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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN THE MATTER OF THE PERSONAL RESTRAINT OF: STEPHAN P. DOWDNEY, Petitioner.	No. 82898-3-I ORDER OF DISMISSAL

Stephan Dowdney filed a personal restraint petition challenging the sanction imposed as a result of prison disciplinary proceeding. In order to obtain relief in this setting, Dowdney must demonstrate that he is being "'restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c).'" In re Pers. Restraint of Grantham, 168 Wn.2d 204, 213, 227 P.3d 285, 290 (2010) (quoting In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298-99, 88 P.3d 390 (2004)).

In May 2021, while incarcerated at the Stafford Creek Correctional Complex, Dowdney was charged with violating WAC 137-25-030 (655) (making any drug, alcohol, or intoxicating substance, or possessing ingredients, equipment, formulas, or instructions used in making any drug, alcohol, or intoxicating substance). According to the Initial Serious Infraction Report, two correctional officers conducted a search of Dowdney's cell on May 12, 2021. They found "excess fruit" and a coffee

container on Dowdney's shelf that held a small amount of liquid which smelled strongly of intoxicants. The substance tested positive for the presence of alcohol.

Dowdney received written notice of the charge and its factual basis on May 19, 2021. On the written notice form, Dowdney requested the appointment of a Department advisor. He also requested witness statements from the two correctional staff members who conducted the search. The witnesses responded that they had nothing to add to their initial reports. Dowdney submitted specific questions for the staff witnesses about the brand and model of the testing machine used, the instructions for the machine, how the testing was conducted, and the officers' training to detect the smell of alcohol. The Department rejected the submitted questions.

Prior to the hearing, Dowdney also requested to view instructions for use of the Department's breath test machines and sought to continue the hearing so he could review DOC policies. He asked to view any photographs of the test result and video of the test being performed. He requested that certain Department policies be presented at the hearing and asked that the fluid sample be sent to an external laboratory for testing.

After an initial brief continuance, the hearing took place on May 28, 2021. Dowdney acknowledged that he had been able to review the Department's policies, including its alcohol and drug testing policy, see DOC Policy 420.380, before the hearing. The hearing officer denied Dowdney's requests to view video evidence and for additional testing of the substance found in his cell. Noting that Dowdney had not been provided an advisor, as he requested, the hearing officer indicated that the hearing would be postponed until an advisor could be assigned. Dowdney offered

to waive the request. The hearing officer accepted Dowdney's waiver and proceeded with the hearing.

Dowdney pleaded not guilty and argued that all of the testing machines approved by the Department required a human to blow air into them. He claimed that no other type of test could yield a valid result and that he should have been present during testing. The hearing officer indicated that he would review the evidence, including photographic and video evidence, when he deliberated. After pausing the hearing to deliberate, and reviewing the evidence which included reports, a photograph of the positive test, and documentation of the chain of custody, the hearing officer found Dowdney guilty. The hearing officer explained to Dowdney that an attachment to the portable breath test machine allowed it to test passive compounds for alcohol content and that his presence during testing was not required by any Department policy. The hearing officer imposed a sanction of 15 days' of cell confinement. Dowdney appealed the sanction and the Associate Superintendent denied the appeal, noting that proper protocols and equipment were used by trained staff to test the fluid in the container.

Review of a prison disciplinary proceeding is limited to a determination of whether the action taken was "so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding so as to work to the offender's prejudice." Grantham, 168 Wn.2d at 215 (citing In re Pers. Restraint of Reismiller, 101 Wn.2d 291, 294, 678 P.2d 323 (1984)). A disciplinary proceeding is not arbitrary and capricious if the petitioner was afforded the applicable minimum due process protections and the decision was supported by at least some evidence. Id. at 215-16; In re Pers.

Restraint of Krier, 108 Wn. App. 31, 38, 29 P.3d 720 (2001). Due process requires that an inmate facing disciplinary sanctions receive adequate notice of the alleged violation, an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional safety and correctional goals, and a written statement of the evidence relied upon and the reasons for the disciplinary action. Grantham, 168 Wn.2d at 215-16; In re Pers. Restraint of Gronquist, 138 Wn.2d 388, 396-97, 978 P.2d 1083 (1999).

The evidentiary requirements of due process are satisfied if there is "some evidence" in the record to support a prison disciplinary decision:

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.

(Citations omitted.) In re Pers. Restraint of Johnston, 109 Wn.2d 493, 497, 745 P.2d 864 (1987), (quoting Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 455-56, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985)). The standard requires "some reasonable connection between the evidence and the inmate in order to support actions taken by the prison disciplinary board." In re Pers. Restraint of Anderson, 112 Wn.2d 546, 549, 772 P.2d 510 (1989). It is not the role of this court to re-weigh the evidence considered by the hearing officer. Johnston, 109 Wn.2d at 497.

Dowdney challenges the sufficiency of the evidence supporting the finding of guilt. He claims that a positive test result for alcohol could only establish that he possessed alcohol, a different infraction, but not that he produced it. However, the evidence included the search report, which showed that the correctional officers

found an ingredient, "excess fruit," as well as a container and the fluid that tested positive for alcohol. The evidence was sufficient to support the finding that Dowdney "made" the alcoholic substance.

Dowdney also claims that none of the Department's approved testing machines has the capability to test liquid in a cup. But, the hearing officer relied on staff reports which established that the correctional staff had the ability to, and did in fact, test the fluid for the presence of alcohol using a portable machine and that the result was positive. The hearing officer also viewed a photograph of the test result, a video, and after deliberating, explained to Dowdney that an attachment provides the capability to test fluid substances. The staff reports, photographic evidence, and video evidence constitute "some evidence" to support the finding of guilt.

The record also demonstrates that Dowdney received all the due process to which he was entitled. There is no dispute that he received advance written notice of the charge, attended the hearing, and had the opportunity to present a defense. Dowdney also received written notice of the hearing officer's decision and the reasons for the sanction imposed. Nevertheless, Dowdney asserts that he was deprived of the right to due process because the hearing officer excluded relevant evidence. But, to the extent Dowdney claims he was prevented from presenting evidence about the Department's policy on breath testing, the record does not support his claim. Dowdney undisputedly had access to the Department's policies and he presented a defense that was largely based on DOC Policy 420.380. With regard to the Department's denial of specific questions Dowdney wished to pose to staff witnesses, due process rights in this context do not include the right to cross

examine witnesses. See In Pers. Restraint of Burton, 80 Wn. App. 573, 585-86, 910 P.2d 1295 (1996), overruled on other grounds by Grantham, 168 Wn.2d 204.

Finally, Dowdney claims he was deprived of due process because he was forced to choose between exercising the right to an advisor and having a hearing within the timeframe provided by the Department's regulations. See DOC Policy 460.000 IV, D (hearing to be held within 5 days of service of notice of serious infraction). But the regulations allow for a continuance to appoint a Department advisor. See DOC Policy 460.000 IV (J)(1)(b) (continuance allowed for any reason, including for appointment of advisor). A further continuance of the hearing for this purpose would not have violated Department policy or due process. See DOC Policy 460.000 IV (J)(2) (continuance of more than 20 days requires approval of Superintendent). And the record clearly demonstrates that Dowdney volunteered to waive the right to an advisor, not that he was coerced into doing so.[1]

Dowdney fails to establish that he was deprived of a fundamentally fair proceeding. The petition must be dismissed.[2]

Now, therefore, it is hereby

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[1] Dowdney also fails to explain why he met the criteria for an appointment. See WAC 137-28-295 (appointment of advisor requires consideration of the offender's literacy, complexity of the issues, offender's overall ability to adequately present his/her case, ability to communicate in English, and any disability that might impair the offender's ability to adequately defend himself/herself.)

[2] In light of this disposition, it is unnecessary to address the Department's argument Dowdney's petition should be dismissed because the sanction of cell confinement does not implicate a protected liberty interest is not subject to minimum constitutional due process requirements. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed 2d 418 (1995); Gronquist, 138 Wn.2d at 397–98. Addressing a slightly different issue in Kozol v. Department of Corrections, 185 Wn.2d 405, 410-11, 379 P.3d 72 (2016), our Supreme Court noted that even when discipline does not result in the loss of good time credit, the Department's regulatory procedures and safeguards apply and that a serious infraction "casts a shadow over an inmate's institutional history."

ORDERED that this personal restraint petition is dismissed under RAP 16.11(b).

Andrus, A.C.J.

Acting Chief Judge