IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WES JOSEPH PERTGEN,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

No. 81409-COA

FILED

APR 23 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Wes Joseph Pertgen appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus challenging prison disciplinary proceedings. Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

In his petition, filed on July 8, 2019, Pertgen claimed the disciplinary proceedings, which resulted in his forfeiture of 30 days of statutory good time credits, violated his due process rights. When a prison disciplinary hearing results in the loss of statutory good time credits, the United States Supreme Court has held that minimal due process rights entitle a prisoner to (1) advance written notice of the charges, (2) a qualified opportunity to call witnesses and present evidence, and (3) a written statement by the fact finders of the evidence relied upon. *Wolff v. McDonnell*, 418 U.S. 539, 563-69 (1974). In addition, some evidence must support the disciplinary hearing officer's decision. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985). In reviewing a claim based on insufficiency of the evidence, this court must determine whether there is any evidence in the record to support the disciplinary hearing officer's conclusion. *Id.* at 455-56.

First, Pertgen claimed the service of various documents and hearings were delayed. There is no cause of action for instances where regulatory time requirements are not met. *See* AR 707.1(1)(C); *Sandin v. Conner*, 515 U.S. 472, 481-82 (1995) (disapproving cases that focused on regulations' mandatory language in determining whether due process rights were implicated). We therefore conclude the district court did not err by denying this claim.

Second, Pertgen claimed he was not allowed to call witnesses. Pertgen requested and was denied the opportunity to call two inmates as witnesses.[1] Pertgen has not alleged facts that demonstrate this curtailed any right of his. *See Wolff*, 418 U.S. at 566 ("Prison officials must have the necessary discretion . . . to limit access to other inmates."). Pertgen's claim that he requested the opportunity to call NDOC's charging employee as a witness is not supported by the record before this court. And while a charging employee must be permitted to testify at the disciplinary hearing, AR 707.1(3)(C)(10)(d), Pertgen did not have a right to cross-examine the employee, *see* AR 707.1(3)(C)(10)(g); *Wolff*, 418 U.S. at 567-68 (discussing confrontation and cross-examination rights and concluding they are not generally required in the context of prison disciplinary proceedings). Because Pertgen did not have the right to confront or cross-examine the inmates and charging employee, we conclude the district court did not err by denying this claim.

Third, Pertgen claimed he was not allowed to see or examine any investigation or incident report. Inmates' due process rights do not extend to examining anything beyond the notice of charges. Moreover,

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[1]The Nevada Department of Corrections (NDOC) denied the request because the inmates were considered victims.

Pertgen merely speculated that additional reports must exist. We therefore conclude the district court did not err by denying this claim.

Fourth, Pertgen claimed the notice of charges was insufficient because it did not list every injury the victim received. He also speculated that the percipient witness may have suffered self-inflicted injuries, and he complained that the notice of charges failed to include this information. The notice of charges must merely apprise the inmate of the charges "to enable him to marshal the facts and prepare a defense." *Wolff*, 418 U.S. at 564. Nothing requires it to contain every detail of the alleged violation. Here, the notice of charges apprised Pertgen he was charged with MJ3 (battery), the specific allegations of the inmate-victim of Pertgen's attack, and the search for the stabbing weapon used in the attack. The notice of charges met the requirements for due process, and we therefore conclude the district court did not err by denying this claim.

Fifth, Pertgen claimed the recitation of the evidence used to support the disciplinary conviction was inadequate and insufficient. The summary of disciplinary hearing stated that the evidence relied on was contained in the notice of charges, which in turn detailed Pertgen's attack on the victim. This satisfied the requirement that "some evidence" support the disciplinary hearing committee's decision. We therefore conclude the district court did not err by denying this claim.

Sixth, Pertgen claimed the disciplinary hearing committee discussed his prior disciplinary proceedings and improperly used them against him. Pertgen has not demonstrated that any discussion about his prior disciplinary proceedings was improper. Moreover, the summary of disciplinary hearing indicates that the disciplinary hearing committee

relied only on the notice of charges in finding Pertgen guilty. We therefore conclude the district court did not err by denying this claim.

Pertgen also claimed the disciplinary hearing violated the Double Jeopardy Clause because the hearing had to be paused after 30 minutes and restarted when it was discovered that the recording equipment was not recording. "The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012). Pertgen failed to allege facts that would implicate the Double Jeopardy Clause. We therefore conclude the district court did not err by denying this claim.

On appeal, Pertgen argues the district court erred by denying his petition without conducting an evidentiary hearing. As indicated in the discussions above, Pertgen failed to allege specific facts that are not belied by the record and, if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). We therefore conclude the district court did not err by denying Pertgen's petition without conducting an evidentiary hearing.

Pertgen also argues he was denied the opportunity to adequately present and argue his postconviction petition, he was not given a copy of the State's proposed order, and he did not receive a file-stamped copy of his proposed order granting relief. Pertgen does not indicate what additional argument he would have presented to the district court, what objections he would have made to the State's proposed order, or why he needed a file-stamped copy of his proposed order. Accordingly, even if these claims constituted error, he failed to demonstrate they affected his

substantial rights. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). We therefore conclude Pertgen is not entitled to relief based on these claims.

Finally, Pertgen argues the district court erred by not ruling on his objection to fabrication of the audio tape of the disciplinary hearing. Pertgen neither sought nor was granted permission to file this document. Accordingly, it was not properly before the district court, *see* NRS 34.750(5), and we conclude the district court did not err by declining to consider the pleading.

Having concluded Pertgen is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Gary Fairman, District Judge
Wes Joseph Pertgen
Attorney General/Carson City
Attorney General/Ely
White Pine County Clerk