

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

JEFFREY LYN UNDERWOOD,)	
)	
Plaintiff,)	Case No. 7:15CV00513
)	
v.)	OPINION AND ORDER
)	
C. BEAVERS, ET AL.,)	By: James P. Jones
)	United States District Judge
Defendants.)	
)	

Jeffrey Lyn Underwood, Pro Se Plaintiff; J. Michael Parsons, Office of the Attorney General of Virginia, Richmond, Virginia, for Defendants Barbetto, Arms, Lowe, and Fleming.

Jeffrey Lyn Underwood, a Virginia inmate proceeding pro se, filed this civil rights action under 42 U.S.C. § 1983. Liberally construed, Underwood’s Complaint alleges that the defendant prison officials mishandled a guard dog that bit Underwood’s left forearm; provided inadequate medical care for resulting injuries; failed to investigate the incident; and denied Underwood due process on a related disciplinary charge. After review of the record, I conclude that the Motion for Summary Judgment filed on behalf of defendants Barbetto, Arms, Lowe, and Fleming must be granted in part and denied in part.¹

¹ I have separately addressed other defendants’ dispositive motions. I note that defendants Beavers and Diperna have filed an Answer, but have not moved for summary judgment.

I.

At the time of the alleged violations, Underwood was incarcerated at Keen Mountain Correctional Center (“Keen Mountain”), a prison facility operated by the Virginia Department of Corrections (“VDOC”). According to Underwood, on October 7, 2014, while getting his breakfast coffee, he had words with an inmate kitchen worker. The kitchen worker then talked to Inmate L. Custis, as observed by Sgt. Sandstorm. After the meal, as a group of inmates was leaving the chow hall, Custis threw punches at Underwood. Underwood pushed Custis away from him. K-9 Officer Beavers witnessed this incident, ordered Underwood and Custis to stop fighting, and told everyone to get on the ground. As Underwood was dropping to ground, Beavers hit him in the back, knocking him to the ground.

Beavers then walked his attack dog over by the collar, dropped him down on Underwood’s left arm, and ordered, “Get him Boy!” (Compl., at 7, ECF No. 1.)² The dog bit Underwood’s arm fourteen times. Sgt. Barbetto, who was at the scene, did nothing to stop the attack. Officer Diperna, who was working the sidewalk, stood by and waited until Beavers was finished attacking Underwood. Then, Diperna ran both of his knees into Underwood’s back and jerked his arm violently to handcuff him.

² The pages of Underwood’s Complaint and exhibits are not sequentially numbered. Thus, in my Opinion, I will cite to the page numbers of the court’s Electronic Case Filing (“ECF”) version of each document.

After the incident, officers took Underwood to a segregation pod and placed him in a shower. Warden Fleming was there, and Underwood told him about Beavers' attack while he was on the ground and about Barbetto's failure to intervene. Fleming used his camera phone to take pictures of the puncture wounds on Underwood's arm, and instructed an officer to take video pictures of the bites before the prison doctor cleaned his wounds and sent him to a local hospital emergency room for X rays. Two days later, Underwood was admitted to the hospital for IV antibiotics to fight infection. While there, he had two episodes when his heart rate became elevated to 200 beats per minute. The hospital doctor administered an IV medication that slowed the heart beat to a more normal rate.

Underwood returned to Keen Mountain on October 13. He submitted an informal complaint and grievance, requesting that the K-9 incident be investigated and that Beavers be charged, but Institutional Investigator Arms failed to investigate or to charge anyone.

Beavers brought a disciplinary charge against Underwood for assaulting Custis. Officer Lowe conducted a disciplinary hearing on October 17, 2014. Beavers reported that at 7:21 a.m. on October 7, he saw Underwood make the initial strike by hitting Custis in the face from behind. Underwood testified that he did not assault Custis and only pushed him away to avoid blows from Custis. He asked Lowe to review video footage of the incident from the surveillance cameras

in the area, but Lowe refused. Sgt. Sandstorm submitted a witness statement about his observation of the kitchen worker speaking with Underwood, and then with Custis, before the altercation. Lowe found Underwood guilty of the charge based on Beavers' report. On October 30, 2014, Fleming upheld Lowe's decision on appeal.

Liberally construed, Underwood's § 1983 Complaint alleges the following claims against the summary judgment movants: (a) Barbetto saw Beavers' use of excessive force against Underwood on October 7, 2014, and failed to intervene or prevent it; (b) Fleming and Arms failed to investigate the October 7 incident fully and took no action to discipline the officers involved to prevent future such incidents; (c) Lowe denied Underwood due process by finding him guilty of assault without viewing video footage of the incident or considering the statements by Sandstorm and Underwood; and (d) Fleming upheld Lowe's unconstitutional ruling despite his personal knowledge of the events. As relief in this action, Underwood seeks monetary damages as well as declaratory relief and an injunction expunging his disciplinary conviction. These defendants have moved for summary judgment, and Underwood has responded, making this matter ripe for disposition.

II.

A. Standard of Review.

Summary judgment is appropriate only if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam). The court does not weigh evidence, consider credibility, or resolve disputed issues — it decides only whether the record reveals a genuine dispute over material facts. *See Id.* at 1866. Facts are material when they “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute exists if “a reasonable jury could return a verdict in favor of the nonmoving party.” *Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 173 (4th Cir. 2014).

B. Failure to Intervene.

Officers who did not personally use force against Underwood during the dog bite incident may yet face § 1983 liability as bystanders who failed to prevent others from violating his rights.

The concept of bystander liability is premised on a law officer’s duty to uphold the law and protect the public from illegal acts, regardless of who commits them. . . . Therefore, if a bystander officer (1) is confronted with a fellow officer’s illegal act, (2) possesses the power to prevent it, and (3) chooses not to act, he may be deemed an accomplice and treated accordingly.

Randall v. Prince George's Cty., 302 F.3d 188, 203 (4th Cir. 2002). Barbetto contends that he is entitled to summary judgment based on his affidavit stating that he was not present when Beavers' dog attacked Underwood. Barbetto is a corrections sergeant and supervisor of the Keen Mountain K-9 unit. Barbetto states that the encounter between Custis and Underwood on October 7, 2014, began at about 7:21 a.m., when Barbetto had just arrived at his office for his shift that started at 7:30 a.m. He further states that once notified of the use of force incident involving a K-9, he went with a camera to the medical unit and took photographs of Underwood's wounds. Barbetto also denies that he investigated the use of force incident, because reviews of K-9 interventions are conducted by an institutional investigator.

In response to Barbetto's evidence, Underwood rests on his account in the verified Complaint that Barbetto was present and saw Beavers' use of the K-9 to attack Underwood on the ground. He contends that Barbetto, as Beavers' supervisor, failed to order Beavers to stop the attack before the dog injured Underwood's arm as badly as he did. Underwood also points to the warden's Level I response to Underwood's regular grievance about the K-9 incident: "Per Sgt. W. Barbetto (the ranking K-9 officer at KMCC) the K-9 handler and canine responded and followed through within policy and within the scope of their training." (Compl. Ex. R, at 35, ECF No. 1-2.)

I conclude that Underwood has presented genuine issues of material fact that remain in dispute about Barbetto's presence at the scene and his opportunity to intervene or prevent part or all of the K-9 attack on Underwood. *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991) (“[A] *verified* complaint is the equivalent of an opposing affidavit for summary judgment purposes, when the allegations contained therein are based on personal knowledge.”). Therefore, I will deny summary judgment on Underwood's claim of bystander liability against Barbetto in his individual capacity.³

C. Failure to Investigate or Discipline Officers.

Underwood asserts that the K-9 officers' alleged actions — urging a canine to bite a prostrate inmate repeatedly — violated VDOC policy and that he asked supervisory officials to investigate, watch surveillance camera footage of the incident, and bring charges against Beavers and others. He sues defendants Arms and Fleming for failing to do so.⁴

³ Underwood also sues Barbetto in his official capacity. Neither a state nor its officers acting in their official capacities are “persons” under § 1983. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70-71 (1989). Therefore, I will grant Barbetto summary judgment on Underwood's claim against him in his official capacity.

⁴ Arms, the institutional investigator at Keen Mountain, states that he “reviewed the reports and bite photographs of the [October 7, 2014] incident, but did not initiate an investigation of the fight between Underwood and Custis because the incident was observed by staff and the reports supported the utilization of the canine.” (Arms Aff. ¶ 4, ECF No. 77-2.) Arms also states that video footage of the incident “would have been recorded by the Lower A Rapid-Eye system. This system was not functioning on

Underwood's desire to have officers punished for what happened to him on October 7, 2014, does not give rise to any constitutional claim. First, by failing to investigate, after the fact, Underwood's complaint that the dog bite incident violated his rights, the supervisory defendants did not contribute in any way to the alleged violations. Only persons who cause or participate in the violations can be held responsible for them under § 1983. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (“[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.”). Second, even assuming that prison policy required an investigation, state officers' violations of prison policies do not equate with constitutional violations, and thus are not actionable under § 1983.⁵ *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 392 (4th Cir. 1990). Finally, Underwood has no constitutional right to have another person prosecuted for wrongdoing. *See, e.g., Leeke v. Timmerman*, 454 U.S. 83, 86-87 (1981) (finding that prisoners seeking criminal prosecution of guards who had beaten them lacked any judicially cognizable interest in prosecution of other persons).

October 7, 2014. Therefore, this system did not record the incident. This system was nonfunctional for several weeks thereafter.” (Arms Suppl. Aff. ¶ 4, ECF No. 85-1.)

⁵ Moreover, Underwood can litigate only to vindicate his own rights and has no standing to vindicate the purported rights of other inmates to be protected against K-9 attacks in future inmate altercations. *See, e.g., Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 401 (4th Cir. 2005) (finding that pro se person's right to litigate for oneself does not create a similar right to litigate on behalf of others).

For the reasons stated, I find no actionable § 1983 claim based on the alleged failure to investigate the dog bite incident or to discipline the officers involved. Therefore, I will grant the defendants' Motion for Summary Judgment as to this claim.

D. Due Process in Disciplinary Proceedings.

Underwood contends that as the disciplinary hearing officer, Lowe failed to provide constitutionally required procedural protections for Underwood. Namely, Lowe refused to view surveillance camera footage or to credit Sgt. Sandstorm's written statement or Underwood's testimony in contradiction of Beavers' account of the events on October 7, 2014. Lowe found Underwood guilty and penalized him with a 30-day suspension of telephone privileges. Underwood alleges that Fleming reviewed these procedural errors Lowe had committed, failed to review camera footage or interview witnesses himself, and upheld Lowe's guilty finding, despite Fleming's personal knowledge of Underwood's injuries and contemporaneous account of events. These alleged events, while no doubt frustrating to Underwood, do not give rise to any claim of constitutional proportions.

“To state a procedural due process violation, a plaintiff 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). “A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty,’ or it may arise from an expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citation omitted).

Although prisoners are afforded some due process rights while incarcerated, those liberty interests are limited to the “freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes 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) (citations omitted). Changes “in a prisoners’ [sic] location, variations of daily routine, changes in conditions of confinement (including administrative segregation), and the denial of privileges [are] matters which every prisoner can anticipate [and which] are contemplated by his original sentence to prison.” *Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991). If the disciplinary penalty he received did not impose atypical hardship on him, then he has no federally protected liberty interest in avoiding that penalty, and he has no federal right to due process protections before prison officials may impose that penalty. *Sandin*, 515 U.S. at 486-87. Moreover, officers’ failure to abide by state prison procedural regulations is not a federal due process issue,

Riccio v. Cty. of Fairfax, 907 F.2d 1459, 1469 (4th Cir. 1990), and is, therefore, not actionable under § 1983.

Under this legal standard, Underwood fails to demonstrate that he had any federal right to procedural protections during the proceedings on the disciplinary charge that he assaulted inmate Custis. Occasional and temporary loss of privileges, such as the 30-day suspension of telephone privileges imposed on Underwood, is an expected condition of his confinement, rather than the type of atypical hardship required to create a liberty interest that would trigger federal due process protections under the rubric in *Sandin*. With no liberty interest at stake, Underwood had no constitutional right to any particular procedural protections during the disciplinary proceedings. Therefore, Underwood's allegations — that Lowe and Fleming did not properly gather or consider evidence in finding or upholding his guilt — do not implicate any federal due process right. Moreover, if their actions violated state procedural rules, such violations do not state claims cognizable under § 1983. For the stated reasons, I will grant summary judgment for defendants Lowe and Fleming on the due process claims regarding the disciplinary hearing and appeal.

III.

Based on the foregoing, it is hereby **ORDERED** as follows:

1. The defendants' Motion for Summary Judgment (ECF No. 76) is GRANTED IN PART AND DENIED IN PART; the motion is DENIED as to the claim of bystander liability against defendant Barbetto in his individual capacity, but is GRANTED as to all other claims against Barbetto and as to all claims against defendants Lowe, Arms, and Fleming;
2. Defendants Lowe, Arms and Fleming shall be terminated from the case; and
3. The Clerk shall schedule this case for a jury trial in the United States Courthouse in Abingdon, Virginia, on the claims of excessive force against defendants Beavers and Diperna and the claims of bystander liability against defendants Diperna and Barbetto.

ENTER: September 29, 2016

/s/ James P. Jones
United States District Judge