COURT OF APPEALS DECISION DATED AND FILED

February 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2005AP955 **Cir. Ct. No. 2003CV3838**

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

STATE OF WISCONSIN EX REL. WILLIAM HARRIS,

PETITIONER-RESPONDENT,

V.

GARY R. MCCAUGHTRY AND MATTHEW FRANK,

RESPONDENTS-APPELLANTS.

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

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

¶1 PER CURIAM. Gary McCaughtry (the former warden of the Waupun Correctional Institution) and Matthew Frank (Secretary of the Wisconsin Department of Corrections) appeal a circuit court order reversing and expunging a prison disciplinary decision against inmate William Harris. The issue is whether

the circuit court properly set aside the disciplinary action because officials allegedly failed to comply with the notice provisions of a prior order that had remanded the disciplinary matter for further administrative proceedings. We reverse because we conclude the prior order was insufficiently specific to advise prison officials what notice they needed to give the inmate.

BACKGROUND

¶2 Prison officials initially issued Harris a conduct report in January of 2003 for group resistance and conspiracy to incite a riot. The prison adjustment committee found him guilty of the riot charge. Following a complicated procedural history not relevant to the present appeal, the circuit court eventually set aside the disciplinary action on certiorari review and remanded the matter with directions for prison officials to afford Harris a new hearing. In its order dated December 6, 2004, the circuit court adopted a prior recommendation from the inmate complaint examiner (ICE) which stated:

> A new hearing should be held with a different Adjustment Committee. Before that occurs, a new advocate should contact inmate Harris well in advance of the new hearing, so as to make it possible to even offer assistance if required. The hearing should be scheduled and, considering the logistics involved,[1] all parties should be equally aware of the new hearing date and time.

The court required that "all the mandates of the ICE for rehearing … are to be met within 30 days of receipt of this decision," and further warned that failure to

[1] The prison officials argue persuasively that the reference to "considering the logistics involved" most likely referred to the fact that Harris had been transferred from the institution where the violations alleged in the conduct report had occurred, and that potential witnesses were located in other institutions.

comply with the court's order within thirty days would result in reversal and expungement of the adjustment committee's decision.

¶3 On December 17, 2004, prison officials reissued the original conduct report to Harris. Attached to the conduct report was a standardized Notice of Major Disciplinary Hearing Rights form which advised Harris that, unless he waived the time limits or the security director extended the deadline, his hearing would be held no sooner than two days, and generally not more than twenty-one days after his receipt of the conduct report. Prison officials did not provide Harris with a second written notice specifying the exact time and place of the hearing,[2] and Harris alleged that neither he nor his advocate was informed when the hearing was scheduled to occur until January 4, 2005—the day it was held.

¶4 Harris appeared at the hearing with his advocate, and submitted statements from several witnesses who were unable to be present. Following the hearing, the adjustment committee again found Harris guilty of conspiring to incite

[2] In ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821, the Wisconsin Supreme Court held that the failure to provide an inmate with a second written notice specifying the exact date and time of a disciplinary hearing constituted a denial of a fundamental procedural right which invalidated the administrative proceedings; which was not harmless error even if the inmate appeared at the hearing with an advocate; and which could be raised in court even if not raised before prison officials. The Respondents point out that ***Anderson-El*** relied heavily on the fact that the administrative code explicitly required such notice at the time, but that the code provision requiring a second notice has since been repealed. *See former* WIS. ADMIN. CODE § DOC 303.81(9). We note, however, that ***Anderson-El*** also mentioned several times that the code provision was itself based upon the constitutional requirements set forth by the United States Supreme Court in ***Wolff v. McDonnell***, 418 U.S. 539 (1974). *See, e.g.,* ***Anderson-El***, 234 Wis. 2d 626, ¶24. It therefore now appears to be an open question whether the failure to give an inmate notice of the specific date and time of a scheduled disciplinary hearing violates an inmate's fundamental due process rights, even if such failure no longer explicitly violates the administrative code. We do not address that question on this appeal, however, because our review is limited by the procedural posture of the case to determining whether the trial court properly sanctioned prison officials for noncompliance with a court order, and does not encompass whether the administrative proceeding itself was otherwise sound.

a riot. Rather than following the usual administrative appeal channels for review of a disciplinary decision, Harris moved the circuit court to reverse the adjustment committee's decision as a sanction for noncompliance with the court's prior order based on the failure of the Respondents to give Harris or his advocate advance notice of the scheduled date and time of his hearing. The trial court granted the motion and the prison officials appeal.

DISCUSSION

¶5 As a threshold matter, the prison officials contend Harris has failed to exhaust his administrative remedies and failed to preserve the issue of the adequacy of his notice by raising it during his disciplinary hearing. Those arguments are misplaced, however, because Harris did not seek a new certiorari review of the second disciplinary proceeding itself, but instead moved for dismissal as a sanction for alleged noncompliance with a prior circuit court order. We are satisfied such a motion was properly directed to the court whose order was allegedly violated.

¶6 The prison officials next offer a series of reasons why they believe the notice provided to Harris complied with Department of Corrections regulations and allowed him sufficient time to prepare for the hearing by gathering witness statements and so forth. Again their arguments miss the point. The issue before us is not whether the notice given to Harris satisfied the administrative code or due process, but whether it complied with the circuit court's order dated December 6, 2004. The question whether Harris was harmed or prejudiced by the lack of more

specific notice would only arise in the context of determining what sanction was appropriate if the notice given failed to comply with the court's order.[3]

¶7 On the question of compliance, the prison officials repeatedly assert that the "record is silent" as to whether Harris or his advocate actually received additional notice of the hearing date beyond the standardized form indicating the hearing would be held within two to twenty-one days. That assertion seems somewhat disingenuous, however, because, by its very nature, an absence of notice would rarely be documented. Harris made the allegation that neither he nor his advocate received notice of the specific time and place of the hearing until that morning, and the prison officials did not dispute that fact when explicitly questioned about it by the trial court at the sanction hearing, instead conceding "time does not seem to be verified anywhere." Thus, the absence of any additional written notice in the record supports Harris's position rather than undermines it.

¶8 Finally, then, we turn to the central issue on this appeal—that is, whether advising Harris that his hearing would be held "no sooner than 2 days, and generally not more than 21 days" after the date he was given the reissued conduct report satisfied the court's order that "all parties should be equally aware of the new hearing date and time." The trial court concluded that it did not because: (1) language in the standardized form provided to Harris erroneously suggested that the deadline could be extended beyond twenty-one days upon the inmate's request when, under the court's order, the hearing needed to be

[3] The circuit court did not believe specific prejudice needed to be shown, given that its prior order specified what the sanction for noncompliance would be.

completed within thirty days of the remand; and (2) the court's order required written notice of the exact date and time of the hearing.

¶9 The problem we have with the trial court's conclusion is that the language in the December 6th order is ambiguous. The order does not direct prison officials to give Harris his notice in writing. Nor does it specify how far in advance Harris should be informed of the date and time of the scheduled hearing. The directive that the parties should be "equally aware" of the date and time for the new hearing cannot mean that Harris needed to know about the hearing's date and time at the exact same moment as prison officials because the officials obviously would need to schedule the date and time before informing Harris. Yet the order gives no guidance as to how soon after setting the date and time the officials needed to inform Harris of the details. For that matter, the record before the circuit court did not give any indication as to when the prison officials actually did schedule the hearing. For all we know, prison officials did not set a date in advance, but rather determined on January 4th that they would have time to hold a hearing that day and then promptly informed Harris and his advocate of that fact.

¶10 While the last scenario may be unlikely, it highlights the problem prison officials would have faced in attempting to comply with a vague order. We therefore cannot conclude prison officials violated the court's remand order by issuing a standard notice that a hearing would be held within two to twenty-one days, and then holding the hearing on the eighteenth day of that specified time period. To the extent that the need to hold the hearing within thirty days of the remand may have limited the option mentioned in the form notice of extending the twenty-one day deadline, Harris and prison officials were "equally aware" of that requirement.

¶11 In sum, while we understand that prison officials did not follow the procedure that the circuit court envisioned, and we certainly do not endorse the view that prison officials would not have needed to comply with the remand order merely because they felt it went beyond the procedural requirements of the administrative code, we cannot conclude that the officials violated the actual terms of the court's order. We therefore conclude that the circuit court erroneously exercised its discretion by dismissing the disciplinary action as a sanction for noncompliance with the remand order.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).