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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 31, 2018

To:

Hon. Valerie Bailey-Rihn
Circuit Court Judge
215 S. Hamilton St.
Madison, WI 53703

Jody J. Schmelzer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Eugene L. Wilson 187659
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

Rebecca Paulson
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2016AP2448 State of Wisconsin ex rel. Eugene L. Wilson v. Reed Richardson and Edward F. Wall (L.C. # 2015CV2971)

Before Lundsten, P.J., Sherman and Kloppenburg, 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).

Eugene L. Wilson, pro se, appeals a circuit court order that affirmed a prison disciplinary decision. Wilson contends that the Department of Corrections (the Department) denied Wilson due process and failed to follow its own rules when the Department: (1) failed to provide Wilson with notice, prior to the disciplinary hearing, of the Department's decision on Wilson's request for witnesses; (2) denied one of Wilson's witness requests; and (3) provided Wilson with an

advocate who failed to assist Wilson in gathering evidence for his defense. 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 November 2014, prison staff issued Wilson a conduct report charging him with battery. The conduct report writer stated that he had witnessed Wilson take a "single spinning swing" at another inmate, and that the other inmate sustained injuries.

The conduct report informed Wilson that the charge against him was for a major offense, and that he was entitled to a formal due process disciplinary hearing unless he waived the due process hearing. Wilson did not waive the formal due process hearing.

Wilson submitted a witness request form acknowledging that he could not request more than two witnesses without good cause. Wilson named two inmate witnesses, and then requested a third inmate witness, asserting that the third witness may have seen the other inmate strike Wilson, showing, according to Wilson, "mutual-combat," rather than "a one-sided assault." Wilson then submitted a second witness request form, explaining that one of his two named witnesses did not witness the event. Wilson sought to replace that witness with the third witness listed on Wilson's prior witness request form.

At the disciplinary hearing, the conduct report writer testified that he witnessed Wilson strike another inmate, but that he did not witness what occurred immediately prior to that. Wilson provided a statement that the other inmate had struck him first. The first witness listed

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

on Wilson's original request for witnesses appeared at the hearing and corroborated Wilson's testimony. The hearing officers found Wilson guilty and imposed 30 days of disciplinary separation. Wilson exhausted his remedies for challenging the disciplinary decision within the prison system, and then sought certiorari review in the circuit court. The circuit court affirmed the disciplinary decision.

In an appeal of a circuit court order affirming a prison disciplinary decision, we review the decision of the Department, rather than the decision of the circuit court. *See* ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶15, 234 Wis. 2d 626, 610 N.W.2d 821. Our review is limited to the following: (1) whether the Department kept within its jurisdiction; (2) whether the Department acted according to law; (3) whether the Department's actions were arbitrary, oppressive, or unreasonable, and represented its will and not its judgment; and (4) whether the evidence was such that the Department might reasonably have made its decision. *See* ***id.*** Whether the Department acted according to law includes the question of whether the Department followed its own rules. ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980).

Wilson contends that, because he never waived his right to a full due process hearing for a major disciplinary violation, he was entitled to all of the rights for a full due process hearing under the Department's rules. *See* WIS. ADMIN. CODE § DOC 303.76 (Dec. 2006)[2] (setting forth the hearing procedure for major disciplinary violations, including the inmate's rights during the proceedings and the process for the inmate to waive the right to a due process hearing). The

[2] All references to the Wisconsin Administrative Code are to the December 2006 version unless otherwise noted.

Department responds that Wilson was not entitled to formal due process rights because the discipline Wilson received was only 30 days in disciplinary separation and did not result in any loss of good time credits. *See* ***Lekas v. Briley***, 405 F.3d 602, 612 (7th Cir. 2005) (no liberty interest implicated when inmate disciplined by 90 days of disciplinary segregation); ***Wolff v. McDonnell***, 418 U.S. 539, 557 (1974) (recognizing liberty interest in good time credits). The Department asserts that Wilson was entitled only to "informal due process" under ***Westefer v. Neal***, 682 F.3d 679, 684 (7th Cir. 2012). Wilson replies that, even if he cannot claim a liberty interest under the due process clause, the Department was required to follow its own rules related to the disciplinary process under ***Meeks***. Wilson asserts that the Department was required to afford him the procedural rights related to a full due process hearing after informing Wilson that he was entitled to those rights.

The Due Process Clause protects against state action that deprives a person of life, liberty, or property without due process of law. *See* ***Casteel v. McCaughtry***, 176 Wis. 2d 571, 579, 500 N.W.2d 277 (1993). As the Department points out, and Wilson essentially concedes in his reply brief, Wilson's disciplinary action resulting in 30 days of disciplinary separation did not implicate a liberty interest that would entitle Wilson to the due process rights recognized in ***Wolff***. *See* ***Lekas***, 405 F.3d at 612. However, Wilson is correct that part of our review of the Department's disciplinary decision is whether the Department followed its own rules. *See* ***Meeks***, 95 Wis. 2d at 119. We turn, then, to Wilson's claims that the Department failed to follow its own rules during Wilson's disciplinary proceedings.

First, Wilson asserts that the Department violated WIS. ADMIN. CODE § DOC 303.81(7) by failing to provide Wilson with advance written notice of which of Wilson's requested witnesses would be present at the disciplinary hearing. *See* § DOC 303.81(7) ("After

determining which witnesses will be called for the accused inmate, staff shall notify the inmate of the decision in writing."). Wilson contends that he had a fundamental right to advance written notice of the Department's decision on Wilson's witness request, and that the Department's failure to follow its own rules was therefore not harmless under ***Anderson-El***, 234 Wis. 2d 626, ¶¶21-24 (rejecting the Department's argument that its failure to provide the required second notice of the disciplinary hearing was harmless error).

The Department responds that it complied with WIS. ADMIN. CODE § DOC 303.81(7) by providing Wilson with written notice of its decision *after* the hearing, pointing out that the rule does not provide a deadline for the Department to provide that written notice. The Department also contends that, even if it violated § DOC 303.81(7), the error was harmless because there is no recognized fundamental right to notice as to which requested witnesses will appear at a disciplinary hearing. *See* ***State ex rel. Anderson v. Gamble***, 2002 WI App 131, ¶9, 254 Wis. 2d 862, 647 N.W.2d 402 (holding that the Department's violation of a rule that amounts to "a violation of … a nonfundamental right does not mandate that the disciplinary proceedings be invalidated").

We conclude that, even if the Department violated its own rules by failing to provide Wilson with advance written notice of the Department's decision on Wilson's witness request, that error was harmless. In ***Anderson***, we held that not every violation of an administrative rule renders a disciplinary proceeding invalid. ***Id.*** We "acknowledge[d] that ***Anderson-El*** rejected the State's harmless error argument," but explained that the ***Anderson-El*** court's "rejection [was] … conditioned" by its reasoning that, there, "'the Department's error was not harmless because the error substantially affected Anderson-El's *fundamental right to adequate notice*'" of the disciplinary hearing. ***Anderson***, 254 Wis. 2d 862, ¶8. In ***Anderson-El***, 234 Wis. 2d 626,

¶24, we explained that written notice of the disciplinary hearing was one of the fundamental procedural rights recognized in ***Wolff***. We explained further that the Department's failure to provide the notice substantially affected Anderson-El's fundamental right to notice because Anderson-El did not know the date, time, and location of the hearing that was necessary to allocate his scarce resources to preparing. ***Anderson-El***, 234 Wis. 2d 626, ¶25. However, neither the informal due process rights outlined in ***Westefer***, 682 F.3d at 684, nor the full due process rights outlined in ***Wolff***, 418 U.S. at 563-72, include the right to advance written notice of a decision on an inmate's witness request. *See* ***Wolff***, 418 U.S. at 563-72. Accordingly, any error in failing to follow the rule as to written notice of the Department's decision on Wilson's witness request was subject to the harmless error rule.

Because the record reveals that Wilson was able to adequately prepare and present his defense, including presenting a witness to corroborate his testimony, the error in failing to provide advance written notice of the decision on Wilson's witness request, if any, was harmless. *See* WIS. ADMIN. CODE § DOC 303.87 ("If staff does not adhere to a procedural requirement under this chapter, the error is harmless if it does not substantially affect a finding of guilt or the inmate's ability to provide a defense.").

Second, Wilson asserts that he was entitled to have two witnesses at the hearing under WIS. ADMIN. CODE § DOC 303.81(1) ("Except for good cause, an inmate may present no more than 2 witnesses in addition to the reporting staff member or members."), and that the Department erred by denying Wilson's request for a second witness. However, the Department approved Wilson's original request for two witnesses. The Department denied Wilson's request for a third witness on grounds that the third witness's testimony would be redundant. Wilson then submitted a second witness request, seeking to substitute the third named witness for the

second named witness. The Department denied the request because Wilson had already submitted his witness request form.

Wilson argues that the Department had no basis to deny Wilson's request for a third witness on grounds that the witness's testimony would be redundant, since the proposed testimony is not in the record. *See* ***Meeks***, 95 Wis. 2d at 127 ("'[S]ome support for the denial of a request for witnesses [must] appear in the record.'" (quoted source omitted)). However, Wilson stated in his original witness request that he believed that the third named witness would testify that the other inmate struck Wilson. At Wilson's disciplinary hearing, Wilson's first named witness provided the same testimony and additionally asserted that the other inmate struck first. Thus, the third named witness's testimony would have been redundant and, indeed, less helpful than the witness who did appear. This supports the Department's decision that Wilson had not shown good cause for his request for a third witness.

Third, Wilson asserts that his staff advocate failed to provide Wilson with the minimum assistance required under WIS. ADMIN. CODE § DOC 303.78(2) because the advocate failed to fulfill Wilson's request for the advocate to obtain testimony or a statement from Wilson's third requested witness. *See* § DOC 303.78(2) (providing that "the advocate's purpose is to help the accused inmate to understand the charges against the inmate and to help in the preparation and presentation of any defense the inmate has, including gathering evidence and testimony"). Wilson cites ***Wolff***, 418 U.S. at 570, for the proposition that an advocate should assist an inmate in collecting evidence when it is unlikely that the inmate will be able to do so on his own. He argues that he was unable to gather the evidence on his own behalf due to his status in separation, and that his advocate was therefore obligated to obtain the third witness's testimony or statement for the disciplinary hearing. However, the record indicates that Wilson was able to

communicate with other inmates regarding his potential witnesses while he was in separation. The record also indicates that Wilson understood the charge against him and was able to present his defense, including witness testimony, at his disciplinary hearing. Wilson's first assigned advocate met with Wilson and provided him with the witness request form, and his second assigned advocate met with him and attended the disciplinary hearing. We conclude that the Department did not violate its own rules or Wilson's due process rights by providing this level of assistance.

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
Acting Clerk of Court of Appeals