

IN THE COURT OF APPEALS OF IOWA

No. 6-019 / 95-206

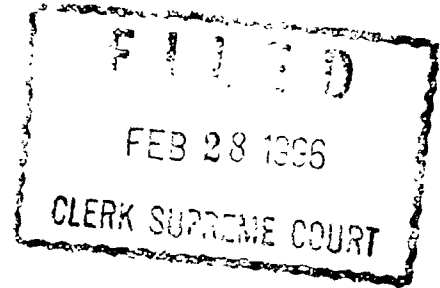
SALVADOR PENA,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Jones County, David M. Remley,
Judge.

Salvador Pena appeals the denial of his application for postconviction relief
in a prison discipline action. **AFFIRMED.**

Kelly A. Phipps of Mears Law Office Iowa City, for appellant.

Thomas J. Miller, Attorney General, and Layne M. Lindebak, Assistant
Attorney General, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

CADY, J.

Appellant, Salvador Pena, appeals the denial of his postconviction application in a prison discipline action. He argues: 1) the disciplinary committee violated his right to present witnesses; 2) he was entitled to counsel substitute; and 3) there was insufficient evidence from which the committee could find him guilty of fighting. Where the issues raised by Pena implicate constitutional concerns, our review is de novo. *Marshall v. State*, 524 N.W.2d 150, 152 (Iowa 1994). With respect to his claim of insufficient evidence, we review for the correction of errors at law. *Giles v. State*, 511 N.W.2d 622, 626 (Iowa 1994). We affirm on all issues raised by Pena.

I. RIGHT TO PRESENT WITNESSES

Pena, an inmate at the Iowa Men's Reformatory in Anamosa, Iowa, was disciplined for violating disciplinary rule thirteen (fighting) while working in the prison's bakery. The prison disciplinary committee's notes from its initial meeting state "Pena told the committee that he wanted all the other inmates in the bakery to be a witness because he didn't fight." The committee deferred action until it could obtain statements from the bakery inmate workers who had witnessed the incident.

The committee met again, and its report indicates it shared with Pena the statements by all of the other workers in the bakery. The names of the witnesses were not disclosed, but the statements were read in their entirety. The committee found Pena guilty of fighting and he was sanctioned.

In his postconviction application Pena claimed his due process right to present witnesses was violated by the committee. In his appeals to the warden and director of the Department of Corrections, Pena did not raise any claim related to the right to present witnesses. As a general matter, before a prison inmate may assert a ground for relief in a postconviction proceeding, the inmate must have exhausted his administrative remedies by asserting the claim in the administrative process. *James v. State*, 479 N.W.2d 287, 292 (Iowa 1991).

We may affirm on any basis appearing in the record, whether urged in the trial court or not. *Bensley v. State*, 468 N.W.2d 444, 445 (Iowa 1991). We reject Pena's arguments that the record contains "cause" to excuse him from the duty to exhaust administrative remedies. He did not raise the witness issue in his administrative appeals, and he has not preserved it for appellate review.

II. COUNSEL SUBSTITUTE

In his administrative appeals Pena cited his difficulty in understanding English and claimed he should have had someone helping him with the disciplinary proceedings. Pena is a native of Mexico, has a fifth grade education, and speaks English as a second language. In its ruling the postconviction court noted Pena apparently has some trouble reading English but appeared to understand spoken English and made appropriate verbal responses when testifying at the postconviction hearing. The administrative law judge testified Pena appeared to have no difficulty understanding the disciplinary proceedings and his "comments were right on point."

Inmates in prison disciplinary proceedings have no right to either retained or appointed counsel. *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994). However, when an inmate is illiterate or the issues are complex, due process requires officials provide the inmate with some form of counsel substitute. *Id.*

The record in this case demonstrates Pena was able to speak English and present his claim of self defense. The judge in the postconviction trial had a first-hand opportunity to observe and speak with Pena, and he concluded --

The Court finds, given Applicant's understanding of and responses to the questions posed during the hearing before this Court, that Mr. Pena was able to understand both the charges, and the nature of the proceedings.

Contrary to the assertion in Pena's brief, the issues of fighting and self defense were not complex, and the record as a whole convinces us Pena's due process rights were not violated.

III. SUFFICIENCY OF EVIDENCE

In his appeals to the warden and director of the Department of Corrections, Pena did not deny an altercation occurred in the bakery. Instead, he argued the attack by a fellow prisoner had been unprovoked and he acted in self defense. On appeal Pena claims that absent the allegedly improper consideration of the inmate witness statements, the only evidence before the committee was that he acted in self defense or had been a victim of assault.

On appellate review of a prisoner's challenge of the evidentiary support of a disciplinary matter, we review to determine whether the committee had "some evidence" to support its decision. *Backstrom v. Iowa District Court for Jones County*, 508 N.W.2d 705, 709 (Iowa 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1566 (1994). Thus, we largely defer to the committee's findings, refraining from a de novo review of the proceedings. *Id.* As noted above, Pena has not preserved error with respect to the witness statements and we consider them in assessing the sufficiency of the evidence.

In reaching its decision the committee relied on the report of the bakery supervisor and statements made by workers in the bakery. In the disciplinary notice the bakery supervisor described finding Pena washing blood off his face. When asked with whom he had been fighting, Pena told the supervisor "somebody couldn't take a joke."

Pena's coworkers in the bakery were interviewed by Lieutenant Phillips. While the coworkers did not individually complete witness statements, the Lieutenant did prepare a written summary of their statements, and this summary was presented to the disciplinary committee. The committee's decision states the inmate workers who witnessed the incident made statements indicating Pena was in a fight with another inmate and both exchanged blows, threw dough at one another, and called each other names.

Reports referenced in a disciplinary committee's decision qualify as evidence, *Speller v. State*, 534 N.W.2d 445, 452 (Iowa 1995). The report of the bakery supervisor and the statements of the coworkers referenced in the committee's decision constitute some evidence sufficient to support the committee's decision.

AFFIRMED.