

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 0809

GLENN HILL

VERSUS

LOUISIANA DEPARTMENT OF
PUBLIC SAFETY AND CORRECTIONS

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Judgment Rendered: DEC 21 2018

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 658,510

The Honorable Donald R. Johnson, Judge Presiding

* * * * *

Glenn Hill
Rayburn Correctional Center
Angie, Louisiana

Appellant/Pro Se

Debra A. Rutledge
Baton Rouge, Louisiana

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

* * * * *

BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

PENZATO, J.

Appellant, Glenn Hill, an inmate in the custody of the Louisiana Department of Public Safety and Corrections¹ (Department), housed at Rayburn Correctional Center (Rayburn Correctional) in Angie, Louisiana, appeals a judgment of the district court that dismissed his petition for judicial review with prejudice. Based on our review of the record, we reverse the district court's judgment.

FACTS AND PROCEDURAL HISTORY

On June 6, 2017, Hill filed a petition for judicial review in the Nineteenth Judicial District Court (19th JDC) seeking review of Administrative Remedy Procedure (ARP) No. RCC-2017-041. On January 16, 2017, Hill was charged with intoxication, a violation of Disciplinary Rules and Procedures for Adult Offenders Rule 14. On January 18, 2017, after an investigation and disciplinary hearing, Hill was sentenced to a custody change to Maximum Custody Level II and Forfeiture 90 Days Good Time. On January 23, 2017, Hill filed an appeal from the Disciplinary Board's decision. On February 16, 2017, the Warden of Rayburn Correctional denied Hill's appeal, claiming that the Disciplinary Board erred in denying his motions to call witnesses and not giving him written reasons for each ruling. He also claimed there was insufficient evidence to support his finding of guilt. The Warden stated that all motions raised at the hearing were ruled on appropriately. Hill then appealed to the Secretary for DPSC, and his request was again denied on April 28, 2017, as it was deemed that he had received due process during the Disciplinary Board hearing. The Secretary also stated that all motions raised at the Disciplinary Board hearing were ruled on appropriately.

After the rejection of his claim, Hill filed the petition for judicial review in the 19th JDC requesting a reversal of his guilty verdict and that his conduct record

¹ Mr. Hill named the defendant as the "Louisiana Department of Corrections." However, the correct name is the "Louisiana Department of Public Safety and Corrections."

be expunged. The Department answered the prisoner suit and denied that it had violated Hill's constitutional rights by not having a medical person testify at the disciplinary board hearing. The Department also claimed that it had followed all policies and procedures. Hill filed a brief in the district court pursuant to court order and La. R.S. 15:1177(A)(6), which permits issues that may be satisfactorily and fairly determined upon argument submitted in brief in lieu of oral argument. Hill argued that he had made motions to face accuser, to call witnesses, and to review video footage, all of which were denied. The 19th JDC Commissioner² (Commissioner) subsequently ordered that the Department supplement the record with an audio recording of the disciplinary hearing, which the Department did.

The Commissioner issued a recommendation pursuant to La. R.S. 15:1177(A)(5) and (9) denying the relief sought by Hill and dismissing his suit, finding that no substantial right was violated. However, the Commissioner did not specifically address Hill's contention that his due process rights were violated when his motions were denied and he was unable to call any witnesses or review video footage. Hill filed a traversal of the Commissioner's report. The district court adopted the recommendation of the Commissioner after a *de novo* review of the record and signed a judgment in accordance therewith on November 27, 2017. It is from this judgment that Hill appeals.

DISCUSSION

Hill's petition for judicial review was filed in accordance with Corrections Administrative Remedy Procedure, La. R.S. 15:1171, *et seq.* Louisiana Revised

² The Office of Commissioner of the 19th JDC was created by La. R.S. 13:711 to hear and recommend disposition of criminal and civil proceedings arising out of the incarceration of state prisoners. La. R.S. 13:713(A). The Commissioner's written findings and recommendations are submitted to a district court judge, who may accept, reject, or modify them. La. R.S. 13:713(C)(5); *see Martinez v. Tanner*, 2011-0692 (La. App. 1 Cir. 11/9/11), 79 So. 3d 1082, 1084 n.3, *writ denied*, 2011-2732 (La. 7/27/12), 93 So. 3d 597.

Statute 15:1177(A)(9) sets forth the appropriate standard of review by the district court, which functions as an appellate court when reviewing the Department's administrative decisions. A review is mandated to be conducted by the district court without a jury and must be confined to the record. La. R.S. 15:1177(A)(5).

Specifically, the court may reverse or modify the administrative decision only if substantial rights of the appellant have been prejudiced because the administrative findings are: (1) in violation of constitutional or statutory provisions, (2) in excess of the statutory authority of the agency, (3) made upon unlawful procedure, (4) affected by other error of law, (5) arbitrary, capricious or characterized by an abuse of discretion, or (6) manifestly erroneous in view of the reliable, probative and substantial evidence on the whole record. La. R.S. 15:1177(A)(9); *Lightfoot v. Stalder*, 2000-1120 (La. App. 1 Cir. 6/22/01), 808 So. 2d 710, 715-716, writ denied, 2001-2295 (La. 8/30/02), 823 So. 2d 957. On review of the district court's judgment under La. R.S. 15:1177, no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. *McCoy v. Stalder*, 1999-1747 (La. App. 1 Cir. 9/22/00), 770 So. 2d 447, 450-51.

Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law. *Sandin v. Conner*, 515 U.S. 472, 485, 115 S.Ct. 2293, 2301, 132 L.Ed.2d 418 (1995). Thus, in order for Hill's petition to state a cognizable claim for judicial review of a disciplinary matter, it must allege facts demonstrating that his "substantial rights" were prejudiced by the agency's decision. *Dorsey v. Louisiana*

Dep't of Pub. Safety & Corr., 2018-0416 (La. App. 1 Cir. 9/24/18), ___ So. 3d ___; *see Giles v. Cain*, 1999-1201 (La. App. 1 Cir. 6/23/00), 762 So. 2d 734, 738.

Loss of good time may be considered an “atypical, substantial deprivation” because it affects the date of eventual release. *See Sandin*, 515 U.S. at 486, 115 S.Ct. at 2301. However, the Department is authorized by statute to administer, manage, and operate “all state institutions for the care, custody and correction of persons sentenced for felonies or misdemeanors.” La. R.S. 15:821. Moreover, La. R.S. 15:571.4 provides for the forfeiture of diminution of sentence and establishes that the Department, and its Secretary, have the authority and discretion to regulate how good time is both earned and forfeited; thus, the Department’s disciplinary rules regarding forfeiture of good time for the infraction of intoxication is authorized. The Department has established Rule 14, which forbids intoxication and has classified the infraction as a schedule B offense, which is punishable by the forfeiture of up to 90 days good time. LAC 22:I.341(I) & (K)(2)(c).

Hill claims that the Disciplinary Board decision prejudiced his substantial rights because their findings were in violation of his constitutional rights of due process. On the date in question, a Rayburn Correctional officer found Hill “rocking back and forth.” When questioned, Hill responded with “slow, slurred speech.” The officer observed him to have red irritated eyes, and he was unable to stand without assistance. A second officer concurred with the first that Hill was intoxicated. He was also observed by two nurses who found no medical reason for his condition. An audio recording of the Disciplinary Board hearing revealed that video footage from a tower camera showed two inmates having to hold up Hill. The referee noted from his observation of the video footage that he believed Hill was intoxicated. The referee also determined that the officer’s version of the incident was more credible than Hill’s version.

Hill has assigned as error that he was denied due process by the denial of his right to cross examine his accuser, to call witnesses on his behalf, and to review the video footage of the incident. With regard to the allegation of the unconstitutionality of not being allowed to have witnesses at a hearing, while confrontation and cross-examination are essential in criminal trials where the accused, if found guilty, may be subjected to the most serious deprivations, or where a person may lose his job, they are not rights universally applicable to all hearings. Specifically, some states allow cross-examination in disciplinary hearings, but the procedure may be curtailed, and the Constitution does not require that prisoners be given the rights of confrontation and cross-examination in disciplinary hearings. *Wolff v. McDonnell*, 418 U.S. 539, 567-68, 94 S.Ct. 2963, 2980, 41 L.Ed.2d 935 (1974).

However, the Department has promulgated rules for the handling of prisoner disciplinary matters entitled Disciplinary Rules and Procedures for Adult Offenders. LAC 22:I.341, *et seq.* Under the rules, a prisoner has certain rights when appearing before the Disciplinary Board, including the right to present evidence and witnesses on his behalf and to cross-examine his accuser, provided such request is relevant, not repetitious, not unduly burdensome to the institution, and/or not unduly hazardous to staff or offender safety. LAC 22:I.341(J)(5); *Oliver v. Louisiana Dep't of Pub. Safety & Corr.*, 2016-0695 (La. App. 1 Cir. 2/17/17), 2017WL658738 (unpublished). These procedural rights must be followed unless waived by the accused. LAC 22:I.341(G)(4)(b); *Giles*, 762 So. 2d at 738. The rules also provide certain procedural requirements for hearings by the Disciplinary Board, including the requirement that all hearings be recorded in their entirety and the recording preserved for a period of five years. LAC 22:I.341(G)(4)(c). The rules further provide that the Disciplinary Board shall

deliberate and rule on motions at the time the motion is made, unless expressly deferred to the actual hearing. LAC 22:I.341(G)(4)(i).

In the present case, the Disciplinary Board ruled on two of Hill's motions. The referee found that the motion to confront the accuser was repetitious and an undue burden on the institution. The officer had submitted a report with a detailed description of Hill's actions, body language, and speech. The motion to call witnesses, namely the physician, was also found to be repetitious, as the medial staff had already submitted its opinion. The Disciplinary Board noted the existence of the motion to review the video footage but did not rule on the motion.

Hill states in his brief that the accusing officer was off-duty on the day of his hearing, so he requested a continuance until the next hearing date. On the date of the incident, Hill was seen by two nurses. At his hearing, he requested that a physician who had treated him previously for knee pain be called to testify. Hill's defense to the charge of intoxication was that he could not walk due to his knee pain.

As noted above, a prisoner has certain rights when appearing before the Disciplinary Board, including the right to present evidence and witnesses on his behalf and to cross-examine his accuser. *Flowers v. Phelps*, 595 So. 2d 668, 669 (La. App. 1 Cir. 1991) (reversing Disciplinary Board decision when prisoner not permitted to call witnesses and to cross-examine his accuser). With regard to the motion to face his accuser, the Disciplinary Board denied the motion for being repetitious and an undue burden on the institution. Denying the presence of a witness because of the mere fact that the requested witness is "off duty" or "cannot be reached by phone," does not comport with those basic due process rights afforded in *Wolff*, 418 U.S. at 555-57, 94 S.Ct. at 2974, 2975. See *Ex parte Bland*, 441 So. 2d 122, 125 (Ala. 1983). We do not find in this matter that the cross-

examination of the accuser would have been repetitious. Although the accuser had given a statement, Hill was never permitted to present his own defense that the appearance of intoxication was due to a previous knee injury.

The reason given by the referee for denying Hill's motion to call witnesses, specifically a physician who had previously treated him, was that the medical staff had already submitted their opinions. It is clear from the record that two nurses who treated Hill on the day of the incident gave their opinion as to his condition. However, Hill requested that a physician who had previously treated him be called to testify regarding Hill's prior knee pain as a defense to the charge of intoxication. The nurses gave no statement regarding Hill's prior complaints. Therefore, we find the Disciplinary Board erred in denying his motion to call witnesses based on the testimony being repetitious and not permitting Hill the opportunity to present a defense.

Hill also requested the right to review the "DVR," which appears to be a reference to the tower video footage, and to review the body camera footage from the accuser. Neither of these requests were ruled on by the Disciplinary Board, even though both the Warden and Secretary stated that all motions had been appropriately addressed. We first note that the audio recording, which was provided by the Department upon request of the Commissioner, is only 3:05 minutes long and consists mainly of the referee speaking. It does not appear to be the entire Disciplinary Board hearing as required by LAC 22:I.341(G)(4)(c). From the partial audio recording of the hearing, it appears that the referee spoke to an officer who had reviewed the body camera video footage, and that the tower camera video footage showed two people trying to hold up Hill. From the limited audio recording of the hearing provided in the record, the following can be ascertained:

- (1) The referee first states that he reviewed all the videos.
- (2) Hill requests that the video footage be preserved as part of the administrative record.
- (3) The referee then states that he spoke to Major Mizell on the phone, and Major Mizell reviewed the body camera footage. Major Mizell opined to the referee that Hill was intoxicated.
- (4) The referee then refers to the tower video footage, which shows two inmates trying to hold up Hill; however, it is unclear if the referee actually viewed this video footage or was relying on Major Mizell.

We find that the Disciplinary Board did not follow its own rules and procedures and did not rule on the motion to view the requested video footage or preserve it as requested by Hill. Clearly, the video footage is pertinent to Hill's defense that he was not intoxicated but rather, was in pain from his knee.

We find that the record clearly shows that Hill did not receive the procedural guarantees to which he was entitled under the Department's own rules. We thus reverse and remand to the Disciplinary Board for a hearing at which Hill is to be allowed to call witnesses on his behalf, to cross-examine his accuser, and to review the tower video footage and body camera footage from the incident in question, in accordance with the Department's rules and procedures. All costs of this appeal are assessed against the Louisiana Department of Public Safety and Corrections in the amount of \$645.00.

REVERSED AND REMANDED.