

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

April 8, 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. 96-3683**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN ex rel.  
TAYR KILAAB al GHASHIYAH (KHAN),**

**Petitioner-Appellant,**

**v.**

**DANIEL BERTRAND, WARDEN, GREEN BAY  
CORRECTIONAL INSTITUTE,**

**Respondent-Respondent.**

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APPEAL from order of the circuit court for Brown County: SUE E. BISCHHEL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Tayr Kilaab al Ghashiyah (Kahn), a prisoner in the Green Bay Correctional Institution, appeals the circuit court's order denying his petition for certiorari challenging disciplinary action taken against him. Kahn asserts that his punishment should be overturned. He asserts that the prison's disciplinary committee did not follow its own written procedures and denied him his right to a fair hearing when the

committee failed to give him a “confirmatory” drug test and when the committee failed to allow him to present the testimony of certain witnesses. We affirm.

As the result of a drug test administered by prison officials, Kahn tested positive for THC. Because a positive test is a violation of WIS. ADM. CODE § DOC 303.59(2), Kahn was given a conduct report notifying him of the alleged violation. Kahn was notified of a hearing on the allegations and was given a form detailing his rights at the hearing. The results of his drug test were written on the conduct report. Kahn requested a confirmation drug test as provided by rule. In preparation for the hearing, Kahn requested the presence of four defense witnesses. The prison staff member reviewing Kahn’s request indicated that “all requested witness[es] will be scheduled to attend.”

Both parties proceeded to the hearing without any confirmation test. The committee allowed Kahn to present the testimony of only two of his four requested witnesses. Kahn presented various written objections to the committee’s procedure. The committee found Kahn guilty of the violation. As a penalty, Kahn received three days of adjustment segregation, thirty days of loss of contact visitation, and his mandatory release date was extended.

Kahn appealed the committee’s decision to the warden. Prior to his appeal being heard, prison officials offered to administer a second drug test. Kahn refused this offer, and subsequently Kahn’s appeal was rejected and the penalty imposed.

On certiorari review, this court is limited to determining (a) whether the agency kept within its jurisdiction, (b) whether it acted according to law, (c) whether its action was arbitrary, oppressive or unreasonable, and (d) whether the evidence presented was such that the agency might reasonably make the decision it did. *Van Ermen v. DHSS*, 84 Wis.2d 57, 63, 267 N.W.2d 17, 20 (1978).

Kahn first asserts that the disciplinary action must be overturned because the results of his drug test were not attached to his conduct report. Kahn cites § DOC 303.66(2), which states that “[a]ny physical evidence shall be included with the conduct report.” We conclude that the written test result on the conduct report is sufficient to satisfy § DOC 303.66(2), and that the committee’s action was not arbitrary, oppressive or unreasonable.<sup>1</sup>

Kahn also cites § DOC 306, IMP #4(b)(5)(a)(4), a provision in the Department of Corrections internal management procedural manual, which states that “the conduct report shall be accompanied by a copy of any printed document produced by the urinalysis testing apparatus.” Even if the committee’s failure to comply with this internal operating procedure is grounds for review, any failure is harmless error. WIS. ADM. CODE § DOC 303.87 provides as follows:

If a procedural requirement under this chapter is not adhered to by staff, the error may be deemed harmless and disregarded if it does not substantially affect the rights of the inmate. Rights are substantially affected when a variance from a requirement prejudices a fair proceeding involving an inmate.

Kahn next asserts that the committee acted unlawfully because he did not receive a confirmation drug test, pursuant to § DOC 303.59(2)(b), prior to his disciplinary hearing.<sup>2</sup> The committee’s failure to obtain a confirmation test constitutes harmless error.

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<sup>1</sup> Kahn also argues that because his test result was not attached to the conduct report, and because the test result was the sole evidence of drug use before the committee, the committee’s decision lacks a factual basis. Because we conclude that the written test result on the conduct report satisfies WIS. ADM. CODE § DOC 303.66(2), we conclude that the committee’s decision had an adequate factual basis.

<sup>2</sup> WIS. ADM. CODE § DOC 303.59(2)(b) states as follows:

(b) The results of a test conducted under par. (a) on a specimen of an inmate’s urine shall be confirmed by a second test if all of the following conditions are met:

While Kahn requested the test, he was given the opportunity to take a second test prior to his appeal to the warden and before the committee's penalty was imposed. Kahn expressly refused to take this second test.

Kahn asserts that he was entitled to the confirmation test *before* his disciplinary hearing. The language of § DOC 303.59(2)(b) does not specify when an inmate is entitled to the confirmation test. For purposes of this appeal, we will assume, but do not decide, that the confirmation test must be administered prior to the disciplinary hearing. Once more, however, Kahn must establish prejudice when the committee fails to follow its procedural rules. By intentionally refusing to submit to the second test, Kahn has failed to establish that the delay in the opportunity to take a second test “substantially affected” his rights. *See* WIS. ADM. CODE § DOC 303.87. Because Kahn intentionally refused a second test, he cannot complain of the absence of a second test result.<sup>3</sup>

Finally, Kahn alleges that he was denied the right to call witnesses in his defense. In a form entitled “Inmate’s Request for Attendance of Witness,” Kahn

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1. The test under par. (a) is the sole evidence of use of intoxicants;
  2. A major penalty as defined in s. DOC 303.68(1)(a) will be imposed as a result of the test under par. (a);
  3. The inmate does not admit the use of intoxicating substances;  
and
  4. The inmate requests a confirmatory test.

<sup>3</sup> Kahn’s first test occurred on April 19, 1996, and he was offered the second test on May 3, 1996. Kahn does not argue that the results of the second test would be unreliable to confirm the first test. In fact, a disciplinary hearing under WIS. ADM. CODE § DOC 303.76 may occur up to 21 days after the inmate receives a copy of the conduct report. Thus, even if inmates are entitled to a confirmation test prior to the disciplinary hearing, the second test could conceivably occur 21 days after the first test, a delay *longer* than that which occurred in this case.

requested that four witnesses attend the hearing to testify on his behalf. This request was approved by the staff member reviewing the request. However, only two of the witnesses appeared at the hearing. Kahn waived this objection by failing to object to the absence of his other two witnesses. We do not agree that Kahn's general written objection that the proceeding was "arbitrary and unfair" encompasses an objection to the absence of these witnesses.<sup>4</sup>

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

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<sup>4</sup> Kahn argues that he orally objected to the absence of two of his witnesses. He does not suggest what evidence the witnesses had to offer. Further, such an objection does not appear in the record. On review by certiorari, this court is confined to the record. *Berschens v. Town of Prairie du Sac*, 76 Wis.2d 115, 118-19, 250 N.W.2d 369, 373 (1977).

