

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2010

David R. Schanker
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. 2008AP486

Cir. Ct. No. 2005CV3704

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. ABEL SILVA,

PETITIONER-APPELLANT,

V.

CATHERINE FARREY AND MATTHEW J. FRANK,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Abel Silva, pro se, appeals an order affirming both a prison disciplinary decision and transfer decision on certiorari review. Silva argues the disciplinary decision violated his First Amendment rights. Silva also challenges the sufficiency of the evidence to support the disciplinary decision and

further claims his transfer to a different institution violated his due process rights. Finally, Silva contends both the disciplinary and transfer decisions should be reversed due to the destruction of evidence. For the reasons discussed below, we reject Silva's arguments and affirm the order.

BACKGROUND

¶2 On March 18, 2005, while incarcerated at New Lisbon Correctional Institution, Silva received an adverse prison disciplinary decision finding him guilty of violating WIS. ADMIN. CODE § DOC 303.47, possession of contraband, and § DOC 303.20(3), engaging in gang activity. On April 14, 2005, Silva filed an inmate complaint, alleging that there was insufficient notice of the charges because the specific subsections of §§ DOC 303.20 and 303.47 were not included on the conduct report. Silva also claimed the rule against engaging in gang activity was unconstitutionally overbroad and failed to define what constituted gang activity. Finally, Silva claimed the evidence was insufficient to support the Adjustment Committee's decision.

¶3 On April 20, 2005, while his inmate complaint was pending, Silva was transferred to the Wisconsin Secure Program Facility following New Lisbon's program review of his custody level. In May 2005, an inmate complaint examiner recommended that Silva's complaint be dismissed, noting she found no harmful procedural errors. The recommendation for dismissal was affirmed by a reviewer's decision, and Silva appealed to the corrections complaint examiner, who recommended that the complaint be dismissed with modification. Specifically, the examiner concluded the decision should have specified which subsection of WIS. ADMIN. CODE § DOC 303.47 Silva violated. The examiner consequently recommended the complaint be dismissed "with a modification that

the conduct report record be returned to the adjustment committee for completion, as noted above.” The examiner, however, rejected Silva’s claim that because of this deficiency, he was unaware of the charges against him. On June 24, 2005, the examiner’s recommendation was accepted by the Office of the Secretary.

¶4 In August 2005, Silva filed another inmate complaint, alleging a failure to timely comply with the recommended modification of the Adjustment Committee’s decision. An inmate complaint examiner determined that the record correction was going to be made and although the complaint was “affirmed,” the examiner deemed further action unnecessary. Citing WIS. ADMIN. CODE § DOC 310.15,¹ Silva appealed to the corrections complaint examiner, arguing the conduct report should be reversed and expunged based on the failure to timely modify the decision. The examiner recommended dismissal of Silva’s complaint, concluding § DOC 310.15 did not require reversal; it merely allowed a complainant to inform the decision-maker of the department’s failure to implement a decision.

¶5 A previous action for certiorari review was dismissed by the circuit court on grounds Silva had failed to exhaust his administrative remedies. That decision was reversed on appeal and remanded for further proceedings. *See State*

¹ WISCONSIN ADMIN. CODE § DOC 310.15 provides:

Implementation of affirmed complaint. (1) The department shall implement an affirmed decision within 30 working days from the date of decision.

(2) If an affirmed complaint has not been implemented within 30 working days, the complainant may directly inform the decision-maker in writing of the failure to implement the decision.

v. Silva, No. 2006AP296, unpublished slip op. (Sept. 15, 2006). On remand, the court affirmed the disciplinary and transfer decisions. This appeal follows.

DISCUSSION

¶6 Our review is limited to whether the Department acted within its jurisdiction, acted according to law, issued an arbitrary or oppressive decision, and had sufficient evidence to make the disciplinary decision in question. *See State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). The evidence is sufficient if reasonable minds could arrive at the same conclusion the committee reached. *See State ex rel. Richards v. Traut*, 145 Wis. 2d 677, 680, 429 N.W.2d 81 (Ct. App. 1988) (citation omitted). We review the record in the same manner as the circuit court, and we independently decide whether to uphold the agency decision. *Ortega*, 221 Wis. 2d at 385-86.

¶7 Characterizing the subject drawings as “Christianity art material,” Silva contends that discipline for mere possession of religious art violated his First Amendment rights. Specifically, Silva argues his punishment for membership or affiliation with a religious organization constitutes an unconstitutional prior restraint on expression. Although Silva argued to the Adjustment Committee that the material was “just art,” he raised his First Amendment argument for the first time on certiorari review before the circuit court. As a general rule, a prisoner forfeits the right to raise issues not brought before the disciplinary committee or on administrative appeal in the prison. *See Saenz v. Murphy*, 162 Wis. 2d 54, 63-64, 469 N.W.2d 611 (1991), *overruled on other grounds by State ex rel. Anderson-El v. Cooke*, 2000 WI 40, ¶31 n.12, 234 Wis. 2d 626, 610 N.W.2d 821 (explaining that an exception to the forfeiture rule existed where the case presented the combination of both an issue of law and the Department of

Corrections' failure to follow its own regulations). We will not consider this issue because Silva did not properly raise it on administrative appeal in the prison.

¶8 Next, Silva contends the Adjustment Committee's disciplinary decision is not supported by substantial evidence. The evidentiary test on certiorari review is the substantial evidence test, which requires the court to determine whether reasonable minds could have arrived at the same conclusion as the Adjustment Committee. *See State ex rel. Palleon v. Musolf*, 120 Wis. 2d 545, 549, 356 N.W.2d 487 (1984). The court may not substitute its view of the evidence for that of the prison officials. *See Van Ermen v. DHSS*, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978).

¶9 Silva argues there was insufficient evidence to determine that the disruptive groups coordinator had verified the disputed material was gang related literature. Based on Silva's belief that the conduct report writer had inadequate experience and training as an institution gang coordinator, Silva also challenges the Adjustment Committee's reliance on the allegations in the report. In the conduct report, Captain Timothy J. Higbee described the following:

[U]nit B staff forwarded material to the institution's disruptive groups coordinator for review. The tablet paper depicts a woman wearing a hat with the bill turned to the left indicating affiliation with People[,] an alliance of disruptive groups. The [two] pages of drawings have a cobra with a crown showing support of Spanish Cobras, a disruptive group as determined by the Wisconsin Department of Corrections. On a piece of cardboard inmate Silva had written "Billeo able" his street nickname. Inmate Silva has his letter "s" resemble a "5" reflective of the "5" point star associated with the People Nation. Inmate Silva is identified as being affiliated with the Latin Kings[,] a disruptive group as designated by the Wisconsin Department of Corrections. In April 2000 inmate Silva received a conduct report for 303.20 Group Resistance and Petitions as an identified gang leader.

At a disciplinary hearing before the Adjustment Committee, Silva denied the allegations and submitted a written statement seeking dismissal of the conduct report.

¶10 The Committee hearing officer found Silva guilty, noting that Silva's testimony was unbelievable and self-serving in an effort to avoid discipline. The hearing officer's decision continued:

Accused is an identified gang member and has been identified as a leader of the Latin Kings. The [Disruptive] Groups [Coordinator] verified the materials confiscated as being gang literature associated [with] the Latin Kings. I have reviewed the material and concur. I find the report, as written, by the report writer to be credible based on his training/experience. He would have no reason to fabricate the allegations.

Despite Silva's claim to the contrary, the hearing officer specifically found that the disruptive groups coordinator had verified the materials confiscated as being gang literature. The hearing officer also specifically found Higbee's report to be credible based on his training and experience. Statements in a conduct report may be relied upon by a hearing officer as a basis for determining guilt. *See Culbert v. Young*, 834 F.2d 624, 631 (7th Cir. 1987); *see also* WIS. ADMIN. CODE § DOC 303.86(2)(a). Here, the hearing officer listened to Silva's testimony—including his statement admitting he had been a member of the Latin Kings—reviewed the material in question, and properly weighed the credibility of the reporting officer in reaching its findings. We therefore conclude there was substantial evidence to support the committee's finding of guilt as to Silva's possession of contraband and involvement in disruptive groups.

¶11 Silva additionally argues that his right to due process was violated by his transfer from New Lisbon Correctional Institution to the Wisconsin Secure

Program Facility. We disagree. It is well settled that prisoners have no liberty interest in retaining a specific security classification. *See generally Meachum v. Fano*, 427 U.S. 215, 224-25 (1976) (prisoners have no constitutionally protected interest in avoiding transfer to a maximum security prison with more burdensome conditions).

¶12 We nevertheless reject Silva's claim that his transfer was an illegal form of discipline for his possession of contraband and involvement in disruptive groups. Although these underlying rules violations played a part in the Program Review Committee's consideration, they were noted as part of a long history of negative institutional adjustment on Silva's part, including fifteen minor and eleven major conduct reports. The applicable administrative rules allow for consideration of Silva's record of misconduct as a factor in determining his custody level, *see* WIS. ADMIN. CODE § DOC 302.07, and the Program Review Committee's findings are supported by the record. To the extent Silva contends the Program Review Committee impermissibly re-litigated the issues surrounding his possession of contraband and participation in disruptive groups, Silva's rule violations were not re-litigated but, rather, properly considered in the context of other evidence reflecting his history of negative institutional adjustment in assigning his custody classification.

¶13 Silva argues the challenged decisions should be reversed due to the destruction of evidence. Specifically, Silva claims the record upon return should have included an interview/information request dated October 12, 2005, and a memo/letter dated July 11, 2006. The petition for certiorari review in this case, however, relates to the Adjustment Committee's March 18, 2005, disciplinary decision and the Program Review Committee's April 20, 2005, transfer decision. Neither of the aforementioned documents belongs in the record because they did

not exist at the time the Adjustment Committee or Program Review Committee decisions were rendered.

¶14 Finally, Silva claims the drawings that formed the basis for the underlying disciplinary action were never provided to the circuit court. Silva is mistaken, as the drawings were filed with the circuit court by supplemental return and also submitted by Silva himself. Silva nevertheless argues the circuit court misused its discretion by allowing the case to proceed while the return was “unresponsive to the writ.” The circuit court supplemented the record with the contraband filed separately and determined that with the supplemented material, it had all the responsive information necessary to proceed. It appears Silva challenges the circuit court’s authority to supplement the record and consider the supplemental return. The decision to supplement the record on certiorari, however, is discretionary with the circuit court. *See Klinger v. Oneida County*, 149 Wis. 2d 838, 846, 440 N.W.2d 348 (1989). We discern no error.

By the Court.—Order affirmed.

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

