

RENDERED: DECEMBER 1, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**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  
VACATING AND REMANDING

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BEFORE: CLAYTON, STUMBO, AND THOMPSON, JUDGES.

CLAYTON, 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 vacate and remand for additional proceedings to consider the petition for declaratory judgment.

### 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 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 the petition, 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. Nonetheless, the Department of Corrections’ motion to dismiss also indicted 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. Still, 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 remanded them for a possible re-hearing. The trial court did not provide any explanation for its order, for directly dismissing Green’s petition, nor did it 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, 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.* at 561-62. 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. Apparently, the trial court agreed.

Here, Green filed a 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.

To counter, the Department of Corrections rationalizes that since Green was voluntarily provided with all the relief requested, nothing was left to adjudicate. Still, the Department of Corrections never explains the justification for possibly re-hearing the charges nor the impact of a re-hearing on whether a controversy still existed.

The Department of Corrections' motion for dismissal was oblique and failed to provide the substantive basis for the motion. In the dismissal motion, the Department of Corrections only noted that the new Warden was now willing to dismiss the convictions but retain the possibility of a re-hearing. But it never provides the rationale behind requesting the dismissal and granting Green all the relief he requested. In the case at bar, as sometimes occurs in prison discipline matters, the Warden did not request dismissal for failure to state a claim or for summary judgment. The lack of an explanation creates a lack of transparency on the part of the Department of Corrections and indirectly suggests some credibility to Green's assertion that he was not provided procedural due process or that insufficient evidence existed to support the charges.

Initially, we note our agreement with Green's argument that the Department of Corrections' administrative remedies were exhausted, and therefore, the Warden no longer had jurisdiction. Green points out that under the directives of the Corrections Policies and Procedure Manual (CPP), in effect in 2015, an appeal after the Warden's review is not provided at the administrative level. CPP 15-6(II)(F)(7). And the Warden's power to appeal once the administrative process concludes is explained as follows:

The 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 re-heard or both. This is at the Warden's level only and shall not create

any new time for additional appeals. The Warden may also dismiss the report.

CPP 15-6(II)(F)(8). Thus, once the Warden dismissed Green's appeal of the adjustment officer's decision, the Warden's authority over the matter is extinguished. After the Warden denied Green's appeal, no authority exists to continue the matter.

In *Thrasher v. Commonwealth*, 386 S.W.3d 132, 133 (Ky. App. 2012), the trial court addressed the failure of a prisoner to exhaust his administrative remedies prior to filing a declaration of rights petition. Our Court affirmed the trial court's dismissal of a petition for declaration of rights due to the inmate's failure to provide proof he exhausted his administrative remedies. The facts herein also relate to administrative remedies except here the administrative process has concluded. Here, the Warden had exercised his administrative authority, and hence, had no jurisdiction to re-hear the matter. Green's disciplinary convictions proceeded through the entire Department of Corrections' administrative process culminating with the Warden's denial of Green's appeal of the adjustment officer's decision. The provision in the Corrections Procedure and Policy Manual does not provide the proverbial "second bite at the apple." CPP 15.6(II)(F)(8). We believe that the limits of the administrative process apply to the Warden as well as the prisoner. Without such an interpretation, Green would be denied his procedural due process.

Further, our review indicates that the motion to dismiss was disingenuous when it suggested that Green was receiving all the relief requested but retained the right for a re-hearing. For example, the first request in Green's petition was "that the disciplinary reports against the Petitioner be dismissed and that Petitioner's conviction on each disciplinary report be vacated." If the disciplinary reports were dismissed, there would be nothing to re-hear. Significantly, the Department of Corrections' motion and appellate brief never address the contradiction between granting all Green's relief but retaining the possibility of a re-hearing on the matter. The language of the declaratory judgment statute mandates that "an actual controversy exists." Consequently, we hold, based on the possibility of a re-hearing, a controversy does exist, and the petition is not moot.

The trial court's order is ambiguous since it never directly dismisses Green's petition but merely notes that the new Warden has agreed to dismiss the convictions and remand for a re-hearing. We vacate the order because a controversy exists, and the Warden does not have jurisdiction to re-hear the matter. Further, we remand the matter and direct the trial court to address the petition on its merits.



CONCLUSION

For the foregoing reasons, we vacate and remand the decision of the Fayette Circuit Court.

STUMBO, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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