

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT A. FARRAR, JR.,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 41334

FILED

MAY 11 2004

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus.

On November 13, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus raising claims related to a prison disciplinary hearing. The State opposed the petition. Appellant filed a reply. On March 5, 2003, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant claimed, among other things, that the hearing officer was not impartial because the hearing officer made statements prior to the hearing that he did not like appellant. The hearing officer candidly acknowledged at the hearing that he had stated words to the effect that "he would bury [appellant] so far in the hole that they would have to pump in daylight," and "[appellant] was this close [apparently pinching his fingers together] to going to segregation." These statements occurred after the disciplinary incident, but prior to the disciplinary hearing. The hearing officer, however, stated at the hearing that he would not be biased and would only consider the facts in this case.

The hearing officer further stated that he felt that he could be "totally impartial." At the conclusion of the hearing, appellant was found guilty of a major violation, and the punishment set by the hearing officer included 365 days in disciplinary segregation, 90 days loss of canteen, phone and appliance privileges, and referral for forfeiture of statutory good time credits. Appellant ultimately forfeited 120 good time credits. Appellant claimed, among other things, that the hearing officer was not impartial as required, that this violated his due process rights, and that his good time credits should be restored.¹

The United States Supreme Court has recognized that minimal due process requires an impartial decision maker.² A prison disciplinary hearing that presented "a hazard of arbitrary decisionmaking" would violate due process.³ The Nevada Code of Penal Discipline sets forth a definition of impartiality:

[I]mpartial means that the person did not witness or investigate the alleged violation, was not a victim of the alleged violation, did not participate

¹To the extent that appellant challenged his placement in disciplinary segregation and the loss of privileges, appellant's challenge was not cognizable in a habeas corpus petition. See Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984); see also Sandin v. Conner, 515 U.S. 472, 486 (1995) (holding that liberty interests protected by the Due Process Clause will generally be limited to freedom from restraint which imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life).

²Wolff v. McDonnell, 418 U.S. 539, 571 (1974).

³Id.

in the writing of the notice of charges, or did not sit as a member of the classification committee which authorized pre-disciplinary detention for the same offense. . . . An employee is not necessarily impartial based on factors such as: general knowledge of the case through the "grapevine", the employee has been the subject of grievances and lawsuits brought by the inmate, the inmate has had a previous unpleasant encounter with the employee, the employee has knowledge of the case by virtue of having heard the violations of others involved in the same incident.⁴

The district court concluded that the hearing officer's statement alone would not establish bias and that the audiotape of the hearing showed that the hearing officer went out of his way to accommodate appellant to give him a fair hearing. However, this court's review of the record on appeal did not tend to support the district court's conclusion. Therefore, this court directed the State to show cause why this matter should not be remanded to the district court.

The State argues that this matter should not be remanded to the district court. The State argues that the record indicates that the hearing was conducted in an impartial manner. The State notes that the recording of the prison disciplinary hearing demonstrates that appellant was provided an opportunity to present a defense and that some evidence was presented to support the finding of guilt by the hearing officer. The

⁴Nev. Code of Penal Discipline I(E)(15).

State further argues that knowledge of a matter should not impair a prison official's ability to act impartially.

Based upon our review of all the materials presented and arguments made before this court, we conclude that the record does not support the district court's determination that appellant's claim lacked merit.⁵ Although this court is reluctant to interfere with the day-to-day administration of prisons, a prisoner possesses minimal due process rights that may be infringed upon when the actions of the prison implicate a prisoner's liberty interest—in this case the loss of good time credits. We agree with the State that knowledge of a matter by a prison official does not cause that official to lose the ability to act impartially. However, a disciplinary hearing conducted before a single hearing officer, who previously stated that he would "bury" the prisoner in the "hole," presents a hazard of arbitrary decisionmaking in violation of a prisoner's due process rights. The fact that the hearing officer allowed appellant to present witnesses and make statements in his defense does not alter the inherent hazard in having a hearing before a single officer that has made a statement prior to any hearing on the issue, in relation to the same incident, indicating that appellant should be punished for the same incident. Finally, the fact that the record reveals that some evidence

⁵In light of this court's conclusion that appellant's due process right to an impartial decision maker was violated in the instant case, this court declines to consider the remainder of the claims raised in appellant's habeas corpus petition.

supported the decision of the hearing officer is irrelevant to appellant's due process claim.⁶

Accordingly, we conclude that this matter shall be remanded to the district court. The district court shall issue an order directing the Department of Corrections to restore appellant's credits—one hundred and twenty good time credits. The Department of Corrections may conduct a new disciplinary hearing that comports with the requirements of due process.⁷ Having reviewed the record on appeal and for the reasons set


⁶See Edwards v. Balisok, 520 U.S. 641, 647-48 (1997) (recognizing that the some evidence standard for a finding of guilt was a factor in addition to due process requirements).


⁷On April 14, 2004, this court received a proper person motion for leave to file pleadings and a document labeled "judicial notice," and on April 28, 2004, this court received a proper person reply. Cause appearing, we direct the clerk of this court to file appellant's motion, "judicial notice" document and reply. In his "judicial notice" document, appellant complains that he will not be able to adequately defend himself because of the time that has passed from the incident, his transfer to another institution, and his loss of supporting documents. We have considered appellant's "judicial notice" document, and we conclude that the relief requested is not warranted. There is no due process requirement preventing the Department of Corrections from conducting a new prison disciplinary hearing. See Wolff, 418 U.S. 539. The Code provides that the receiving institution (the institution to which appellant was transferred) shall complete the prison disciplinary process if transfer preceded the completion of the prison disciplinary process. Nev. Code of Penal Discipline, 1(F). The chairman of the disciplinary committee for the sending institution, however, is responsible for transfer of the pending case. Id. The prison disciplinary hearing officer is permitted to take testimony by telephone if the telephone has the capability for all present to hear the questions and answers. Nev. Code of Penal Discipline

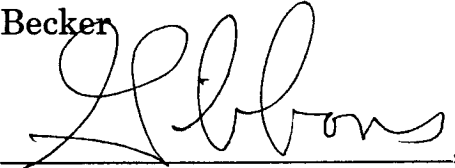
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forth above, we conclude that oral argument is unwarranted in this matter.⁸ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 C.J.
Shearing

 J.
Becker

 J.
Gibbons

cc: Hon. Steve L. Dobrescu, District Judge
Albert A. Farrar Jr.
Attorney General Brian Sandoval/Ely
White Pine County Clerk

... continued

I(C)(3)(g). Appellant should be provided with a copy of a transcript for the first prison disciplinary hearing and any supporting documents related to this matter if they exist. We conclude that appellant is only entitled to the relief described herein.

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).