

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2918

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

HECTOR CUBERO,

Petitioner-Appellant,

v.

DAN BUCHLER,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Hector Cubero appeals from an order affirming a decision of the disciplinary committee at Racine Correctional Institution (RCI). At issue is its finding that Cubero violated WIS. ADM. CODE § DOC 303.511, being in an unassigned area. He alleges numerous procedural and substantive errors in the proceeding. We reject his arguments and affirm.

Cubero worked in the records office at RCI. However, he was discovered in the office at a time when he was not scheduled to work there. When he was detained and searched, officers found that he possessed records he was apparently not authorized to have. As a result, he was charged in a conduct report with theft and possession of contraband, as well as being in an unassigned area. He was also placed in temporary lockup pending his hearing.

Evidence at the hearing indicated that Cubero had not stolen the recovered documents from the records office but that he lawfully possessed them. He was therefore acquitted on the theft and contraband charges. However, the evidence also showed that he was signed out to the library, was not scheduled to work in the records office when he was discovered there, and was observed acting suspiciously while in the office. As a result, the disciplinary committee found him guilty on the remaining charge of being in an unassigned area. As punishment, the committee imposed five days' adjustment segregation and ninety days' program segregation, and referred Cubero to the program review committee (PRC). On appeal, RCI's warden removed the ninety-day program segregation.

On appeal, Cubero raises the following issues: (1) that RCI officers abused their discretion by placing him in temporary lockup; (2) that the officer who prepared the conduct report on the incident failed to properly investigate beforehand; (3) that the security director failed to sign and date the conduct report; (4) that the committee relied on an incident report that was not disclosed to Cubero; (5) that the evidence did not support the committee's finding; (6) that the committee had no authority to refer him to the PRC; and (7) that the trial court erred by holding that Cubero must exhaust his administrative remedies before raising the committee's procedural errors in his petition for judicial review.

We need not review the decision to place Cubero in temporary lockup. Cubero petitioned for review of the disciplinary committee's decision as upheld by the warden. He has not shown that the temporary lockup decision affected that decision. Cubero's remedy, if he had one, was therefore unavailable in this proceeding.

We also need not review whether the conduct report resulted from a proper investigation. The issue before the disciplinary committee concerned Cubero's guilt or innocence on the charges against him. The committee was not assigned responsibility to judge the sufficiency of the investigation that resulted in those charges. In any event, the record does not indicate that Cubero raised the issue before the committee. An issue is generally waived if not raised before the trier of fact. *Saenz v. Murphy*, 162 Wis.2d 54, 63, 469 N.W.2d 611, 615 (1991), *overruled on other grounds*, *Casteel v. Vaade*, 167 Wis.2d 1, 481 N.W.2d 476, 484 (1992).

Cubero asserts that the security director did not sign and date the conduct report and infers that the director therefore failed to review it as he is required to do. However, the record does not bear out Cubero's assertion. It shows that the conduct report was signed and dated by the security director on June 7, 1993, and served on Cubero the next day. There is no contrary evidence in the record. Even if the security director had failed in this duty, Cubero cannot reasonably argue that any such omission prejudiced him.

The committee's reliance on an incident report was harmless. The report contained evidence on the theft and contraband charges that were dismissed. Additionally, Cubero never challenged its use during the proceeding.

The evidence supported the committee's finding on the unassigned area charge. Cubero points out that an officer who supervised his work in the records office testified that he was allowed to come and go from the office. He argues that this testimony establishes that he was innocent because he had permission to be in the records office. However, the officer also testified that she did not know whether he had permission on that particular occasion. Other evidence established that Cubero was signed out to the library. The committee could reasonably determine that if Cubero was signed out to another area, and his supervisor did not know whether he had permission to be in the records office, then he did not have that permission.

The committee did not exceed its authority by referring Cubero to the PRC. As Cubero notes, WIS. ADM. CODE § DOC 303.84 sets forth the penalties for violating a disciplinary rule and a referral to the PRC is not listed

as a penalty. However, WIS. ADM. CODE § DOC 302.20(2) authorizes the PRC to review an inmate's status after a disciplinary infraction. The DOC considers referral for that review mandatory. *See* WIS. ADM. CODE § DOC ch. 302 appendix, n. DOC 302.20. When the committee referred Cubero to the PRC it was following this mandate, and was not imposing a penalty under § DOC 303.84.

Because we have addressed each of Cubero's issues on de novo review of the disciplinary decision, it is not necessary to address whether the trial court properly held that he failed to exhaust his administrative remedies on certain of those issues.

By the Court. – Order affirmed.

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