IN THE
SUPREME COURT OF VIRGINIA

Record No. 171562

JOHN ALBERT ANDERSON,

Appellant,

v.

JEFFREY N. DILLMAN, WARDEN,
FLUVANNA CORRECTIONAL CENTER
FOR WOMEN, et al.,

Appellees.

BRIEF OF APPELLEES

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INTRODUCTION

"The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact." *Superintendent, Mass. Corr. Inst. at Walpole v. Hill*, 472 U.S. 445, 456 (1985). "Because prison officials must be responsible for the security of the prison and the safety of its population," prison officials have "wide discretion in promulgating rules to govern the prison population and in imposing disciplinary sanctions for their violation." *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964).

In this case, appellant John Albert Anderson appeals a circuit court's dismissal of due process claims contesting prison disciplinary proceedings that found Anderson guilty of using a prohibited substance in violation of prison policy. Following regular random drug testing, Anderson's urine tested positive for opioids. As part of the prison disciplinary proceeding that followed, Anderson sought, but did not receive, a chain of custody form that he had signed when giving the urine sample. At the hearing held as part of those disciplinary proceedings, Anderson testified that the form he signed inaccurately

stated that he was not taking any medication and suggested that his medication regimen might have cause a false positive urine test. The hearing officer consulted medical staff, who confirmed that Anderson's medication regimen would not cause a false positive test. The charge was upheld, and Anderson was fined $10.

Anderson sued various prison officials, alleging that his procedural due process rights were violated because he did not receive the particular form he requested. The circuit court dismissed Anderson's claims and Anderson appeals.

The circuit court's decision should be affirmed for several reasons. Anderson's due process claims fail on the merits, both because Anderson has not alleged invasion of a constitutionally protected liberty or property interest and, even if he had, Anderson received all the process he was due. Anderson's claims against the supervisor who upheld the disciplinary finding also fail for the separate reason that they are predicated on a respondeat superior theory and the statute involved does not create respondeat superior liability. And even if Anderson had established a constitutional violation, all of the defendants would be entitled to qualified immunity.

ASSIGNMENTS OF ERROR

Anderson's assignments of error are as follows:

I. The Circuit Court erred by holding that the claim as to the Defendant Maurice should be dismissed.

II. The Circuit Court erred by holding that the VDOC procedures used during Anderson's disciplinary hearing provided adequate due process protection and that the penalty imposed did not rise to the level of a constitutional violation.

III. The Circuit Court erred by holding that the Defendants are entitled to the defense of qualified immunity.

IV. The Circuit Court erred by holding that Anderson is improperly attempting to use the Court as a means to challenge the accuracy of the findings made at the disciplinary hearing.

STATEMENT

1. Plaintiff-appellant John Albert Anderson is serving an eight year prison term for firearms and related offenses at the Deep Meadows Correctional Center (Deep Meadows) in State Farm, Virginia. JA 6. Defendant-appellees are officials of the Virginia Department of Corrections (VDOC), who are named both individually and in their official capacities. JA 2–3, 6–8.

2. In 2015, Anderson provided a urine sample as part of regular random drug testing of inmates. JA 11, 48. Anderson's sample tested positive for opiates. JA 14–15, 35, 66.

Anderson challenged the test results at a disciplinary hearing overseen by defendant–appellee G.A. Grant, an institutional hearing officer at Deep Meadows. JA 4, 7, 15–16. Anderson requested and received an inmate advisor to assist at the disciplinary hearing, who cross-examined defendant-appellee D.L. Leonard, an "Institutional Investigator," about the procedures for collecting and establishing chain of custody of urine specimens. JA 8, 15, 37, 68. Anderson testified at the hearing and claimed that he had not used any illicit substances. JA 17.

Anderson also raised questions about the Chain of Custody (COC) form he signed at the time of the test. Anderson claimed that the form had erroneously stated that Anderson was not taking any medication and testified that he was "unsure" whether the medications he was taking "could create a 'false positive' test result for opiates." JA 17. Anderson alleges that he asked for the COC form before the hearing but that it was never provided to him. JA 16. Anderson acknowledges, however, that after hearing Anderson's testimony, hearing officer Grant paused the hearing "to inquire about medications prescribed to [Anderson] at the time of the collection of the urine sample." JA 17; accord JA 37, 50. When the hearing resumed, Grant "stated that he had contacted the [Deep Meadows] Medical Department and that they had informed him that [Anderson] was taking multiple prescribed medications" but that "none of them were opiates." JA 18; accord JA 69 (affidavit from Grant stating that he confirmed that "Anderson was not taking any medications that would have interacted with any of his other medications that would have caused a false positive drug test result"). Grant found Anderson guilty of the charged offense and fined him $10. JA 4, 18. Anderson alleges that this "disciplinary process and

proceedings" were "approved" by defendant-appellee Major Ross Maurice, the chief correctional supervisor at Deep Meadows "on 'Institutional Review.'" JA 18.

Anderson filed an administrative appeal, which was denied by Jeffrey N. Dillman, the then-warden of the complex that included Deep Meadows. JA 6, 18; accord JA 69, 122; see *infra* note 1 (explaining that Anderson has abandoned any claim against Warden Dillman). Warden Dillman addressed Anderson's points, see JA 119–22, and ultimately concluded that, "[b]ased on written report of the Reporting Officer; a review of all documentation; review of the recorded hearing and [Anderson's] testimony; I find no major procedural errors, and [that Anderson] ha[d] not provided any justifiable reason to modify or overturn the action of the Hearings Officer." JA 122.

Anderson filed a second administrative appeal to the regional administrator, Wendy S. Hobbs, who is not a party to this case. JA 18. Like Warden Dillman, Hobbs denied the appeal and upheld the decision below. JA 18; accord JA 123 (concluding that "all of the contentions [Anderson] presented within [his] Level II Appeal ha[d] already been

answered in full within [Anderson's] Level I Appeal Response and/or during [Anderson's] original hearing").

3. In 2017, Anderson filed suit in the circuit court for Powhatan County. JA 2. As relevant here, the complaint named four defendants: Major Maurice (who, the complaint alleged, "approved the disciplinary process and proceedings," JA 18); hearing officer Grant (who presided over Anderson's disciplinary hearing); Investigator Leonard; and R. Bisbal, a Senior Correctional Officer "charged with the day-to-day responsibility for the implementation of security procedures." JA 8; see JA 7–8.[1]

The complaint was brought under 42 U.S.C. § 1983, which provides a cause of action to those whose federal constitutional rights have been violated by those acting under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988). The relevant counts of Anderson's seven-

[1] The complaint also named Warden Dillman, who denied Anderson's first appeal. JA 5–6. The circuit court dismissed those claims because "Anderson ha[d] failed to allege specific personal involvement" by the warden. JA 176. Anderson's opening brief does not challenge that conclusion—indeed, the brief never even mentions Warden Dillman's name. Accordingly, Anderson has waived any challenge to the circuit court's dismissal of Warden Dillman. See *Muhammad v. Commonwealth*, 269 Va. 451, 478, 619 S.E.2d 16, 31 (2005) ("Failure to adequately brief an assignment of error is considered a waiver.").

count complaint alleged various violations of the procedural component of the Fourth Amendment's Due Process Clause, including:

- "failure of adequate or appropriate evidence collection, processing, retention, and chain of custody" by Officer Bisbal, JA 19 (capitalization omitted);
- "failure to train and supervise the collecting officers, regulate the urine collection process and failure to adhere to regulatory limitations" against Investigator Leonard, JA 20 (capitalization omitted);
- "failure to provide adequate assistance; failure to permit or provide access to evidence and failure to apply appropriate or required standards and authority in the review and evaluation of evidence at the disciplinary hearing" against hearing officer Grant, JA 21 (capitalization omitted); and
- "failure to train and supervise collecting officers, investigative staff and hearing officer; ratification of improper and unlawful collection procedures, investigative and disciplinary hearing

processes" against Major Maurice, JA 22 (capitalization omitted).[2]

As relief, Anderson sought a preliminary and permanent injunction, fees, costs and $20,011 in damages ($10,000 in punitive damages, $10,000 in compensatory damages for emotional distress, $10 in compensatory damages for the fine from the disciplinary hearing, and $1 in nominal damages). JA 25.[3]

4. The defendants demurred and moved to dismiss. JA 33. As relevant here, they argued that: (1) the claims against Major Maurice failed as a matter of law because Anderson failed to allege specific

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[2] The other three counts raised a due process claim against Warden Dillman, as well as defamation and conspiracy claims against all defendants. JA 22–24. As explained previously, Anderson has abandoned the due process claim against Warden Dillman by failing to raise it in his opening brief. See *supra* note 1. And because Anderson's assignments of error do not cover the circuit court's dismissal of his defamation and conspiracy claims, see JA 176 (circuit court opinion); JA 184 (assignments of error), those claims are likewise not before this Court.

[3] The complaint also requested declaratory relief. JA 24. But the circuit court never reached that issue because Anderson "concede[d] the issue of declaratory judgment under Virginia law" in his opposition to defendants' motion to dismiss. JA 134. Because "an issue abandoned at trial may not be resurrected on appeal, *Clifford v. Commonwealth*, 274 Va. 23, 25, 645 S.E.2d 295, 297 (2007), this case no long raises any issues about Anderson's eligibility for declaratory relief.

personal involvement by Major Maurice, JA 39–41; (2) all of Anderson's due process claims failed as a matter of law because "the VDOC policies and procedures in place afford more than adequate protection for each offender's Due Process rights" and "Anderson's alleged receipt of an institutional conviction and his $10.00 fine was not in violation of the Constitution," JA 43; and (3) all of the defendants were entitled to absolute immunity in their official capacities and to qualified immunity in their personal capacities, and hearing officer Grant was likewise entitled to quasi-judicial immunity for his participation in disciplinary hearings, JA 45–46.

The circuit court granted the defendants' motion and dismissed Anderson's complaint without prejudice. JA 178–79. The court determined that Anderson's "claims should be dismissed as to [Major Maurice] because plaintiff has failed to allege specific personal involvement" by the major. JA 176. The court further concluded that the "procedures that were used in [Anderson's] disciplinary hearing gave [Anderson] adequate protection for his due process rights under the Fourteenth Amendment and that the fact that he received an institutional conviction and a $ 10.00 fine does not rise to the level of a

constitutional violation." *Id.* Finally, the circuit court held that, in any event, all of the defendants were "entitled to immunity." *Id.*

This Court granted Anderson's petition for appeal.[4]

STANDARD OF REVIEW

"This Court performs de novo review of a trial court's sustaining of a demurrer." *Brown v. Jacobs*, 289 Va. 209, 214–15, 768 S.E.2d 421, 424 (2015). "For purposes of evaluating a demurrer, a court assumes that all material facts, implied facts and reasonable inferences from those facts that are properly alleged in the complaint are true." *Id.* at 212 n. 2, 768 S.E.2d at 423 n.2. "However, [a demurrer] does not admit the

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[4] Three days after filing this case, Anderson also filed a petition for a writ of habeas corpus with the same circuit court, challenging the same disciplinary proceeding at issue here and raising the same due process allegations. See *John Albert Anderson v. John F. Walrath*, Powhatan Circuit Court Case Number CL17-311. The circuit court also dismissed that petition, stating that "it would [be] fair to infer from the record that the hearing examiner, G. Grant, investigated the chain of custody . . . and was satisfied with it." *John Albert Anderson v. John F. Walrath*, No. CL17-311, at 1–2 (Va. Cir. Sept. 14, 2017) (letter order). The circuit court also perceived "some evidence in the record from which one may infer that petitioner was not the victim of a false positive test for opiates." *Id.* at 2. The court thus concluded that, "under the low standard that applies to review of prison disciplinary proceedings," Anderson's procedural due process allegations were "without merit." *Id.* This Court refused Anderson's petition for appeal, concluding that "there is no reversible error in the judgment complained of." *John Albert Anderson v. John F. Walrath*, No. 180359 (Va. Sept. 6, 2018) (order).

correctness of conclusions of law" and this Court "is not bound by conclusory allegations in a review of a demurrer." *Id.* (internal citations and quotation marks omitted). "This Court's review of an order granting a motion to dismiss is [also] de novo." *Goodman v. Rubenstein*, No. 16-1207, 2017 WL 4772897, at *2 (Va. Oct. 23, 2017).

Although this Court reviews the circuit court's decision de novo, the same is not true when it comes to the actions or decisions of prison officials during disciplinary proceeding. Instead, "the relevant question is whether there is *any evidence* in the record that could support the conclusion reached by the disciplinary board." *Superintendent, Mass. Corr. Inst. at Walpole v. Hill*, 472 U.S. 445, 455–56 (1985) (emphasis added); see *id.* at 455 (stating that even "modicum of evidence" supporting the result reached in the prison disciplinary proceeding is sufficient).

ARGUMENT

The circuit court's decision was correct and should be affirmed.

First, Anderson's procedural due process claims fail on the merits. For one thing, Anderson has not identified a constitutionally protected liberty or property interest: neither the $10 penalty Anderson actually

received nor the prospect of a reduced ability to earn good time credits in the future implicates such an interest because they do not "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). What is more, the single procedural defect Anderson asserts (not being given the COC form he requested) did not deprive Anderson of any process he was due.

Second, the circuit court correctly determined that the claims against Major Maurice also fail because they are based on a respondeat superior theory, which is not available in a Section 1983 case.

Third, all of the defendants are also shielded by immunity. The defendants have absolute immunity from claims against them in their individual capacities and qualified immunity against them in their personal capacities. In addition, hearing officer Grant would be entitled to quasi-judicial immunity for any claims based on his conduct of the prison disciplinary hearing.

I. Anderson fails to state a due process claim

"Because prison officials must be responsible for the security of the prison and the safety of its population," such officials have "wide

discretion in promulgating rules to govern the prison population and in imposing disciplinary sanctions for their violation." *McCloskey v. State of Md.*, 337 F.2d 72, 74 (4th Cir. 1964); see also *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974) (courts "should not be too ready to exercise oversight and put aside the judgment of prison administrators"). "To state a procedural due process violation, [Anderson] must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015); see *Fun v. Virginia Military Inst.*, 245 Va. 249, 253, 427 S.E.2d 181, 183 (1993) (looking to federal law when evaluating procedural due process claim). As the circuit court correctly determined, Anderson can make neither showing.

A. Anderson fails to demonstrate a deprivation of a protected liberty or property interest

Anderson's brief does not clearly "identify [the] protected liberty or property interest" that forms that basis for his due process claim. *Prieto*, 780 F.3d at 248. It appears, however, that Anderson is suggesting that either his "potential[] . . . loss of good time credits and the loss of property through a fine," Appellant Br. 17, is what constituted the relevant "depriv[ation]" of "liberty" or "property." U.S.

Const. amend. XIV § 1; see Appellant Br. 16 (again referencing "the potential for losing good time credits" and suggesting that that alone "is sufficient to create a liberty interest under the Fourteenth Amendment"). But see *id.* at 17 ("The fact that the Hearings Officer only imposed a pecuniary penalty is irrelevant to *Anderson's standing* to challenge the procedural due process he should have been afforded using § 1983.") (emphasis added). In any event, neither a $10 fine nor the "potential[] loss of good time credits" implicates a cognizable liberty or property interest in the prison setting.

1. Within the prison context, a $10 fine does not constitute a constitutionally significant "depriv[ation]" of "liberty" or "property"

Money is, of course, a quintessential form of property. But that does not mean that every small fine triggers federal constitutional protections in the prison context. Instead, the United States Supreme Court has emphasized that prison disciplinary proceeding do not implicate a constitutionally protected liberty interest unless they "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Applying this reasoning, various courts have concluded that

"small fines" like the $10 fine imposed on Anderson "do not trigger due process concerns" on either a liberty or property theory "because the punishments do not impose an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life." *Jeffries v. Tennessee Dep't of Correction*, 108 S.W.3d 862, 871 (Tenn. Ct. App. 2002); *Clark v. Wilson*, 625 F.3d 686, 691 (10th Cir. 2010) (applying the *Sandin* test for assertion of property interest in fine in prison context).[5] Because the deprivation of a constitutionally protected liberty or property interest is one of the "prerequisites of a valid due process claim,"

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[5] See also *Partin v. Parris*, No. 17-6172, 2018 WL 1631663, at *2 (6th Cir. Mar. 20, 2018) (per curiam) ("a three-week stint in segregation or a small fine is not atypical or a significant hardship in relation to the ordinary incidents of prison life"); *Henderson v. Commonwealth*, No. 7:07-CV-00266, 2008 WL 204480, at *10 (W.D. Va. Jan. 23, 2008) ("In this case, [plaintiff's] penalty for the disciplinary conviction was a $12.00 fine. This court cannot find that this penalty posed an atypical and significant hardship on the plaintiff in comparison to the ordinary incidents of prison life."); *Bratcher v. Mathena*, No. 7:15CV00500, 2016 WL 4250500, at *1 (W.D. Va. Aug. 10, 2016) (30 days of disciplinary segregation and $12.00 fine "did not constitute an atypical or significant hardship on [a prisoner] in relation to the ordinary incidents of prisoner life"); *Watson v. Burton*, No. 7:12-CV-00404, 2013 WL 432478, at *3 (W.D. Va. Feb. 4, 2013) (holding that a $12 fine "is not an atypical and significant hardship on plaintiff in comparison to the ordinary incidents of prison life"); *McMillan v. Fielding*, 136 Fed. Appx. 818, 820 (6th Cir. 2005) ("Ten days in lock up, the loss of package privileges, and a $4.00 fine do not constitute an atypical and significant hardship in the context of prison life.").

Parratt v. Taylor, 451 U.S. 527, 536 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), any constitutional claim based on the $10 fine fails for that reason alone.

2. A reduced ability to earn good time credits in the future did not deprive Anderson of any constitutionally protected liberty interest

Anderson acknowledges that the only punishment actually imposed at the disciplinary hearing was a $10 fine. Appellant Br. 16–17; accord JA 18 (complaint). Anderson nonetheless alleges that the disciplinary proceedings also "reduced his capacity to earn good time credit reductions to his sentence of imprisonment," JA 23, and argues that the mere "potential for losing good time credits," even if the good-time credit has not yet accrued or vested, "is sufficient to create a liberty interest under the Fourteenth Amendment." Appellant Br. 16 (citing *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974)). Not so.

Wolff does not establish the broad proposition that *any* prospect of a reduced ability to earn good time credits in the future implicates a constitutionally protected liberty interest. To the contrary, the Supreme Court was clear that "the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison." *Wolff*, 418 U.S. at

557. And the Court's holding that even the loss of *vested* good-time credits in *Wolff* implicated a constitutionally sufficient liberty interest was *expressly* predicated on the fact that Nebraska both "provided a statutory right to good time" *and* "specifie[d] that it is to be forfeited only for serious misbehavior." *Id.*

Anderson points to no such entitlement to good-time credits in Virginia. He also cites no authority that calls for stretching *Wolff* to apply to good-time credits that have not yet vested.

To the contrary, numerous courts have specifically rejected the claim that that the loss of "the *mere opportunity* to earn good-time credits" implicates a constitutionally protected liberty interest. *Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995) (emphasis added); see *Antonelli v. Sheahan*, 81 F.3d 1422, 1431 (7th Cir. 1996) (holding that a convicted prisoner with no access to good time credit program "has no due process interest in the opportunity to earn good time credit"); *Abed v. Commissioner*, 682 A.2d 558, 561 (Conn. App. Ct. 1996) (concluding that an inmate did not have "a liberty interest in good time credits he

has not yet earned").[6] In short, where, as here, a prisoner "does not allege that he lost any earned good time," but "merely complains that this conviction will impede his ability to earn good time credits" in the future, there is no "issue of constitutional magnitude" for courts to review. *Hines v. Ray*, No. Civ.A. 7:05-CV-00565, 2005 WL 2333468, at *3 (W.D. Va. Sept. 22, 2005).

B. Anderson received any process he was due and sufficient evidence in the record supports the disciplinary proceeding's findings

The previous Section explained that Anderson's due process claims fail because nothing that happened as a result of the prison disciplinary proceedings implicated a constitutionally protected liberty

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[6] See also *Malchi v. Thaler*, 211 F.3d 953, 959 (5th Cir. 2000) ("the timing of [a prisoner's] release is too speculative to afford him a constitutionally cognizable claim to the 'right' to a particular time-earning status"); *Marksberry v. Chandler*, 126 S.W.3d 747, 753 (Ky. Ct. App. 2003), *as modified on reh'g* (Jan. 30, 2004) ("The loss of the mere opportunity to earn good-time credit does not constitute a cognizable liberty interest."); *Frazee v. Maschner*, 12 Kan. App. 2d 525, 529 (1988) ("the potential to receive good time credits available under [state administrative regulation] is not a protected liberty interest"); *Coslett v. State*, 697 So. 2d 61, 65 (Ala. Crim. App. 1997) ("The loss of ability to earn 'good time' was a collateral consequence of a classification change based upon the appellant's improper conduct and did not rise to the level of a liberty interest deprivation."); see generally *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (noting that possible effect on parole decision does not create liberty interest in confinement in particular prison).

or property interest. Yet even if that were not true, Anderson's due process claims also would fail for a second, independent reason: the disciplinary procedures themselves satisfied any constitutional requirements that may have attached.

1. Prisoners are not entitled to the same due process protections as those who are not incarcerated. "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff*, 418 U.S. at 556. In addition, "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen." *Wolff*, 418 U.S. at 555; see *Brown v. Braxton*, 373 F.3d 501, 504 (4th Cir. 2004) (noting that "[p]rison disciplinary hearings, unlike criminal prosecutions or parole revocation hearings, 'take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law'" (quoting *Wolff*, 418 U.S. at 561)).

In the context of inmate disciplinary proceedings, due process requires only written notice of the charges, a written statement by the fact finder as to the evidence relied on and reasons for the disciplinary action, a limited right "to call witnesses and present documentary

evidence when . . . do[ing] so will not be unduly hazardous to institutional safety or correctional goals." *Wolff*, 418 U.S. at 566; see *id.* at 564–66; see also *id.* at 566–67 (stating that there is no federal constitutional right to confrontation or cross-examination in prison discipline proceedings). What is more, "[t]he fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact." *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 456 (1985) (*Hill*). Instead, when confronted with a due process challenge to the results of a prison disciplinary proceeding, "the relevant question is whether there is *any evidence* in the record that could support the conclusion reached by the disciplinary board." *Id.* at 455–56 (emphasis added).

2. Here, there is at least "some basis in fact," *Hill*, 472 U.S. at 456, for the disciplinary officer's determination that Anderson had used a prohibited substance. Anderson's urine test came back positive for opioids and medical staff confirmed that none of Anderson's medications would create a false positive test for opioids. JA 14–15, 17, 35, 37, 50, 66. Because there is "evidence in the record that could support the

conclusion reached by the disciplinary board," *Hill*, 472 U.S. at 455–46, Anderson's claim fails.

3. Anderson does not claim that his prison disciplinary proceeding lacked any of the procedural safeguards identified by the United States Supreme Court in *Wolff*. Instead, Anderson argues that "minimum due process protections were not observed" because Anderson did not receive "the documentary evidence he requested" and because "[q]uestions raised by the chaotic nature of the collection procedure (including the issue of the prescribed medications) could have been answered had the COC been produced and provided to Anderson as requested." Appellant Br. 13–15. Anderson also argues that, because hearing officer Grant deemed the COC form "relevant," a "specific DOC policy require[d] for the provision of such evidence to Anderson." *Id.* at 14.

As an initial matter, even if "DOC policy require[d] for the provision of such evidence to Anderson," Appellant Br. 14, any such policy would not have given Anderson a *constitutional* entitlement to the COC form. Prison regulations are "primarily designed to guide correctional officials in the administration of a prison. [They are] not

designed to confer rights on inmates." *Sandin*, 515 U.S. at 481–82; see *Riccio v. County of Fairfax, Va.*, 907 F.2d 1459, 1469 (4th Cir. 1990) ("[T]o hold that a state violates the Due Process Clause every time it violates a state-created rule regulating the deprivation of a property interest would contravene the well recognized need for flexibility in the application of due process doctrine."). Indeed, other courts have specifically stated that, "in deciding whether a state has violated a person's *constitutional* right to procedural due process, we should pay *no attention* to whether the state has complied with procedures mandated by state law." *Hulen v. Yates*, 322 F.3d 1229, 1247 (10th Cir. 2003) (emphasis added); accord *Alicea v. Howell*, 387 F. Supp. 2d 227, 233 (W.D. N.Y. 2005) (stating that "[e]ven if" the plaintiff inmate were correct "that the procedures that were followed in testing and preserving his urine sample did not comport with DOCS regulations concerning inmate drug tests . . . that would not give rise to a due process claim"). "[R]egardless of state procedural guarantees, the *only* process due an inmate is that minimal process guaranteed by the Constitution, as outlined in *Wolff*." *Shakur v. Selsky*, 391 F.3d 106, 119 (2d Cir. 2004); accord *Culbert v. Young*, 834 F.2d 624, 628 (7th Cir.

1987) ("The adoption of mere procedural guidelines . . . does not give rise to a liberty interest protected under the fourteenth amendment.").

Anderson also fails to explain how receipt of the COC form was "necessary" to defend against his disciplinary charge—and it was not. Anderson summarily asserts that "[q]uestions raised by the chaotic nature of the collection procedure (including the issue of the prescribed medications) could have been answered had the COC been produced and provided to Anderson as requested." Appellant Br. 14–15. But no such "questions" about Anderson's medication existed. Even if the COC form inaccurately stated that Anderson took no medication, that error would not undercut the results of the urine test because medical staff specifically confirmed that Anderson's medication regimen would not yield a false positive drug test. JA 17, 37–38, 50.

This case is thus unlike *Ellison v. Zatecky*, 820 F.3d 271, 274 (7th Cir. 2016), which is cited on page 14 of Anderson's brief. In *Ellison*, there was a specific "conflict between" a disciplinary report stating that heroin was found in the inmate's cell and "the location of the heroin as identified on [a] photo" that was also in the record. *Ellison*, 820 F.3d at 274. Yet the hearing officer "refus[ed] to allow [the inmate] to present

evidence" and "refused to call" an officer who "had searched [the inmate's cell] on the day in question." *Id.* at 272–73

Nothing like that happened here. Instead, hearing officer Grant "stopped the proceedings" after Anderson testified about his concern that his medication regimen could have yielded a false positive urine test and confirmed with medical staff that Anderson's medications, in fact, would not cause a false positive test. JA 17; accord 37–38, 50.

At bottom, Anderson's complaints about the COC form do not undermine the circuit court's conclusion that the disciplinary proceeding's finding had at least "some basis in fact." *Hill*, 472 U.S. at 456. The Supreme Court's decision in *Wolff* "establishes beyond doubt . . . [that] hearing officers . . . may decide that legitimate penological interests justify the denial of an individual inmate's witness request, and their decisions are not to be lightly second-guessed by courts far removed from the demands of prison administration." *Brown v. Braxton*, 373 F.3d 501, 505 (4th Cir. 2004). The positive drug test, along with the confirmation by medical staff that none of Anderson's

medications would cause a false positive test, is sufficient to meet the low due process standard for prison disciplinary hearings.[7]

II. The circuit court also properly dismissed Anderson's claim against Major Maurice because there is no respondeat superior liability under Section 1983

The circuit court correctly held that the claims against Major Maurice also should be dismissed because the complaint failed to allege specific personal involvement by Major Maurice. JA 176. That decision was correct and provides an additional basis for affirming the dismissal of those claims.

The relevant count of the complaint asserts only that Major Maurice "formally and officially ratified and approved the urine specimen collection procedure, chain of custody and disciplinary hearing procedures challenged herein" and that Major Maurice "knew, or

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[7] At the end of its letter opinion, the circuit remarked that Anderson was "trying to use this court to challenge the accuracy of the findings that were made in his VDOC disciplinary hearing" and stated that this was "improper, as courts do not 'serve as a reviewing body of the accuracy of disciplinary committees findings of fact.'" JA 177 (citing *Woodard v. Mills*, 511 F.2d 1399 (4th Cir. 1975)). Although Anderson assigns error to this statement, see Appellant Br. 3, the body of the brief simply conflates his argument on this assignment of error with his procedural due process argument. See Appellant Br. 19–20. Because Anderson's procedural due process claim fails, so too does his fourth assignment of error.

reasonably should have known that his actions or omissions to act complained of herein were in violation of Virginia Department of Corrections policy and procedures, improper, and unlawful." JA 22; see JA 18 (asserting that Major Maurice "approved the disciplinary process and proceedings (Case No. DMCC-2016-0328) on 'Institutional Review.'").

Before this Court, Anderson attempts to amplify his allegations against Major Maurice. In particular, Anderson's brief argues that, "as Institutional Reviewer," Major Maurice had oversight responsibility "to determine if proper procedures were followed" and that, per VDOC policy, Major Maurice should have been "provided with the completed Disciplinary Report and all related documents." Appellant Br. 11 (quotation marks omitted). From this, Anderson "presume[s] that, upon [Major Maurice's] review of the disciplinary process here, he knew or reasonably should have known of the procedural due process failures inherent therein and complained of in this litigation." *Id.*

No such "presumption" is warranted or appropriate. For one thing, as already explained, there were no "procedural due process failures" in the disciplinary proceedings here. See Part I, *supra*.

Moreover, "principles of respondeat superior do not apply in imposing liability under § 1983," and "it is not enough that [Major Maurice] had general supervisory authority over . . . employees." *Doe v. Rosa*, 795 F.3d 429, 439 n.7 (4th Cir. 2015) (internal quotation marks and citation omitted); *Wilkins v. Montgomery*, 751 F.3d 214, 226 (4th Cir. 2014). As the circuit court correctly recognized, Anderson's complaint failed to plead that Major Maurice's "own individual actions . . . violate[d]" Anderson's right, *Doe*, 795 F.3d at 439 n.7, and Major Maurice's denial of Anderson's appeal of the disciplinary proceeding alone is insufficient to assert a constitutional violation, see *George v. Smith*, 507 F.3d 605, 609 (7th Cir. 2007) ("[r]uling against a prisoner on an administrative complaint does not cause or contribute to the [constitutional] violation"); *McGee v. Adams*, 721 F.3d 474, 485 (7th Cir. 2013) (same); *Brooks v. Beard*, 167 Fed. Appx. 923, 925 (3d Cir. 2006) (grievance responses alone "do not establish [an official's] involvement in the treatment itself").

III. All of the defendants would be entitled to immunity

Were this Court to conclude that the Anderson has stated a valid constitutional claim against any of the defendants—and for the reasons

explained above, it should not—the Court should nonetheless affirm because any such defendant would be immune from suit. See JA 176 (circuit court "agree[ing]" that the defendants "are entitled to immunity").

First, Section 1983 does not permit Anderson to sue any of the defendants in their official capacities. "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office" and "it is no different from a suit against the State itself." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). "Neither a State nor its officials acting in their official capacities are 'persons' under § 1983," *id.*, and "the Commonwealth and its agencies are generally immune from suits," *Virginia Bd. of Med. v. Virginia Physical Therapy Ass'n*, 13 Va. App. 458, 465, 413 S.E.2d 59, 63 (1991), *aff'd*, 245 Va. 125, 427 S.E.2d 183 (1993).

Second, to the extent the defendants are being sued in their personal capacities, they all would be entitled to qualified immunity. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It does so by "shield[ing] officials from civil liability so long as

their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks and citation omitted); see *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1994) (stating that so long as "there is a 'legitimate question' as to whether an official's conduct constitutes a constitutional violation, the official is entitled to qualified immunity"). For the reasons set forth above, it was—at minimum—not "clearly established" at the time of the relevant events that any conceivable constitutional violation by any of the defendants violated Anderson's constitutional rights. And, for that reason, all of the defendants would be entitled to qualified immunity.

Finally, hearing officer Grant would likewise be entitled to quasi-judicial immunity for his role as hearing officer in Anderson's disciplinary hearing and in his evidentiary decisions. See, e.g., *Ward v. Johnson*, 690 F.2d 1098, 1105 (4th Cir. 1982) (disciplinary hearing officer "enjoyed absolute immunity in connection with his rulings on the evidentiary issues in the disciplinary hearing"); *Segarra v. McDade*, 706 F.2d 1301, 1307 (4th Cir. 1983) (prison officials who serve on disciplinary committee are absolutely immune).

CONCLUSION

The judgment of the circuit court should be affirmed.

Respectfully submitted,

JEFFREY N. DILLMAN, Warden;
ROSS MAURICE, Chief Correctional
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Institutional Hearings Officer, Individually
and in their Official Capacity,

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CERTIFICATE OF SERVICE AND FILING

I certify that, on October 23, 2018, this brief was filed electronically with the Court, in Portable Document Format, and three printed copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was also electronically mailed to:

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