

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-60041
Summary Calendar

RONNIE SMITH, Plaintiff-Appellant,
versus
H. B. GILBERT, ET AL., Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi
(CA-3:91-15(B))

(October 18, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM¹:

Plaintiff-Appellant Ronnie Smith ("Smith") filed a civil rights complaint challenging the conditions of his confinement at the Central Mississippi Correctional Facility ("CMCF"). Smith named as defendants: (1) Lee Roy Black, the Commissioner of the Mississippi Department of Corrections ("MDOC"); (2) Lake Lindsey, the Superintendent of the CMCF; (3) Lora Cole, the Associate Superintendent of the CMCF; (4) members of the CMCF Disciplinary Committee, Leanette Jordan, Gwen McClinton, Jane Smithhart, Doris

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

McDonald and Tina Ladner; (5) members of the CMCF Classification Committee, Eddie Lucas, Jackie Parker, Gwen McClinton and Doris McDonald; (6) James Holman, the Chief of Security at the CMCF; (8) Billy Atkinson and William Carroll, Correctional Officers at the CMCF; (9) Bruce Ward, the Food Service Manager at the CMCF²; and (10) Pinky McMurray, a CMCF employee who investigated a disciplinary charge against Smith.

An evidentiary hearing was held before a magistrate judge. At the hearing, Smith introduced the evidence summarized below. Smith was charged by Sergeant Gilbert with being in an unauthorized area. Gilbert reported that he observed Smith, who was assigned to work in the support kitchen, leaving the kitchen and walking into the warehouse. Smith was observed having a discussion with a female inmate assigned to work in the warehouse. When Smith saw Gilbert, he continued through the warehouse to the office of a staff member, Gregory Hayes ("Hayes"). When asked, Smith stated that he did not need permission to be in the warehouse because he worked near that area. Hayes stated that Smith had asked him for some change. The kitchen officer said that no one in the kitchen had given Smith permission to go into the warehouse. A Rule Violation Report ("RVR") was prepared and served on Smith. Seven days later, a hearing was held before the CMCF disciplinary committee, consisting of defendants Jordan McClinton, Smithhart, McDonald, and Ladner.

² The district court concluded that Ward was not involved in any alleged constitutional deprivation and granted Ward's motion for summary judgment. Smith does not dispute this ruling on appeal.

Smith was found guilty of a rule violation and received a reduction in custody classification from "A" to "B."

Prior to the hearing, defendant McMurray, a disciplinary investigator, was asked by Smith to interview Hayes. McMurray did not interview Hayes because he was no longer employed at the prison. In accordance with prison policy, McMurray submitted her findings to the disciplinary committee without disclosing them to Smith. McMurray found that a staff member in charge of an area could give an inmate permission to enter. Defendant Smithhart testified, however, that Hayes was a warehouse clerk in charge of inventory; he was not in charge of the warehouse. Accordingly, Hayes was not empowered to give permission to Smith to enter the warehouse.

Smith testified that Hayes authorized him to enter the warehouse area and that Hayes escorted him. Smith asked McMurray to interview Hayes. Smith also asked for a copy of her report to the disciplinary committee. Smith was informed at the hearing that Hayes had not been interviewed. Smith was not allowed to call other witnesses at the hearing. Smith appealed and asked defendant Lindsey, the superintendent at CMCF, to interview Hayes. Lindsey was unable to contact Hayes. Lindsey denied Smith's appeal because Hayes had not given Smith permission to enter the warehouse.

When Smith was transferred from the Mississippi State Penitentiary to CMCF, he was assigned to common work consisting of cutting grass, digging ditches, making beds, and cleaning floors. Smith was also assigned to care for dogs and to work in the

kitchen. Smith had three full-time jobs. At the Mississippi State Prison, he had been a writ-writer. Believing that he had been assigned erroneously to menial work because he had never been before the classification committee, Smith began to file grievances with defendants Parker, Lindsey, and Black. Smith complained that other prisoners had been interviewed by the classification committee and that no other prisoners had been told to work three jobs. Two months later, Parker called him before the classification committee. Notwithstanding Smith's complaint that he had no skills as a canine worker, Parker classified Smith as a canine worker and common worker. Although Smith was never classified as a kitchen worker, he was required to work in the kitchen full-time.

Smith admitted on cross-examination that the warehouse was an unauthorized area and that he was in the warehouse. By "three full-time jobs," Smith meant that one day he would work at one job and another day he would work all day at a different job. He sometimes worked a twelve-hour day.

Defendant Parker testified that Smith was assigned to unit support when he was transferred to CMCF. All male inmates at CMCF meet with the classification committee when they are assigned to CMCF, and all permanently assigned to CMCF are placed in unit support. "Unit support" means that the prisoner can be told to perform any type of work because of the limited number of men held at the facility. Smith was assigned to the canine unit because that was where the facility needed help at the time. If Smith was

dissatisfied with his assignment, he would be transferred back to the state penitentiary because CMCF needed inmates who would do any type of work. Smith was not taken before the classification committee before being told to work in the kitchen because that job responsibility is included within the unit support job classification. It was not unusual for an inmate to have three separate job assignments.

The magistrate judge found that Smith did meet with the classification committee when he was transferred to CMCF and that he was classified to perform unit support work. Digging ditches, working with dogs and working in the kitchen were all subsumed within the classification "unit support" work. All three of Smith's job assignments were part-time. The fact that Smith was required to work an occasional twelve-hour day did not rise to the level of a constitutional violation. The magistrate judge found that the conduct of the disciplinary hearing did not violate due process. The absent witness, Hayes, did not have authority to give Smith permission to be in the unauthorized area. Therefore, his absence did not prejudice Smith. The magistrate judge found no evidence, apart from Smith's testimony, that the defendants' actions were in retaliation for his use of the grievance procedures. The magistrate judge recommended that judgment be entered in favor of the defendants. The district court conducted a *de novo* review, adopted the report and recommendation of the

magistrate judge as modified³, and entered judgment dismissing Smith's claims with prejudice. Smith filed a *pro se* appeal, explicitly waiving all issues except for those pertaining to the disciplinary proceeding and his job classification.

DISCUSSION

We review the district court's factual findings for clear-error and issues of law *de novo*.⁴

Smith contends that McMurray, the members of the disciplinary committee and Lindsey denied him due process by failing to interview his Hayes, and by failing to have Hayes available to testify at the disciplinary hearing.

The Supreme Court has set out two standards in this area [of disciplinary procedures], depending on the sanction imposed upon the prisoner and consequences flowing from it. A prisoner punished by solitary confinement and loss of good-time credits must receive: (1) written notice of the charges against him at least twenty-four hours before the hearing, (2) a written statement of the factfinders as to the evidence relied on and the reasons for the disciplinary action taken, and (3) the opportunity to call witnesses and present documentary evidence in his defense, unless these procedures would create a security risk in the particular case. Wolff [v. McDonnell], 418 U.S. 539, 563-66, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)]. On the other hand, a mere few days

³ The magistrate judge stated that it was "undisputed" that Hayes did not have authority to give Smith permission to be in the warehouse. Because Smith testified that Hayes had that authority, the district court concluded that there was a factual dispute as to this issue. However, the court also found that the great weight of the evidence was that Hayes had no authority. Based upon that finding, the district court found that the absence of Hayes did not prejudice Smith. The court also concluded that this finding rendered irrelevant the fact that Smith had not been permitted to call witnesses at the disciplinary proceeding.

⁴ See *Odom v. Frank*, 3 F.3d 839, 843 (5th Cir. 1993) (bench trial before district judge).

administrative segregation, having no effect on parole, only merits an informal nonadversary evidentiary review as long as the prisoner receives notice and has an opportunity to present a statement. Hewitt [v. Helms, 459 U.S. 460, 476-77, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983)].⁵

This Court has held that the higher standard of due process enunciated in *Wolff* is triggered when the prisoner has been penalized by solitary confinement or loss of good time credit as a result of the charge.⁶ Because the sanction imposed in this case involved only a reduction in custody classification which did not result in an increase in the length of Smith's confinement, Smith is only entitled to the *Hewitt* standard of due process.⁷ Smith does not dispute that he received notice and an opportunity to present a statement. Therefore, the disciplinary proceeding comported with the requirements of *Hewitt*.

Smith complains that Lindsey failed to contact Hayes before denying Smith's appeal. However, Lindsey had discretionary authority to conduct his own investigation. Smith argues that the prison practice of refusing to allow prisoners to call witnesses violates his right to due process. He also contends that he should have been granted a continuance to conduct discovery, that he should have had access to the investigatory records, and that he should have been advised of the results of McMurray's investigation. Because the *Hewitt* standard applies in this case,

⁵ *Jackson v. Cain*, 864 F.2d 1235, 1252 (5th Cir. 1989) (internal quotations omitted).

⁶ *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994).

⁷ *Id.*

we find Lindsey's failure to contact Hayes, the disciplinary committee's refusal to permit Smith to call live witnesses, and the failure to provide Smith with an opportunity for additional discovery prior to the hearing did not violate Smith's right to due process.

Smith next contends that the defendants' failure to bring him before the classification committee and the fact that he had three full-time job assignments violated his right to equal protection and constituted a denial of due process. He admits that "he has no right to any particular classification."⁸ However, Smith complains that he was not given a meaningful hearing before he was given a full-time job in the prison kitchen by Lindsey. The district court found that Smith did meet with the classification committee when he was transferred to CMCF, and that he was classified to perform unit support work, which included kitchen work. All three of Smith's job assignments were part-time. We find these fact-findings were not clearly erroneous.⁹

Smith argues that he received disparate treatment because he had three job assignments while other prisoners had only two job assignments. Smith's job assignments were part-time and, although Smith was sometimes required to work an extended shift, Smith has

⁸ See *Moody v. Baker*, 857 F.2d 256, 257-58 (5th Cir.), cert. denied, 488 U.S. 985, 109 S.Ct. 540, 102 L.Ed.2d 570 (1988).

⁹ See *Odom*, 3 F.3d at 843.

not shown that he actually received disparate treatment.¹⁰

Smith argues that the failure to provide him with an opportunity to call witnesses at the disciplinary hearing violates the requirements of the district court's order in the prisoner class action *Gates v. Collier*.¹¹ He requests this Court to enforce the *Gates* order. However, under the principle announced in *Gillespie v. Crawford*¹², Smith is required to bring equitable and declaratory claims by urging further action through the class representative and attorney, or by intervention in the ongoing class action.

Smith has requested appointment of counsel. There is no general right to counsel in a 42 U.S.C. § 1983 action.¹³ "This [C]ourt may appoint counsel in civil rights suits presenting 'exceptional circumstances.'"¹⁴ Smith's difficulties at CMCF appear to have resulted solely from his assignment to perform menial work when he believes he is better suited for work as a writ-writer. Therefore, we find that this case does not present exceptional circumstances. AFFIRM.

¹⁰ See *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993), *cert. denied*, ___U.S.____, 114 S.Ct. 2134, 128 L.Ed.2d 864 (1994) ("Only if the challenged government action classifies or distinguishes between two or more relevant groups must we conduct an equal protection inquiry.").

¹¹ 454 F. Supp. 579 (N.D. Miss. 1978), *aff'd*, 606 F.2d 115 (5th Cir. 1979).

¹² 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc).

¹³ *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982).

¹⁴ *Cooper v. Sheriff, Lubbock County, Tex.*, 929 F.2d 1078, 1084 (5th Cir. 1991) (citation omitted).