COURT OF APPEALS
DECISION
DATED AND RELEASED

May 29, 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.

NOTICE

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

No. 96-2719

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN EX REL.
DONALD LEE,

PETITIONER-APPELLANT,

V.

GARY R. MCCAUGHTRY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County: THOMAS W. WELLS, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. Inmate Donald Lee appeals from Waupun Correctional Institution's disciplinary decision finding him guilty of conspiring with other inmates to commit battery to, among others, a prison guard. He argues that: (1) he was denied the right to call witnesses at his disciplinary hearing; (2) he did not

receive proper notice of the hearing; (3) the evidence was insufficient to convict him of conspiracy because the confidential informants' statements were inconsistent and uncorroborated; and (4) the adjustment committee failed to give adequate reasons for its decision. We affirm.

In the wake of an attempted battery of a prison guard by inmate Devin Holmes, Lee was charged with conspiracy in violation of WIS. ADM. CODE § DOC 303.21.[1] The conduct report stated the results of an investigation which revealed that, according to the investigating officer, Lee conspired with "other inmates … in an attempt to assault both staff and inmates." The report relied on information from two confidential informants. The informants' testimony indicated that they had overheard conversations in which Lee expressed hostility toward inmates and staff and urged Holmes and other inmates to attack targeted individuals.

After conducting a hearing on the report, the committee found Lee guilty of conspiracy and sentenced him to eight days' adjustment segregation and 360 days' program segregation. Lee appealed the decision to the warden, who remanded the file to the committee for a further hearing, ordering that Lee be provided with a copy of the informants' statements. The hearing was reconvened shortly thereafter and, after hearing testimony from Lee and two witnesses Lee had called (inmates Raymond Sanders and Anthony Brock) and reviewing the

[1] WISCONSIN ADM. CODE § DOC 303.21, entitled Conspiracy, provides:

> (1) If 2 or more inmates plan or agree to do acts which are forbidden under this chapter, all of them are guilty of an offense.
> ....
> (3) The penalty for conspiracy may be the same as the penalty for the most serious of the planned offenses.

informants' statements, the conduct report and various materials submitted by Lee, the committee affirmed its earlier decision, concluding that Lee "knowingly and intentionally conspired with another inmate to commit battery against a staff member," and that "he conspired with other inmates to commit battery against staff and inmates."[2] The warden affirmed the decision, and Lee sought certiorari review in circuit court. The court upheld the decision and Lee appeals. Other facts will be discussed below.

On certiorari, we review the action of the agency, not the circuit court, and our review is limited to the record made before the agency. ***State ex rel. Whiting v. Kolb***, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990); ***State ex rel. Irby v. Israel***, 95 Wis.2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980). We consider whether: (1) the agency stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable, representing the agency's will, not its judgment; and (4) the evidence supported the agency's decision. ***Kolb***, 158 Wis.2d at 233, 461 N.W.2d at 819; ***State ex rel. Riley v. DHSS***, 151 Wis.2d 618, 623, 445 N.W.2d 693, 694 (Ct. App. 1989). Our consideration of whether the committee acted according to law includes the

[2] Lee argues at one point that the committee lacked jurisdiction to hold the second hearing because WIS. ADM. CODE § DOC 303.76(3) requires due process hearings to be held between two and 21 days after the inmate receives a copy of the conduct report and hearing notice. The State points out—and the record confirms—that Lee received a copy of his conduct report on September 27, 1995, and the original hearing was held on October 10, 1995, thirteen days later. To the extent Lee argues that the reconvened hearing must also be held within the 21-day period, the administrative code contains no such requirement. Elsewhere, the code specifically states that when an inmate appeals a guilty decision to the warden, the warden may affirm, reverse or return the matter to the committee for further consideration. § DOC 303.76(7)(c). Lee has not persuaded us that a reconvened hearing at the warden's direction must be held within the initial 21-day period. Indeed, such a requirement would make little sense in light of the time the appeal to the warden would consume.

question of whether Lee was afforded due process of law. ***State ex rel. Meeks v. Gagnon***, 95 Wis.2d 115, 119, 289 N.W.2d 357, 361 (Ct. App. 1980).

I. Right to Present Witnesses

Lee argues first that his due process rights were violated because he "was denied the right to call witness[e]s" at the hearing. *See* WIS. ADM. CODE § DOC 303.81.[3] Lee's argument goes no further than to state the proposition; he does not indicate how or in what manner his rights were denied. Our own review of the record satisfies us that Lee was not deprived of his right to call witnesses.

When Lee received the conduct report he also acknowledged receipt of a form entitled "Notice of Major Disciplinary Hearing Rights," which stated, among other things:

> At said hearing, you or your staff advocate may present ... evidence from voluntary eye witnesses. If there are persons who are eye witnesses ... to the alleged violation(s), you may request, in writing, within 2 days of this notice ... that any one or more of those witnesses be present at said hearing. You may request no more than 2 witnesses ... without good cause. The Hearing Officer may investigate your request to determine if the witnesses should be called. You will be given the ... Officer's decision in writing, which will include, if any of the witnesses are rejected, the reason for rejection.

The notice was accompanied by a "witness request form" on which the inmate may designate the witnesses he or she wishes to appear at the hearing. The form includes an acknowledgement stating: "I understand that I cannot call more than two witness[es] without good cause."

[3] WISCONSIN ADM. CODE § DOC 303.81(1) states: "Except for good cause, an inmate may present no more than 2 witnesses in addition to the reporting staff member or members."

Two such forms appear in the record. Both are signed by Lee and request the same two witnesses, inmates Sanders and Brock. On the first form, in the space for "additional witnesses," Holmes's name is listed and behind it appears a notation: "Requests statement (trans. to CCI)."[4] At the foot of the form is a "reviewing staff decision," which states that Holmes would not attend because it "would only prolong the hearing." The second form, submitted to the committee two days later, also states: "Request advocate to obtain a statement from inmate Devin Holmes." A staff notation on the bottom of this form indicates that all requested witnesses would attend but that the request for a statement from Holmes "should be made to the advocate" because it was "[i]nappropriate for [a] witness form."

We assume Lee's challenge is to the committee's failure to have Holmes appear at the hearing. But we see nothing in the record suggesting that "good cause" existed to exceed the two-witness limit set forth in the administrative code. *See supra* note 3. The State contends that Holmes's testimony would have been cumulative within the meaning of WIS. ADM. CODE § DOC 303.86, which defines "evidence" as "any statement or object which could be presented at a disciplinary hearing ..." and states that an adjustment committee or hearing officer may refuse to hear or admit evidence if it is "merely cumulative of evidence already received at the hearing and is no more reliable than the already admitted evidence, for example: testimony of other inmates corroborating the accused's story, when corroboration has already occurred." ***Id***. § DOC 303.86(1),(2)(b)3.

[4] Although the parties do not tell us, it appears that Holmes had been transferred to a different institution and was unavailable to appear at the Waupun hearing. WISCONSIN ADM. CODE §§ DOC 303.81(4) and 303.86(3) provide that inmates who have been transferred are unavailable witnesses, and their statements may be submitted to the disciplinary committee in place of live testimony.

Holmes's statement appears in the record. It is a very brief affidavit, stating only that: he does not know Lee, he and Lee did not converse on August 21, 1995, and at no time did he "conspire[], intend[], plan[] or talk[] about assaulting any Prison Staff." It comports with the statement Lee submitted to the committee that he never asked Holmes to harm anyone. Holmes also said his and Lee's cells were so located that no one could have overheard any such conversation.

We are satisfied that Holmes's affidavit could properly be considered a corroborative statement that the committee could reasonably conclude rendered his actual appearance at the hearing unnecessary and that no cause had been shown for Lee to exceed the two-witness limit. *See* ***Gagnon***, 95 Wis.2d at 127, 289 N.W.2d at 364 (when written statement is submitted to committee, live testimony to establish the point is unnecessary).

We conclude, therefore, that contrary to Lee's assertion that he was denied the opportunity to present witnesses, the record establishes that both of his requested witnesses testified at both hearings and that the disciplinary committee not only granted his request for a statement from Holmes but considered it—along with the other inmates' statements—at the second hearing. We agree with the trial court's determination that "the record does not disclose any deprivation of his right, under the rules, to present witnesses ...."

II. Notice of the Hearing

Lee also claims he did not receive twenty-four hours' notice of the rehearing. *See* Appendix note to WIS. ADM. CODE § DOC 303.76(3), at 58; ***Saenz v. Murphy***, 153 Wis.2d 660, 680-81, 451 N.W.2d 780, 788 (Ct. App. 1989) (constitutionally adequate notice requires inmate to receive notice twenty-four

hours before adjustment committee appearance), *rev'd on other grounds*, 162 Wis.2d 54, 469 N.W.2d 611 (1991). The "Notification of Disciplinary Hearing" in the record indicates that Lee received notice of the reconvened hearing on November 21, 1995, and that the hearing commenced the following day. While the notice does not state the time it was received, neither does Lee. The record—to which our review is confined—indicates that he received notice of the reconvened hearing the day before it was held. Without more, we see no violation of the notice rule.

III. Sufficiency of the Evidence

Lee next challenges the sufficiency of the evidence to support the committee's determination that he was a party to a conspiracy to cause harm to inmates or staff. Again, our review is limited to ascertaining whether the record contains substantial evidence to support the determination. ***Van Ermen v. DHSS***, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978); ***State ex rel. Gibson v. DHSS***, 86 Wis.2d 345, 349, 272 N.W.2d 395, 398 (Ct. App. 1978). We neither weigh the evidence nor assess the credibility of the witnesses; that is the committee's task. ***Shoreline Park Preservation, Inc. v. Wisconsin Dep't of Admin.***, 195 Wis.2d 750, 761, 537 N.W.2d 388, 391-92 (Ct. App. 1995). The question before us is whether reasonable minds could reach the same conclusion as the committee. ***Kolb***, 158 Wis.2d at 233, 461 N.W.2d at 819. If that is the case, the agency's determination will not be overturned even if it is against the great weight and clear preponderance of the evidence. ***Voight v. Washington Island Ferry Line***, 79 Wis.2d 333, 342, 255 N.W.2d 545, 549 (1977).

Lee states that the informants' statements did not establish a conspiracy. In particular, he claims that the statement of Informant #1 is false in

material respects.[5] Informant #1's statement related a conversation between Lee and Holmes on August 21, 1995, in which Lee was said to have urged and instructed Holmes to assault a guard—to which Holmes agreed—and it is this portion of the statement about which Lee particularly complains. Lee maintains that on August 21, 1995, he was in what he describes as a "double door isolation cell" that effectively prohibited him from communicating with other inmates. Other evidence in the record confirms that Lee was in isolation on that day.

Other evidence in the record, however, supports the charge, and the committee's determination, that Lee "conspired with another inmate to commit battery against a staff member …. [and] conspired with other inmates to commit battery against staff and inmates." First, in addition to his questionable testimony about overhearing the August 21 conversation between Holmes and Lee, Informant #1 also recounted: (1) Lee's conversations with another inmate, Sanders, at a different place and time, in which he was "instructing … Sanders to

---

[5] Lee also claims that the informants' statements were inconsistent and uncorroborated. After reading both statements, the trial court concluded they were not fatally inconsistent and were mutually corroborative:

> The statements of two confidential informants, summarized for the accused in the conduct report and examined by the court in camera, are properly signed, sworn to and corroborated, each by the other. They are not inconsistent with each other except in inconsequential detail. Error with respect to those statements does not exist.

We, too, have read the statements, and we discuss them below. We agree with the trial court that they are sufficiently consistent and corroborative for the committee to have properly considered them.

Lee also states that he never received notice of the dates of the conspiracy, but, as the State points out, the conduct report Lee received stated that the conspiracy occurred over a two-month time period, in August and September 1995. He has not suggested how or why this information was inadequate.

assault another inmate and that Sanders agreed to do it"; and (2) Lee's conversations at still another time and location "trying to organize his gang within the institution" and "putting himself out as [its] leader." Second, Informant #2 stated that, before Lee was placed in the isolated cell, he (Informant #2) overheard him talking with other inmates "about killing some officers when he's released from segregation.… [and that] he was gonna hurt the inmate that caused him to be locked up in segregation." Informant #2 also stated that Lee "was trying to get … other gang members"—particularly Sanders—"to follow along with him to do those things to those officers." Informant #2 also described Lee as talking like "he was acting in the capacity of a leader of the Gangster Disciples" when he talked with other inmates "regarding hurting staff or inmates."

We are satisfied that, on such evidence, the committee could reasonably conclude that Lee engaged in a conspiracy to injure inmates or staff or both at Waupun, as the conduct report charged. *See* ***Wisconsin Professional Police Ass'n v. Public Serv. Comm'n***, 205 Wis.2d 60, 67, 555 N.W.2d 179, 183 (Ct. App. 1996) (agency's findings are set aside only if a reasonable person could not have made the findings from the evidence). Lee's assertions regarding Informant #1's statements about the August 21 conversation certainly go to Informant #1's credibility. But given other portions of Informant #1's statement—and the statements of Informant #2—about Lee's actions on other occasions, we believe the committee could choose to believe that testimony over Lee's own denials. Where conflicting views of the evidence are both supported by substantial evidence, it is for the decision-making body to determine which view it wishes to accept. ***Daly v. Natural Resources Bd.***, 60 Wis.2d 208, 220, 208 N.W.2d 839, 845 (1973), *cert. denied*, 414 U.S. 1137 (1974). The State posits that the committee "simply believed and accorded greater weight to the evidence that

supported the findings of guilt and disbelieved and accorded less weight to Lee's testimony," and that is the committee's prerogative.

IV. Adequacy of the Committee's Decision

Lee also argues that the disciplinary committee failed to adequately set forth the reasons for its finding of guilt. Due process entitles inmates to a "written statement of the factfindings as to the evidence relied upon and the reasons for the disciplinary action taken." ***Wolff v. McDonnell***, 418 U.S. 539, 563, 565 (1974). The statement need not be lengthy or detailed, ***Gagnon***, 95 Wis.2d at 125, 289 N.W.2d at 363-64; rather, enough must be stated from which it can be ascertained what the problem was, how it was resolved, and why. ***Id***.

> A prison disciplinary committee is required to give a brief statement of the evidentiary basis for its decision to administer discipline, so that a reviewing court, parole authorities, etc., can determine whether the evidence before the committee was adequate to support its findings concerning the nature and gravity of the prisoner's misconduct.

Saenz v. Young, 811 F.2d 1172, 1174 (7th Cir. 1987).[6]

The committee stated that it relied on statements in the conduct report and the confidential witnesses' statements, as well as the materials Lee submitted. It also stated that Lee was "fully aware of committing the rule violation at the time of the offense, [which] created a risk of serious injury to staff and inmates [and] also created a risk o[f] serious disruption at the institution." On an attached sheet entitled "Reason for Decision," it continued:

[6] In ***Saenz v. Young***, 811 F.2d 1172 (7th Cir. 1987), the Seventh Circuit Court of Appeals held that the following statement of a prison adjustment committee, though extremely brief, did not violate the inmate's right to procedural due process: "Officer Fabry's written statement supports the finding of guilt that an attempt was made by Inmate Saenz to commit battery upon the [other] inmate." ***Id.*** at 1173 (alteration in original).

> After a review of the confidential informants[’] statements, all statements and exhibits submitted by Lee, and the conduct report, we find that he knowingly and intentionally conspired with another inmate to commit battery against a staff member .... We also find that he conspired with other inmates to commit battery against staff and inmates. Inmate witnesses [called by Lee] both stated that they had no idea why they were called as witnesses .... [and] [w]e find that they had nothing relevant to say in regards to this [report]. The confidential informants[’] names and complete statements were supplied to this hearing committee and we found the informants to be credible. Their statements were consistent with the incident ... and with information already known to security staff.

The disciplinary committee’s reliance on the conduct report in rendering its decision was proper, ***Culbert v. Young***, 834 F.2d 624, 631 (7th Cir. 1987), *cert. denied*, 485 U.S. 990 (1988), and we believe the committee’s explanation of the reasons for its decision meets the standards set forth in ***Wolff*** and other applicable cases.[7]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[7] Lee also claims that the conspiracy charge was false and retaliatory, thus violating his substantive due process rights, and that the finding of guilt was erroneous, arbitrary and capricious. He also states that his administrative remedy was inadequate because the record was incomplete. Because, as discussed above, we have concluded that the committee afforded Lee the hearing rights he was due and that the record contains substantial evidence to support the conspiracy charge and the finding of guilt, we need not address these claims further.

Lee makes numerous other allegations of error, including several one-sentence statements to the effect that there was no reason for the informants’ failure to appear, the “sentence” imposed by the committee is nonexistent, and his advocate denied him assistance and used a racial slur against him. We do not consider the statements to constitute arguments deserving discussion. *See* ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992).