COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2010AP1834 **Cir. Ct. No. 2009CV5586**

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

STATE OF WISCONSIN EX REL. RAMIAH ABIYAH WHITESIDE,

PETITIONER-APPELLANT,

V.

ANNA BOATWRIGHT, LIZZIE TEGELS AND RICK RAEMISCH,

RESPONDENTS-RESPONDENTS.

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

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Ramiah Whiteside, pro se, challenges Wisconsin Department of Corrections decisions regarding an inmate conduct report. Whiteside argues: (1) the evidence was insufficient; (2) the adjustment committee failed to adequately explain its reasons for the discipline imposed; (3) the

adjustment committee was not impartial; (4) he was denied his right to appeal a version of the adjustment committee's decision that corrected one word; (5) he was denied his right to view and use video evidence in his defense; and (6) he was not provided copies of confidential informant statements. We reject each of Whiteside's arguments and affirm.

¶2 Whiteside was issued an adult conduct report charging him with group resistance and petitions, in violation of WIS. ADMIN. CODE § DOC 303.20 (Dec. 2006).[1] The charges arose out of Whiteside's alleged involvement in a protest over institutional meals. Two confidential informants witnessed Whiteside handing out canteen items to inmates who agreed to stay in their cells at mealtime.

¶3 Whiteside was found guilty of the charges after a due process hearing. Whiteside appealed the decision to the Warden, who remanded the matter to the adjustment committee for a new hearing to reconsider the reasons for the decision. Whiteside was again found guilty. Whiteside again appealed to the Warden. The Warden affirmed the decision and discipline, and the case was returned to the adjustment committee for correction of the record. A typographical error was thereafter corrected by inserting the word "not" in a sentence of the decision.[2]

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

[2] The corrected sentence stated, "The committee has reviewed the confidential informant's statements and found that they were signed, taken under oath and corroborated by each [other] and [by] the fact that a majority of the inmates on D Unit did not come out to eat on April 9, 2009 for the lunch meal."

¶4 Whiteside filed a petition for writ of certiorari. The circuit court affirmed the disciplinary decision. This appeal follows.

¶5 Prison disciplinary decisions are reviewable by common law certiorari. ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980). This court's scope of review on certiorari is identical to the circuit court's. ***State ex rel. Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). We are limited to determining: (1) whether the agency kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was sufficient to demonstrate that the agency's decision was reasonable. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990).

¶6 Here, the evidence was sufficient to find Whiteside guilty and the decision was reasonable in light of the evidence. Group resistance is defined by WIS. ADMIN. CODE § DOC 303.20(1) as follows: "Any inmate who participates in any group activity which is not approved under s. DOC 309.365 or is contrary to provisions of this chapter is guilty of an offense."

¶7 It is undisputed that there was a substantial group protest on April 9, 2009, as part of which inmates on D-Unit did not come out to eat lunch. It is also undisputed that Whiteside did not come out to eat lunch. Two confidential informants provided written statements alleging that they witnessed Whiteside handing out canteen items to inmates who agreed to stay in their cells at mealtime. The confidential informants' statements were found to be "signed, taken under oath and corroborated by each [other] and [by] the fact that a majority of the inmates on D Unit did <u>not</u> come out to eat on April 9, 2009 for the lunch meal."

Whiteside's testimony was found to be "untruthful." Whiteside's witnesses were found to be "intentionally minimizing the accused[']s level of involvement in the incident giving rise to this conduct report … in an effort to aid the accused in the avoidance of discipline." Based upon these facts, the adjustment committee reasonably found:

> more likely than not, that the accused committed a violation of 303.20(1) when he participated in not eating lunch in an apparent group protest of the food at NLCI, to include his providing direction (leading) other inmates to not eat the meal and participate in the protest as well, as giving other inmates canteen goods so they would have something to eat during the protest.

¶8 The adjustment committee also reasonably concluded that this activity created "a significant risk to the security and safety of this institution and bordered on inciting a riot." The evidence was sufficient to conclude that Whiteside participated in a group activity that was contrary to prison rules regarding safety and security.

¶9 The adjustment committee also adequately explained its reasons for the discipline imposed. The adjustment committee recorded Whiteside's statement and his witnesses' testimony and explained why it did not find the evidence persuasive. Moreover, after the hearing, a memorandum thoroughly responded to each of Whiteside's objections. The adjustment committee properly considered the factors set forth in WIS. ADMIN. CODE § DOC 303.83 and provided detailed reasoning regarding the discipline imposed.

¶10 We reject Whiteside's argument that the adjustment committee was not impartial. WISCONSIN ADMIN. CODE § DOC 303.82 provides that "[n]o person who has substantial involvement in an incident, which is the subject of a hearing, may serve on the committee for that hearing." We note that this rule does not on

its face appear to prohibit a person who has *investigated* an incident from participating on a committee, nor does it bar those whose involvement in the incident was less than substantial from serving. Whiteside contends that Jeff Jaeger, one of two members of the adjustment committee for the rehearing, was not impartial. However, Jaeger had no involvement in the incident. Whiteside attempts to mischaracterize the record by arguing that Jaeger "was involved with the incident and the investigation of said incident because he was on the Unit the day of the incident, during the incident, and after the incident." Whiteside also contends that Jaeger questioned inmate Carlos Hope for fifteen to twenty minutes. However, these assertions are not part of the record and will not be considered. *See* ***State ex rel. Richards v. Leik***, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993).

¶11 Hope's affidavit established that Jaeger's involvement in even the investigation of the incident was minimal.[3] Jaeger's description of his involvement, as relayed to the inmate complaint examiner (ICE), was consistent with Hope's statement. ICE noted that Whiteside had alleged in his inmate complaint, "Mr. Jaeger questioned inmate Carlos Hope on 4/9/09, on D-Unit, about the incident and received a signed statement from him." However, Jaeger stated he did not formally interview Hope but merely asked him some cursory questions in passing. Jaeger also stated he did not receive, or ask for, any signed

[3] Hope's affidavit stated, in relevant part:

> I was ask[ed] why Inmates were not coming out to eat. I explain[ed] to Mr. [Jaeger] I had no clue. Mr. [Jaeger] told me that he believed that I knew and that I'm always into something. And that for me to tell guys that the meat is good and something about soy products what I don't recall ….

statement from Hope. ICE found that Whiteside provided no evidence to support Whiteside's factual allegations to the contrary. The ICE properly found no procedural errors regarding WIS. ADMIN. CODE § DOC 303.82(2). Our review of the record reflects no more than a passing involvement by Jaeger in the investigation. Whiteside fails to provide a basis for his assertion that the adjustment committee was not impartial.

¶12 We also conclude Whiteside was properly denied an opportunity to appeal the corrected final adjustment committee decision, which corrected one word. On June 15, 2009, Deputy Warden Lizzie Tegels' decision was remanded to add the word "not," a simple typographical error, as referenced above. The correction of the typographical error in the previous decision did not change the finding of guilt, the discipline imposed, or the reasoning in any substantive way.

¶13 Whiteside next argues that he was denied due process because prison officials denied his request to view and use purported video evidence. According to Whiteside, the video evidence would show that he did not engage in the alleged actions. However, Whiteside's argument assumes that a video recording existed and, further, that such video would show that he was not guilty. The record fails to support his assumption.[4] Whiteside's claim is essentially that he was denied the production of a video that may exist and that may provide evidence of his innocence. Whiteside was not denied the right to present evidence at the hearing. He was allowed to present his evidence through his statement that he was not

[4] The State argues in its response brief to this court that no video was entered into evidence, used as evidence at the initial hearing or rehearing, or otherwise existed in the record. Whiteside does not attempt to reply to this argument and we therefore deem the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

involved in the protest, and with his witness testimony. The adjustment committee properly weighed Whiteside's evidence and found it unpersuasive.

¶14 Whiteside's complaints about the confidential informants' statements are also without merit. Whiteside argues that he was not provided copies of the statements, that there was no independent determination of the informants' reliability, and that the statements were not mutually corroborating.

¶15 However, Whiteside was provided with a summary of the confidential informants' statements prior to his disciplinary hearing, which "reveal[ed] the contents of the statement[s] to the accused inmate," but was edited to "avoid revealing the identity of the witness." *See* WIS. ADMIN. CODE § DOC 303.81(5). Each summary contained the relevant content of the witness statement, i.e., that Whiteside issued canteen goods to inmates who agreed to stay in their cells and not eat meals. The "description of incident" section of the adult conduct report also contained a summary of the confidential informants' statements. Moreover, Whiteside's attorney was provided with a copy of the confidential informant's statements during the certiorari proceedings, redacted as to all personally identifying information, and Whiteside was permitted to review these copies.

¶16 An independent determination of the confidential informants' reliability was not required. *See* WIS. ADMIN. CODE §§ DOC 303.81(5), 303.86(4) (Confidential informant statements are sufficiently reliable if "[t]wo anonymous statements by different persons … corroborate each other."). Here, the statements corroborate each other because both confidential informants indicated that Whiteside issued canteen goods to inmates who agreed to stay in their cells and not eat meals.

¶17 Whiteside contends the statements are not corroborating because the statements provide different dates for the occurrence. However, there is no dispute that the group protest occurred on April 9, 2009. It is also apparent that Whiteside knew that April 9, 2009, was the relevant date because he provided a timeline of his activities on that date, and his witnesses testified concerning that date.

By the Court.—Order affirmed.

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