FILED
FEB 25 '96
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No 5-699 / 94-1388

FREDERICK LEON BOUTCHEE,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Jones County, August F. Honsell, Judge.

Prison inmate, Frederick Boutchee, appeals a denial of his application for postconviction relief. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, and William A. Hill, Assistant Attorney General, for appellee.

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

HAYDEN, P.J.

This prison disciplinary case stemmed from a confrontation inmate Frederick Boutchee had with a prison guard. The guard noticed Boutchee did not have his shirt buttoned and was not wearing his I.D. Boutchee told the guard he thought it was not necessary to have his shirt buttoned as long as he was in his unit. Boutchee then turned away from the guard and attempted to go to the shift captain's office. The guard then gave Boutchee a direct order to return and button his shirt. Boutchee refused and proceeded to the shift captain's office. A prison disciplinary committee found Boutchee guilty of violating disciplinary rule 17 (disruptive conduct) and rule 23 (disobeying a direct order). As a result, the committee imposed three days disciplinary detention and a loss of sixteen days good conduct time.

Boutchee appealed to the warden and the director of the department of corrections. He asserted his constitutional due process rights were violated by the denial of a witness, the shift captain, at the prison disciplinary hearing. According to Boutchee, the shift captain would have testified about the guard's harassment of Boutchee prior to the events at issue in this case. Boutchee also claims the shift captain would have testified the rules of Boutchee's unit do not forbid an inmate from having his shirt unbuttoned and, therefore, the reprimands from the guard were not justified. At some point during the proceedings, the ALJ contacted the shift captain to determine what he knew about the case. As a result of this contact, the ALJ determined the shift

captain's testimony was irrelevant and, therefore, did not allow his testimony. The ALJ, however, did not make a written record of his conversation with the shift captain and did not state his reasons for denying the witness. After Boutchee's administrative appeals, his subsequent application for postconviction relief was denied.

Boutchee appeals.

I. Standard of Review.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Giles v. State*, 511 N.W.2d 622, 626 (Iowa 1994); *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards, we make our own evaluation based on the totality of the circumstances. *Id.* This is equivalent to de novo review. *Id.* The issue presented by Boutchee involves violation of constitutional safeguards. As such, our review is de novo.

II. Merits.

In this case, Boutchee argues his constitutional due process rights were violated by the denial of a witness at a prison disciplinary hearing and by the ALJ's failure to make a written record of his conversation with the shift captain. With respect to the denial of a witness, it is clear a prisoner has a due process right at a disciplinary hearing to call witnesses and present written evidence. *Mahers v. State*, 437 N.W.2d 565, 568 (Iowa 1989). This right, however, is not unlimited. *Id.* An inmate is only permitted

to call witnesses when doing so will not be unduly hazardous to institutional safety or correctional goals. *Id.* Furthermore, the disciplinary committee does not have to consider testimony which is irrelevant or not reasonably necessary to resolve the conflict. *See Brown v. Frey*, 889 F.2d 159, 167 (8th Cir. 1989) (prison officials have broad discretion to reject an inmate's request to call witnesses in order to exclude irrelevant or unnecessary testimony); *Pierce v. State*, 433 N.W.2d 38, 40 (Iowa App. 1988) (inmate's rights were not violated by the disciplinary committee not considering testimony of a witness where the testimony was not reasonably necessary to resolve the conflict).

It is important to note Boutchee was not disciplined for the failure to have his shirt buttoned. Rather, he was diciplined for disruptive conduct and failure to follow a direct order which resulted from his refusal to turn around when ordered to do so by a guard. Instead of turning around, Boutchee proceeding to walk away from the guard to the shift captain's office. The shift captain whom Boutchee requested testify did not have any relevant information concerning Boutchee's refusal to follow the guard's order. According to Boutchee, the shift captain was, at best, going to testify about a rule concerning buttoning shirts and about the guard's alleged harassment of Boutchee. None of the shift captain's testimony is relevant to whether or not Boutchee failed to follow a direct order of the guard. In fact, the shift captain was not present when the alleged violation occurred and had no direct knowledge of the events in question. As

such, his testimony was irrelevant and not reasonably necessary to resolve the conflict. Therefore, the witness was properly excluded.

Boutchee also argues his due process rights were violated by the ALJ's failure to make a record of the conversation he had with the shift captain. Apparently, because an investigator was not available, the ALJ called the shift captain directly to determine the substance of his testimony. After their conversation, the ALJ determined the shift captain's testimony was not relevant. The ALJ, however, never documented this conversation and did not explicitly state the reasons for denying the witness. Although this court certainly does not encourage the ALJ's conduct, Boutchee fails to cite case law which holds such conduct alone is a constitutional violation. To the contrary, case law indicates it is not a constitutional violation for an ALJ to fail to list the reasons for denying a witness. *Ponte v. Real*, 471 U.S. 491, 497, 105 S. Ct. 2192, __, 85 L. Ed. 2d 553, 559 (1985); *Mahers*, 437 N.W.2d at 568 ("we have recommended, without actually requiring, that the authorities offer reasons for refusing a prisoner's request to call witnesses . . ."). In *Ponte*, the Supreme Court stated,

> prison officials may be required to explain, in a limited manner, the reason why witnesses were not allowed to testify, but that they may do so either by making the explanation a part of the "administrative record" in the disciplinary proceeding, or by presenting testimony in court if the deprivation of a "liberty" interest is challenged because of that claimed defect in the hearing. In other words, the prison officials may choose to explain their decision at the hearing, or they may choose to explain it "later."

Id. In this case, although the ALJ did not explain in the administrative record his reasons for not allowing the shift captain's testimony, the ALJ later explained to the district court the shift captain's testimony was not allowed because it was irrelevant. As such, the requirements of *Ponte* were met, and Boutchee's due process rights were not violated.

In summary, we determine the shift captain's testimony was properly excluded from the disciplinary hearing because it was irrelevant and not reasonably necessary to resolve the conflict. Furthermore, the ALJ's failure to make a record of his conversation with the shift captain and to immediately explain the reason behind the exclusion of the testimony did not violate due process.

AFFIRMED.