COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP948 **Cir. Ct. No. 2005CV1862**

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

STATE OF WISCONSIN EX REL. DARNELL JACKSON,

PETITIONER-APPELLANT,

V.

DANIEL BUCHLER AND MATTHEW FRANK,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Darnell Jackson appeals from an order affirming a prison discipline decision. We affirm.

¶2 Jackson was found guilty of inciting a riot. On certiorari review, the circuit court affirmed the decision. Review on certiorari is limited to whether: (1) the agency kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the order or determination in question. ***Coleman v. Percy***, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980). We review the decision of the administrative agency, not the decision of the circuit court. ***State ex rel. Sprewell v. McCaughtry***, 226 Wis. 2d 389, 393, 595 N.W.2d 39 (Ct. App. 1999).

¶3 Jackson first argues that his placement in temporary lock-up before the adjustment committee hearing deprived him of his ability to marshal the facts and present his defense to the committee. The circuit court rejected this argument because the issue was not raised by Jackson before the adjustment committee or during the administrative review process, and therefore he failed to exhaust his administrative remedies. Jackson's brief on appeal does not dispute this conclusion, either factually or legally. Therefore, we affirm on this issue. Jackson also argues that the adjustment committee lost competence to exercise its subject matter jurisdiction due to the alleged illegality of his earlier detention, but he cites no authority that reasonably can be read as leading to this conclusion.

¶4 Jackson argues that it was not proper for a certain lieutenant to be a member of the adjustment committee, due to the fact that she participated in the investigation of the incident. His argument is based on an administrative rule and on due process case law.

¶5 We first address the applicable rule. It provides in relevant part: "No person who has substantial involvement in an incident, which is the subject of a

hearing, may serve on the committee for that hearing." WIS. ADMIN. CODE § DOC 303.82(2) (Dec. 2000). Jackson argues that the lieutenant's involvement in the investigation of this incident precludes her from serving on the committee. The respondents argue that involvement in the "incident" should be read as meaning only involvement in the facts giving rise to the disciplinary charge, and not to the investigation of the incident. Both readings of the rule may be reasonable, and the rule may therefore be ambiguous. However, we conclude that we need not resolve this issue, based on our review of due process case law.

¶6 In addition to the rule, Jackson relies on due process principles. The main legal authority he cites is a quotation he attributes to a leading case on the subject, to the effect that due process is satisfied as long as no member of the disciplinary board has been involved in the investigation. While Jackson's citation appears to attribute this quotation to the majority opinion, it actually appears in a dissent. *See* ***Wolff v. McDonnell***, 418 U.S. 539, 592-93 (1974) (Marshall, J., concurring in part and dissenting in part). The majority opinion's discussion of the required impartiality of committee members is not as specific on this point. *See* ***id.*** at 570-72. However, in a footnote collecting federal Court of Appeals cases on disciplinary proceedings, the majority noted that an impartial hearing board has been required, "to the extent that a member of the board may not participate in a case as an investigating or reviewing officer." ***Id.*** at 572 n.20, (citing ***Clutchette v. Procunier***, 497 F.2d 809 (9th Cir. 1974)). Our research shows that the Supreme Court has not decided this issue since then.

¶7 As discussed above, the respondents argue that the DOC rule should be interpreted to exclude only persons involved in the facts of the alleged violation, and not in the investigation. They argue that their interpretation of the standard in that rule is "similar to that required by considerations of due process." In support of

that proposition they cite two federal Court of Appeals decisions from 1979 and 1983, one from the Third Circuit and one from the Seventh. These contain due process language referring only to the involvement of committee members in the incident itself or in the circumstances underlying the charge. However, neither reaches any conclusion about whether investigating officers are permitted on the committee.

¶8 The parties are apparently unaware that since then the Seventh Circuit has squarely held that "[i]f an officer is substantially involved in the investigation of the charges against an inmate, due process forbids that officer from serving on the adjustment committee." ***Whitford v. Boglino***, 63 F.3d 527, 534 (7th Cir. 1995); *see also* ***Gaither v. Anderson***, 236 F.3d 817, 820 (7th Cir. 2001) (applying ***Whitford***, 63 F.3d at 534); ***Piggie v. Cotton***, 342 F.3d 660, 667 (7th Cir. 2003) (due process forbids "officials who are directly or substantially involved in the factual events underlying the disciplinary charges, or the investigation thereof, from serving on the board hearing the charge," (citing ***Whitford***, 63 F.3d at 534)).

¶9 To summarize, Jackson has provided us with no authority to support his contention that an adjustment committee member is not permitted to have had *any* involvement in the investigation at all. As far as we have discovered, due process case law holds at best that *substantial* involvement is not permitted. Similarly, even if the DOC rule is read most favorably to Jackson, at best it prohibits only substantial involvement, not all involvement. However, for the reason that follows, we conclude it is not necessary in this case for us to decide whether to adopt the Seventh Circuit case law, or to resolve any ambiguity in the DOC rule. Even if we did so, Jackson has not shown a basis for reversal.

¶10 Jackson does not attempt to argue that the lieutenant's involvement in the investigation was substantial. He argues simply that *no* involvement is permitted. His argument essentially is that when the inmate complaint examiner found, in response to Jackson's complaint, that the lieutenant did not have "substantial involvement in the investigative process," this was a concession that there was, in fact, some involvement. However, even if we were to agree with that reading of the decision, that would not by itself lead to relief for Jackson. The question would instead become whether the involvement was "substantial," a point Jackson does not attempt to address. Therefore, we affirm the conclusion that the lieutenant properly served on the committee.

¶11 Jackson next argues that the committee improperly relied on two confidential informant statements. He argues that the statements were not notarized, as is necessary for compliance with the rule requiring the statements to be under oath. *See* WIS. ADMIN. CODE § DOC 303.86(4) (Dec. 2000). We have reviewed the copies of the statements provided to us in the record, and both are notarized. Jackson also argues that the two statements did not meet the rule's corroboration requirement, which provides that, to be considered by the committee, a confidential informant statement must be corroborated by other evidence. The rule provides that two confidential informant statements can corroborate each other, and the respondents argue that this was the basis for admitting these statements.

¶12 We conclude that the statements corroborate each other. The underlying concern in the corroboration requirement is whether there is some ground to believe the informant's statement is reliable. Both of statements in this case say, essentially, that Jackson is a gang leader and, before this incident occurred, he was huddled with other inmates, including the ones who assaulted the staff. These are

significant facts on which both informants agree, and this is a sufficient basis to conclude that the statements corroborate each other.

¶13 Jackson's corroboration argument also includes arguments that are more accurately seen as relating to the sufficiency of the evidence to sustain the finding of guilt. On certiorari review, we apply the substantial evidence test, that is, whether reasonable minds could arrive at the same conclusion reached by the department. ***State ex rel. Richards v. Traut***, 145 Wis. 2d 677, 680, 429 N.W.2d 81 (Ct. App. 1988). The evidence of Jackson's involvement was sufficient. The confidential informant statements show his contact with other involved inmates, and his statement to the effect that the other inmates knew what they had to do in response to the actions of corrections officers against a fellow inmate.

¶14 Jackson next argues that exculpatory evidence, in the form of a videotape of the incident and other prison areas, was withheld from him. He asserts the tapes would be exculpatory because they would show that he was elsewhere in the prison when the alleged events took place. However, Jackson has not provided us with any rule or case law that gives him a right to exculpatory evidence. He argues that he has a right to present physical evidence, but that argument does not establish that he is entitled to obtain such evidence from prison officials.

¶15 Finally, Jackson argues that the committee's statement of the reasons for its decision was insufficient to comply with due process requirements. We conclude the decision was sufficient.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).