COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP106 **Cir. Ct. No. 2012CV4545**

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

STATE OF WISCONSIN EX REL. DAVID LARSEN,

PETITIONER-APPELLANT,

V.

MICHAEL THURMER, WILLIAM POLLARD AND GARY HAMBLIN,

RESPONDENTS-RESPONDENTS.

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

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. David Larsen appeals a circuit court order that affirmed a prison disciplinary decision on certiorari review. Larsen alleges that numerous procedural errors occurred during both the administrative and circuit

court proceedings. For the reasons explained below, we conclude that the circuit court properly affirmed the disciplinary decision.

BACKGROUND

¶2 According to a conduct report charging Larsen with attempted escape, Larsen's cellmate, Tony Tate, reported to prison officials that Larsen was planning to fake a heart attack during a recreation period two days later, and then to have some friends help him escape from the ambulance on the anticipated ride to the hospital. During the specified recreation period, another inmate, Dangelo Triplett, punched a guard. While Triplett was being subdued, prison officials, who were closely monitoring Larsen due to Tate's tip, observed Larsen look from side to side, lower himself onto the ground, roll onto his back, and claim to be having chest pains. Prison officials took Larsen to be examined by a nurse in the health services unit, and the nurse determined that all of Larsen's vital signs were within a normal range. Prison officials then placed Larsen in temporary lockup pending further investigation.

¶3 When prison officials asked Tate whether Triplett may have been helping Larsen, Tate noted that he had seen Larsen and Triplett talking together the day before the incident, and that Larsen appeared to be showing Triplett a booklet showing how much money Larsen had. Tate also said that he saw Triplett nod at Larsen just before Triplett punched the guard, and Tate thought the assault was intended as a diversion. Triplett admitted that Larsen had approached him the day before the incident, showed him an account ledger, and offered to send Triplett's "people on the street" money in the amount of four figures if Triplett would create a diversion for Larsen. Prison officials also reviewed Larsen's medical history and found no prior heart problems or complaints.

¶4 Larsen filed a request to have seven witnesses present at his disciplinary hearing: Triplett, Tate, two inmates who Larsen claimed were aware of Larsen's medical problems and problems with Tate, an inmate who Larsen claimed was aware of Larsen's problems with Tate and had been present during the recreation period, another inmate who had been present during the recreation period, and the reporting staff member, Captain Muraski. The adjustment committee permitted Larsen to have Triplett, Tate, and Muraski at the hearing, but denied the other requested witnesses.

¶5 At the hearing, Triplett recanted his prior statement, claiming that he had made up the story about creating a diversion for Larsen because Muraski had pressured him, mocked him, and offered him a deal on the battery. Tate refused to answer any questions. Muraski testified consistent with his report, and the committee disallowed as irrelevant a series of questions that Larsen attempted to ask Muraski that were largely focused on the circumstances under which Tate provided information to Muraski or other staff, such as when and where the conversation between Larsen and Triplett—that Tate claimed to have observed—had occurred, and who else was present.

¶6 The hearing officer deemed Muraski credible and Triplett not credible. It acknowledged that Larsen had not explicitly asked for an ambulance or to be taken to the health unit or a hospital, but noted that if staff had believed him to have been having a heart attack, it was reasonable to assume he would have been taken to the hospital. The committee determined that Larsen's act of getting onto the ground and claiming to have chest pains was deliberate and—given the prior information from Tate that an escape was being planned in just that manner—concluded that it was more likely than not that Larsen was in fact attempting to escape.

¶7 Larsen promptly sought administrative review of the disciplinary decision, during which process he submitted various materials to support his appeal. After waiting for more than a year and one-half for a final decision from prison officials, Larsen filed this certiorari action. The Office of the Secretary of the Department of Corrections (secretary) then issued a final decision on the administrative appeal after the certiorari action had been filed. The certiorari return included the secretary's decision and other documents generated by prison officials after the certiorari action had been filed, but did not include many of the submissions Larsen had made to the institution complaint examiner designated by the warden (warden) and the corrections complaint examiner (complaint examiner) designated by the secretary during the administrative proceedings.

STANDARD OF REVIEW

¶8 The established procedure for seeking judicial review of a prison disciplinary decision is by writ of certiorari. ***State ex rel. L'Minggio v. Gamble***, 2003 WI 82, ¶21, 263 Wis. 2d 55, 667 N.W.2d 1. Certiorari review is limited to the record created before an administrative agency. ***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 disciplinary committee stayed within its jurisdiction, (2) it acted according to law, (3) its decision reflected reasoned judgment rather than an arbitrary imposition of will, and (4) the evidence was such that the committee might reasonably make the order or determination in question. ***Id.*** We may, however, independently determine whether an inmate was afforded due process during administrative proceedings. ***State ex rel. Staples v. DHSS***, 128 Wis. 2d 531, 534, 384 N.W.2d 363 (Ct. App. 1986).

DISCUSSION

¶9 Larsen raises ten issues on this appeal, containing multiple subissues, all pointing to errors he believes were made by the circuit court. We have combined and slightly reordered some of Larsen's arguments into seven general categories of related claims. However, as noted above, in a certiorari action we review the merits of an administrative proceeding directly. Therefore, aside from the first, second, and last issues—which do involve procedural matters that first arose in the circuit court—we have reframed Larsen's issues to focus on the administrative process, rather than on how the circuit court handled Larsen's claims of error.

The Certiorari Return

¶10 Larson first contends that the circuit court erred in refusing to strike the certiorari return. Larsen challenges both the inclusion of documents that were generated by prison officials after Larsen had already filed his certiorari action, and the omission of materials that Larsen had submitted to the warden and complaint examiner during the administrative review process.

¶11 Ordinarily, a certiorari return should be composed of only those documents that were before the administrative agency when it made the final decision from which review is being sought. This case arose in an unusual procedural posture, however, because Larsen filed his certiorari action after waiting more than a year and one-half for the complaint examiner to issue a recommendation on his pending Inmate Criminal Review System (ICRS) complaint, *before* a final decision had been issued by the secretary.

¶12 If the certiorari return had been limited to the documents that were in the administrative record at the time the writ petition had been filed as Larsen contends it should have been, the circuit court would have been well within its authority to either dismiss the certiorari action as premature or issue a remand, directing prison officials to complete Larsen's administrative review process. If the circuit court had ordered such a remand, it would also have been appropriate to direct that a supplemental return be filed in the circuit court after the administrative proceedings had been completed. The result of either a dismissal (after which Larsen could have refiled his action upon receiving a final administrative decision) or of a remand (after which a supplemental return would have been filed) would have been that the circuit court would have had the subsequently produced documents before it when it addressed the merits of whether the disciplinary action against Larsen should stand. We therefore conclude that any error in including materials in the certiorari return relating to subsequent administrative proceedings in the first instance was harmless.

¶13 Larsen contends that additional materials he submitted to the warden and/or the complaint examiner during the ICRS process—largely consisting of correspondence about his case between himself and the security director, his advocate, the property department, the records department, the warden and the complaint examiner—should also have been included in a supplemental return. *See generally* WIS. ADMIN. CODE § DOC 303.87(3) (2015)[1] (requiring the

[1] The administrative code revisions relating to DOC disciplinary procedures were renumbered and slightly revised by 2014 WIS. ADM. REG. No. 705 (eff. Jan. 1, 2015), but neither party contends that any revision affects the substance of the issues before us on this appeal. We will therefore use the current numbering of all of the relevant DOC administrative code provisions throughout this opinion.

institution to place in the inmate's file the original conduct report and "all due process documents"). The prison officials challenge that contention on the grounds that Larsen did not present his additional materials to the hearing examiner. We note, however, that whether certain issues were properly preserved for further review is a separate issue from what documents were before administrative officials by the time the secretary issued his final decision. Because the prison officials do not appear to dispute that Larsen provided the warden and the complaint examiner with copies of the same documents attached to his certiorari petition, we will treat those documents as if they had been submitted by means of a supplemental return, and will consider them in our analysis of the disciplinary decision.

Evidentiary Hearing

¶14 Larsen's second claim is that he was entitled to an evidentiary hearing in the circuit court to make a record about what was left out of the summaries of the witness statements included in the conduct report, and what testimony Triplett would have given at the hearing if he had been permitted to answer all of Larsen's questions. However, if this court were to determine that administrative officials erred in failing to provide more detailed statements from the witnesses or by refusing Larsen's requests to submit additional evidence—or that more information was required to decide those issues—the remedy would be a remand to have the hearing officer reopen the disciplinary hearing and take additional evidence, not for the circuit court to hold a hearing to collect that evidence. We therefore reject this claim.

Advocate's Assistance

¶15 Third, Larsen argues that the disciplinary decision should be invalidated because his advocate failed to fulfill her obligations under the administrative code, which provides in relevant part:

> The role of the staff representative is to help the accused inmate understand the charges against the inmate and to provide direction and guidance regarding the disciplinary process. The staff representative may use discretion in the performance of this role, including gathering relevant evidence and testimony and preparing the inmate's own statement. The staff representative may speak on behalf of the accused inmate at a disciplinary hearing or may help the inmate prepare to speak.

WIS. ADMIN. CODE § DOC 303.83(3).

¶16 Larsen specifically faults his advocate for directing him to personally obtain documents that he was seeking from the property and record departments, as well as written statements from other inmates. Larsen asserts that his advocate's failure to assist him with obtaining evidence was prejudicial because the property and records department informed him that he should advance his requests for documents relating to other inmates through his advocate, and that prison officials did not provide Larsen with the witness statements he personally had requested from other inmates until after the hearing.

¶17 The flaw in this argument is that the text of the rule gives a staff advocate discretion to assist an inmate in gathering evidence; it does not require that he or she do so. *See* ***id.*** The documents Larsen attached to his certiorari petition show that the advocate provided Larsen with written answers to questions that he sent her. It is plain from those documents and others in the record that Larsen understood the nature of the charges against him and further understood

that the disciplinary hearing would be his opportunity to refute those charges by presenting such witnesses, witness statements, or other evidence as he would be able to gather. We are therefore satisfied that the advocate's primary purpose of providing Larsen with general guidance about the charges and disciplinary process was fulfilled. Quite simply, it was not the advocate's fault that other prison policies may have impeded Larsen's attempts to obtain some of the evidence he sought, or that the hearing examiner did not conduct the hearing as Larsen would have liked.

Presentation of Defense Evidence

¶18 Fourth, Larsen claims that the hearing examiner failed to comply with several of the department's own rules and procedures for conducting a disciplinary hearing by limiting Larsen's ability to present evidence on his own behalf. The rules at issue are set forth in WIS. ADMIN. CODE § DOC 303.80(5), which provide in relevant part:

> HEARING. The hearing officer shall conduct the due process hearing by doing all of the following:
>
> ….
>
> (b) Permit the accused inmate to make an oral statement. An inmate may submit a written statement in lieu of an oral statement only under extraordinary circumstances as authorized by the security director. The written statement under this paragraph shall only be accepted if the statement is a legibly printed statement limited to 500 words on no more than two sheets of paper, a transcript of an oral statement, or a recorded statement.
>
> (c) Question approved witnesses. The hearing officer may accept a written witness statement only if it conforms to the requirements under s. DOC 303.84(3).
>
> (d) Permit the offering of relevant physical evidence.

> (e) Permit questions or require the inmate or the inmate's staff representative to submit written questions to the hearing officer to be asked of the witness.
>
> (f) Prohibit repetitive, disrespectful or irrelevant questions.

Larsen then cites ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶16, 234 Wis. 2d 626, 610 N.W.2d 821, for the proposition that an agency's failure to follow its own rules renders its actions invalid, and ***State ex rel. Riley v. DHSS***, 151 Wis. 2d 618, 625, 44 N.W.2d 693 (Ct. App. 1989), for the proposition that it is not harmless error when an agency acts beyond the scope of its authority.

¶19 Larsen's eighth argument similarly contends that largely the same limitations on his ability to present defense evidence violated his due process rights. Larsen's ninth argument claims that his due process rights were also violated because the hearing officer did not permit him to adequately cross-examine the three witnesses who appeared at the hearing. Due to the considerable overlapping between Larsen's fourth, eighth and ninth arguments relating to the presentation of defense evidence, we will discuss them together.

¶20 Larsen asserts that the hearing examiner cut him off when he attempted to submit, or alternatively read, a seven-page "conclusionary-type statement" during the evidentiary portion of the hearing. Larsen contends that was fundamentally unfair because his advocate had advised him that how he organized things was up to him, and the DOC-71 form that he was provided to advise him about his hearing rights stated he could present his version of events, without mentioning any limitations on when or how the statement needed to be made or providing more specific information about the procedures to be followed at the hearing.

¶21 We first note that Larsen testified on his own behalf, and the applicable rules allow written statements to be submitted only when a witness is unavailable to testify. Moreover, Larsen does not dispute that the hearing officer afforded him an opportunity to make a verbal statement at the outset of the hearing and that he did so, but declined to use that opportunity to also read his written statement. We are satisfied that the opportunities provided for Larsen to give his side of the story were well within the proper exercise of the hearing examiner's discretion and sufficient to satisfy both the administrative rule and due process.

¶22 Larsen next complains that he was not allowed to present all of his requested defense witnesses to establish that he had preexisting health problems, and contends it was error for the hearing officer to deny his request for additional witnesses when the authority to review whether to allow requested witnesses is assigned to the security director under WIS. ADMIN. CODE § DOC 303.84(2). However, the administrative rules plainly state that an inmate may make a request "for no more than two identified witnesses in addition to the reporting employee." WIS. ADMIN. CODE § DOC 303.84(1). This is in accordance with the general principle that there is less process due in an administrative proceeding than in a criminal trial. ***Wolff v. McDonnell***, 418 U.S. 539, 556 (1974). Both the administrative rule and due process were satisfied when both Tate and Triplett were approved as witnesses. It was Larsen's own choice to name the two witnesses identified in the conduct report so that he could cross-examine them, rather than naming other witnesses who might have supported his claim of having had prior chest pains. It is irrelevant who rejected Larsen's request for additional witnesses because the rules would not have permitted Larsen to present them in any event.

¶23 Larsen next complains that he was not allowed to present physical evidence that he brought with him to the hearing—namely, the blue booklet or booklets that purportedly served as the account ledger that Larsen showed to Triplett. The contested issue, however, was not what was contained in the blue booklet, but rather whether Tate and Triplett both lied about Larsen showing any blue booklet at all to Triplett. The hearing examiner could reasonably conclude that having the booklet itself in evidence was of limited relevance and was not necessary for resolution of the credibility issues.

¶24 Larsen next asserts that prison officials withheld exculpatory evidence because they did not provide him with: (1) requested information from the property department that he contends supported his theory that his cellmate Tate fabricated the story about a planned escape in order to get out of his cell so that he could transfer a television; (2) Triplett's face card showing when he was in segregation and/or on a furlough day, limiting his opportunity to have met with Larsen as alleged; (3) security tape footage that Larsen believes would not have shown any meeting between him and Triplett; and (4) the witness statements that he had requested from other inmates, which were dated several days before the hearing but not provided to Larsen until about four hours after the hearing.

¶25 However, the reporting staff member did not claim to have any video footage of Larsen conversing with Triplett, and he did not dispute Larsen's factual assertions regarding Tate's interactions with the property department or when Triplett was in segregation. Instead, both the reporting staff member and the hearing officer simply disagreed with Larsen about the significance of those facts. The hearing officer noted that, even on furlough days there are periods when inmates can come out of their cells into the hall, as well as have recreation, and that there were several places where a conversation could have occurred. Since

the hearing officer was already aware of the limited opportunity that Larsen would have had to meet with Triplett, and that Tate might have reason to want to get out of his cell to facilitate a property transaction, any additional documentary evidence on those points would be cumulative.

¶26 As to the written statements Larsen had requested from other inmates, the administrative record does not reveal why they were not provided to Larsen until after the hearing. However, even if we assume that prison officials had the statements in their possession before the hearing and either deliberately or inadvertently failed to turn them over in a timely manner, the failure of prison officials to adhere to a procedural requirement under the administrative rules is "harmless if it does not substantially affect a finding of guilt or the inmate's ability to provide a defense." WIS. ADMIN. CODE § DOC 303.88.

¶27 Here, Larsen was able to present his defense theory that Tate had fabricated the entire escape plan for his own benefit both through his statement conveyed in the conduct report and through his own testimony and his oral statement at the beginning of the hearing. Larsen contends that the witness statements would have further supported his own assertions that he had experienced chest pains in the past, and that he and Tate had not been getting along. However, even if Tate wanted to fabricate a story to get himself out of his cell or to get Larsen in trouble, Larsen's theory does not explain how Tate could have known in advance the exact time and place that Larsen would suddenly get chest pains and lie down; or why a man who Tate claimed to have seen conversing with Larsen the day before the incident, but who Larsen had not previously known, would tell prison officials that Larsen had offered him money to create a diversion. The possibility that Triplett would coincidently hit a guard just when Larsen was having real chest pains that had been accurately predicted by his

cellmate two days earlier, and would then falsely claim to have done so as a diversion for Larsen, strains all credibility. We therefore see no possibility of a different result even if the additional witness statements had been presented during the hearing, and conclude that any failure to turn the statements over to Larsen in a timely manner was harmless under the facts of this case.

¶28 Finally, Larsen complains that the hearing examiner disallowed many of his cross-examination questions for the witnesses—primarily centered on where and when conversations with witnesses took place, exactly what witnesses actually said to the reporting staff member, and whether any other inmates provided information. To a large extent, Larsen is asking this court to second guess the hearing examiner's discretion to determine what was relevant, which is outside the scope of certiorari review. Moreover, even assuming for the sake of argument that the hearing examiner should have allowed more of Larsen's questions, we are again not persuaded that Larsen's substantive rights were violated because we cannot see what answers to the questions would have altered the outcome of the case.

Documentation and Sufficiency of the Evidence

¶29 Fifth, Larsen claims that his due process rights were violated because the conduct report provided an inadequate recitation of the relevant facts, and because the administrative record did not contain the complete witness statements, any documentation of the reporting staff member's contact with outside law enforcement, or the correspondence between various parties, including Larsen, the hearing examiner, the warden, the complaint examiner, and the DOC secretary.

¶30 In the seventh argument of his brief, Larsen raises a related claim that his due process rights were violated because he was not afforded the opportunity to introduce the remainder of the witness statements according to the rule of completeness. Larsen characterizes the lack of evidence he has identified as a failure or refusal on the part of the hearing examiner to consider all of the relevant information as required under WIS. ADMIN. CODE § DOC 303.80(6)(b). Absent the additional evidence Larsen contends should have been considered, he also contends that prison officials acted arbitrarily in imposing and upholding the discipline against him.

¶31 As noted above, we have cured any error administrative officials committed in failing to place Larsen's submissions documenting his correspondence with prison officials about his case into the administrative record by treating them as a supplemental return. We will address the remaining points from Larsen's fifth and seventh argument sections together.

¶32 Under WIS. ADMIN. CODE § DOC 303.67(2), a staff member who writes a conduct report "shall describe the facts and list the sections [of the DOC administrative rules] which were allegedly violated." The conduct report at issue here alleged a violation of the administrative rule on escape, and includes two and one-half pages explaining how Tate informed prison officials of the escape plan in advance; what prison guards observed about Larsen's and Triplett's conduct in the exercise area; what the nurse found when she examined Larsen; and what Triplett said about his involvement. Those facts were more than adequate to put Larsen on notice as to the nature of the charge against him. It was not necessary for the reporting staff member to attach any evidentiary submissions to the charging document.

¶33 Larsen cites WIS. STAT. § 901.07 (2013-14)[2] for the proposition that "when a written or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part of any other writing or recorded statement which ought by right to be considered contemporaneously with it." Aside from the fact that the judicial rules of evidence do not apply in administrative proceedings, the rule of completeness is not relevant here because the reporting staff member did not present any written or recorded statements from witnesses to the hearing examiner. Nor did the hearing officer receive or consider any information from confidential informants. Instead, the reporting officer gave his own summary of what witnesses had told him.

¶34 Larsen complains that being provided with the reporting officer's summation in the conduct report of statements made by Tate and Triplett—rather than with full written statements by the inmates themselves or recordings of their interviews—did not provide Larsen with a meaningful opportunity to challenge the witnesses' statements. This argument is without merit because both Tate and Triplett were present at the hearing. The fact that Tate refused to answer questions at the hearing does not mean that prison officials failed to make him available. Tate's lack of cooperation at the hearing could have been considered by the hearing examiner in assessing the credibility of his prior statement, just as the hearing examiner properly weighed the credibility of Triplett's hearing testimony against his prior statement.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶35 Just as there was no requirement for the reporting officer to provide written or recorded statements from the inmates whose statements he relayed, there was no requirement that he provide written documentation from other sources he contacted outside of the prison relating to Larsen's lack of documented heart problems. If Larsen had any documents from medical providers that showed he had in fact reported heart problems in the past, he was free to introduce those documents at the hearing himself.

¶36 In sum, the record shows that the hearing examiner did consider all of the relevant information before him, as set forth in the conduct report and the hearing testimony, and reasonably determined that Larsen's guilt had been established as more likely than not. Contrary to Larsen's apparent belief, the administrative rules do not mandate that any particular form of evidence must be presented.

Delay in Administrative Review

¶37 Larsen's sixth claim is that his due process rights were violated because the complaint examiner took 625 days to issue a recommendation to the secretary, when the administrative rules require a recommendation to be made within 35 days. *See* WIS. ADMIN. CODE § DOC 310.13(6). The record shows that the secretary granted himself an "indefinite" extension to issue a decision in order to allow the complaint examiner to investigate the complaint. Larsen points out, however, that while the rules authorize the secretary to extend the time to make a final decision based upon cause, they contain no provision explicitly providing similar authority for the complaint examiner to extend the time to make his recommendation. *Cf.* WIS. ADMIN. CODE §§ DOC 310.13(6) *and* DOC 310.14(1). Larsen further contends that it is not clear from the complaint examiner's

recommendation what, if any, actual investigation the complaint examiner performed, and no explanation has been provided that would explain or provide "good cause" for a delay of over a year and one-half.

¶38 We first note that a complaint examiner's recommendation is directed toward the secretary, not toward the inmate. As such, it would seem that the deadline for the complaint examiner to provide a recommendation to the secretary is integral to the deadline for the Secretary to issue a final decision—and that it is the final decision to which any substantive rights of the inmate would attach.

¶39 In any event, even if the secretary lacks explicit authority to extend the deadline for the complaint examiner's recommendation, the administrative rules do not specify any sanction that would apply or remedy that would be available if the complaint examiner fails to meet the deadline. In particular, we see nothing in the administrative rules to suggest that the secretary would lose jurisdiction or competency to proceed in the absence of a timely recommendation. Therefore, while we understand Larsen's frustration, we are not persuaded that the delay in the administrative review process warrants dismissal of the disciplinary action.

Respondent's Circuit Court Brief

¶40 Finally, having already discussed Larsen's seventh, eighth and ninth issues in our discussion above, we turn next to his tenth and last issue. Larsen claims that the circuit court should have struck the respondent's brief under WIS. STAT. § 802.05(3), because the signature on the brief was illegible, and the signer's authority to act on behalf of the respondent was not apparent on its face.

This claim is a non-starter. As we explained above, we directly examine the documents from the administrative proceedings, not those from the circuit court.

By the Court.—Order affirmed.

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