

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-5156  
Conference Calendar

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JUAN GOMEZ,

Plaintiff-Appellant,

versus

PAULA MOTEN, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 9:92cv65  
- - - - -  
(March 24, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

BY THE COURT:

Texas prisoner Juan Gomez challenges a disciplinary proceeding for insufficient evidence. A federal court reviews a state prison disciplinary proceeding to determine only if it was arbitrary and capricious. Stewart v. Thigpen, 730 F.2d 1002, 1005-06 (5th Cir. 1984). When a disciplinary board's factual findings are challenged, a federal court's review is limited to determining whether the findings are supported by any evidence at all. Id. Even if all of Gomez's allegations are correct, the fact that he held his pants is some evidence of the offense of which Officer Moten complained.

Gomez also argues that he was given no notice of the substitution of the charge of making an indecent or vulgar

gesture instead of sexual misconduct. He conceded that the former is a lesser included offense of the latter and that the facts are the same for both charges.

Prison disciplinary proceedings must include notice. Hewitt v. Helms, 459 U.S. 460, 476, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983) (less severe offenses); Wolff v. McDonnell, 418 U.S. 539, 563-64, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (more severe offenses). The purpose of notice is to enable the prisoner to prepare a defense. McDuffie v. Estelle, 935 F.2d 682, 687 (5th Cir. 1991). As the facts are the same for both offenses and one is a lesser included offense of the other, the purpose of notice was satisfied.

Gomez presents no issue of arguable merit. His appeal is thus frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, IFP is denied and the appeal is dismissed. Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982); 5th Cir. R. 42.2.

IFP DENIED, APPEAL DISMISSED.