COURT OF APPEALS
DECISION
DATED AND RELEASED

December 14, 1995

No. 95-0371

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

STATE OF WISCONSIN EX REL. AL-FURQAAN FUSSILAT A/K/A SEAN F. ROWELL,

Petitioner-Appellant,

v.

GARY R. MCCAUGHTRY,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dodge County: THOMAS W. WELLS, Judge. *Affirmed and cause remanded with directions*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

VERGERONT, J. Sean F. Rowell is an inmate confined to the custody of the Wisconsin Department of Corrections. He appeals from an order affirming a disciplinary decision made by a Waupun Correctional Institution hearing officer. Rowell raises the following issues on appeal: (1) whether prison officials failed to provide an adequate reason for placing him in temporary lockup; (2) whether prison officials failed to conduct an adequate

investigation prior to issuing the conduct report in violation of WIS. ADM. CODE § DOC 303.66(1); (3) whether the security director failed to properly review the conduct report under WIS. ADM. CODE § DOC 303.67; (4) whether prison officials failed to timely provide exculpatory evidence in violation of WIS. ADM. CODE § DOC 303.66(2); (5) whether he validly waived his right to a formal due process disciplinary hearing under WIS. ADM. CODE § DOC 303.76(2); (6) whether the hearing officer failed to corroborate the statements of two confidential informants; (7) whether the hearing officer provided an adequate statement of the reasons for his decision; and (8) whether the trial court erred in remanding the matter to the hearing officer with directions to supplement his reasons for the decision. We reject each of Rowell's contentions and affirm.

BACKGROUND

Rowell was charged in a conduct report with battery of another inmate in violation of WIS. ADM. CODE § DOC 303.12.[1] The conduct report states in relevant part:

> This conduct report was written following an investigation. On [March 1, 1994, at 3:52 p.m.] a 10-10 was called over the institution radio by officer Michael Norton. Officer Norton knew that there was a fight in progress but could not identify the participants because they were not in his line of vision. Responding officers retained inmates Charles Gates and Sean Rowell in the [Northwest Cell Hall]. Inmate Gates ... had visible fresh wounds on his face as well as lacerations on his left ear. Inmate Rowell ... appeared to be breathing hard and had visible redness over the knuckles on both his right and left hands.
>
> ....

[1] WISCONSIN ADMINISTRATIVE CODE § DOC 303.12 provides: "Any inmate who intentionally causes bodily injury to another is guilty of an offense."

> While inmate Gates was being treated by H.S.U. staff Gates made the following statements[:] "As I was walking through the NCH underpass on my way back to the [Northwest Cell Hall], inmate Rowell hit me in the head and knocked me on a cart and punched and kicked me in my chest and head."
>
> ....
>
> During the course of an investigation into this matter, I developed two confidential informants who claimed to be eye witnesses to an assault by inmate Rowell on inmate Gates. The two informants will be referred to hereafter as C.I. #1 and C.I. #2.
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> C.I. #1 states, "On March 1st 1994 I observed the following, inmate Rowell on top of inmate Gates, hitting him."
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> C.I. #2 states, "I seen what happened on 3-1-94 at about 4:00 p.m.... I seen 2 black men fighting. One man called "G.D." his last name is Gates was on his back and a black cart that was out there. The other black man named Rowell was just kicking the shit out of Gates. Gates had his hand up, I think trying to stop some of the hits."
>
> ....
>
> Signed, sworn, and notarized statements provided by the informants will be provided to the members of the due process committee only.

Pending an investigation of the incident, Rowell was placed in temporary lockup. With his copy of the conduct report, Rowell also received a form entitled "NOTICE OF MAJOR DISCIPLINARY HEARING RIGHTS AND WAIVER OF MAJOR HEARING AND WAIVER OF TIME (FOR MAJOR OR MINOR DISCIPLINARY HEARINGS)," informing him of his right to a formal due process hearing under WIS. ADM. CODE § DOC 303.76. Rowell signed this form, and a minor disciplinary hearing was conducted under WIS. ADM. CODE § DOC 303.75.

At the minor hearing,[2] Rowell submitted a written statement asserting that while the victim initially indicated he was battered by two inmates, the next day he stated that he was battered by only Rowell. Rowell stated that the second inmate, Ezzard McKinney, had also been placed in TLU for the alleged battery to Gates, but had been released. Rowell also maintained that he was at the adjustment center at the time of the incident and questioned how the victim could remember him.

The hearing officer found Rowell guilty of battery, relying on the statement in the conduct report and Rowell's written statement. As a reason for his decision, the hearing officer stated, "I find Rowell intentionally injured Gates by punching him in the head." The hearing officer imposed a penalty of eight days' adjustment segregation and 360 days' program segregation. As a reason for the disposition, the hearing officer stated: "Poor attitude. Very aware of committing the violation. Risk of injury. Creates a security risk. TLU time considered." Rowell's appeal to the institution superintendent was denied.

Rowell filed a petition for a writ of certiorari with the trial court for review of the disciplinary proceeding. In his petition, Rowell made several arguments. First, he alleged that prison officials failed to provide an adequate reason for placing him in temporary lockup pending an investigation of the incident. Second, he alleged the security director failed to properly review the conduct report in violation of WIS. ADM. CODE § DOC 303.67. Third, he alleged that prison officials failed to conduct an adequate investigation prior to issuing the conduct report in violation of WIS. ADM. CODE § DOC 303.66(1). Fourth, he alleged that prison officials failed to provide him with a copy of an incident report, which includes a statement that two inmates, not one inmate, assaulted Gates, in violation of WIS. ADM. CODE § DOC 303.66(2). He asserted that he obtained the report from the records office after the hearing. Fifth, he alleged that he did not validly waive his right to a formal due process disciplinary hearing. Sixth, he alleged that the hearing officer failed to corroborate the statements of two confidential informants. Finally, he alleged the hearing officer did not provide an adequate statement of the reasons for his decision.

[2] The hearing was postponed so that Rowell could obtain summaries of the statements made by the confidential informants.

The trial court issued the writ of certiorari and the respondent submitted a return of the record of the disciplinary proceeding. The trial court rejected all of Rowell's contentions, but remanded the matter to the hearing officer with directions to provide a more thorough explanation of his reason for the decision.

On remand, the hearing officer added the following reason for his decision:

> I relied on staff noting Rowells heavy breathing and visible redness over knuckles of both hands.
>
> Victim Gates said Rowell did it. Both confidential informants identified Rowell as the assaulter and aggressor. Their statements are consistent with Gates injuries and the appearance of Rowell (breathing and redness), I found them both to be credible.

When the amended return was filed, the trial court concluded that the hearing officer's supplemented reason for the decision was adequate and affirmed the hearing officer's decision.

SCOPE OF REVIEW

On certiorari, we are limited to determining: (1) whether the agency kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable; and (4) whether the evidence presented was such that the agency might reasonably make the determination it did. *See* ***Van Ermen v. DHSS***, 84 Wis.2d 57, 63, 267 N.W.2d 17, 20 (1978). The test on certiorari is whether reasonable minds could arrive at the same conclusion reached by the agency. ***State ex rel. Palleon v. Musolf***, 120 Wis.2d 545, 549, 356 N.W.2d 487, 489 (1984). "An important component of the analysis is whether the department followed its own rules, `for an agency is bound by the procedural regulations which it itself has promulgated.'" ***State ex rel. Riley v. DHSS***, 151 Wis.2d 618, 623, 445 N.W.2d 693, 694-95 (Ct. App. 1989) (quoting ***State ex rel. Meeks v. Gagnon***, 95 Wis.2d 115, 119, 289 N.W.2d 357, 361 (Ct. App. 1980)).

BASIS FOR TEMPORARY LOCKUP

Rowell first contends that prison officials failed to provide a sufficient written reason for placing him in temporary lockup (TLU) pending an investigation of the incident. We agree.

Prison officials must provide sufficient reasons for placing an inmate in TLU. ***State ex rel. Riley***, 151 Wis.2d at 621 n.1, 445 N.W.2d at 694. Here, on the form entitled "NOTICE OF INMATE PLACED IN TEMPORARY LOCKUP," prison officials checked a box indicating: "If the inmate remains in the general population it is more likely than not that ... the inmate will encourage other inmates by example, expressly, or by their presence to defy staff authority and thereby erode staff's ability to control a particular situation." The State concedes that this is an insufficient explanation for placing Rowell in TLU, as it is no more than a recitation of WIS. ADM. CODE § DOC 303.11(4)(b).[3]

Our conclusion does not require reversal, however, for the limited scope of certiorari review does not provide a remedy for a violation of WIS. ADM. CODE § DOC 303.11(4)(b). *See* ***State ex rel. Riley***, 151 Wis.2d at 621 n.1, 445 N.W.2d at 694. The failure to provide an adequate reason for placing Rowell in TLU does not appear to have had any impact on the hearing officer's decision on the charge in the conduct report. Thus, the violation does not provide a basis for reversal of the hearing officer's decision. As in ***State ex rel. Riley***, we will remand this matter to the trial court with directions to enter an order expunging any reference to Rowell's placement in TLU from his prison records.

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[3] WISCONSIN ADMINISTRATIVE CODE § DOC 303.11(4) provides in part:

> An inmate may be placed in TLU and kept there only if the decision maker is satisfied that it is more likely than not that one or more of the following is true:
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> ....
>
> (b) If the inmate remains in the general population, he or she will encourage other inmates by example, expressly, or by their presence, to defy staff authority and thereby erode staff's ability to control a particular situation.

INVESTIGATION UNDER WIS. ADM. CODE § DOC 303.66(1)

Rowell argues that the staff member who issued the conduct report violated his obligation under WIS. ADM. CODE § DOC 303.66(1) to conduct an investigation to assure himself that a violation occurred before issuing a conduct report. We reject this argument.

WISCONSIN ADMINISTRATIVE CODE § DOC 303.66(1) provides in relevant part:

> [A]ny staff member who observes or finds out about a rule violation shall do any investigation necessary to assure himself or herself that a violation occurred, and if he or she believes a violation has occurred, shall write a conduct report.

The Appendix Note to this provision states in part:

> If the officer did not personally observe the infraction, sub. (1) requires that he or she investigate any allegation to be sure it is believable before writing a conduct report. An informal investigation by the reporting officer can save the time of the adjustment committee by weeding out unsupported complaints, and can also provide additional evidence to the adjustment committee if any is found. Also, it is fairer to the inmate to spare him a hearing when the officer cannot uncover sufficient evidence.

The conduct report plainly states that it was issued after an investigation. The investigation revealed that when officers responding to a report of a fight arrived at the scene, inmate Gates had fresh wounds to his face and ear, Rowell appeared to be breathing hard and had visible redness over the knuckles of both hands, and Gates stated that Rowell had hit him in the head, knocked him onto a cart, and punched and kicked his head and chest. The investigating officer also obtained the signed, sworn and notarized statements of two confidential informants who claimed to be eyewitnesses to Rowell's

battery of Gates. This pre-conduct report investigation was sufficient to satisfy the requirement in WIS. ADM. CODE § DOC 303.66 that a staff member conduct any investigation necessary to satisfy himself or herself that a battery had occurred and that Rowell was the aggressor.

SECURITY DIRECTOR'S REVIEW

Rowell contends that the security director's review of the conduct report under WIS. ADM. CODE § DOC 303.67 was deficient. Rowell argues that the security director should have dismissed the conduct report, or at least reduced the charge to WIS. ADM. CODE § DOC 303.17 (Fighting), because there was no factual basis for a conclusion that he was the aggressor. We reject this argument because the conduct report quotes Gates and the two confidential informants as alleging that Rowell was the aggressor.

EXCULPATORY EVIDENCE

Rowell asserts that the staff member who prepared the conduct report failed to include relevant physical evidence with the conduct report in violation of WIS. ADM. CODE § DOC 303.66(2).[4] Specifically, Rowell contends that the staff member should have included a copy of an incident report which includes an "exculpatory" statement that Gates was assaulted by *two* inmates.[5]

Even if the incident report were considered "physical evidence," there is no indication that the incident report was one of the documents before the hearing officer at the time of the hearing. The return of the record is certified to be "the complete record of all proceedings related to the matter or matters which are the subject of a writ of certiorari." In the absence of a showing that the record is incorrect, the petitioner must be content to have his rights determined from the facts contained in the return of the record. *See* ***State ex rel. Gray v. Common Council***, 104 Wis. 622, 627, 80 N.W. 942, 943 (1899). *See also* ***State ex rel. Irby v. Israel***, 95 Wis.2d 697, 705-06, 291 N.W.2d 643, 647 (Ct.

[4] WISCONSIN ADMINISTRATIVE CODE § DOC 303.66(2) provides that in preparing a conduct report, "[a]ny physical evidence shall be included with the conduct report."

[5] Rowell obtained a copy of the incident report several months after the hearing was concluded.

App. 1980). Because the incident report is not part of the record, we cannot consider it.[6]

WAIVER OF FORMAL DISCIPLINARY HEARING

Rowell contends that he did not execute a valid waiver of his right to a formal due process disciplinary hearing to which he was entitled under WIS. ADM. CODE § DOC 303.76. He does not allege that his waiver was not knowing and intelligent. Rather, he argues that his waiver was invalid because he did not check all of the boxes on the waiver form provided by the DOC.

WISCONSIN ADMINISTRATIVE CODE § DOC 303.76 provides that an inmate accused of a major offense is entitled to a formal due process disciplinary hearing. A violation of WIS. ADM. CODE § DOC 303.12 (Battery) is a major offense. However, WIS. ADM. CODE § DOC 303.76(2) provides that an inmate accused of a major offense may waive his or her right to a formal due process hearing.[7] When an inmate charged with a major offense waives his or her right to a formal due process hearing, a hearing of the type used for a minor offense is used. Rowell's offense was disposed of under this minor offense procedure. *See* WIS. ADM. CODE § DOC 303.75.

WISCONSIN ADMINISTRATIVE CODE § DOC 303.76(2) provides that "[a]n inmate may waive the right to a due process hearing in writing at any time." The Appendix Note to that provision provides the following:

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[6] We note that WIS. ADM. CODE § DOC 310.04(3) provides that the Inmate Complaint Review System (ICRS) may be used to challenge the procedure used by the adjustment committee or hearing officer. *See* ***State ex rel. Irby v. Israel***, 95 Wis.2d 697, 291 N.W.2d 643 (Ct. App. 1980) (inmate used the ICRS to challenge the adjustment committee's failure to consider a piece of documentary evidence at his disciplinary hearing).

[7] Waiver of the right to such a formal due process hearing includes waiver of the inmate's right to a staff advocate and to question or confront witnesses. *See* WIS. ADM. CODE § DOC 303.76. In a minor hearing, the inmate still has an opportunity to make a statement, there is an impartial hearing officer, a decision is based on the evidence, and an entry in the records is made only if the inmate is found guilty. *See* APPENDIX NOTE, WIS. ADM. CODE § DOC 303.76.

> To ensure that any waiver is a knowing, intelligent one, the inmate must be informed of his or her right to a due process hearing and what that entails; be informed of what the hearing will be like if he or she waives due process; and be informed that the waiver must be in writing.

All the requirements of a knowing and intelligent waiver were met in this case. Rowell was provided with a DOC form entitled "NOTICE OF MAJOR DISCIPLINARY HEARING RIGHTS AND WAIVER OF MAJOR HEARING AND WAIVER OF TIME." Rowell checked boxes on this form indicating that: (1) he had read the notice of major disciplinary hearing rights; (2) he understood what his rights were; (3) he understood that in waiving his rights he was waiving his rights to a staff advocate and to request witnesses; and (4) he was waiving his right to a formal due process hearing, but was not admitting his guilt. The form is signed and dated by Rowell, and witnessed.

It is true that Rowell ignored a section of the form that included boxes designed to indicate whether the inmate is waiving his right to a formal due process hearing and to certain hearing time limits, or only one or the other. However, the significant point is that Rowell fully completed the section of the form dealing with waiver of a formal due process hearing. Because Rowell completed the relevant portion of the waiver form and does not contend that his waiver was not knowing and intelligent, we reject his argument that his waiver was invalid.

CONFIDENTIAL INFORMANT STATEMENTS

Rowell asserts that the record does not reflect that the statements of the two confidential informants were corroborated under WIS. ADM. CODE § DOC 303.86(4).[8] However, the provisions of WIS. ADM. CODE § DOC 303.86(4)

[8] WISCONSIN ADMINISTRATIVE CODE § DOC 303.86(4) provides in part:

> If a witness refuses to testify in person and if the committee finds that testifying would pose a significant risk of bodily harm to the witness, the committee may consider a corroborated, signed statement under oath from that witness without revealing the witness's identity.

apply only in formal due process hearings, not minor hearings. ***State ex rel. Hoover v. Gagnon***, 124 Wis.2d 135, 150, 368 N.W.2d 657, 664 (1985).[9] Rowell validly waived his right to a formal due process hearing. Accordingly, the hearing officer properly relied on the statements of the confidential informants, whether or not they were corroborated within the meaning of WIS. ADM. CODE § DOC 303.86(4).

REMAND

Rowell complains that the trial court erred in remanding the matter to the hearing officer with directions to supplement his reasons for the decision. We disagree. A court sitting in certiorari may remand for limited purposes. ***State ex rel. Lomax v. Leik***, 154 Wis.2d 735, 741, 454 N.W.2d 18, 21 (Ct. App. 1990). One of those purposes is to direct the adjustment committee or hearing officer to set forth the evidence relied on and the reasons for whatever penalty is imposed. *See* ***State ex rel. Irby***, 95 Wis.2d at 708, 291 N.W.2d at 648. On remand, the hearing officer indicated that in addition to the statements in the conduct report, he relied on the statements of the confidential informants. This did not involve an impermissible shoring-up of deficient findings. *See* ***State ex rel. Meeks***, 95 Wis.2d at 129, 289 N.W.2d at 365. The hearing officer did not reopen the evidentiary record against Rowell--he simply provided further reasons for his decision.

SUFFICIENCY OF THE EVIDENCE

When a court on certiorari considers whether the evidence is such that the hearing officer might reasonably have made the decision that he or she did, the court does not conduct a de novo review. ***Van Ermen***, 84 Wis.2d at 64, 267 N.W.2d at 20. The court does not weigh the evidence, nor may it substitute its view of the evidence for that of the hearing officer. ***Id.*** The inquiry is whether there is substantial evidence in the record to support the conclusion reached by the hearing officer. ***Id.***

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[9] An inmate does not have the right to confront or cross-examine witnesses in a disciplinary proceeding beyond that permitted by the department of corrections' administrative rules. *See* ***Wolff v. McDonnell***, 418 U.S. 539, 567-68 (1974).

Under this standard, we affirm the hearing officer's decision. In the conduct report, upon which the hearing officer relied, Gates is quoted as saying that Rowell "hit me in the head and ... punched and kicked me in my chest and head." The conduct report also cites the staff member's statement that Rowell was breathing heavy and had visible redness over the knuckles of both hands when he was located, which the hearing officer noted was consistent with Gates' injuries. Finally, the summaries of the two confidential informants indicate that they viewed the incident and that it was Rowell who was involved in the battery and who was the aggressor.

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

Not recommended for publication in the official reports.