COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-0978

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

STATE OF WISCONSIN EX REL. MARK TAYLOR,

PETITIONER-APPELLANT,

V.

DANIEL BERTRAND, WARDEN, GREEN BAY CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Vergeront, J., and William Eich, Reserve Judge.

¶1 PER CURIAM. Mark Taylor appeals from an order denying his petition for a writ of certiorari to review a prison disciplinary action against him, and affirming the decision of the warden of the institution. Although he raises several claims, one is dispositive. We conclude that under the recent case of ***State ex rel. Anderson-El, II v. Cooke***, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821, the institution's failure to follow its rule with respect to the inmate's request for witnesses requires that we reverse the trial court's order.[1]

¶2 Taylor was an inmate at Green Bay Correctional Institution at the time of the incident giving rise to this appeal. He was involved in an inmate disturbance and was issued Conduct Report No. 906838, charging him with violations of institutional rules. That conduct report was not processed, and instead was referred for investigation. Pursuant to that investigation, the report was replaced by Conduct Report No. 633469, which charged Taylor with violations of WIS. ADMIN. CODE § DOC 303.18 (Inciting a Riot), WIS. ADMIN. CODE § DOC 303.16 (Threats), WIS. ADMIN. CODE § DOC 303.24 (Disobeying Orders), and WIS. ADMIN. CODE § DOC 303.25 (Disrespect).

¶3 Taylor requested that two staff members attend his disciplinary hearing. They had not prepared the conduct reports. The form on which he requested the two witnesses indicates the request was reviewed by another staff member, and that the two requested witnesses would not attend because the hearing was "not in [their] working hours." At the hearing, as summarized in the

[1] We have withdrawn an earlier summary decision of this case in light of ***State ex rel. Anderson-El, II v. Cooke***, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821, which overruled ***Saenz v. Murphy***, 162 Wis. 2d 54, 469 N.W.2d 611 (1991). We relied on ***Saenz*** in our summary decision. We commend the State for bringing ***Anderson El*** to our attention promptly after it was decided.

written record of witness testimony, the staff advocate stated that he talked to the requested witnesses: one said "the report is correct" and the other said he "doesn't know anything about the [first] paragraph, but the rest is correct." The record of testimony from the hearing also indicates that the officer who prepared the conduct report was present at the hearing and stated he obtained the information in the report from the two officers who were involved in the incident and from the two requested witnesses.

¶4 The adjustment committee found Taylor guilty of all four charged offenses. He received a disposition of eight days adjustment segregation, 360 days program segregation, and twenty days extension of his mandatory release date. Taylor appealed and the warden affirmed the adjustment committee's findings of guilt and disposition. The trial court, on certiorari review, affirmed the adjustment committee's and the warden's determinations.

¶5 On certiorari review, this court reviews the adjustment committee's record independently of the trial court's review. ***Gordie Boucher Lincoln-Mercury Madison, Inc. v. City Plan Comm'n***, 178 Wis. 2d 74, 84, 503 N.W.2d 265 (Ct. App. 1993). Accordingly, we do not review the trial court's decision for error. *See* ***id.*** Our review is limited to the record created before the committee. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). On certiorari we consider only whether: (1) the committee stayed within its jurisdiction; (2) it acted according to law; (3) its 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. ***Id.***

¶6 Among other claims in the trial court, Taylor asserted that his due process rights were violated because his requested staff witnesses did not attend his disciplinary hearing and because he was denied the right to cross-examine witnesses. He also asserted the institution did not follow its own rule. The trial court decided, based on ***Saenz v. Murphy***, 162 Wis. 2d 54, 469 N.W.2d 611 (1991), that Taylor had waived these issues because he failed to raise these claims of error to the committee.

¶7 ***Saenz*** was recently overruled by ***Anderson-El***. The supreme court held in ***Anderson-El*** that "[b]ecause the right to call witnesses is fundamental to due process, and the issue presented is a question of law, ... Saenz did not waive his objection to the absence of his anticipated witness." ***Anderson-El***, 2000 WI 40 at ¶31. Therefore, while there is no evidence in the record that Taylor objected, either at his hearing or in his appeal to the warden, that his witnesses were absent, that he was being denied his right to cross-examine them, or that the institution did not follow its rule, the holding in ***Anderson-El*** permits him to have the issue heard on the merits on this appeal.

¶8 WISCONSIN ADMIN. CODE § DOC 303.81(1) permits the accused inmate to request no more than two witnesses to appear at the hearing, in addition to the reporting staff member or members, except where good cause is shown. WISCONSIN ADMIN. CODE § DOC 303.81(2) provides that "… the security director shall review [the witness requests] to determine whether the witnesses possess relevant information and shall be called." Under WIS. ADMIN. CODE § DOC 303.81(3), requested witnesses who are staff or inmates are required to attend the hearing unless there is risk of harm to the witness if the witness testifies; the testimony is irrelevant to the question of guilt or innocence; or the testimony is "merely cumulative of other evidence and would unduly prolong the hearing."

After determining which witnesses are to be called for the accused inmate, the staff is required to notify the inmate in writing. WIS. ADMIN. CODE § DOC 303.81(7).

¶9 While WIS. ADMIN. CODE § DOC 303.81(4) states that a staff member's being on a different shift constitutes unavailability, it provides for alternative procedures in that event:

> (4) If a witness is unavailable to testify, the adjustment committee may consider a written statement, a transcript of an oral statement, or a tape-recorded statement. Unavailability means … being on a different shift in the case of a staff member. The adjustment committee may consider a written statement, a transcript of an oral statement, or a tape-recorded statement if it determines that there is cause for the witness not to testify.
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> ….
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> (6) If it is not possible to get a signed statement in accordance with subs. (4) and (5), the hearing officer may consider other evidence of what the witness would say if present.
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> ….
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> (8) Witnesses other than inmates or staff may not attend hearings but advocates with the hearing officer's permission may contact them. The adjustment committee may designate a staff member to interview any such witness and report to the committee.

WIS. ADMIN. CODE § DOC 303.81(4), (6), (8).

¶10 In this case, the staff advocate spoke with the requested witnesses and reported what they said to the committee, rather than obtain from them a written statement, a transcript of an oral statement or a tape recorded statement. However, the option the advocate selected is permitted only for witnesses other than inmates or staff under WIS. ADMIN. CODE § DOC 303.81(8). The subsection of the rule which addresses unavailability for the two classes of witnesses who are

permitted to attend the hearing, inmates and staff, specifies three alternatives—each requiring a statement in the witnesses own words, either oral or written. Neither § DOC 303.81(4), nor § DOC 303.81(6), which refers to subsec. (4), says anything about a report of an interview by a staff advocate.

¶11 The State does not assert the institution complied with the rule, but asserts that any error was harmless, citing to WIS. ADMIN. CODE § DOC 303.87 which provides:

> If a procedural requirement under this chapter is not adhered to by [prison] staff, the error may be deemed harmless and disregarded if it does not substantially affect the rights of the inmate. Rights are substantially affected when a variance from a requirement prejudices a fair proceeding involving an inmate.

It was harmless error, according to the State, because based on what the advocate reported, the requested witnesses did not have anything to add, and their written or oral statements would have been cumulative. Under WIS. ADMIN. CODE § DOC 303.81(3)(c), the State points out, the cumulativeness of their testimony could have been a reason for not allowing them to attend.

¶12 However, the court in ***Anderson-El*** rejected a harmless error analysis when the institution did not comply with the second notice required by WIS. ADMIN. CODE § DOC 303.81(9). ***Anderson-El***, 2000 WI 40 at ¶7. The court stated: "[b]ecause [the Department] failed to abide by its own regulations, the proceedings are rendered invalid." ***Id.*** at ¶20. Moreover, it is not harmless error for an agency to disobey its procedural regulations." ***Id.*** at ¶21. The court went on to explain that the right to adequate written notice is a fundamental right under ***Wolff v. McDonnell***, 418 U.S. 539 (1974). Because the court, in its discussion overruling ***Saenz*** on the issue of waiver, described the right to call witnesses as a

fundamental right, also relying on ***Wolff***, we conclude we should not apply the harmless error analysis to the department's failure to follow § DOC 303.81(4) in this case.

¶13 Presumably Taylor requested the two staff witnesses because he believed their testimony would benefit him. While the rule permits the staff members not to attend for the written reason stated—that they are on a different shift—it specifies three alternative ways to present their testimony. Those three alternatives require statements in the witnesses' own words—written by them or spoken orally. The requested witnesses were not disallowed by the staff because their testimony was cumulative and would unduly prolong the proceeding. It may be that the difference between the witnesses' written or oral statements and the advocate's report would not be significant, but, following the reasoning of ***Anderson-El***, we do not apply a harmless error analysis because the department has not followed its own rule concerning the right to call witnesses. We therefore reverse the trial court's order and remand with directions to enter an order reversing the adjustment committee's decision and invalidating the proceedings.

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

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.