

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 10, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2223

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. BERRELL FREEMAN,

PETITIONER-APPELLANT,

V.

GARY R. MCCAUGHTRY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County:
JOSEPH E. SCHULTZ, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Berrell Freeman, a Waupun Correctional Institution inmate, appeals from a prison disciplinary decision. He raises various due process issues. We reject Freeman's arguments and affirm.

A staff member charged Freeman with lying to a correctional officer, a violation of WIS. ADM. CODE § DOC 303.27. According to the conduct report, Freeman was observed standing in his cell, completely dressed, with his light on, at 6:15 a.m. Seven minutes later, he was observed undressed, in bed with his light off. Freeman was charged with lying because he later denied being awake and dressed at 6:15 a.m.

The violation was characterized as major because the security director determined that it created a risk of serious disruption at the institution or in the community. Freeman waived, in writing, a formal due process hearing. He also refused to attend the informal hearing that took place as a consequence of his waiver. *See* WIS. ADM. CODE § DOC 303.76(2). The hearing officer therefore decided the charge based on the conduct report and a written statement that Freeman submitted in which he denied the charge. The decision was as follows:

After a review of the conduct report and the inmate's written statement, I find that he knowingly made a false statement by stating that he was not up and awake when he had been observed by a staff member to be awake, standing up and dressed. His statements hindered an investigation and affected the safety of the institution.

The warden received Freeman's appeal four days later and affirmed in a decision issued twenty days after the original decision.

Freeman identifies three alleged due process violations during the proceeding. First, he contends that the reason given for classifying the offense as major was not sufficient. That issue is raised for the first time on appeal, and is therefore waived. *Wirth v. Ehly*, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). In any event, if the explanation was insufficient, as it may have been, any error in that regard was harmless. Freeman moved to add documents to the record

showing that while he feigned sleep a major disturbance was occurring on his cell row. Freeman was suspected of participating in it and was, in fact, placed in temporary lockup for investigation of attempted battery and group resistance. He cannot reasonably contend, based on this information which he himself submitted, that he did not know why the institution considered his false statement a major offense. We disregard procedural errors that do not substantially affect the rights of the inmate. WIS. ADM. CODE § DOC 303.87.

Freeman next contends that his waiver of a formal due process hearing was invalid because the security director did not approve it. The applicable regulation, WIS. ADM. CODE § DOC 303.76(2), does not require the security director to approve waivers. It requires the security director's approval only if an inmate attempts to retract a waiver, which Freeman did not.

Freeman's third alleged due process violation concerns what he asserts was an arbitrary and capricious decision. The record does not support his assertion. Due to Freeman's waiver and his refusal to appear at the hearing, the only evidence before the hearing officer was the conduct report and Freeman's statement. The hearing officer made a reasonable determination based on that limited evidence and adequately explained it.

Freeman raises two other issues regarding the proceeding. First, he contends that he was improperly placed in temporary lockup before and after his hearing. Certiorari review provides no remedy for violation of temporary lockup procedures. *State ex rel. Riley v. DHSS*, 151 Wis.2d 618, 621 n.1, 445 N.W.2d 693, 694 (Ct. App. 1989). Additionally, documents Freeman submitted to the trial court show that he was not placed in temporary lockup in connection with this disciplinary matter. Second, Freeman points out that the warden's delayed

decision on administrative review violated the time limit in WIS. ADM. CODE § DOC 303.68(7). The additional time the warden took to deny the appeal had no substantial affect on Freeman's rights. His violation of the time deadline was therefore harmless and must be disregarded. *See* WIS. ADM. CODE § DOC 303.87.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

