

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 24, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1802

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL.
ROBERT ANTHONY LEE,

Petitioner-Appellant,

v.

OFFICER C.O. LUTZOW,
WAUPUN DISCIPLINARY COMMITTEE, and
GARY R. MCCAUGHTRY, SUPERINTENDENT,
WAUPUN CORRECTIONAL INSTITUTION,

Respondents-Respondents.

APPEAL from an order of the circuit court for Dodge County:
JOSEPH E. SCHULTZ, Judge. *Reversed and cause remanded with directions.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Robert Anthony Lee appeals from an order affirming the decision of the adjustment committee at Waupun Correctional

Institution, where he is an inmate. The dispositive issue is whether the committee provided Lee with due process. We conclude that the record is insufficient to decide this issue, and therefore we reverse the order and remand to the trial court to vacate the committee's decision.

The conduct report alleged that Lee was working in the cafeteria's tray return area, and that he threw a tray out of the window at a corrections officer, striking him in the chest and face with dishes and food. Lee denied doing so. The adjustment committee found him guilty of attempted battery, in violation of WIS. ADM. CODE § DOC 303.12.

Lee argues that his inmate advocate did not carry out his request to identify witnesses, and therefore he was not provided with due process. He cites *Eng v. Coughlin*, 858 F.2d 889, 897-98 (2d Cir. 1988). In *Eng*, the court held that an "assigned assistant who does nothing to assist a disabled prisoner—one who is segregated from the general prison population—has failed to accord the prisoner his limited constitutional due process right of assistance." *Id.* at 898. "At a minimum, an assistant should perform the investigatory tasks which the inmate, were he able, could perform for himself." *Id.*

Review on certiorari is limited to whether: (1) the agency kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the order or determination in question. *Coleman v. Percy*, 96 Wis.2d 578, 588, 292 N.W.2d 615, 621 (1980).

When used in conjunction with certiorari review, the phrase "acted according to law" includes common law concepts of due process and fair play. *State ex rel. Lomax v. Leik*, 154 Wis.2d 735, 740, 454 N.W.2d 18, 20 (Ct. App. 1990). If an agency on certiorari fails to return a record sufficient to demonstrate that the proceedings before it were procedurally proper, we may direct the circuit court to vacate the agency's decision. *Id.* at 740, 454 N.W.2d at 21. We would otherwise invite evasion of judicial review, because the agency could hide its procedural violations by failing to develop a record regarding them. *Id.*

This certiorari record shows that Lee presented the committee with copies of his complaints about what he described as the failure of his inmate advocate. He stated that he sought the advocate's assistance in locating two inmates who were witnesses, but who Lee knew only by nicknames. The committee denied Lee's request for witnesses because he provided only the nicknames. Someone, apparently the adjustment committee, has written "not relevant" at the top of Lee's complaints. The record contains no rebuttal of Lee's assertions about his advocate, nor any explanation of the advocate's actions, nor any substantive response to his complaints. The committee's decision did not address whether Lee had been provided due process.

Respondent Lutzow argues on appeal that Lee's advocate did obtain a list of that day's kitchen workers from the office. The list is included in the record. However, the list is by last name only, and does not include nicknames. Furthermore, it states that there were other temporary workers assigned to kitchen duty who were not on the list. Lutzow also argues that any error was harmless. However, without knowing what the testimony of the potential witnesses might be, we cannot reach that conclusion.

Therefore, we conclude that the committee failed to return a record sufficient to demonstrate that Lee's due process right to an advocate's assistance was not violated in this proceeding. We direct the trial court to vacate the decision of the adjustment committee and remand to that committee. See *Lomax*, 154 Wis.2d at 741, 454 N.W.2d at 21. On remand the committee shall either supplement the record with evidence showing that Lee received proper assistance from his advocate, and then reinstate its decision, or it shall expunge its decision from Lee's record. See *Id.* The committee may take additional evidence on whether Lee received such assistance. *Id.* Lee, of course, should be given an opportunity to respond to any such evidence and to present his own.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.