

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 18, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-1996**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN EX REL. LARRY TIEPELMAN,**

**PETITIONER-APPELLANT,**

**v.**

**PHIL KINGSTON,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County:  
PAUL B. HIGGINBOTHAM, Judge. *Reversed and cause remanded with  
directions.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Larry Tiepelman appeals from an order quashing his writ of certiorari to review a prison disciplinary decision against him. Although we conclude that Tiepelman has waived all but one of the issues he attempts to raise on appeal, the record is insufficient to decide the remaining issue

of whether the disciplinary hearing was untimely and should not have been considered with regard to his subsequent transfer to another institution. Accordingly, we reverse the order of the trial court and direct it to remand the matter with directions to supplement the return.

On August 21, 1997, officials at the Oregon Correctional Institution discovered a quantity of food that had been taken from the prison kitchens. Based on Tiepelman's alleged participation in the theft and storage of the food, prison officials placed Tiepelman in temporary lockup on September 8, 1997, and issued him a conduct report on September 9, 1997. Tiepelman requested a full due process hearing and the appointment of a staff advocate. He later received a summary of three confidential informant statements linking him to a series of food thefts.

After a hearing on September 24, 1997, the prison adjustment committee found Tiepelman guilty of theft (contrary to WIS. ADM. CODE § DOC 303.34), the unauthorized transfer of property (contrary to WIS. ADM. CODE § DOC 303.40) and lying (contrary to WIS. ADM. CODE § 303.27).<sup>1</sup> Tiepelman was required to pay \$16.52 in restitution for the stolen food, and was given five days of adjustment segregation with five days' loss of good time. Tiepelman appealed the committee's decision to the warden claiming, among other things, that the deadline for the hearing had expired and that the statements given by the confidential informants were lies.<sup>2</sup> The warden denied the appeal on the basis that

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<sup>1</sup> Tiepelman's appeal to the warden twice refers to an additional sheet that does not appear to have been included in the return, unless he was referring to a photocopy of relevant rules.

<sup>2</sup> We cannot determine from the record whether Tiepelman raised any objections before the committee, because there are no minutes from the hearing included in the return.

“the inmate verbally requested a time waiver per affidavit,” although no such affidavit was included in the return.

Tiepelman petitioned for a writ of certiorari on the grounds that the deadline for the hearing had expired and that the committee’s decision was based solely upon lies by other inmates. The trial court issued the writ, but then summarily affirmed the warden’s decision and quashed the writ after Kingston presented twelve statements of law in a brief in support of his petition without applying any of them to the facts of his case. Tiepelman now claims on appeal that his due process rights were violated because: (1) his notice of rights form was not signed, dated or explained to him; (2) he was not assigned a staff advocate until the day of the hearing; (3) his hearing was untimely; and (4) the committee improperly relied upon confidential informant statements that were not signed. He asks that all of the collateral consequences of his being found guilty of the offenses in the conduct report, including his transfer to another correctional institution, be reversed.

We conclude that Tiepelman has waived any objection to the notice he received, the adequacy of the advocate’s assistance, and the form in which the confidential statements were presented to the committee,<sup>3</sup> because he did not properly raise any of those issues in his petition to the circuit court. *See C.A.K. v. State*, 154 Wis.2d 612, 624, 453 N.W.2d 897, 902 (1990). However, we also conclude that Tiepelman’s allegation in his petition that “the timeline on the ticket

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<sup>3</sup> We do not consider the argument that the confidential informant statements were lies to be the same as the argument that the form of the statements given to the committee or the summary of the statements given to Tiepelman were in some way inadequate. The first argument involves a judgment as to the relative credibility of the confidential informants and the accused, and thus goes to the sufficiency of the evidence rather than to whether the proper procedures were followed for the admission of confidential statements.

elapsed,” in conjunction with his citation to WIS. ADM. CODE § DOC 302.20(5) in his brief, was sufficient to preserve the issue of the hearing’s timeliness for judicial review.

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, 819 (Ct. App. 1990). 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. *See id.*

An inmate may be transferred from one correctional facility to another based upon a disciplinary infraction, but not until the prison adjustment committee has held a disciplinary hearing on the infraction and forwarded its findings of fact to the program review committee. WIS. ADM. CODE § DOC 302.20(2) and (3). The inmate may be transferred to a county jail pending the program review committee’s consideration of an inter-institutional transfer. *See* § DOC 302.20(4). However, under § DOC 302.20(5), when a prison inmate is transferred to a county jail pending the result of his disciplinary hearing and the subsequent review of his security classification and program assignment, the disciplinary hearing and program and security review shall be held not more than three days after service of the report of the disciplinary infraction upon the inmate. The inmate may request additional time to prepare for the hearing, but “[i]n no event shall the disciplinary hearing occur more than ten calendar days from the date of the disciplinary report.” The failure to hold a disciplinary hearing within the time prescribed is not harmless error because the adjustment committee exceeds its authority when it violates an administrative rule that it was bound to

follow. See *State ex rel. Jones v. Franklin*, 151 Wis.2d 419, 423-23, 444 N.W.2d 738, 740-41 (Ct. App. 1989).

Here, Tiepelman's disciplinary hearing was held fifteen days after his conduct report was issued, although he claims he was being held in the Columbia County Jail prior to the hearing. Fifteen days falls within the twenty-one day period the adjustment committee ordinarily has to hear a conduct report under WIS. ADM. CODE § DOC 303.76(3), but is well outside of the three-day time limit set forth in WIS. ADM. CODE § DOC 302.20(5). Even if Tiepelman waived the three-day time limit, as the warden's decision may indicate, it appears that the disciplinary hearing still should have been held no more than ten days after the conduct report was issued *if* Tiepelman was being held in a county jail pending the program review committee's consideration of his placement following the adjustment committee's determination on the alleged disciplinary infractions. However, the record does not establish where Tiepelman was being held pending the outcome of his disciplinary hearing, and under what authority.

Tiepelman's contention that he was being held in the Columbia County Jail pending his disciplinary hearing is plausible given that the State did not contest the assertion in its brief. Similarly, the fact that the warden did not indicate that Tiepelman's hearing was timely under WIS. ADM. CODE § DOC 303.76(3) lends support to the inference that the shorter time limit of WIS. ADM. CODE § DOC 302.20(5) may have applied. Nonetheless, our standard of review does not permit us to assume facts outside of the record.

We must therefore reverse the trial court's order and direct the trial court to remand the matter for the administrative agency to supplement the record with documentation as to where Tiepelman was being held pending the outcome

of his disciplinary hearing and why he was placed in the jail, if it turns out that he was in jail. The trial court should direct the agency to include in the supplemental return any minutes from the disciplinary hearing and any additional papers submitted to the warden on Tiepelman's administrative appeal, such as the affidavit purportedly waiving the time limit for Tiepelman's hearing. The agency should also be required to produce any documents from the program review committee's review which would shed light on the question of whether the time limit in WIS. ADM. Code § DOC 302.20(5) applied. The scope of the remand should be broad enough to allow the administrative agency to dismiss the conduct report and/or reverse Tiepelman's inter-institutional transfer on its own reconsideration. Otherwise, the trial court should proceed to consider the timeliness of the hearing based upon all of the evidence provided in the supplemental certiorari return.

*By the Court.*—Order reversed and cause remanded with directions.

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

