

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1576

Handwritten initials: A circle with a cross inside, followed by 'RW' and 'JEW' written vertically.

RANDELL ORANGE

VERSUS

STEVEN RADAR, WARDEN, AND IVY MILLER,
CLASSIFIED DIRECTOR, DIXON CORRECTIONAL
CENTER

Judgment Rendered: MAY 26 2010

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 568,144

Honorable William Morvant, Judge Presiding

Randell Orange
Dixon Correctional Institute
Jackson, LA

Plaintiff/Appellant
Pro Se

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Louisiana Department of Public
Safety and Corrections

BEFORE: WHIPPLE, KUHN, DOWNING, HUGHES, AND
WELCH, JJ.

*Whipple, J. dissents & would affirm the district court.
Kuhn, J., dissents. by [initials]*

HUGHES, J.

This is an appeal by Randell Orange, an inmate in the custody of the Louisiana Department of Public Safety and Corrections (DPSC), from a judgment of the district court, affirming the disciplinary board's decision imposing discipline of 10 days of disciplinary detention/isolation and 90 days loss of good time, and dismissing Orange's petition for judicial review with prejudice. For the following reasons, we reverse the district court, amend the DPSC ruling, and affirm as amended.

FACTS AND PROCEDURAL HISTORY

In a March 20, 2008 disciplinary report, Orange was charged with a violation of Disciplinary Rule 3, Defiance, for allegedly having used insulting or defiant language in a conversation with another inmate at Dixon Correctional Institute. Specifically, a correctional officer overheard Orange state to another inmate, "Tell [another named DPSC employee] to suck my [d**k]." Following a disciplinary hearing, Orange was found guilty of a Rule 3 violation, and penalties of ninety days loss of good time and ten days of isolation were imposed.

From the disciplinary board decision, Orange appealed to both the warden and the Secretary of the DPSC and was denied relief at both administrative levels. Thereafter, Orange filed a petition for judicial review in the Nineteenth Judicial District Court, which affirmed the finding of a disciplinary violation and the punishment imposed.

Orange now appeals to this court, contending that the district court erred in affirming the DPSC's finding of a Rule 3 violation for defiance, when Orange instead should have been found guilty of a Rule 7 violation for disrespect.

LAW AND ANALYSIS

An inmate aggrieved by a disciplinary action by the DPSC may seek judicial review pursuant to LSA-R.S. 15:1177. **Victorian v. Stalder**, 99-2260 (La. App. 1 Cir. 7/14/00), 770 So.2d 382, 384 (en banc). The standard of review is set forth in LSA-R.S. 15:1177(A)(9), which provides in pertinent part:

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:

- (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 abuse of discretion or clearly unwarranted exercise of discretion.
- (f) Manifestly erroneous in view of the reliable, probative and substantial evidence on the whole record. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by firsthand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

As stated above, Orange argues on appeal that the record before us supports a finding of a Rule 7 violation for disrespect (a Schedule A - or lesser - violation), rather than the charged Rule 3 violation for defiance (a Schedule B - or major - violation), because he did not address any harsh words directly toward an officer. Rather, he claims that he made the statement to another inmate, which statement was overheard by an officer. Notably, Orange has never denied that he made the statement at issue.

Disciplinary Rule 3, governing defiance, which is a major violation, provided, at the time of the March 2008 incident at issue herein, that an

inmate shall not "curse or insult an employee" and shall not "threaten an employee." The rule further provided that "[a]n employee ... shall not be subject to abusive conversation." See La. Admin. Code, Title 22, Part 1, § 365(D) (March 2008). On the other hand, Rule 7, prohibiting disrespect, a lesser violation, provided that employees "shall not be subject to disrespectful conversation." See La. Admin. Code, Title 22, Part 1, § 365(H) (March 2008).

Penalty provisions for a Schedule A violation, applicable to a Rule 7 violation, authorized disciplinary detention/isolation of up to 5 days for each violation and the forfeiture of good time of up to a maximum of 30 days for each violation. Penalty provisions for a Schedule B violation, applicable to a Rule 3 violation, authorized disciplinary detention/isolation of up to 10 days for each violation and the forfeiture of good time of up to a maximum of 180 days for each violation. See La. Admin. Code, Title 22, Part 1, § 359(A) (March 2008).

The 19th Judicial District Court Commissioner noted in her report: "Certainly, the language used and the idea expressed by it could reasonably be considered 'abusive' or 'insulting' to someone within hearing of it." We respectfully disagree with the commissioner's interpretation and/or application of Rule 3.

Rule 3's directive that "[n]o inmate shall curse or insult an employee" is phrased in such a way that it can only be taken to mean a curse or insult made by the inmate directly toward a DPSC employee, rather than one made to a third person, as was the case herein. Furthermore, Rule 3's prohibition against "abusive conversation," while encompassing comments made to third persons, does not include a prohibition against "insulting

conversation." While Orange's comment to another inmate was certainly disrespectful, we do not consider it to have been "abusive."¹

We conclude the district court, in affirming the DPSC disciplinary board's finding that Orange was guilty of a Rule 3 violation for defiance, instead of a Rule 7 violation for disrespect, was arbitrary and capricious and abused its discretion. Because the applicable disciplinary sanctions authorized for a Rule 3 violation were more severe than those for a Rule 7 violation, we further conclude that Orange's substantial rights were prejudiced by the disciplinary board's erroneous ruling. Accordingly, we hereby amend the DPSC disciplinary board ruling to find Randell Orange guilty of a Rule 7 violation rather than a Rule 3 violation, and amend the penalty imposed from 10 days of solitary confinement and 90 days loss of good time to the lesser penalty of 5 days of solitary confinement and 30 days loss of good time.

CONCLUSION

For the above and foregoing reasons, we reverse the May 6, 2009 judgment of the district court, affirming the DPSC decision and dismissing Randell Orange's petition for judicial review, and amend the Louisiana Department of Public Safety and Corrections ruling as stated hereinabove, and affirm as amended. Costs of the district court proceeding, in the amount of \$982.60, and costs of this appeal, in the amount of \$821.50, are assessed against the Louisiana Department of Public Safety and Corrections.

**DISTRICT COURT MAY 6, 2009 JUDGMENT REVERSED;
DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS
DECISION AMENDED AND AFFIRMED AS AMENDED.**

¹ We note that Rule 7 was amended in October 2008 to prohibit "abusive or insulting conversation." See La. Admin. Code, Title 22, Part 1, § 363(C) (October 2008). We express no opinion herein regarding the application of the amended provision.