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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001775-MR

LARRY DENNISON — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 05-CI-00067

PATTI WEBB, WARDEN; JAMES VINCENT; PAUL WALKER; JANETTA FULKERSON; FREDRICK BASHAM; MICHAEL ROBINSON; EMILY DENNIS; REBECCA BAYLOUS; THE OFFICE OF GENERAL COUNSEL; THE KENTUCKY DEPARTMENT OF CORRECTIONS; ADVANCED TOXICOLOGY NETWORK; JOHN AND JANE DOE(S) AND SHAREHOLDERS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND WINE, JUDGES, GUIDUGLI,[1] SENIOR JUDGE.

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

WINE, JUDGE: Larry Dennison appeals, *pro se*, from three separate orders of the Muhlenberg Circuit Court: first, a protective order restricting his discovery, entered May 26, 2005; second, an order dismissing his complaint for declaratory relief from a prison disciplinary proceeding, entered July 31, 2006; and third, an order denying his postjudgment motion for findings of fact and conclusions of law, entered August 8, 2006. We find that the trial court did not abuse its discretion by limiting Dennison's discovery, that the circuit court correctly found that the result of the prison disciplinary proceeding was supported by some evidence of substance, and that the circuit court was not obligated to make additional findings of fact. Hence, we affirm.

In his complaint to the circuit court, Dennison requested declaratory relief from a prison disciplinary proceeding held at the Green River Correctional Complex ("GRCC"), where he is currently an inmate, on December 27, 2004, alleging due process violations. Specifically, Dennison's urine sample, given October 10, 2004, tested positive for THC (cannabinoids), consistent with marijuana use. At the prison disciplinary hearing, Appellee, Adjustment Officer Paul Walker ("Lt. Walker") found that Dennison had violated a provision in the prison disciplinary code that prohibits "unauthorized use of drugs," a category IV, item 2 violation. For this violation, Dennison received a 45-day assignment to disciplinary segregation, forfeited 60 days of earned good time credit, and was assessed $16.00 as restitution for the cost of the drug test.

Dennison appealed the findings to GRCC Warden Patti Webb ("Warden Webb"), who concurred with Lt. Walker's findings and action. Dennison then filed an

original action in the Muhlenberg Circuit Court on July 16, 2007, challenging the prison disciplinary proceeding. Dennison asserted that the custodian of GRCC's records violated the Kentucky Open Records Act by denying him access to the back page of the chain of custody documentation. Dennison contended the back page would show that prison authorities and testing laboratories were in violation of the Health Information Portability and Accountability Act ("HIPAA") and state medical privacy law when the results of a urinalysis test are used to impose institutional discipline on an inmate. Dennison further alleged that his First Amendment rights were violated because Appellees failed to maintain up-to-date legal materials in the GRCC, denying him access to the courts to complain about his conditions of confinement and challenge his conviction. Finally, Dennison challenged his classification assignment in disciplinary segregation during the lawsuit because it limited the amount of time he had access to available legal materials.

The circuit court found no violation of Dennison's due process rights and no violation by the Appellees of his right to access the courts. The trial court further held that it lacked subject-matter jurisdiction to addressed Dennison's HIPAA claim. Finally, the trial court found that Dennison's claim under the Kentucky Open Records Act was time-barred. Dennison's postjudgment motion for findings of fact was subsequently denied. This appeal followed.

On appeal, Dennison first contends that the circuit court abused its discretion by entering a protective order on May 25, 2005, to protect the Appellees from

having to comply with his discovery requests. Dennison specifically styled his initial pleadings as a "Civil Complaint with Jury Demand" with hopes of "attack[ing] the actions and inactions committed by various named defendants . . ." pursuant to KRS 418.040 versus seeking review of his dispute "via a simple KRS Chapter 418 petition." However, the appropriate vehicle to challenge a prison disciplinary proceeding in Kentucky is the Declaratory Judgment Act found in KRS 418.040. *Graham v. O'Dea*, 876 S.W.2d 621 (Ky.App. 1994); *Polsgrove v. Kentucky Bureau of Corrections*, 559 S.W.2d 736, 737 (Ky. 1977). Under *Polsgrove* and *Graham*, an inmate disputing a disciplinary action may appeal to the courts but is not entitled to a trial. Even though Dennison styled his action as a "Civil Complaint with Jury Demand," he properly invoked KRS 418.040 – the Declaratory Judgment Act. While he is not entitled to a trial does not mean that he is not entitled to discovery. However, it is clear from the record that Dennison's requests for admissions and production of documents in interrogatories from the Appellees were essentially unnecessary and therefore burdensome. While it is true that Dennison is entitled to some discovery, it is within the circuit court's discretion to determine what discovery is appropriate. We find no abuse of discretion as the trial court's ruling was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

We now turn to Dennison's allegation that the circuit court erred in dismissing his complaint. Dennison asserts that his due process rights were violated

when the prison investigator failed to: (1) meaningfully investigate the improper handling of his urine sample; (2) failed to consider that the positive result from the urine test might be a false positive because he was taking sinus medication; (3) failed to consider the reliability of the medical memorandum from the lab that issued the positive result; (4) failed to consider the sanitary conditions of the lab where his urine was tested; and (5) failed to support the scientific principles and procedures utilized by the lab in testing his urine.

A prison disciplinary hearing where an inmate's good time credit is at risk must comply with procedural due process of law. *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974). At a minimum, the prisoner is entitled to written notice of the charges, the opportunity to present evidence in his defense, and a report by the committee of its reasoning and conclusions. *Id*. at 564-66, 94 S. Ct. at 2978-80. In a subsequent case, the United States Supreme Court explained:

> [T]he requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. . . . Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.

Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 455-56, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356 (1985) ("hereinafter *MCI v. Hill*"). Indeed, this Court has acknowledged United States Supreme Court precedent and held

"that the 'some evidence' standard of review provides courts with a sufficient check upon adjustment committee fact-finding." *Smith v. O'Dea*, 939 S.W.2d 353, 358 (Ky.App. 1997).

We find that the circuit court appropriately reviewed Dennison's claims under the standard of *MCI v. Hill*. Dennison argues at some point the refrigerator where his urine sample was being kept became unplugged and this tainted his urine, making it more likely that it would test positive for THC. However, Dennison offers no proof on how refrigeration or lack thereof would increase the concentration of THC in his urine. Further, there is no evidence that Lt. Basham falsely reported information in his incident report. In fact, Lt. Basham confirmed that the proper drug urinalysis testing procedures were followed as per the policy. Lt. Basham confirmed from Janetta Fulkerson ("Fulkerson"), R.N. of GRCC medical, that Dennison was not taking prescription medication that would cause a false positive. Dennison's allegations that Fulkerson made false allegations in her medical memorandum are baseless as they are not supported by any proof other than his unsupported claims.

The hearing officer provided a written record indicating the evidence upon which he relied in finding Dennison guilty. That evidence included: (1) Sgt. Turnley collected the urine sample from Dennison with Lt. Behringer as a witness; (2) the litigation packet returned by ATN shows that Dennison's urine tested positive for marijuana; (3) record specialist Douglas reported that Dennison had not been convicted of any unauthorized drug use since July 13, 1993; (4) Fulkerson reported Dennison was

not taking any medication that would have altered the results of the urine test causing a false positive. We agree with Appellees that to the extent that a prison adjustment officer incorporates facts stated in an incident report by reference, these statements become the written findings of the adjustment officer in satisfaction of the requirements of *Wolff v. McDonnell*, 418 U.S. at 564, 94 S. Ct. at 2979; *Yates v. Fletcher*, 120 S.W.3d 728 (Ky.App. 2003).

As stated above, the circuit court's role is to determine whether "some evidence" supports the adjustment committee's decision, and the court is not required to conduct an independent investigation of the evidence. *MCI v. Hill*, 472 U.S. at 455-56, 105 S. Ct. at 2774. At any rate, we also note that Dennison's alleged right to call witnesses violation is without merit. Witnesses may be denied if their testimony would prove redundant or irrelevant, which the trial court correctly noted in this case. *Higgs v. Bland*, 888 F.2d 443 (6th Cir. 1989). Despite Dennison's arguments to the contrary, we find no deficiencies in the chain of custody of his urine specimen that would otherwise provide for unreliable evidence of drug use. *Byerly v. Ashley*, 825 S.W.2d 286 (Ky.App. 1991).

Furthermore, the circuit court was correct in denying Dennison's claim under HIPAA for lack of subject-matter jurisdiction. We find no error in the trial court's ruling that Dennison's claim under the Kentucky Open Records Act was time-barred or that he was somehow denied access to the courts.

Finally, we find no merit to Dennison's complaints that the circuit court erred in failing to grant his postjudgment motion for additional findings of fact and conclusions of law. Review of a prison disciplinary proceeding does not require additional findings of fact by the reviewing court. *O'Dea v. Clark,* 883 S.W.2d 888 (Ky. App. 1994). In fact, judicial review of prison disciplinary proceedings involves a review of the administrative actions taken by the correctional institution but does not involve the creation of a new record. *Smith v. O' Dea*, 939 S.W.2d at 355-56. The circuit court was not obligated to articulate additional findings in affirming the prison disciplinary decision. Thus, the circuit court did not err by failing to make additional findings of fact and conclusions of law.

Accordingly, the orders of the Muhlenberg Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Larry D. Dennison, *pro se*
Green River Correctional Complex
Central City, Kentucky

BRIEF FOR APPELLEE:

Brenn O. Combs
Jeff Middendorf
Justice and Public Safety Cabinet
Office of Legal Services
Frankfort, Kentucky