STATE OF VERMONT
CALEDONIA COUNTY, SS

PAUL KENNEDY Plaintiff v. ROBERT HOFMANN Commissioner, Vermont Department of Corrections, Defendant	SUPERIOR COURT Docket No. 243-9-07 Cacv FILED JUL 15 2008 CALEDONIA COURTS

Decision on:
Cross-Motions for Summary Judgment

This is a complaint for review of governmental action pursuant to V.R.C.P. 75. Plaintiff Paul Kennedy is represented by Dawn Seibert, Esq., of the Prisoners' Rights Office. Defendant Robert Hofmann is represented by Emily A. Carr, Esq., of the Office of the Attorney General.

By his Complaint, filed *pro se* September 21, 2007, Plaintiff seeks expunction of a "Major A#9 DR," a disciplinary penalty imposed upon him consequent to a determination that he possessed and attempted to introduce into the St. Johnsbury/Northeast Regional Correctional Facility a bag of cocaine, which cocaine was discovered and confiscated from him in the "135 strip room" of the facility on June 18, 2007. The Complaint alleges that the Department of Corrections (DOC) failed to comply with its own policies respecting (1) the time a DR report is to be completed; (2) the disposition of DR hearings[1]; (3) chain-of-custody documentation; and (4) timely response to an inmate appeal.[2] See Plaintiff's Affidavit. For purposes of procedural order, the court construes Plaintiff's Complaint as alleging that Defendant abused his discretion when he, through the facility superintendent, upheld the Major A#9 violation notwithstanding the alleged procedural defects and the alleged absence of adequate factual support.

[1] Although it is not a significant issue in the instant motions, the court notes that Plaintiff's contention that he was not supplied the disposition, or that it was somehow inadequate, is at variance with the "Disciplinary Hearing Report Form" in the record, which appears to the court clear and complete, and which was signed by the DOC hearing officer on July 17, 2007. See Defendant's Attachment E.

[2] Although it is not a significant issue in the instant motions, the court notes that Plaintiff's contention that "the superintendent never replied to the plaintiff[']s appeal of the outcome of the DR hearing," is at variance with the "Inmate Disciplinary Appeal Form" in the record, which shows that Mr. Kennedy filed his appeal July 18, 2007 and the superintendent denied the appeal on July 26, 2007. See Defendant's Attachment E-5.

Plaintiff moved for summary judgment on March 3, 2008. On April 7, 2008, Defendant filed opposition to Plaintiff's motion together with a cross-motion for summary judgment.

I.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. *Price v. Leland*, 149 Vt. 518 (1988). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which he or she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251 (1989).

In addressing summary judgment motions, the court derives the undisputed facts from the parties' statements of fact submitted pursuant to V.R.C.P. 56(c)(2) and the documents cited in those statements. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413, 427. The court need not consider any facts omitted from the Rule 56(c)(2) statements, nor any facts unsupported by specific citation to the record; however, the court may address a summary judgment motion based on nonconforming documents. *State v. Great Northeast Productions, Inc.*, 2008 VT 13, ¶ 6, 19 Vt.L.W. 37.

II.

The undisputed facts are as follows. On June 18, 2007, Plaintiff was brought to the Northeast Regional Correctional Facility. As he prepared to be searched, Plaintiff was observed to throw a pair of socks into the corner of the room. Correctional Officer Crocker retrieved the socks and found a bag of white powder in one.

Correctional Officer Crocker passed the bag to Correctional Officer Bowen, who submitted a testing sample to Operations Supervisor Scott Shafer. Bowen retained the substance, exclusive of the sample. Shafer applied a chemical test to the sample and concluded that the substance was cocaine. Bowen then sealed the cocaine in an evidence bag, completed a chain-of-custody form on the bag, and put it in the facility's safe. The cocaine was then surrendered to St. Johnsbury Police Officer Kristen Maurice.

DOC's evidence policies call for the use of a "Contraband/Criminal Physical Tag and Chain of Custody" to track evidence. Corrections officials did not use the department's form, but instead used a chain-of-custody form attached to their evidence bags. This form was not identical to the DOC form, but it did indicate what the evidence was, who it was collected from, who collected it, when, and who had custody since.

At a disciplinary hearing held July 16, 2007, a DOC hearing officer concluded that Plaintiff was guilty, by a preponderance of the evidence, of a Major A#9 violation, a violation for "possession, introduction or use" of narcotics. Directive 410.01, App. 1. Mr. Kennedy appealed, and the facility superintendent denied the appeal.

DOC's contraband directive, Directive 408, requires that:

> Any time contraband [including drugs] is stored, handled, inventoried, removed or returned from the secure storage area, the activity shall be noted on the *Contraband/Criminal Physical Tag and Chain of Custody Form, Attachment 1* and in the contraband log to include the following data: (a) employee's name, (b) date and time, (c) reason, and (d) any other relevant information.

Id. ¶ 4, Chain of Custody.

The chain of custody documentation supplied to Plaintiff in discovery shows that, as Plaintiff has alleged, DOC officials did not complete the "Contraband/Criminal Physical Tag and Chain of Custody Form," but instead used forms provided with, and attached to, the evidence bags in which they placed the cocaine. The bag forms show the date and time the evidence was collected; they show that Correctional Officer Crocker collected it; they show that it was collected from Paul Kennedy; they show that it is thought to be cocaine; and they show to and from whom custody was transferred and on what date. Had DOC officials used the Contraband/Criminal Physical Tag and Chain of Custody Form, they would have been required to include exactly the same information, but they also would have had to specify the location where the evidence was found or confiscated.

II.

On a V.R.C.P. 75 challenge to the determination of a DOC hearing officer, the question before the superior court becomes whether some evidence supported the hearing officer's determination. *LaFaso v. Patrissi*, 161 Vt. 46, 49-50 (1993). *LaFaso* held that "due process requires prison authorities to prove inmate disciplinary infractions by a preponderance of the evidence," but nonetheless defended the idea that "the appropriate standard for judicial review of the actions of prison authorities" is whether they have "some basis in fact." *Id.* (applying *Superintendent, Mass. Correctional Inst. v. Hill*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985)).

Government agencies are, as a general rule, bound to those rules they create for themselves; however, not every deviation from internal rules or directives impinges due process—"substantial compliance," not "strict and literal compliance" is what is requirerd. *Rutz v. Essex Junction Prudential Committee*, 142 Vt. 400, 406 (1983) (context of school discipline). Due process is violated where an agency fails to achieve "substantial compliance" and a risk of prejudice results. *Id.* The undisputed facts here show that the deviation from DOC chain-of-custody policy was formal and technical, or "strict and literal" only; Plaintiff makes no claim that something about the forms attached to the evidence bags renders them less reliable than the DOC form or otherwise

prejudices him. If the goal is to prevent and expose tampering or fraud, it would stand to reason that the bag-attached forms are, if anything, superior to the DOC form, by virtue of their original physical attachment to the bag and the evidence. Further, one of the forms appears to come from the St. Johnsbury Police Department, to whom the cocaine ultimately was surrendered. DOC does not by directive—and does not pretend to—dictate evidence collection procedures to local law enforcement.

More important than those conjectures, though, is that the information is the same among forms, rendering them substantially identical. Accepting as true Plaintiff's motion argument that "The chain of custody evidence must show 'a continuous, physical nexus between the source of the substance in issue, the testing or analytical process to which the substance is subjected, and the proponent of the substance as real evidence," Pl's motion, p.2 (citing *Soto v. Lord*, 693 F.Supp. 8, 17 n. 20 (S.D.N.Y. 1988), the court nonetheless finds nothing in Plaintiff's statement of facts to show that the chain of custody in this case is incomplete or inaccurate, or that the fact of it being presented on one form rather than another makes it somehow less reliable. The chain of custody information recorded by DOC, and relied upon by the hearing officer in convicting Mr. Kennedy of a disciplinary violation, indicates accurately the date and time the evidence was recovered; indicates that Correctional Officer Crocker recovered it, and shows, consistent with Defendant's affidavits from all involved, that the evidence passed from Crocker to Bowen, with a sample going directly to Shafer while Bowen watched, and then to St. Johnsbury Officer Maurice. Accord Affidavits of Shafer, Crocker, and Bowen, appended to Defendant's motion.

The directive to which Plaintiff appeals requires recording of the following data: "(a) employee's name, (b) date and time, (c) reason, and (d) any other relevant information." Contraband directive, ¶ 4, Chain of Custody. The forms actually used show each element of the required information. DOC is, of course, bound to the rules it promulgates, but to the extent DOC deviated from its directive by recording the right information on the wrong form, Plaintiff has not offered any evidence or argument to show that the deviation impinged his right to due process before the hearing officer or undermined the fundamental purposes for which chain of custody is documented.

Absolute certainty is not required to establish a chain of custody. "The identity of the specimen need not be proved beyond a possibility of doubt, but the circumstances must be such as to establish a reasonable assurance of the identity of the specimen although all possibility of tampering is not excluded." *State v. Connarn*, 138 Vt. 270, 274-75 (1980). Where there is "no evidence of tampering with, change in, or confusion of the sample," the court is compelled to conclude "that there was no legally fatal deficiency in the chain of custody in this case." *Comstock*, 145 Vt. 503, 507 (1985). Plaintiff has shown no substantive deficiency in this chain of custody.

The hearing officer had before her reports from Crocker, Bowen, and Shafer—which is to say, every DOC official who had custody of the subject cocaine. That evidence included the affirmation of Crocker that Plaintiff asked him to flush the white powder as soon as it was discovered, which provided independent evidence suggesting

that the substance was in fact cocaine, and that Plaintiff knew he possessed it. The hearing officer also had before her the written testimony of Plaintiff detailing a number of procedural arguments but conspicuously failing to deny that he in fact had a bag of cocaine inside the correctional facility. The undisputed facts show that the hearing officer's determination was made upon ample evidentiary support, and the Commissioner did not abuse his discretion in upholding it.

Order

For the foregoing reasons,

Plaintiff's motion for summary judgment is DENIED; and
Defendant's motion for summary judgment is GRANTED

Dated at St. Johnsbury this 15th day of July, 2008.

Harold E. Eaton, Jr.
Superior Court Judge

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Final Judgment

Judgment is hereby entered in favor of Defendant, Robert Hofmann, Commissioner of the Vermont Department of Corrections, on all claims and causes of action. The Complaint is **dismissed**, with prejudice.

This action is terminated.

Dated at St. Johnsbury this 15th day of July, 2008.

Harold E. Eaton, Jr.
Superior Court Judge