COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2522 **Cir. Ct. No. 2007CV4301**

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

STATE OF WISCONSIN EX REL. ANDRE AVERY,

PETITIONER-APPELLANT,

V.

MICHAEL THURMER AND RICHARD RAEMISCH,

RESPONDENTS-RESPONDENTS.

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

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

¶1 PER CURIAM. Andre Avery appeals from a circuit court order that affirmed a prison disciplinary decision on certiorari review. For the reasons discussed below, we also affirm.

BACKGROUND

¶2 Prison officials issued Avery a conduct report for soliciting staff in violation of WIS. ADMIN. CODE § DOC 303.26 (Dec. 2006).[1] The conduct report was based on an allegation that Avery had accepted candy from a staff member. Avery attempted to obtain log records to show that he was not even in the unit at the time of the alleged incident, but his receipt of the records was delayed because the records custodian was out of the office for a week.

¶3 Avery asked to delay his hearing until he received the records he had requested. The disciplinary hearing officer denied the requested postponement after noting the document Avery had submitted to show that the records custodian was out of the office did not demonstrate that he had requested the records until over a week and a half after the conduct report had been submitted.

¶4 At the disciplinary hearing, both Avery and the staff member named in the conduct report denied that any exchange of candy had occurred. Avery complained that the staff member who wrote the conduct report had neither personally observed the incident, nor personally interviewed Avery or the named staff member; and that the denial of his postponement request and lack of assistance from his advocate in obtaining the log records denied him his due process right to present a defense. The hearing officer relied upon Avery's own admission during the investigation that he had received the candy, and concluded that his admission was more credible than his subsequent denial because it was corroborated by other statements from both staff and other inmates. The hearing

[1] All references to the Wisconsin Administrative Code are to the December 2006 version unless otherwise noted.

officer deemed it irrelevant that the reporting staff member had not personally observed the incident or interviewed Avery or the named staff member. The hearing officer noted that it was Avery's responsibility, not his advocate's, to assemble any information needed for his defense. The hearing officer found Avery guilty of the violation and imposed 360 days of disciplinary separation.

¶5 Avery used the separate administrative paths available to challenge the substance of the hearing officer's decision and the alleged procedural errors.[2] The warden affirmed the substance of the disciplinary decision. During his subsequent procedural appeal, Avery submitted additional documentation showing that he had actually made his first records request two days after the conduct report was issued, as he had alleged in the materials submitted to the hearing officer.

¶6 The Institution Complaint Examiner (ICE) noted that the conduct report had failed to specify whether the alleged violation involved contraband, and it directed that the disciplinary packet be returned to the hearing officer to correct that documentation error. The ICE found no other procedural errors that would have substantially affected Avery's finding of guilt or affected his ability to

[2] WISCONSIN ADMIN. CODE § DOC 303.76(7)(d) provides that the warden's decision on a disciplinary appeal "is final regarding the sufficiency of the evidence," but goes on to note that "[a]n inmate may appeal procedural errors as provided under s. DOC 310.08 (3)," which is part of the inmate complaint review system (ICRS). Thus, as we explained in ***State ex rel. Frasch v. Cooke***, 224 Wis. 2d 791, 796-97, 592 N.W.2d 304 (Ct. App. 1999), the time for an inmate to file a certiorari action seeking review of alleged procedural errors relating to a prison disciplinary decision is tolled until after the inmate has pursued a complaint through the ICRS. *See also* ***State ex rel. Smith v. McCaughtry***, 222 Wis. 2d 68, 77-78, 586 N.W.2d 63 (Ct. App. 1998) (holding that an inmate who wishes to challenge a disciplinary action on both procedural and substantive grounds must complete the ICRS procedure before seeking judicial review on either claim), *abrogated in part on other grounds by* ***State ex rel. Hensley v. Endicott***, 2001 WI 105, ¶13, 245 Wis. 2d 607, 629 N.W.2d 686 (holding that there is no futility exception to the exhaustion requirement of the Prisoner Litigation Reform Act).

provide a defense to the charge. The conduct report was subsequently modified to show that no contraband was involved in the incident.

¶7 The Corrections Complaint Examiner (CCE) noted three additional documentation errors: the hearing officer failed to document her evaluation of the inmate's statements; the hearing officer failed to document her evaluation of the involved staff member's testimony; and the disciplinary decision listed the wrong subsection for receiving something from staff. The CCE noted that none of these flaws entitled Avery to a new hearing, and directed that the disciplinary packet be returned to the hearing officer for further modifications.

¶8 The Secretary of the Department of Corrections issued a decision on September 6, 2007, accepting the CCE's recommendation to dismiss Avery's procedural complaint with modifications to the disciplinary decision. A handwritten correction to the applicable subsection of the rule was made to the disciplinary decision on some unspecified date.

¶9 Avery filed a petition for certiorari review in the circuit court dated October 18, 2007, 42 days after the Secretary's decision was issued. In his petition, Avery noted that he had not yet received any modified hearing forms. On October 24, 2007, a modified disciplinary decision was issued and given to Avery, which included the correct subsection of the rule, but failed to check boxes indicating that the committee had relied upon testimony of the reporting staff member and other testimony. The modified decision also added that the hearing officer did not find Avery credible based on his own admission and the fact that the incident had been witnessed by a staff member with no vested interest, and that the involved staff member's testimony was not corroborated by any other statements or information provided.

¶10 The certiorari record returned by the Department of Corrections included copies of the modified disciplinary decision that had been issued after the certiorari petition had already been filed. Avery moved to strike those documents from the record on the grounds that they were untimely and that the discrepancies between the copies showed manipulation. The court concluded that there was no deadline by which the administrative agency needed to make the corrections because WIS. ADMIN. CODE § DOC 303.76(7)(e) permits the warden to review and act upon a conduct report at any time, as if there were an appeal; and that the multiple copies of the disciplinary form were all properly included in the record because they reflected the modifications made by prison officials. The court ultimately affirmed the disciplinary decision, and Avery appeals.

STANDARD OF REVIEW

¶11 Our certiorari review is limited to the record created before the committee. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). 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 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

¶12 Avery first renews his arguments that the modified version of his disciplinary decision should be excluded from the certiorari return. *See generally* WIS. STAT. § 893.735(2) (2007-08)[3] (setting a 45-day deadline for filing a certiorari action). He claims that the modified decision is untimely since it was issued more than 45 days after the final decision by the Secretary, when his deadline to appeal would have passed, and also after Avery had actually filed his certiorari petition. Avery further argues that, even if the modified decision is accepted as timely, it is deficient because it does not include all of the modifications ordered by the Secretary and contains discrepancies regarding what evidence was actually relied upon by the hearing officer.

¶13 The Respondents assert that Avery has waived any objections to the modified decision by failing to raise them during the administrative proceeding. However, the modified decision was not issued until after Avery had already filed his petition for certiorari. Avery obviously could not have raised an objection during the administrative proceeding to a document that had not yet been filed.

¶14 With respect to the timeliness of the modification, the Respondents' reliance upon WIS. ADMIN. CODE § DOC 303.76(7)(e), which allows the warden to review a conduct report at any time as if there were an appeal, is misplaced. The modified decision here was not issued or directed to be modified by the warden. Rather, it was issued by the hearing officer at the direction of the Secretary through the ICRS process. Avery asserts that it is unfair to allow prison

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

officials to wait until after the certiorari deadline has passed before making corrections to a disciplinary decision at the Secretary's direction. However, there does not seem to be any administrative rule or other authority that sets a deadline for how long a disciplinary committee or hearing officer has to act upon a direction that it modify a disciplinary decision. It is also unclear whether the certiorari deadline would or should be tolled for an inmate who is awaiting a modified disciplinary decision, and if so, how long an inmate should have to wait before pursuing further relief. Nonetheless, we need not resolve these questions because the outcome of this appeal is the same whether we are reviewing the original or the modified disciplinary decision. We will therefore assume, for the sake of argument, that the modified disciplinary decision was untimely and should have been excluded from the certiorari return on the grounds that it was not in existence when the certiorari petition was filed.

¶15 The reason it doesn't matter whether or not the modified decision is included in the certiorari return is that all of the documentation flaws in the original decision were at most harmless error. Under WIS. ADMIN. CODE § DOC 303.87, a prison official's failure to adhere to a procedural requirement in the disciplinary process is harmless if the error "does not substantially affect a finding of guilt or the inmate's ability to provide a defense."

¶16 The failure to check a box on the conduct report stating that the offense did not involve contraband did not affect the finding of guilt because the offense of soliciting staff is not limited to soliciting contraband items. Rather, the rule prohibits an inmate from requesting or accepting "anything" from a staff member unless otherwise authorized to do so by the rules or institution policy or procedure. WIS. ADMIN. CODE § DOC 303.26(2). This is consistent with the placement of the rule under the subsection relating to "offenses against order" and

not under the subsection relating to contraband offenses. Avery points to no rule or institutional policy, and we are not aware of any, that authorizes inmates to accept candy from staff members.

¶17 The failure to explicitly state that the hearing officer did not find the statements Avery and the involved staff member gave at the hearing to be credible did not affect the finding of guilt. It was plain from the hearing officer's discussion that she found Avery's admission during the investigation to be more credible because it was corroborated by staff and other inmates.

¶18 The notation of the wrong subsection of the rule on the disciplinary decision was harmless because the conduct report did not state the wrong subsection and made plain that Avery was charged with receiving, not giving, candy. The typographical error occurred after the hearing and therefore in no way affected Avery's ability to defend the charge.

¶19 The next issue is whether the denial of Avery's postponement request denied him due process. WISCONSIN ADMIN. CODE § DOC 303.76(3) provides that an inmate may request more time to prepare for a disciplinary hearing and the security director may grant the request. Avery admits that he did not ask the security director for an extension, but instead asked for a postponement when he got to his hearing. He contends that since he did not know in advance when his hearing was to be held (other than the general requirement that it be held between 2 and 21 days after the conduct report was issued), he did not know that his pending records request would not be fulfilled prior to the hearing. He also points out that the evidence he submitted during the ICRS process shows that he made his first records request only two days after the conduct report was issued and did not wait a week and a half, as the hearing officer found.

¶20 It does appear that the hearing officer was operating under the mistaken view that Avery had waited longer than he actually had to make his records request. However, we are persuaded that it would not have mattered if the hearing officer knew Avery had acted in a more timely manner. The hearing officer still would have lacked the authority to grant the postponement request, which should have been directed to the security officer as soon as Avery learned that there was going to be a delay in receiving the requested log records. Furthermore, Avery has not explained how the log records, which he has since received, would have affected the finding of guilt. We therefore have no basis to conclude that Avery was prejudiced by the refusal of his postponement request. In other words, even if the refusal was in error, this error was harmless under WIS. ADMIN. CODE § DOC 303.87

By the Court.—Order affirmed.

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