FILED
Apr 17, 2023
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint of: **JOE W. ROBERTS, JR.,** **Petitioner.**	**No. 38852-2-III** **ORDER DISMISSING PERSONAL RESTRAINT PETITION**

Petitioner Joe W. Roberts, Jr. petitions for relief from several Department of Corrections prison disciplinary decisions. He asks the court to dismiss and expunge his infractions and to reverse the sanctions imposed against him. We dismiss his petition as frivolous. RAP 16.11(b).s

A PRP challenging the outcome of a prison disciplinary proceeding that has not been subject to prior judicial review is an original action in the appellate court. Thus, the petitioner need only demonstrate unlawful restraint under RAP 16.4. *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010). Under *Grantham*, "[w]e will reverse a prison discipline decision only upon a showing that it was so

arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding so as to work to the offender's prejudice." *Id*. at 215; *In re Pers. Restraint of Reismiller*, 101 Wn.2d 291, 293-94, 678 P.2d 323 (1984). The proceeding is not arbitrary and capricious if the petitioner was afforded the minimum due process applicable to prison disciplinary proceedings as set forth in *Wolff v. McDonnell*, 418 U.S. 539, 563-66, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). Minimum due process requires that the prisoner (1) receive notice of the alleged violation, (2) be provided an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional safety and correctional goals, and (3) receive a written statement of the evidence relied upon and the reasons for the disciplinary action. *Id.*; *see In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 396-97, 978 P.2d 1083 (1999). Further, minimum due process is satisfied if "any evidence in the record . . . could support the conclusion reached[.]" *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455-56, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985) ("*Hill*"). This court does not reweigh the evidence or second guess the hearing officer's credibility determinations. *Id*. at 455.

A petition is frivolous if it "fails to present an arguable basis for relief in law or in fact, given the constraints of the personal restraint petition vehicle." *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015). To avoid dismissal, the petition must be supported by facts and not merely speculation or self-serving or conclusory allegations. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992); *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990).

Motion Requesting Relief From Court that DOC Submit the Video Evidence and Disciplinary Recordings

Mr. Roberts asks the court to order the Department of Corrections to file "a copy of the infraction recordings . . . for Infraction Group Numbers 67; 68; 69; 70; 72; 73; 74 and 78 along with video evidence from Infraction Group Number 78." Mot. Requesting Relief from Court that DOC Submit the Video Evidence and Disciplinary Recordings at 2 (Oct. 7, 2022). He argues that "[t]he Court needs to especially review the video evidence because it does not support a guilty finding and shows I was denied fundamental due process, fairness a fair hearing." *Id*. at 1.

The motion is denied. "Ascertaining whether [the 'some evidence'] 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" hearing officer. *Hill*, 472 U.S. at 455–56 (alteration added). We need not review evidence that does not support the guilty finding.

Having resolved Mr. Roberts' preliminary motion, we analyze each challenged disciplinary decision that Mr. Roberts' petition addresses and conclude the petition is frivolous[1]:

[1] We do not consider those disciplinary decisions to which Mr. Roberts devotes no argument.

1. **Infraction 1: May 2, 2021 Infraction for Roughhousing**

Although Mr. Roberts was charged with fighting with another offender, a serious violation under WAC 137-25-030, he was found guilty of roughhousing, a general violation. Roughhousing is disruptive behavior. WAC 137-28-220(1). Mr. Roberts contends (1) he was not afforded due process; (2) the hearing officer went off the record to mock him, call him a "smart ass," and tell him to stop pissing off staff; (3) the hearing officer ignored Mr. Roberts' evidence and arguments that challenged the credibility of contrary evidence; (4) insufficient evidence of roughhousing exists; and (5) he did not receive a decision on his appeal.

Mr. Roberts' due process argument is frivolous for lack of an arguable factual basis for relief. His argument is conclusory. And the record shows Mr. Roberts received due process: he was provided notice, an opportunity to present evidence, and a copy of the hearing officer's decision

Mr. Roberts' conclusory allegation that the hearing officer mocked and insulted him is also frivolous for lack of factual support. His argument that the hearing officer ignored his evidence and arguments lacks an arguable basis in law for relief; as stated above, the law does not allow this court to reweigh the evidence or second guess the hearing officer's credibility determinations. *Hill*, 472 U.S. at 455. Mr. Roberts' insufficiency of the evidence argument lacks an arguable legal basis for relief because some evidence, i.e., Officer Biggs' report, which states that he saw Mr. Roberts engage in

mutual combat, supports the hearing officer's finding of guilt. Finally, because Mr. Roberts' petition acknowledges that his appeal of this particular disciplinary decision was denied and asserts no legal basis for relief, his argument that he received no decision on his appeal is frivolous.

2. Infractions 2 and 3: June 7, 2021 Infractions for Threatening and Intimidation

Mr. Roberts contends he was deprived of due process, a fair hearing, supporting evidence, and notice of evidence against him when he was found not guilty of threatening but guilty of intimidation and, consequently, sanctioned to 10 days in segregation but granted credit for time already served. The decision that Mr. Robert's was not guilty of threatening another cannot be reviewed because Mr. Roberts does not demonstrate he was in fact restrained as a result of the decision. *See* RAP 16.4(a), (b) (requiring proof of restraint for relief to be granted). The court addresses only the decision finding him guilty of intimidation.

The hearing officer was persuaded by "staff documentation" that Mr. Roberts attempted to intimidate staff. Resp. of the Dep't of Corr. ("Resp.") at 99. Staff documentation includes Officer George Bryant's Initial Serious Infraction Report. Officer Bryant states he asked Mr. Roberts, who was yelling at his neighbor, to "tone it down" because he was disrupting the Medication Line. Am. Pers. Restraint Pet. ("Pet."), Ex. J at 72 (May 20, 2022); Resp. at 107 (Sept. 9, 2022). Mr. Roberts "screamed at [Officer Bryant] and said, 'I've been here a long time and you're fucking nothing,' and

'You don't want to see me get out of here because I will tear you a fucking new one, bro.'" *Id*. Officer Bryant "took this as a threat of violence with intimidation." *Id*. As a result of Mr. Roberts' conduct, he was placed in administrative segregation and charged with a serious infraction.

Mr. Roberts first claims his due rights under WAC 137-28-285, WAC 137-28-290(2), and WAC 137-28-300(1) were violated because he did not receive requested video evidence and was prejudiced as a result. He believes the officer he asked to obtain the video did not request it even though the officer told him the video had already been destroyed by the time he requested it. Mr. Roberts produces no proof that he requested video evidence, and, even assuming he requested it, he speculates as to whether and when the officer requested the video. This conclusory and speculative argument presents no arguable factual basis for relief. *See Rice*, 118 Wn.2d at 886; *Cook*, 114 Wn.2d at 813-14.

Mr. Roberts further contends insufficient evidence supports the hearing officer's findings of guilt because Mr. Roberts and two witnesses reported no intimidating statements made by him. No arguable basis for relief in law or fact supports this contention in light of Officer Bryant's above-quoted statement, which is some evidence of intimidation.

Infraction 4: June 14, 2021 Infraction for Threatening

Mr. Roberts next challenges a decision finding him guilty of threatening. Based on

staff documentation and individual testimony, the hearing examiner was persuaded that Mr. Roberts threatened another individual while on administrative segregation pending an investigation into whether he threatened Officer Bryant when, during a meeting with mental health staff, who asked whether he could continue to be housed in Officer Bryant's unit without further issue, he said, "If I go back there and things happen, I'm probably going to kill that CO." Resp. at 109, 124. He was sanctioned five days' loss of good conduct time.

Mr. Roberts first contends he was denied due process because he was never screened for serious mental illness. This argument has no arguable factual basis because the record shows he was screened the day after the infraction occurred, and the screener found that Mr. Roberts' mental health status did not contribute to the alleged violation.

He next contends that, as a participant of the prison's pilot program for seriously mentally ill prisoners, he cannot be punished for reporting a safety concern (i.e., homicidal ideation) as instructed or when his behavior was caused by mental health related issues, and the individual about whom he had the homicidal ideation was not in the facility at the time. Mr. Roberts' argument is conclusory, and he offers no legal basis for relief on these grounds.

Infraction 5: July 8, 2021 Infraction for Discriminatory Harassment

On July 8, 2021, mental health counselor, Sabrina Bachman, an Asian-American woman, approached Mr. Roberts' cell to assess him for safety because he had reportedly made self-harm statements. After denying he had made self-harm statements, Mr. Roberts

called Counselor Bachman a "cunt" and a "chinky bitch" Resp. at 127. Based on these facts, Mr. Roberts was found guilty of discriminatory harassment and lost 10 days of good conduct time.

Mr. Roberts contends he was denied due process and a fair hearing because mental health staff did not comply with DOC Policy 460.000 or the process set forth on the Serious Mental Illness (SMI) Hearings Memo Process form, and because mental health staff "knowingly falsified check boxes" on the SMI Memo form. Mr. Roberts also contends his due process rights were violated because he was not given the appeal decision on this infraction.

These contentions lack arguable legal and factual grounds for relief because only due process to which Mr. Roberts is entitled is: (1) to receive notice of the violation, which he received; (2) to be provided an opportunity to present evidence and witnesses, which he was provided; and (3) to receive a written statement of the evidence relied upon and the reasons for the disciplinary action, which he received. *Wolff*, 418 U.S. at 563-66; *Gronquist*, 138 Wn.2d at 396-97; Resp. at 126, 129, 132. Furthermore, relief may not be granted because other remedies may be available to Mr. Roberts to address his concerns regarding staff compliance with the Serious Mental Illness (SMI) Hearings Memo Process. RAP 16.4(d).

Infraction 6: July 20, 2021 Infraction for Threatening

Mr. Roberts was found guilty of threatening another individual based on staff documentation that Mr. Roberts thrice threatened to kill Correctional Mental Health Unit

Supervisor Melina Murray for her housing assignment recommendation. He lost 10 days of good conduct time.

Mr. Roberts again contends he was denied due process and a fair hearing because mental health staff did not comply with DOC Policy 460.000 or the process set forth on the Serious Mental Illness (SMI) Hearings Memo Process form, and because mental health staff "knowingly falsified check boxes" on the SMI Memo form. This contention is frivolous for the same reasons indicated with respect to the July 8, 2021, Infraction for Discriminatory Harassment.

Mr. Roberts also contends he was denied the opportunity to present evidence when a video he requested was no longer available because he was not served with the infraction notice and staff did not request the video until the 30-day retention period for video footage had passed. No arguable legal or factual basis supports this argument because some evidence supports the hearing examiner's finding of guilty even if the video had been available and because Mr. Roberts' claim that the video contained exculpatory footage is not fact but merely a self-serving statement.

Finally, Mr. Roberts presents no arguable legal basis for relief on the ground that he was denied due process when his infraction hearing was delayed while he was on suicide watch or when he did not receive an acceptable response to his request for an update on his appeal because minimum due process requirements due not entitle him to a hearing within a certain amount of time or to a certain response regarding an appeal.

Infraction 7: April 1, 2022 Infraction for Causing a Threat of Injury to Another Person by Resisting Orders

A hearing examiner found Mr. Roberts guilty of the reduced violation of "[c]ausing a threat of injury to another person by resisting orders" rather than the charged violation of "[c]ausing injury to another person by resisting orders." WAC 137-25-030(717), (777). The decision was based on written staff testimony that Mr. Roberts continued to reach his hand through the wicket of his cell door despite the correction officer's repeated commands that he pull his hand back inside his cell. When attempting to shut the wicket while Mr. Roberts' hand was in it, the officer received two lacerations on his knee, requiring stitches.

Mr. Roberts contends (1) the written staff testimony is false; (2) video evidence of the event contradicts the written evidence and shows he did not resist; (3) the hearing officer did not explain why he found Mr. Roberts guilty of the reduced violation rather than the charged violation; and (4) the hearing officer was neither fair nor impartial. These contentions are frivolous because (1) Mr. Roberts' self-serving allegation that the officer's statement is false is not an arguable factual basis for relief; (2) even if the video evidence conflicted with the officer's statement, no arguable legal basis for relief exists because the officer's testimony satisfies the "some evidence" standard and this court does not weigh the evidence presented; (3) Mr. Roberts offers no arguable legal basis to conclude that due process entitles him to a statement of the reason for finding him guilty of a reduced charge rather than the charged violation; and (4) Mr. Roberts offers no arguable factual basis for his claim that the hearing officer was not fair or impartial.

Mr. Roberts' petition raises only frivolous arguments. Accordingly,

IT IS ORDERED, the petition is dismissed as frivolous. RAP 16.11(b).

Lawrence-Berrey, A.C.J.

ROBERT LAWRENCE-BERREY
ACTING CHIEF JUDGE