

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP86

Cir. Ct. No. 2004CV66

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. BERRELL FREEMAN,

PLAINTIFF-APPELLANT,

V.

**GERALD BERGE, STEPHEN CASPERSON, JOHN SHARPE
AND DEPARTMENT OF CORRECTIONS,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Berrell Freeman appeals an order dismissing a complaint that raised various claims against the Department of Corrections and three of its officers. The case was first removed to Federal Court; the district court

dismissed Freeman's federal claims and subsequently remanded to state court the three remaining State law claims: whether one of the defendants failed to comply with WIS. ADMIN. CODE § DOC 303.76(6)(f) during a disciplinary proceeding against Freeman; whether the Department denied him the right to call witnesses at a hearing to extend his administrative confinement; and whether the Department unlawfully continues to rely on a certain incident report to administratively confine him when prior court decisions have ordered the Department to expunge that report. We conclude the trial court properly ruled against Freeman on all three issues and affirm.

¶2 WISCONSIN ADMIN. CODE § DOC 307.76(6)(f) provides that the subject of a prison disciplinary proceeding must receive an explanation of the decision in writing. Freeman alleged that respondent John Sharpe violated this rule in a disciplinary proceeding concluded in May 2003. However, the right to seek review of a disciplinary decision in the circuit court depends on the inmate's exhaustion of his or her administrative remedies. *See* WIS. STAT. § 801.02(7)(b) (2003-04).¹ For procedural issues, such as the one Freeman raised here, the administrative remedies include the inmate complaint review system. WIS. ADMIN. CODE § DOC 310.08(3). Here, Freeman did not file an inmate complaint seeking review of the alleged procedural error.

¶3 Freeman's due process claim, that he was denied witnesses at an administrative confinement hearing, was untimely and properly denied on that basis. WISCONSIN STAT. § 893.735(2) provides that an action seeking a remedy

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

available by certiorari, which is the case for Freeman's claim, is barred unless commenced within forty-five days after the cause of action accrues. Freeman did not commence this action until nine months after the administrative confinement hearing at issue.

¶4 As determined in earlier litigation, Freeman has no basis to contend that the Department is using an expunged report to administratively confine him. While incarcerated at Whiteville Correctional Facility in Tennessee, Freeman was charged with a major disciplinary infraction for his role in a violent prison riot that occurred in November 1999. He was found guilty in a disciplinary proceeding at the facility on December 9, 1999, and transferred to the Wisconsin Secure Program Facility (WSPF) (formerly Supermax Correctional Institution) in April 2000. Relying on the Whiteville disciplinary findings, the Department's Administrative Confinement Review Committee (ACRC) ordered his placement in administrative confinement.

¶5 After seeking various administrative remedies, Freeman commenced this action by filing a petition for writ of habeas corpus in which he challenged the Whiteville disciplinary decision, the decision transferring him to WSPF and the decision to place him in administrative confinement. The trial court construed the petition as one seeking certiorari review of the three administrative decisions and dismissed it because Freeman did not exhaust his administrative remedies before filing it. Freeman appealed and on review we reversed in part and remanded to allow Freeman to proceed on his challenge to the ACRC decision of April 2000. *State ex rel. Freeman v. Berge*, 2002 WI App 213, ¶1, 257 Wis. 2d 236, 651 N.W.2d 881.

¶6 Meanwhile, other inmates had successfully challenged administrative confinements also imposed because of their participation in the Whiteville riot, on the grounds that the subsequent Whiteville disciplinary proceedings were procedurally invalid. *See State ex rel. Curtis v. Litscher*, 2002 WI App 172, ¶1, 256 Wis. 2d 787, 650 N.W.2d 43. In such cases, this court held the DOC could impose administrative confinement based on the Whiteville riot participation but only to the extent the DOC proved the inmate's participation without relying on findings of the Whiteville disciplinary proceedings. *Id.*, ¶1.

¶7 Consequently, the DOC vacated Freeman's administrative confinement decision of April 2000 and conducted an independent investigation of his conduct during the riot. After that investigation revealed Freeman's significant participation in the riot, the ACRC again placed him in administrative confinement. In other words, Freeman's administrative confinement no longer has any connection to the expunged document.

By the Court.—Order affirmed.

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

