

STATE OF VERMONT

**SUPERIOR COURT
Windsor Unit**

**CIVIL DIVISION
Docket No. 449-9-15 Wrcv**

**WILLIAM HYLTON,
Petitioner**

v.

**LISA MENARD,
Respondent**

**DECISION
Motion For Summary Judgment (#2)**

The Petitioner, an inmate in the custody of the Commissioner of the Department of Corrections, seeks Rule 75 review of a Department of Corrections disciplinary proceeding. He was found guilty of a Major A13 Violation for Security Threat Group (STG) Affiliation. It appears that such a violation is for possession of gang-related material. The State seeks summary judgment.

Petitioner claims that there was insufficient evidence for the Hearing Officer to find a violation and that the Hearing Officer merely recited what the evidence was without making specific findings.

He also claims that he did not receive due process at the hearing. In the appeal he filed to the prison Superintendent, he claimed that his rights were violated because he asked to have the officer who wrote the report against him appear at the hearing and he was not there, so Petitioner did not have the chance to question or cross examine him. In Petitioner's memorandum in response to the Motion for Summary Judgment, on the due process issue he states that courts "have found due process violations when prisoners disciplined without the chance to get witness testimony, have a hearing or present evidence. Court's [sic] have also found due process violations when punishment is based on vague claims of gang affiliation."

The Petitioner represents himself. Assistant Attorney General Andrew Gilbertson represents the Commissioner of the Department of Corrections.

Summary Judgment Standard

Summary judgment is appropriate "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). Motions for summary judgment must be supported by admissible evidence. V.R.C.P. 56(c).

Admissible evidence is viewed in the light most favorable to the party opposed to summary judgment. *Goodrum v. Vermont Dept. of Taxes*, 2014 VT 128, ¶ 4. The nonmoving party is entitled to the benefit of all reasonable doubts and inferences. *In re All Metals Recycling, Inc.*, 2014 VT 101, ¶ 6. However, the nonmoving party may not rest on mere allegations in the pleadings to rebut admissible evidence or affidavits but “must come forward with an opposing affidavit or other evidence that raises a dispute as to the fact or facts in issue.” *Clayton v. Unsworth*, 2010 VT 84, ¶ 15, 188 Vt. 432.

Facts

The court has received the record from the hearing below, including the audio recording of the proceeding, and the exhibits presented at the hearing. Petitioner does not challenge what the procedure was or what the evidence was. His claim seems to be primarily about whether the Hearing Officer weighed and evaluated the evidence and made his own judgment about whether that evidence constituted gang-related material, and he also raises a due process violation claim. The facts are as follows.

1. On July 15, 2015, the Petitioner received a Major A13 Disciplinary Report.
2. A Major A13 is defined by the Department of Corrections as “possessing or displaying any materials, symbols, colors or pictures of any identified security threat group [STG] or engaging in a membership in or in behaviors uniquely or clearly associated with security threat group.”
3. The Notice of Hearing dated July 16, 2015 informed Petitioner of his rights and opportunities, and he checked off that he had read each one, and signed the form. He checked off the box that informed him that he had the right to call the Reporting Officer, and he also checked off the box that said, “I Do Not wish to have the Reporting Officer present.”
4. A hearing was held on July 23, 2015.
5. At the hearing, the Department presented a report of Reporting Officer Scott E. Isenor. The Report states that Mr. Hylton was known to associate himself as a member of two specifically identified gangs, and that during an investigation, when “Floats” went to his cell to gather property, his cellmate attempted to conceal Mr. Hylton’s property.
6. Certain items were recovered from the Petitioner’s belongings. One was a document that Mr. Hylton had previously signed when a piece of mail to him was rejected because it was gang-related. The Report stated that its significance was that by signing it, Mr. Hylton knew that gang-related activities are considered contraband.
7. The Report stated that other items were recovered that constituted contraband as gang-related materials: ten letters sent to Mr. Hylton said to contain references to STG Crip activity, two letters typed by Mr. Hylton, a red watch which was described

as a trophy from a rival gang, three drawings described as having gang themes, and other contraband that was blue in color with a statement that the color blue is associated with the STG 'Crip' gang.

8. During the hearing, the Petitioner questioned the basis for the investigation having been started and denied possession of the red watch. He noted that the Reporting Officer was not present so he could not inquire what the Petitioner did to prompt the Disciplinary Report.
9. The Hearing Officer stopped the hearing and went off the record to contact the Reporting Officer. When he resumed the hearing, he stated that the Reporting Officer was not available, but in any case would not be a helpful witness because the Reporting Officer told the Hearing Officer that any information he had was confidential.
10. The Hearing Officer then reviewed the exhibits. He determined that they were not confidential and permitted the Petitioner to inspect them. Mr. Hylton did not claim that any of the specific items were not gang-related. The only item he challenged was the watch.
11. The Hearing Officer made findings of fact on the record, and concluded that the Petitioner was in violation of Major A13. He made specific findings that Mr. Hylton knew that possession of gang-related material was contraband, and that he was in possession of several specified items of gang-related material.

Conclusions

The Petitioner raises two challenges to the proceeding. First, he argues that a due process violation occurred when the reporting officer did not appear at the hearing. Second, the Petitioner argues that there was insufficient evidence to prove the violation.

With respect to the due process claim, there is no right to confrontation at prison disciplinary proceedings. *Wolff v. McDonnell*, 418 U.S. at 539, 567-70 (1974). To the extent more recent confrontation cases have extended the right in any way, the Petitioner waived any such claim by failing to request the Reporting Officer's presence at the time he signed the Notice of Hearing on July 16, 2016. Although during the hearing the Hearing Officer attempted to accommodate the complaint about lack of opportunity to hear from the Reporting Officer, the fact that the Reporting Officer was not available and/or did not participate is not a violation of Petitioner's due process rights when Petitioner had specifically been informed in advance of the right to request his presence and had waived that right.

Petitioner's references, in his memorandum responding to the State's motion, of cases in which due process violations have been found are generalized and not shown to be grounds for any violation in relation to the facts of this case.

With respect to sufficiency of evidence, Petitioner suggests that the Hearing Officer simply adopted the Report without evaluating the evidence and making his own findings. While that could be a legitimate criticism under certain circumstances, the audio recording of the findings of fact demonstrate that while the Hearing Officer was persuaded by the Reporting Officer's Report and attached documents, he had reviewed them, and he expressed his findings in his own words.

In addition, the court's role in reviewing the findings of fact in a Department of Corrections disciplinary proceeding is narrow: the question is whether there is "some evidence" sufficient to support the outcome. That is, a court conducting a Rule 75 review must uphold the hearing officer's decision "if it is supported by some evidence in the record." *Herring v. Gorczyk*, 173 Vt. 240, 243 (2001). The question then becomes whether there is 'some evidence' that the items gathered from Mr. Hylton's cell were gang-related, given that none of them contain direct references to specific gangs.

The court concludes that there was 'some evidence' here sufficient to support the finding of a violation of Major A13. First, it is apparent from the findings of fact that the Hearing Officer found the Reporting Officer's Report to be credible. Determination of credibility is always a determination for the fact finder alone. Moreover, it is a reasonable inference from the Report itself that the Reporting Officer was familiar with specific meanings of references and written and artistic patterns in the documents found in Mr. Hylton's cell and knew them to be gang-related, as he was able to specifically relate them to particular gangs. While Mr. Hylton objected to the ownership or possession of the watch, he did not raise objections about the meaning or significance of any of the other items gathered from his cell. Taking the totality of all these factors into account, the Hearing Officer had 'some evidence' on which to base his findings and his conclusion that there had been a Major A13 violation.

Accordingly, the decision of the Hearing Officer must be upheld.

Order

The Respondent's motion for summary judgment is *granted*. The decision of the Department of Corrections hearing officer is upheld. The Respondent shall prepare a judgment order.

Dated in Woodstock, Vermont this ___ day of May, 2016.

Mary Miles Teachout
Superior Court Judge