**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

May 16, 1996



**NOTICE**



**No. 95-1550**

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

**STATE OF WISCONSIN EX REL. RONALD WAITES,**

**Petitioner-Respondent-Cross Appellant,**

**v.**

**GARY R. MCCAUGHTRY,**

**Respondent-Appellant-Cross Respondent.**

APPEAL and CROSS-APPEAL from an order of the circuit court for Dodge County: THOMAS W. WELLS, Judge. *Remanded with directions*.

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

VERGERONT, J. Gary McCaughtry, warden of the Waupun Correctional Institution (WCI), appeals from an order reversing a disciplinary decision of the WCI adjustment committee. The adjustment committee decided that Ronald Waites was guilty of conspiracy and of group resistance and petitions, in violation of WIS. ADM. CODE §§ DOC 303.21 and 303.20, respectively. The trial court determined that reversal was required because

Waites' due process rights were violated with respect to his request for the attendance of a witness at the disciplinary hearing and the admission of the statements of two confidential informants.

We conclude that Waites did not have a constitutional right to have either the witness, Captain Milliren, or the confidential informants present at the hearing. We also conclude that the adjustment committee did not comply with WIS. ADM. CODE § DOC 303.86(4) because it did not make a finding whether testimony by the confidential informants would pose a significant risk of bodily harm to the informants. However, we conclude that this does not require reversal. Remand to the adjustment committee is proper with instructions to determine whether such a finding is supported by the circumstances of this case.

## BACKGROUND

Waites was an inmate at the Racine Correctional Institution at the time of the incident giving rise to these proceedings. On January 26, 1994, Waites was given a conduct report signed by Captain Milliren. The report charged him with aiding and abetting battery in violation of WIS. ADM. CODE § DOC 303.12, in addition to the charges of conspiracy and group resistance and petitions. The report stated:

> This conduct report is the result of an investigation. On the above date and time, Inmate Waites was reported to be in the Walworth Unit Servery, leading a Gangster Disciple meeting of over a dozen inmates. Inmate Bibbins came into the servery at the urging of Inmate Charles McGowan. Inmate Bibbins announced to the other inmates that he would not participate in the Gangster Disciple activity. He then turned around and left. This behavior is considered a serious insult to the Gangster Disciples present and especially insulting to Inmate Waites who was leading the meeting. (I have interviewed many inmates over this incident. All information received indicated and confirmed that Inmate Waites is the

> "houseman" or "leader" for the Walworth Unit.) Inmate Waites immediately stood up and told Inmate Bibbins that he'd be "taken care of," for his actions. Immediately after Inmate Bibbins left, Inmate Waites pulled Inmate Charles McGowan aside and had a head to head private conversation with him. Inmate McGowan, very shortly after that conversation, was leading the assault of Inmate Bibbins, along with four other inmates.

Waites was given a form entitled "Notice of Major Disciplinary Hearing Rights" and a form entitled "Inmate's Request for Attendance of Witness." On this latter form, Waites requested the presence of two inmates: Charles McGowan and Johnny Bibbins. Waites did not check the box next to the sentence, "I'm requesting reporting staff member(s) to attend." However, in the space below the box with the heading "Name(s) of Reporting Staff Member(s)," Waites wrote "Capt. Milliren."

Waites was present at the hearing and testified that he had not been involved in the incident at all; that he was on the phone for about one hour at the time; and that, while on the phone, another inmate told him there was a fight. Waites' staff advocate also made a statement. Inmate McGowan attended the hearing and testified that he was in the Walworth unit five days prior to the incident and did not know Waites.

Inmate Bibbins did not appear at the disciplinary hearing. The "Inmate's Request for Attendance of Witness" form and the "Record of Witness Testimony" form together state that Bibbins refused to appear and refused to give a statement, citing WIS. ADM. CODE § DOC 303.81(3)(a) and (b).[1] However, a one sentence written statement over the signature "Johnny Bibbins" was apparently offered by Waites or his advocate and received and considered at

[1] WISCONSIN ADM. CODE § DOC 303.81(3)(a) and (b) provides that inmates and staff requested as witnesses by the accused shall attend the disciplinary hearing unless there is a significant risk of bodily harm to the witness if he or she testifies, or the witness is an inmate and does not want to testify.

the hearing. This statement says: "Ronald Wade [sic] a.k.a. (Ya-Ya) did not harm me."[2]

Captain Milliren did not appear, but the conduct report was considered by the adjustment committee. The adjustment committee also considered photographs of the injuries to Bibbins, a short written report by Captain Milliren describing the results of her interviews with twelve unidentified inmates, the written statements of two confidential informants, and the written statement of Inmate Brownlee. An edited version of the statements of the two confidential informants was given to Waites. Brownlee's statement said that he was in the Walworth dayroom on the phone and that Waites was there talking on the phone at the time Bibbins was in a fight.

The adjustment committee determined that Waites was guilty of conspiracy and group resistance and petitions, but not battery. The committee stated the reasons for its decision as follows:

> Confidential informant statements are clear, consistent, and document visual observations of Inmate Waites taking part in a meeting of gang members (in viol. of 303.20,) and taking part in planning activities that led to Inmate Bibbins being battered in violation of 303.21 because Inmate Waites was heard threatening Inmate Bibbins. Committee views confidential informant statements and report as well as statement of conduct report writer as more credible than statement of co-conspirator inmate McGowan. Statements submitted at hearing by Inmate Brownlee, and Bibbins were considered with

[2] A copy of this statement is attached to Waites' petition for a writ of certiorari. It is referred to in the adjustment committee's summary of Waites' advocate's comments and its summary of Waites' testimony at the hearing, and also in the committee's written reasons for the decision. But the statement itself is not in either the original return or the supplemental return. Waites requested that this statement and certain other documents be included in a supplemental return and a supplemental return was filed containing certain other documents, but not this statement. However, McCaughtry's counsel acknowledged in his brief before the trial court that Waites was permitted to submit this statement at the hearing.

> other confidential statements. Finding of no guilt on 303.12(B), as statements do not support Inmate Waites' involvement in the actual battery.

Waites' appeal to the warden was denied and Waites filed a petition for a writ of certiorari seeking review of the adjustment committee's decision. He challenged the failure of the adjustment committee to require Bibbins and Captain Milliren to appear and the adjustment committee's reliance on the statements of the confidential informants. The trial court determined that the adjustment committee's failure to make a finding that the confidential informants would be subject to a significant risk of bodily harm, and the absence in the record of the reason for Captain Milliren's failure to appear, violated Waites' right to due process.[3]

On certiorari review, this court's standard of review is the same as that applied by the trial court. ***State ex rel. Staples v. DHSS***, 136 Wis.2d 487, 493, 402 N.W.2d 369, 373 (Ct. App. 1987). Review is limited to determining whether the adjustment committee kept within its jurisdiction, whether it acted according to law, whether the action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and whether the evidence was such that it might reasonably make the determination in question. ***State ex rel. Meeks v. Gagnon***, 95 Wis.2d 115, 119, 289 N.W.2d 357, 361 (Ct. App. 1980). Whether the adjustment committee acted according to law includes the questions of whether due process was afforded and whether the adjustment committee followed its own rules. ***Id.***

## ABSENCE OF CAPTAIN MILLIREN

McCaughtry contends that the absence of Captain Milliren did not deny Waites his right to due process. First, he argues that Waites did not request Milliren because the appropriate box on the Inmate's Request for Attendance of Witness was not checked. We reject this argument. Since Captain Milliren's name was written in the space provided, we think the most reasonable interpretation of the form is that Waites was requesting Captain Milliren as a witness.

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[3] The trial court did not address Waites' argument concerning Bibbins' appearance and Waites does not raise this issue in his cross-appeal.

McCaughtry also argues that Waites waived any right he might have had to Milliren's attendance because he did not object at the hearing to her absence. Waites responds that he did object, but the committee omitted his objection on the "Disciplinary Hearing" form and the "Record of Witness Testimony" form. These two documents are the only record of oral statements made at the hearing. We need not decide whether Waites waived his objection because we conclude that the absence of Captain Milliren did not violate Waites' right to due process.

WISCONSIN ADM. CODE § DOC 303.81(4) provides in part:

> [I]f a staff member witness, who may be the officer who reported the rule violation, will be unavailable due to illness, no longer being employed at the location, being on vacation or being on a different shift, but there is no other reason to exclude the witness's testimony under sub. (3),[4] then the hearing officer shall attempt to get a signed statement from the witness to be used at the disciplinary hearing.

(Footnote added.)

It is undisputed that the notice of hearing given Waites stated: "Capt. Milliren--Statement Requested (Conflict of Schedule)."[5] Waites does not contend that WIS. ADM. CODE § DOC 303.81(4) was violated. His contention is that he has a constitutional right to require Captain Milliren's presence.

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[4] WISCONSIN ADM. CODE § DOC 303.81(3) provides that witnesses who are inmates or staff requested by the accused shall attend the disciplinary hearing unless there is a significant risk of bodily harm to a witness, an inmate witness does not want to testify, the testimony of the witness would be irrelevant or cumulative, or an inmate witness must be transported.

[5] Waites attached a copy of this notice as an exhibit to his petition for a writ of certiorari. It was not in the original return. The court ordered it to be included in the supplemental return at Waites' request. However, the certificate of supplemental return states that it is not included because it is not kept as part of the record. Both parties agree this notice was given to Waites.

Inmates have a protected liberty interest in the retention of earned good-time credit. ***Irby v. Macht***, 184 Wis.2d 831, 838, 522 N.W.2d 9, 11-12, *cert. denied*, 115 S. Ct. 590 (1994). Before an inmate may be subjected to the possible loss of good time for an offense which merits segregation if the inmate is found guilty, the minimum due process requirements established in ***Wolff v. McDonnell***, 418 U.S. 539 (1974), must be satisfied. ***Id.*** at 838-42, 522 N.W.2d at 11-13.[6]

In discussing the constitutionally-required procedures for prison disciplinary hearings, ***Wolff*** distinguished between calling witnesses to present evidence on one's behalf and confronting and cross-examining witnesses furnishing evidence against one. ***Wolff***, 418 U.S. at 566-68. The Court held that there was a limited constitutional right to the former but not the latter. ***Id.*** *See also* ***Baxter v. Palmigiano***, 425 U.S. 308, 321-22 (1976). ***Wolff*** did not impose any constitutional obligation on prison officials to give written reasons for denying the inmate the right to have witnesses present in either of the two situations. ***Baxter***, 425 U.S. at 322.

Captain Milliren provided evidence against Waites in the form of the conduct report and the short written statement. Although Waites requested her presence, Milliren was an adverse witness whom Waites wished to confront and cross-examine. Under ***Wolff*** and ***Baxter***, Waites does not have a constitutional right to Captain Milliren's attendance at the hearing.

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[6] In ***Sandin v. Conner***, 515 U.S. ___, 132 L.Ed.2d 418 (1995), the United States Supreme Court altered the analysis for determining when a state creates a liberty interest protected by the Due Process Clause such that the ***Wolff*** procedural protections apply. After ***Sandin***, the existence of such an interest depends on the nature of the deprivation--whether it is "atypical and significant"--rather than whether the language of prison regulations is mandatory. ***Sandin***, 515 U.S. at ___, 132 L.Ed.2d at 431. In ***Sandin***, the Court held that discipline in segregated confinement did not present the type of deprivation that created a liberty interest. ***Id.*** However, the discipline in ***Sandin*** did not inevitability affect the duration of the inmate's sentence. ***Id.*** In Wisconsin, for inmates who committed offenses on or after June 1, 1984, and other inmates who chose to have 1983 Wis. Act 528 apply to them, a guilty finding for major disciplinary offenses affects the inmate's mandatory release date. Section 302.11(2), STATS.; Appendix Note, WIS. ADM. CODE § DOC 303.84; ***State v. Martin***, 191 Wis.2d 646, 662, 530 N.W.2d 420, 426 (Ct. App. 1995). Therefore, ***Sandin*** does not alter the analysis in ***Irby v. Macht***, 184 Wis.2d 831, 522 N.W.2d 9 (1994).

For the same reasons, Waites did not have a constitutional right to confront and cross-examine the confidential informants. We therefore consider whether the adjustment committee complied with DOC rules regarding the statements of the confidential informants. We conclude it did not comply.

In the context of disciplinary hearings for major violations, WIS. ADM. CODE § DOC 303.86(4) provides:

> If a witness refuses to testify in person and if the committee finds that testifying would pose a significant risk of bodily harm to the witness, the committee may consider a corroborated, signed statement under oath from that witness without revealing the witness's identity. The contents of the statement shall be revealed to the accused, though the statement may be edited to avoid revealing the identity of the witness. The committee may question the witnesses, if they are otherwise available. Two anonymous statements by different persons may be used to corroborate each other. A statement can be corroborated in either of the following ways:
>
> (a) By other evidence which substantially corroborates the facts alleged in the statement such as, eyewitness account by a staff member or circumstantial evidence; or
>
> (b) By evidence of a very similar violation by the same person.

The requirement of corroboration is an expression of the due process requirement that confidential information relied upon by the committee be reliable. *See* ***Wells v. Israel***, 854 F.2d 995, 998-99 (7th Cir. 1988).

The confidential informant statements were certified as part of the record. We have examined them, as did the trial court. These statements were

made under oath. WISCONSIN ADM. CODE § DOC 303.86(4) specifically provides that "[t]wo anonymous statements by different persons may be used to corroborate each other." Each statement is corroborated by the other.

The confidential informant statements each contain, as part of the form, a section headed:

> REASON WHY THE INFORMANT WILL NOT TESTIFY IN PERSON: (Must be because informant fears that testifying in person would pose a significant risk of bodily harm to him/her.) INVESTIGATOR EXPLAIN WHAT THIS RISK IS:

In this section on each form is typed this statement:

> The inmate named below is providing information that will help to result in another inmate doing a very long time in segregation. There is high risk that this inmate will be severely retaliated against by other inmates if the information contained in this statement was divulged.

There is no staff name or signature on either statement indicating who is making the assessment of a high risk of retaliation.

McCaughtry concedes that the adjustment committee did not make the required finding that testifying would pose a serious risk of bodily harm to the informants. However, he presents three arguments against reversal on this ground. First, he contends that there is sufficient evidence in the record--the conduct report and written statement--to support the adjustment committee's conclusions even without the statements of the confidential informants. We disagree. Captain Milliren did not herself observe Waites' involvement in the incident. Her conduct report, which is similar in content to her short written statement, briefly relates the contents of her conversations with unidentified inmates, including, presumably, the two whose statements were submitted. The written report of an officer may be considered, even though it is hearsay. *See* WIS. ADM. CODE § DOC 303.86(2)(a). But it does not

follow that a report containing only brief summaries of the statements of unidentified persons is sufficient evidence, in itself, to base the committee's decision on. Such a conclusion would make the rule concerning the admissibility of the statement of a confidential witness meaningless.

McCaughtry also argues that the confidential informant statements are the "equivalent" of a finding by the adjustment committee. We reject this argument for two reasons. First, the statements do not indicate who made the assessment of a high risk of retaliation. Without that minimal degree of formality, we hesitate to find that the statements are the equivalent of a committee finding. Second, even if we assume what is perhaps obvious--that a member of the prison staff completed the forms--we are unwilling to disregard the requirement that the committee itself make a finding. We consider this requirement in WIS. ADM. CODE § DOC 303.86(4) to be significant because of the contrasting language in a counterpart provision for hearings on administrative confinement.[7] An inmate's right to a review by the Program Review Committee (PRC) of the decision to place him or her in administrative confinement includes, among other rights:

> The right to present and question witnesses in accordance with sub. (6) and the hearing procedures for major disciplinary offenses except that, in the case of a confidential informant, a designated security staff member shall investigate to determine whether testifying would pose a significant risk of bodily harm to the witness. If the designated staff member finds a significant risk of bodily harm, the designated staff member shall attempt to obtain a signed statement under oath from the witness and determine that the statement is corroborated in accordance with s. DOC 303.86(4). The designated staff member shall edit the signed, corroborated statement to avoid revealing the identity of the witness. A copy of the edited statement shall be delivered to the inmate....

[7] Administrative confinement is an involuntary nonpunitive status for the segregated confinement of an inmate solely because the inmate is dangerous, to ensure personal safety and security in the institution. WISCONSIN ADM. CODE § DOC 308.04(1).

WISCONSIN ADM. CODE § DOC 308.04(4)(e)4.

In the review before the PRC, a designated staff member is to make the finding whether there is a significant risk of bodily harm. In contrast, in a disciplinary hearing before the adjustment committee, this responsibility is placed on the committee. Since the Department of Corrections has plainly defined the required procedure in each instance differently, we see no basis for concluding that they are interchangeable.

Finally, McCaughtry argues that the failure of the adjustment committee to make the requisite finding was harmless error in view of the statements on the confidential informant forms concerning the high risk of retaliation. WISCONSIN ADM. CODE § DOC 303.87 provides:

> If a procedural requirement under this chapter is not adhered to by staff, the error may be deemed harmless and disregarded if it does not substantially affect the rights of the inmate. Rights are substantially affected when a variance from a requirement prejudices a fair proceeding involving an inmate.

In ***State ex rel. Riley v. DHSS***, 151 Wis.2d 618, 445 N.W.2d 693 (Ct. App. 1989), we addressed an inmate's challenge to the decision of the PRC regarding administrative confinement because the PRC relied on unsworn statements from confidential informants in violation of WIS. ADM. CODE § DOC 308.04(4)(e)4. We rejected the State's argument that this was harmless error because we concluded that the purpose of the requirement was to protect the accused. ***Id.*** at 626, 445 N.W.2d at 696.

The requirement that the adjustment committee make a finding on risk of harm to a confidential informant also protects the accused: it ensures that witnesses against the accused are made known to the accused unless there is a sufficient reason. Arguably, this purpose has been served by the statement on high risk of retaliation in the confidential informant statements. However, for the reasons already discussed, we decline to treat the absence of a finding by the committee as harmless error. The Department of Corrections has adopted a rule that expressly requires a finding by the adjustment committee, rather than

delegating this responsibility to an investigating officer as it has done for administrative confinement reviews. Under these circumstances, we are unwilling to disregard the Department of Corrections' failure to follow its own rules.

However, we do not agree with the trial court or Waites that reversal is automatically warranted. A remand for purposes of making further findings is permissible when it does not involve taking additional evidence. *See* ***Snajder v. State***, 74 Wis.2d 303, 314, 246 N.W.2d 665, 670 (1976). In this case, we conclude the appropriate procedure is to remand the matter back to the committee with instructions that it make the necessary finding, if such a finding is supported by the circumstances in this case.[8] If such a finding is made, the discipline imposed on Waites may stand. If the record does not support such a finding, the adjustment committee shall vacate its order and expunge these offenses from Waites' prison record.

*By the Court.*—Order remanded with directions.

Not recommended for publication in the official reports.

[8] In ***State ex rel. Riley v. DHSS***, 151 Wis.2d 618, 445 N.W.2d 693 (Ct. App. 1989), we declined to remand to permit compliance with WIS. ADM. CODE § DOC 308.04(4)(e)4 because the matter had already been remanded once to the adjustment committee due to noncompliance with the rule. ***Id.*** at 627-28, 445 N.W.2d at 696. That is not the case here.