IN THE COURT OF APPEALS OF IOWA

No. 3-011 / 91-1846

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CLERK SUPREME COURT

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RONALD A. MAHERS,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Lee County, Harlan W. Bainter, Judge.

The applicant appeals from the district court's ruling denying his application for postconviction relief. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, and Kristin W. Ensign, Assistant Attorney General, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ.

PER CURIAM. 000394

Applicant-appellant Ronald A Mahers sought postconviction relief from a decision in his prison disciplinary proceedings. After a hearing, the trial court denied Mahers relief. Mahers filed a writ of certiorari contending (1) he was denied his due process right to a fair and impartial hearing, (2) the trial court erred in finding the disciplinary committee's alleged reliance on an expunged 1985 report did not violate his due process rights and the prison's rules, (3) the trial court erred in finding his rights were not violated when the disciplinary hearing was not held within four working days of the alleged rule violation as required by prison rules, and (4) there was not sufficient evidence to support the disciplinary committee's decision. We affirm in part and reverse in part and remand.

On April 11, 1985, Mahers, an inmate at the Iowa State Penitentiary in Fort Madison, was required to submit to a urine analysis test. The specimen tested positive for the presence of tetrahydrocannabinol (THC), the active ingredient in marijuana. Mahers went before the disciplinary committee and was found guilty of violating Rule 9 of "Rules, Regulations and Disciplinary Procedures for the Government of the Iowa State Penitentiary Inmates." After exhausting his administrative appeals, Mahers appealed to the district court. The district court

on July 7, 1989, found there was not substantial evidence to support a violation of Rule 9 and granted Mahers relief and ordered his record expunged of the rule violation. The State did not appeal this decision.

On December 27, 1990, Mahers was served with another disciplinary notice charging him with violation of Rule 27 (Obstructive/Disruptive Conduct) and violation of Rule 29 (Being Intoxicated or Under the Influence) of "Rules, Regulations and Disciplinary Procedures for the Government of the Iowa State Penitentiary Inmates" based on the positive test results of the urine analysis. The committee imposed sanctions including detention and loss of good time. Mahers requested postconviction relief which was denied, and this appeal followed.

Mahers first contends he was denied his due process right to a fair and impartial hearing because the members presiding at the 1991 hearing were the same as presided over the 1985 hearing and one member is a defendant in a federal lawsuit filed by Mahers.

In a postconviction relief action where a fundamental constitutional issue is raised, we make our own independent evaluation of the totality of the circumstances in a de novo review. See Fichtner v. Iowa State Penitentiary, 285 N.W.2d 751, 752 (Iowa 1979).

We agree with Mahers and the State that Mahers is entitled to an impartial tribunal for the disciplinary

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hearing. See Fichtner, 285 N.W.2d at 758. A prison disciplinary committee must be sufficiently impartial in order to satisfy due process. See Wolf v. McDonnell, 418 U.S. 539, 570-71, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974).

Charles Harper apparently served as chairman of the 1985 disciplinary hearing and as administrative law judge at the 1991 hearing. Harper also is named as a defendant in a federal lawsuit Mahers filed.

The State, while admitting Harper is a defendant in the federal lawsuit filed by Mahers, has failed to respond to Mahers's argument that because Harper is a defendant in the lawsuit, he was not an impartial decision-maker. We agree with Mahers on this issue. We remand for a new hearing. The hearing officer or panel should not include Harper. We do not retain jurisdiction.

Mahers also contends the disciplinary committee was improperly influenced by the attorney general's office. We need not address this issue having remanded for a hearing. Charles Harper should not participate in the rehearing.

We do address several issues raised by Mahers that may come up on retrial. Mahers next contends the 1991 disciplinary action was in retaliation of his federal lawsuit. We find no evidence supporting this claim.

Mahers contends the records of the April 1985 incident were not expunged from his file. Rule III-G(2) in pertinent part provides:

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> If an alleged rule violation is not adjudicated in accordance with the procedure contained in this manual of Disciplinary Policy and Procedures, no punishment may be imposed for such rule violation, and all records of the alleged violation, including the reporting officer's incident report, shall be expunged from the inmate's treatment and legal filed and from any other records which may be subject to review by the Board of Parole.

The State contends prison officials did expunge the material from Mahers's treatment and legal files, and from all records subject to review by the Board of Parole. A retrial after expungement does not violate due process. See Harmon v. Auger, 768 F.2d 270, 277 (Eighth Cir. 1985).

Mahers contends the trial court erred in finding his rights were not violated when the disciplinary hearing was not held within four working days of the alleged rule violation. The district court construed Rule III-D(1) to mean that the disciplinary hearing must be held within four working days of service of the disciplinary notice. The law allows reprosecution of disciplinary proceedings. See Harmon, 768 F.2d at 277.

Mahers contends there was not sufficient evidence to support the committee's decision and the matter should be dismissed. We need only concern ourselves with whether there is any evidence in the record to support the committee's decision. LuGrain v. State, 479 N.W.2d 312, 318 (Iowa 1991). There is evidence supporting the committee's decision.

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AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Habhab, J., dissents.

HABHAB, J. (dissenting) 000399

I concur with all parts of the majority opinion except that which remands for a new hearing. As to that, I dissent. Thus, I would affirm the trial court.