COURT OF APPEALS
DECISION
DATED AND RELEASED

December 12, 1996

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. 95-2108

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

JOHN S. BERGMANN,

Petitioner-Respondent,

v.

GARY R. McCAUGHTRY,

Respondent-Appellant.

APPEAL from orders of the circuit court for Dodge County: THOMAS W. WELLS, Judge. *Affirmed*.

Before Eich, C.J., Vergeront, J., and Robert D. Sundby, Reserve Judge.

PER CURIAM. Gary R. McCaughtry appeals from circuit court orders vacating discipline imposed on John Bergmann, and denying his motion for reconsideration. We affirm.

BACKGROUND

In four major conduct reports, Bergmann was accused of disobeying orders by attempting to contact his son. The reports were issued one each on May 9 and 17 and two on May 18, 1994. Each contained the following statement:

> "The hearing officer or designee will notify you and your staff advocate of the date, time and place of the hearing.
>
> A.The hearing shall be held not sooner than 2 days and no more than 21 days after the date you were given a copy of the above-referenced report."

The first portion of this notice apparently arises from WIS. ADM. CODE § DOC 303.81(9) which provides: "The hearing officer shall prepare notice of the hearing and give it to the accused, the advocate (if any), the committee and all witnesses, including the staff member who wrote the conduct report."

It is undisputed that the "hearing officer or designee" did not inform Bergmann of the "date, time or place of the hearing."[1]

The disciplinary committee held a hearing on all four reports on May 26, 1996. Bergmann refused to attend on the grounds that he had not been given notice. The committee found him guilty of all four conduct reports. He appealed to Warden Gary R. McCaughtry, who affirmed. On certiorari, the circuit court reversed. It held that DOC had to comply with the procedural rules by giving notice, which was withheld here.

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[1] The circuit court remanded this case to the committee to amend the certiorari return with proof that Bergmann had been served notice. The committee did not comply, instead moving for reconsideration on legal grounds.

McCaughtry moved the circuit court for reconsideration on the grounds that this court has previously held that the second part of the notice (hearing to be no less than two days, no more than twenty-one days) was constitutionally sufficient. ***Saenz v. Murphy***, 153 Wis.2d 660, 681, 451 N.W.2d 780, 788 (Ct. App. 1989), *rev'd on other grounds*, 162 Wis.2d 54, 469 N.W.2d 611 (1991). The circuit court denied McCaughtry's motion for reconsideration.

ANALYSIS

In essence, the circuit court held that a form notice of hearing within two to twenty-one days is not "notice" of the type required by the administrative code. McCaughtry argues that this is an incorrect statement of law, based on our holding in ***Saenz***, 153 Wis.2d 660, 451 N.W.2d 780. We do not agree and conclude the trial court applied the correct law.

In ***Saenz***, we considered the same notice given Bergman, and in ***Saenz***, as in this case, the inmate was not given notice of the date, time, or place of the hearing. ***Saenz***, 153 Wis.2d at 674, 451 N.W.2d at 785. We held that Saenz's right to due process was not violated because he received notice that his disciplinary hearing would be held at least two days but not more than twenty-one days after he was served with the notice and because he had more than twenty-four hours to marshal the facts and prepare a defense. ***Saenz***, 153 Wis.2d at 681, 451 N.W.2d at 788.

However, in ***Irby v. Macht***, 184 Wis.2d 831, 845, 522 N.W.2d 9, 15 (1994), the Wisconsin Supreme Court enumerated "procedures inmates *must* be afforded with respect to disciplinary hearings." (Emphasis in original.) Among the procedures which "*must*" be afforded, the court explicitly read into WIS. ADM. CODE § DOC 303.81(9), a requirement that "inmates must be given notice of the *hearing's time*." (Emphasis supplied.) Although we are bound by our prior pronouncements, holdings of the Wisconsin Supreme Court take precedence. ***Livesey v. Copps Corp.***, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979). Any holding of ***Saenz*** that is contrary to ***Irby*** is no longer good law. Where there are four conduct reports each charging distinct violations, the notice of the hearing must also inform the inmate which charges will be heard at the specified time. *See*

Wolff v. McDonnell, 418 U.S. 539, 564 (1974) (adequate notice must inform inmate of charges and enable him to marshal facts and prepare defense).[2]

By the Court.—Orders affirmed.

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

[2] As appellant concedes, Bergmann preserved for appeal his contention that he had no notice that all four cases would be heard together.