COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP407 **Cir. Ct. No. 2008CV3192**

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

STATE OF WISCONSIN EX REL. RENATO C. BEATON,

PETITIONER-APPELLANT,

V.

JUDY P. SMITH AND SECRETARY OF CORRECTIONS,

RESPONDENTS-RESPONDENTS.

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

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

¶1 PER CURIAM. Renato Beaton, pro se, appeals an order affirming a prison disciplinary decision on certiorari review. Beaton argues his due process rights were violated and he was otherwise entitled to the process due for a major, as opposed to a minor, violation. Beaton also challenges the sufficiency of the

evidence to support the disciplinary decision and further claims that the discipline imposed by the hearing officer violated double jeopardy. Finally, Beaton claims the circuit court erroneously relied on matters outside the record and misconstrued the administrative code. For the reasons discussed below, we reject Beaton's arguments and affirm the order.

BACKGROUND

¶2 In October 2007, while incarcerated at Oshkosh Correctional Institution, Beaton was accused of attempted theft and of enterprises and fraud, in violation of WIS. ADMIN. CODE §§ DOC 303.34 and 303.32 (Dec. 2006), respectively.[1] A conduct report alleged that Beaton, who was then employed by Badger State Industries, was stealing clothes from his employer. A minor offense disciplinary hearing was held pursuant to § DOC 303.75. The conduct report was read aloud to Beaton and when asked to comment on the charges, Beaton stated: "This matter was resolved before. Sgt. Benzel counseled me about this. There is no evidence to substantiate the charges."

¶3 The hearing officer found Beaton guilty of attempted theft based on the written testimony in the conduct report, but concluded there was insufficient evidence to support a finding of guilt on the enterprises and fraud charge. The hearing officer's decision was adopted by the adjustment committee, and Beaton received ten days of building confinement. On appeal to the warden, the decision was affirmed.

[1] All references to the Wisconsin Administrative Code are to the December 2006 version unless otherwise noted.

¶4 Beaton subsequently filed an inmate complaint, alleging that his punishment violated double jeopardy. Beaton also claimed his due process rights to a fair and impartial hearing were violated when he was foreclosed from submitting his own written statement and the written statement of a witness. Beaton claimed his due process rights were further violated when he was removed from the hearing before he was given the opportunity to respond to comments made by the complaining officer to the hearing officer.

¶5 An inmate complaint examiner recommended that Beaton's complaint be dismissed, noting he found no procedural errors. The recommendation for dismissal was affirmed by a reviewer's decision and Beaton appealed to the corrections complaint examiner, who recommended that the complaint be dismissed with modification. The examiner rejected Beaton's double jeopardy claims and concluded that, because the alleged violations were minor violations, Beaton received all of the rights afforded under the administrative code. Modification was recommended, however, because the hearing officer did not document his evaluation of Beaton's written statement, address the mitigating circumstances raised by Beaton, or include a conclusion statement in the hearing decision. The examiner also noted the decision failed to include a finding that it was more likely than not that Beaton committed the offense. The examiner consequently recommended the complaint be dismissed "with the modification that the disciplinary packet be returned to the hearing officer for correction of the above-identified deficiencies." The reviewer's recommendation was accepted by the Office of the Secretary.

¶6 On remand, the hearing officer issued a new statement of the reasons for the decision. The officer noted that he did not consider Beaton's written statement because such consideration was not required at a minor violation

hearing. The hearing officer emphasized the officer's observations relayed in the conduct report and concluded that, based on the written report and testimony, it was more likely than not that Beaton was attempting to take clothing from his worksite for other inmates. Beaton again appealed, claiming the offense should not have been classified as a minor offense because it precluded him from presenting witness statements. The warden subsequently affirmed the decision.

¶7 After Beaton filed another inmate complaint alleging the same deficiencies, an examiner rejected the complaint on the ground that Beaton's claims had already been addressed. A reviewer concluded the complaint was properly rejected. On certiorari review, the circuit court affirmed the disciplinary decision and this appeal follows.

DISCUSSION

¶8 Our review is limited to whether the Department acted within its jurisdiction, acted according to law, issued an arbitrary or oppressive decision, and had sufficient evidence to make the disciplinary decision in question. *See* ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). The evidence is sufficient if reasonable minds could arrive at the same conclusion the committee reached. *See* ***State ex rel. Richards v. Traut***, 145 Wis. 2d 677, 680, 429 N.W.2d 81 (Ct. App. 1988). We review the record in the same manner as the circuit court, and we independently decide whether to uphold the agency decision. ***Ortega***, 221 Wis. 2d at 385-86.

¶9 First, Beaton argues he was denied due process at the hearing when he was not permitted an opportunity to refute the allegations in the conduct report. Specifically, Beaton contends he was not allowed to present either a written statement or witness testimony. He also claims the hearing violated WIS. ADMIN.

CODE § DOC 303.76(1)(e)1. regarding the right to present oral, written, documentary and physical evidence. We reject these claims.

¶10 WISCONSIN ADMIN. CODE § DOC 303.75 governs minor disciplinary infractions and provides, in relevant part:

> HEARING. At the hearing, a hearing officer shall review the conduct report and discuss it with the inmate. The hearing officer shall provide the inmate with an opportunity to respond to the report and make a statement about the alleged violation. The hearing officer may question the inmate. The inmate has no right to a staff advocate, to confront witnesses or to have witnesses testify on the inmate's behalf. If an inmate refuses to attend a hearing, or is disruptive, the hearing officer may conduct the hearing without the inmate being present….

§ DOC 303.75(4). Although Beaton complains he was not permitted to submit a written statement, the hearing officer was not required to accept such a statement under the administrative code. Beaton's claim that he should have been allowed to present witnesses or witness statements likewise fails under the rule, as does his complaint that he was not allowed to comment on the reporting officer's testimony. On this last point, we note that the rule anticipates the possibility that witnesses may testify at the hearing in support of the conduct report and states that the inmate has no right to confront that testimony.

¶11 Beaton also claims it was inappropriate for the complaining officer to sit next to the hearing officer. Nothing in the record, however, indicates that the complaining officer participated in adjudicating Beaton's violation. Further, that the complaining officer may have been seated next to the hearing officer does not taint the entire proceedings.

¶12 Finally, Beaton complains he was removed from the hearing without cause before its completion. Even assuming Beaton's representation is accurate,

Beaton was allowed to orally respond to the conduct report before his removal. Because he had no right to present a written statement or confront witnesses, he has failed to establish how he was prejudiced by his removal.

¶13 To the extent Beaton asserts violations of WIS. ADMIN. CODE § DOC 303.76, that rule applies only to major violations or offenses. Major violations or offenses are distinguished from minor violations or offenses, primarily based on the severity of the possible punishment. *See* § DOC 303.68(1). Beaton does not contend that the potential punishment for his offense required a major hearing under § DOC 303.68(1), and he does not develop an argument that he was constitutionally entitled to the procedures under § DOC 303.76 because of the punishment he received—ten days of building confinement.

¶14 To the extent Beaton contends the disciplinary decision is not supported by substantial evidence, we reject his claim. The evidentiary test on certiorari review is the substantial evidence test, which requires the court to determine whether reasonable minds could have arrived at the same conclusion as the adjustment committee. *See* ***State ex rel. Palleon v. Musolf***, 120 Wis. 2d 545, 549, 356 N.W.2d 487 (1984). The court may not substitute its view of the evidence for that of the prison officials. *See* ***Van Ermen v. DHSS.***, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978).

¶15 Here, the conduct report included the following narrative by a reporting staff member:

> I saw Inmate Beaton call over Inmate Rossettie, … who was walking on the rec field, to where he was. Inmate Beaton talked to Rossettie for a few seconds and then reached into his pocket (left shirt) and pulled out a small white box, he handed it to Rossettie who in turn opened the box and pulled out a small piece of paper. Inmate Rossettie then appeared to read the small paper, he said a few words

> to Beaton, he refolded the paper, put it back into the box and handed it back to Beaton. They talked to each other for a few seconds and Beaton started to walk towards Q Bldg. I met him at the door of Q Bldg and pat searched him. I found a small white box in his left shirt pocket. I opened the box (small dental floss box) and inside was a folded piece of paper. On the paper was a list of clothes and what appeared to be sizes. I asked Beaton what the paper was and he stated "a clothes list." I asked him what the other marks were and he stated "sizes." I asked him why he had this and he explained to me, after I told him what I saw him doing on the rec field, that guys were asking him to get clothes and he was going through a contact at Institution laundry to get them. He went on to tell me that the contact would then get the items and send them out to the unit where the person would pick them up. … I then asked him if there really was a[n] Institution laundry contact [and] he stated "no." I asked him if it was just him getting it and he stated "yes." Inmate Beaton works at [Badger State Industries]. I called BSI Officer J. Smude who told me that she has received numerous notes that Inmate Beaton specifically was stealing clothes from BSI, also BSI Tech Radloft stated the same that he received numerous notes about Beaton.

Based on the officer's observations and Beaton's statements, we conclude there was substantial evidence to support finding Beaton guilty of attempted theft.

¶16 Beaton nevertheless argues the disciplinary decision should have, but did not, discuss the fact that physical evidence was not presented at the hearing. Beaton, however, had no right to inspect physical evidence at the minor violation hearing. Even had a major violation been charged, the institution would not have been required to produce physical evidence at the hearing. *See* ***Ortega***, 221 Wis. 2d at 389-90. Beaton also appears to challenge the validity of the hearing officer's decision because it had been remanded for modification. The remand to correct any deficiencies, however, is sanctioned under WIS. ADMIN. CODE § DOC 310.14(2).

¶17 Beaton further claims that the hearing officer's imposition of ten days' building confinement violated double jeopardy because he had already been "counseled" by an officer and the white box with enclosed paper had been destroyed. We are not persuaded. Beaton received only one conduct report for the violation; therefore, his claim of double punishment fails.

¶18 Finally, Beaton challenges the circuit court's decision, claiming the court erroneously relied on matters outside the record and misconstrued the administrative code. As noted above, however, this court's review is limited to reviewing the Department's decision. *See* ***Ortega***, 221 Wis. 2d at 385. Therefore, we do not address Beaton's arguments regarding the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08)