

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000053-MR

KENT DORSEY

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
CIVIL ACTION NO. 05-CI-00210

JOHN MOTLEY, WARDEN

APPELLEE

OPINION
AFFIRMING

** ** * * * * * * * * * *

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

BUCKINGHAM, SENIOR JUDGE: Kent Dorsey appeals from an order of the Morgan Circuit Court dismissing his Petition for Declaration of Rights brought pursuant to Kentucky Revised Statute (KRS) 418.040. Dorsey's petition related to the imposition of

¹ Senior Judges Michael L. Henry and David C. Buckingham sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

disciplinary penalties by prison authorities for Dorsey's assault on a fellow inmate. We affirm.

Dorsey was incarcerated at the Northpoint Training Center at the time of the alleged assault. He allegedly committed two institutional infractions: (1) physical action resulting in the serious injury of another inmate and (2) using an authorized object as a weapon. The institutional charges stem from a single incident occurring on July 19, 2004. Dorsey, along with several other inmates, allegedly assaulted a fellow inmate. Dorsey allegedly used a lock to beat the inmate, causing him serious injury such that the inmate required treatment at a local hospital. During the investigation of the assault, Dorsey was transferred to the Eastern Kentucky Correctional Complex (EKCC).

On September 9, 2004, Dorsey was found guilty of both charges at an adjustment hearing conducted before a single hearing officer. As a result of the physical action charge, Dorsey was assessed a penalty of 180 days segregation and forfeiture of two years of good time. The authorized object charge resulted in an additional penalty of 90 days of segregation, forfeiture of 180 days of good time, and restitution for the medical expenses incurred for treating the injured inmate.

Dorsey's appeal of the physical action charge to the warden of EKCC was denied on October 8, 2004. Dorsey did not appeal the findings of the hearing officer with respect to the authorized object charge. On August 25, 2005, Dorsey filed a Petition for Declaration of Rights with the Morgan Circuit Court, seeking a reversal of his conviction on the institutional charges. On December 1, 2005, the court entered an order dismissing Dorsey's petition with prejudice. This appeal followed.

On appeal, Dorsey raises several challenges to the disciplinary proceeding based on constitutional due process grounds. He alleges that the prison authorities failed to afford him a fair hearing in accordance with Kentucky Corrections Policies and Procedures (CPP) 15.6.

First, Dorsey contends that his rights to due process were violated when the hearing officer failed to give him an opportunity to call witnesses at the hearing in violation of CPP 15.6(D)(2)(f) and (g). Dorsey also argues that the hearing officer failed to give him notice of the reason his opportunity to call witnesses was waived, unsafe, or unnecessary, as required by the regulations. We note that the disciplinary report includes a line for Dorsey to request witnesses. However, Dorsey failed to make any such request prior to his hearing. The failure of an inmate to identify witnesses to the hearing officer prior to the hearing constitutes a waiver. *See* CPP 15.6(C)(5)(a)(2) and (b). Dorsey's contentions in this regard are thus without merit.

Dorsey next contends that the hearing officer violated his due process rights because he failed to hear and decide his case solely from the evidence presented during the hearing. Dorsey essentially argues he should not have been found guilty of striking another inmate with a lock because the lock was not produced at his hearing. In support of his argument, Dorsey cites CPP 15.6(D)(3)(d), which states that a hearing officer's decision must include specific findings of fact and not merely refer to the reporting employee's report without specific findings.

Here, the hearing officer's decision was based upon the investigation conducted by a reporting employee. However, the hearing officer's decision did not

merely refer to the report, but rather was supported by specific findings of fact. Those findings included the name of the reporting employee, the instrument used in the attack, that the other inmate suffered serious injuries, and that several eyewitnesses observed the attack. The fact that the actual lock used in the attack was not put into evidence does not preclude the hearing officer from finding that a lock was used. This is especially true in view of the fact that all the eyewitnesses related substantially the same version of events and at least one of them had a past history of reliability.

This court had adopted the “some evidence” standard of review in prison disciplinary proceedings outlined by the U.S. Supreme Court in *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985); *Smith v. O'Dea*, 939 S.W.2d 353, 358 (Ky.App. 1997). In Dorsey's case, there was clearly “some evidence” to support the hearing officer's findings regarding the unauthorized object charge. We thus affirm those findings.

Finally, Dorsey argues that his due process rights were violated because the disciplinary report failed to address the disposition of physical evidence (presumably the lock) pursuant to CPP 15.6(C)(2)(e). Following the hearing, Dorsey did not appeal this issue to the warden. “The failure to raise an issue before an administrative body precludes a litigant from asserting that issue in an action for judicial review of the agency's action.” *O'Dea v. Clark*, 883 S.W.2d 888, 892 (Ky.App. 1994). Dorsey's failure to raise this issue in the prison disciplinary proceedings constitutes a waiver preventing judicial review. *See id.* Accordingly, we are unable to review this issue.

The order of the Morgan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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