

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Jason E. Waybright,
Petitioner Below, Petitioner**

vs) **No. 13-0899** (Fayette County 13-C-127)

**David Ballard, Warden, Mt. Olive Correctional Complex,
Respondent Below, Respondent**

FILED

March 14, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jason E. Waybright, appearing *pro se*, appeals the August 1, 2013 order of the Circuit Court of Fayette County that dismissed his petition for a writ of habeas corpus challenging his conviction on a prison disciplinary violation. Respondent Warden, by counsel John H. Boothroyd, filed a summary response. Petitioner filed a reply.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner is an inmate at Mt. Olive Correctional Complex. On January 2, 2013, Investigator Curtis Dixon charged petitioner with violating disciplinary rule 1.03(3) which provides, in pertinent part, that no inmate shall "engage in any sexual act, such as, but not limited to . . . kissing, fondling[.]"¹ Investigator Dixon issued a violation report following his interview of Correctional Officer Brittany Taylor who stated that on December 21, 2012, she observed petitioner and two other inmates "kiss each other on the cheek, grab each other on the butt, and hug each other" in Oak Hall.

A disciplinary hearing occurred on January 14, 2013. Petitioner moved to dismiss the charge because (1) the employee making the violation report (Investigator Dixon) was not the charging employee (Correctional Officer Taylor); and (2) Policy Directive 325.00 was not followed.² The hearing officer denied each motion and found that "Policy Directive 325.00 was

¹ Disciplinary rule 1.03 is entitled, "rape/sexual assault/sexual abuse/sexual acts."

² Policy Directive 325.00 delineates the various disciplinary violations and sets forth the procedure for disciplining inmates.

followed.” Petitioner also offered to plead guilty to the reduced charge of “physical contact,” but the hearing officer denied his motion to reduce the charge.

Pursuant to disciplinary rule 2.36, “physical contact” constitutes a lesser disciplinary violation that is defined as “purposeful physical contact (i.e. embracing, holding hands, etc.) with any other person.” As noted in the January 14, 2013 hearing report, Correctional Officer Taylor described the inmates’ activity on December 21, 2012, as horseplay rather than a sexual act. However, the hearing officer credited Investigator Dixon’s testimony that Correctional Officer Taylor was only a temporary officer who had not received any training under the Prison Rape Elimination Act of 2003 (“PREA”), 42 U.S.C. §§ 15601 to 15609. Investigator Dixon indicated that petitioner was charged with the more severe rule violation under 1.03(3), in part, because of the PREA.³

Petitioner denied he committed any “rape/sexual assault/sexual abuse/sexual act” under disciplinary rule 1.03 and desired to call the two other inmates as witnesses. The correctional hearing officer ruled that the other inmates were excused from testifying at petitioner’s hearing as “they were all involved in the sex act.” Based on the report and testimony of Investigator Dixon, as well as petitioner’s own testimony, the hearing officer found petitioner guilty of violating rule 1.03(3). The hearing officer sentenced petitioner to sixty days of punitive segregation with loss of all privileges from January 3, 2013, to March 3, 2013.⁴

Petitioner administratively appealed his disciplinary conviction and sanction.⁵ The Commissioner of Corrections affirmed the correctional hearing officer’s decision prior to the issuance of Respondent Warden’s decision. Pursuant to disciplinary rule 7.01(b)(2), Respondent Warden had thirty days to answer petitioner’s appeal. Once that time period expired, petitioner proceeded to appeal to the Commissioner without a ruling from Respondent Warden. As found by the circuit court, the Commissioner has the practice of treating a lack of a decision from a warden as a “unfavorable answer” to an inmate’s appeal. The Commissioner followed his practice in the instant case and proceeded to affirm the hearing officer’s decision. Subsequently, on March 14, 2013, Respondent Warden answered petitioner’s appeal and also upheld the hearing officer’s decision.

On May 20, 2013, petitioner filed a petition for a writ of habeas corpus in the circuit court challenging his disciplinary conviction and sanction under rule 1.03(3). The circuit court

³ The PREA was enacted to “protect the Eighth Amendment rights of Federal, *State*, and local *prisoners*,” and to “establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States[.]” 42 U.S.C. §§ 15602(1) and (7) (Emphasis added.).

⁴ According to petitioner, the two other inmates were also charged under rule 1.03(3) and each received thirty days of punitive segregation with loss of all privileges.

⁵ While petitioner has been released from punitive segregation, he has not been placed back in the general prison population. Rather, petitioner has been placed in administrative segregation.

conducted a preliminary review of the petition⁶ and dismissed it in an order entered August 1, 2013. The circuit court specifically refuted numerous arguments raised by petitioner, which included (a) finding that sufficient evidence existed to support petitioner's conviction of disciplinary rule 1.03(3) and (b) concluding that petitioner's disciplinary proceeding comported with the due process standards set forth by this Court in Syllabus Point 1 of *Harrah v. Leverette*, 165 W.Va. 665, 271 S.E.2d 322 (1980).⁷ The circuit court indicated that any argument it did not specifically address did not merit any discussion.

Petitioner appeals the circuit court's August 1, 2013, dismissing the petition. We review a circuit court's dismissal of a habeas petition under the following standard:

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

STRICT COMPLIANCE WITH POLICY DIRECTIVE 325.00 WAS NOT REQUIRED.

Petitioner asserts that there were numerous instances where correctional officials failed to comply with the procedures set forth in Policy Directive 325.00. Respondent Warden counters that correctional officials met due process standards in petitioner's disciplinary proceeding. Section I of Policy Directive 325.00 states that while the policy is meant to serve as a procedural guideline governing the inmate disciplinary process, "[i]t shall not be construed as vesting any inmate a liberty or property interest greater than that, which is otherwise provided by law." Accordingly, this Court finds that the circuit court's determination that petitioner's disciplinary proceeding met

⁶ The circuit court stated that it performed the preliminary review pursuant to Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. However, the correct citation is to West Virginia Code § 25-1A-4, as this is the provision that allows pre-screening of habeas petitions in which only the terms and conditions of confinement are being challenged.

⁷ Those standards are as follows: (a) written notice to the inmate of the claimed violation; (b) disclosure to the inmate of the evidence against him; (c) opportunity to be heard and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body; (f) a written statement by the fact-finders of the evidence relied on and reasons for discipline; and (g) the right to counsel if the State is represented by a lawyer.

the *Harrah* standards resolves all of petitioner's procedural arguments and that strict compliance with Policy Directive 325.00 was not required.

PETITIONER'S EQUAL PROTECTION CLAIM LACKS SUPPORT

Petitioner asserts that he received unequal treatment because he was sanctioned with sixty days of punitive segregation (followed by administrative segregation) while the two other inmates were sanctioned with only thirty days of punitive segregation even though they possessed far worse prison records. However, this Court "may disregard errors that are not adequately supported by specific references to the record on appeal." Rule 10(c)(7), W.V.R.A.P. The Court has reviewed petitioner's appendix and finds no information with regard to the respective prison records. Therefore, the Court disregards this alleged error.

PETITIONER HAD NO RIGHT TO BE CHARGED WITH A LESSER VIOLATION

Petitioner argues that the hearing officer should have reduced the charge to a lesser violation because Correctional Officer Taylor described the inmates' activity as horseplay rather than a sexual act. Respondent Warden counters that the circuit court correctly found that sufficient evidence existed to support petitioner's conviction of "rape/sexual assault/sexual abuse/sexual act" under disciplinary rule 1.03(3). This Court notes that the hearing officer—the finder of fact—credited Investigator Dixon's testimony that Correctional Officer Taylor was only a temporary officer who had not receive any training on the PREA which was meant to reduce, if not eliminate, inmate sexual assault. Where sufficient evidence exists, as in this case, to support multiple disciplinary rule violations, "the [S]tate, at its option, may choose to prosecute for the violation of one [rule] or for the violation of multiple [rules] under appropriate circumstances where multiple punishment is . . . authorized." *Snider v. Fox*, 218 W.Va. 663, 666 n. 6, 627 S.E.2d 353, 356 n. 6 (2006) (finding sufficient evidence for inmate's conviction of "rape" under disciplinary rule 1.03 when he grabbed the breast of a nurse) (Internal quotations and citations omitted.). Therefore, this Court concludes that petitioner had no right to be charged with a lesser violation.

With respect to all other issues raised, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's August 1, 2013 order to this memorandum decision

For the foregoing reasons, we find no error in the decision of the Circuit Court of Fayette County and affirm the circuit court's August 1, 2013 order dismissing the petition for a writ of habeas corpus.

Affirmed.

ISSUED: March 14, 2014

CONCURRED IN BY:

Chief Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

IN THE CIRCUIT COURT OF
FAYETTE COUNTY, WEST VIRGINIA

JASON E. WAYBRIGHT,

Petitioner

v.

Civil Action No. 13-C-127-H

DAVID BALLARD, Warden
Mount Olive Correctional Complex,

Respondent.

FAYETTE COUNTY
CIRCUIT CLERK
2013 AUG - 1 P 3:06
DANIEL E. WRIGHT

ORDER

On May 20, 2013, the Inmate Petitioner (hereinafter "Petitioner"), pro se, filed a Petition, with exhibits, for writ of habeas corpus, to institute the above-styled civil action. The Petition alleges that proceedings in Mount Olive Correctional Complex (hereinafter "MOCC") administrative disciplinary Case No. MOC-13-0001-G violated the Petitioner's due process rights. A motion for appointment of counsel was attached to the Petition.

The Court has conducted a preliminary review of this matter pursuant to Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. After full consideration and review of the Petition, relevant law, and complete contents of the court file, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Petitioner is presently incarcerated at MOCC in Fayette County, West Virginia.
2. The Court notes that the Petitioner filed a separate Petition in Fayette County Civil Action No. 13-C-103-H, arising from separate disciplinary proceedings in MOCC Case No. MOC-13-0002-G. Said Petition was dismissed by an Order entered July 25, 2013.
3. On January 14, 2013, the Petitioner appeared at a hearing before a MOCC magistrate concerning an alleged violation of Division of Corrections (hereinafter "DOC") Policy Directive No. 325.00, Rule No. 1.03-3, Rape/Sexual Assault/Sexual Abuse/Sexual Acts. Exhibit No. 1 and Exhibit No. 2 to the Petition are each entitled "Detention Report." Both exhibits put the Petitioner on notice of the pending administrative charge arising from alleged inappropriate sexual conduct on December 21, 2012.
4. Exhibit No. 3, entitled "Violation Report," reads that MOCC Officer Brittney Taylor observed the Petitioner kissing another inmate on the cheek, hugging said inmate, and grabbing said inmate's buttocks.
5. An administrative disciplinary hearing was conducted on January 14, 2013, as detailed in a document entitled "Hearing Report," attached as Exhibit No. 4 to the Petition. Said hearing report provides that the testimony of inmates Travis Johnson and Brandon Combs were waived due to their alleged participation in the aforementioned alleged conduct. At said hearing, Officer Taylor testified that

she had, in fact, worked on December 21, 2012, despite the Petitioner's claim to the contrary. Intelligence Officer Gary Hinte also testified at said hearing that his reports of the incident were true and correct. The hearing officer found that the evidence supported a finding of guilt, and as a result the Petitioner received sixty (60) days punitive segregation and sixty (60) days loss of privileges, commencing January 3, 2013, and ending March 4, 2013.

6. Also attached as Exhibit No. 4 is a document entitled "Loss of Privileges Notification," detailing the Petitioner's aforementioned punishments.
7. The Petitioner filed an appeal to the Respondent Warden in the aforementioned administrative disciplinary case on January 22, 2013. A copy of said appeal is attached as Exhibit No. 5. Attached as Exhibit No. 6 is a list of DOC administrative rules which the Petitioner presumably believes supports his arguments set forth in said appeal.
8. The Respondent Warden failed to answer the Petitioner's appeal in writing within thirty (30) days as required by DOC Policy Directive No. 325.00. On March 11, 2013, the Petitioner filed an appeal with Jim Rubenstein, Commissioner, West Virginia DOC (hereinafter "Commissioner"). A copy of said appeal is attached to the Petition as Exhibit No. 7.
9. On March 18, 2013, the Commissioner denied the Petitioner's appeals in both Case No. MOC-13-0001-G and Case No. MOC-13-0002-G (this being the case in Civil Action No. 13-C-103-H, aforementioned). A written copy of the

Commissioner's decision, addressing both administrative cases, is attached as Exhibit No. 8 to the Petition.

10. A copy of DOC Policy Directive No. 129.00 is attached to the Petition as Exhibit No. 9.
11. The Petitioner filed a document with the Commissioner on March 18, 2013, entitled "Supplemental Appeal of Magistrate Verdict." Said document is attached to the Petition as Exhibit No. 10. Said document features a DOC stamp, indicating that said document was rejected because the "issue (was) previously addressed, answered, and supp. rejected (sic)."
12. No copy of an appeal decision by the Respondent Warden is attached to the Petition, nor does any such document appear anywhere in the court file.
13. The Petitioner filed a grievance on March 26, 2013, arguing that MOCC Case No. MOC-13-0001-G and Case No. MOC-13-0002-G should be expunged from his record because the Respondent Warden failed to answer the Petitioner's appeal within thirty (30) days as required by DOC Policy Directive No. 325, Section 7.01 (b)(2). Said grievance was accepted by MOCC and denied. The reason for the denial was that the correctional officer was without authority to grant the requested relief. The Respondent Warden denied the Petitioner's appeal of said grievance on April 8, 2013, for the reason that "(disciplinary) appeals are not allowed through grievance procedure." The Petitioner then appealed the Respondent Warden's decision to the Commissioner, who affirmed the Respondent Warden's decision and denied said grievance. A copy of said

grievance, also containing said appeal decisions, is attached to the Petition as Exhibit No. 11.

14. The Petitioner raises the following grounds for relief in the Petition:
 - a) "The Petitioner's Procedural and Substantive Due Process Right's (sic) Were Denied (and) Violated With Respect (to the) Disposition Finding the Petitioner Guilty of Rape/Sexual Assault/Sexual Abuse and Sexual Acts;"
 - b) "The Petitioners (sic) Procedural and Substantive Due Process Rights Were Denied (and) Violated With Respect (to the) Adoption (of the) Adverse Findings (and) Decisions (of the) Magistrate (by the) Respondent (and the) WV DOC Commissioner Jim Rubenstein."

15. In support of the aforementioned grounds for relief, the Petitioner, in part, claims the following: the hearing officer's refusal to permit the Petitioner to call the other accused inmates as witnesses at the administrative disciplinary hearing; Officer Taylor did not work on December 21, 2013; there is testimony by Officer Taylor which would have been favorable to the Petitioner and was not reflected in the hearing report; Officer Hinte did not testify at the administrative disciplinary hearing; and the Petitioner was denied an effective administrative appeal.

CONCLUSIONS OF LAW

1. Venue and jurisdiction are appropriately in the Circuit Court of Fayette County.

2. The Petitioner has exhausted all administrative remedies, as required by West Virginia Code § 25-1A-2(a).
3. The Court notes that all issues concerning the administrative appeal process raised in the Petition were previously addressed in an Order entered July 25, 2013, in Fayette County Civil Action No. 13-C-103-H. In said Order, the Court wrote as follows in Finding of Fact No. 10:

Paragraph Seven of the "Statement of Facts" contained in the Respondent Warden's Response reads, in part, as follows:

Where the inmate has appealed to the Commissioner and the Commissioner is in receipt of all the documents necessary to evaluate the claims of an inmate on appeal, the Commissioner (as is done in the inmate grievance process) may treat the lack of an answer as an "unfavorable" answer and proceed to address the appeal on its merits or de novo rather than remand the matter back to the Warden for an answer to the appeal and wait for a second appeal from the inmate.

4. The Commissioner, in the case sub judice, apparently considered the Respondent Warden's lack of a written answer to the Petitioner's appeal as an unfavorable answer to said appeal and issued an independent appeal decision accordingly. The Petitioner's claim would be valid had the Commissioner failed to consider the Respondent Warden's silence a denial and further failed to make

his own independent appeal decision. However, Since the Petitioner's administrative appeal received independent consideration from the Commissioner, who considered the Respondent Warden's silence an adverse appeal decision, this ground for relief is without merit.

5. The Supreme Court of Appeals of West Virginia has held as follows concerning administrative disciplinary proceedings in correctional facilities:

Due process requirements for prison disciplinary hearings are:

- a) Written notice to the inmate of the claimed violation;
- b) Disclosure to him of the evidence against him;
- c) Opportunity to be heard and to present witnesses and documentary evidence;
- d) The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- e) A neutral and detached hearing body;
- f) A written statement by the fact-finders of the evidence relied on and reasons for discipline; and
- g) The right to counsel if the state is represented by a lawyer. Syl. Pt. 1, Harrah v. Leverette, 165 W.Va. 665, 271 S.E.2d 322 (1980).

6. The hearing examiner had good cause not to permit Petitioner to call as witness the other two inmates accused of the aforementioned impermissible sexual conduct. The credibility of any testimony offered by said inmates would have been dubious at best under the aforementioned circumstances.
7. The hearing report shows that Officer Taylor testified that she did work on December 21, 2013, and the Petitioner offers only mere allegations to the contrary.
8. The Supreme Court has recognized that “[t]he maintenance of discipline in a jail is essential to the effective and proper operation of a penal system and is an executive function with which courts ordinarily will not interfere.” Syl. Pt. 2, Drake v. Airhart, 162 W.Va. 98, 245 S.E.2d 853 (1978). Also, the Supreme Court has held that “[p]rison officials are vested with wide discretion in disciplining prisoners committed to their custody [.]” Syl. Pt. 3, in part, Id.
9. The Court has previously written the following, said language having been quoted approvingly by the Supreme Court in a Memorandum Decision affirming a past Order of this Court:

Penal institution administrative disciplinary rules, regulations, procedures and the administration and enforcement thereof clearly do not rise to the same level of rights, proof, procedural due process and substantive due process as do criminal justice proceedings in judicial settings wherein innocence, guilt, or sentencing are determined.

In consideration of all of the aforementioned, the Court concludes that the Petitioner was denied neither procedural nor substantive due process of law during the course of his disciplinary proceedings. Peterson v. Ballard, 2012 WL 5990139 (2012).

10. The Petitioner offers nothing more than mere allegations concerning the issues raised concerning the testimony of Officer Taylor and Officer Hinte. A review of the aforementioned hearing report reveals that sufficient evidence existed to support a finding of guilt.
11. Nothing in the Petition demonstrates that the proceedings in the underlining administrative disciplinary case violated the above-quoted standards set forth by the Supreme Court in Harrah.
12. Clearly, no constitutional violation has occurred in the underlying administrative disciplinary case.
13. The Court also notes that, during the pendency of the aforementioned Civil Action No. 13-C-103-H, dismissed by the Court in an Order entered July 25, 2013, the Petitioner filed multiple lengthy pleadings which ultimately proved to be frivolous.
14. The Petitioner raises frivolous issues in the instant Petition, such as the claim that he lacked proper notice in violation of his right to due process because the aforementioned violation report used "military time" and not "civilian standard time." Any issues raised in the Petition not specifically addressed herein are

deemed without merit or frivolous, clearly failing to amount to violations of a Constitutional dimension, and do not require further consideration by the Court.

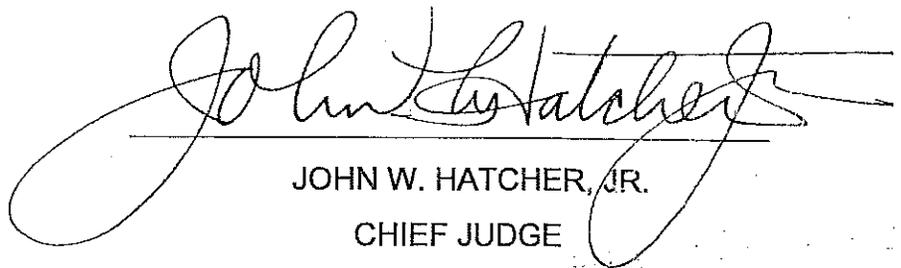
15. Initial review of the case sub judice reveals that that the Petitioner is not entitled to appointment of counsel under Rule 4.

Accordingly, it is ORDERED that the motion to appoint counsel be and the same is hereby DENIED.

It is further ORDERED that said civil action be and the same is hereby DISMISSED.

The Clerk shall, forthwith, mail an attested copy of this Order to the Petitioner, Inmate Jason E. Waybright, One Mountainside Way, Mount Olive, West Virginia 25185 and David Ballard, Warden Mount Olive Correctional Facility, One Mountainside Way, Mount Olive, West Virginia 25185.

ENTERED this 1st day of August, 2013.



JOHN W. HATCHER, JR.
CHIEF JUDGE

A TRUE COPY of an order entered
01 August 2013
Teste: David E. Wright
Circuit Clerk Fayette County, WV