COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP506 **Cir. Ct. No. 2009CV2407**

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

STATE OF WISCONSIN EX REL. EDUARDO M. PEREZ,

PETITIONER-APPELLANT,

V.

BRADLEY HOMPE AND RICK RAEMISCH,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

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

¶1 PER CURIAM. Eduardo M. Perez appeals an order dismissing his petition for a writ of certiorari from a prison disciplinary decision. Perez argues that the Department of Corrections (DOC) violated its administrative rules and denied him due process by: (1) denying Perez an effective staff advocate; and

(2) relying on an insufficient sworn statement of a confidential informant, without providing Perez a copy of the statement for his defense. We reject these arguments, and affirm.

Background

¶2 On January 13, 2009, DOC issued Perez a conduct report alleging misuse of a prescription medication. The report alleged that Perez sold his prescription methadone to other inmates, based in part on information from a confidential informant. On January 29, 2009, the Adjustment Committee held a disciplinary hearing on the conduct report. At the conclusion of the hearing, the committee found Perez guilty.

¶3 Perez filed a complaint with the Corrections Complaint Examiner's Office regarding the disciplinary proceedings, alleging that the committee had not provided him an effective staff advocate and had not complied with administrative rules regarding statements by confidential informants. The Office of the Secretary dismissed the complaint, with a modification allowing the committee to reconvene the hearing and make a record sufficient to meet the rules regarding confidential informants. The committee did not reconvene the hearing, but issued a revised decision finding Perez guilty, including additional information on the statement by the confidential informant. Perez petitioned for certiorari review, and the circuit court dismissed his petition. Perez appeals.

Standard Of Review

¶4 On appeal from an order dismissing a petition for certiorari review of a prison disciplinary decision, we examine only whether DOC's decision was within its jurisdiction, was according to law, was arbitrary or unreasonable, and

was supported by substantial evidence. *See* ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶15, 234 Wis. 2d 626, 610 N.W.2d 821. Part of this analysis is whether DOC followed its own rules and whether it complied with due process requirements. *See* ***State ex rel. Curtis v. Litscher***, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43. We owe no deference to the circuit court's decision on our certiorari review of DOC's disciplinary decision. *See* ***Anderson-El***, 234 Wis. 2d 626, ¶15.

Discussion

¶5 Perez argues first that DOC violated WIS. ADMIN. CODE § DOC 303.78(2) when Perez's appointed staff advocate refused Perez's request that the advocate obtain a copy of the confidential informant's statement. We disagree.

¶6 WISCONSIN ADMIN. CODE § DOC 303.78(2) provides that, "[w]hen the warden assigns an advocate, the advocate's purpose is to help the accused inmate to understand the charges against the inmate and to help in the preparation and presentation of any defense the inmate has, including gathering evidence and testimony, and preparing the inmate's own statement." However, the rule does not state that a staff advocate must obtain for the inmate any evidence DOC will use in the disciplinary proceedings, as Perez asserts. To the contrary, we have said that § DOC 303.78(2) establishes only "'limited' and 'general'" duties of a staff advocate, and that the rule "'afford[s] the advocate a great deal of discretion in carrying out those duties.'" ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 398, 585 N.W.2d 640 (Ct. App. 1998). We do not agree with Perez that his staff advocate's refusal to obtain a copy of the confidential informant's statement for him violated the limited and general duties of the staff advocate set forth in § DOC 303.78(2).

¶7 Perez also contends that DOC violated WIS. ADMIN. CODE § DOC 303.78(1)(b) when it: (1) did not grant his request for a new staff advocate after his advocate refused to obtain the confidential informant's statement for him; and (2) appointed a second staff advocate for Perez when his first advocate was unavailable for the disciplinary hearing, because, Perez claims, the second advocate had a conflict of interest. We disagree.

¶8 WISCONSIN ADMIN. CODE § DOC 303.78(1)(b) provides that "[t]he warden may assign a different staff member to serve as the inmate's advocate if the inmate establishes the assigned advocate has a conflict of interest in the case." First, as explained above, we discern no error in Perez's first staff advocate's refusal to obtain the confidential informant's statement for Perez, and we do not agree that DOC was required to appoint a new staff advocate on that basis. Second, we do not agree with Perez that DOC was required to assign a third staff advocate based on a conflict of interest between Perez and his second advocate. Perez did not establish at the hearing that a conflict of interest existed; rather, Perez asserted only that his second staff advocate had previously written him a warning. Moreover, the rule provides that DOC "may" assign a different advocate if there is a conflict of interest, not that it must do so. We discern no violation of the rules on this record.

¶9 We also reject Perez's argument that he was denied due process based on the conduct of DOC and his staff advocate. "[A] constitutional due process right to a staff advocate arises only where an inmate is illiterate or where 'the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case.'" ***Ortega***, 221 Wis. 2d at 392 (citation omitted). There are no facts in this case to implicate a due process right to a staff advocate under ***Ortega***.

¶10 Next, Perez asserts that DOC violated WIS. ADMIN. CODE § DOC 303.86(4) and his due process rights by relying on an insufficient confidential informant's statement and by failing to provide that statement to Perez to prepare his defense. Perez contends that DOC violated the rules and his due process rights because: (1) DOC's January 29, 2009, decision indicates that DOC did not provide Perez with the confidential informant's statement or verify its reliability; (2) DOC's failure to provide him the statement violated his due process right to prepare his defense; and (3) DOC then failed to provide him with a second hearing as Perez argues was ordered by the Office of the Secretary. We disagree.

¶11 Under WIS. ADMIN. CODE § DOC 303.86(4), the committee may consider a confidential informant's signed and sworn statement "[i]f the institution finds that testifying would pose a risk of harm to the witness." If the committee considers a confidential informant's statement, it must "reveal the statement to the accused inmate," although it "may edit the statement to avoid revealing the identity of the witness." ***Id.*** Further, "[a] statement can be corroborated ... [b]y other evidence which substantially corroborates the facts alleged in the statement such as … circumstantial evidence." ***Id.***

¶12 Here, as Perez asserts, DOC's January 29, 2009, decision does not reflect that Perez was provided a copy of the confidential informant's statement or that DOC verified the statement's reliability. Accordingly, on Perez's complaint to the Corrections Complaint Examiner's Office, the Office of the Secretary dismissed the complaint with a modification allowing the committee to reconvene the hearing to meet those requirements on the record. The committee responded by issuing a revised decision on June 9, 2009, indicating that Perez was provided a

copy of an edited version of the confidential informant's statement at the January 29, 2009, hearing.[1] The revised decision also states that the confidential informant did not testify due to a fear of retaliation from Perez; that the informant's statement was signed and notarized; and that the statement was corroborated by evidence that Perez was one of only three inmates at that institution receiving prescription methadone, of a total population of more than 1500.

¶13 Thus, the committee did meet the criteria for use of a confidential informant's signed and sworn statement under WIS. ADMIN. CODE § DOC 303.86(4), and we discern no violation of the administrative rules or Perez's due process rights on the record before us. The rules require only that Perez be provided with the confidential informant's statement, which he was. Additionally, due process does not require advance notice regarding a disciplinary committee's reliance on a confidential informant's statement, *see* ***Mendoza v. Miller***, 779 F.2d 1287, 1293-94 (7th Cir. 1985), and therefore we discern no due process error in DOC's failure to provide Perez a copy of the statement itself prior to the hearing.

¶14 Finally, we do not agree that reversal is warranted because the committee did not reconvene the hearing, as allowed in the Office of the Secretary's decision on Perez's complaint. The Office of the Secretary made clear that it allowed the committee to reconvene the hearing to establish a record meeting the criteria under WIS. ADMIN. CODE § DOC 303.86(4). The committee

[1] The revised decision continues to indicate that Perez was provided a copy of the decision on January 29, 2009, even though that decision was signed by committee members on June 9, 2009. Perez does not assert that he did not receive a copy of the revised decision; rather, he asserts that the committee erred by correcting its decision without reconvening the hearing as ordered by the Office of the Secretary.

determined that it was able to do so without a reconvened hearing. Because we have no basis to reverse the disciplinary decision in this case, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).