STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1121

Pyotr Shmelev, petitioner,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections,
Respondent.

Filed May 19, 2009
Affirmed in part, reversed in part, and remanded; motion denied
Schellhas, Judge

Washington County District Court
File No. 82-C9-06-005209

Pyotr Shmelev, OID #208056 MCF-Stillwater, 970 Pickett Street North, Bayport, MN 55003 (pro se appellant)

Lori Swanson, Attorney General, Angela Behrens, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127 (for respondent)

Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's dismissal of his petition for writ of habeas corpus, arguing that his extended incarceration for a rule violation was imposed by respondent without due process because (1) there was insufficient evidence to conclude

that appellant violated rule 386, (2) the disciplinary hearing officer was not impartial, (3) he was denied the right to call a witness, and (4) he was denied the right to cross-examine another witness. Appellant also moved to stay this appeal. We affirm the district court's rejection of appellant's argument that his hearing officer was not impartial and that he had the right to cross-examine a witness. But because the district court's reliance on Minnesota Department of Corrections (DOC) division directives was misplaced and the district court therefore erred in determining that there was some evidence that items recovered from appellant's cell were contraband, and because appellant is entitled to an evidentiary hearing on the issue of denial of the right to call a witness, we reverse in part and remand. We deny appellant's motion to stay this appeal.

FACTS

This appeal concerns a prison disciplinary proceeding that resulted in extended incarceration of appellant Pyotr Shmelev, a prison inmate, as a penalty for a DOC rule violation. DOC accused Shmelev of violating several DOC rules and searched his cell. Officers found: (1) a file of 68 items referring to online stock trading; (2) discipline information from another prison showing that Shmelev was removed from a work assignment for misuse of facility computers; (3) "[i]tems that include computer language and programs designed to bypass computer security"; (4) a box of sudafedrine containing 20 tablets and three items containing chemical compounds and mixtures; (5) a file with

computer-generated items; and (6) a pencil sharpener.[1] Printouts from a Skype webpage were included with the materials.

The DOC charged Shmelev with violating DOC rules: (1) 170, governing interference with security procedures; (2) 190, governing unauthorized control, theft, possession, transfer or use of property; (3) 381, governing "possession of contraband–drugs"[2]; and (4) 386, governing "possession of contraband - other" (two violations). After a disciplinary hearing, a hearing officer found Shmelev guilty of violating DOC rules 170, 190, and two violations of 386. The hearing officer did not explicitly find that any of the items recovered from Shmelev's cell was contraband. As to the Skype printouts, the hearing officer stated that (1) Shmelev testified that Okishev asked him to check out the service, (2) Okishev testified that Shmelev asked him to send Shmelev information about making prison calls online, and (3) Okishev's testimony was credible. The hearing officer stated:

> I find that it is more likely than not that [Shmelev] was trying to interfere with the institution's current phone system. As a result, he is found in violation based [on] a preponderance of evidence. The requested penalty of 20 days segregation with 6 days extended incarceration is imposed.

The penalty of extended incarceration was imposed only in connection with one of the rule 386 violations.

After the prison warden denied his appeal, Shmelev filed a petition for writ of habeas corpus, alleging that his extended incarceration was imposed without due process.

[1] The items were not included in the record on appeal, so this court must rely on descriptions of the items located in the record.

[2] DOC subsequently withdrew this charge.

Shmelev argued that: (1) he was denied the right to an impartial hearing officer; (2) he was denied the right to call a staff witness; (3) the testimony of Okishev was taken off the record and out of Shmelev's hearing; and (4) there was no evidence to support the guilty finding reached by the hearing officer.

Along with his petition, Shmelev submitted Okishev's affidavit, stating that he never mailed information about *prison calls* online but, rather, mailed information about Skype to Shmelev so that Shmelev could look into the terms of the service, advise Okishev about using the service to communicate with Shmelev's family members in Russia, and translate the instructions into Russian. Shmelev also submitted a "kite" that contains written communication between Shmelev and Gary Schwartz, who was Shmelev's prison work supervisor. In the kite, Shmelev asked Schwartz whether he was available for the disciplinary hearing, explaining that his testimony was needed to establish that no inmates have access to computers with outside Internet connections and that Schwartz had authorized Shmelev to take to his cell four books on database programming. Shmelev further stated in the kite that Lt. M. Smith, the prosecuting officer, said that she called Schwartz shortly before the hearing and reported that Schwartz was "unavailable/unwilling" to appear. Schwartz responded in the kite, stating, "I was not asked to attend the hearing, but I was questioned over the phone by Lt. M. Smith." DOC filed a return to Shmelev's petition. In his reply to DOC's return, Shmelev included a copy of another kite. In this kite, sent by Shmelev several days before the disciplinary hearing, Shmelev informed Schwartz that he had been charged with rules violations and stated, "I requested a hearing. I put you on my witness list–I hope you do

not mind." Schwartz responded several days after the disciplinary hearing, stating, "Spaeth told me that you thought I left you hanging at your hearing. That is not the case. No one ever called me down." Shmelev also submitted his own affidavit in which he stated that he requested Schwartz as a witness at the disciplinary hearing and Smith told him before the hearing that Schwartz refused to testify.

In its order of May 31, 2007, the district court concluded that there were questions of fact and law as to whether Shmelev was provided due process at his disciplinary hearing and Shmelev was entitled to an evidentiary hearing "for the purposes of determining whether MCF-Stillwater has a rational explanation for why Mr. Schwartz did not testify." But the court concluded that Shmelev had failed to make a prima facie showing that the manner of taking Okishev's testimony was unfair and failed to make a prima facie showing of bias in his hearing officer.

On August 29, 2007, Shmelev's counsel requested that the district court continue the evidentiary hearing because Shmelev had been unable to locate Schwartz, who was no longer a DOC employee. On November 30, 2007, Shmelev moved the district court for reconsideration of its May 31, 2007 order denying a writ of habeas corpus or, in the alternative, to compel production of Gary Schwartz's contact information. In his supportive memorandum, Shmelev asked the district court to compel DOC to disclose Schwartz's contact information, direct DOC to subpoena Schwartz, or fashion a protective order.

On December 14, 2007, the district court heard Shmelev's motion for reconsideration. The district court ruled that there was some evidence to support DOC's

determination that Shmelev committed the rule violations and denied Shmelev's motion for reconsideration and his request to compel DOC to disclose Schwartz's contact information. The court denied and dismissed the habeas petition, concluding that an evidentiary hearing was no longer needed, and denied and dismissed the habeas petition. This appeal follows.

D E C I S I O N

"A writ of habeas corpus is a statutory civil remedy available 'to obtain relief from imprisonment or restraint.'" *Roth v. Comm'r of Corr.*, 759 N.W.2d 224, 227 (Minn. App. 2008) (quoting Minn. Stat. § 589.01 (2006)). "A writ of habeas corpus may also be used to raise claims involving fundamental constitutional rights and significant restraints on a defendant's liberty or to challenge the conditions of confinement." *Id.* (quotation omitted). "This court gives great weight to the district court's findings in considering a petition for a writ of habeas corpus and will uphold the findings if they are reasonably supported by the evidence." *Id.* (quotation omitted). "Questions of law are reviewed de novo." *Id.*

In reviewing a due-process argument related to prisoner discipline, this court asks (1) whether the offender has a protected interest and (2) whether the procedures used to deprive the offender of that interest were constitutionally sufficient. *Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005). An inmate has a protected liberty interest in a release date and a right to procedural due process before the release date can be extended. *Id.* at 773. The United States Supreme Court has concluded that due process requires that an inmate in a prison disciplinary proceeding be afforded: (1) a written notice of a

violation at least 24 hours in advance of the hearing; (2) the right to present evidence and call witnesses; and (3) written findings from the hearing officer explaining the evidence and reasoning relied on in reaching the decision. *Wolff v. McDonnell*, 418 U.S. 539, 563-66, 94 S. Ct. 2963, 2978-79 (1974). In *Carillo*, the Minnesota Supreme Court concluded that due process additionally requires that the hearing officer find a rule violation under the preponderance-of-the-evidence standard. *Carillo*, 701 N.W.2d at 777. But the "some evidence" standard previously employed, under which a violation may be found "if there is some credible evidence presented to show that the inmate committed the offense charged," may be used by appellate courts reviewing DOC factfinding. *Id.* at 774, 775-76.

Sufficiency of the Evidence

Shmelev's extended incarceration, which triggers the right to procedural due process under *Carillo*, was imposed only in connection with one of his rule 386 violations, which prohibits possession of contraband in the form of "stolen or unauthorized property." We cannot ascertain from the hearing officer's findings which materials recovered from Shmelev's cell, if any, were found to be "stolen or unauthorized property."

The district court determined that DOC Division Directive 302.250 provides that inmates are only authorized to possess items that appear on an "allowable items" list and that DOC Division Directive 301.030 provides that contraband is any item "not specifically authorized by the warden/superintendent." The district court then concluded that the "various computer-related documents" found in Shmelev's cell "were clearly not

items that [Shmelev] had specific authorization to possess by DOC policy or other directive" and that they were contraband and possessed in violation of rule 386. Although not specifically stated by the district court, we conclude that implicit in the district court's order is a finding that the web-generated materials found in Shmelev's cell were contraband.

But the district court's reliance on Division Directive 302.250 was misplaced. Division Directive 302.250 provides that offenders are allowed to possess personal property during incarceration and that DOC will publish an "allowable property list" that will include information regarding the quantity of allowable items and specifications regarding the type or brand of an item. As Shmelev's counsel argued before the district court, DOC never produced MCF-Stillwater's list to allow the district court to determine whether the web-generated materials fell outside of the list. Thus, the district court's determination that the items found in Shmelev's cell were not on the allowable property list is unsupported by evidence in the record and therefore in error.

Similarly, the district court's reliance on Division Directive 301.030 was misplaced. Division Directive 301.030 provides that contraband consists of items "not specifically authorized by the warden." The district court concluded that no DOC policy or directive authorized possession, and thus the web-generated materials were unauthorized and therefore contraband. But the district court, in concluding no DOC policy or directive authorized Shmelev to possess the materials found, did not address Shmelev's argument that he was authorized to receive the web-generated materials by the facility's mailroom policies. Shmelev argues that he was authorized to receive the web-

generated materials in the mail because DOC policies authorize inmates to receive mail, which can include "letters, publications, or packages." *See* DOC Div. Directive 302.020 (providing that inmates may receive mail and defining what constitutes mail for purposes of the division directive). Shmelev also argues that mailroom staff determined that the web-generated materials were not contraband before delivering them to Shmelev. The district court appeared to reject Shmelev's argument and accept DOC's assertion that the mailroom does not screen mail for contraband.

But Shmelev is correct that DOC policies provide that all mail is inspected to determine if materials mailed contain contraband or disallowed items. *See* DOC Div. Directive 302.020 (providing that the content or source of mail or publications is not restricted, but providing that mail will be inspected for contraband and for unallowable materials).[3] We express no opinion on whether the web-generated materials in question were allowable materials under the mailroom policies, and we note that Shmelev has not addressed Division Directive 302.020, which provides that incoming mail is "not authorized" if it "constitutes a risk to the safety and security of the facility." We conclude that the district court erred in rejecting Shmelev's argument because it did not address the mailroom policies. Because the district court lacked essential evidence upon which to determine whether Shmelev's web-generated materials were contraband, we

[3] Shmelev also submitted a kite with his motion to amend findings that indicates web-generated materials are not generally disallowed. In the kite, Shmelev asked a mailroom supervisor: "Am I officially allowed to receive through MCF-Stillwater mailroom any correspondence containing computer printouts with web headings?" The mailroom supervisor responded: "This is allowed, however it's subject for review to ensure the contents do not violate any policies."

conclude that the district court abused its discretion in ruling on this issue, and we reverse and remand.

Impartial Hearing Officer

Shmelev argues that his hearing officer was not impartial and that bias is shown by: (1) the hearing officer's comment, made before receiving evidence, that Shmelev should not be allowed to work with computers; (2) the contradiction between the hearing officer's findings as to Okishev's testimony and Okishev's affidavit as to his testimony; (3) the finding that the Skype materials were related to making *prison* calls online (Shmelev argues that the Skype materials did not address prison calls specifically); and (4) the hearing officer's statement in her deposition that Shmelev had Internet access in his work at the prison, which is a factual assertion unsupported by the record.

In prison disciplinary proceedings, the right to due process includes the right to an impartial decisionmaker. *Wolff*, 418 U.S. at 571, 94 S. Ct. at 2982. "Due process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case." *Malek v. Camp*, 822 F.2d 812, 816 (8th Cir. 1987) (quoting *Wolff*, 418 U.S. at 592, 94 S. Ct. at 2992 (Marshall, J., concurring)). The personal interest required to establish bias for purposes of a due-process violation has been described as "direct, personal, and substantial." *Ivy v. Moore*, 31 F.3d 634, 635 (8th Cir. 1994) (quotation omitted).

The district court concluded that Shmelev had not made a prima facie showing of bias. We agree. Shmelev's allegations regarding his hearing officer do not demonstrate that the hearing officer had a "direct, personal, and substantial" interest in the case.

Disciplinary and Evidentiary Hearings and Schwartz

Shmelev argues that he was denied due process when he was not permitted to call Schwartz as a witness before the hearing officer and that the district court erred in denying him a means to call Schwartz as a witness at the evidentiary hearing. We agree that the district court erred in denying and dismissing the habeas petition without holding the evidentiary hearing it initially ordered to address the issue of Schwartz's testimony.

An inmate's right to due process in prison disciplinary proceedings includes the right to "call witnesses and present documentary evidence in his defense when permitting [the offender] to do so will not be unduly hazardous to institutional safety or correctional goals." *Wolff*, 418 U.S. at 566, 94 S. Ct. at 2979. Initially, the district court concluded that Shmelev was entitled to an evidentiary hearing for the purpose of determining whether DOC had a rational explanation for why Schwartz did not testify. But when Shmelev could not locate Schwartz and the district court denied his motion to compel disclosure of Schwartz's contact information, the district court ruled that an evidentiary hearing was no longer required and denied the habeas petition entirely.

The district court ruled that Schwartz's contact information was non-public information, relying on Minn. Stat. § 13.43, subd. 5a (2006), which provides that certain personal information of employees of a state correctional facility shall not be disclosed to inmates. The district court ruled that, as non-public data, the information could only be

disclosed under the procedure in Minn. Stat. § 13.03, subd. 6 (2006), which provides that a court may compel discovery of non-public data if the court decides that the benefit to the party seeking access outweighs any harm to the confidentiality interests of the entity maintaining the data or the person who is the subject of the data. The section authorizes the court to "fashion and issue any protective orders necessary to assure proper handling of the data by the parties." Minn. Stat. § 13.03, subd. 6. The district court concluded Schwartz's interest in confidentiality outweighed Shmelev's interest in disclosure and that "[i]n view of the paramount concern over maintaining privacy of a former prison employee's contact information, the Court does not believe that an appropriate protective order can be fashioned in this case."

Shmelev argues that the district court erred in not using alternative means to allow Schwartz to be subpoenaed, such as requiring DOC to subpoena Schwartz or fashioning a protective order. Shmelev now also argues that the district court could have ordered that disclosure be made only to Legal Assistance to Minnesota Prisoners (LAMP), which represented Shmelev in the district court proceedings. But Shmelev suggested the alternate means to secure Schwartz's testimony in his memorandum supporting his motion to the district court, not in the motion itself. DOC correctly points out that, under Minn. R. Civ. P. 7.02(a), an application to the court for an order must be stated in a written motion setting forth the relief requested. Thus, Shmelev has not demonstrated that the district court abused its discretion in refusing to disclose Schwartz's contact information and refusing to fashion a protective order. And Shmelev failed to argue to the district court that the contact information could have been disclosed to LAMP,

therefore we will not consider the argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that a reviewing court generally will not consider arguments that were not presented to and considered by the district court).

DOC argues that the district court properly denied Shmelev's habeas petition entirely after denying his motion to compel disclosure of Schwartz's contact information. We disagree. The district court concluded that without Schwartz, the evidentiary hearing ordered to address why DOC failed to call Schwartz at the disciplinary hearing no longer needed to be held. But nothing in the record suggests Schwartz's testimony at the evidentiary hearing was necessary to explain DOC's failure to call him as a witness at the disciplinary hearing. Because the record remains unclear about why DOC did not call Schwartz as a witness at the disciplinary hearing, we cannot determine whether DOC's failure to call Schwartz violated Shmelev's due-process right to call a witness at the disciplinary hearing. We therefore reverse the district court's ruling that the evidentiary hearing was moot and remand for further proceedings. *See Seifert v. Erickson*, 420 N.W.2d 917, 920 (Minn. App. 1988) (stating that a petitioner is entitled to an evidentiary hearing where a factual dispute is shown), *review denied* (Minn. May 18, 1988).

Cross-Examination of Okishev

Shmelev's final argument is that he was denied due process because he was denied the right to cross-examine Okishev at the disciplinary hearing. The district court concluded that there was no prima facie showing that Shmelev's rights were violated. We agree. Shmelev has not established that his due-process rights include the right to cross-examine witnesses, and it appears that no such right exists in prison disciplinary

proceedings. The Supreme Court held in *Wolff* that an inmate does not have a due-process right to cross-examine witnesses in a prison disciplinary proceeding. 418 U.S. at 567-68, 94 S. Ct. at 2980; *see also Piggie v. Cotton*, 342 F.3d 660, 666 (7th Cir. 2003) (stating that inmates have no right to cross examine witnesses in disciplinary proceedings); *Silva v. Casey*, 992 F.2d 20, 22 (2nd Cir. 1993) (citing *Wolff* for the rule that inmates have no right to cross examine witnesses in disciplinary proceedings). Shmelev's argument regarding cross-examination of Okishev therefore fails.

Motion to Stay Appeal

More than one year after the district court's decision and almost two months after this matter was taken under advisement, Shmelev made a motion to stay the appeal and remand for the district court to consider a document that Shmelev claims to have obtained recently in a separate action. Shmelev provided no information about the separate action, but it is clear that the document was not presented to the district court and is not part of the record on appeal. *See* Minn. R. Civ. App. P. 110.01 (limiting record on appeal to papers filed in the trial court and transcript of proceedings, if any). We deny Shmelev's motion.

Affirmed in part, reversed in part, and remanded; motion denied.