COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1996

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, STATS.

NOTICE

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No. 95-1042

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

STATE OF WISCONSIN EX REL.
GARY E. ANDRASHKO,

Petitioner-Appellant,

v.

GARY R. MCCAUGHTRY,

Respondent-Respondent.

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

Before Eich, C.J., Vergeront, J., and Robert D. Sundby, Reserve Judge.

PER CURIAM. Gary Andrashko appeals from an order of the trial court, which determined that although the Department of Corrections failed to follow its own rules at a major conduct hearing, the error was not prejudicial. The court sustained the adjustment committee's finding that Andrashko was guilty of violating WIS. ADM. CODE §§ DOC 303.24 (disobeying

orders); 303.25 (disrespect) and 303.511 (being in an unassigned area). Because we conclude that (1) the admitted errors were prejudicial; and (2) Andrashko failed to receive proper notice of his hearing, we reverse.

Andrashko worked in the laundry department at Waupun Correctional Institution. On August 5, 1994, he took a pair of pants to the "auto-tag department." Although no party enlightened this court, we surmise there is an ongoing relationship between laundry and auto-tag which requires passing garments back and forth.

The parties disagree on whether Andrashko had permission to be in auto-tag. Andrashko claims he took the pants to auto-tag by direct orders of Sergeant McCarthy, his supervisor. He also claims that an "Officer Jill," last name unknown, who was stationed in auto-tag, had knowledge of his right to be in auto-tag with the pants. However, another officer, Sergeant Core, did not believe that Andrashko had permission to be there. He challenged Andrashko, who replied, "What are you trying to be some kind of super cop." Sergeant Core contacted Sergeant McCarthy, who told Sergeant Core that Andrashko did not have his permission to be in auto-tag. Sergeant Core then wrote the conduct report that underlies this appeal.

On August 5, 1994, Andrashko was placed in temporary lock-up (TLU) and was appointed a staff advocate named Chuck Pearce. On August 11, 1994, Andrashko designated inmate Hunter and Sergeant McCarthy as his two witnesses. On August 16, Andrashko requested that Sergeant McCarthy be removed from his witness list and replaced with two others, inmate Funk and "Officer `Jill,' Auto Tag."

On August 17, 1994, Andrashko wrote to Warden McCaughtry and the adjustment committee, asking them to postpone the hearing and replace Pearce as his advocate. Andrashko stated he was dissatisfied with Pearce because Pearce refused to investigate and interview eyewitnesses. Andrashko indicated that, because of his TLU status, he was unable to "perform any investigatory functions on my own, [and] I therefore need an advocate who will assist me in marshalling evidence, interviewing witnesses, and other aspects vital to preparing and presenting a defense at my hearing...."

Andrashko received no response to his requests, and the hearing occurred on August 25, 1994. The adjustment committee found Andrashko guilty of the three charges over his objection regarding his requests, and the warden affirmed the decision. The trial court granted Andrashko's petition for certiorari.

Judicial review of certiorari actions is limited to determining whether the administrative hearing committee kept within its jurisdiction, whether it proceeded on a correct theory of law, whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and whether the evidence was such that the committee might reasonably make the determination in question. As to this last question, the test is whether reasonable minds could arrive at the same conclusion reached by the administrative tribunal. ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment,*** 131 Wis.2d 101, 120, 388 N.W.2d 593, 600 (1986); *see also* ***Van Ermen v. DHSS,*** 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978) (same standard applies on appellate review).

A reviewing court on certiorari does not weigh the evidence presented to the adjustment committee. ***Id.*** at 64, 267 N.W.2d at 20. Our inquiry is limited to whether any reasonable view of the evidence supports the committee's decision. ***State ex rel. Jones v. Franklin,*** 151 Wis.2d 419, 425, 444 N.W.2d 738, 741 (Ct. App. 1989).

As the trial court found, it is undisputed that DOC ignored Andrashko's request for postponement and request for change of advocate. This was improper. Specifically, WIS. ADM. CODE § DOC 303.76(3) provides that an inmate may request additional time to prepare for a hearing "and the security director shall grant the request unless there is good reason to deny it." Similarly, WIS. ADM. CODE § DOC 303.78(1)(c) provides that if an inmate objects to assignment of a particular advocate because the advocate has a conflict of interest, "the superintendent shall assign a different staff member to serve as the inmate's advocate."

Although the trial court correctly found that DOC failed to adhere to these provisions, it found that failure was not prejudicial because "[t]he two inmate substitute witnesses were workers in the auto tag shop where the

offenses occurred; their testimony, at best, would have been cumulative to the testimony of Inmate Hunter."

We disagree that no prejudice attached. The trial court's finding is contradicted by the record. First, the substitute witnesses were not both inmates. One was "Officer `Jill,'" who was alleged to be an officer regularly stationed in auto-tag. As Andrashko cogently points out, "[H]er status as an officer affords much credibility to [p]etitioner's defense." Second, inmate Hunter was not an auto-tag employee, but was stationed in the laundry. Thus, the testimony of auto-tag employee inmate Funk (the substitute witness Andrashko requested) would not necessarily have been cumulative to that of laundry employee inmate Hunter.

We conclude that the adjustment committee's failure to honor Andrashko's requests was a prejudicial violation of WIS. ADM. CODE §§ DOC 303.76(3) and 303.78(1)(c), and was therefore "unreasonable." ***Brookside***, 131 Wis.2d at 120, 388 N.W.2d at 600.

Andrashko also argues that he had no notice of his hearing. The trial court found that Andrashko was informed that his hearing would be held not sooner than two days and not later than twenty-one days after he received notice, and this complied with all the notice he was due under ***Saenz v. Murphy***, 153 Wis.2d 660, 681, 451 N.W.2d 780, 788 (Ct. App. 1989), *rev'd on other grounds* 162 Wis.2d 54, 469 N.W.2d 611 (1991). We disagree that ***Saenz*** remains good law. ***Livesey v. Copps Corp.***, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979) (we are bound by Wisconsin Supreme Court precedent).

In ***Irby v. Macht***, 184 Wis.2d 831, 845, 522 N.W.2d 9, 15 (1994), *cert. denied*, 115 S. Ct. 590 (1994), our supreme court enumerated the "procedures inmates *must* be afforded with respect to disciplinary hearings." Among these "*must*"-have procedures, the court specifically read into WIS. ADM. CODE § DOC 303.81(9) a requirement that "inmates must be given notice of the *hearing's time* ...." ***Id.*** (Emphasis added.) Thus, a bare form notice that a hearing would be held between two and twenty-one days of a conduct report does not comply with WIS. ADM. CODE § DOC 303.81(9) and is "unreasonable." ***Brookside***, 131 Wis.2d at 120, 388 N.W.2d at 600.

Because we conclude that the adjustment committee erred in three major ways, we reverse on these grounds and need not consider the remainder of Andrashko's arguments. ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983). We remand to the trial court, which shall order the necessary relief for Andrashko. *Cf.* ***State ex rel. Lomax v. Leik***, 154 Wis.2d 735, 741, 454 N.W.2d 18, 21 (Ct. App. 1990).

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

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