COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1768

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

STATE OF WISCONSIN EX REL. LARRY J. BROWN,

PETITIONER-APPELLANT,

V.

GARY R. MCCAUGHTRY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County: JOSEPH E. SCHULTZ, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Larry Brown, pro se, appeals the order of the circuit court quashing a writ of certiorari and affirming a decision of the Program Review Committee (PRC) and two separate disciplinary decisions. The issues on appeal are whether the conduct reports were properly upgraded from minor to

major offenses, whether the reporting officer was impartial, and whether there was sufficient evidence to support the adjustment committee's decisions. We affirm.

The three decisions at issue are conduct reports numbers 770365 and 816326, and a PRC decision denying Brown's request for transfer to a medium security institution. In conduct report number 770365, Brown was found guilty of violating WIS. ADM. CODE § DOC 303.15, sexual conduct, for masturbating in front of a female officer. Captain Schaller was the officer who determined that the report should be upgraded from a minor to a major offense.

In report number 816326, Brown was found guilty of violating WIS. ADM. CODE § DOC 303.271, lying about staff, for false statements he made about an officer in an inmate complaint which he gave to another officer to read. The officer who read Brown's complaint reported the incident to Captain Schaller, who then wrote the conduct report.

In the PRC determination, Brown was denied transfer to a medium security institution because of the nature and severity of his criminal offenses. Captain Schaller was a member of the PRC which denied the transfer.

Brown appealed the decisions in all three cases administratively, and the decisions were affirmed. Brown raised several issues in his three administrative appeals. In 770365, Brown argued that the report did not list the subsection he had violated and that it had been improperly upgraded from a minor to a major violation. In 816326, Brown apparently argued both to the adjustment committee and the warden that Captain Schaller was not impartial and should not have written the conduct report, and that the report was improperly upgraded from a minor to a major violation. He also appears to have argued that there was insufficient evidence to support the adjustment committee's decisions in both

cases. On appeal from the decision of the PRC, Brown argued that there was no justification for the committee's decision not to transfer him.

Standard of Review.

On certiorari, review of the prison adjustment committee is limited to the record created before the committee. *See* ***State ex rel. Whiting v. Kolb,*** 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). The court's review is limited to whether (1) the committee stayed within its jurisdiction, (2) it acted according to law, (3) the action was arbitrary, oppressive or unreasonable and represented the committee's will and not its judgment, and (4) the evidence was such that the committee might reasonably make the order or determination in question. *See* ***id.*** "The facts found by the committee are conclusive if supported by 'any reasonable view' of the evidence and [the court] may not substitute [its] view of the evidence for that of the committee." ***Id.*** (citation omitted).

The PRC Decision.

In his appeal to this court, Brown argues that the PRC decision violated his due process rights because Captain Schaller was a member of the committee and was the same officer who wrote one of the conduct reports and upgraded the other. He also argues that the record does not contain the complaint used against him at the hearing. Issues which an inmate does not raise before the PRC are waived. *See* ***Saenz v. Murphy***, 162 Wis.2d 54, 62-63, 469 N.W.2d 611, 615 (1991). Issues which an inmate does not raise in his administrative appeal are also waived. *Cf.* ***State ex rel. Braun v. Krenke***, 146 Wis.2d 31, 39, 429 N.W.2d 114, 118 (Ct. App. 1988). Since Brown did not raise these issues before the PRC or in his administrative appeal, he has waived them.

Brown also contends that the circuit court did not rule on his motion to compel the production of certain documents. The State points out in its brief, however, that the record below was supplemented in response to Brown's motion with a page that had been inadvertently omitted from one of the documents in his appeal of the PRC decision.

The other document which Brown wanted added to the record, the inmate complaint which he had drafted and which formed the basis for conduct report number 816326, was not part of the record before the adjustment committee and therefore could not be added to the record on certiorari. This court is limited to the administrative record on certiorari and facts which are not in the record cannot be added to it. *See* ***State ex rel. Irby v. Israel***, 95 Wis.2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980). Furthermore, the complaint was adequately described by the officer in the conduct report.[1] The adjustment committee was not required to produce the actual complaint. *Cf.* ***State ex rel Ortega v. McCaughtry***, No. 97-2972, slip op. at 10-11 (Wis. Ct. App. Aug. 6, 1998).

The Conduct Reports.

In his appeals of both reports 770365 and 816326, Brown argues that the reports were improperly upgraded from minor to major offenses in violation of DOC rules. WISCONSIN ADM. CODE § DOC 303.68(4) allows the security director to decide whether a violation shall be treated as a major offense. The regulation

[1] The inmate complaint was described in the conduct report as follows: "[The officer] said she read the [inmate complaint] which contained several statements about [another officer]. These statements being (1) that [the officer] comes into work on third shift smelling of alcohol and (2) that [the officer's] clothing is all messed up when she comes to work and she looks all sexed out."

requires the security director to consider certain criteria and indicate in the record the reason for his or her decision.

In both incidents, the conduct reports indicate that the security director decided to upgrade the violations from a minor to a major offense because the conduct created the risk of serious disruption to the institution. The two offenses charged were engaging in sexual conduct in front of a prison officer and lying about a prison officer. Both offenses create a threat to the officer's authority and hence the risk of institutional disruption. The reports were not improperly upgraded.

The second issue is whether Captain Schaller should not have written conduct report 816326 because he was not impartial. The adjustment committee concluded in response to this claim raised by Brown: "We do not find the inmates [sic] defense that Captain Schaller should not have written the report credible. The fact that he signed off as the security director on another report is irrelevant." As we discussed above, we are limited to the record created before the adjustment committee. *See* ***Irby***, 95 Wis.2d at 703, 291 N.W.2d at 646. There is no evidence establishing that Schaller was not impartial. We agree with the circuit court's conclusion that the record before us does not support Brown's allegations that Captain Schaller was not impartial.

The third issue is whether there was sufficient evidence to support the committees' decisions. On certiorari review, we apply the substantial evidence test, under which we determine whether reasonable minds could reach the same conclusion reached by the committee. *See* ***State ex rel. Richards v. Traub***, 145 Wis.2d 677, 680, 429 N.W.2d 81, 82 (Ct. App. 1988).

In conduct report number 770365, Brown was charged with a violation of WIS. ADM. CODE § DOC 303.15, sexual conduct. Section 303.15(1), STATS., states, in relevant part, that any inmate who "[e]xposes his or her intimate parts to another person for the purpose of sexual arousal or gratification, or for exhibitionistic purposes," is guilty of an offense. Brown did not deny masturbating but claimed only that he did not know the officer was there. The adjustment committee found, however, that the incident "occurred during the second round of opening cells so he was fully aware of [the officer's] presence and made no attempt to cover himself." Based on this evidence, the adjustment committee could reasonably determine that Brown was guilty of the charged violation.

In conduct report 816326, Brown was charged with violating WIS. ADM. CODE § DOC 303.271, lying about staff. Section DOC 303.271 states in pertinent part:

> (1) Any inmate who knowingly makes a false written or oral statement about a staff member with the intent to harm the staff member and makes that false statement public is guilty of an offense.
>
> (2) This section applies to all false statements, including those made in the inmate complaint review system, which are revealed to persons outside the complaint system.

The adjustment committee found that Brown had falsely stated in an inmate complaint that an officer "comes into work on the third shift smelling of alcohol and that her clothing is all messed up when she comes to work and she looks all sexed out." Further, the adjustment committee found that he had made this statement public by giving it to another officer to read. In reaching this decision, the committee relied on the officer's statements in the conduct report.

We conclude that based on this evidence the committee could reasonably conclude that Brown committed the offense charged.

Any other issues that Brown may have raised on this appeal he has waived because he did not raise them before the adjustment committee or in his appeal to the warden. Because we conclude that there was sufficient evidence to support the adjustment committees' and the PRC's decisions, we affirm.

By the Court.—Order affirmed.

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