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DISTRICT IV

November 14, 2018

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

2017AP642

State of Wisconsin ex rel. Joshua Howard v. Scott Neitzel
(L.C. # 2016CV214)

Before Lundsten, P.J., Blanchard, 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).

Joshua Howard appeals a circuit court order affirming a prison disciplinary decision. Based upon our review of the briefs and record, we conclude at conference that this case is

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

This case arises out of a Department of Corrections (DOC) conduct report alleging that Howard, while an inmate, was running a lawyering enterprise and using a third-party account to conceal payments for legal work performed on behalf of other inmates. A search of Howard's property by DOC staff revealed that Howard was in possession of legal materials belonging or relating to 30 other inmates. After a disciplinary hearing held on October 20, 2014, Howard was found guilty of enterprises and fraud, contrary to WIS. ADMIN. CODE § DOC 303.36 (through September 2014),² and not guilty of three other offenses. The hearing officer documented the decision on a form DOC-84.

Howard appealed the decision through DOC administrative channels and, as a result, the decision was affirmed, but form DOC-84 was revised to include references to the specific evidence the hearing officer evaluated and reviewed, and to explain in greater detail the officer's reasoning for the decision. Howard again sought administrative appeal of the decision, and the revised decision was affirmed by the warden. Howard then sought certiorari review in the circuit court. The circuit court determined that there was substantial evidence in the record to support a finding that Howard engaged in enterprising and fraud, and affirmed DOC's decision. Howard now appeals.

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

² Unless otherwise noted, all references to the Wisconsin Administrative Code are to the September 2014 register, which was in effect for the cited code sections at all times relevant to this action.

“Judicial review on certiorari 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. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). Here, Howard argues that DOC did not act according to law. Specifically, he argues that DOC failed to comply with WIS. STAT. § 227.55 and violated his due process rights in the disciplinary proceedings against him.

We turn first to Howard’s argument that DOC failed to comply with WIS. STAT. § 227.55, which sets forth the requirements for compilation and transmittal of the record after service of a petition for review upon an administrative agency. The provisions of chapter 227 do not apply to proceedings involving prison discipline, such as this one. *See* WIS. STAT. § 227.03(4). Therefore, we reject Howard’s argument that any violation of § 227.55 occurred.

We turn next to Howard’s due process argument. The due process rights of inmates in prison disciplinary proceedings are ““subject to restrictions imposed by the nature of the regime to which they have been lawfully committed.”” *Jackson v. Buchler*, 2010 WI 135, ¶48, 330 Wis. 2d 279, 793 N.W.2d 826 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974)). There are three due process requirements that must be satisfied in a prison disciplinary action: (1) a written notice of the claimed violation; (2) a written statement of the evidence relied upon and the reasons for the disciplinary decision; and (3) an opportunity to call witnesses and present documentary evidence, so long as it does not jeopardize institutional safety or correctional goals. *Jackson*, 330 Wis. 2d 279, ¶50; *Wolff*, 418 U.S. at 563-66.

All three due process requirements were satisfied in this case. The record reflects that Howard was given a copy of the conduct report that detailed his alleged violations, satisfying the

first requirement. As to the second requirement, the hearing officer rendered a written decision on a form DOC-84 and then, at the recommendation of a Corrections Complaint Examiner, revised the form to list the specific evidence relied upon and explain in greater detail the reasoning for the decision. The record also reflects that Howard presented a written statement and witness testimony at the disciplinary hearing, thus satisfying the third due process requirement.

Howard complains that DOC failed to include in the administrative record a twelve-page letter that he received from an individual named Peg Swan. The conduct report alleged that another inmate, Jeff Poff, had attempted to pay Swan \$200 for “legal services.” Howard asserts that Swan’s letter was important to his defense because it would have shown that the \$200 he solicited was not for purposes of engaging in business or enterprise, but to pay half of the filing fee for a federal lawsuit in which Howard and Poff were plaintiffs. Howard concedes that he was given the opportunity to review Swan’s letter at the hearing. In addition, the written statement Howard submitted at the hearing includes a summary of Swan’s letter. However, Howard is correct that the letter itself is not included in the record.

Even if we assume, without deciding the issue, that Swan’s letter was improperly omitted from the record, we agree with the respondents’ position that the error would have been harmless. An inmate is guilty of enterprises and fraud if the inmate “engages in a business or enterprise, whether or not for profit” or “sells anything except as specifically allowed under other sections.” WIS. ADMIN. CODE § DOC 303.36. The hearing officer explained in the revised DOC-84 form that Howard was found guilty of enterprises and fraud because Howard “had other inmate[s] send money via a third part[y] to have them then in return send the money to Howard for legal services” and because the evidence showed that Howard was sent a large number of

receipts addressed to him at the “Howard Institute.” The Swan letter is not listed among the evidentiary materials the hearing officer relied upon, and neither the original nor the revised DOC-84 form makes any reference to Jeff Poff or the \$200 solicited for Peg Swan. In short, Howard has failed to show that inclusion of Swan’s letter in the record would have made any difference to his defense or to the outcome of the disciplinary proceedings. Any error, therefore, was harmless. *See* WIS. ADMIN. CODE § DOC 303.88 (through August 2018) (“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.”).

Finally, Howard asserts that, when the hearing officer was directed by the Corrections Complaint Examiner to issue a revised decision, the officer relied upon “new” documents that were not presented at the original disciplinary hearing, in violation of his due process rights. The revised DOC-84 form lists the physical evidence relied upon as: “3 pages of a phone Interview, 39 copies of money/receipts, 1 prisoner assistant form, 6 papers of [] contract documents.” The respondents argue that these documents were not actually new evidence, but rather were the same documents that were listed on the original DOC-84 form as “Misc[.] paper work.” There is nothing in the record to support Howard’s assertion that the documents at issue were not reviewed by the committee as part of its initial finding of guilty. Moreover, an opportunity to inspect physical evidence is not among the due process requirements for prison disciplinary hearings. *See Jackson*, 330 Wis. 2d 279, ¶50 (stating the three hallmarks of due process that must be satisfied in prison disciplinary actions).

In sum, Howard fails to persuade us that DOC acted contrary to law in any of its actions or omissions described in his briefs.

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

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

Sheila T. Reiff
Clerk of Court of Appeals