

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

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.

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

No. 96-3261

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. RONALD WOLFE,

PETITIONER-APPELLANT,

V.

KENNETH MORGAN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

VERGERONT, J. Ronald Wolfe appeals from an order affirming the decision of the Racine Correctional Institution (RCI) Adjustment Committee. The committee determined that Wolfe violated administrative rules relating to conspiracy, lying, disruptive conduct and disfigurement. The committee imposed a punishment of eight days adjustment segregation, 360 days program segregation,

a ten-day extension of his mandatory release date, and restitution costs of staff time, medical expenses and unit lock down. Wolfe challenges the committee's decision on five grounds: (1) inadequate investigation of the incident; (2) limitation to two witnesses on his behalf; (3) failure to provide access to physical evidence; (4) failure to provide him with the sheriff's department's investigative report; (5) denial of effective assistance of a staff advocate; and (6) insufficient evidence to support the charges. Because we conclude that the committee complied with the applicable constitutional provisions and administrative rules, we affirm the trial court's order.

Wolfe was given a conduct report alleging violations of WIS. ADM. CODE § DOC 303.21 (conspiracy), WIS. ADM. CODE § DOC 303.27 (lying), WIS. ADM. CODE § DOC 303.28 (disruptive conduct), and WIS. ADM. CODE § DOC 303.58 (disfigurement). The conduct report was signed by staff member Christopher Ellerd. It stated that on August 22, 1995, the officers on duty discovered Wolfe lying on the floor of his assigned cell bleeding from a laceration to his chest. The conduct report also stated in part:

Under questioning, inmate Wolfe subsequently stated that he had been assaulted by one or more inmates who had struck him on the head and had cut him on the chest. He repeatedly stated that he did not know the names of the inmates who had assaulted him and had not seen them. Inmate Wolfe was supported in his allegations by his brother, inmate Todd Wolfe #202491. The Village of Sturtevant Rescue Squad was summoned to the institution to transport inmate Wolfe to St. Mary's Hospital emergency room by ambulance. This caused disruption to the orderly lives of the Rescue Squad EMTs who are all volunteers. Inmate Wolfe was examined and treated in the emergency room of St. Mary's Hospital causing disruption to the orderly operation of that facility and delaying treatment to other individuals. The Walworth Housing Unit was placed in lock-down status immediately following the discovery of inmate Wolfe's injuries. The Unit remained in lock-down status until approximately 6:00 pm

on Wednesday, August 23, 1995, causing major disruption to the orderly operation of that unit as well [as] the institution as a whole. Approximately twenty Correctional Officers were assigned to shake down the unit looking for the weapon which was used to injure inmate Wolfe. Captain Ronald Molnar was summoned to the institution at 6:00 am on August 23, 1995 to investigate the assault on inmate Wolfe. Detectives Bruce Koellner and James Luedke were assigned by the Racine County Sheriff's Department to spend the entire day investigating the assault on inmate Wolfe, disrupting the orderly operation of the Racine County Sheriff's Department and delaying the processing of other investigations.

Investigation revealed that inmate Wolfe inflicted the laceration to his chest upon himself using a ball point pen for this purpose. Inmate Ronald Wolfe told his brother, inmate Todd Wolfe, that he was planning to do this. After Ronald Wolfe inflicted the laceration on his own chest, he called inmate Todd Wolfe to his cell, handed inmate Todd Wolfe the pen which he had used to inflict the injury on himself, and was assisted by inmate Todd Wolfe in disposing of the pen by flushing the pen down a toilet. Inmate Todd Wolfe then summoned officers to inmate Ronald Wolfe's cell where Ronald Wolfe's self-inflicted injuries were discovered. All of this information is substantiated by the Racine County Sheriff's Department's investigative Report which is attached to this Conduct Report and which include a statement, self-incriminating, from inmate Todd Wolfe, which details elements of the above described violations....

The matter was scheduled for a hearing and Wolfe was given notice of the hearing. He chose to have a staff advocate assist him in the preparation of his defense and requested the presence at the hearing of inmate Todd Wolfe, inmate Richard Stowell, staff social worker Ruth Kelly, and Officer Clark. On the request form, Wolfe stated that he had spoken to Kelly about his safety concerns and requested special placement. He described Officer Clark as "the officer who

discovered me.”¹ He also requested that photographs of his wound and the t-shirt he was wearing when he was discovered be present at the hearing. The request for Kelly and Clark was denied, for the stated reason that only two witnesses were allowed.

Wolfe appeared at the hearing and submitted a written statement denying his laceration was self-inflicted and pointing to earlier statements of his concerning a fear for his safety. Todd Wolfe testified that he did not flush the pen down the toilet, that he did not hear that Wolfe wanted to harm himself, and he did not sign a statement. Inmate Richard Stowell testified that a gang in the Ozaukee Unit wanted to harm Wolfe, but did not provide any names. Wolfe’s staff advocate had no comments.

The stated reason for the committee’s decision that Wolfe was guilty of the rule violations was:

Inmate presents no substantive evidence to refute charges. Statements he presented, plus copies of photos do not support his position. Signed and notarized statement of his brother to sheriffs dept. is credible and carefully done and supports guilt. Allegations of threats and risks to himself do not prove an assault occurred and he may have self inflicted wounds to get himself transferred. Brother’s denial of statement to sheriff is now not credible as he may have reason to now change his story. Investigation was lengthy and carefully done and supports self inflicted wounds, not assault.

In the section entitled “Evidence (The committee relies on the following evidence in finding the inmate guilty),” the committee checked these

¹ The request form states that: “I understand I cannot call more than two persons without good cause.” The names of Todd Wolfe and Richard Stowell were written on the first two lines, which did not ask for a reason for their presence. Kelly and Clark were listed under “additional witnesses” which called for a “reason why testimony is essential.”

boxes: “Statement in the Conduct Report,” “Physical Evidence” and “Institution Rules and Polices.” Next to “Physical Evidence” was written: “Incident reports and photocopy of photos[.] Affidavit of Todd Wolfe.”

Wolfe appealed the decision to the warden, who affirmed the decision of the committee. Wolfe then sought review by petition for a writ of certiorari.

On certiorari review, this court’s standard of review is the same as that applied by the trial court. *State ex rel. Staples v. DHSS*, 136 Wis.2d 487, 493, 402 N.W.2d 369, 373 (Ct. App. 1987). Judicial review is limited to whether: (a) the agency kept within its jurisdiction; (b) the agency acted according to law; (c) the action was arbitrary, oppressive, or unreasonable; and (d) the evidence presented was such that the agency might reasonably make the decision it did. *State ex rel. Jones v. Franklin*, 151 Wis.2d 419, 425, 444 N.W.2d 738, 741 (Ct. App. 1989). Whether the commission acted according to law includes the questions of whether due process was afforded and whether the committee followed its own rules. *State ex rel. Meeks v. Gagnon*, 95 Wis.2d 115, 119, 289 N.W.2d 357, 361 (Ct. App. 1980).

First, Wolfe argues that the committee failed to adequately investigate the incident because the officer who wrote the conduct report never investigated Todd’s statements to the sheriff’s department naming individual inmates who could have possibly assaulted Wolfe. WISCONSIN ADM. CODE § DOC 303.66(1) states that any staff member who observes or finds out about a rule violation “shall do any investigation necessary to assure himself or herself that a violation occurred.” In addition, some investigation is necessary before a disciplinary committee can make a factual determination sufficient to meet

constitutional minimum due process requirements established in *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Meeks*, 95 Wis.2d at 126, 289 N.W.2d at 364. There is ample information in the record that the incident was sufficiently investigated before the conduct report was issued. We are satisfied that the investigation met both the constitutional and regulatory standards.

Second, Wolfe claims that he had a right to call as witnesses Kelly and Clark, in addition to the two inmate witnesses he requested. Wolfe does not have a constitutional right to confront or cross-examine witnesses beyond those allowed by the administrative rules. *See Wolff v. McDonnell*, 418 U.S. 539, 567-68 (1974). WISCONSIN ADM. CODE § DOC 303.81(1) provides that, except for good cause, an inmate may present no more than two witnesses in addition to the reporting staff member or members.

Wolfe argues that the plain meaning of WIS. ADM. CODE § DOC 303.81(1) requires he be allowed to call “any” staff member in addition to his two named witnesses. However, § DOC 303.81(1) specifically qualifies “staff member” as the person who signed the conduct report: “an inmate may present no more than 2 witnesses in addition to the *reporting staff member or members*.” Neither Kelly nor Clark is the “staff member” who signed the conduct report. In addition, the committee has the necessary discretion to keep the hearing within reasonable limits. *See Wolff*, 418 U.S. at 566. There is no constitutional requirement that the committee state its reasons for refusing to permit an inmate to call a witness, whether it is for irrelevance, lack of necessity, or the hazards presented in individual cases. *See id.*

The record does not establish that the two additional witnesses would have provided information that was essential to Wolfe’s defense and had

not already been provided the committee. Kelly's corroboration of Wolfe's statements that he was fearful of his safety is not essential to his defense because the existence of threats does not rule out self-infliction of the wound, as the committee's reason for the decision notes. The record does not indicate why Wolfe considered Clark's testimony essential. We conclude that the committee did not violate any administrative rule or constitutional provision in limiting Wolfe's witnesses to two.

Third, Wolfe argues that he was wrongfully denied access to the t-shirt he was wearing when injured. We disagree. *Wolff* establishes the procedural protections guaranteed an inmate in a disciplinary hearing by the due process clause of the United States Constitution. An inmate has a constitutional right to a written statement of the evidence relied upon and the reasons for the disciplinary action taken. *See Wolff*, 418 U.S. at 563. The written statement of reasons provided Wolfe and the statement of evidence relied on does not indicate that the committee relied on the t-shirt in any way in making its decision. *Wolff* does not require that the adjustment committee produce physical evidence. *See Holm v. Haines*, 734 F. Supp. 366, 372 (W.D. Wis. 1990).

Wolfe is apparently of the view that because WIS. ADM. CODE § DOC 303.76(1) provides that "... an inmate may present oral, written, documentary and physical evidence at the hearing," the committee is obligated to produce physical evidence at his request. That is not what the regulation says. We also note that § DOC 303.76(5) provides that "... [t]he adjustment committee may require that physical evidence be offered," but says nothing about requiring the committee to produce such evidence. We conclude that the committee was not obligated to produce the t-shirt.

Fourth, we consider whether the adjustment committee wrongfully denied Wolfe the opportunity to adequately prepare a defense by denying him access to the sheriff's investigative report. For the reasons we have explained above, the committee did not have an obligation to produce evidence simply because Wolfe requested it to aid in preparation of his defense. Wolfe apparently relies on WIS. ADM. CODE § DOC 303.66(2), which provides:

In the conduct report, the staff member shall describe the facts in detail and what other staff members told him or her, and list all sections which were allegedly violated, even if they overlap. Any physical evidence shall be included with the conduct report.

The conduct report refers to the sheriff's investigative report but apparently did not attach the report, although it is in the record provided on the return to the writ of certiorari. The critical part of the report for purposes of the charges against Wolfe was his brother's statement that Wolfe's wound was self-inflicted. The content of that statement was explained in the conduct report. Wolfe had the opportunity to and did provide a defense to his brother's statement that Wolfe inflicted the wound himself. We conclude there was substantial compliance with § DOC 303.66(2).

Fifth, we consider Wolfe's argument that he was denied adequate assistance of the staff advocate because the staff advocate did not conduct an investigation of witnesses. There is no evidence in the record to show whether the advocate did or did not investigate the issues, whether Wolfe made any requests of the staff advocate, or whether Wolfe objected to the adequacy of the investigation before the committee. Because a court on certiorari review may not consider matters outside the record, we do not address this issue. *See State ex rel. Irby v. Israel*, 95 Wis.2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980). Wolfe may

raise any complaint about the staff advocate's performance in the Inmate Complaint Review System. *See* WIS. ADM. CODE § DOC 310.04.

Finally, we consider whether there is sufficient evidence to support the committee's decision. When a court on certiorari review considers whether the evidence is such that a committee might reasonably have made the decision it did, the court does not conduct a de novo review. *Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). The court does not weigh the evidence, nor may it substitute its view of the evidence for that of the committee. *Id.*

We conclude that there was sufficient evidence to support the committee's decision. Given Todd's statement to the sheriff's department and his contradictory testimony before the committee, the committee had to determine which testimony to credit and which to reject. The committee chose to believe Todd's statement to the sheriff's department, and to reject Todd's later testimony recanting that statement. The committee chose not to believe Wolfe's testimony. It is within the committee's authority to make this credibility assessment. The evidence the committee found credible provides a reasonable basis for the determination that Wolfe was guilty of the rule violations charged.

By the Court.—Order affirmed

Not recommended for publication in the official reports.

