COURT OF APPEALS
DECISION
DATED AND RELEASED

November 16, 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(1), 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. 94-1986

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

STATE OF WISCONSIN EX REL.
DINO L. MCQUAY,

Plaintiff-Appellant,

v.

GARY R. MCCAUGHTRY,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dodge County: Thomas W. Wells, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Dennis McQuay appeals from a circuit court order affirming an order of the Waupun Correctional Institution Adjustment Committee. The committee found McQuay guilty of a major conduct infraction for violating WIS. ADM. CODE §§ DOC 303.24 and 303.28 (disobeying orders and disruptive conduct). For the reasons set forth below, we affirm.

BACKGROUND

On August 1, 1993, McQuay was waiting in line for lunch at the prison cafeteria. The parties disagree on what happened next. McQuay alleges that when he reached the milk station, he found the milk warm and asked for another. He states that an officer at the milk station was in the process of granting his request when a second officer arrived and demanded that McQuay take the warm milk and sit down.

By contrast, the conduct report alleges that McQuay became disruptive, spoke in a loud voice, held up the lunch line for several minutes and refused several direct orders to go to his seat. The report also alleges that the milk looked cold in that there was condensation on the container and that a chef checked the milk for temperature immediately after the incident and found it to be cold.

The Adjustment Committee conducted a hearing at which the lone witness requested by McQuay appeared and testified. The witness's testimony was inconclusive, in that he had not heard the exchange between McQuay and the officer. McQuay also testified. The committee concluded that McQuay knowingly disobeyed a verbal order from a staff person acting in an official capacity. Thereafter, McQuay appealed to the warden, and then initiated this certiorari action before the circuit court.

STANDARD OF REVIEW

Judicial review of certiorari actions is limited to determining whether the administrative hearing committee kept within its jurisdiction, whether it proceeded on a correct theory of law, whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and whether the evidence was such that the committee might reasonably make the determination in question. As to this last factor, the test is whether reasonable minds could arrive at the same conclusion reached by the administrative tribunal. ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment,*** 131 Wis.2d 101, 119-20, 388 N.W.2d 593, 600 (1986).

See also ***Van Ermen v. DHSS,*** 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978) (same standard applies on appellate review).

ANALYSIS

McQuay's arguments fall into two categories. First, he raises credibility challenges. Chief among these is a challenge to the committee's decision to disbelieve his testimony. Second, he alleges that various procedures were not followed. Among his arguments are that he was not told which specific subsection of WIS. ADM. CODE § DOC 303.24 he was charged with violating, that the prison authorities failed to conduct a sufficient investigation, that a letter he wrote protesting assignment to Temporary Lockup (TLU) was not considered sufficiently, that prison officials failed to call the officer at the milk station who allegedly acquiesced in McQuay's request for a colder milk, and that prison authorities failed to include a videotape of the incident.

Credibility Determinations

The evidence against McQuay was the conduct report, and the evidence in his favor was his own testimony. The committee chose to disbelieve his evidence, and believe the conduct report. Credibility is a determination for the committee, and we will not substitute our judgment for the committee's. ***Robertson Transp. Co. v. Public Serv. Comm.***, 39 Wis.2d 653, 658, 159 N.W.2d 636, 638 (1968). Our role is limited to determining whether there is substantial evidence in the record to support the committee's determination. ***Samens v. LIRC***, 117 Wis.2d 646, 660, 345 N.W.2d 432, 438 (1984). Such evidence exists here.

McQuay's defense at the August 10, 1993, hearing was that the reporting officer "was having a problem with the guy behind me[,] Silvia." However, also in the record is a letter dated August 3, 1993, in which McQuay offers the quite different theory that the reporting officer approached McQuay "obviously looking" for a "confrontation." Although McQuay claims to have simply asked for a cold milk, the reporting officer allegedly "ordered [him] about belligerently," requiring him to "`MOVE ON[,] McQuay'" (emphasis in

original). Faced with two conflicting versions of the facts by McQuay, the committee was entitled to discount McQuay's version.

Procedural Violations

McQuay argues that he did not receive sufficient notice of the violation because the conduct report contained only the section number and omitted the subsection number of the alleged violations. He implies a lack of due process. However, the report contained a complete account of the behavior which constituted the claimed violation. This comports with the requirement that a charged prisoner be given notice sufficient to permit him to marshal the facts in his defense and to clarify the facts of the charges. ***Wolff v. McDonnell***, 418 U.S. 539, 564 (1974). The lack of the subsection number did not deprive McQuay of constitutionally adequate notice. He knew exactly what behavior he was accused of, and he knew which section of the administrative code the alleged behavior violated.

McQuay also argues that the prison authorities failed to conduct a sufficient investigation and failed to call to the hearing the officer who allegedly acquiesced in his request for colder milk. He concludes that he was therefore denied due process. However, the record reveals that McQuay requested only an inmate as a witness and specifically waived attendance of the reporting officer.[1] His witness request form also fails to list the milk station officer. Permitting a prisoner to call witnesses is one way in which to meet due process requirements. ***Wolff v. McDonnell***, 418 U.S. at 566. McQuay could have caused a far fuller investigation at the hearing by requesting or, at the least, not waiving attendance of the relevant witnesses. His failure to do so defeats his argument.

McQuay also argues that a letter he wrote protesting assignment to TLU was not considered sufficiently. Citing DOC § 303.11,[2] McQuay argues

[1] The "Inmate's Request for Attendance of Witness" form contains a box to check for the following option: "I'm requesting reporting staff member(s) to attend." Into this area of the form was written the word "NO." Also, the form was partially filled out to request an officer's presence, and the partial request scratched out. We conclude that McQuay affirmatively waived his right to have the reporting officer attend.

[2] That section provides that in reviewing the decision to retain the inmate in TLU, the

that his retention in TLU nullified the hearing that followed. The record contains the letter, however, as well as the required notice to inmate at the time of placement in TLU and the required review. McQuay's argument seems to be that the review is defective for failure to have written words upon it "considering" his response. McQuay misunderstands the standard. The reviewing officer is required only to consider the response, not to document the consideration. Nothing in the record demonstrates lack of consideration. Further, because the acts reviewed are presumptively regular, the burden is on McQuay to prove otherwise. ***Pire v. Wisconsin State Aeronautics Comm'n***, 25 Wis.2d 265, 273, 130 N.W.2d 812, 816 (1964). He has not done so and we do not consider the matter further.

Finally, McQuay argues that prison authorities failed to include a videotape of the incident, although we have only McQuay's assertion that a tape exists. To the contrary, the record contains a notation that "there is no tape." In certiorari review, we are confined to the record and may not consider matters outside the record. ***State ex rel. Irby v. Israel***, 95 Wis.2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980). Therefore, we do not consider further the videotape issue.

By the Court.—Order affirmed.

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

(..continued)
reviewing officer must "include consideration of the inmate's response to the confinement."