NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 1966

RANDELL ORANGE

VERSUS

SGT. STEWART, CORRECTIONAL OFFICER,
DIXON CORRECTIONAL INSTITUTE

DATE OF JUDGMENT: March 27, 2009

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 558,792, DIV. D, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

THE HONORABLE JANICE CLARK, JUDGE

* * * * * *

Randell Orange
Jackson, Louisiana

Plaintiff-Appellant
In Proper Person

Jonathan R. Vining
Baton Rouge, Louisiana

Counsel for Defendant-Appellee
Richard Stalder

* * * * * *

BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Disposition: AFFIRMED.

Kuhn, J.

Randell Orange, an inmate in the custody of the Department of Public Safety and Corrections ("DPSC"), appeals a judgment of the Nineteenth Judicial District Court, Parish of East Baton Rouge, which affirmed the DPSC's decision in a disciplinary matter and dismissed Orange's petition for judicial review. Based on our review of the record and applicable law, we affirm.

In a January 10, 2007 disciplinary report filed by Cadet Ka'Deisha Stewart, she reported that Orange told her that she was "trying to f***ing run something since you have them bars on your shirt," while "lining inmates up to return to Unit 2." Cadet Stewart's report further stated, "Then [Orange] proceeded to tell me that he didn't like me and he wasn't going to f***ing listen to me." Following a January 12, 2007 disciplinary board hearing, Orange was found guilty of "defiance." The board determined that Cadet Stewart's disciplinary report was clear and precise, her version was determined to be more credible than Orange's, and his only defense was denying the contents of the report. The board imposed two penalties, a custody change from medium to maximum custody status and the forfeiture of 90 days of good time.[1]

After exhausting the administrative remedy procedures (ARP) available to him within the prison without obtaining relief, Orange filed this petition for judicial review. After reviewing the ARP record and considering Orange's arguments, the commissioner found the DPSC's decision was "not arbitrary, capricious, manifestly erroneous or in violation of [Orange's] rights," and that the district court was "constrained to affirm [DPSC's] decision" and dismiss

[1] Under the DPSC rules governing disciplinary matters, "defiance," which includes cursing or insulting a DPSC employee, is a "Schedule B" offense for which the discipline can include a change to maximum custody and the forfeiture of up to 180 days of good time for each violation. See La. Admin. Code 22:I.359A(2) and I.365A & D.

Orange's petition. (See the Commissioner's Report, attached as "Appendix A.") A judgment in accordance with the commissioner's recommendation was signed by the district court judge on July 15, 2008, and Orange appealed that decision to this court.

On appeal, Orange asserts that various constitutional rights have been violated and that his lost good time should be restored. Our review of the record establishes that the district court reviewed Orange's petition under the provisions of La. R.S. 15:1177(A)(5) & (9) and found no basis to reverse or modify the DPSC decision. After a thorough review of the record, we find no error in the district court's judgment, and we affirm it in accordance with Uniform Court of Appeal Rules 2-16.2(A)(2)(5), (6), and (8).

The district court's judgment affirming the DPSC's decision and dismissing Orange's petition is affirmed at his costs.

AFFIRMED.

APPENDIX A

RANDALL ORANGE **NUMBER: 558,792 DIVISION D**

19TH JUDICIAL DISTRICT COURT

VS. **PARISH OF EAST BATON ROUGE**

DIXON CORRECTIONAL, ET AL **STATE OF LOUISIANA**

JUL 16 2008

COMMISSIONER'S REPORT

The Petitioner, an inmate in the custody of the Louisiana Department of Public Safety and Corrections, filed this suit for judicial review of Disciplinary Board Appeal Number DC1-2007-88, seeking review in accordance with R.S. 15:1171, et. seq. The Defendants filed into the suit record the entire administrative record of the aforementioned Disciplinary Board Appeal which has been accepted and marked for the Court's identification as DBA-A, (the written administrative record) and DBA-B, (the audio record of the disciplinary hearing complained of).[1] Both parties were notified of their right to file briefs in support of their positions and the Plaintiffs brief has been considered and is in the record for the Court's review and consideration. This report is issued on the record alone in accordance with law for the Court's final de novo consideration and adjudication on the merits of the Petitioner's claim.

ANALYSIS OF THE FACTS AND LAW

The scope of this Court's review is limited by R.S. 15:1177(A) (5) & (9), which states, in pertinent part, as follows:

> (5) The review shall be conducted by the Court without a jury and shall be confined to the record. The review shall be limited to the issues presented in the petition for review and the administrative remedy request filed at the agency level.
>
> (9) The court may reverse or modify the decision only if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

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[1] See DBA-A and DBA-B in the record attached to the Defendants' answer and attested to an employee of the Louisiana Department of Public Safety and Corrections.

a. In violation of constitutional or statutory provisions;
b. In excess of the statutory authority of the Agency;
c. .Made upon unlawful procedure;
d. Affected by other error of law;
e. Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or
f. Manifestly erroneous in view of the reliable, probative and substantial evidence on the whole record.

In this case, the Petitioner seeks the reversal of a disciplinary board decision of guilt and the restoration of 90 days of good time lost thereby. The record shows that the Petitioner was charged under Disciplinary Board rules with a violation of Rule 3 (Defiance), a Schedule B (major) prison disciplinary violations stemming from alleged profane and insulting language by the Petitioner directed to a security officer. Defiance is defined by the Department's Rules of Discipline in pertinent part as follows:

DEFIANCE — SCHEDULE B:

> " **... No inmate shall curse or insult an employee,** visitor, guest or their families. ... No inmate shall obstruct or resist an employee who is performing his proper duties. No inmate shall try to intimidate an employee to make the employee do, as the inmate wants him to do. **An employee, visitor, guest or their families shall not be subject to abusive conversation,** correspondence, phone calls or gestures .... "[2](emp. mine)

As to the facts of the violation, the Petitioner states that he and several other inmates were standing together and that "some inmates was in the line making fun of Ms. Stewart's [a new female officer's] hair and size."[3] Another inmate with the Petitioner, Samuel Myers, told them she had seen "how we act' and the Petitioner responded that is the reason he doesn't socialize with authority.[4] Officer Myers then asked if he had a

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[2] See p. 15 of the Department of Public Safety and Corrections' *Disciplinary Rules and Procedures for Adult Inmates* manual the December 2000 Edition at p. 15. A copy of this manual was previously provided to the Court for reference.

[3] See Exh. A, the argument offered on appeal.

[4] Id,.

problem, to which he answered that he did not and that "if he did, he would let her know. "[5]

While the Petitioner does not discuss whether his words and actions were insulting or abusive, he does deny that he ever used any curse words or specifically the vulgar language alleged by the officer, as she stated in her disciplinary report. That report states that the Petitioner insulted her--a new correctional officer-- by telling her in part that he was not going to f---ing listen to her and that she was "trying to f---ing run something" because she had bars on her shirt.[6]

At the disciplinary board hearing the Petitioner did not attempt to speak at all, but allowed inmate counsel substitute to speak on his behalf. Thereby, he denied the officer's charges that he used vulgar language and stated that he was charged for no reason. He made no motion to call witnesses, or to offer written or stipulated testimony of other inmates to support his version of the events. Further, he did not attempt to speak on the record at all. After deliberating on the record, the Board found the Petitioner guilty of defiance, finding the officer's version was more credible than the Petitioner's.

The Court notes that in the Petitioner's administrative appellate argument, he acknowledged that he was with other inmates who were making fun of the officer and that she overheard them, which is what resulted in his exchange with her.[7] This Court's review is limited to the administrative record alone, and the issues raised therein. The only issue raised by the administrative appeal was whether the Petitioner or the officer was telling the truth about the events.[8]

In order to overturn the Department's decision, the Court must find, based on the evidence in the record, that the decision was without any factual basis in the appellate record. The officer's statement of events offers a factual basis for the violation-

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[5] Id.
[6] See Exh. A, the disciplinary report and Exh. B, Petitioner's statement in defense.
[7] See Exh. A, the administrative appeal argument to the Warden
[8] See Exh. A, the administrative appeal argument to the Warden.

i.e. use of vulgar, insulting and/or abusive language that is prohibited by the prison Rules. Thus, the decision must be affirmed. If the agency's decision is supported by any reasonable basis in fact, it is not arbitrary.[9] In this case, there were two versions of events—that of the Petitioner and that of the officer.

> "In reviewing the [agency's] findings of fact, the court should not reverse or modify such a finding unless it is clearly wrong or manifestly erroneous."[10]
>
> "The issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong but whether the fact finder's conclusion was a reasonable one. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony...."[11]

The law is that when two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous.[12] In sum, the statement of the charging officer supports a finding that the Petitioner used abusive/insulting language directed at her, and therefore, the Board had the authority to find he had violated the rule prohibiting defiance.

I note that the Petitioner's argument on appeal to this Court raises for the first time the issue that he was not allowed to call any witnesses. While this claim is raised for the first time herein, and thus, is not properly before the Court pursuant to R.S. 15:1177A, out of an abundance of caution, I reviewed the audio record of the hearing once again and found that the Petitioner made no motions to the Board and did not call or ask to call, or even mention any, witnesses.* Neither did he offer any written statements of any other inmates who were with him at the time or witnessed the exchange. The belated assertion that he was not allowed to call witnesses was not presented in the hearing, and only raised in argument on appeal to say that Samuel Myers, one of the inmates with him

[9] *Lindsley v. Natural Carbonic Gas Co.*, 31 SCT 337(1910).
[10] *Walters v. Dept. of Police of City of NO.* 454 So2d 106 (La. 1984) at p.114.
[11] *Nettleton v. Audubon Ins. Co.*, 637 So2d 792 (1st Circ. 1994).
[12] *Mystich v. Volkswagen of Germany,* 666 So.2d 1073 (La.1996).
[13] Exh. B, audio record.

at the time of the incident, "can state I didn't curse her at all."[14] There is simply no evidence to show that the Petitioner ever mentioned Mr. Myers to the Board, or sought to call Mr. Myers at the hearing, to offer his statement or even to request the Board stipulate what Mr. Myers would have said if called. All of these procedures are allowed under the Department's rules and were available to the Petitioner at the hearing. Yet, he did not seek to avail himself of any of them timely.

The Board considered his statement alone—offered through a third party-- that he did not use the vulgar language, and it found that the statement by the officer was more credible. It is not within this Court's authority to usurp the authority of the disciplinary Board when there is evidence in support thereof in the record.[15]

I also note that for the first time on appeal, the Petitioner also claims he should have been allowed to take a polygraph test to determine who was telling the truth—him or the officer. However, there is no evidence in the record to show that he requested one, that one would have been allowed under the department's rules, or that such tests are used in disciplinary proceedings. This Court is aware that such tests are not generally admissible in courts of law, and without more, the Petitioner's claim that he was denied due process by the Department's failure to offer him a polygraph test is without merit.

Finally, the Petitioner asserts that another officer, in escorting him after the incident, pushed or struck him. While the Petitioner asks for no relief in connection with this alleged incident, I note for edification that he has the right to file a separate ARP complaint in regard to any allegation of excessive force, but that such a complaint, if intended here, is not properly before the Court on a disciplinary appeal.

Therefore, considering the evidence in the record on the issue of whether the Petitioner violated the rule prohibiting abusive or insulting language against an employee, the Board's decision, based on the record does not appear to be arbitrary nor

[14] Exh. A, the administrative appeal argument.
[15] *Save Ourselves Inc., v. La. Environmental Control Comm., 452 So2d* 1152 (La. 1984) at p. 1159.

capricious or in violation of the Petitioner's rights. Therefore, this Court is constrained to affirm the decision of the administration.

COMMISSIONER'S RECOMMENDATION

Therefore, after a careful review of the record, for the reasons stated hereinabove, it is the recommendation of this Commissioner that the Department's decision herein is not arbitrary, capricious, manifestly erroneous or in violation of the Petitioner's rights and therefore, the Court is constrained to affirm the decision and dismiss this appeal with prejudice at the Petitioner's costs.

Respectfully recommended, this 5th day of June 2008 in Baton Rouge, Louisiana.

RACHEL P. MORGAN,
COMMISSIONER, SECTION A
NINETEENTH JUDICIAL DISTRICT COURT