COURT OF APPEALS DECISION DATED AND FILED

April 22, 2004

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. 03-1494

Cir. Ct. No. 02CV002624

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL. NATHANIEL ALLEN LINDELL,

PETITIONER-APPELLANT,

V.

JON E. LITSCHER AND GERALD BERGE,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Nathaniel Lindell appeals from an order affirming two prison discipline decisions. We affirm.

¶2 Review on certiorari is limited to whether: (1) the agency kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the order or determination in question. ***Coleman v. Percy***, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980).

¶3 The first group of issues concern conduct report no. 1249747. The conduct report alleged that Lindell put toilet paper all around his cell window, and when ordered to remove it, swore at the officer and the rules, and refused to do so. He was found guilty of disobeying orders, disrespect, and misuse of state or federal property.

¶4 Lindell first argues that he did not receive the notice of hearing rights that is required by WIS. ADMIN. CODE § DOC 303.76(1). The respondents claim Lindell was given a form, known as DOC-71, "Notice of Major Disciplinary Hearing Rights and Waiver of Major Hearing and Waiver of Time," notifying him of his hearing rights. Lindell did not raise this issue in the administrative proceedings, but argues that he may raise it for the first time in circuit court under ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821. We disagree. While there is some language in ***Anderson-El*** that suggests we do not apply waiver if the agency failed to follow its own rule, we think ***Anderson-El*** is correctly read as holding that the court did not apply waiver in that case because the facts were undisputed and the court was presented only with a question of law. ***Id.***, ¶29, 31.

¶5 In Lindell's case, there is a dispute of fact about whether he received the form DOC-71. Although the form was not signed by Lindell and was also not signed in the space provided for a staff member to sign and indicate that Lindell

had refused to sign, there is other evidence in the record from which it could be inferred that he received the form. The conduct report was issued on January 30, 2002, and on January 31, 2002, Lindell submitted a form DOC-73, "Offender's Request for Attendance of Witness." The right to request witnesses is one of the rights the inmate is informed of by form DOC-71. Therefore, it would be reasonable to infer that, because Lindell made a request for witnesses, he received the form advising him of that right. This is a factual dispute that should have been resolved during the administrative process, and because the issue was not raised there, we conclude it was waived.

¶6 Lindell next argues that the hearing officer and those involved in the administrative review were biased against him because Lindell was suing them. There is no record upon which we can review this issue in certiorari. Lindell does not point to any specific evidence of bias within the record of his own administrative proceeding. The record does not contain papers related to these other lawsuits. Although the circuit court's decision shows that it inspected the records of some of the actions cited by Lindell "that were readily obtainable," we are doubtful that it is appropriate for this court to take judicial notice in that manner. *See* WIS. STAT. § 902.01 (2001-02).[1] Furthermore, being a defendant in a suit by the inmate does not, by itself, disqualify a person from serving in the disciplinary process; rather, the inquiry must be made on a case-by-case basis, in light of the circumstances of the suit. ***Redding v. Fairman***, 717 F.2d 1105, 1113 (7th Cir. 1983).

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶7 Lindell next argues that this conduct report was inappropriate because he had stuffed the toilet paper around the window to control noise, and requiring him to remove it was inconsistent with the requirement that inmates be treated with kindness, was arbitrary, and was purposeless abuse of authority. He offers no legal authority compelling these conclusions on these facts.

¶8 Finally, Lindell argues that he should not have been found guilty of misuse of state or federal property because there was no evidence that the toilet paper he used was state or federal property, and because toilet paper is meant to be destroyed when put to its intended use. While it is true that the record contains no evidence regarding property interests in the toilet paper, we conclude that the fact finder could reasonably assume that the toilet paper was provided by the state; that the state retained its ownership interest in the toilet paper even after it was distributed to the inmate; and that, even if toilet paper is meant to be destroyed eventually, that does not mean other uses are authorized before that moment arrives. *See* WIS. ADMIN. CODE §§ DOC 303.36 and 303.02(3).

¶9 Conduct report no. 1249776 is also at issue. That report alleged that, during a search of Lindell's cell, staff discovered various unauthorized items, including a rope made out of toilet paper, a plastic meal-tray covering, wax paper cereal bags, note pads, pictures ripped from a postcard, and pages ripped from a book. He was found guilty of misuse of state or federal property, damage or alteration of property, and possession of contraband.

¶10 Lindell first argues, as above, that the decision makers were biased. Our analysis above also applies to this conduct report.

¶11 Lindell argues that his First Amendment rights were violated because he was punished for possessing expressive materials. However, those

materials were not the only contraband he possessed, so even if they were not considered, the disciplinary findings would stand.

¶12 To the extent that Lindell has made arguments not specifically addressed above, they have been considered and rejected.

By the Court.—Order affirmed.

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