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

February 10, 2016

To:

Hon. Rhonda L. Lanford
Circuit Court Judge
215 South Hamilton, Br 16, Rm 6105
Madison, WI 53703

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

Luke N. Berg
Deputy Solicitor General
P. O. Box 7857
Madison, WI 53707-7857

Special Litigation & Appeals Unit
P.O. Box 7857
Madison, WI 53707-7857

Robert L. Tatum 574254
Wisconsin Secure Program Facility
P.O. Box 9900
Boscobel, WI 53805-9900

Wisconsin Secure Program Facility
1101 Morrison Dr.
P.O. Box 1000
Boscobel, WI 53805-1000

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

2015AP1488 State of Wisconsin ex rel. Robert L. Tatum v. Michael Dittman and Edward Wall (L.C. # 2014CV2304)

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Robert L. Tatum, pro se, appeals circuit court orders denying Tatum relief on certiorari review of a prison disciplinary decision and denying reconsideration. Based upon our review of

the briefs and record at conference, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

Background

On December 12, 2013, Tatum filed a complaint alleging that Correctional Officer Sainsbury[2] had threatened him and tried to start a fight with him. Tatum alleged that Sainsbury had followed Tatum back to his housing unit after an incident near the educational area and said, "[W]e can do something [fight] right now, bitch! Yea[h], I thought not!"

Upon receipt of Tatum's complaint, the Institution Complaint Examiner requested additional information from Tatum, and Tatum submitted a written statement. The ICE then met with Tatum and explained that the allegation of staff misconduct would be investigated pursuant to DAI Policy 310.00.01.[3] Tatum was also told that his allegation could expose him to a charge

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. All references to the Wisconsin Administrative Code are to provisions in effect at the time of the incident and disciplinary hearing. *See* Wis. Admin. Reg. No. 612 (Dec. 2006). Chapters DOC 303 and 310 were repealed and recreated, effective January 1, 2015. *See* Wis. Admin. Reg. No. 705 (Sept. 2014).

[2] Sainsbury's name is spelled several ways in the record. We use the spelling that appears in documents authored by Department of Corrections personnel.

[3] Division of Adult Institutions Policy 310.00.01 states, in pertinent part:

> When an ICE receives a complaint alleging staff misconduct of a non-sexual nature, the inmate must be interviewed as soon as possible. At the interview the inmate will be advised of the provisions of DOC 303.271 (Lying About Staff). If the inmate wishes to proceed with the complaint an in-depth interview must follow, resulting in a detailed written statement signed by the inmate. Refusal of the interview, refusal to provide details or refusal to sign the statement shall result in dismissal of the complaint for failure to cooperate.

The respondents included a copy of the policy in their appendix and Tatum does not challenge the accuracy of the reproduced policy.

of lying about staff, in violation of WIS. ADMIN. CODE § DOC 303.271.[4] The ICE recommended that Tatum's complaint be dismissed, "[b]ased on [Tatum's] statement and the sensitive nature of this incident … with the modification that it be further processed pursuant to DAI Policy 310.00.01."

As a result of the ensuing investigation, Tatum was issued a conduct report for a violation of WIS. ADMIN. CODE § DOC 303.271. That report recounted Sainsbury's account that Tatum was cursing at him, both near the education area and while returning to Tatum's housing unit. Two other correctional officers, Kratz and Pitzen, corroborated Sainsbury's version of events, and both indicated that Sainsbury had not tried to provoke a fight with Tatum.

A formal hearing was scheduled. Tatum requested two witnesses – a teacher, Pam Schmidt, and a fellow inmate, Joseph Kazel. Additionally, Tatum requested that "reporting staff member(s)" Pitzen and Kratz attend. Tatum's request that Pitzen and Kratz appear as witnesses at the hearing was denied because "[n]o good cause [was] shown to allow extra witnesses." At the hearing, Kazel testified that he did not recall any conversation between Tatum and Sainsbury near the education area. Schmidt testified that she did not hear Tatum curse at Sainsbury and that Sainsbury was very cooperative and tried to accommodate Tatum. The staff member who issued the conduct report, Lieutenant Miller, testified about his investigation into Tatum's allegation, and testified that it appeared that Tatum had lied about staff.

[4] WISCONSIN ADMIN. CODE § DOC 303.271 states that "[a]ny inmate who makes a false written or oral statement about a staff member which may affect the integrity, safety or security of the institution or staff, and makes that false statement outside the complaint review system is guilty of an offense."

Tatum was found guilty of the offense and received 210 days in disciplinary separation. The Hearing Committee concluded that Tatum's statement was "self-serving and an attempt to blame staff for his actions." Miller was found to be credible, "without reason to fabricate the report and has no stake in the outcome of the hearing." The two witnesses were also found to be credible.

Discussion

Tatum raises three issues on appeal. He first argues that he cannot be disciplined for lying about staff because his statement was made within the inmate complaint review system.

We disagree. The ICRS is generally confidential. *See* WIS. ADMIN. CODE § DOC 310.16(1).[5] However, confidentiality may be waived "if the security, [or] safety … of the institution or any person is involved." WIS. ADMIN. CODE § DOC 310.16(2). Tatum's allegation that Sainsbury had threatened him implicated Tatum's safety and security. Thus, the confidential nature of the ICRS was no longer a paramount concern. The department must take an allegation that a staff member has threatened an inmate seriously. DAI Policy 310.00.01 sets forth the process for review of such an allegation, balancing the inmate's interest to be protected from misconduct against the staff member's interest in being protected against false accusations.

[5] WISCONSIN ADMIN. CODE § DOC 310.16(1) states that "[e]xcept as otherwise provided in this section, the department shall ensure that complaints filed with the inmate complaint review system are confidential. Persons working in the ICRS may reveal the identity of complainants and the nature of the complaint only to the extent necessary to investigate the complaint, implement the remedy, or in response to litigation."

The Appendix to WIS. ADMIN. CODE § DOC 310.16(1) addresses the tension between those interests.

> If the ICRS is to maintain integrity and the confidence of the inmates, complaints entered must be treated confidentially and, with certain limited exceptions, no sanctions can result from the good faith use of the system. The ICRS is an appropriate forum for resolving staff issues.…
>
> This is not to say that inmates are free to make threatening or false statements about staff, knowing they are false, especially if those false statements are made public.… This rule does not prohibit disciplinary action for the bad faith use, or rather abuse, of the ICRS under DOC 303.271.

The record establishes that Tatum was repeatedly advised that his allegation against Sainsbury would be reviewed under DAI Policy 310.00.01, and not as part of the ICRS. Tatum was warned that the provision prohibiting lying about staff found in WIS. ADMIN. CODE § DOC 303.271 would come into play after a DAI Policy 310.00.01 review was initiated. Tatum was explicitly told that his inmate complaint was being dismissed, yet Tatum continued to assert that Sainsbury had threatened him. Tatum was not insulated from discipline for lying merely because he chose the ICRS as the initial vehicle for pursuing his false claims.

Tatum also argues that insufficient evidence supported the finding of guilt. We disagree. Pitzen reported that Sainsbury "never made any comments to Tatum" and Kratz reported that Tatum was cursing at Sainsbury and that Sainsbury did not retaliate or try to provoke a fight with Tatum. Neither officer appeared at the hearing, and their statements, set forth in the conduct report, are hearsay. Hearsay evidence, however, is permissible in prison disciplinary hearings. *See* ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 388, 585 N.W.2d 640 (Ct. App. 1998).

Tatum's reliance on ***Gehin v. Wisconsin Group Ins. Bd.***, 2005 WI 16, 278 Wis. 2d 111, 692 N.W.2d 572 is misplaced. ***Gehin*** stands for the proposition that an administrative agency cannot rely on uncorroborated written hearsay alone when that hearsay is otherwise controverted by in-person testimony. ***Id.***, ¶4. In this case, the hearsay statements of Pitzen and Kratz were not uncorroborated. Both Pitzen and Kratz indicated that Sainsbury did not threaten Tatum. Schmidt's testimony that Sainsbury was trying to accommodate Tatum is consistent with Kratz's statement that Sainsbury did not try to provoke a fight with Tatum. Inmate Kazel did not hear Sainsbury threaten Tatum. ***Gehin***'s limitation to the use of the uncorroborated hearsay evidence does not come into play.

On certiorari review of the sufficiency of evidence, "we determine whether reasonable minds could arrive at the same conclusion the committee reached. 'The facts found by the committee are conclusive if supported by "any reasonable view" of the evidence, and we may not substitute our view of the evidence for that of the committee.'" ***Ortega***, 221 Wis. 2d at 386 (citations omitted). We will not substitute our view for that of the agency as to the credibility of witnesses. ***Samens v. LIRC***, 117 Wis. 2d 646, 660, 345 N.W.2d 432 (1984). The committee rejected Tatum's statements as "self-serving and an attempt to blame staff for his actions." The committee found the statements of both witnesses and Miller to be credible. Tatum's challenge to the sufficiency of evidence fails.

Tatum next argues that his request that Pitzen and Kratz appear as witnesses at the disciplinary hearing was improperly denied. WISCONSIN ADMIN. CODE § DOC 303.81(1) states: "[e]xcept for good cause, an inmate may present no more than 2 witnesses in addition to the reporting staff member or members." Tatum offered no explanation why Pitzen and Kratz should be witnesses, in addition to his two other requested witnesses. Tatum asserts, however,

that Pitzen and Kratz should have been considered to be "reporting staff member(s)" so that a showing of good cause was not necessary.

We are not persuaded. Neither Pitzen nor Kratz issued the conduct report. While both are correctional officers, they were merely witnesses to the interaction between Tatum and Sainsbury. Tatum did not have a constitutional right to call an unlimited number of witnesses. *See* ***Wolff v. McDonnell***, 418 U.S. 539, 566-68 (1974). The framework for prison disciplinary hearings, set forth in WIS. ADMIN. CODE § DOC 303.76 through 303.84, meets the minimum requirements of the Due Process clause of the Fourteenth Amendment. *See* ***State ex rel. Hoover v. Gagnon***, 124 Wis. 2d 135, 141, 368 N.W.2d 657 (1985). Because Tatum did not show good cause for calling more than two witnesses, no error occurred.

Upon the foregoing reasons,

IT IS ORDERED that the orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals