

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 92-3409  
Summary Calendar

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CLARION BAY,

Plaintiff-Appellant,

VERSUS

BRUCE N. LYNN, Secretary,  
Dept. of Corrections,

Defendant-Appellee.

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Appeal from the United States District Court  
For the Middle District of Louisiana

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( 91 690 B 1 )

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( April 5, 1993 )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

Clarion Bay, an inmate at Louisiana State Penitentiary, filed a complaint pro se and in forma pauperis pursuant to 42 U.S.C. § 1983, alleging that his constitutional right to due process was

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

violated when the Secretary of the state department of corrections failed to notify him of a disciplinary appeal decision within 120 days.

The charges resulting in Bay's transfer to extended lockdown stem from an alleged fight between Bay and another prisoner on a prison bus which involved Bay's use of a razor. Bay was charged with "aggravated fighting." The disciplinary report reveals that hearings were held on three different occasions. Following investigation of the incident, the prison's disciplinary board found that Bay was guilty as charged.

Bay appealed the decision, conceding that he engaged in "simple fighting" and that the other inmate was cut, but he contended also that the evidence was insufficient to prove that he engaged in "aggravated fighting" by using the razor blade.

In a decision dated less than 120 days after the board's decision, the warden found that Bay received "a full due process hearing" and maintained that "[t]he Disciplinary Board is in a better position to evaluate this evidence and testimony." The warden thus denied Bay's appeal and found that Bay's argument was without merit. Over seven months later, Bay signed an acknowledgment of receipt of the disciplinary appeal decision.

Bay moved for summary judgment, asserting that he had a protected liberty interest in the receipt of an appeal decision within 120 days. The Secretary also moved for summary judgment, contending, inter alia, that Bay failed to state a constitutional

violation. The parties do not dispute that Bay did not receive timely notice of the appeal decision.

The magistrate judge recommended denial of Bay's motion for summary judgment and that the Secretary's motion for summary judgment be granted. The magistrate judge noted that (1) "[t]he rule does not contain substantive predicates to guide the secretary in rendering appeal decisions," (2) the language indicating that a decision would be issued in 120 days could not be construed as mandatorily granting the appeal or another particular outcome if the secretary failed to render a decision within that time period, and (3) "the disciplinary rules do not create a protected liberty interest based on an untimely appeal decision."

Bay objected to the magistrate judge's recommendations based on the untimeliness of review by the warden, rather than the Secretary, and contended that he was thereby denied state-created rights to due process.

The district court reviewed the record de novo, adopted the recommendation of the magistrate judge, and accordingly dismissed Bay's complaint without prejudice to state-law claims.

#### **OPINION**

Bay argues that no cause or reason was given for the seven-month delay in his appeal from the disciplinary board's findings and that the Secretary, rather than the warden, should have reviewed the matter on appeal. Bay also argues that, because of (1) the delay beyond the 120-day period mandated by the prison rules and (2) the fact that the wrong person actually reviewed it,

he was denied a state-created liberty interest which grants a right to an appeal.

Louisiana Revised Statute 15:829 authorizes the Secretary for the Louisiana Department of Public Safety and Corrections to establish rules and regulations for the maintenance of good order and discipline in correctional facilities. The Disciplinary Rules and Procedures for Adult Prisoners of the Louisiana Department of Public Safety and Corrections are in the record and also appended to the appellee's brief.

The particular rule in question states that: "(t)he Secretary will issue all appeal decisions within 120 days of the date of the last hearing for each case." See Disciplinary Rules and Procedures for Adult Prisoners, p. 11.

In Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), the Supreme Court held that a prisoner confined to administrative segregation need only receive some notice of the charges against him, within a reasonable time after pre-hearing detention, and be provided an opportunity to present his views to satisfy due process. See id., 459 U.S. at 476. This Court has extended analysis under Hewitt to include situations involving extended lockdown. See McCrae v. Hankins, 720 F.2d 863, 866 & n.4 (5th Cir. 1983).

Specific rules do not automatically create liberty interests. Such an interest will only be created if the specific rule establishes mandatory discretion-limiting standards. Olim v. Wakinekona, 461 U.S. 238, 249, 103 S. Ct. 1741, 75 L. Ed. 2d 813

(1983). The Disciplinary Rules and Procedures for Adult Prisoners of the Louisiana Department of Public Safety and Corrections do create "a substantive [liberty] interest in being free of extended lockdown." McCrae, 720 F.2d at 866-68. Due process in such cases does not require that the prisoner have an opportunity to call witnesses and present documentary evidence in his defense. See id.

Bay does not complain that he did not receive proper notice or a hearing. His complaint focuses only on the fact that he was not informed of the outcome of his appeal until over seven months after the decision which was also made by the wrong person. Bay argues, in essence, that the disciplinary rules establish mandatory discretion-limiting standards sufficient to provide a state-created protective liberty interest in an appeal decision within 120 days. Because Bay misstates the law, his argument lacks merit.

"A state's failure to follow its own procedural regulations does not automatically establish a violation of due process, because the `constitutional minima may nevertheless have been met.'" Jackson v. Cain, 864 F.2d 1235, 1251 (5th Cir. 1989).

A protective liberty interest arises under Olim only if the state places substantive limits on an official's discretion. Indeed, the liberty interests protected by the due process clause "`cannot be the right to demand needless formality.'" Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." Olim, 461 U.S. at 250 (citation omitted).

Although the prison rules establish certain procedural rights which include the right to an appeal decision, such rights, if violated, do not constitute a due process violation under the constitution unless language in the rules specifically creates such a right. The language in the rules prohibits extended lockdown "unless [the prisoner] has been afforded a full hearing ... and ... found guilty." The rules, although providing for "appeal decisions within 120 days," contain no language that grants a separate right "not to be punished at all if a proper appeal is not conducted." Nor does Hewitt guarantee any kind of administrative appeal. See 459 U.S. at 476. Because the disciplinary rules do not contain a "substantive predicate" mandating the grant of an appeal or any other outcome should the appeal decision not be rendered within 120 days, the "constitutional minima" were satisfied in this case when Bay received some kind of notice and a hearing.<sup>1</sup>

Bay's reliance on decisions from state court, including Flowers v. Phelps, 595 So.2d 668 (La. Ct. App. 1991), a decision from a state court of appeal, to support his argument that he has a liberty interest in an administrative appeal to the Secretary is misplaced, because such cases only delineate the state remedy afforded a prisoner when the state fails to follow its own disciplinary procedures. Accordingly, although Bay's contention

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<sup>1</sup> Although McCrae was decided based on the prison rules effective March 1981, see McCrae, 720 F.2d at 867, the language of the February 1986 rule book, upon which Bay relies to support a liberty interest, still remains the same: "No prisoner can be placed in extended lockdown for any reason unless he has been afforded a full hearing before the Disciplinary Board . . ."

that the Secretary rather than the Warden<sup>2</sup> should have heard his appeal may have some merit in a state court, that error would not be sufficient to trigger a due process violation under McCrae, because Bay did receive some kind of notice and a hearing. See McCrae, 720 F.2d at 866-68. The language of the prison rules setting out the basis for extended lockdown grants no further liberty interest.

AFFIRMED.

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<sup>2</sup> This argument was first raised in Bay's "Objection to Magistrate Judge's Report and Recommendation." In his appeal of the Disciplinary Board's decision, Bay requested that the *Warden* reverse the decision of the Board.