

RENDERED: JULY 13, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

OPINION OF DECEMBER 1, 2017 WITHDRAWN

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001345-MR

MARCUS P. GREEN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NO. 15-CI-04448

STEVE HANEY, RICK ROWLETTE,  
DUNCAN J. KENDALL AND THE  
DEPARTMENT OF CORRECTIONS

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \*

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Marcus P. Green, *pro se*, an inmate at Little Sandy Correctional Complex, appeals the August 16, 2016, Fayette Circuit Court's order

dismissing his declaratory judgment action. Green had filed a petition for a declaration of rights following two convictions in a prison disciplinary action.

After careful consideration, we affirm.

### BACKGROUND

Green was charged with two prison disciplinary violations in December 2014. The prison accused him of the “possession or promoting of dangerous contraband” and “smuggling of contraband items into, out of, or within the institution.” At the January 9, 2015, disciplinary hearing, Green was found guilty of both charges. Green appealed the findings to the Warden, but the Warden concurred with the adjustment officer’s decision and denied the appeal.

Green then filed a petition for a declaration of rights to the trial court pursuant to Kentucky Revised Statutes (KRS) 418.040 arguing that his right to due process and a fair disciplinary process, while incarcerated at Blackburn Correctional Complex, were violated. In the petition for declaration of rights, Green asked for the following relief:

1. That the disciplinary reports against the Petitioner be dismissed and that Petitioner’s conviction on each disciplinary report be vacated;
2. That the Petitioner be restored all good time sentence credits that were forfeited as a result of his conviction on the prison disciplinary reports;
3. That both disciplinary reports be expunged from the Petitioner’s prison record;
4. That the Petitioner be allowed to proceed *in forma pauperis*; and
5. For any and all other relief the Petitioner may, in the court’s discretion [*sic*] appear [*sic*] entitled.

After the filing of Green's petition in the trial court, Steve Haney, Rick Rowlette, Duncan J. Kendall, and the Department of Corrections (collectively "Department of Corrections") filed a motion to dismiss the two disciplinary convictions underlying Green's petition. In the motion, the Department of Corrections observed that after Green filed the petition, Warden Haney retired, and the new Warden, Rowlette, agreed to file a motion to dismiss the petition.

The Department of Corrections' motion to dismiss also indicated that while it was requesting that the two disciplinary convictions be vacated, the charges underlying the convictions could possibly be subject to a re-hearing. Nonetheless, the Department of Corrections maintained that their motion rendered the petition moot since the convictions were dismissed. Green responded to the motion by arguing that the petition was not moot because even though the disciplinary convictions were dismissed, the Department of Corrections retained the ability to re-hear the disciplinary charges.

The trial court dismissed the convictions without prejudice noting that the new Warden had agreed to dismiss the two disciplinary convictions and remand them for a possible re-hearing. The trial court did not provide any explanation for its order dismissing Green's petition or address whether the issue was moot.

Green now appeals the decision.

#### STANDARD OF REVIEW

Prison disciplinary proceedings are not criminal prosecutions but rather administrative proceedings. *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). Prisoners subjected to disciplinary proceedings are not entitled to the full panoply of rights as non-institutionalized individuals who are faced with similar proceedings. *Id.* Rather, prison inmates are provided with a minimum standard of constitutional due process. *Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997).

Furthermore, the *Smith* court instructed as follows:

in light of the exceptional difficulties confronting prison administrators, a highly deferential standard of judicial review is constitutionally appropriate with respect to both the factfinding that underlies prison disciplinary decisions and the construction of prison regulations.

*Id.* at 357. Nonetheless, we review questions of law *de novo*. *Ragland v. DiGiuro*, 352 S.W.3d 908, 912 (Ky. App. 2010).

#### ANALYSIS

This matter involves the declaratory judgment act, which states:

In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

KRS 418.040. The plain language of the statute indicates that an actual controversy must exist. In its dismissal motion, the Department of Corrections

claimed that once the matter was dismissed there was no actual case or controversy, and thus, nothing to appeal. The trial court agreed.

Here, Green filed the petition under KRS 418.040 arguing that his right to due process and a fair prison disciplinary hearing was violated during the prison disciplinary process. Once the trial court dismissed the petition, Green appealed because he believed the Department of Corrections' potential for holding a re-hearing on the charges did not make the matter moot. He called the opportunity for a re-hearing as a chance for prison officials to have a "second bite at the apple."

Second, Green argues that when Warden Haney denied his appeal of the adjustment officer's findings, the Department of Corrections' administrative process on the matter ended, too. Green asserts that once the prison appeal was denied, the Warden no longer had jurisdiction over the disciplinary charges and convictions.

The Department of Corrections countered that since Green was voluntarily provided with all the relief requested, nothing was left to adjudicate.

We begin our analysis by addressing Green's argument that the Warden no longer had jurisdiction over the matter once he originally denied Green's appeal. The procedure for prison disciplinary proceedings is found in Corrections Policy and Procedure (CPP) 15.6. The specific section dealing with appeals is found in CPP 15.6(II)(F)(4) wherein it states that if an inmate appeals the findings of an adjustment officer/committee, "[t]he Warden or his designee

shall respond in writing within thirty (30) days of the Adjustment Committee or Adjustment Officer decision.” CPP 15.6(II)(F)(4).

Next, the policy outlines the options available to the Warden during the review of the inmate’s appeal. The options include:

- a. Order a rehearing because of procedural errors, substantive errors, or other appropriate reasons
- b. Reduce the penalty
- c. Suspend the penalty for a period of time not to exceed six (6) months
- d. Void the disciplinary report in its entirety
- e. Reduce the category of violations
- f. Remand the charge for a new hearing before a different Adjustment Committee or Adjustment Officer.

CPP 15.6(II)(F)(5). Here, the Warden ultimately dismissed Green’s appeal of the adjustment officer’s decision.

Green’s assertion that once the Warden denied his appeal of the adjustment officer’s findings, the Warden no longer had jurisdiction over the disciplinary charges and convictions is not accurate. The Corrections Policy and Procedures manual states that “[t]he Warden has the authority at any time to order the disciplinary report to be vacated upon justification and may allow it to be re-investigated or reheard, or both.” CPP 15.6(II)(F)(8). Further, “[t]his is at the Warden level only and shall not create any new time for additional appeals,” and, “[t]he Warden may also dismiss the report.” *Id.* Clearly, Subsection 8 has no time limit, and the policy says that the Warden has the authority “at any time” to vacate the disciplinary review and to have it reheard.

Thus, contrary to Green's assertion, the Warden had authority to dismiss Green's appeal of the adjustment officer's decision notwithstanding the filing of a declaratory judgment action. Moreover, the trial court's dismissal of the declaratory judgment action was not in error since "for a declaratory judgment action to proceed, the movant must show that an actual and justiciable controversy exists involving the specific rights of the parties." *Blair v. Hendricks*, 30 S.W.3d 802, 805 (Ky. App. 2000), *overruled on other grounds by Lang v. Sapp*, 71 S.W.3d 133 (Ky. App. 2002).

Green also contended on appeal that because the Department of Corrections' dismissal still allowed for the possibility of a re-hearing on the charges, the matter was not moot because the opportunity for a re-hearing gave the prison officials an opportunity for a "second bite at the apple." But, in fact, once the Warden dismissed Green's disciplinary reports, any reference to the report was automatically expunged from his records. *See* KRS 196.180(3).

Consequently, even though the Department of Corrections retained the possibility to re-hear the disciplinary report in the future, a current controversy does not exist for the trial court's attention. Since the disciplinary reports and the resulting penalties have been expunged, there is no additional remedy for a trial court to provide. If the disciplinary charges were reinstated and a re-hearing ordered, an actual controversy would not exist until Green was found guilty for a second time. Here, the charges have not been reinstated; no rehearing has been ordered, and thus, there is no controversy to resolve.

Therefore, the issues in Green's suit were rendered moot by the Warden's dismissal of the disciplinary charges, and the trial court did not err in dismissing the petition for declaratory judgment.

### CONCLUSION

We affirm the decision of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marcus P. Green, *pro se*  
Little Sandy Correctional Complex  
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Allison R. Brown  
Department of Corrections  
Frankfort, Kentucky