

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BYRON JAMES FORE,  
Appellant,  
vs.  
THE STATE OF NEVADA; NEVADA  
DEPARTMENT OF CORRECTIONS;  
AND JAMES G. COX,  
Respondents.

No. 64028

**FILED**

OCT 23 2015

TRACIE K. LINDÉMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Appeal from a district court order granting summary judgment in a declaratory relief action. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

*FACTS*

While incarcerated at Ely State Prison, appellant Byron James Fore stabbed and wounded a fellow inmate with a knife-like object. The victim was given medical treatment, and Fore was charged with various disciplinary offenses pursuant to Nevada Department of Corrections (NDOC) Code 11. He received various administrative sanctions that are not challenged in this appeal. Additionally, NDOC imposed restitution to his victim in an amount "to be determined" accompanied by notice that his inmate spending account would be frozen "until the amount of restitution is determined." Fore was also criminally charged with and convicted of the crime of battery by a prisoner in lawful custody with use of a deadly weapon. At sentencing, the district court did not require Fore to pay restitution to his victim as part of his criminal sentence based upon the understanding that restitution would be imposed administratively.

Subsequently, Fore's inmate account was administratively frozen. About six months after the incident, one administrative charge of \$50 was assessed against the account and the account was unfrozen. For the next 8 years, no other charges were assessed.

Approximately 8 years after the stabbing, the victim suffered intestinal pain and underwent emergency surgery. In his written report, the emergency room surgeon described the victim as having suffered internal injuries resulting "from an old stab wound" and "secondary to a remote stab wound." After initial emergency surgery, the victim suffered extensive post-surgical complications and had to undergo two additional surgeries as well.

Based upon the surgeon's conclusion, NDOC assessed a series of charges against Fore's account which eventually exceeded \$91,000. All of the charges were identified as restitution owed as a result of the stabbing eight years earlier.

In response, Fore filed an administrative grievance and requested a hearing to contest the new charges pursuant to NDOC Administrative Regulation 707(F)(3). Fore also requested an itemized list of the new charges. NDOC denied Fore's request for a hearing and also refused to provide an itemized list of the charges. Fore administratively appealed, and his appeal was denied. Fore then sued NDOC in district court.

Fore's lawsuit was styled as an action in "declaratory relief" and "injunctive relief" seeking a declaration that NDOC had exceeded its administrative authority and violated his due process rights, as well as a permanent injunction against any continued restitution assessments. The district court granted summary judgment against Fore, concluding that Fore was not entitled to injunctive or declaratory relief because NDOC possessed the lawful authority to assess inmate accounts for restitution in

connection with a properly conducted disciplinary hearing, and the existing grievance process supplied adequate due process protections. Fore now appeals.

### ANALYSIS

As a preliminary matter, NDOC argues that Fore's appeal should be dismissed on procedural grounds because an action seeking declaratory relief is not the proper vehicle for Fore to assert his claims. However, the district court noted that NDOC did "not contest the form of the action. Indeed, it appears that Fore has met the requirements of a declaratory relief action." Therefore, NDOC waived this argument below and we will not address it here for the first time. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of the court, is deemed to have been waived and will not be considered on appeal.").

In his appeal, Fore raises a variety of arguments, including that NDOC's belated restitution assessments are barred by substantive or procedural due process, the doctrines of waiver, laches, and the statute of limitations. However, for the reasons stated below, we need only address one of his arguments.

Fore asserts that his procedural due process rights were violated when he was not given an itemized explanation of the \$91,000 in charges assessed against him, and furthermore was not permitted to challenge those assessments in a hearing. It is well-settled that prisoners have cognizable property interests in the funds on deposit in their inmate accounts. *Quick v. Jones*, 754 F.2d 1521, 1523 (9th Cir. 1985) (citing *Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983)). The question then becomes what "process" is "due" when NDOC wishes to charge an assessment against an inmate account. This constitutes a question of law. *Quick*, 754 F.2d at 1523.

Nevada's due process clause is co-extensive with the due process clause of the United States Constitution. *See Wyman v. State*, 125 Nev. 592, 600, 217 P.3d 572, 578 (2009). "[I]mprisonment does not automatically deprive a prisoner of certain important constitutional protections . . . But at the same time the Constitution sometimes permits greater restrictions of rights in a prison than it would allow elsewhere." *Beard v. Banks*, 548 U.S. 521, 528 (2006) (internal citations omitted). Generally, inmates are owed only the "minimum procedures appropriate under the circumstances." *Wolff v. McDonald*, 418 U.S. 539, 557 (1974). "What constitutes adequate procedure varies depending upon the circumstances of a particular case." *Weaver v. State, Dept. of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 199 (2005). The Nevada Supreme Court looks at three factors to determine whether a given procedure satisfies due process: (1) the private interest impacted by the government action; (2) the chance that the procedures used will result in an improper deprivation of the private interest, and the likely value of added procedural protections; and (3) the government's interest in the proceedings and the cost of additional procedural protections. *Id.* (citing *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

NRS 209.246(1)(b)(1) requires NDOC to establish a procedure for deducting money from inmate accounts to repay the cost of "medical examination, diagnosis, or treatment of injuries . . . inflicted by the offender upon himself or other offenders." NDOC has implemented several additional levels of regulations which provide the framework for assessing restitution. NDOC Administrative Regulations govern the entire correctional system, "Medical Directives" apply to institutionally-provided medical care, and "Institutional Procedures" apply only to particular facilities.

Administrative Regulation 707.1(12)(F)(2) permits medical restitution to be assessed as "To Be Determined" and left open following a disciplinary hearing. The purpose of this regulation quite obviously is to permit restitution to include medical costs legitimately incurred after the conclusion of the disciplinary hearing. Administrative Regulation 707(F)(3) specifies that "once restitution can be determined, a hearing may be scheduled to address the assessment." If an inmate wishes to challenge any restitution assessed against him, Administrative Regulation 707(F)(4) specifies that "due process on a restitution issue may be achieved by giving the inmate notice and details of a deduction, with an opportunity to be heard through the grievance process."

Additionally, Ely State Prison has adopted Institutional Procedure 6.32(VII)(G) governing the assessment of restitution. Institutional Procedure 6.32(VII)(G)(1) states that "[m]edical restitution will be sought to the fullest extent allowed by existing legislative mandates and departmental regulations." Such medical charges are assessed at certain fixed rates for institutional services, or at the actual billed rate for outside physicians and emergency transportation. Institutional Procedure 6.32(VII)(G)(3). Section (G)(4) provides that "[f]or fights and altercations, the correct assignment of liability is the purview of the disciplinary committee -- they have the means to investigate the circumstances of a fight or altercation and determine culpability at which time the restitution amount will be assessed accordingly." Institutional Procedure 6.32.05(5.3) allows for restitution "at the discretion of the institutional disciplinary committee" or by NDOC Central Medical Administration. *See generally, Dease v. MacArthur*, 2007 WL 1827135 at \*7 (D. Nev. June 21, 2007).

NDOC argues that its existing administrative grievance process is sufficient to allow inmates such as Fore to challenge restitution

assessments. Because its regulations merely permit, but do not require, notice of the details of a deduction and a hearing, NDOC argues that no due process violation occurred when it refused to give Fore any details regarding the deduction and denied him a hearing to challenge the deduction.

Fore challenges both the refusal to provide the details of the deduction, as well as the refusal to grant him a hearing. We conclude that, under *Weaver*, NDOC was required to provide Fore with details regarding how the amount of the deduction was calculated. Because this matter must be remanded so that Fore can be provided with details regarding the deduction so that he can determine whether grounds exist for a further challenge, we need not reach the question of whether a hearing is also required.

Applying the analysis of *Weaver* to the instant case, we first conclude that the private interest impacted by the governmental action is substantial. While not every minor or insubstantial deduction assessed against an inmate's spending account necessarily satisfies the first prong of the *Weaver* analysis, in this case the amount deducted approximates \$91,000, a large sum far exceeding a typical NDOC deduction. Therefore, we conclude that the first prong of *Weaver* tilts toward Fore in this case. Second, we conclude that, in view of the unusually large amount of the deduction as well as the fact that it was assessed eight years after the stabbing -- a delay probably far exceeding the typical NDOC deduction -- a substantial possibility exists that NDOC's current procedures could result in an improper deprivation against Fore unless he is given enough information to determine whether the deduction is actually numerically correct. Furthermore, this deprivation could be easily avoided by simply giving Fore an explanation of how the amount of the deduction was calculated, a procedure unlikely to be unduly onerous to NDOC. Finally,

while NDOC possesses a substantial interest in obtaining restitution from inmates who injure other inmates, the added costs of merely providing some additional detail to Fore regarding the basis for the deduction may be minimal. Consequently, we conclude that Fore is entitled to additional information regarding the basis for the \$91,000 deduction and how that amount was calculated.

We also note the existence of NDOC Administrative Regulation 707(F)(4), which specifies that "due process on a restitution issue may be achieved by giving the inmate notice and details of a deduction . . . ." Thus, by failing to provide Fore with "the details" of the restitution assessed against him -- especially when the amount of restitution was substantial and was assessed eight years after the subject incident -- NDOC arguably violated its own regulations. Due process generally requires that a state agency comply with its own procedural regulations. See *Wilson v. Commissioner of Social Security*, 378 F.3d 541, 544 (6th Cir. 2004) (reversing administrative decision "because the agency failed to follow its own procedural regulation, and the regulation was intended to protect applicants like Wilson"); *Marshall v. Lansing*, 839 F.2d 933, 943 (3d Cir. 1988) ("[P]rinciples of due process require an agency to follow its own regulations, which have the force of law"); *Derrickson v. Board of Education*, 703 F.2d 309, 315 (8th Cir. 1983) ("We agree that a state agency's failure to follow its own ordinances or regulations may constitute a deprivation of property without due process"). This is especially so when the very purpose of the regulation was to protect Fore's due process interests. *Woodard v. Los Fresnos Independent School District*, 732 F.2d 1243, 1245 (5th Cir. 1984) (the failure of an agency to follow each and every regulation is not per se a denial of due process in every instance, but it is when the regulation was required to be implemented in order to satisfy the constitution).

In this case, simply announcing 8 years after the fact that \$91,000 is owed -- with no explanation of how those costs were calculated, when they were incurred, or precisely what they are attributable to -- is insufficient to satisfy the purpose either of due process or of NDOC's own Administrative Regulation 707(F)(4), which are to permit inmates an opportunity to know the "details" of what has been deducted and how the amounts were calculated, and to allow them to be challenged if they are incorrect.

NDOC argues that security and privacy considerations prevent it from giving copies of another inmate's medical bills, reports, or records to Fore. We accept that to be true. But NDOC does not explain why these interests cannot be satisfied by giving Fore something more than a mere total amount but something less than the actual medical bills themselves. For example, NDOC could provide redacted copies of bills, or itemized summaries, or at least a general description of the medical services rendered and the costs of each service. The point is that, by giving nothing more than a round number total, NDOC has not complied with its own regulations and Fore has no way of determining whether the restitution assessed against him is even remotely correct. Without even knowing the basis for the deduction, Fore has been effectively deprived of any meaningful way to challenge the legitimacy of the deduction even if it was incorrectly calculated.


In view of NDOC's legitimate need to balance Fore's rights against competing security and privacy interests, we cannot unduly restrict NDOC by specifying precisely what must be given. Rather, under the circumstances of this case, we instruct NDOC that it must implement some method of providing additional "details" that it agreed to provide under Regulation 707(F)(4) sufficient to enable Fore to determine whether restitution was correctly assessed against him, while honoring the other

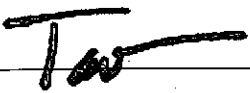



security and privacy interests NDOC is also charged with protecting. Once Fore has been given this information, he can then determine whether to pursue a further grievance. Because Fore has not yet been provided this information, and because this information could theoretically moot the need for any further challenge, we need not address the question of whether Fore might be entitled to a hearing in connection with a grievance after the information has been provided to him.

For the foregoing reasons, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Steve L. Dobrescu, District Judge  
Byron James Fore  
Attorney General/Carson City  
White Pine County Clerk