



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

January 8, 2015

To:

Hon. Frank D. Remington
Circuit Court Judge
215 South Hamilton, Br 8, Rm 4103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 South Hamilton, Rm 1000
Madison, WI 53703

Karla Z. Keckhaver
Asst. Attorney General
P. O. Box 7857
Madison, WI 53707-7857

Dept. of Justice, Civil Litigation Unit
P.O. Box 7857
Madison, WI 53707-7857

Michael B. Kingsley 301363
Wisconsin Resource Center
P.O. Box 220
Winnebago, WI 54985-0220

Wisconsin Resource Center
P.O. Box 16
Winnebago, WI 54985-0016

You are hereby notified that the Court has entered the following opinion and order:

2013AP1565

State of Wisconsin ex rel. Michael B. Kingsley
v. Gary H. Hamblin (L. C. #2012CV4459)

Before Lundsten, Sherman and Kloppenburg, JJ.

Michael Kingsley, pro se, appeals from an order dismissing a petition for writ of certiorari concerning a prison conduct report. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2011-12).¹

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Kingsley was issued a conduct report for battery after scratching a correctional officer's hand with his fingernails while actively resisting officers trying to remove wrist restraints through Kingsley's cell door. During the scuffle, Kingsley caused a three-inch bloody wound that required medical attention. Kingsley insisted the officer injured himself on the cell door, or that the scratch was an accident. He was found guilty. The Warden affirmed the disciplinary decision. Kingsley filed a petition for writ of certiorari which the circuit court dismissed. Kingsley now appeals.

We review the decision of the agency, not the decision of the circuit court. *See Kozich v. Employe Trust Funds Bd.*, 203 Wis. 2d 363, 368-69, 553 N.W.2d 830 (Ct. App. 1996). Our review is limited to whether “the agency’s decision was within its jurisdiction, the agency acted according to law, its decision was arbitrary or oppressive and the evidence of record substantiates the decision.” *State ex rel. Staples v. DHSS*, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987).

Kingsley argues the proceedings were invalid because the disciplinary hearing was not timely held within twenty-one days. In support, Kingsley relies upon *State ex rel. Jones v. Franklin*, 151 Wis. 2d 419, 444 N.W.2d 738 (Ct. App. 1989). In that case, we held “the committee lost competency to proceed when it failed to hold the hearing within twenty-one days.” *Id.* at 423.

However, the relevant administrative code provision has been modified since the *Jones* decision. At the time *Jones* was decided, the administrative code provided that a prison disciplinary hearing “shall be held no ... later than 21 days after the inmate receives a copy of the conduct report and hearing notice.” *See id.* at 422 (quoting WIS. ADMIN. CODE § HSS

303.76(3)). The code provision was subsequently modified to state “[t]he institution may not hold the hearing more than 21 days after the inmate receives the approved conduct report and hearing rights notice unless otherwise authorized.... The 21 day time limit is not jurisdictional.” WIS. ADMIN. CODE § DOC 303.76(3) (Dec. 2006).² Moreover, the administrative code does not require a specific reason for a delay to be given. Kingsley’s timeliness argument fails.

Kingsley also argues the “DOC represented their will and not their judgment when they failed to meet their burden of guilt.” Kingsley insists he was entitled to a written decision discussing the evidence relied upon and the reasons for the disciplinary action. He claims the hearing officer did not meet this burden. According to Kingsley, the hearing officer “in a rather cursory fashion simply submitted a cookie cutter decision and arbitrarily said Kingsley was guilty.” Kingsley contends he specifically addressed this fact in his appeal to the Warden, but the Warden similarly upheld the hearing officer’s decision in cursory fashion.

The State responds that this issue is not properly before us because Kingsley did not name the Warden as a party in the certiorari action. The State argues that certiorari is available only to review a final determination, and the Warden’s decision regarding the sufficiency of the evidence is final pursuant to WIS. ADMIN. CODE § DOC 303.76(7)(d). The State contends that Kingsley failed to name the Warden as a respondent in this certiorari action, and therefore, may not make any challenges to the sufficiency of the evidence.

² The Appendix Note to WIS. ADMIN. CODE § DOC 303.75, regarding the hearing procedures for minor violations, states: “The 21-day time limit is not intended to be jurisdictional in nature. This provision specifically overrules *State ex rel. Jones v. Franklin*, 151 Wis. 2d 419, 444 N.W.2d 738 (Ct. App. 1989).” The Appendix Note to § DOC 303.76 states, “Subsection (3) concerns time limits, which are the same as those under s. DOC 303.75.”

Kingsley fails to reply to this argument, and the issue is therefore deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed admitted). In any event, we agree with the State's argument that issues regarding the sufficiency of the evidence are not properly before us because the Warden's decision is final regarding the sufficiency of the evidence and Kingsley failed to name the Warden as a respondent.

Kingsley raises other arguments for the first time in his reply brief, including the assertion that he was improperly denied the opportunity to obtain documentary evidence prior to the hearing which he claims was highly relevant and exculpatory. We have consistently held that arguments raised for the first time in a reply brief are in violation of the Rules of Appellate Procedure and will not be considered. *See Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals