

[REDACTED]

GRIEVANT

v.

THE MARYLAND DIVISION

OF CORRECTION

* BEFORE BRIAN PATRICK WEEKS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH Nos.: DPSC-IGO-002V-19-33325
* DPSC-IGO-002V-19-33331¹
*
* IGO Nos.: [REDACTED]
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DECISION

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STATEMENT OF THE CASE

On May 28, 2019 the Grievant filed a grievance² (IGO No. [REDACTED]) with the Inmate Grievance Office (IGO),³ which the IGO summarized as follows:

The Inmate complains that 60-75 pictures were destroyed by an unknown liquid substance which caused them to stick together while stored in the property room at [REDACTED]

¹ The two matters were consolidated for the purpose of taking evidence. In the interest of judicial economy, I am issuing one written decision that will cover both grievances. Code of Maryland Regulations (COMAR) 28.02.01.11.

² A "grievance" is "the complaint of any individual in the custody of the Commissioner [of the Division of Correction] or confined to the Patuxent Institution against any officials or employees of the Division or the Patuxent Institution arising from the circumstances of custody or confinement." COMAR 12.07.01.01B(8).

³ The IGO is part of the Department of Public Safety and Correctional Services. Md. Code Ann., Corr. Servs. § 2-201(12) (Supp. 2019). The IGO receives complaints from inmates and refers those not found "wholly lacking in merit" to the Office of Administrative Hearings. *Id.* § 10-207(c)(1) (2017).

On March 20, 2019, the Grievant filed a grievance (IGO No. [REDACTED]) with the IGO which the IGO summarized as follows:

The Inmate complains that when he opened the box containing his property on December 10, 2018 after his transfer to Housing Unit [REDACTED] fifty pictures of his fiancé and his friend were missing.

On October 31, 2019, I held a hearing via videoconference from the Office of Administrative Hearings (OAH). Md. Code Ann., Corr. Servs. § 10-207(c)(2) (2017); Md. Code Ann., State Gov't § 10-211 (2014); and Code of Maryland Regulations (COMAR) 28.02.01.20C. The Grievant represented himself and was located at the [REDACTED] [REDACTED].⁴ Lieutenant [REDACTED] Inmate Grievance Coordinator for [REDACTED] [REDACTED], represented the Division of Correction (DOC) and was located at [REDACTED] a facility of the DOC.

The contested case provisions of the Administrative Procedure Act, the IGO's General Regulations, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); COMAR 12.07.01; and COMAR 28.02.01.

ISSUES

Were the Grievant's photographs lost or destroyed as a result of the actions of employees of the DOC and, if so, is the Grievant entitled to relief?

SUMMARY OF THE EVIDENCE

Exhibits

I incorporated the entire IGO file from IGO No. [REDACTED] into the record, which included the following documents:

- Notice to Presiding ALJ, undated
- Transmittal, received October 23, 2019

⁴ The Division of Correction moved the Grievant to [REDACTED] in May 2019.

- Notice of Hearing, August 12, 2019
- Referral to the OAH, August 12, 2019
- Rules of Procedure for Grievance Hearings, undated
- Letter from Grievant to IGO, received July 12, 2019
- Request for Administrative Remedy, signed December 17, 2018
- Request for Administrative Remedy, signed December 29, 2018
- Appeal of Administrative Remedy Response, signed February 11, 2019
- Letter from IGO to Grievant, June 19, 2019
- Appeal of Administrative Remedy Response, signed May 28, 2019
- Appeal of Administrative Remedy Response, signed February 11, 2019
- Internal DOC email, March 6, 2019

I also incorporated the entire IGO file from IGO No. [REDACTED] into the record, which included the following documents:

- Notice to Presiding ALJ, undated
- Transmittal, received October 23, 2019
- Notice of Hearing, September 11, 2019
- Notice of Hearing, July 12, 2019
- Notice of Hearing, May 24, 2019
- Referral to the OAH, May 16, 2019
- Rules of Procedure for Grievance Hearings, undated
- Appeal of Administrative Remedy Response, signed March 20, 2019
- Administrative Remedy Response, signed February 16, 2019
- Request for Administrative Remedy, signed January 14, 2019

I admitted the following exhibits on the DOC's behalf:

DOC Ex. 1 - Personal Property Inventory, December 10, 2018

DOC Ex. 2 - Personal Property Inventory, May 7, 2019

DOC Ex. 3 - Memorandum, February 11, 2019

DOC Ex. 4 - [REDACTED] Notice of Incident, February 1, 2019

I admitted the following exhibit on the Grievant's behalf:

Griev. Ex. 1 - Appeal of Administrative Remedy Response, signed October 1, 2018

Testimony

The Grievant testified and did not present other witnesses.

Lt. [REDACTED] testified and presented the following witness on behalf of the DOC:

- Corporal [REDACTED] Correctional Officer (CO) II, [REDACTED]

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to this proceeding, the Grievant was housed at [REDACTED] a DOC facility.
2. Housing Unit [REDACTED] at [REDACTED] is for inmates who are on disciplinary segregation.
3. Housing Unit [REDACTED] at [REDACTED] has a property room used to store inmates' personal property while they are on disciplinary segregation.
4. On an unspecified date, the Grievant was moved to Housing Unit [REDACTED] at [REDACTED] Staff at [REDACTED] placed his personal property in the Housing Unit [REDACTED] property room.
5. On or about December 10, 2018, the Grievant received pictures that had been in storage at Housing Unit [REDACTED] at [REDACTED] from the officer responsible for property, CO [REDACTED]. Approximately sixty-five pictures had a liquid substance on them and were stuck together.
6. On or before December 28, 2018, the Grievant informed Lt. [REDACTED] CO [REDACTED]'s supervisor, that he was missing certain pictures.
7. On December 28, 2018, CO [REDACTED] brought pictures from the Grievant's personal property storage area to the Grievant. Later that day, the Grievant informed CO [REDACTED] that he was still missing approximately fifty pictures of his fiancé and another female friend.

DISCUSSION

In an inmate grievance proceeding concerning inmate property that has been alleged to have been lost, damaged, stolen, or destroyed, the burden of proof rests with the Grievant, who

must prove his case by a preponderance of the evidence. COMAR 12.07.01.09B. The Grievant must prove the following:

- (1) That the property was lost, damaged, stolen, or destroyed through the negligence or other wrongful act or omission of an employee or official of the Division or the Patuxent Institution;
- (2) That the grievant was the owner of the property at the time of the alleged loss, damage, theft, or destruction;
- (3) That the grievant was authorized to possess the property under the rules of the correctional facility in which the grievant was confined at the time of the alleged loss, damage, theft, or destruction; and
- (4) The fair value of the property at the time of the alleged loss, damage, theft, or destruction.

Id.

The Grievant argued the DOC failed to abide by OPS.220.0004, which requires the DOC to store inmate personal property safely. The Grievant argued his pictures were in the possession of the property officer at [REDACTED] when they were lost and destroyed, and therefore the DOC is responsible for his loss. As a remedy, he seeks \$50.00 for each destroyed photo and \$500.00 for each missing photo.

The DOC argued there is no evidence of any negligence on the part of the DOC's staff. The DOC argued no photos were lost because the Grievant signed a personal property inventory sheet that states that the inventory "consists of [the Grievant's] personal property."

The Grievant was the owner of the photos at the time of the alleged loss. The DOC did not argue that the Grievant was not authorized to possess the photos under the rules of [REDACTED] at the time of the alleged loss. Thus, the main issues in this case are (1) whether the Grievant proved that certain photos were missing, and (2) whether he proved that the photos were lost or destroyed through the negligence or other wrongful act or omission of an employee of the DOC. COMAR 12.07.01.09B(1).

Based on the circumstantial evidence, I conclude the Grievant has proven that the DOC's negligence caused his photos to be destroyed. However, I further conclude the Grievant has not proven the fair value of the property at the time of alleged loss, and therefore is not entitled to any relief.

Generally, to state a claim for negligence a party must show 1) that the defendant was under a duty to protect the plaintiff from injury, 2) that the defendant breached that duty, 3) that the plaintiff suffered actual injury or loss, and 4) that the loss or injury proximately resulted from the defendant's breach of the duty. *Hamilton v. Kirson*, 439 Md. 501, 523-524 (2014).

The DOC owes a duty to inmates to protect the personal property of the inmate while it is in the possession of the DOC. *See, e.g.*, Maryland Division of Correction Inmate Handbook, IV.B. (2007 version) (listing inmate rights including the right to proper and secure storage of personal property).

The main dispute in this case regards whether the DOC breached the duty to protect the Grievant's photographs. I conclude that it did. Although there is no direct evidence of a wrongful act or omission by DOC staff, it can be inferred from the circumstances. *Id.* at 526-538 (discussing the use of inferences in a lead paint case to establish the elements of negligence). The photographs in question were in the possession of the DOC at all times relevant to the grievance. Thus, there is no other potential explanation for the loss and destruction of the photographs, and it is reasonable to infer that the DOC breached its duty to properly store and secure the Grievant's photographs and that the Grievant's loss proximately resulted from the DOC's breach of its duty.

The DOC also argued the Grievant did not suffer any injury or loss because he signed a personal property inventory form declaring that "all the items [listed above] are mine, and

consist of all my personal property.” The DOC submitted into evidence two personal property inventory sheets, one from December 10, 2018 and one from May 7, 2019. The personal property inventory sheets have a line item for “Books & papers,” which presumably includes personal photographs. On both sheets, there is a check mark next to “Books & papers” indicating that the Grievant had the maximum allowable number of books and papers.

I do not find this documentary evidence sufficient to weaken or rebut the Grievant’s uncontroverted testimony, which is that certain photos were destroyed by the sticky substance and certain photos were missing after he was placed on disciplinary segregation around December 10, 2018. I credit his testimony because he was able to provide details regarding the sticky substance that caused his photos to stick together and to describe in detail how this caused the photos to be destroyed. He also was able to identify with particularity the photos that were missing and the number of photos. For these reasons, I conclude that his testimony establishes that certain photos were destroyed because of the sticky substance, certain photos were never returned to him, and that these acts occurred while the photographs were in possession of the property officer at [REDACTED]. In concluding that the DOC bears responsibility for the loss, I also have considered the fact that the one witness with personal knowledge regarding the storage of the Grievant’s property, CO [REDACTED] was not called as a witness by the DOC to rebut the Grievant’s testimony regarding the photographs, or to provide details as to the manner in which the photographs were stored and who had access to the property room during the relevant time periods.

However, this does not end the inquiry. The Grievant also has the burden of proof to demonstrate the fair value of the photographs at the time of the loss. COMAR 12.07.01.09B. The Grievant testified he had calculated his alleged loss by asking a family member how much it

cost to develop the photographs and pay for postage so that the photographs could be sent to the Grievant. However, it is hard to fathom how the cost to develop and send the photographs to the Grievant could result in a fair value of \$50.00 for each destroyed photograph and \$500.00 for each missing photograph. Therefore, I do not find the proffered basis for the Grievant's fair value calculation to be sufficiently reliable for me to award damages to the Grievant. Since there is no other evidence in the record that would prove the fair value of the photographs at the time of the loss, I conclude that the Grievant has failed to prove the fair value of the photographs.

I acknowledge the Grievant feels that the photographs, which included photographs of the Grievant's family, are "priceless," as he argued in closing. However, I am bound by the DOC's regulations governing grievances, and cannot make an award in the absence of any evidence as to the fair value of the photographs.

CONCLUSION OF LAW

I conclude as a matter of law that the Grievant did not establish all the elements set forth in COMAR 12.07.01.09B in order to substantiate his claim. In particular, the Grievant offered insufficient evidence of fair market value of the damaged and missing photographs. COMAR 12.07.01.09B(4).

ORDER

Having concluded that the grievance is without merit, I **ORDER** that it is **DENIED** and **DISMISSED**.

January 15, 2020
Date Decision Issued

Signature Appears on Original

Brian Patrick Weeks
Administrative Law Judge

BPW/dlm
#183873

REVIEW RIGHTS

You are entitled to file a petition for judicial review with the circuit court for the county in which the institution you are confined is located within thirty (30) days of the mailing of the decision. Md. Code Ann., Corr. Servs. § 10-210(b) (2017); Md. Rules 7-201 through 7-210. A separate petition may be filed with the court to waive filing fees and costs on the ground of indigence. Md. Rule 1-325. This decision may only be reversed or modified on appeal if any substantial right may have been prejudiced because a finding, conclusion, or decision of the final decision maker: (1) is unconstitutional; (2) exceeds the statutory authority or jurisdiction of the final decision maker; (3) results from an unlawful procedure; (4) is affected by any other error of law; (5) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or (6) is arbitrary or capricious. Md. Code Ann., State Gov't § 10-222(h)(3) (Supp. 2019). Judicial review of disputed issues of fact shall be confined to the record for judicial review supplemented by additional evidence taken. Md. Code Ann., State Gov't § 10-222(f)(1) (Supp. 2019). The Office of Administrative Hearings is not a party to any review process.

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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