

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 2079

TRACEY MARQUEZ

VERSUS

LOUISIANA DEPARTMENT OF CORRECTIONS



Judgment Rendered: June 8, 2012

**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 600,821**

The Honorable Todd Hernandez, Judge Presiding

**Tracey Marquez
Angie, Louisiana**

**Plaintiff/Appellant
*Pro Se***

**William Kline
Baton Rouge, Louisiana**

**Counsel for Defendant/Appellee
Louisiana Department of
Corrections**

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J. - concurs.

GAIDRY, J.

This is an appeal of the judicial review by the Nineteenth Judicial District Court of a disciplinary action taken by the Louisiana Department of Public Safety and Corrections (“DOC”), appellee, against Mr. Tracey Marquez, appellant, an inmate at Rayburn Correctional Center, which is administered by DOC. For the following reasons, we affirm the decision by the Nineteenth JDC to dismiss the appellant’s petition with prejudice.

FACTS AND PROCEDURAL HISTORY

On October 24, 2010, Mr. Marquez was seen by Rayburn Correctional Center staff via security monitor engaged in an action which appeared to be masturbating in a shower stall, allegedly in the view of a female correctional officer. Such behavior is classified by prison rule 30w as prohibited behavior. If found guilty, the offender is subject to disciplinary sanctions by the prison.

A disciplinary hearing in the matter was conducted the following day by the board, and Mr. Marquez was found guilty of the prohibited behavior. The penalty imposed was a custody transfer to a “working cellblock.” Mr. Marquez’s actual prison sentence was not affected in any way by the penalty.

Mr. Marquez subsequently filed a disciplinary board appeal with DOC, which was denied on January 28, 2011. Mr. Marquez’s complaint on appeal was that he was found guilty without the incident being adequately investigated. DOC’s reasons for denying the appeal are as follows:

We have considered the appellant’s arguments and the decision rendered by the Warden. Upon review, we find the disciplinary report to be clear, concise and to provide convincing evidence of the violation as charged. The offender has not provided anything to warrant reversal or modification of the disciplinary proceeding. The security camera surveillance footage provides enough evidence for the finding of guilt. The Warden’s

decision clearly addressed the offender's issue on appeal. The accused received a complete hearing which afforded him full due process of the law. The imposed sanctions are in accordance with the sentencing guidelines for such Schedule B offenses. For the following reasons, we agree with the decision of the Disciplinary Board and the Warden.

Mr. Marquez then petitioned the Nineteenth JDC for judicial review of DOC's decision.¹ Commissioner Smart issued the following Screening Recommendation on May 13, 2011:

[I]t is the recommendation of this Commissioner that this Court raise, on the Court's own motion, and grant an exception of no cause of action, dismissing the petitioner's suit, prior to service, with prejudice, without an opportunity to amend at the petitioner's cost.

Judgment was rendered by Judge Hernandez on June 21, 2011, adopting the Commissioner's Recommendation. Motion for appeal of this judgment was filed by Mr. Marquez on August 29, 2011 and granted on October 5, 2011.

ASSIGNMENT OF ERROR

Mr. Marquez's brief states his sole assignment of error as follows: "The District Court incorrectly dismissed plaintiff's Judicial Review Application, ruling there was no cause of action."

STANDARD OF REVIEW

The function of the peremptory exception of no cause of action is to test the legal sufficiency of the petition, which is done by determining whether the law affords a remedy on the facts alleged in the pleading. No evidence may be introduced to support or controvert an exception of no cause of action. Consequently, the court reviews the petition and accepts well-pleaded allegations of fact as true. The issue at the trial of the

¹ The office of the Commissioner of the Nineteenth Judicial District Court was created by La. R.S. 13:711 to hear and recommend disposition of criminal and civil proceedings arising out of the incarceration of state prisoners. The Commissioner's written findings and recommendations are submitted to a district court judge, who may accept, reject, or modify them. LA. R.S. 13:713(C)(5).

exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Aycock v. Chicola*, 09-563, p. 3 (La. App. 3 Cir. 12/16/09) 27 So.3d 1005, 1007. Therefore, exceptions of no cause of action present legal questions, and are reviewed under the de novo standard of review. *Phillips v. Gibbs*, 2010-0175 (La. App. 4 Cir. 5/21/10), 39 So.3d 795, 797. See also *Kinchen v. Livingston Parish Council*, 2007-0478, p. 2 (La. 10/16/07), 967 So.2d 1137, 1138.

DISCUSSION

Louisiana Revised Statutes 15:1177 provides judicial review of administrative acts by the Nineteenth JDC. Specifically, paragraph (A)(9) states “[t]he court may reverse or modify the decision only if *substantial rights* of the appellant have been prejudiced.” (emphasis added) Therefore, in order for Mr. Marquez’s petition to state a cause of action, he must plead that DOC prejudiced or infringed upon one of his “substantial rights.”

Mr. Marquez states in his brief that his right to due process of law was violated by DOC “by not giving him a full, fair, and impartial hearing.” However, we note from the record that a hearing was held by the board on October 25, 2010. Mr. Marquez complains that the hearing board disregarded several of his questions, suggesting that Mr. Marquez was present for his hearing. Mr. Marquez therefore doesn’t allege that the hearing was not had or that he was not present for it, but that the hearing was not (in his estimation) conducted adequately. The manner in which a hearing or trial is conducted can potentially violate due process of law when a person’s constitutional liberty is at stake. See *Clark v. Louisiana State Penitentiary*, 697 F.2d 699, 701 (5th Cir.La., 1983).

In the instant case, the punishment Mr. Marquez received was a transfer to another cell block. The record does not reflect that the prison

sentence he was serving was lengthened, or that a diminution of time on his sentence was revoked. Nowhere does the record state that his eligibility for parole was affected. He was simply moved to another part of the prison in which he was already serving his sentence.

This Court need not stray from our decision in *Parker v. LeBlanc*, 2002-0399 (La. App. 1 Cir. 2/14/03), 845 So.2d 445, 446, where we saw this precise issue surrounding virtually identical facts. We decided there:

[T]he Due Process Clause does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner... Mr. Parker's change in custody status from medium to maximum and a thirty-day confinement was not atypical or a significant hardship in relation to the ordinary incidents of prison life. Thus, the change in custody did not afford Mr. Parker a protected liberty interest that would entitle him to... procedural protections, violate his constitutional rights, or entitle him to damages.
(citations and quotation marks omitted.)

We adopt the above reasoning and apply it directly to Mr. Marquez.

CONCLUSION

Louisiana Revised Statutes 15:1178(D) allows the Nineteenth JDC, in its judicial screening process, to dismiss a petition *ex parte* when the petition on its face fails to state a cause of action. The court therefore acted properly in dismissing Mr. Marquez's petition, which failed to state a cause of action. We find the Commissioner's Screening Recommendation to be correct and affirm the judgment of the Nineteenth JDC. Granting Mr. Marquez an opportunity to amend his petition would avail him nothing, as the penalty he received is fully stated in the record and clearly shows that no substantial rights of Mr. Marquez were violated.

DECREE

The ruling of the Nineteenth JDC, dismissing Mr. Marquez's petition with prejudice, is affirmed. Appeal costs in this matter are assessed to Mr. Marquez, the appellant.

AFFIRMED