-2011-0124-W, concerning petitioner's custody change to maximum custody as a result of his conviction for violating Prison Disciplinary Rules.[1]

On July 8, 2011, petitioner filed a petition for judicial review in the Nineteenth Judicial District Court, contending that he was denied "due process rights to a [f]air [t]rial."[2] The action was initially referred to a Commissioner for review pursuant to LSA-R.S. 15:1178 and R.S. 15:1184-1188. On August 5, 2011, the Commissioner issued a screening report recommending that petitioner's appeal be dismissed for failure to state a "substantial right" violation, and, thus, for failure to state a cause of action for which relief is available, pursuant to LSA-R.S. 15:1177(A)(9). After *de novo* review of the entire record, including the Commissioner's screening report and petitioner's timely filed traversal, the district court rendered judgment on September 20, 2011, adopting the recommendations set forth in the Commissioner's screening report and dismissing petitioner's appeal without prejudice. Petitioner then filed the instant appeal.

It is well settled that a change of custody status is not atypical nor a significant hardship in relation to the ordinary incidents of prison life, and does not prejudice an inmate's substantial rights. See Sandin v. Conner, 515 U.S.

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[1]Petitioner was originally charged with a violation of Rule #30E and was convicted of violating Rule #30C. However, the violation of Rule #30C was amended to reflect a violation of Rule #30W as it is a description of the conduct and not the rule number that determines the violation.

[2]Given our ultimate holding herein, we pretermit consideration of the issue of whether, and under what circumstances, the results of a polygraph examination can be introduced and used in an administrative proceeding.

472, 484-486, 115 S. Ct. 2293, 2300-2301, 132 L.Ed.2d 418 (1995); Parker v. LeBlanc, 2002-0399 (La. App. 1st Cir. 2/14/03), 845 So. 2d 445, 446; Lay v. Porey, 97-2903 (La. App. 1st Cir. 12/28/98), 727 So. 2d 592, writ denied, 1999-2720 (La. 3/31/00), 758 So. 2d 812; Alford v. LeBlanc, 2009-0666 (La. App. 1st Cir. 10/23/09) (unpublished), 24 So. 3d 1030 (table); Gusman v. LeBlanc, 2010-1572 (La. App. 1st Cir. 3/25/11) (unpublished), 58 So. 3d 1152 (table); Perryman v. LeBlanc, 2010-1649 (La. App. 1st Cir. 3/25/11) (unpublished), 58 o. 3d 1153 (table); Williams v. Department of Public Safety and Corrections, 2010-2301 (La. App. 1st Cir. 6/10/11) (unpublished). Since the penalty imposed in this case does not rise to the level of a substantial rights violation, modification or reversal of the disciplinary action is not warranted. See LSA-R.S. 15:1177(A)(9).

As noted by the Commissioner in the screening report:

> In this case, the only penalty imposed was a custody level change. The Petitioner does not assert facts to support a finding that he has a constitutional right in connection with either penalty, whether as a matter o[f] discipline or otherwise. I[n] fact, the final decision shows that the Petitioner was afforded a hearing and an appeal of the ruling to the Warden and the Secretary. Considering the nature of the penalty, and the fact that it does not affect the length of the Petitioner's sentence or present any other drastic departure from expected prison life in a maximum security prison, the Petitioner fails to set forth a substantial right violation which would authorize this Court to intervene and reverse the Agency's decision. Consequently, this Court is constrained by R.S. 15:1177A [to] dismiss this appeal because it presents no cause of action.

After thorough review of the record and relevant jurisprudence, we agree with the district court's screening judgment for the reasons set forth in the Commissioner's screening report, which we attach herein as Exhibit "A" and adopt as our own. Accordingly, we affirm the judgment of the district court in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.2(A)(2), (4), (5),

and (6). All costs of this appeal are assessed against petitioner, Gary Boudreaux.

AFFIRMED.

Exhibit "A"

GARY BOUDREAUX

VS.

LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS, ET AL

NUMBER: 603,295 SECTION 23

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

COMMISSIONER'S SCREENING REPORT

The Petitioner, an inmate in the custody of the Department of Public Safety and Corrections, filed this suit for review of a prison disciplinary decision in DBA LSP-2011-124-W, seeking review in accordance with R.S. 15:1171, et. seq. Pursuant to R.S. 15:1178 and R.S. 15:1184-88, this Court is required to screen all prisoners' suits as soon as practicable to determine if the Petitioner states a cause of action or cognizable claim, and whether the petition is frivolous, malicious, or seeks monetary damages from an immune defendant. This screening report is issued on the petition and attachments alone based on a finding that there is no substantial right violation involved in this complaint. This report is issued for the Court's de novo consideration and adjudication of this claim for relief.

ANALYSIS OF THE FACTS AND LAW

The scope of this Court's review is limited by R.S. 15:1177(A)(5) & (9), which states, in pertinent part, as follows:

> "(5) The review shall be conducted by the Court without a jury and shall be confined to the record. The review shall be limited to the issues presented in the petition for review and the administrative remedy request filed at the agency level.
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> * * * * * * * * * *
>
> (9) The court may reverse or modify the decision **only if substantial rights of the appellant have been prejudiced** because the administrative findings, inferences, conclusions or decisions are:
>
> a. In violation of constitutional or statutory provisions;
>
> b. In excess of the statutory authority of the Agency;
>
> c. Made upon unlawful procedure;
>
> e. Affected by other error of law;
>
> d. Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or
>
> f. Manifestly erroneous in view of the reliable, probative and substantial evidence on the whole record. (Emphasis added).

According to the final appeal decision in LSP2011-124, attached to the petition, the Petitioner was found guilty of violating Rule 30E of the Prison Disciplinary Rules. The Secretary's final decision shows that after a hearing, he was found guilty and penalized with a

custody change to maximum security.[1] He was allowed to appeal to the Warden and Secretary, who both denied any relief[2]. (It is unknown if the Petitioner's custody status has remained the same or has since been changed again, but that is irrelevant to the authority of this Court to intervene in this particular disciplinary decision.)

The penalty of a custody change to maximum is authorized under the Department's Rules and Procedures, found in Louisiana Administrative Code, Title 22:1:341 et seq, for reference. Under the jurisprudence, the penalty does not present a substantial right violation. The Petitioner has no statutory or constitutional right to a particular housing or custody status.

Absent factual allegations supporting "a substantial right violation", the Petitioner fails to state a cause of action because he does not meet the threshold requirement that would permit this court to intervene in the authority of the prison administration to enforce discipline and security at the prison.[3]

> "In Louisiana, prison officials are accorded wide latitude in the administration of prison affairs. Only in extreme cases will courts interfere with the administration of prison regulations or disciplinary procedures."[4]

DETERMINATION OF A SUBSTANTIAL RIGHT VIOLATION

As stated hereinabove in Subsection 9 of R.S. 15:1177(A), this Court may intervene and reverse and/or modify the decision of the Agency in this matter **only** if substantial rights of the Petitioner have been prejudiced. In this case, because of the ordinary penalty imposed, no substantial right has, in fact, been violated, and therefore, this Court has no authority to overturn the Department's decision in this case.

For purposes of a Disciplinary Board Appeal, (following the Supreme Court's decision in *Sandin v. Conner*, infra), the jurisprudence holds that a substantial right would be limited to one in which the Petitioner has a "liberty" or due process interest.[5]

> "The due process clause does not protect every change in conditions of confinement which has a substantial adverse effect upon a prisoner." [6]
>
> "As long as the condition or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the due process clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." [7]

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[1] See the final decision attached to the petition dated 3/10/11.
[2] Id, the final decision attached to the petition.
[3] See R.S. 15:1177(A)(9) above; also *Sandin v. Conner*, 115 S.Ct. 2293 (1995); *Lay v. Porey* 727 So2d 592 (1st Cir. 1998).
[4] *Watts v. Phelps* 377 So2d 1317,1320 (1st Cir. 1995); See also, *Sanchez v. Hunt* 329 So2d 691 (La. 1976); *Victorian v. Stalder* 770 So2d 392 (1st Cir. 2000); *Lay v. Rachel-Major* 761 So2d 723 (1st Cir. 2000).
[5] See, *Sandin v. Conner*, 115 S.Ct. 2293 (1995).
[6] *Sandin v. Connor*, 115 S.Ct. 2293 (1995) at 2297, citing *Meachum v. Fano*, 96 S.Ct. 2532.
[7] *Montanye v. Haymes*, 96 S.Ct. 2543 (1976) at p. 2543; (see also, *Hewitt v. Helms*, 103 S.Ct. 864 (1983).

> **"Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer 'grievous loss'." [8]**

In the case of *Sandin v. Conner*, the Supreme Court sought to clarify the proper analysis to determine liberty interests and due process rights of a prisoner in a disciplinary proceeding.[9] *The Court specifically discussed the circumstances under which a prisoner would be entitled to the protection of the due process clause in facing prison disciplinary charges.* The *Sandin* court held that *no inmate has a constitutionally protected liberty interest in an ordinary disciplinary hearing unless he suffers some "atypical substantial hardship," such as a loss of good time or the involuntary administration of psychotropic drugs.*[10] The Courts stated that *the type of liberty interest requiring some measure of due process by the State includes those interests in freedom from restraint that impose unusually difficult hardships on the inmate or a "dramatic departure from basic conditions" in relation to the ordinary incidence of prison life.*

Specifically, even confinement to disciplinary segregation was held not to "present the type of atypical significant deprivation which a state might conceivably create a liberty interest in."[11] Consequently, a custody change does not implicate the constitution or rise to the level of atypical punishment. If the punishment does not effect the date of eventual release, (such as a loss of good-time would), and is not a "dramatic departure" from expected maximum-security prison life, due process merely requires the prisoner to be given the opportunity to give his version of the incident.[12] He need not be allowed to present evidence, cross examine witnesses, etc.[13] In this case, the Petitioner was apparently given a hearing, together with the right to appeal to the Warden and to the Secretary. Therefore, his due process rights were more than satisfied.

Following the lead of the Supreme Court in *Wolff v. McDonnell* 94 S.Ct. 2963 (1974) and *Sandin v. Connor, supra*, the First Circuit Court of Appeal has held confirmed that a custody change does not implicate the constitution or a substantial right:

> "After a thorough review of the record, we find no error in the analysis or conclusions of the district court. As recognized by the commissioner in her screening report, in order for the district court to reverse or modify the decision of the DPSC, Taylor had to first

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[8] *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972) at p. 2600.

[9] The Court stated that the "mechanical" liberty interest analysis suggested by *Hewitt v. Helms* supra., and following cases, had confused the criteria to determine a liberty interest, and resulted in encouraging inmates to comb the regulations for "mandatory language" while discouraging prison officials from publishing uniform rules and regulations for fear of "creating" a liberty interest in their procedures. (See *Sandin v. Conner*, supra.)

[10] Previous State case law based upon Federal jurisprudence had held that prisoners may have a protected liberty interest in not being confined to extended lockdown, based upon "mandatory language" in a prison regulation or rule. See, *Wallace v. Tier*, 527 So2d. 1061 (La.App. 1st Cir. 1988, citing *McCrae v. Hankins*, 720 F2d. 863 (5th Cir. 1983.) However, the Supreme Court noted in Sandin that the prior due process analysis using the "mandatory language" criteria was improper and unworkable since Hewitt, and the Court sought to set out a bright line for future decisions regarding Disciplinary Board appeals.

[11] *Ibid. Sandin at p. 2301.*

[12] *Sandin v. Conner, supra.*

[13] *Sandin v. Conner*, supra.

show how his substantial rights were prejudiced by the decision. *See* La. R.S. 15:1177A(9). The imposition of 28 days cell confinement and a custody change from medium to maximum is not unusual or a significant hardship in relation to the ordinary incidents of prison life and did not prejudice Taylor's substantial rights. Thus, modification or reversal of the disciplinary action by the DPSC was not warranted under the law. *See* Parker v. Leblanc, 02-0399 (La.App. 1st Cir.2/14/03), 845 So.2d 445; *Lay v. Porey*, 97-2903, pp. 3-4 (La.App. 1st Cir.12/28/98), 727 So.2d 592, 593-594, *writ denied, sub nom.* Lay v. First Circuit Court of Appeal, 99-2720 (La.3/31/00), 758 So.2d 812."[14]

"After a thorough review of the record, we find no error in the analysis or conclusions of the district court. As recognized by the commissioner in the screening report, in order for the district court to reverse or modify the decision of the DPSC, Alford had to first show how his substantial rights were prejudiced by the decision. *See* La. R.S. 15:1177A(9). The disciplinary sentence of a loss of 24 weeks incentive wages and a custody change to maximum extended lockdown is not unusual or a significant hardship in relation to the ordinary incidents of prison life and did not prejudice Alford's substantial rights. Thus, modification or reversal of the disciplinary action by the DPSC was not warranted under the law. *See* Parker v. Leblanc, 02-0399, p. 2 (La.App. 1st Cir.2/14/03), 845 So.2d 445, 446; *Giles v. Cain*, 99-1201, pp. 6-7 (La.App. 1st Cir.6/23/00), 762 So.2d 734, 739.

We, therefore, affirm the screening judgment of the district court and issue this summary disposition in accordance with Uniform Rules-Courts of Appeal, Rule 2-16.2(A)(2), (5), and (6). Costs of this appeal are assessed to the appellant, Lawrence Alford." [15]

In addition, the Fifth Circuit noted in the case of *Madison v. Parker*, 104 F3rd. 765 (5th Cir. 1997), that no liberty right is created by a change in the quality of confinement as opposed to the quantity thereof. In the case of *Clark v. Rayborn*, the Sixth Circuit, in applying the *Sandin* holding, found that an inmate had no constitutionally protected liberty interest in an ordinary disciplinary hearing absent an atypical, significant penalty, and therefore had no right to complain.

> *"It is difficult to see that any other deprivation in the prison context short of those that clearly impinge on the duration of confinement, will henceforth qualify for constitutional liberty status."* [16]
>
> "Even assuming the lockdowns were punitive..., they do not 'present a dramatic departure from he basic conditions of [his] sentence." [17]

SUMMARY

In this case, the only penalty imposed was a custody level change. The Petitioner does not assert facts to support a finding that he has a constitutional right in connection with either penalty, whether as a matter or discipline or otherwise. IN fact, the final decision shows that the Petitioner was afforded a hearing and an appeal of the ruling to the Warden and the Secretary. Considering the nature of the penalty, and the fact that it does not affect the length of the Petitioner's sentence or present any other drastic departure from expected prison life in a maximum security prison, the

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[14] See *Taylor v. Stalder*, 1st Cir. 2006, unpublished and attached hereto for reference.

[15] *Alford v. Leblanc* WL 3465245 La.App. 1 Cir.,2009, unpublished and attached hereto.

[16] *Orellana v. Kyle* 65 F3rd 29, 31-32 (CA 5, 1995)

[17] *Ricks v. Boswell* 149 F3d 1191 (CA 10[Kansas], 1998).

Petitioner fails to set forth a substantial right violation which would authorize this Court to intervene and reverse the Agency's decision.[18] Consequently, this Court is constrained by R.S. 15:1177A dismiss this appeal because it presents no cause of action.

SCREENING RECOMMENDATION

After a careful review of the petition and attachments, for the reasons stated hereinabove, it is the recommendation of this Commissioner that the Petitioner's appeal be dismissed without service on the Department at Appellant's cost in accordance with R.S. 15:1178, 15:1184-88 and 15:1177A(9), for failure to raise a "substantial right" violation, and thus to state a cause of action for which relief is available. (I note that Burl Cain, a listed defendant, must be dismissed by judgment from this suit as R.S. 15:1177A(1)(b) makes the only proper defendant in a disciplinary board appeal (or ARP) the Department of Corrections.

Respectfully recommended, this 5th day of August 2011 in Baton Rouge, Louisiana.

RACHEL P. MORGAN,
COMMISSIONER, SECTION A
NINETEENTH JUDICIAL DISTRICT COURT

FILED
AUG 05 2011
DY. CLERK OF COURT
COMMISSIONER CT. SEC. A

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS/JUDGMENT/ORDER/ COMMISSIONER'S RECOMMENDATION WAS MAILED BY ME WITH SUFFICIENT POSTAGE AFFIXED TO: ALL PARTIES.
DONE AND SIGNED THIS 17 DAY OF Aug 20 11.
DEPUTY CLERK OF COURT

[18] See R.S. 15:1177 A(9).