

IN THE SUPREME COURT OF THE STATE OF NEVADA

WARDEN, SOUTHERN DESERT
CORRECTIONAL CENTER, BRIAN
WILLIAMS AND SGT. PLUMLEE,
DISC. HEARING OFFICER,
Appellants,
vs.
HOWARD BRIAN ACKERMAN,
Respondent.

No. 51304

FILED

MAY 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is a State's appeal from an order of the district court granting a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

On January 30, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court challenging a prison disciplinary hearing, which resulted in a finding of guilt of MJ51 (compromising staff), MJ25 (threats), and G20 (tampering). Appellant was sanctioned as follows: (1) 547 days in disciplinary segregation, and (2) forfeiture of 221 days of statutory good time credits. Appellant retained counsel, and counsel filed a supplement to the petition. The State opposed the petition. After considering arguments from counsel, the district court granted appellant's petition on the ground that appellant's due process rights were violated when he was not permitted to call and confront witnesses. The State appeals.

In the petition filed below, appellant claimed that he was deprived of due process at the prison disciplinary hearing that resulted in

the loss of 221 days of statutory good time credits.¹ Appellant claimed that his due process rights were violated when he was denied the right to call the charging employees as witnesses. Appellant specifically identified Sergeant Adams and Ms. Reed (an instructor). Appellant further claimed that there was no evidence to support the MJ51 (compromising staff) charge, the MJ25 (threats) charge, and the G20 (tampering) charge. Post-conviction counsel further claimed that appellant was denied the right to inmate assistance at the prison disciplinary hearing.

"Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418 U.S. 539, 556 (1974). The United States Supreme Court has held that minimal due process in a prison disciplinary hearing requires: (1) advance written notice of the charges; (2) written statement of the fact finders of the evidence relied upon and the reasons for disciplinary action; and (3) a qualified right to call witnesses and present evidence. Id. at 563-69. The Wolff Court declined to require confrontation and cross-examination in prison disciplinary proceedings because these procedures presented "greater hazards to institutional interests." Id. at 567-68. Although counsel is not required in a prison disciplinary hearing, the Wolff Court suggested that

¹To the extent that appellant challenged his placement in disciplinary segregation, appellant's challenge was not cognizable in a petition for a writ of habeas corpus. See Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984); see also Sandin v. Conner, 515 U.S. 472, 486 (1995) (holding that liberty interests protected by the Due Process Clause will generally be limited to freedom from restraint which imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life).

where there is an illiterate inmate or complex issues are involved, the inmate “should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff.” Id. at 570. The requirements of due process are further met if some evidence supports the decision by the prison disciplinary hearing officer. Superintendent v. Hill, 472 U.S. 445, 455 (1985).

The district court granted the petition on the ground that appellant had been denied due process when he was deprived of the right to call and confront Sergeant Adams and Ms. Reed.² The State argues the district court erred in granting the petition and reinstating the forfeited credits. The State argues that because appellant was not permitted to confront or cross-examine the charging employees his due process rights were not denied when he was not permitted to call Sergeant Adams or Ms. Reed. In addition, the State argues that appellant’s claim that his due process rights were denied when he was not permitted to call Correctional Officer Critchfield, who was not one of the charging employees, should not be considered because the claim was not raised in the petition or

²We note that the district court’s February 19, 2008 order contained a typographical error in that it granted the petition, but determined that appellant’s due process rights had not been violated. The minute order, however, indicated that the district court had determined that appellant’s due process rights had been violated. In briefing, the parties argued about the meaning of this inconsistency. To solve the confusion, this court requested the district court to clarify its order. On April 8, 2009, the district court clarified that inclusion of the word “not” was a typographical error. Thus, the district court’s final determination was that appellant had been denied due process when his request to call witnesses was denied.

supplement filed in district court.³ The State further argues that there was some evidence to support the decision of the prison disciplinary hearing officer.

Based upon our review of the documents before this court, we conclude that the district court erred in determining that appellant's due process rights had been violated when he was denied the right to call Sergeant Adams and Ms. Reed. In providing a qualified right to call witnesses at a prison disciplinary hearing, the Supreme Court determined that a prisoner "should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals" and noted that witnesses may be denied "for irrelevance, lack of necessity, or the hazards presented in individual cases." Wolff, 418 U.S. at 566. The Supreme Court determined that confrontation and cross-examination were not required because of the "considerable potential for havoc inside the prison walls" in terms of increasing the length of the hearings and engendering "resentment which may persist after confrontation." Id. at 567, 569. Appellant did not have the right to call as a witness Sergeant Adams, the author of the notice of charges, because the sole purpose of calling Sergeant Adams would have been confrontation.⁴ Appellant

³The State acknowledges that appellant mentioned Correctional Officer Critchfield in his factual statement, but points out that in the grounds for relief appellant specifically only identified and provided arguments regarding Sergeant Adams and Ms. Reed.

⁴In the proceedings below, appellant stated that the purpose of calling Sergeant Adams would have been to determine if the notice of charges was exaggerated.

further did not have the right to call as a witness Ms. Reed, the instructor of the Horticulture program and the subject of the charges, because the purpose again would be confrontation, which is not required. Appellant did not specifically identify Correctional Officer Critchfield in the grounds for relief raised below; thus, the district court's consideration of this claim could not have included Correctional Officer Critchfield.⁵ Thus, we reverse the decision granting relief on this claim.

We further conclude that there was some evidence to support the prison disciplinary hearing officer's decision regarding the MJ51 (compromising staff) and MJ25 (threats) charges. As stated earlier, due process requires that some evidence support the decision of the prison disciplinary hearing officer. Hill, 472 U.S. at 455, 457. In determining whether there is some evidence, the reviewing court is not required to examine the entire record, independently assess the credibility of the witnesses, or weigh the evidence; but rather, the reviewing court must determine whether there is any evidence in the record to support the prison disciplinary hearing officer's finding of guilt. Id. at 455. In the instant case, the documents before this court contain some evidence to support the prison disciplinary hearing officer's finding of guilt for MJ51 (compromising staff) and MJ25 (threats). The recitation of the prison's presentation of the case stated that "inmate was attempting to get a staff

⁵Notably, Correctional Officer Critchfield is not mentioned in the district court's order. Rather, the facts relating to the claim regarding witnesses are set forth as follows: "On October 11, 2006, prior to recording the hearing, Petitioner requested to call two witnesses on his behalf, Officer Adams and Ms. Reed, the two charging employees. Sergeant Plumlee denied Petitioner's request."

member (teacher) to do him a favor by writing him an open yard pass and when he did not get it he got upset and the teacher says she felt threatened.” There was some evidence to support the charge of MJ51⁶ (compromising staff) because he asked the staff member for a favor regarding a yard pass that appellant was not entitled to receive.⁷ There was further some evidence to support the charge of MJ25⁸ (threats) because Ms. Reed informed prison officials she felt threatened during the exchange with appellant. Thus, we reverse the decision of the district court granting relief on this claim.

However, we conclude that to the extent the district court determined that there was not some evidence to support the G20 (tampering) charge, the district court did not err. Tampering is defined as “Preparing, soliciting, or giving false or misleading information to or about a staff member and representing the statement as fact.” N.D.O.C. A.R. 707.02. Nothing in the documents before this court supports this charge. However, the practical effect of this conclusion does not entitle appellant to any other relief than to have this charge expunged from his inmate file. The loss of credits sanction was applicable based upon the offenses of

⁶MJ51 is defined as “[c]onduct that includes, but is not limited to, bribery, extortion, sexual conduct, or any other behavior designed to violate the safety and security of an institution and/or obtain favorable treatment.” N.D.O.C. A.R. 707.02.

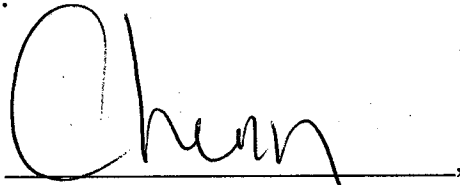
⁷In denying appellant’s appeal to the warden, the warden set forth that appellant was not entitled to receive a yard pass for days that he was not permitted to be on the yard because of his custody level status.

⁸MJ25 is defined as “issuing a threat, either verbally, by gesture or in a written statement to or about any person.” N.D.O.C. A.R. 707.02.

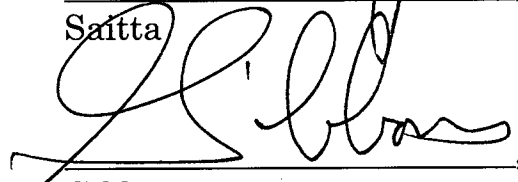
MJ51 and MJ25, and the sanctions imposed were based on the whole of the charges. Thus, we affirm the order of the district court to the extent that the district court determined that there was not some evidence of the G20 charge and that this information should be relayed to the Nevada Department of Corrections.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.⁹


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Las Vegas
Potter Law Offices
Eighth District Court Clerk

⁹We note that appellant did not raise any arguments on appeal relating to inmate assistance, and thus, we conclude that the claim has been abandoned. Even assuming that appellant had not abandoned the claim, appellant failed to demonstrate a violation of any due process rights as he failed to demonstrate that he was illiterate or that complex issues were involved.