

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2020 CA 0492

JOSHUA G. KELLY

VERSUS

LOUISIANA DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONS

Consolidated With

2020 CA 0493

JOSHUA G. KELLY

VERSUS

LOUISIANA DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONS

Judgment Rendered: DEC 30 2020

On Appeal from the
19 Judicial District Court
In and for the Parish of
State of Louisiana
Trial Court No. 653,750 c/w 653,751

Honorable Janice G. Clark, Judge Presiding

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Joshua G. Kelly
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Plaintiff-Appellant,
In Proper Person

BEFORE: HIGGINBOTHAM, THERIOT, AND WOLFE, JJ.

MT.
TMH
zw

HIGGINBOTHAM, J.

Joshua G. Kelly is an inmate in the custody of the Louisiana Department of Public Safety and Corrections (DPSC), and is currently housed at the Louisiana State Penitentiary in Angola, Louisiana. Kelly appeals a judgment of the district court that dismissed his petition for judicial review after affirming the disciplinary board's decision that found him guilty of aggravated escape and theft.

FACTS AND PROCEDURAL HISTORY

These consolidated matters concern two separate disciplinary reports dated December 28, 2012, charging DPSC inmate Kelly with a violation of Disciplinary Rule 8C, Aggravated Escape, and Disciplinary Rule 22, Theft. The reports described an incident that occurred on December 27, 2012, where Kelly bound a DPSC employee, took by force an Elayn Hunt Correction Center's prison ambulance without permission, and used the ambulance to escape the Hunt facility, where he was housed at the time. Kelly was apprehended three hours later.

Following a series of five hearings¹ before the disciplinary board in January and February of 2013, Kelly was found guilty and sentenced on both charges. The disciplinary board reasoned that: (1) the disciplinary reports were clear and precise; (2) Kelly lacked a credible defense and offered little to no defense; (3) the only defense offered was a denial of the contents of the reports; and (4) the DPSC officer's version of the incident was determined to be more credible than Kelly's version. The disciplinary board also denied all but one of Kelly's multiple written motions regarding various ways that DPSC had violated his constitutional rights without due process of law. For the theft charge, the disciplinary board sentenced Kelly to a loss

¹ The record reveals that Kelly appeared at five separate disciplinary hearings on January 3, 2013, January 8, 2013, January 24, 2013, January 31, 2013, and February 7, 2013. The outcomes of each hearing is not clear from the record as only one audio recording is included, wherein Kelly's motions were decided and the disciplinary board found Kelly guilty on both charges and sentenced him.

of 12 weeks of canteen and phone privileges, and ordered him to pay restitution. For the aggravated escape charge, the disciplinary board sentenced Kelly to a custody change to maximum-extended lockdown (at Louisiana State Penitentiary), a loss of 12 weeks of phone privileges, and ordered him to pay restitution.

Kelly appealed the disciplinary board's decisions in two separate appeals, EHCC-2013-050A (on the aggravated escape violation) and EHCC-2013-050B (on the theft violation). Kelly alleged he was denied due process at all stages of the disciplinary hearings. The warden initially denied both of Kelly's appeals; however, when Kelly appealed to the Secretary of the DPSC, the Secretary remanded both appeals to the warden for further review and to determine the amount of restitution owed. The DPSC Secretary then denied both appeals after the order to pay restitution was rescinded for the theft charge, and DPSC imposed an order to pay \$3,053.66 in restitution for apprehension costs related to the aggravated escape charge.

Kelly then filed two different petitions for judicial review in the Nineteenth Judicial District Court, one for each disciplinary board decision.² Upon service, DPSC answered both petitions. On October 25, 2019, the district court signed a motion and order to consolidate both appeals into a single suit. On October 31, 2019, the Commissioner of the district court issued a report, recommending that the district court uphold the disciplinary board's finding of guilt on both charges. Thereafter, the district court rendered judgment on November 27, 2019, adopting the Commissioner's recommendation and dismissing Kelly's consolidated appeals at his cost. Kelly now appeals to this court, raising ten assignments of error that basically contend that his due process rights were violated when he was denied the ability to

² The appeal of EHCC-2013-050A was filed under docket number 653,751 and the appeal of EHCC-2013-050B was filed under docket number 653,750. The appeals were later consolidated into a single suit under docket number 653,750.

face his accuser or call witnesses at the disciplinary hearing. Kelly also avers in his brief that DPSC failed to follow its own rules and regulations governing disciplinary proceedings, such as failing to give him timely notice of the disciplinary reports, failing to read him his rights at the last hearing, and failing to allow him outside counsel.

LAW AND ANALYSIS

The scope of this court's review is limited by La. R.S. 15:1177(A)(5) and (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.

* * *

(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.
- (d) Affected by other error of law.
- (e) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.
- (f) Manifestly erroneous in view of the reliable, probative and substantial evidence on the whole record. (Emphasis added.)

On review of the district court's judgment under La. R.S. 15:1177, the appellate court reviews the administrative record *de novo*, owing no deference 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. **Johnson v. Louisiana Department of Public Safety and Corrections**, 2019-1244 (La. App. 1st Cir. 5/11/20), ___ So.3d ___, 2020 WL 2393887, *5.

The promulgation of rules for the handling of prisoner disciplinary matters is contained in LAC 22:I.341, entitled *Disciplinary Rules and Procedures for Adult Offenders*. The rules were amended in December 2013 and May 2014, which was after Kelly's alleged offenses and the disciplinary proceedings at issue took place in late December 2012 and the early months in 2013. Therefore, we cite the version of the rules as they existed at that time, as well as the current version.

Under the rules, a prisoner has certain offender 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. See former LAC 22:I.349(A)(1) and current LAC 22:I.341(G)(4)(a) and (J)(5). See also **Oliver v. Louisiana Department of Public Safety and Corrections**, 2016-0695 (La. App. 1st Cir. 2/17/17), 2017 WL 658738, *2 (unpublished). 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.³ See former LAC 22:I.349(B) and current LAC 22:I.341(G)(4)(c).

The record clearly reflects that Kelly has a very long history of seeking review stemming from the disciplinary action that occurred subsequent to his actions on December 27, 2012. As previously noted, this court may intervene and reverse and/or modify the decision of DPSC *only* if Kelly's *substantial rights* have been violated. Based upon this record and the discipline imposed, no substantial right

³ The record contains one audio recording that is not identified by hearing date; however, it is the hearing wherein each of Kelly's motions were considered by the disciplinary board and the disciplinary reports were read to Kelly before he was found guilty and sentenced. Additionally, the recording reveals that Kelly was represented by inmate counsel at that particular hearing. Because it is well past five years since the disciplinary hearings took place in 2013, there is no obligation for DPSC to have preserved the recordings at this point in time.

has, in fact, been violated. Therefore, this court has no authority to overturn the district court's affirmation of DPSC's decision and dismissal of Kelly's petitions.

To clarify our reasoning, we point to well settled jurisprudence. In **Sandin v. Conner**, 515 U.S. 472, 483-484, 115 S.Ct. 2293, 2300, 132 L.Ed.2d 418 (1995), the United States Supreme Court sought to explain the proper analysis to determine liberty interests and due process rights of an inmate in a disciplinary proceeding. The **Sandin** court specifically discussed the circumstances under which an inmate would be entitled to the protection of the Due Process Clause in facing prison disciplinary charges. The Supreme Court held that no inmate has a constitutionally protected liberty interest in an ordinary disciplinary hearing unless he suffers some "atypical and significant hardship," such as a loss of good time or the involuntary administration of psychotropic drugs – neither of which occurred in this case. The Due Process Clause does not protect every change in the conditions of confinement that may have a substantial adverse effect upon an inmate. **Id.**, 515 U.S. at 484, 115 S.Ct. at 2300. If the punishment affects only the custody status or classification of an inmate, and not the date of eventual release (such as a loss of good-time), 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. **Id.**, 515 U.S. at 485-486, 115 S.Ct. at 2301. See also **Wilson v. Louisiana Department of Public Safety and Corrections**, 2019-1264 (La. App. 1st Cir. 5/28/20), 2020 WL 2765832, **4-5 (unpublished).

Furthermore, the disciplinary sentences of a loss of canteen and phone privileges, along with restitution for the cost of apprehending an escapee, are not unusual or a significant hardship in relation to the ordinary incidents of prison life.⁴ See **Johnson**, 2020 WL 2393887 at *8. The inmate need not be allowed to present

⁴ Restitution is not considered a disciplinary sanction, and may be assessed in addition to any other permissible penalties. See current LAC 22:I.341(G)(6)(e).

evidence, cross-examine witnesses, etc. when a substantial right is not affected. See Wilson, 2020 WL 2765832 at **4-5. The notion that the procedural protections of the Due Process Clause are triggered by *any* substantial deprivation imposed by prison authorities has been soundly rejected. See Dorsey v. Louisiana Department of Public Safety and Corrections, 2018-0416 (La. App. 1st Cir. 9/24/18), 259 So.3d 369, 371.

In this case, Kelly was given multiple disciplinary hearings wherein he was allowed to file numerous motions that were all addressed by the disciplinary board, and he was given the opportunity to state his version of events, but he merely denied the allegations. Furthermore, he was given the right to file multiple appeals of the adverse decisions to the warden, the DPSC Secretary, and the district court. Considering the nature of the disciplinary penalties imposed, including restitution, and the fact that none of the penalties affect the length of Kelly's sentence or present any other drastic departure from expected prison life, we find that Kelly fails to set forth a substantial right violation that would authorize this court to intervene and reverse DPSC's decision. Therefore, the district court properly dismissed Kelly's petitions for judicial review.

CONCLUSION

For the stated reasons, we find the record clearly supports the district court's judgment upholding DPSC's decision and dismissing the petitions for judicial review on both disciplinary charges. We affirm the district court's November 27, 2019 judgment. All costs of this appeal are assessed to Joshua G. Kelly.

AFFIRMED.