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DISTRICT IV

October 5, 2023

To:

Hon. Frank D. Remington
Circuit Court Judge
Electronic Notice

Carlo Esqueda
Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2022AP895

Vance Hernandez-Smith v. Cindy O'Donnell
(L.C. # 2021CV2492)

Before Kloppenburg, P.J., Blanchard, and Nashold, JJ

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Vance Hernandez-Smith appeals an order affirming a prison discipline decision. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

Hernandez-Smith was found guilty of soliciting a prison employee, and a sanction was imposed. He filed a certiorari petition in circuit court, and that court affirmed the Department of

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Corrections decisions. On appeal, we review the decisions of the agency, not the circuit court. *Kozich v. Employe Tr. Funds Bd.*, 203 Wis. 2d 363, 368-69, 553 N.W.2d 830 (Ct. App. 1996).

The arguments on appeal center on a discrepancy in the conduct report as to the date of the charged incident. In the header portion of the form, the “incident date” is shown as “06/21/2021.” However, the “description of incident” section begins: “On 06-22-21”

Before the hearing, Hernandez-Smith asked that a certain prison employee be a witness at his hearing. He stated that the “relevance of testimony” from this witness would be that the witness would testify that the officer who wrote the conduct report and claimed to have been involved in the incident “was not working on unit on 6/22/21.”

The “record of witness testimony” form that was created from the hearing contains this statement, not attributed to any person:

Sgt. Keeku will not be called as witness as this question is not relevant as the day of incident was 06/21/2021 and Sgt. Keeku would not know if Sgt. Gray was on the Unit on 06/21/2021. Conduct Report #173388 - Incident Date: 06/21/2021 - In body of report Officer Gray mistyped the 22nd instead of the 21st he typed above. Per DOC-303.88 - Harmless Error. {If staff does not adhere to a procedural requirement under this chapter, the error is harmless if it does not substantially affect a finding of guilt or the Inmate’s ability to provide a defense.}

Officer Gray was the Officer on 2A on 06/21/2021 that was scheduled and worked 2nd Shift.

At the hearing, Hernandez-Smith stated that “no such incident” happened on June 22, and he declined to discuss any events on June 21 because “I’m only concerned with what’s written in the report on that date,” apparently meaning June 22, and “I’m not here to discuss a different date.”

Hernandez-Smith argues that, in preparing his defense, he reasonably relied on the June 22 date in the narrative portion of the conduct report, and therefore the error in that report affected his ability to present a defense, because his planned defense was no longer relevant when the focus changed to June 21 at the hearing.

As part of this argument, Hernandez-Smith argues that it was a violation of department rules for the error to go uncorrected before the hearing. Specifically, he points to rules that allow the security director, before the hearing, to refer a conduct report for further investigation, and to correct or add information to be considered at the hearing. *See* WIS. ADMIN. CODE §§ DOC 303.68(1)(d) and 303.80(1) (Mar. 2018). We do not agree that the failure to correct the error can be characterized as a rule violation, because these rules only permit the security director to take the specified actions, without requiring those actions.

Although not a rule violation, it appears that the error was, indeed, uncorrected before the start of the hearing. Hernandez-Smith disagrees with the department's conclusion that the error was harmless. The harmless error rule provides: "If staff does not adhere to a procedural requirement under this chapter, the error is harmless if it does not substantially affect ... the inmate's ability to provide a defense." WIS. ADMIN. CODE § DOC 303.88 (Mar. 2018). As stated, Hernandez-Smith argues that the conduct report error in the date affected his ability to provide a defense because he reasonably relied on the June 22 date to prepare a defense, but the hearing and decision ultimately did not focus on that date.

We do not agree that any reliance by Hernandez-Smith on the June 22 date was reasonable. Although a casual glance at the conduct report would leave the reader uncertain as to which date was correct, a closer look at the times of day shown in the report would suggest that June 21 was the more likely date. The time of the incident is shown in both the header and

the narrative section of the conduct report as 6:20 p.m. or 18:20. At the end of the narrative, the following note appears: “Date: 06/22/2021 — Time: 05:24:47 PM — User: A. Gray.” We infer that this note indicates the time that the narrative or the report was prepared.

A report time of June 22 at 5:24 p.m. would be consistent with the incident having occurred on June 21, but not consistent with the incident having occurred on June 22, *at the reported time of 6:20 p.m. on June 22*. In other words, to read the report as describing an incident on June 22, one would have to believe that the report was describing an event that occurred an hour later. That would not be a reasonable belief.

Hernandez-Smith also argues that he reasonably relied on the June 22 date in the report because the denial of his requested witness was not communicated to him before the hearing, as he asserts is required by rule. *See* WIS. ADMIN. CODE § DOC 303.84(8) (Mar. 2018) (“After determining which witnesses shall be called for the accused inmate, staff shall notify the inmate of the decision in writing.”). In other words, Hernandez-Smith argues that he could reasonably interpret the lack of a witness denial before the hearing as indicating that the department agreed that the witness’s testimony about June 22 would be relevant at the hearing.

While it may be true that the lack of denial of the witness could arguably support the belief that Hernandez-Smith suggests, we conclude that this is still not sufficient to make any reliance by him on the June 22 date reasonable. It is not enough to overcome the more reasonable inference based on the times shown in the report.

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals