COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2664 **Cir. Ct. No. 2010CV956**

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

STATE OF WISCONSIN EX REL. JULIAN LOPEZ,

PETITIONER-APPELLANT,

V.

MICHAEL THURMER AND RICK RAEMISCH,

RESPONDENTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Julian Lopez appeals circuit court orders denying his petition for certiorari relief from a prison disciplinary decision and his motion for reconsideration. Lopez contends that: (1) the hearing officer erred by refusing to consider exculpatory evidence; (2) Lopez was denied access to information

sufficient to prepare a defense, in violation of his due process rights; (3) the Department of Corrections (DOC) finding that Lopez violated DOC rules was arbitrary and capricious; (4) the DOC improperly relied on confidential informant statements; and (5) Lopez's staff advocate refused to obtain evidence, in violation of due process and DOC rules. We disagree and affirm.

Background

¶2 In April 2009 Lopez received a conduct report alleging he violated WIS. ADMIN. CODE §§ DOC 303.20 (group resistance and petitions) and 303.12 (battery). The conduct report stated that in March 2009 an investigation was conducted into a conflict between the inmate gangs Spanish Cobras and Latin Kings. The conduct report stated that inmates reported that Lopez occupies a position of leadership within the Spanish Cobras and had arranged for others to cause bodily harm to inmate Jose Alicea, who reportedly had provided information against Lopez to law enforcement authorities. Two of the inmates provided sworn statements and requested anonymity due to fear of gang retaliation. The author of the conduct report stated he found the confidential informants' statements to be credible because they were consistent, corroborated each other, and neither inmate was promised anything or threatened in obtaining the statements. The conduct report writer stated that a mail monitor on Alicea revealed that Alicea requested money to pay other inmates for his protection, indicating Alicea was concerned for his safety. The author also stated he relied on his twenty-two years of experience in monitoring gang activity within the DOC and his certification as a gang specialist.

¶3 Lopez requested a full due process hearing and was appointed a staff advocate to assist him in his defense. Lopez submitted a statement denying the

allegations in the conduct report. Lopez also submitted the following evidence, which was entered as exhibits at the hearing: (1) statements by several inmates supporting his defense that other inmates had provided false information about him; (2) records from a previous disciplinary proceeding against him; (3) an affidavit by Lopez's trial counsel asserting that Alicea was not involved in Lopez's trial; (4) a notice of temporary lock-up issued to another inmate; and (5) correspondence between Lopez and his staff advocate.

¶4 In May 2009 a hearing officer found Lopez guilty of group resistance and petitions under WIS. ADMIN. CODE § DOC 303.20(1) and (3) and battery under § DOC 303.12(1) and (3). The hearing examiner's decision indicates that the hearing examiner considered Lopez's statement and the exhibits in the record and determined that two of the exhibits in the record—material related to a previous conduct report and the notice of temporary lock-up against another inmate—were irrelevant to these proceedings. It also states that Lopez submitted twenty-eight pages of material related to a previous conduct report, but those materials were returned to him. The hearing examiner stated that after reviewing the report, the evidence, and the testimony, he found it was more likely than not that Lopez had planned with another inmate to harm another inmate and that the action was gang related.

¶5 Lopez appealed to the warden, who affirmed the part of the decision finding Lopez had violated WIS. ADMIN. CODE §§ DOC 303.20(1) and (3) (gang activity) and 303.12(1) (battery causing bodily harm), but modified the decision to eliminate the finding of guilt under § DOC 303.12(3) (battery causing death). After an unsuccessful appeal through the inmate complaint review system, Lopez petitioned for certiorari review in the circuit court. The circuit court denied the

petition for certiorari relief and Lopez's motion for reconsideration. Lopez appeals.

Standard of Review

¶6 On appeal from an order denying a petition for relief on certiorari following a prison disciplinary decision, we examine only whether the DOC was within its jurisdiction, whether it acted according to law, whether the DOC's decision was arbitrary or unreasonable, and whether it was supported by substantial evidence. ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶15, 234 Wis. 2d 626, 610 N.W.2d 821. Part of this analysis is whether the DOC followed its own rules and complied with due process requirements. *See* ***State ex rel. Curtis v. Litscher***, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43. We owe no deference to the circuit court's decision on our certiorari review of the DOC's disciplinary decision. *See* ***Anderson-El***, 234 Wis. 2d 626, ¶15.

Discussion

¶7 Lopez contends that the hearing officer refused to consider exculpatory evidence when he returned the twenty-eight pages of evidence that Lopez had offered in his defense. Lopez contends that the hearing officer stated only that the material was from a previous conduct report and was returned to Lopez, but did not state a reason for not considering it. Lopez points out that the hearing officer specifically found two exhibits irrelevant yet accepted those exhibits and placed them in the record, while refusing to put the other twenty-eight pages in the record. Lopez argues that the hearing officer improperly excluded the following twenty-eight pages of evidence that Lopez offered in his defense: (1) evidence from previous conduct reports, including affidavits from other inmates stating that the confidential informants provided false statements and got

favorable treatment from the report writer for providing those statements; (2) disciplinary records for Alicea establishing that the same hearing officer for Lopez's case had found Alicea wrote to relatives seeking money to pay other inmates for legal services, not for protection; and (3) disciplinary records for Lopez establishing that he was previously accused of being in the La Familia gang, rather than the Spanish Cobras gang.

¶8 Lopez cites ***Whitford v. Boglina***, 63 F.3d 527 (7th Cir. 1995), for the proposition that he "is entitled to an explanation of why the [hearing officer] disregarded the exculpatory evidence and refused to find it persuasive." ***Id.*** at 537. Lopez also cites WIS. ADMIN. CODE § DOC 303.86(2)(b), which provides:

> An adjustment committee or a hearing officer may refuse to hear or admit relevant evidence for any of the following reasons:
>
> 1. The evidence is not reliable.
>
> 2. The evidence, even if true, would be of marginal relevance.
>
> 3. The evidence is merely cumulative of evidence already received at the hearing and is no more reliable than the already admitted evidence, for example: testimony of other inmates corroborating the accused's story, when corroboration has already occurred.

Lopez contends that the hearing officer did not provide any explanation as to why he refused to consider the twenty-eight pages of exculpatory evidence Lopez offered, and that the evidence was not properly excluded under § DOC 303.86(2)(b). We disagree.

¶9 The hearing officer explained that two of the exhibits in the record—previous conduct report records for Lopez and a notice of temporary lock-up for another inmate—were irrelevant. The hearing officer also stated that twenty-eight

pages of material from a previous conduct report were returned to Lopez. It is clear from these statements that the hearing officer deemed the material related to other conduct reports irrelevant. Lopez argues that the decision that other conduct reports are irrelevant does not establish that the supporting material related to those conduct reports is also irrelevant. However, the hearing officer also stated that the evidence Lopez submitted was reviewed and then returned to Lopez, indicating that the hearing officer did review all of the material before determining it was not relevant. Additionally, we do not agree with Lopez that the placement of two irrelevant exhibits in the record means that the hearing officer was required to put the additional material he deemed irrelevant in the record as well. We conclude that the record is sufficient to establish that the hearing officer reviewed the material Lopez submitted, determined that the twenty-eight pages relating to other conduct reports were irrelevant, and thus returned that material to Lopez. We discern no violation of the rules.

¶10 Lopez next contends that the confidential informant statement summaries provided to Lopez were insufficient to allow him to prepare a defense. Lopez states that he repeatedly sought the dates, times, and locations of alleged conversations he had with other inmates, which were not revealed in the summaries. Lopez asserts that he needed this additional information to prepare his defense that the conversations did not take place, and he asserts that the information he sought was "non-disruptive" and relevant. Lopez asserts he also requested video footage of the times and locations of the alleged conversations, and he disputes his advocate's response that no video footage was available. Lopez argues that the DOC's failure to provide the information rendered the summaries insufficient for him to prepare his defense, violating his right to due process. We disagree.

¶11 The confidential informant statement summaries provided to Lopez indicate that the alleged conversations took place in early March 2009 in the north cell hall. The summaries also provide the content of the alleged conversations. Lopez does not cite any authority for the proposition that he had a due process right to more specific information, nor does he establish that his advocate was untruthful in stating that video footage for that time period was not available. We conclude that the summaries provided to Lopez were sufficient for Lopez to prepare his defense, and that Lopez did not have a due process right to more specific details or video footage.

¶12 Lopez also contends that the DOC's finding was arbitrary and capricious because it was unsupported by substantial evidence, violating his right to due process. Lopez argues that the evidence was insufficient to convict him of arranging an attack on Alicea because the only corroboration of that allegation by the confidential informants was the conduct report writer's unsupported claim that Alicea wrote to family members seeking money to pay for protection. Lopez argues that Alicea wrote to family members requesting money to pay for legal assistance from other inmates, which was established in the resulting disciplinary proceedings against Alicea. However, under WIS. ADMIN. CODE § DOC 303.86(4), "[t]wo anonymous statements by different persons may be used to corroborate each other." Lopez provides no authority for the proposition that, despite this compliance with the rule, due process requires corroboration by another source.

¶13 Lopez also contends that the hearing officer must independently establish that a risk is posed to the informants if they testify, and the hearing officer may not rely on that finding by the conduct report writer. However, this is not required by the rule. WISCONSIN ADMIN. CODE § DOC 303.86(4) provides: "If

the institution finds that testifying would pose a risk of harm to the witness, the committee may consider a corroborated, signed statement under oath from that witness without revealing the witness's identity …." Thus, the rule requires only that the *institution* find testifying would pose a risk of harm and does not require that the hearing officer independently make that determination. Here, the conduct report writer stated that the informants gave confidential statements due to fear for their safety from gang retaliation if their identities were known, and he found the witnesses credible. This is sufficient as a finding by the institution that testifying would pose a risk of harm to the witnesses.

¶14 Lopez next contends that the assistance he received from his staff advocate was inadequate under WIS. ADMIN. CODE § 303.78. Lopez contends that his advocate refused his requests to gather evidence vital to Lopez's defense, including evidence that would show two inmates were given special treatment for providing statements against him, the letters Alicea wrote requesting money, and surveillance video footage. Lopez contends that his advocate failed in his duties to gather evidence and testimony on Lopez's behalf. We disagree.

¶15 WISCONSIN ADMIN. CODE § DOC 303.78(2) provides that "[w]hen the warden assigns an advocate, the advocate's purpose is to help the accused inmate to understand the charges against the inmate and to help in the preparation and presentation of any defense the inmate has, including gathering evidence and testimony, and preparing the inmate's own statement." We have said that § DOC 303.78(2) establishes only "limited and general" duties of a staff advocate, and that the rule "affords the advocate a great deal of discretion in carrying out those duties." ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 398, 585 N.W.2d 640 (Ct. App. 1998). We do not agree with Lopez that his staff advocate's refusal to obtain additional material for Lopez violated the rule. As explained above,

Lopez was provided information relevant to the allegations against him. Lopez has not established that the additional information was actually available or that his advocate had a duty to obtain the information for him.

¶16 Finally, Lopez contends that adequate assistance from a staff advocate was constitutionally required due to the complexity of his case. In ***Wolff v. McDonnell***, 418 U.S. 539, 570 (1974), the United States Supreme Court held that an inmate is entitled to assistance from staff during disciplinary proceedings when the complexity of the case makes it unlikely the inmate will be able to collect and present the necessary evidence. Lopez contends that he focused his attention on disproving the allegation that Alicea cooperated in Lopez's criminal trial, establishing that Lopez did not understand how to defend against the charges against him. However, the record reveals that Lopez was able to understand the allegations against him and mount an appropriate defense by denying the allegations. We do not agree that Lopez's focus, in part, on irrelevant evidence means that the case was too complex for Lopez to defend. We have no basis to conclude that Lopez required a staff advocate based on the complexity of the charges. Accordingly, we affirm.

By the Court.—Orders affirmed.

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