

STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
No. 22-CV-554

KENNETH BARBER,  
Petitioner,

v.

NICHOLAS DEML,  
Respondent.

RULING ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT

The Department of Corrections administratively charged and convicted inmate Kenneth Barber with a major disciplinary infraction for attempting to bring into a correctional facility contraband (cigarettes and drugs) hidden in a pair of shoes. In this appeal Mr. Barber seeks Rule 75 review of that decision by this Court. Presently before the Court is Barber's motion for summary judgment. Barber argues that he should not have been convicted of the infraction because DOC failed to meet its burden of proving that he asked for the shoes or contraband to be brought into the prison. Barber further argues that the DOC hearing officer violated his right to due process by prohibiting him from listening to evidence (recordings of two telephone conferences) that was used against him at the disciplinary hearing. The State opposes the motion and contends that there are factual issues in dispute which preclude the issuance of a summary judgment. Because we conclude that the DOC hearing officer violated Barber's due process right to hear evidence that was used against him at the hearing, the Court does not need to address Barber's argument that the evidence was insufficient to convict him.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "A vague allegation that facts are contested, without more, is insufficient to withstand summary judgment." Lawson v. Halpern-Reiss, 2019 VT 38, ¶22, 210 Vt. 224 (citing Baldwin v. Upper Valley Servs., Inc., 162 Vt. 51, 55 (1994) ("Opposing allegations must have sufficient support in specific facts to create a genuine issue of material fact.")). "Additionally, when reviewing administrative action by the DOC under V.R.C.P. 75, we will not interfere with the DOC's determinations absent a showing that the DOC clearly and arbitrarily abused its authority." King v. Gorczyk 2003 VT 34, ¶7, 175 Vt. 220.

The facts material to the due process issue are not genuinely in dispute. On November 3, 2021, Barber submitted a "Special Package Request Form" to his caseworker, asking for the following allowable clothing items: underwear, sweatpants, socks, t-shirts, sweater-shirts, gym shorts, and a coat. The request was approved that same day. On

November 6<sup>th</sup> Barber's girlfriend dropped a package off at the prison. The package contained, among other things, a pair of shoes, which was not an item that Barber had included on his "Special Package Request Form." An officer searched the shoes and found marijuana, tobacco, and orange suboxone strips hidden in the insoles. Barber was charged with violating Major Disciplinary Rule A-19, which forbade the attempted introduction of "any alcohol, narcotics, depressants, stimulants, hallucinogenic substances or marijuana ... not prescribed for the individual by the medical providers."

In order to obtain a conviction, DOC needed to present evidence at least showing that Barber "knew in advance that the [contraband] would be brought to him ... or that he invited, encouraged, or in any way participated in the attempt to introduce it." Cady v. Pallito, 2015 WL 4771474 (Vt. 2015) (mem.). To meet this burden, Correctional Officer Goodrich reviewed Barber's telephone log and found two recorded telephone conversations that Barber had had on November 4<sup>th</sup> with his father, with whom Barber had been staying prior to his incarceration. During one of the calls with his father, Barber explained where the clothing items he wanted dropped off at the prison could be found in the house, and Barber also informed his father that there was an envelope containing suboxone strips in the room where Barber had been staying. Officer Goodrich wrote up an incident report, in which he quoted statements purportedly made by Barber and his father during the telephone calls. Officer Goodrich added the following comment to his report: "In my experience I believe this is a suggestion that at one time II/Barber's father was involved in regular introductions of contraband using clothing and now I/I Barber was asking to begin planning regular introductions again." Goodrich's incident report was included among the materials charging Barber with violating Rule A-19.

Barber vehemently disputed Officer Goodrich's summary of the November 4 phone calls with his father and the inferences drawn by the officer. A hearing on the alleged violation was held on November 18, 2021. At the start of the hearing, Barber's hearing assistant requested that the recordings of Barber's November 4<sup>th</sup> phone calls with his father be placed into the record. The hearing officer denied this request, saying, "it is not something we offer due to security reasons." Barber pointed out that he was asking to hear a recording of his own phone call. The hearing officer replied that he would listen to the audio outside of Barber's presence. The hearing officer did not explain what security concerns justified this decision.

After listening to the telephone recordings, the hearing officer found Barber guilty of the violation and issued the following findings:

During phone calls the statements in COII Goodrich's report are accurate. You began telling your father a list of clothing to pack then stated that you had Suboxone too. Shoes came in your special package and you did not deny that they were in the property and agreed that COI Boudreau did take the shoes in during the property drop. During the phone calls your father says "putting tread on the shoes" and the reported contraband is found between the tread and the sole of your shoes.

Barber was sentenced to serve 5 days in disciplinary segregation and the loss of 30 days of phone privileges with his father. Barber appealed the disciplinary conviction on November 25, 2021. The superintendent denied Barber's appeal on December 1, 2021.

When an inmate is charged with a disciplinary offence which might involve the imposition of disciplinary segregation, the inmate is entitled to notice of the charge and an opportunity to be heard, including the right to confront the person bringing the charge and to offer evidence on his or her own behalf. 28 V.S.A. § 852(b). DOC's administrative rules provide:

Offenders have the opportunity to question witnesses and review documentary evidence provided such is not hazardous to the institutional security or safety of individuals or deals with confidential information under Department of Corrections Policy 266, Security, Privacy Confidentiality of Offender Information, or the provision for the use of confidential information by case law.

Vt. Admin. Code 12-8-13:2 ("Hearings for Major A & B Violations"), § g. Moreover, the Vermont Supreme Court has made it clear that "due process requires prison authorities to prove inmate disciplinary infractions by a preponderance of the evidence." LaFaso v. Patrissi, 161 Vt. 46, 51 (1993).

Here, DOC offered into evidence an incident report containing Officer Goodrich's summary of Barber's November 4<sup>th</sup> phone calls with his father and the officer's inferences from what was purportedly said in those calls. It is also undisputed that Barber vehemently disputed Officer Goodrich's summary of Barber's November 4 phone calls with his father and the inferences Goodrich drew from those calls. It is further undisputed that, at the start of the hearing Barber requested that the recordings of the phone calls be placed into the record, but that the hearing officer denied the request, saying that he would listen to the recordings himself outside of Barber's presence. The hearing officer then returned to the hearing and announced that Goodrich's report was accurate and that the calls proved that Barber had committed the offense charged. Barber clearly was denied his due process rights to confront the person bringing the charge against him, to offer evidence on his own behalf, and "to review documentary evidence provided such is not hazardous to the institutional security or safety of individuals or deals with confidential information...."

The only reason given by the hearing officer for denying Barber's request for the recordings was that "it is not something we offer due to security reasons." The hearing officer offered no explanation as to how allowing Barber to hear and comment on recordings of conversations that he had been a party to could possibly be hazardous to the security of the facility or the safety of any individual. DOC has not come forward with any rule, directive or policy that justifies the hearing officer's decision to deny Barber's request for the recordings.

DOC argues that Barber cannot show that he was prejudiced by the hearing officer's denial of his request. See State v. Mott, 166 Vt. 188, 193 (1997) ("Due process claims must be resolved on the facts before the court, and we must look to whether the individual asserting a denial of due process can show prejudice from the asserted denial."). In light of the undisputed facts, however, Barber clearly was prejudiced as a matter of law. DOC offered into evidence a report by Officer Goodrich, purportedly summarizing the contents of the recordings and expressing the inferences that he drew from what was purportedly said. DOC did this in order to meet its burden of proving an essential element of the charge,

namely, that Barber had known in advance that the contraband would be brought to him or that he had invited, encouraged, or in any way participated in the attempt to introduce it. Barber vehemently disputed Goodrich's summary and inferences and requested the ability to listen to the recordings himself. If his request had been granted, Barber would have had the opportunity to point out portions of the recordings that may have supported his defense or that may have contradicted the adverse inferences that DOC was seeing to draw from the recordings. The hearing officer denied that request, however, and then listened to the recordings himself outside of Barber's presence. Proceeding in that manner denied Barber access to, and the ability to comment on evidence that was critical to the case.

Because Barber was denied his due process rights, his conviction must be reversed, and another hearing must be held before a new hearing officer. Hallsmith v. City of Montpelier, 2015 VT 83, 199 Vt. 488 (affirming trial court's ruling that City's failure to hold a proper due process hearing required remanding case back to City); Hanson v. Parissi, 154 Vt. 389, 391-92 (1990) (remand appropriate if based on insufficient findings rather than insufficiency of the evidence). *See, also*, Bauer v. State, Dep't of Corr., 193 P.3d 1180, 1184 (Alaska, 2008); *and* Miller v. Iowa Dist. Court for Jones Cty., 603 NW2d 86, 90 (Iowa, 1999) (both remanding for new hearing in light of deficiencies associated with first disciplinary hearing).

#### Order

For the foregoing reasons, Kenneth Barber's motion for summary judgment is granted, and his administrative conviction is reversed, on the grounds that he was denied his rights to procedural due process and the denial was prejudicial. This case is remanded to the DOC for a new hearing before a different hearing officer.

SO ORDERED this 14<sup>th</sup> day of October, 2022.



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Robert A. Mello  
Superior Judge