COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3143 **Cir. Ct. No. 2006CV498**

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

STATE OF WISCONSIN EX REL. JERRY P. DOWDLEY, JR.,

PETITIONER-APPELLANT,

V.

LARRY JENKINS AND MATTHEW FRANK,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jerry Dowdley, Jr. appeals a circuit court order denying his writ petition for certiorari relief from a prison disciplinary decision. We affirm for the reasons discussed below.

BACKGROUND

¶2 Dowdley is an inmate at the Waupun Correctional Institution. He received two conduct reports on August 16, 2005, for conduct occurring the day before. The first conduct report charged Dowdley with disobeying orders, disruptive conduct, threats, and being in an unassigned area. In the report, Sergeant Timothy Immel alleged that Dowdley had arrived late to the Unit 7 dining area, at about 11:37 a.m. Upon being informed that the lunch line was closed, Dowdley began chanting, "You're gonna feed me." Immel told Dowdley to be quiet and to go to his room. When Dowdley did not leave, Immel went to call a supervisor. Dowdley then entered the kitchen area and took food, again refusing to leave the area when directed to do so. Other staff members arrived and took Dowdley away to temporary lockup.

¶3 The second conduct report charged Dowdley with attempted battery of a staff member and disruptive conduct. In that report, Officer Scott Ader alleged that he had responded to a call to deal with a disruptive inmate in Unit 7 at about 11:45 a.m. He entered the unit and applied a handcuff to Dowdley's right wrist. Dowdley spun around, raised his left arm, clenched his fist, made eye contact with Ader, and yelled, "This ain't gonna be no Racine." Ader then directed Dowdley to the unit office wall, secured Dowdley's left wrist, and escorted Dowdley to temporary lockup in Unit 14, with Dowdley pushing backwards.

¶4 Dowdley provided a written statement objecting to the attempted battery charge on various grounds, including that the factual allegations, even if true, would not support the charge. Dowdley also provided a written interview of Correctional Officer Haag, in which Haag stated that Dowdley was facing Immel

when Haag arrived at the unit, and that Dowdley had his back toward Haag and Lt. Vanderwerff as they approached. Haag also stated that he had Dowdley's left arm when Dowdley spun around.

¶5 Prison officials held two disciplinary hearings on September 1, and found Dowdley guilty on both conduct reports on September 9.[1] Both decisions stated that they were delayed because the hearing officer conducted a follow-up written interview of Sergeant Immel after the hearing. The interview clarified that Immel was not going to allow Dowdley to eat late; that Immel entered the kitchen area to give directions to kitchen workers, not to reengage Dowdley after having already contacted a supervisor; and that the supervisor had arrived while Dowdley was being restrained near a silverware cart. Immel also stated that Dowdley had his back to the office when the officers arrived and would be able to see all angles.

¶6 After exhausting his administrative remedies, Dowdley filed the present certiorari action. The circuit court set aside the first conduct report on the grounds that Dowdley had been denied his administratively provided right to cross-examine the adverse witness Immel, but affirmed the second conduct report on the grounds that Immel's statement was not relevant to that incident. Dowdley appeals the circuit court's decision with respect to the second conduct report, claiming prison officials: (1) improperly issued two conduct reports relating to the same incident; (2) failed to comply with the twenty-one-day administrative deadline for hearings on conduct reports; (3) failed to provide Dowdley an

[1] Some specific charges fell away. On the first conduct report, Dowdley was found guilty of disobeying orders, but was found not guilty of disruptive conduct, threats, and being in an unassigned area. On the second conduct report, Dowdley was found guilty of attempted battery, but the charge of disruptive conduct was dismissed as a lesser-included offense of the attempted battery.

opportunity to cross-examine Immel; and (4) improperly took Immel's testimony outside Dowdley's presence without a showing that Immel was unavailable for the hearing.

STANDARD OF REVIEW

¶7 Our certiorari review is limited to the record created before an administrative agency. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). In addition, we focus on the decision of the administrative agency—in this case, the prison disciplinary committee, as affirmed by the Secretary of the Department of Corrections—rather than that of the circuit court. ***Id.*** Therefore, we do not address any of Dowdley's complaints regarding the circuit court's decision, instead conducting our own independent certiorari review.

¶8 With regard to the substance of the prison disciplinary decision, we will consider only whether: (1) the committee stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive, or unreasonable and represented the committee's will and not its judgment, and (4) the evidence was such that the committee might reasonably make the order or determination in question. ***Id.*** The inquiry into whether the committee acted according to law includes consideration of whether due process was afforded and if the committee followed its own rules. ***State ex rel. Curtis v. Litscher***, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43 (citing ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980)).

DISCUSSION

¶9 Dowdley's first claim is that prison officials violated WIS. ADMIN. CODE § DOC 303.66(1) by issuing two conduct reports based on the "same incident." We are satisfied, however, that, although the events underlying the two conduct reports occurred in close succession, they were in fact distinct incidents. The first incident involved Dowdley's interaction with Sergeant Immel after being informed that the lunch line was closed. The second incident involved Dowdley's interaction with Officer Ader while being taken to temporary lockup. Therefore, we see no problem with prison officials issuing two conduct reports.

¶10 Dowdley's second claim is that prison officials violated WIS. ADMIN. CODE § DOC 303.76(3) by failing to hold his hearing within twenty-one days after the conduct report was provided to him and by failing to obtain authorization from the security director to extend the deadline. This contention is based on the premise that the hearing officer's interview of Sergeant Immel constituted a de facto continuation of the hearing. We need not address whether the interview was in fact a continuation of the hearing and, if so, whether such a continuation was improper without authorization from the security director because we are satisfied that the resulting delay was at most harmless error. Under the administrative rules, the failure to adhere to a procedural requirement is harmless error where the violation did not "substantially affect a finding of guilt or the inmate's ability to provide a defense." WIS. ADMIN. CODE § DOC 303.87. In short, we do not see how the result of the proceeding would have been any different if the hearing examiner had interviewed Sergeant Immel within the twenty-one-day time period, rather than two days after it had expired. The extra two days were inconsequential.

¶11 Dowdley's final two claims are interrelated and essentially boil down to complaints that prison officials improperly took Sergeant Immel's testimony outside Dowdley's presence or allowed Immel to provide a written statement without a showing that Immel was unavailable for the hearing, and then failed to provide Dowdley an opportunity to cross-examine Immel. *See* WIS. ADMIN. CODE §§ DOC 303.76(5) and 303.81(4) and Notice of Major Disciplinary Hearing Rights form. Setting aside Dowdley's misplaced focus on the circuit court's decision rather than the administrative decision, we understand Dowdley to be arguing that these violations of the administrative rules were not harmless error.[2]

¶12 Dowdley notes that the committee explicitly cited Immel's interview as part of the evidence it relied upon. In particular, he points to Immel's statement regarding the direction Dowdley was facing when the additional correctional officers arrived to take Dowdley to temporary lockup. Dowdley also argues more generally that he should have been able to question Immel since Immel was present during the attempted battery incident.

¶13 The respondents do not directly dispute Dowdley's claim that the administrative rules would have permitted Dowdley to cross-examine Immel, or to at least see Immel's statement prior to the hearing, and we assume that premise to be true for the purpose of this appeal. As we have already discussed, however, a

[2] The respondents seem to have interpreted Dowdley's third claim as a challenge to the sufficiency of the evidence. However, although Dowdley does cite some boilerplate language on that topic, that does not seem to be the focus of his argument that follows. Rather, Dowdley appears to be discussing the evidence merely to show the relevance of Immel's interview statement. To the extent Dowdley may have intended to challenge the sufficiency of the evidence, we conclude that his argument is insufficiently developed to warrant a response. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

rule violation which does not "substantially affect a finding of guilt or the inmate's ability to provide a defense" constitutes harmless error. WIS. ADMIN. CODE § DOC 303.87.

¶14 We conclude that the admission of Immel's interview statement, even if error, did not substantially affect Dowdley's finding of guilt or his ability to provide a defense on the attempted battery charge. The attempted battery charge was based on Ader's allegation that Dowdley spun around and raised his fist at Ader while Dowdley was being restrained. Ader's account of Dowdley spinning around with a raised fist was confirmed by both the written statement and the hearing testimony of Officer Haag. Immel's statement did not mention Dowdley spinning around or raising his fist, or even assert that Immel was still watching as Dowdley was restrained.

¶15 Immel's statement did discuss what direction Dowdley was facing when the additional correctional officers first arrived, saying Dowdley had his back to the office. Since we do not have a map of the unit area, it is unclear whether Immel's statement that Dowdley had his back to the office contradicted Haag's statement that Dowdley was facing Immel and had his back to Haag as Haag approached him. Immel's statement, however, did not contradict Ader's statement because Ader did not specify which direction Dowdley was facing when either he or Haag approached him. Nor did Dowdley himself make any assertions in his own statement regarding the direction he was facing either before or during the incident.

¶16 Since Immel's statement did not describe the actual attempted battery, it did not go directly to the question of Dowdley's guilt. The only possible relevance of Immel's description of the parties' positions shortly before

the incident would be if that description contradicted another witness's statement, raising a credibility question. However, as we have noted, so far as the record shows, nothing about Immel's description is inconsistent with Haag's statement, and Dowdley has not developed any argument on that point. Furthermore, since Dowdley, in his own statement, did not assert any different account of the parties' positions just before the incident, we cannot conclude that the parties' positions was central to Dowdley's ability to present a defense. Finally, it is entirely speculative that Immel would have been able to provide any other information favorable to the defense if Dowdley had been able to question him. We therefore conclude that the committee's use of Immel's statement without providing Dowdley an opportunity to examine Immel was harmless error with respect to the battery charge.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).