

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0045
STATE OF WISCONSIN**

Cir. Ct. No. 02CV001697

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. DAVID A. SCHLEMM,

PETITIONER-APPELLANT,

V.

JON E. LITSCHER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MORIA KRUEGER, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. David Schlemm, formerly a Waupun Correctional Institution inmate, appeals an order affirming a Waupun prison disciplinary decision. He raises both substantive and procedural issues. We reject his arguments and affirm.

¶2 Waupun Corrections Officer Miller issued a conduct report charging Schlemm with several disciplinary rule violations stemming from an incident on June 4, 2001. Miller was patrolling a cell block at the time and described the incident this way:

I identified inmate Schlemm walking toward me. I continued my round as usual, looking into the cells, closing doors as necessary. As I passed under the bridge I again observed Schlemm walking slowly, directly toward me. I changed direction, walking closer to the cells, and continued down range. I again glanced up and saw Schlemm looking directly at me. Schlemm did not alter direction to avoid colliding into me. Schlemm intentionally collided with my right arm turning me sideways. As I stepped forward Schlemm's foot caught the inside of my right foot, thereby tripping me.

She added that Waupun rules require inmates to stay inside certain lines in that area of the cellblock. Miller stated "that Schlemm walked outside of the yellow lines that are placed on the cell hall floor."

¶3 Corrections Officer Karlen observed the collision from above. He prepared an incident report on the collision, stating as follows:

I (CO Karlen) observed inmate Schlemm, David (198339) collide with Officer Miller. Officer Miller was looking into the cells as she walked down range so she wasn't seeing what Schlemm was doing. Inmate Schlemm was looking directly at Officer Miller as he was walking towards her and made no visible attempt to avoid a collision with the officer in any way.

¶4 On June 6, Schlemm had contact with the staff advocate appointed to assist him in preparing for his disciplinary hearing on the conduct report. Initially, he asked her to obtain eyewitnesses, but could not name any. He suggested she contact an inmate named Mel Johnson for assistance, but the advocate could find no one by that name at Waupun. On June 12, Schlemm gave

his advocate the name of inmate Denny as a contact, and the advocate did contact him on June 13. By June 18, with Denny's help, the advocate had identified three eyewitnesses, and on that day she submitted a form requesting their attendance as witnesses at the disciplinary hearing. On June 19, she informed Schlemm that the request had been denied as untimely, under WIS. ADMIN. CODE § DOC 303.81. She reported that she asked the three potential witnesses for written statements for use at the hearing.

¶5 Schlemm's hearing occurred on June 21. In addition to the conduct report, the disciplinary committee considered written statements by two inmates who stated that they witnessed Schlemm's collision with Miller. Both stated that neither Miller nor Schlemm saw the other, and that the collision was strictly accidental. Schlemm pointed out what he described as discrepancies between Miller's conduct report and Karlen's incident report. The staff advocate had offered to submit the incident report into evidence. However, it is not clear whether the committee considered the report.

¶6 In any event, the committee found Schlemm guilty of disruptive conduct and violating institution rules, and not guilty of battery and creating a hazard. The decision states:

After a review of the conduct report, the evidence, and all of the testimony we find the inmate caused a disruption in cell hall by intentionally running into a staff member. We note that other inmates began to laugh in response to the inmate's actions. We also find [he] violated an institution policy and procedure by walking outside of the yellow lines painted on the floor.

The committee noted that it found Miller's statement credible, and Schlemm's statement not credible. The committee added that the statements of the two inmate witnesses seemed rehearsed, and consequently were not credible either.

¶7 On appeal, Schlemm contends that the evidence before the committee was insufficient to support its decision, that he was prejudiced by his advocate's ineffective assistance, that the committee violated his due process right to present witnesses, and that the trial court inadequately and erroneously decided the matter. We need not address Schlemm's last issue, because our review of a prison disciplinary decision is *de novo*. See *State ex rel. Anderson-El v. Cooke*, 225 Wis. 2d 604, 607-08, 593 N.W.2d 98 (Ct. App. 1999), *rev'd on other grounds*, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821. Consequently, we directly review whether the Department of Corrections acted within its jurisdiction, whether its action was arbitrary or unreasonable, whether the evidence supported its determination, and whether the disciplinary committee followed its own rules and procedures. *Anderson-El*, 225 Wis. 2d at 607-08. In other words, we decide the merits of the matter independently of the trial court's decision. *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998).

¶8 The committee received sufficient evidence to find Schlemm guilty of a rule violation. On review, we apply the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion that the committee did. *Id.* The committee's fact findings are conclusive if supported by any reasonable view of the evidence, and we do not substitute our view of the evidence for the committee's. *Id.*

¶9 Here, the conduct report, if believed, presented a detailed description of Schlemm's violation. It was the committee's prerogative to accept that report as credible, and to find the competing evidence not credible. See *id.* at 391.

¶10 Schlemm contends that the committee should not have deemed the conduct report credible because, in his opinion, it was discredited by Karlen's

incident report. However, the Karlen report conflicts with the conduct report in only one minor detail: whether Miller noticed Schlemm before Schlemm collided with her. The Karlen report fully agrees with the conduct report that Schlemm deliberately caused the collision. Nothing in the Karlen report refutes Miller's statement that the collision occurred in an area closed to inmates. Therefore, we need not resolve whether the committee considered the Karlen report in making its decision because its contents were inculpatory and supported the committee's decision.

¶11 The record fails to establish the advocate's alleged ineffectiveness. Schlemm contends that the advocate's ineffectiveness consisted of her failure to timely identify Schlemm's witnesses and to submit a request for their attendance at the hearing. WISCONSIN ADMIN. CODE § DOC 303.81(1) requires that the inmate request witnesses within two days of the initial contact by the advocate. Here, that contact occurred on June 6. During their contact, Schlemm failed to provide the names of the witnesses he wanted. It was not until June 12 that he provided the information on witnesses that allowed the advocate to proceed. It is possible that the advocate could have done more to identify the witnesses by June 8, even without Schlemm's assistance. However, that remains a matter of speculation.

¶12 Even if the advocate failed to adequately represent Schlemm, the record does not show any harm to Schlemm. We disregard errors during a disciplinary proceeding if they do not substantially affect a finding of guilt or the inmate's ability to provide a defense. WIS. ADMIN. CODE § DOC 303.87. As noted, the alleged ineffectiveness here was counsel's failure to identify Schlemm's witnesses in time to submit a timely request for their attendance at the hearing. Testimony from two of them was received anyway, by written statement, and the

committee chose not to believe it. Nothing in the record suggests a different outcome had these witnesses appeared in person. Nothing suggests that the committee would have received testimony from the third witness, in any event. *See* WIS. ADMIN. CODE § DOC 303.81(1) (inmate limited to two witnesses at disciplinary hearing absent good cause).

¶13 For the same reason, we reject Schlemm's contention that the committee violated his due process right by enforcing the timeliness provision of WIS. ADMIN. CODE § DOC 303.81(1). The committee allowed the witnesses to present their statements, anyway, in written form. Nothing in the record suggests a different outcome if those witnesses had appeared in person.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

