2018 IL App (1st) 171567-U

FIFTH DIVISION
August 31, 2018

Nos. 1-17-1567; 1-17-1706 (cons.)

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
CHARLES KUCINSKY,	)	Circuit Court of
	)	Cook County
Petitioner-Appellant,	)	
	)	
v.	)	No. 14 CH 1774
	)	
ILLINOIS DEPARTMENT OF CORRECTIONS, RANDY PFISTER, PAT HASTINGS, ED LEWIS, JACKIE MILLER, HELEN HAMILTON, and S.A. GODINEZ,	)	Honorable
	)	Neil Cohen,
	)	Judge Presiding.
Respondents-Appellees.		

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County upholding the petitioner's finding of guilt of violent assault as a result of prison disciplinary proceedings.

¶ 2 Petitioner Charles Kucinsky *pro se*, an inmate in the Illinois Department of Corrections (Department), filed a petition for a common law writ of *certiorari* in the circuit court of Cook

County seeking review of a prison disciplinary proceeding wherein he was found guilty of a violent assault against a correctional officer pursuant to the Administrative Code (Code) (20 Ill. Adm. Code 504.Appendix A (2003) (No. 100)). Upon reviewing the administrative record, the circuit court affirmed the judgment of the Department. On appeal, petitioner contends that the evidence was insufficient to support the finding of guilt and that the circuit court erred when it (1) applied the wrong standard of review to his petition for writ of *certiorari*; (2) failed to consider certain exhibits not included in the administrative record; and (3) concluded the definition of violent assault as set forth in the Code was not unconstitutionally vague. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Petitioner was an inmate at the Menard Correctional Center operated by the Department when the incidents complained of occurred. Respondents Randy Pfister (Pfister), Pat Hastings (Hastings), Ed Lewis (Lewis), Jackie Miller (Miller), Helen Hamilton (Hamilton), and S.A. Godinez (Godinez) were all employees of the Department at the time of the incident.

¶ 5 On August 29, 2012, an inmate disciplinary report was served on petitioner. In the report, Lieutenant Craig Mitchell (Mitchell), a correctional officer, accused petitioner of two offenses as defined by the Department's regulations: (1) violent assault of any person (violent assault) (*id.*); and (2) dangerous disturbance (*id.* (No. 105)). The report provided that on August 27, 2012, at 2:10 p.m. petitioner was exiting the east yard with 40 other inmates when he engaged in an altercation with Lieutenant Mitchell. Incident reports from correctional officers, including Lieutenant Mitchell, provided the details of the altercation. These reports indicated that after petitioner walked past Lieutenant Mitchell in the east yard, petitioner turned around and struck Lieutenant Mitchell in the left side of his face with a closed fist, knocking Lieutenant

Mitchell to the ground. Petitioner then struck Lieutenant Mitchell again. A struggle between Lieutenant Mitchell and petitioner ensued and a warning shot was fired by another correctional officer from the watch tower. Shortly thereafter petitioner was restrained. Lieutenant Mitchell then received treatment for his injuries, which included a laceration to his upper lip that required sutures, a CT scan, an x-ray of his right hand, abrasions to his right elbow, pain in his left bicep, and a chipped lower tooth.

¶ 6 On September 5, 2012, a disciplinary hearing was conducted before the adjustment committee, consisting of two Department employees Hamilton and Lewis. The final summary report of the adjustment committee indicated that petitioner pled guilty. The report did not indicate that petitioner called or requested any witnesses. After considering the evidence detailed above, the adjustment committee found the evidence was sufficient to find petitioner guilty of violent assault and dangerous disturbance. The adjustment committee recommended one year in "C grade," indeterminate segregation, revocation of one year of good-conduct credits, six months of yard restriction, one year audio/visual restriction, and six months of "contact visits restriction." Pfister, the chief administrative officer, approved the recommendation.

¶ 7 After exhausting his administrative remedies, petitioner filed a petition for writ of *certiorari* in the circuit court against respondents seeking review of the September 5, 2012, hearing before the adjustment committee and the Department's final determination. Petitioner requested reversal of this decision and a new hearing on the basis that he had been denied due process because he had not been allowed to call witnesses on his behalf and the hearing decision erroneously stated that he had pled guilty. On September 11, 2015, the circuit court entered an order remanding the matter to the Department for a "*de novo*" hearing on the charges against

petitioner. Although the order did not so expressly state, the record reflects this order was entered by agreement between the parties.

¶ 8 A new hearing was conducted on January 19, 2016. Petitioner pled not guilty, but admitted he struck Lieutenant Mitchell twice after Lieutenant Mitchell grabbed him. Petitioner argued before the adjustment committee that his actions did not constitute "violent assault" under the Code (*id.* (No. 100)), but was instead "assault" (*id.* (No. 102)). At petitioner's request statements of two witnesses were provided to the adjustment committee. One witness indicated he observed Lieutenant Mitchell grab petitioner, cuff him, and slam him to the ground. The other witness stated he observed "the lieutenant" grab petitioner by the pants and then petitioner turned around and hit him. Considering this evidence, along with the same evidence presented at the September 2012 disciplinary hearing, the adjustment committee again found petitioner guilty of violent assault and dangerous disturbance. The adjustment committee recommended one year in "C grade," indeterminate segregation, revocation of one year of good-conduct credits, six months of yard restriction, one year audio/visual restriction, and six months of "contact visits restriction." The chief administrative officer, Guy Pierce, approved the recommendation.

¶ 9 Thereafter, petitioner filed a grievance in which he maintained that his due process rights were violated because his charge was not changed from violent assault to assault and he was denied the opportunity to present documentary evidence and an additional witness. Petitioner's grievance was denied.

¶ 10 In May 2016, with the assistance of counsel, petitioner filed an amended petition for writ of *certiorari* seeking review of the Department's January 2016 disciplinary hearing. Petitioner alleged that he was denied due process at the January 2016 disciplinary hearing because (1) he was not allowed to make a statement or cross-examine Lieutenant Mitchell, and (2) the outcome

of the hearing was predetermined. Petitioner further alleged that the evidence did not support finding him guilty of violent assault. Petitioner did not challenge the finding of guilt for dangerous disturbance. Respondents answered the complaint by filing the administrative record with the circuit court.

¶ 11 In his brief in support of his petition, petitioner argued that (1) the finding of guilt for violent assault was against the manifest weight of the evidence; and (2) the definition of violent assault is sufficiently vague so as to be unconstitutional and, therefore, his due process rights were denied. In response, respondents maintained that petitioner was afforded due process at the January 19, 2016, hearing and that the evidence presented supported the finding that petitioner's conduct towards Lieutenant Mitchell was "likely to result in serious bodily injury" (*id.* (No. 100)) as to justify a finding of violent assault.

¶ 12 The circuit court entered a written order affirming the judgment of the Department finding petitioner guilty of violent assault. Applying the clearly erroneous standard of review, the circuit court found the record demonstrated that petitioner struck Lieutenant Mitchell in the head twice, knocking him to the ground and that this conduct met the definition of violent assault as set forth in the Code. The circuit court further found that the definition of violent assault was not unconstitutionally vague as it "clearly specifies a standard that guides those who must comply with it" and that the term "serious bodily injury" is not so vague as to be incapable of being validly applied.

¶ 13 Petitioner filed a *pro se* motion to reconsider to which he attached numerous exhibits. These exhibits consisted, in part, of four hand-copied adjustment committee final summary reports regarding inmates other than petitioner. Shortly thereafter, petitioner filed a motion to supplement his motion to reconsider, requesting he be allowed to include nine additional final

summary reports of other inmates to support his claim that the facts of his case did not amount to violent assault.

¶ 14 After the motion to reconsider was briefed, the circuit court denied the motion. In denying the motion, the circuit court expressly declined to consider the 13 additional final summary reports which were not included in the administrative record and struck them from the circuit court record. This appeal followed.[1]

¶ 15 ANALYSIS

¶ 16 On appeal, petitioner *pro se* contends that the evidence was insufficient to support finding him guilty of violent assault and that the circuit court erred when it (1) improperly applied the standards under the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2016)) to his petition for writ of *certiorari*; (2) did not consider certain exhibits which were not included in the administrative record; and (3) concluded the definition of violent assault as set forth in the Code was not unconstitutionally vague.

¶ 17 We first turn to address petitioner's assertion that the circuit court erred in two ways when it applied the Administrative Review Law to his common law writ of *certiorari*. First, petitioner argues that the circuit court erred when it ordered a "*de novo*" or new disciplinary hearing in September 2015. According to petitioner, while remands to the administrative agency are allowed under the Administrative Review Law, such a remedy is prohibited in the context of a writ of *certiorari*. Petitioner maintains that upon finding the disciplinary proceedings were not in compliance with the law the circuit court was only allowed to "affirm in full or reverse in full" and thus "remand was not an option." Second, petitioner maintains that the circuit court committed error in applying the "clearly erroneous" standard of administrative review instead of

[1] Petitioner filed two notices of appeal referencing the same final order. These appeals have been consolidated for our review.

the "some evidence" standard that is required when a finding of guilty results in the relinquishment of good-conduct credit. See *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 454 (1985).

¶ 18 Regarding petitioner's first argument, we observe that petitioner did not take issue with the circuit court's September 2015 order remanding the matter to the adjustment committee for rehearing in any of his subsequent filings before the circuit court. Having failed to raise this issue before the circuit court, petitioner has forfeited this claim for our review. See *Dookeran v. County of Cook*, 2013 IL App (1st) 111095, ¶ 45 (finding a claim not raised before the administrative body or in the petition for writ of *certiorari* to be forfeited). Furthermore, our review of the record reveals, through petitioner's own filings no less, that (1) his petition for writ of *certiorari* regarding the September 2012 disciplinary hearing requested the circuit court afford him "further relief as may be proper and just," which included that the circuit court "have the hearing decision overturned and *** have a new hearing"; and (2) the order granting the "*de novo*" hearing was entered by agreement. Accordingly, due to petitioner's forfeiture, we decline to address the merits of his claim.

¶ 19 Petitioner's second argument, that the circuit court improperly applied a "clearly erroneous" standard of review to the adjustment committee's determination, also fails. The case is before us on appeal from a common law writ of *certiorari*, which is used to obtain circuit court review of an administrative decision when the administrative agency's enabling statute does not expressly adopt the Administrative Review Law (735 ILCS 5/3-101 *et seq.*) (West 2016)), and provides no other method for reviewing the agency's decisions. *Outcom, Inc. v. Illinois Department of Transportation*, 233 Ill. 2d 324, 332-33 (2009). Because the statutory provisions pertaining to prison disciplinary procedures (730 ILCS 5/3-8-7 to 3-8-10 (West 2016)) neither

adopt the Administrative Review Law nor provide any other method of judicial review, such disciplinary proceedings are reviewable through a writ of *certiorari*. *Fillmore v. Taylor*, 2017 IL App (4th) 160309, ¶ 72; *Alicea v. Snyder*, 321 Ill. App. 3d 248, 253 (2001). The purpose of *certiorari* review is to have the entire record of the inferior tribunal brought before the court to determine, from the record alone, whether that body proceeded according to the applicable law. *Reichert v. Court of Claims*, 203 Ill. 2d 257, 260 (2003) (citing *Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413, 427 (1990)). Our supreme court has stated that review of a writ of *certiorari* is "essentially the same" as our review of a petition filed under the Administrative Review Law. *Outcom, Inc.*, 233 Ill. 2d at 337. Accordingly, we review the administrative agency's decision, not the circuit court's decision. *Id.* (holding that review of a common law writ is treated as "any other appeal that comes to us on administrative review"); *Rodriguez v. Chicago Housing Authority*, 2015 IL App (1st) 142458, ¶ 13. Therefore, petitioner's claims of error attributable to the circuit court, including that it employed an improper standard of review, are misplaced on appeal, as we review the decision of the agency and not that of the circuit court. See *Outcom, Inc.*, 233 Ill. 2d at 337.

¶ 20 Nonetheless, the circuit court here did not err when it applied the clearly erroneous standard of review. Our traditional standards of review of administrative decisions similarly apply to matters before us on a writ of *certiorari*. *Id.* The applicable standard of review in each case depends on the question posed on appeal. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008); *Porter v. Illinois State Board of Education*, 2014 IL App (1st) 122891, ¶¶ 25-26. Here, petitioner's primary argument before the circuit court and on appeal is that no evidence was presented to the adjustment committee that he committed a violent assault as provided in the Code (20 Ill. Adm. Code 504.Appendix A (2003) (No. 100)).

This is a mixed question of fact and law, which arises when courts are asked to decide whether the established facts satisfy the statutory standard. See *Cinkus*, 22 Ill. 2d at 211. We apply a clearly erroneous standard of review to mixed questions of fact and law. *Id.* An agency's decision "is deemed clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted). *Id.*

¶ 21 Having clarified our standard of review, we now turn to petitioner's substantive claim regarding the sufficiency of the evidence to support the adjustment committee's finding. According to petitioner, there was no evidence that he came into contact with another person in a deadly manner or in a manner that resulted in or was likely to result in serious bodily injury.

¶ 22 In this case, as a result of the finding of guilt, petitioner had one year of good-conduct credit revoked and therefore is entitled to procedural safeguards under the due process clause of the fourteenth amendment. See *Lucas v. Taylor*, 349 Ill. App. 3d 995, 1000 (2004) ("Illinois inmates have a statutory right to receive good-conduct credits, and thus they have a liberty interest entitling them to procedural safeguards under the due-process clause of the fourteenth amendment."). The full array of rights due to a defendant in a criminal prosecution, however, does not apply to an individual subject to a prison disciplinary proceeding. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). Instead, the process required in prison disciplinary proceedings includes the following: (1) notice of the charges at least 24 hours prior to the hearing, (2) an opportunity to call witnesses and present documentary evidence when consistent with institutional safety and correctional goals, and (3) a written statement by the fact finder of the evidence upon which it relied and the reasons for the disciplinary action. *Id.* at 563-66. Revocation of good time does not comport with the minimum requirements of procedural due process unless the findings of the prison disciplinary board are supported by some evidence in

the record. *Walpole*, 472 U.S. at 454; see 20 Ill. Adm. Code 504.80(j)(1) (2011) ("The Committee must be reasonably satisfied there is some evidence that the offender committed the offense for the individual to be found guilty.").

¶ 23 Prior to addressing the merits of petitioner's claim, we observe that petitioner references numerous documents, which were attached as exhibits to his motion to reconsider and motion to supplement the motion to reconsider, in support of his claim that he did not commit violent assault. These ten exhibits consist of hand-copied and photocopied adjustment committee final summary reports. As observed by the circuit court, these documents were not part of the administrative record and, thus, we cannot consider them on review.[2] See *Reichert*, 203 Ill. 2d at 260.

¶ 24 Turning to the merits, we conclude that the Department's determination was not clearly erroneous because there was some evidence petitioner committed violent assault. Pursuant to the Code, violent assault is defined as "[c]ausing a person or an object to come into contact with another person in a deadly manner or in a manner that results in or is likely to result in serious bodily injury."[3] 20 Ill. Adm. Code 504.Appendix A (2003) (No. 100). The evidence established that after petitioner walked past Lieutenant Mitchell he struck Lieutenant Mitchell in the left side of the face with his fist. This contact was unexpected, as Lieutenant Mitchell was ushering 40 inmates in from the east yard at the time. In addition, the force of petitioner's fist was so strong that it caused Lieutenant Mitchell to fall to the ground. While Lieutenant Mitchell was on the

[2] It thus follows that petitioner's claim that the circuit court erred when it did not allow him to supplement his motion to reconsider with nine similar exhibits also fails. See *Reichert*, 203 Ill. 2d at 260.

[3] We note that in 2017, the definition of violent assault was amended and now provides as follows: "Causing a person, substance or object to come into contact with another person in a deadly manner or in a manner that results in serious bodily injury." 20 Ill. Adm. Code 504.Appendix A (2017) (No. 100).

ground, petitioner struck him again and a struggle ensued. As a result of petitioner's conduct Lieutenant Mitchell went to the hospital where he received sutures in his upper lip. His tooth was also chipped. Medical tests were also performed on him, including a CT scan and an x-ray. Taking into consideration the location of the injuries (head), the force of the blows, and the medical treatment he received, it follows that there is some evidence that petitioner's conduct caused "serious bodily injury." Furthermore, even if we were to agree with petitioner that these injuries were not "serious bodily injury," the definition of violent assault does not expressly require that a serious bodily injury occur, only that the individual comes into contact with another "in a manner that results in or is likely to result in serious bodily injury." *Id.* Therefore, the Department's conclusion that there was some evidence petitioner's conduct constituted a violent assault under the Code was not clearly erroneous.

¶ 25 Lastly, petitioner asserts that the circuit court committed error when it found the definition of violent assault as set forth in the Code was not unconstitutionally vague. As a general matter, issues not raised before the administrative agency will not be considered on administrative review or on review of a petition for a writ of *certiorari. Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 278 (1998). The issue of constitutionality is subject to forfeiture. See *Lehmann v. Department of Children & Family Services*, 342 Ill. App. 3d 1069, 1078 (2003) (failure to raise an issue before the administrative agency, even a constitutional question, waives the issue for review). Even though an administrative agency lacks the authority to invalidate a statute on constitutional grounds, or even to question its validity, it is advisable to assert a constitutional challenge on the record before the administrative agency, because administrative review (or review of a petition for writ of *certiorari*) is confined to the proof offered before the agency. *Texaco-Cities*, 182 Ill. 2d at 278-79. Raising the issue before the

agency allows the parties to fully present evidence bearing on the constitutional challenge. *Id.* at 279. For the first time before the circuit court petitioner argued that the definition of violent assault was unconstitutionally vague. Petitioner did not raise this constitutional issue before the adjustment committee or in his subsequent grievance. Accordingly, petitioner has forfeited this issue for our review.

¶ 26 CONCLUSION

¶ 27 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.