COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1762

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN EX REL.
WILLIAM SPEENER,

PETITIONER-APPELLANT,

V.

DONALD GUDMANSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Reversed and cause remanded with directions.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. William Speener appeals the decision of the circuit court denying his petition for a writ of certiorari and affirming the decision of the superintendent of the institution. Because we conclude that it is impossible to

determine the merits of Speener's appeal from the record before us, we reverse and remand to the circuit court with instructions to remand to the adjustment committee for the limited purpose of supplementing the record as discussed below.

Speener was found guilty by the adjustment committee of using marijuana in violation of WIS. ADM. CODE § DOC 303.59, use of intoxicants. The adjustment committee found him guilty based on a positive urinalysis. On the same day the adjustment committee reached its decision, Speener appealed to the warden, claiming that the adjustment committee had not allowed him to place in the record a statement of facts and certain documents. The warden affirmed the adjustment committee's decision and Speener filed a petition for a writ of certiorari in the circuit court. The circuit court affirmed the adjustment committee's decision.

On certiorari, review of the prison adjustment committee is limited to the record created before the committee. *See* ***State ex rel. Whiting v. Kolb,*** 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). The court's review is limited to whether (1) the committee stayed within its jurisdiction, (2) it acted according to law, (3) the action was arbitrary, oppressive or unreasonable and represented the committee's will and not its judgment, and (4) the evidence was such that the committee might reasonably make the order or determination in question. *See* ***id.*** "The facts found by the committee are conclusive if supported by 'any reasonable view' of the evidence and [the court] may not substitute [its] view of the evidence for that of the committee." ***Id.*** (citation omitted).

On his appeal to this court, Speener claims that the urinalysis was not properly performed. In support of this argument he includes in his appendix certain documents. The State correctly asserts that on review of certiorari, this

court is limited to the record before it, and facts which are not in the record cannot be added to it. *See* ***State ex rel. Irby v. Israel***, 95 Wis.2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980). We may not, therefore, consider the documents Speener has attached.

Speener also argues, however, that he attempted to introduce these documents at the hearing before the adjustment committee and was prohibited from doing so. WISCONSIN ADM. CODE § DOC 303.76 provides that in a full due process disciplinary proceeding, "the inmate may present oral, written, documentary and physical evidence ...." The record here, however, is silent as to whether Speener did in fact offer these documents, and if he did, why the adjustment committee would not consider them.

This is the type of situation that this court sought to avoid in ***State ex rel. Lomax v. Leik***, 154 Wis.2d 735, 740, 454 N.W.2d 18, 21 (Ct. App. 1990). We began by noting that on certiorari review, this court may consider whether the agency acted according to law. *See* ***id.*** at 739, 454 N.W.2d at 20. We reasoned that the standard "acted according to law" included the common-law concepts of due process and fair play. ***Id.*** at 740, 454 N.W.2d at 20. This court then stated:

> This means not only that a hearing applying minimal due process or fair play standards must be provided but also "that some form of comprehensible and adequate record should be kept and provided for purposes of review."
>
> For that reason, if an agency on certiorari fails to return a record sufficient to demonstrate that the proceedings before it were procedurally proper, we may vacate the agency's decision. We would otherwise invite an agency subject to certiorari review to evade judicial review of their procedural violations. Evasion would be simple. The agency could hide its procedural violations by failing to develop the record regarding them.

Id. at 740, 454 N.W.2d at 20-21 (citations omitted).

As in ***Lomax***, the committee here may have failed to return a record sufficient to demonstrate that the proceedings before it were procedurally proper. If the committee did commit a procedural error by not allowing Speener to present his documents, then the error is hidden because of the lack of information in the record.[1] The record, which was created by the adjustment committee, is simply not sufficient. Therefore, we must have more information before we can complete our review.[2]

As in ***Lomax***, we reverse and remand only for a limited purpose: supplementation of the record concerning the compliance with procedural rules. *See* ***id.*** at 741, 454 N.W.2d at 21. We remand the case to the circuit court with instructions to remand to the adjustment committee. On remand, the committee shall supplement the record with an indication of whether Speener sought to introduce the documents as he asserts. If he did offer them, the committee must include them in the record and explain why the committee did not accept them. If he did not offer them, the committee should so state.[3]

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[1] Speener's claim gains some support in the record, which indicates that on the same day the committee rendered its decision, he appealed to the warden claiming he was prohibited from offering this evidence.

[2] Speener also claims in this appeal that the adjustment committee erred by not allowing him to present the witnesses he requested. The record indicates, however, that Speener requested the witnesses beyond the two day limit of WIS. ADM. CODE § DOC 303.81(1), and therefore the committee properly denied his request. This is the type of information this court needs to determine whether Speener offered the documents and, if so, why the committee would not accept them.

[3] An adjustment committee may avoid the present problem in the future by noting in its "Reasons for Decision and Evidence Relied On" whether an inmate offered written statements or other documents at a disciplinary hearing. The committee should specifically note a failure to offer any documents when that is the case.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.