COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2491 **Cir. Ct. No. 02CV003384**

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

STATE OF WISCONSIN EX REL. NATHANIEL ALLEN LINDELL,

PETITIONER-APPELLANT,

V.

JON E. LITSCHER AND GERALD BERGE,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Nathaniel Allen Lindell appeals an order affirming two prison disciplinary decisions. He raises numerous issues concerning each of the administrative proceedings. We affirm.

¶2 A conduct report was issued on April 9, 2002, charging Lindell with four disciplinary rule violations, battery, disobeying an order, disrespect to an officer, and disruptive conduct. All resulted from an incident in which, according to the report, officers wanted Lindell to leave his cell while they replaced his television set. Lindell refused to leave and then physically resisted when officers entered his cell and forcibly removed him. He also called the officers "bitches." Two officers and Lindell suffered minor injuries.

¶3 Lindell received a hearing on the charges, and the hearing officer acquitted him of disruptive conduct and found him guilty on the other three charges. On the battery charge, the hearing officer relied on photographs of the injured officers. For the disobeying orders charge, he relied on the statements and testimony that Lindell refused the order of three officers to come out of his cell. The officer relied on the report that Lindell called staff "bitches" to find him guilty of disrespect. The hearing officer expressly found credible the staff description of the incident. As punishment, Lindell received 360 days of program segregation, eight days of adjustment segregation, and fourteen days loss of phone privileges.

¶4 A second, unrelated conduct report was issued on April 23, 2002, charging Lindell with damage to property, group resistance, possession of contraband, and violation of institutional policy and procedure. The conduct report stated that an officer saw Lindell engaging in suspicious activity. Officers subsequently searched Lindell and discovered stitching removed from the seam of his shirt. They also searched his cell and discovered a torn sheet, a pillow with a torn seam, damage to an intercom, and documents containing gang-related symbols and white supremacist literature.

¶5 The hearing officer acquitted Lindell on the policy and procedure charge and found him guilty on the other three. The reasons he was found guilty were:

> 303.20 Group Resistance & Petitions – Guilty
> Based upon testimony of Disruptive Group Coordinator Capt. Linjer testified about the gang affiliation of the contraband (Precepts 88) held as evidence. Committee also notes previous convictions of 303.20 on 2/26/01 and 4/17/02.
>
> 303.35 Damage State Prop – Guilty
> Photographs held as evidence show inmate's torn pillow, torn sheet, and screws partially removed from the intercom.
>
> 303.47 Poss. of Contraband – Guilty
> I/M Lindell was in possession of material deemed by Capt. Linjer as gang related and determined as contraband.
>
> 303.63 Policy and Procedure – Not Guilty
> This violation was not substantiated in the body copy of the conduct report.

¶6 Lindell pursued his administrative appeals, and commenced this judicial review proceeding after exhausting them. This appeal follows the trial court's decision affirming the disciplinary decisions, with a remand for recalculation of restitution for the damaged state property.

¶7 On review of disciplinary decision we apply the same standard of review as the circuit court, as to whether the prison disciplinary committee kept within its jurisdiction, correctly applied the law, did not issue an arbitrary, oppressive or unreasonable decision, and made a determination reasonably based on the evidence. ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). Our review is limited to the record of the prison disciplinary proceedings. *See* ***State ex rel. Irby v. Israel***, 95 Wis. 2d 697, 703, 291 N.W.2d 643 (Ct. App. 1980).

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¶8 Lindell contends that the following errors occurred in his first disciplinary proceeding: (1) his appointed staff advocate did not provide adequate assistance; (2) he was not allowed to review the photographic evidence before the hearing; (3) the evidence was insufficient to support the guilty findings and the discipline imposed; (4) the evidence required a finding that he used self-defense in the face of arbitrary orders and unlawful force; (5) the decision makers in the disciplinary proceeding were biased; and (6) the disciplinary decision provided inadequate reasons.

¶9 Lindell waived his claim of inadequate staff advocate performance. The inmate's duty to preserve the issue is set forth as follows:

> If an inmate believes that an advocate appointed to assist him has failed to perform the duties outlined in WIS. ADM. CODE § DOC 303.78(2), and wishes to preserve the issue for purposes of judicial review, the inmate bears the burden of clearly presenting for the record before the adjustment committee the basis for the claim. An inmate may also pursue a claim that he or she was denied the proper assistance of a staff advocate via the Inmate Complaint Review System, thereby directing administrative attention to, and providing a more specific record of the grounds for, an inmate's complaint regarding his or her advocate.

Ortega, 221 Wis. 2d at 396. Here, the record demonstrates that Lindell neither raised the issue during the disciplinary proceeding, nor in his subsequent administrative appeals. We note that under the holding in ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶¶27-33, 234 Wis. 2d 626, 610 N.W.2d 821, the waiver rule does not apply if an issue of law is presented on review concerning the Department of Correction's failure to follow its own regulations. However, the issue here is one of fact concerning his staff advocate's performance. Additionally, the issue whether the DOC complies with its rule on staff advocates

is resolved when evidence shows that the DOC assigned an advocate. ***Ortega***, 221 Wis. 2d at 395.

¶10 Lindell had no due process right to examine the photographic evidence before his hearing. The limited due process rights afforded prisoners simply do not extend to inspecting physical evidence before a disciplinary hearing. *See* ***Holm v. Haines***, 734 F. Supp. 366, 372 (W.D. Wis. 1990). Additionally, there is nothing to indicate that Lindell suffered any prejudice. Lindell argued self-defense. There was no dispute that a physical confrontation occurred in which guards suffered minor injuries. Therefore, even if Lindell had a right to examine the evidence, the failure to do so in this case was harmless. *See* WIS. ADMIN. CODE § DOC 303.87 (a procedural error is harmless if it does not substantially affect a finding of guilt or the inmate's ability to provide a defense). The issue was how the injury occurred, not whether it occurred.

¶11 The evidence was sufficient to support the guilty findings and the punishment. The conduct report sets forth in detail how Lindell refused direct orders to leave his cell, and then offered violent physical resistance when officers tried to forcibly remove him. If deemed credible, the conduct report alone was sufficient to find Lindell guilty on the charges. *See* ***Saenz v. Young***, 811 F.2d 1172, 1173 (7th Cir. 1987) (the conduct report may provide sufficient evidence of a disciplinary infraction). The hearing officer expressly found the statements in the conduct report credible, and by implication found Lindell's contradictory statement not credible. Those credibility determinations are not subject to review. *See* ***American Mfrs. Mut. Ins. Co. v. Hernandez***, 2002 WI App 76, ¶11, 252 Wis. 2d 155, 643 N.W.2d 584.

¶12 No evidence supports Lindell's claim that he was given an unlawful order to leave his cell, or that forcibly removing him when he refused was unlawful. Lindell alleges that the officers acted with a retaliatory and discriminatory motive. No evidence supports that conclusory allegation. Just as conclusory is his assertion that he had to use self-defense to protect himself against the allegedly unlawful, discriminatory acts.

¶13 There is also no evidence of record showing that the decision makers for the hearing and his administrative appeals were influenced by their bias against him. This, again, is nothing more than a conclusory allegation. The record contains no evidence of bias.

¶14 The disciplinary decision provides an adequate statement of reasons for the guilty findings. A decision must provide a brief statement of the evidentiary basis for the decision such that a reviewing court can determine the sufficiency of the evidence. ***Saenz***, 811 F.2d at 1174. Here, the decision provides a sufficient basis for review. The grounds for the decision are precisely stated, and that is all that is required. Nothing more is necessary.

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¶15 In his challenge to the second disciplinary proceeding, Lindell raises the following issues: (1) did prison officials violate Lindell's due process right by refusing to compel testimony from another inmate; (2) did prison officials charge Lindell in retaliation, because they disapproved of material he possessed; (3) is the rule prohibiting group resistance and petitions unconstitutional; (4) was due process violated because Lindell could not review a correctional officer's statement before the hearing; (5) was the evidence sufficient to find Lindell guilty

of the charges; (6) were the decision makers biased; and (7) did the decision provide adequate reasons.

¶16 Due process does not require a compelled statement from an unwilling witness. There is no authority for the proposition that, in order to provide due process, prison officials must compel any witness the prisoner desires. The decision whether a particular witness should testify remains within the discretion of the prison officials. *See* ***Wolff v. McDonnell***, 418 U.S. 539, 566-67 (1974). In any event, Lindell made no showing that a statement from the unwilling inmate was necessary or even helpful to his defense.

¶17 No evidence of record indicates a retaliatory motive in charging Lindell. Lindell contends, in effect, that the charges against him were so unfounded that one must necessarily infer a retaliatory motive. However, that contention has no merit. Lindell was found in possession of white supremacist literature and gang-related material, according to the witness whose statement the hearing officer relied on. The decision to charge him based on possession of such material carries no inference of retaliation.

¶18 Lindell raises his constitutional challenge to WIS. ADMIN. CODE § DOC 303.20(3) for the first time on appeal. The issue is therefore waived and we will not consider it.

¶19 Due process does not require access to a correctional officer's statement before the hearing. The statement in question, by Captain Linjer, explained the meaning of the symbols and coded messages found in the documents in Lindell's possession. Nothing of record shows that failure to see the document beforehand hampered Lindell's defense, or that any of the information in the

statement surprised him. In any event, there is no authority holding that due process requires discovery in a prison disciplinary proceeding.

¶20 The evidence was sufficient to find Lindell guilty of the three charges. Lindell undisputedly and admittedly possessed state property that was damaged. The hearing officer could reasonably infer that Lindell was responsible for the damage. The hearing officer could also find credible the testimony and statements explaining the gang-related nature of the seized written material, which inmates are prohibited from possessing. The hearing officer was equally entitled to reject, on credibility grounds, Lindell's statement denying the racist and gang-related nature of the written material.

¶21 As in the other proceeding, Lindell's allegation that the decision makers were biased has no support in the record. His statement to that effect is conclusory and without factual support.

¶22 The statement of reasons for the guilty findings, quoted in paragraph 5, are adequate. It is clear, to the point, and precisely states the evidence relied on. Nothing more is needed to satisfy due process.

¶23 Our decision makes it unnecessary to address Lindell's claim of entitlement to costs against the respondents.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.