

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

KEN PRIEST #323208,

Petitioner,

v

Case No. 03-22783-AA
HON. PHILIP E. RODGERS, JR.

MICHIGAN DEPARTMENT OF
CORRECTIONS,

Respondent.

Ken Priest #323208
Petitioner in Pro Per

Diane M. Smith (P32402)
Attorney for Respondent

DECISION AND ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS OR AFFIRM

The Petitioner is an inmate under the jurisdiction of the Respondent Michigan Department of Corrections. On May 22, 2003, while he was confined at the Pugsley Correctional Facility in Grand Traverse County, Michigan, the Petitioner filed a Petition for Judicial Review of an administrative decision by the Respondent regarding a major misconduct. The Petitioner has since been transferred to the Straits Correctional Facility (KTF) in Kincheloe, Michigan.

On June 2, 2003, the Court issued a Pre-Hearing Order. The Pre-Hearing Order was subsequently vacated and an alternate briefing schedule was established by Order dated July 7, 2003. The Respondent filed a Motion to Dismiss or Affirm. The time line established by that Order has now expired. The Court now issues this Decision and Order and, for the reasons stated herein, grants the Respondent's Motion to Dismiss or Affirm.

Petitioner filed this Petition for Judicial Review challenging a major misconduct ticket for Theft; Possession of Stolen Property (037) that he received after a prison official found 11 food service sponges in Petitioner's locked foot locker during a shakedown. A hearing on the violation was held on January 13, 2003. After reviewing the entire record, the Hearings Officer concluded that Petitioner was guilty as charged. An appeal was filed with the Hearings Division on February 10, 2003 and denied February 27, 2003 by the Office of Policy and Hearings. The Hearings Division erroneously noted that the request had not been filed within 30 days.

The Petitioner signed his Petition for Judicial Review on May 18, 2003 and it was date stamped as received by the Court on May 22, 2003. Pursuant to MCL 791.255(2), the Petitioner was required to file his Petition within 60 days of the denial of his request for rehearing. The Petition, having been filed beyond the statutory time limit, is time-barred.

Even if the Petition was not time-barred, the Court would affirm the decision of the Hearings Officer.

The Michigan Administrative Procedures Act of 1969 (MAPA) provides the standard of judicial review governing Department of Corrections misconduct hearings. *Tocco v Marquette Prison Warden*, 123 Mich App 395, 398; 333 NW2d 295 (1983). The scope of judicial review under the MAPA is defined by MCL 24.306 which provides:

(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency. (c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

In *Wolff v McDonnell*, 418 US 539; 94 S Ct 2963; 41 L Ed 2d 935 (1974), the Supreme Court ruled that a state prisoner was entitled to due process notice and some kind of hearing in connection with disciplinary determinations involving serious misconduct. In *Tocco, supra* at 399, the Court noted that the Michigan Legislature has fashioned misconduct hearing procedures designed to comply with the due process mandate of *Wolff v McDonnell, supra*. These

procedures, set forth in MCL 791.251, *et seq.* were in effect at the time of the instant hearing. These statutory provisions are supplemented by the Department of Corrections's own Hearings Handbook (DCHH).

The Court has reviewed the whole record in this matter. It is clear that the hearing was conducted in compliance with the Constitution, the laws of this State and the DCHH. It is also clear that the Hearings Officer's decision was supported by competent, material and substantial evidence. Const 1963, art 6, § 28; MCL 791.251, *et seq.*

The Petitioner claimed that he got the sponges from another inmate who got them from yet another inmate who ordered them from the hobby craft store. The Food Service Director provided a statement to the Hearings Officer that Food Service purchased the sponges from surplus in Lansing and that no one authorized any prisoner to have them in their possession outside of Food Service. The hobby craft supervisor provided a statement that the sponges in question could not be ordered through the hobby craft store. The Hearings Officer concluded that Petitioner knew or should have known the sponges were stolen because he obtained them from a convicted felon who did not reveal the name of his alleged source. Besides, the Petitioner should have asked staff before taking anything not available in the store from a prisoner. The Hearings Officer found Petitioner's version of the story to lack credibility.

This Court must not substitute its judgment for that of the Hearings Officer on matters of credibility. In light of the Hearings Officer's opportunity to hear the testimony and view the witnesses, we give great deference to the Hearings Officer's factual findings and credibility determinations. *Arndt v Dep't of Licensing & Regulation*, 147 Mich App 97, 101; 383 NW2d 136 (1985). Thus, the decision of the Hearings Officer is affirmed.

The Respondent seeks an award of taxable costs in the amount of \$44. Pursuant to MCR 2.625, the prevailing party is entitled to an award of taxable costs. Therefore, the Respondent is entitled to taxable costs in the amount of \$44.

CONCLUSION

The Petitioner's Petition for Judicial Review is time-barred and is therefore dismissed. If it had not been time-barred, the Court would have affirmed the decision of the Hearings Officer because that decision is supported by competent, material and substantial evidence on the whole record. The Hearings Officer simply did not find the Petitioner's version of how he came into

possession of the subject sponges to be credible. This Court cannot and will not substitute its judgment regarding credibility for that of the Hearings Officer.

Costs in the amount of \$44 will be taxed against the Petitioner. The Michigan Department of Corrections shall withdraw \$44 from the Petitioner's prisoner account and forward same to Respondent's Attorney Michael Cox, Michigan Attorney General, within 30 days of the date of this order.

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: S/10/03/03