VERMONT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

Justin Durphey, Plaintiff, v. Andrew Pallito, Commissioner, Vermont Department of Corrections, Defendant.	Docket No. 215-4-15 Wncv

Opinion and Order on Cross-Motions for Summary Judgment

In this petition for review of governmental action under Vt. R. Civ. P. 75, Plaintiff Justin Durphey, seeks review of Defendant Vermont Department of Corrections' (the "Department's") imposition of a disciplinary conviction based on allegations that he wrongfully possessed tobacco in a correctional facility. Plaintiff is an inmate in the custody and control of the Department.

Plaintiff asserts that there was insufficient evidence to support the hearing officer's determination of guilt. He has moved for summary judgment. The Department opposes Plaintiff's motion and has cross-moved for summary judgment, arguing that the evidence and findings, taken as a whole, establish a basis in fact for Plaintiff's conviction. Seth Lipschutz, Esq., of the Prisoner's Right's Office represents Plaintiff; Jennifer Mihalich, Esq., represents the Department. After considering the parties' memoranda and the summary judgment record, the Court makes the following determinations.

Summary Judgment Standard

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(2), shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. Vt. R. Civ. P. 56(c)(3); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, party fails to make showing sufficient to establish essential element of the case on which the party will bear burden of proof at trial). Where there are cross-motions for summary judgment, as here, "both parties are entitled to the benefit of all reasonable doubts and inferences." *Montgomery v. Devoid*, 2006 VT 127, ¶ 9, 181 Vt. 154, 156.

The Court derives the undisputed facts from the parties' statements of fact submitted under Vt. R. Civ. P. 56(c)(2), and the supporting documents. *Boulton v. CLD Consulting Engineers*, Inc., 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts or affidavits to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991).

In this instance, the Court's examination is further cabined by Vt. R. Civ. P. 75. Rule 75 allows judicial review of governmental administrative decisions, but only "if such review is otherwise available by law." While the case law interpreting

Rule 75 has insulated the overwhelming majority of discretionary administrative decisions made by the Department from judicial review, *see, e.g., Rheaume v. Pallito*, 2011 VT 72, ¶11, 190 Vt. 245, 250, the Court may still review quasi-judicial decisions in accordance with the principles of *certiorari* review. *Id.*

The scope of *certiorari* review under Rule 75 is very narrow. "[W]hen reviewing administrative action by the [Department] under V.R.C.P. 75, we will not interfere with the Department's determinations absent a showing that the [Department] clearly and arbitrarily abused its authority." *King v. Gorczyk*, 2003 VT 34, ¶ 7, 175 Vt. 220, 224; *Molesworth v. University of Vermont*, 147 Vt. 4, 7 (1986) (*certiorari* review "confined to addressing substantial questions of law affecting the merits of the case.").

More specifically, in the context of reviewing disciplinary determinations made in the prison setting, the Vermont Supreme Court has adopted the standards set forth by the United States Supreme Court in *Superintendent v. Hill*, 472 U.S. 445, 455 (1985). *LaFaso v. Patrissi*, 161 Vt. 46, 49 (1993). Although due process requires the Department to prove inmate disciplinary infractions by a preponderance of the evidence at the disciplinary hearing, *id.* at 51, under *Hill*, this Court will uphold a disciplinary determination if "there is *any evidence* in the record to support the conclusion reached by the disciplinary board." *Hill*, 472 U.S. at 455-56 (emphasis added); *King*, 2003 VT 34, ¶ 7, 175 Vt. at 224 (noting same); *Lafaso*, 161 Vt. at 49 (prison determination "must be upheld if it is supported by 'some evidence' in the record" (citation omitted)).

As the *Hill* Court concluded, "[r]equiring a modicum of evidence to support a decision [of a disciplinary board] . . . will help to prevent arbitrary deprivations without threatening the institutional interest or imposing undue administrative burdens." 472 U.S. at 455. Accordingly, in this case, the disciplinary decision will be affirmed if it is supported by "any evidence" in the record. *King*, 2003 VT 34, ¶ 7, 175 Vt. at 224.

Factual Background

The Court takes the facts largely from the Department's Statement of Undisputed Facts, which has not been opposed. Vt. R Civ. P. 56(c)(2) & (e)(3). On March 6, 2015, corrections officers searched Plaintiff's cell, which he shared with another inmate, Todd Clapper. The guard found contraband tobacco in a sock in a common area of the cell. Corrections officers spoke with Clapper and Plaintiff during their investigation. During those conversations, Clapper denied that the tobacco belonged to him.[1] While the investigation was occurring, one officer overheard Plaintiff telling Clapper to take responsibility for the tobacco in what the officer perceived to be a threatening manner.

A hearing was held concerning the charge March 12, 2015. Plaintiff testified that the tobacco was not his. Clapper testified that the tobacco belonged to him. With regard to allegedly threatening conduct towards him by Plaintiff, Clapper

[1] The parties do not appear to dispute that Clapper initially told the guards that the tobacco was not his. *See* Plaintiff's Statement of Undisputed Facts; Affidavit of Clapper, attached to the Complaint as Exhibit D. The Court, however, has found no such statement in any of the reports of the investigating officers.

stated: "at first, you know, [Plaintiff], he was, he stood strong and, and, but he wasn't loud and the more I thought about it he wasn't threatening me."

The hearing officer found Plaintiff guilty in reliance on the facts that the contraband was found in Plaintiff's cell and that Clapper had told inconsistent stories. In essence, the hearing officer did not find credible the claim of ownership Clapper made at the hearing. The decision was affirmed on internal review within the Department.

Analysis

Plaintiff argues that the hearing officer's findings are insufficient to support the conclusion that he possessed the tobacco at issue. For a number of reasons, the Court believes Plaintiff is correct.

The hearing officer was faced with conflicting evidence of ownership. Both cellmates from the cell where the contraband was found testified at the hearing. The evidence supported two possible scenarios. Under one, Plaintiff owned the tobacco and Plaintiff used intimidation to have Clapper falsely state at the hearing that the contraband belonged to him. Under the other, Clapper owned the tobacco, Clapper falsely denied ownership to protect himself, Plaintiff merely encouraged Clapper to do the right thing, and Clapper testified truthfully at the hearing that he owned the tobacco.

The hearing officer had an opportunity to evaluate the credibility of each witness. After giving the statements due consideration, he chose to not believe the statements made at the hearing by the cellmates but, instead, to give credence to

Clapper's purported initial disavowal of ownership of the tobacco. As *Hill* determined, a reviewing court is not permitted to make an independent assessment of either the credibility or weight of the evidence. 472 U.S. at 454; *accord Ellenburg v. Mahoney*, No. CV 07-74, 2008 WL 1992162, at *10 (D. Mont. May 7, 2008) (the "credibility of the witnesses and evidence is for prison officials, not this Court or a jury, to decide"). On that basis, this Court would typically affirm a credibility determination such as the one made in this case.

For a number of reasons, however, the Court believes it cannot simply affirm the credibility decision of the hearing officer based on the very limited findings set out in his decision. First, it appears from the hearing officer's ruling that he believed Clapper's initial statement that the tobacco did not belong to him. The hearing officer did not specifically adopt that factual position, however. He only states that Clapper's hearing testimony was not corroborated.

Second, while the parties do not dispute that Clapper initially denied his ownership of the contraband, the Court has been unable to find that statement anywhere in the actual reports of the investigating officers. Given its importance to the hearing officer's determination, the Court is troubled merely deferring to a factual point that may not have been part of the record that was before the hearing officer. Indeed, the precise words used by Clapper in connection with such a statement could be vital, and the Court has no way to assess what language was used.

Third, there are additional facts in the record that could support the hearing officer's decision, including: (1) the officer's report indicating that Plaintiff had acted in a threating manner in telling Clapper to take responsibility for the tobacco; (2) Clapper, at least initially, must have agreed that Plaintiff had acted in a threatening fashion because, at the hearing, he indicated that he then had second thoughts about that assessment; (3) Clapper testified that he did not know the precise location where the tobacco was found by the guards, but Plaintiff did; and (4) three of the officers' reports indicate that the contraband was located in Plaintiff's sock.

But, the hearing officer did not make any findings with regard to that evidence. As a result, the Court cannot determine whether he found that those facts were established by the evidence. *See Parker v. Parker*, 2012 VT 20, ¶ 13, 191 Vt. 222, 227-28 ("primary purpose of findings is to enable appellate review"). Nor does the Court believe it is its task to comb the record to find evidence of Plaintiff's guilt beyond that deemed credible by the hearing officer. *LaFaso*, 161 Vt. at 50 (standard "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence") (quotation omitted)).

Given the circumstances of this case, the Court believes the appropriate remedy is to order a new hearing within the Department. *Hansen v. Patrissi*, 154 Vt. 389, 391-92 (1990) (remand appropriate if based on insufficient findings rather than insufficiency of the evidence presented at first hearing); *see Bauer v. State,*

Dep't of Corr., 193 P.3d 1180, 1184 n.14 (Alaska 2008); *Miller v. Iowa Dist. Court for Jones Cty.*, 603 N.W.2d 86, 90 (Iowa 1999) (both remanding for new hearing in light of deficiencies associated with first disciplinary hearing); *see also Dokmo v. Indep. Sch. Dist. No. 11, Anoka-Hennepin*, 459 N.W.2d 671, 675 (Minn. 1990) (similar ruling in the education context).

WHEREFORE, this matter is remanded to the Department, and it is ordered to expunge Plaintiff's conviction without prejudice to a second hearing on the tobacco possession charge.

Electronically signed on January 29, 2016 at 10:32 AM pursuant to V.R.E.F. 7(d).

_____
Timothy B. Tomasi
Superior Court Judge