COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2517 **Cir. Ct. No. 2009CV263**

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

STATE OF WISCONSIN EX REL. JEREMY T. GREENE,

PETITIONER-APPELLANT,

V.

RICK RAEMISCH AND WILLIAM POLLARD,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Jeremy Greene appeals the order of the circuit court that dismissed his petition for certiorari review of a prison disciplinary proceeding related to his work at the prison library. Greene argues on appeal that:

(1) the Department of Corrections did not follow its own rules when it removed him from his work assignment in the prison library; (2) the conduct report issued against him was maliciously prosecuted in retaliation for a complaint he filed against the staff member who issued the report; (3) the Department did not follow its own rules when it rejected his complaint alleging retaliation; (4) the Department failed to follow its own rules when issuing the conduct report against him and improperly designated the offense as a major rather than a minor violation; (5) the Department did not adequately strike a dismissed charge from the record of his disciplinary hearing; (6) the Department acted arbitrarily and unreasonably when it denied Greene's request to have certain witnesses appear at his hearing; (7) Greene was not given notice that the author of the conduct report would appear at his hearing; and (8) the hearing officer was biased and committed a number of procedural errors during the hearing, including arbitrarily deeming Greene's legal materials to be contraband and ordering them destroyed, and stating as a reason for the disposition that Greene had a history of similar offenses.

¶2 We conclude that the Department acted improperly when it denied Greene's request for inmate witnesses who could have provided potentially exculpatory testimony, and when it deemed his property to be contraband and ordered it destroyed. Consequently, we affirm in part and reverse in part the order of the circuit court affirming the Department's decision, and we remand the matter to the circuit court with instructions to vacate the Department's decision on the conduct report, to direct the Department to reopen the hearing to take the testimony of the inmate witnesses requested by Greene, and for further proceedings consistent with this opinion.

¶3 Greene is an inmate at Green Bay Correctional Institution. At the time of the incident underlying this case, he worked in the prison library. Greene

was removed from his job for an incident that happened on July 2, 2008. On August 8, Greene received an adult conduct report for the incident. The report was issued by the institution's education director, Jack Doruff, and alleged that Greene sent a manila envelope to himself that contained fifty-six pages of documents, including materials for a case he was working on with another inmate and the library's copy of a case, ***Anders v. California***.[1] The case materials were highlighted in yellow marker, which the report stated meant "that Inmate Greene was working on material after it was copied while on his job as a library clerk." Greene was initially charged with inadequate work or study performance and theft. These were classified as "major" disciplinary violations. The theft charge, however, was subsequently struck from the conduct report.

¶4 Greene was notified of the hearing and submitted a request for witness form. Greene requested that the library officer, the librarian, and Richard Crapeau, another inmate library clerk, as well as "[a]ll inmate library workers who have a bearing on this" appear at the hearing. Greene was allowed to call the officer and the librarian but was denied the other witnesses. The denial stated: "No cause for more than 2 witnesses. The theft charge has been dropped from your [conduct report]. Requested testimony is irrelevant."

¶5 The hearing was held and Greene submitted a written statement that said the conduct report had been filed as a reprisal for a complaint he filed against Doruff for removing Greene from his job as a library clerk. Greene stated his supervisor allowed him to highlight his own legal materials "as long as it only took a couple [of] minutes and my work duties were not neglected in the process,

[1] ***Anders v. California***, 386 U.S. 738 (1967).

however doing actual 'legal work' was not allowed. I stayed within this confine." Greene also asserted that he had properly checked out the copy of ***Anders*** and that none of the library workers he spoke with had ever been asked if Greene had checked the case out. The hearing officer found Greene guilty of inadequate work performance, ordered Greene confined to his cell for fourteen days, deemed the seized materials to be "contraband," and ordered the materials to be destroyed. One of the reasons the hearing office gave for the disposition was a "history of similar offenses." Greene appealed to the warden and the warden affirmed the hearing officer's decision.

¶6 Greene also filed four inmate complaints related to this incident. The first one, which he filed before the conduct report was issued, alleged that he was improperly removed from his work assignment. The Inmate Complaint Examiner (ICE) rejected the complaint as untimely. The second complaint alleged that copies of cases, which Greene had paid for, were improperly destroyed as contraband after his hearing. The ICE rejected this complaint as outside the scope of the Inmate Complaint Review System (ICRS) because Greene was, in essence, challenging the hearing officer's decision that the copies were contraband. The third complaint alleged that the conduct report was issued by Doruff as reprisal for the first complaint Greene filed, alleging that Greene had been improperly removed from his work assignment. This complaint was also rejected on the grounds that Greene brought it to "harass or cause malicious injury." All of the decisions were affirmed by the reviewing authority.

¶7 In his fourth complaint, Greene alleged a variety of procedural errors at his disciplinary hearing, which were similar to the issues he raised in his appeal to the warden. That complaint was "dismissed with modification," but a new hearing was not ordered. Greene appealed this decision through the ICRS to the

secretary of the Department of Corrections, and the decision was affirmed each time. Greene then petitioned the circuit court for certiorari review, raising essentially the same issues he has raised in this appeal. The circuit court ultimately dismissed the petition, and Greene appeals to this court.

¶8 Our certiorari 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). With regard to the substance of the prison disciplinary decision, we will 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.*** The inquiry into whether the committee acted according to law includes consideration of whether due process was afforded and the committee followed its own rules. ***State ex rel. Curtis v. Litscher***, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43 (citing ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980)).

¶9 In this appeal, Greene argues that the Department violated its own procedures when it issued the conduct report and in the manner in which it conducted the hearing. Specifically, Greene argues, among other things, that the Department acted arbitrarily and unreasonably when it denied his request to have another inmate, Crapeau, appear at his hearing, stating that this testimony was irrelevant. In support of the charge that Greene inappropriately engaged in legal research while he was on work duty in the prison library, the conduct report noted that the documents which had been seized were highlighted in yellow, which showed that Greene had worked on his own work while he was at his job. Greene

argues that Crapeau would have testified that their supervisor had given them permission to do this type of work while on their job assignments.

¶10 We agree with Greene that this testimony was not irrelevant. "One of the minimum procedural rights guaranteed … to an inmate in a disciplinary proceeding is to call witnesses in his defense 'when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.'" ***Meeks***, 95 Wis. 2d at 127 (quoting ***Wolff v. McDonnell***, 418 U.S. 539, 566 (1974)). In ***Meeks***, we reversed the decision of the Department because there was no support in the record for the Department's refusal to call a witness whose testimony could have been important in resolving the issue before it. ***Meeks***, 95 Wis. 2d at 127-28. In this case, the Department said that the testimony of this witness was irrelevant, but we find no support for this in the record. Greene said in his statement for the hearing that Crapeau would testify that the librarian authorized Greene to conduct legal research while on the job. If Greene had the librarian's permission to copy and highlight this material, then there was no basis for the conduct report. Crapeau's testimony is potentially exculpatory and, therefore, highly relevant.

¶11 The State argues in support of the Department's decision that the education director had given a directive that "all personal legal work be discontinued." We conclude, however, that what the education director told the librarian does not resolve the issue of whether the librarian told Greene that Greene could do his own legal research while on the job. There was no evidence at the hearing that Greene knew that the education director had issued such a directive. The issue is not what the librarian had been told, but what Greene had been told. If Greene had been told by his supervisor that it was acceptable for him to do his own work while on the job, and if Crapeau's testimony will show this, then there is no basis for the charge in the conduct report.

¶12 Greene also argues that he should be able to call the other inmate witnesses that he listed on his request for witnesses form. Greene says that these witnesses would testify that he did not steal the library copy of ***Anders***. The theft charge, however, was dropped from the conduct report before the hearing occurred. We agree with the Department's determination that the testimony of these witnesses was irrelevant.

¶13 We conclude that the Department acted unreasonably when it denied Greene's request that Crapeau testify at the hearing by determining that Crapeau's testimony was irrelevant. In ***Meeks***, 95 Wis. 2d at 129, we concluded that a remand was proper after prison officials had refused to allow the inmate to call witnesses on his behalf without an adequate explanation for the refusal. We reasoned that reopening the hearing to allow the inmate to present additional evidence was a proper remedy. ***Id.*** We noted, however, that if the requested witnesses were no longer available, the disciplinary findings would need to be vacated based on prejudice resulting from the violation. ***Id.*** *See also* ***State ex rel. Irby v. Israel***, 95 Wis. 2d 697, 708, 291 N.W.2d 643 (Ct. App. 1980) (a remand was appropriate to take the testimony of a witness who had been requested by the inmate, with directions that the disciplinary findings should be vacated if the witness was not available). Consequently, we remand the case to the circuit court with directions that it vacate that portion of the Department's decision that affirmed the hearing officer's decision, and direct that the hearing be reopened to allow Greene to call Crapeau as a witness.

¶14 Greene raises a number of other issues in this appeal. Some of these issues we need not address because they relate to the procedures used for the

disciplinary hearing, which we have ordered reopened.[2] Two of the issues may be addressed summarily. Greene argues that the conduct report improperly characterized his conduct as a major rule violation, and that the hearing officer erred when he noted as a reason for disposition that Greene had a number of "similar offenses." As to the first, we note that to the extent designating this charge as a major rule violation was in error, there was no harm because Greene's sentence of fourteen days of cell confinement was consistent with a sentence for a minor rule violation. *See* WIS. ADMIN. CODE § DOC 303.68(1)(b) (Dec. 2006).[3] As to the second, Greene argues that he does not have a history of similar offenses, and the State does not seem to dispute his assertion. Even if we were to determine that the hearing officer erred in relying on this as a reason for the disposition, however, we see no remedy. Greene has already served the cell confinement and he does not explain what other remedy would be available to him.

¶15 We also conclude that the Department erred when it deemed the materials it seized from him to be contraband and ordered the materials destroyed. The State argues that the materials were properly designated as contraband and destroyed under WIS. ADMIN. CODE § DOC 303.10(1)(f) and (3). Section DOC 303.10(1)(f) states that contraband is: "Anything used as evidence for a disciplinary hearing deemed contraband by the adjustment committee or hearing

[2] We do not address the arguments concerning whether the Department followed their own procedures at the initial stages, the failure of the Department to strike the theft charge from the record, the lack of notice that Doruff would be attending Greene's hearing, the allegations against the hearing officer's conduct at the hearing, and any procedural errors in the decision.

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

officer." Section DOC 303.10(3) states: "The hearing officer, adjustment committee, or security director shall dispose of items in accordance with institution policies and procedures. If the inmate files a grievance regarding the seizure or disposition of the property, the institution shall retain property until the warden makes a final decision on the grievance."

¶16 We conclude that this rule cannot be reasonably read to allow the destruction of this property under the facts of this case, and that the Department acted unreasonably when it deemed these materials to be contraband. The materials seized were copies of cases, for which Greene had paid. Under WIS. ADMIN. CODE § DOC 309.20(3)(f), the department "shall allow an inmate legal materials which are necessary for that inmate's legal actions or the action of another inmate whom the first inmate is assisting." After the Department dropped the theft charge, there was no allegation that Greene should not have possessed the copies of the cases. The documents were offered as evidence because the highlighting on the documents showed that Greene had engaged in a prohibited activity. The Department properly seized the documents to use as evidence that Greene had done personal work while on his work assignment. Once the hearing was concluded, however, we see no reasonable basis for the hearing officer's determination that the documents were contraband and should be destroyed.[4]

[4] In another section of the administrative code, contraband offenses are defined as offenses involving possession of intoxicants, drug paraphernalia, weapons, items of a type which are not allowed, allowable items in excess of the quantity allowed, allowable items which are required to be listed but are not listed on the inmate's property list, items which do not belong to the inmate other than state property issued to the inmate for the inmate's use, personal written information relating to any staff or staff's immediate family, and anything sent through the mail in violation of the rules. WIS. ADMIN. CODE § DOC 303.42-.48. These are materials or information the inmate is not allowed to possess. There is no prohibition against Greene possessing the case materials that he possessed; indeed, this is expressly permitted. *See* WIS. ADMIN. CODE § DOC 309.20(3)(f).

¶17 Under these circumstances, we conclude that it was arbitrary and unreasonable for the hearing officer to have deemed the materials to be contraband and to have ordered them destroyed. When the case is returned to the Department, the case materials may be used for the hearing and held under WIS. ADMIN. CODE § DOC 303.10(3) until the warden completes a review, if one is requested. Once the process is completed, however, the Department shall return the case materials to Greene.

¶18 Greene also argues that the conduct report was filed by Doruff in retaliation for the inmate complaint Greene filed about his removal from his work assignment. The hearing examiner rejected this complaint on the basis that Greene had filed it to harass or cause malicious injury. Greene's argument is based on his interpretation of the facts, and he asks us to reconsider a factual determination made by the hearing officer, which a reviewing court does not do. There is no evidence in the record, other than the timing of the filing of the conduct report, to support Greene's assertion that the conduct report was filed in retaliation. We conclude that the hearing officer's determination was not incorrect.

¶19 For the reasons stated, we affirm in part and reverse in part the order of the circuit court, and we remand to the circuit court with directions that it vacate that portion of the Department's decision that affirmed the hearing officer's decision on the conduct report, and direct that the hearing be reopened to allow Greene to call Crapeau as a witness, and for other proceedings consistent with this opinion.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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