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DISTRICT IV

November 22, 2017

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

2016AP835

State of Wisconsin ex rel. Scott A. Heimermann v. William Pollard
(L.C. # 2014CV2869)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Scott Heimermann, pro se, appeals a circuit court order that denied Heimermann's petition for a writ of certiorari challenging a prison disciplinary decision. Heimermann contends that he was denied access to exculpatory evidence contrary to prison procedural rules and his due process rights. Based upon our review of the briefs and record, we conclude at conference that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We summarily affirm.

In February 2014, the Department of Corrections (DOC) issued a conduct report charging Heimermann with lying about staff. The conduct report was written by Sergeant Peter Schalk. Schalk alleged that Heimermann had falsely asserted to prison staff, in the context of a prior disciplinary proceeding, that Schalk intended to intervene on Heimermann's behalf. The conduct report quoted the statements that Heimermann made in the prior disciplinary proceedings that formed the basis of the charge, and indicated that the supporting documents were attached. The hearing officer found Heimermann guilty.

On appeal from an order denying a petition for a writ of certiorari as to a prison disciplinary decision, we examine only whether DOC's decision was within its jurisdiction, according to law, arbitrary or unreasonable, and supported by substantial evidence. *See 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 DOC followed its own rules and complied with due process requirements. *See Curtis v. Litscher*, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43. We independently review DOC's disciplinary decision. *See Anderson-El*, 234 Wis. 2d 626, ¶15.

Heimermann contends that DOC failed to follow its procedural rules and denied Heimermann due process when DOC failed to provide Heimermann with the correspondence that was attached to the conduct report, post-it notes placed on that correspondence in the administrative record, and another handwritten note included in the record. Heimermann

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

contends that he was entitled to that material under WIS. ADMIN. CODE § DOC 303.76(1)(e)1. (Dec. 2006), which provides that an inmate may present evidence at a disciplinary hearing. Heimermann cites a memorandum written by Heimermann's staff advocate in the prior related disciplinary proceedings, which stated that documents attached to the conduct report would be available at the hearing, as establishing a written department policy that Heimermann was entitled to the material for his defense. Heimermann also contends that he had a due process right to the material because, he asserts, the material was exculpatory and would have established his innocence at the disciplinary hearing. In support of his due process argument, Heimermann cites *Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1974) (providing that due process requires "that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense"); and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (providing that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"). We disagree.

The problem with Heimermann's argument that DOC violated its own rules is that nothing Heimermann cites establishes a rule that DOC must provide inmates with material to use in their defense at disciplinary proceedings. WISCONSIN ADMIN. CODE § DOC 303.76(1)(e)1. (Dec. 2006) provides only that an inmate may present evidence at the hearing. Thus, that provision provides inmates the right to present evidence, but does not require DOC to provide the evidence to inmates. The memorandum written by Heimermann's staff advocate does not establish a rule that material must be provided. Thus, we reject Heimermann's claim that DOC violated its own rules.

The problem with Heimermann's due process argument is that nothing about the correspondence attached to the conduct report, the post-it notes, or the separate handwritten note appears relevant to Heimermann's claim of innocence. The material consists of the following: (1) an information request from Heimermann to the warden in the prior disciplinary proceeding, in which Heimermann sought a change of staff advocate, with an attached post-it note stating "Inmate is being issued a conduct report for 'Lying about staff' from Sgt. Schalk"; (2) the information request from Heimermann to the warden in the prior disciplinary proceeding in which Heimermann asserted that Schalk would intervene on Heimermann's behalf, with an attached post-it note stating "Don—This goes with other letters given to you yesterday. Sherry"; and a note in the administrative record, following the warden's response denying Heimermann's request for a change of advocate, stating "Bill—Don has all the info. regarding this. Don asked me to prepare this memo. He wanted to keep the IM documentation so he can conduct an investigation re: Food Service Sgt. SS."

Heimermann asserts that the material shows that Schalk made false statements in the present disciplinary proceeding to deflect blame as to the prior disciplinary proceeding and corroborates Heimermann's claim that Schalk was under investigation for misconduct. He contends that the material would have put the whole proceeding in a different light, because the hearing officer relied on Schalk's credibility to find Heimermann guilty. But Heimermann does not explain why he believes that is so. The content of the material, which is set forth above, does not indicate that Schalk fabricated the allegations against Heimermann or that Schalk was under investigation for misconduct. Because the material that Heimermann believes should have been disclosed would not have supported Heimermann's innocence claim, the failure to provide that evidence did not violate Heimermann's due process rights. See *Jackson v. Buchler*, 2010 WI

135, ¶¶69-72, 330 Wis. 2d 279, 793 N.W.2d 826 (declining to reach whether **Brady** applies in prison disciplinary setting because evidence lacked evidentiary value, and thus there was no due process violation from failure to disclose).

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals