

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 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. 98-2034

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. BATTITES WESLEY,

PETITIONER-APPELLANT,

v.

WARDEN MARIANNE COOKE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Affirmed.*

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

PER CURIAM. Battites Wesley appeals a circuit court order quashing a writ of certiorari which had been issued for the review of a prison disciplinary decision. Wesley claims that prison officials failed to provide him adequate notice of his disciplinary hearing, that he was not given access to requested documents before the hearing, and that the confidential informant

statements adduced at the hearing were insufficient to support a finding of guilt. We conclude, however, that Wesley has waived any objection to the adequacy of his notice; that the record does not show that he asked for the documents he wanted through the proper channels; and that there was sufficient evidence to support the disciplinary action. Therefore, we affirm.

BACKGROUND

There were a series of prisoner fights and incidents of resistance to guards in the Kettle Moraine Correctional Institution during the spring of 1997. Prison investigators received information from several sources that Wesley was involved in instigating some of this activity, and that he was dealing canteen goods out of his cell for the benefit of Gangster Disciple gang members. On June 28, 1997, prison officials issued Wesley a conduct report for violations of WIS. ADM. CODE §§ DOC 303.16 (threats), 303.20 (group resistance and petitions), 303.21 (conspiracy), and 303.28 (disruptive conduct) based upon his alleged leadership role in prison gang activities. Attached to the report were statements from three confidential informants corroborating the information that Wesley was an “elder” and “overseer” of other gang members and that he had advised other gang leaders about how to cause a disruption in the institution.

Wesley received an initial notice of his upcoming disciplinary hearing which complied with the requirements of WIS. ADM. CODE § DOC 303.76, but the record shows he did not receive a second notice in compliance with WIS. ADM. CODE § DOC 303.81. He appeared and testified before the committee without objecting to the lack of second notice, although he did complain that he had not been given copies of certain documents which he believed would assist in his defense.

The committee, after considering Wesley's testimony and his prepared statement in addition to the conduct report and informants' statements, found Wesley guilty of all four offenses and imposed five days adjustment segregation and 360 days of program segregation. The committee found that the documents requested by Wesley were not necessary. On administrative appeal, the warden affirmed the disciplinary action. Wesley next filed a complaint in the inmate review system, which resulted in the reversal of all but the group resistance violation and a reduction in the punishment imposed. Wesley then commenced the certiorari action which is now before us on appeal, seeking to overturn the remaining offense.

STANDARD OF REVIEW

Our review is limited to the record created before the committee. *See 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.* "The facts found by the committee are conclusive if supported by 'any reasonable view' of the evidence, and [the court] may not substitute [its] view of the evidence for that of the committee." *Id.* (citations omitted).

Because on certiorari review we are limited to the record created before the committee, it follows that we cannot consider issues which were not raised before the committee and hence are not in the record. Consequently, if an inmate does not raise an issue before the committee, the inmate has not preserved

that issue for review by this court. *See Santiago v. Ware*, 205 Wis.2d 295, 327, 556 N.W.2d 356, 368 (Ct. App. 1996). We also do not review the decision of the circuit court for error, although we may benefit from that court's analysis.

ANALYSIS

Notice of Hearing

A prison disciplinary committee is to follow the administrative rules promulgated by the Department of Corrections. *See, e.g., State ex rel. Riley v. DHSS*, 151 Wis.2d 618, 623, 445 N.W.2d 693, 694-95 (Ct. App. 1989). Those rules include WIS. ADM. CODE § DOC 303.81(9), which provides that the hearing officer shall give the accused, his or her advocate, the committee and all witnesses, notice of the hearing. Wesley did not, however, raise any objection to the lack of proper hearing notice either before the disciplinary committee or during his administrative review by the respondent. We therefore conclude that he has waived the issue, and we will not consider it further. *See Santiago*, 205 Wis.2d at 327, 556 N.W.2d at 368.

Access to Documents

Before the disciplinary hearing, Wesley sought copies of unit logbook entries and recreation department sign-in sheets to support his contention that he did not attend recreation periods. He claimed his absence from recreation was contrary to the information given by one or more of the confidential informants.¹ He wrote to the security director, who directed him to the records

¹ It does not appear that either the conduct report or the confidential statements specified where Wesley's alleged oversight of gang members took place; however it would be logical to assume that the recreation periods might have provided such opportunities.

department, and then to the records custodian, who advised him that the records office did not routinely gather the information that Wesley had requested. The records custodian further advised Wesley that he should have his advocate collect the requested documents. There is nothing in the record to indicate that Wesley ever followed through on this directive to ask his advocate to obtain the desired records.² There is also nothing in the record indicating that Wesley or his advocate were denied an opportunity to marshal the facts and prepare a defense on his behalf.

Confidential Informants

Wesley next appears to argue that he was denied the right to confront the witnesses against him by the absence of the confidential informants from the hearing. We note, however, that the record shows Wesley did not request the attendance of any witnesses under WIS. ADM. CODE § DOC 303.81(1). Therefore, he cannot now claim that he was denied due process by their absence.

Wesley further asserts that, even if the confidential informants were not required to be present, the adjustment committee erred by considering their statements as evidence without making a determination that they would be in any danger if they testified. Under WIS. ADM. CODE § DOC 303.86(4):

If a witness refuses to testify in person and if the committee finds that testifying would pose a significant risk of bodily harm to the witness, the committee may consider a corroborated, signed statement under oath from that

² Wesley asserts in his brief that he did ask his advocate to gather the information he sought, and that nothing in the record contradicts his assertion. Our standard of review, however, does not permit us to overturn an administrative decision without evidence in the record that the agency has failed to follow its rules or otherwise acted improperly. See *State ex rel. Ortega v. McCaughtry*, 221 Wis.2d 376, 394-98, 585 N.W.2d 640, 649-51 (Ct. App. 1998).

witness without revealing the witness's identity. The contents of the statement shall be revealed to the accused, though the statement may be edited to avoid revealing the identity of the witness. The committee may question the witnesses, if they are otherwise available. Two anonymous statements by different persons may be used to corroborate each other.

It is true that the committee's written decision does not include an explicit finding of danger to the witnesses. Each of the confidential statements at issue, however, specifically mentions that identifying the informant would pose a risk of bodily harm to the informant, and the committee's decision also states that "the confidential informants and the report [are] correct," and that "the informants have nothing to lie about and are credible." It may therefore be inferred that the committee found that the informants would be subject to reprisals if their identity were known. In addition, we are satisfied that the confidential statements were sufficiently corroborative of one another to satisfy the due process requirement of reliability. The committee did not exceed its authority by considering the statements.

Sufficiency of the Evidence

Finally, Wesley challenges the sufficiency of the evidence to support his adjudication of guilt for group resistance, and he claims the committee failed to give a satisfactory account of the basis for its decision. *See Wolff v. McDonnell*, 418 U.S. 539, 563 (1974). We disagree. Under WIS. ADM. CODE § DOC 303.20(3):

Any inmate who intentionally participates in any activity with the purpose of identifying himself or herself with an inmate gang, as defined in s. DOC 303.02(9), is guilty of an offense.

Under WIS. ADM. CODE § DOC 303.02(9), an inmate gang is

“a group of inmates which threatens, intimidates, coerces or harasses other inmates or engages in activities which intentionally violate or encourage the intentional violation of statutes or administrative rules or institutional policies and procedures.”

The conduct report and confidential statements before the committee were more than sufficient to allow it to reasonably conclude that Wesley had violated the group resistance provision by advising gang members how to organize prison disturbances and by organizing a canteen for Gangster Disciple gang members. The committee’s written decision adequately explains why it believed the conduct report and confidential statements to be credible, satisfying the requirements of *Wolff* and *State ex rel. Meeks v. Gagnon*, 95 Wis.2d 115, 125, 289 N.W.2d 357, 363-64 (Ct. App. 1980).

By the Court.—Order affirmed.

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

