

STATE OF VERMONT

FILED

CALEDONIA SUPERIOR COURT

CALEDONIA COUNTY, ss.

1998 JUL -6 P 1:18

DOCKET NO. 28-2-98 CaCv

MITCHELL HARTWELL,
Petitioner

vs.

JOHN GORCZYK et al,
Respondents

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**NOTICE OF DECISION
and
ORDER**

This matter came before the court on July 2, 1998 for hearing on Petitioner's Complaint for Review of Governmental Action pursuant to V.R.C.P. 75. The petitioner was represented by Susan M. Buckholz, Esq. of the Prisoners' Rights Office. Respondents were represented by Christopher L. White, Esq., Special Assistant Attorney General. Evidence was admitted and the court heard arguments of counsel.

On December 20, 1997, Petitioner was in the custody of the Vermont Department of Corrections serving a sentence for a criminal conviction of DWI #5. He was on furlough status. He had permission on that date to be at Serenity House in Rutland where he was authorized to be receiving treatment for his serious substance abuse problem. The previous evening, he was told that he was being discharged from Serenity House because a bag of marijuana had been found in his belongings. He was told to stay the night and arrangements would be made the next day for him to be transported. During the previous few days, while on furlough, he had been drinking and had also sought treatment for his drinking at the Hitchcock Hospital in Hanover, N.H., which was an unauthorized location under his furlough conditions. Nonetheless, he had been given specific permission under the terms of his furlough to go from Hitchcock to Serenity

House to seek treatment. It is undisputed that he left Serenity House without DOC permission in the company of his girlfriend, Diane LaPalm, at approximately 10:00-11:00 a.m. on December 20, 1997, and that for several hours thereafter the Department of Corrections did not know where he was. He was placed on escape status at approximately 1:30 p.m. At some point on December 20th he presented himself at the Rutland Hospital, and checked in for treatment. Around 11:00 a.m. on December 21st, the next morning, Ms. LaPalm telephoned his Corrections Officer to inform him that Mr. Hartwell had admitted himself to the Rutland Hospital. The Department of Corrections quickly confirmed that he was at the hospital and resumed supervision of him. Ms. LaPalm was with him from the time he left Serenity House until he checked into the Rutland Hospital.

As a result of the events on December 20th and 21st, Mr. Hartwell was charged with the Major "A" disciplinary violation of Escape from Furlough. On December 24, 1997, he was given a Notice of Hearing specifying the charge and notifying him of his rights at a hearing on the charge. These include the following: "c) To present documentary evidence and call the Reporting Officer and/or other reasonably available witnesses who have relevant information, provided the witnesses are not unduly hazardous to facility security, order or discipline." He completed the form signifying that he wished to be assisted by a Hearing Assistant, and that he wished to call as a witness Diane LaPalm to testify to "time frames." He signed the Notice on December 24, 1997 at 4:24 p.m. No hearing date or time was specified.

He was given a new Notice of Hearing on December 29, 1997, specifying again the charge of Major a #3 Escape, notifying him of the same hearing rights, and specifying the hearing time as December 31, 1997 at 9:00 a.m. He completed the form signifying that he wished to be assisted by David Fisher as Hearing Assistant, and that he wished to call as a witness Diane LaPalm to testify. He identified the subject matter of her testimony as "was with her on date of incident." He did not request a continuance. He signed the Notice on December 29, 1997 at 9:30 p.m.

The hearing was held on December 31, 1997 and started at 9:47 a.m. Mr. Hartwell was present and assisted by Hearing Assistant David Fischer. Ms. LaPalm was not present. Mr. Hartwell's position at the hearing was that he should have been charged with the Minor violation #6 of being in an Unauthorized Area on Furlough. He conceded that he did not have permission to be where he was during the time he was missing, but his position is that he was pursuing

treatment and not that he was seeking to avoid supervision altogether on an indefinite basis, which is the basis for an escape charge.

At issue in this case is whether Mr. Hartwell was improperly denied the right and opportunity to present evidence through the testimony of Diane LaPalm at the hearing. The court has listened to the tape of the hearing (Defendant's A), and read the transcript of the hearing (Plaintiff's 1), and reviewed the evidence. It is undisputed that Mr. Hartwell had the right at the hearing to present evidence through a witness if such witness was "reasonably available" and had "relevant information." He had also identified her as his only witness and described the subject matter of her testimony, in writing, on both Notices of Hearing that he signed prior to the hearing.

At the hearing, the issue of Ms. LaPalm giving testimony came up on three occasions. The first time was after the Hearing Officer was asking questions trying to determine what time Mr. Hartwell checked in at the Rutland Hospital. (Plaintiff's 1, Page 12.) Mr. Hartwell and Mr. Fischer indicated they wanted Ms. LaPalm to respond on the question of what time Mr. Hartwell arrived at Rutland Hospital. (Plaintiffs 1, Pages 12-13.) The Hearing Officer asked why Ms. LaPalm was not there. Mr. Hartwell stated that he only received the notice of the hearing time "night before last." The Hearing Officer asked, "Does she have a phone number?" There was no response to the question on the tape or in the transcript. There was no further attempt at any time during the hearing to determine whether she had been given or received any notification of the time of the hearing, or to determine whether she could come to the hearing.

The second time the issue of Ms. LaPalm came up (Plaintiff's 1, Pages 17-18), the Hearing Officer asked for a specific statement of what she would testify about if she were present. Mr. Fischer identified certain facts. The Hearing Officer agreed to accept those statements as the truth: that she had picked up Mr. Hartwell at Serenity House, that she had taken him to the hospital at some point the same day, and that she did not make the telephone call to Corrections until the next morning. He ruled therefore that there was no need to hear her testimony because he was accepting the facts that she would testify about as established. This was within his role as Hearing Officer, and he properly ruled that she would not have relevant testimony to offer since those facts were already undisputed. At this point, Mr. Fischer indicated that there might be other things she could testify about. The Hearing Officer asked what they would be: "If you could give me something valid that she can testify to then perhaps we can

continue.” (Page 18). Mr. Fischer had nothing further to offer, but asked to be able to speak with Mr. Hartwell before continuing. This was granted. The Hearing Officer shut off the tape recorder and took a break to allow them to confer.

After the break was the third occasion on which the issue of Ms. LaPalm as a witness was addressed. Mr. Fischer made a formal request for a continuance to permit the testimony of Ms. LaPalm, and he proposed that “Friday would be very good.” December 31st was on Thursday, so this was not a significant delay. The Hearing Officer again reasonably required a specific identification of the subject matter of her proposed testimony. Mr. Fischer identified the proposed new testimony as follows: Mr. Hartwell’s emotional state at the time he left Serenity House; statements made by him at that time; and unsuccessful attempts made to get hospital staff to contact Corrections for him. After hearing this offer of testimony, the Hearing Officer denied the request for a continuance to permit the testimony of Ms. LaPalm on the grounds that it would not change the fact that he left Serenity House and went to the local hospital. (Plaintiffs 1, Page 20.) He noted that this denial might give a basis for an appeal, if Mr. Hartwell chose to follow up with an appeal.

The Hearing Officer issued a Disciplinary Hearing Report in which he reported that “LaPalm would testify that she was with Hartwell when he left Serenity House and when he checked into Rutland Hospital and to his emotional condition.” He further reported that the inmate had requested a continuance and it was denied because “Hearing Officer determined that statement listed above sufficient for decision.”

Conclusions of Law

The issue before the court is not whether or not Mr. Hartwell is or is not guilty of the charge of Major A Escape from Furlough. That determination is entirely up to the Hearing Officer. There is no direct right of appeal to the court from a determination by the Hearing Officer. The only issue for the court is whether or not procedural rights were properly observed at the disciplinary hearing. The specific question is whether the Hearing Officer’s refusal to continue the hearing to permit the testimony of Ms. LaPalm violated Mr. Hartwell’s right to present testimony through a witness who was reasonably available and had relevant information.

Shortly after the presentation of the documentary evidence at the hearing, the Hearing Officer asked a direct question of Mr. Hartwell: “What time did you check yourself into the

hospital?” (Plaintiffs 1, Page 12.) While Mr. Hartwell, who chose not to testify at the hearing, did specify that it was the 20th of December rather than the 21st, the question of what time Mr. Hartwell arrived at or checked into the Rutland Hospital was never answered. It was this question from the Hearing Officer that prompted the first discussion about Ms. LaPalm testifying. Mr. Hartwell: “That’s why I wanted a statement from Diane because. . .” (Plaintiff’s 1, Page 13.) This was the subject matter (“time frames”) that Mr. Hartwell had originally stated on the first Notice of Hearing that Ms. LaPalm would testify about. This was relevant information, and it was exactly the information that the Hearing Officer himself wanted early on in the hearing. Whether Mr. Hartwell checked in to the Rutland Hospital early in the afternoon on the 20th, or whether he checked in to the hospital shortly before midnight on the 20th, is pertinent to a determination of whether he was evading supervision or whether he was actively pursuing substance abuse treatment. His emotional state at the time is also relevant to this determination, as are any statements he made at the time. Ms. LaPalm is the only witness with such information. Whether or not he sought to have the hospital call Corrections upon his arrival is also relevant, together with the information about what time that was, and what his condition was. These were identified as the subject matter of testimony to be given by Ms. LaPalm. While it is quite possible that Ms. LaPalm’s testimony on these matters would confirm, rather than undermine, the Hearing Officer’s determination made on the rest of the evidence, that is not the issue. The question is whether she had relevant information, and whether she was reasonably available. The information that she had relative to the subject matter of the hearing was certainly relevant.

As to her availability, the record shows that Mr. Hartwell had one day, December 30th, in which to notify her of the date and time of the hearing. Whether she had been so notified, or could have been so notified, was not determined. Mr. Fischer offered to make her available the next day. This made her available within three days of the notice of the hearing time, which is reasonable availability.

Because Ms. LaPalm had information that was highly relevant to the subject matter of the hearing, and was the only one with such information, and indeed that exact information was sought by the Hearing Officer, and because she was reasonably available, the court concludes that at the disciplinary hearing, Mr. Hartwell was not properly afforded his right to present testimony of a witness with relevant information who was reasonably available. Mr. Hartwell

and his Hearing Assistant had done everything they could do to exercise that right: consistently identify her as a witness, together with the subject matter of her testimony, on two separate Notices of Hearing, and make three requests during the course of the hearing to have her testify. Mr. Hartwell did not waive or fail to exercise his right in any way.

A Hearing Officer has a great deal of discretion in deciding whether a proposed witness has relevant information, and is reasonably available. Such determinations require the exercise of judgment, and it is not the role of the court to second-guess the Hearing Officer on most judgment calls on such issues. Indeed, if the hearing had ended after the second occasion described above, after the break when the recorder was shut off, the court would consider that the efforts the Hearing Officer made to determine whether Ms. LaPalm had relevant evidence were reasonable, and his conclusion that he would accept as true the substance of her offered testimony was an appropriate basis for a decision that she was not needed, because if those facts constituted all her evidence, then there was nothing for her to add.

After the break, however, Mr. Hartwell made a formal request to call Ms. LaPalm to give additional relevant information as described above, and this was denied. At this point, the decision of the Hearing Officer was no longer an exercise of judgment within a reasonable range, but it denied Mr. Hartwell the right and opportunity that he was entitled to exercise at the hearing: to present testimony through a witness with relevant testimony who was reasonably available.

It may well be that once Ms. LaPalm gives testimony, the outcome will be the same and it will be a reasonable conclusion based on the evidence, or her testimony may result in a change in the decision of the Hearing Officer. The court takes no position on this. In any event, the matter is remanded in order to take the evidence of Ms. LaPalm, if she is reasonably available. It is not necessary to have an entirely new disciplinary hearing on the same subject matter. It will be sufficient to reopen the hearing to add the testimony of Ms. LaPalm.

Petitioner's request that any violation resulting from the charge be expunged is out of proportion to the extent of the deficiency in the hearing. The situation can reasonably be remedied by reopening the hearing and taking the testimony of the witness.

ORDER

For the foregoing reasons, the matter is remanded to the Department of Corrections to reopen the disciplinary hearing to take testimony from Diane LaPalm, if she is reasonably available.

Dated at St. Johnsbury this 6th day of July, 1998.

Mary Mile Teachout
Mary Mile Teachout
Superior Judge