VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 236-4-12 Wrcv

Gordon Campbell
Plaintiff

v.

Andrew Pallito, Comm.
Defendant

DECISION ON MOTION TO DISMISS

The defendant has filed a motion to dismiss this V.R.C.P. 75 action filed by plaintiff on the basis that plaintiff has no protected liberty interest in having a disciplinary report (DR) removed from his record.

The factual background is that plaintiff, an inmate in Department of Corrections (DOC) custody, received a Major A12 Disciplinary Report for allegedly lying about his ownership of a CPAP machine prescribed by a doctor and permitted into the correctional facility for plaintiff's use. DOC apparently believed plaintiff did not own the machine and removed it from him. Plaintiff asserted he owned the machine and DOC charged him with a Major A DR. Following a hearing, at which plaintiff testified and again asserted his ownership, DOC found plaintiff guilty of the violation.

The Court lacks a complete factual background at this stage of the proceedings. It is unclear whether plaintiff has exhausted his administrative remedies, and if so, when review of his DR conviction took place. It is asserted by plaintiff that after the DR became final it was learned by DOC that plaintiff had been truthful about his ownership of the CPAP machine all along. Plaintiff asserts DOC, although sending him a letter in 2012 acknowledging that he was correct about his ownership of the CPAP machine, which is not before the court, refuses to remove the DR from his record. Thus, according to plaintiff, DOC is refusing to remove a DR which they acknowledge had no factual basis from his record.

DOC's pleading does not specifically address whether plaintiff is factually correct. Rather, the DOC asserts that since the removal of a DR from an inmate's record does not involve a protected liberty interest, plaintiff is not entitled to procedural due process as a matter of constitutional law. Thus, the DOC appears to be asserting that no matter how flawed the imposition of a DR may be, there is no judicial review available since no protected liberty interest is at stake.

In discussing the protected liberty interest issue, DOC cites to an unpublished Vermont Supreme Court opinion and several trial court opinions. The Supreme Court opinion, *Ladd v. Plank*, Docket No. 2007-164 (Nov. 16, 2007)(mem.), involved a case where the inmate had brought a claim as a result of being placed in segregation for three days on for a DR which the DOC had later expunged. The Court stated:

> We agree with defendants that because plaintiff's disciplinary conviction was expunged from his record, his complaint essentially seeks damages solely for his three days of confinement in the prison's segregation unit. We conclude that the trial court properly dismissed plaintiff's complaint here.

Thus, what was at issue in *Ladd* was a damages claim for three days of confinement, not whether there is a liberty interest implicated by an attempt to have a DR expunged.

DOC insists that because the consequences of a DR on an inmate's record implicate no protected liberty interest, there can be no review of the DR procedures since procedural due process concerns do not apply. They recite that the granting of furlough is entirely discretionary with the Commissioner (*Parker v. Gorczyk*, 170 Vt. 263 (1999)); that there is no interest in being placed at work camp (*Moody v. Daggett*, 429 U.S. 78 (1976)); that there is no liberty interest for an inmate to earn good time credits (*Conway v. Gorczyk*, 171 Vt. 374 (2000)), and that decisions concerning prison administration are best left to prison administrators (*Nash v. Coxon*, 155 Vt. 336 (1990)).

Thus the DOC appears to contend that the role of the judiciary with respect to DR matters is confined to the issue of whether there was some evidence to support the DR determination and, if so, the inmate must lose. It is true that appellate review of Rule 75 administrative decisions is to determine if there is any evidence in the record upon which the administrative body could have reached its decision. *Herring v. Gorczyk*, 173 Vt. 240 (2001). An inmate accused of a DR cannot be convicted in the administrative hearing unless his guilt is established by a preponderance of the evidence. *LaFaso v. Patrissi*, 161 Vt. 46 (1993). The "some evidence" standard ensures that the judicial review does not result in the substitution of the judgment of the Court for that of the administrative hearing body. *Richards v. Pallito*, Docket No. 514-8-11 Rdcv (Jan. 31, 2012).

Based upon the pleadings before the Court, it appears the DOC argues for a rigid, or perhaps wooden, application of the "some evidence" standard which would have the Court ignore the later establishment that the evidence relied upon by the DOC in finding the DR was false. In the DOC's view, the existence of "some evidence" at the time of the hearing is the end of the judicial inquiry, even if the evidence is later acknowledged by the DOC to be wrong.

There is nothing before the Court to enable it to determine the consideration given by the DOC to its later realization that plaintiff had not lied as he was convicted of doing. In the context of criminal law it is well established that some consideration should be given to newly discovered evidence. *State v. Bruno*, 212 VT 79. "To succeed on a motion for a new trial based on newly discovered evidence, defendant must prove each of the following elements: (1) new

evidence would probably change the result on retrial; (2) the evidence was discovered only subsequent to trial; (3) the evidence could not have been discovered earlier through the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching." 2012 VT 79, ¶ 9. In the context of a criminal conviction, of course, there is no concern about the absence of a protected liberty interest.

The Vermont Supreme Court has been less exacting in its consideration of procedural due process protections than its Federal counterpart. Under the Vermont Constitution, the due process analysis is made on a fact-sensitive examination of the particular circumstances involved. *Parker v. Gorczyk*, 170 Vt. 263 (1999). If the circumstances here prove to be that the DR on plaintiff's corrections record is admittedly improper, the information supporting it is admittedly wrong, and the DOC gave no consideration to the after-learned incorrectness of its decision, this court is hard-pressed to believe that plaintiff is not entitled to relief, or even to any review. As Justice Dooley has noted, "the price of due process is small, while the gain in protection against arbitrary action is great." *Conway v. Cumming*, 161 Vt. 113, 126 (1993)(dissenting).

Whatever minimal continuing effect the result of a DR on an inmate's record may have, where it is not disputed that the DR conviction is based upon discredited information, that impact outweighs the effort required to expunge the DR conviction. Deference is to be paid to the difficult job prison officials have in running institutions and the Courts should give liberal application to the discretion of the DOC. However, the Court remains convinced that whatever virtue comes from being liberal, it is less than that which comes from being fair-minded. *Orvis v. Hutchins*, 123 Vt. 18, 25 (1962)(Hurlburd, dissenting).

Motions to dismiss are not favored, and are rarely granted. *Gilman v. Maine Mutual Fire Ins. Co.*, 2003 VT 55, ¶ 14, 175 Vt. 554 (mem.). The purpose of a motion to dismiss is to test the law of the case, not the facts which underlie the complaint. *Kane v. Lamothe*, 2007 VT 91, ¶ 14, 182 Vt. 241. In considering a motion to dismiss, the court assumes all factual allegations in the complaint to be true and gives the benefit of all reasonable inferences to the non-moving party. *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999). A motion to dismiss should not be granted unless it is beyond doubt that there exist no facts or circumstances which would entitle the plaintiff to relief. *Assoc. of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 446–47 (1985).

Based upon the record before the Court at this time, it can not be said that there are no facts and circumstances under which plaintiff would be entitled to relief. The Motion to Dismiss is, therefore, DENIED.

Dated at Woodstock this 30th day of November, 2012.

Harold E. Eaton, Jr.
Civil Division Judge

FILED
DEC - 4 2012
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