

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000981-MR

MICHAEL HANDLE

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 05-CI-00851

WARDEN LARRY CHANDLER, LT.,
CARLOS SCHANTZ, C/O A. WARREN
AND CTO DONNA REID

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, STUMBO, AND THOMPSON, JUDGES.

STUMBO, JUDGE: Michael Handle appeals *pro se* from an order of the Oldham Circuit Court denying his Petition for Declaratory Judgment. Handle, who is incarcerated at the Kentucky State Reformatory (KSR) in LaGrange, Kentucky, claimed below that the Department of Corrections failed to abide by proper policies and procedures in its adjudication of a prison disciplinary action against him. He maintained that the failure resulted in the violation of several protections to which he was entitled and set forth in the

United States Constitution and Kentucky Constitution. For the reasons stated below, we affirm the order on appeal.

On December 2, 2004, KSR Sgt. Dale Chapman and Corrections Officer Cole Estill conducted a search of Handle's cell. Handle shared the cell with another inmate. The search uncovered a small container of a substance which was later proven to be marijuana, and the incident resulted in the issuance of a disciplinary report.

The report charged Handle with unauthorized drug use, and the matter proceeded before a three-person adjustment committee. Handle sought to produce the statements of three witnesses at the hearing, to wit, the two officers who conducted the search, and a fellow inmate. The request to produce the officers' testimony was denied, and the fellow inmate did not appear. Handle was found guilty of the amended offense of possession of drug paraphernalia. He received the forfeiture of 60 days of good time credit, and was given 45 days of disciplinary segregation.

Handle appealed the adjustment committee's decision to KSR Warden Larry Chandler, arguing that he was denied due process when he was not allowed to produce the testimony of Officers Chapman and Estill. Warden Chandler then ordered a new hearing for the apparent purpose of allowing Handle to take Chapman's testimony.

Thereafter, the matter was reinvestigated and a higher category charge – possession of dangerous contraband – was assigned. Though the original finding was reversed for the apparent purpose of allowing Handle to call Officer Chapman at the new hearing, Handle declined to request any witnesses at the new hearing. A hearing on the

amended charge was conducted resulting in a finding of guilt. This finding resulted in Handle receiving 90 days of disciplinary segregation and the forfeiture of 180 days of good time. Handle's appeal to the Warden was denied.

On December 12, 2005, Handle filed a Petition for Declaratory Judgment in Oldham Circuit Court. As a basis of the petition, Handle protested the reevaluation of the December 2, 2004, incident and resultant assessment of the higher category offense. He also maintained that Warden Chandler failed to comply with Corrections Policy and Procedure (CPP) rule 15.6 by allowing the reinvestigation and amended charge. According to Handle, these failures resulted in the violation of numerous constitutional rights to which Handle was entitled.

After proof was heard, Warden Chandler, et al., filed a Motion to Dismiss Handle's petition. Upon considering the motion, and Handle's response thereto, the circuit court rendered its Findings and Order on April 13, 2006. The order held in relevant part that Handle improperly failed to exhaust his administrative remedies before seeking judicial redress; had not demonstrated a violation of CPP 15.6; failed to demonstrate a violation of due process or equal protection; and did not demonstrate the existence of an ex post facto law nor violation of the Double Jeopardy Clause. Upon finding no basis for Handle's petition, the circuit court dismissed the petition and denied the claim seeking a declaratory judgment. This appeal followed.

Handle now argues that the circuit court erred in dismissing his petition for a declaratory judgment. After reciting the procedural due process and liberty interests to

which he believes he was entitled, Handle maintains in his one-page argument that the circuit judge abused her discretion by improperly applying CPP 15.6 (VI)(F)(6). His apparent argument is that CPP 15.6 bars the Warden from ordering the reinvestigation and rehearing of a disciplinary report. He further appears to argue that the circuit court improperly failed to find that the CPP also prohibits a higher category charge from being imposed following the reinvestigation. In sum, Handle contends that the circuit court's decision was arbitrary, unreasonable, unfair and unsupported by sound legal principles. He seeks an order reversing the circuit court's order and remanding the matter for a declaration of rights.

Handle's claim of error centers on CPP 15.6 (VI)(F)(6). It states that,

The Warden or his designee shall not during his administrative or appellate review:

- a. order a rehearing if the action has been dismissed,
- b. raise the discipline,
- c. order a rehearing on a new charge which carries a higher penalty.

It is uncontroverted that Warden Chandler did not "order a rehearing if the action has been dismissed" (because the proceeding against Handle was not dismissed), and that he did not "raise the discipline." The question, then, is whether he ordered "a hearing on a new charge which carries a higher penalty," and if so, whether this policy violation rises to the level of a substantive or procedural due process violation sufficient to entitle Handle to relief.

The sole reference in the appellate record to the action taken by Warden Chandler resulting from Handle's appeal is the typewritten notation of "retrail" [sic] on Attachment 4 of the December 20, 2004, Adjustment Committee Appeal Form. Our examination of the record has uncovered nothing – nor has Handle cited anything – demonstrating the basis for Warden Chandler's decision. Similarly, nothing in the record reveals whether Warden Chandler or some other individual ordered the matter re-investigated, nor who determined that a higher category charge was warranted.

In order to reach the conclusion that Warden Chandler improperly deviated from CPP (VI)(F)(6), some evidence must exist that he "order[ed] a rehearing on a new charge which carries a higher penalty." No such evidence is found in the record. To the contrary, Handle's appeal resulted in precisely what he sought, to wit, a new hearing availing him of the opportunity to call witnesses. The CPP does not prohibit KSR from amending the charge at any point in the process.

A prison disciplinary hearing where an inmate's good time credit is at risk must comply with procedural due process of law. *Wolf v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). In the context of prison disciplinary proceedings, procedural due process requires "(1) advance written notice of the disciplinary charges; (2) an opportunity when consistent with institutional safety and correctional goals to call witnesses and present documentary evidence in defense; and (3) a written statement by the fact-finder of the evidence relied upon and the reasons for the disciplinary actions."

Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985).

Handle has not demonstrated a violation of his due process rights. He received notice of the charges, was availed of the opportunity to call Officers Chapman and Estill as witnesses at the second hearing, and received a written statement by the fact-finder of the evidence relied upon and the reasons for the disciplinary action. Similarly, no evidence was presented that Warden Chandler ordered a rehearing on a new charge. Accordingly, we find no error on this issue.

Hays raised a number of other arguments before the circuit court. The sole argument raised in the instant appeal, however, is whether Circuit Judge Conrad abused her discretion in the manner in which she applied CPP 15.6 to the facts, and whether she improperly failed to find that Handle suffered a deprivation of substantive due process rights. This question must be answered in the negative, and the remaining issues raised before the circuit court, but not argued herein, are not preserved for appellate review or are otherwise moot.

For the foregoing reasons, we affirm the order of the Oldham Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Handle, *pro se*
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BRIEF FOR APPELLEE:

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