

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 13, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-0993

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL. TAYR KILAAB AL
GHASHIYAH (KHAN) F/K/A JOHN CASTEEL,**

PETITIONER-APPELLANT,

v.

KENNETH MORGAN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Pro se appellant Tayr Kilaab al Ghashiyah (Khan), f/k/a John Casteel, appeals from an order quashing his writ of certiorari seeking review of four disciplinary determinations. Khan contends the trial court erred

when it dismissed his claims for failure to exhaust administrative remedies.¹ Khan maintains that he filed inmate complaints under the Inmate Complaint Review System (ICRS), but that the complaints were refused and returned because he used his Muslim name rather than Casteel, the name he was incarcerated under. Because we conclude that Khan has not established that he exhausted his administrative remedies, we affirm the trial court's order quashing the writ of certiorari.

BACKGROUND

¶2 Khan is an inmate currently confined at Racine Correctional Institution (RCI). Respondent Kenneth Morgan is the RCI warden. Khan seeks review of four findings of disciplinary infractions concerning four separate conduct reports. The first conduct report, #892137, charged Khan with disobeying orders and violations of institution policy and procedure on January 28, 1998. The conduct involved using a personal coffee container in the dining area contrary to institution rules. A disciplinary hearing was held on February 6, 1998, and Khan was found guilty. Khan appealed to the warden claiming the hearing officer failed to make a complete record, failed to give an adequate reason for the decision, and failed to discuss any credibility considerations. The warden affirmed the decision on February 18, 1998.

¶3 The second conduct report, #892184, charged Khan with disobeying orders and disruptive conduct on February 9, 1998. The conduct involved lining up for evening meals despite an order not to because Khan was scheduled to attend

¹ The trial court counted the dismissal as a strike against Khan pursuant to WIS. STAT. § 801.02(7)(d).

the Ramadan Feast. A disciplinary hearing was held on February 27, 1998, and Khan was found guilty. He appealed to the warden claiming he was not credited with time spent in temporary lockup; did not receive the two notices required under the administrative code; and was denied a fair hearing because the committee failed to accurately record the hearing, did not give an adequate reason for its decision, and failed to discuss any credibility determinations. On March 9, 1998, the warden rejected the appeal on the grounds that Khan was instructed to use the name he was sentenced under when filing his appeal.

¶4 On February 13, 1998, during the processing of these first two conduct reports, Khan received a written order from Unit Manager Mary Greene instructing him to sign any future internal correspondence using the name under which he was incarcerated and to add any secondary names using a/k/a (also known as). Khan was also warned that failure to abide by this order would subject him to disciplinary proceedings.

¶5 On February 26, 1998, Khan received conduct report #891139, charging him with disobeying orders for violating the February 13, 1998 order prohibiting him from signing internal institution documents with his Muslim name. A disciplinary hearing was held on March 17, 1998, and Khan was found guilty. He appealed to the warden claiming the committee's statement of facts was inadequate, and objecting to the denial of the presentation of his witnesses because he failed to use his institution name on the witness request form. The warden affirmed the decision on March 27, 1998.

¶6 On February 27, 1998, Khan received a fourth conduct report, #891191, charging him with disobeying orders and false names and titles for submitting a written statement to a disciplinary hearing committee using his

Muslim name, contrary to the written February 13, 1998 order. A disciplinary hearing was held on March 18, 1998, and Khan was found guilty. He appealed to the warden raising the same objections as in conduct report #891139. On March 27, 1998, the warden affirmed the decision.

¶7 Khan filed a certiorari action in trial court on June 5, 1998. The trial court quashed the writ of certiorari, dismissing Khan's claims on the grounds that Khan failed to establish that he had exhausted his administrative remedies by appealing his allegations of procedural error through the ICRS.

STANDARD OF REVIEW

¶8 Our scope of review is identical to the trial court's on certiorari. *See State ex rel. Staples v. DHSS*, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). Because we independently determine this appeal's merits, it is unnecessary to review the trial court's analysis. *See id.*

ANALYSIS

¶9 The State contends that Khan has waived his objections to the disciplinary proceedings because he failed to show that he had exhausted his administrative remedies by employing the ICRS prior to bringing his certiorari action. We begin our analysis by examining the exhaustion provisions that control this matter. We apply the statutes and administrative rules which were in effect at the time of Khan's disciplinary proceedings. At the time of Khan's disciplinary proceedings, WIS. STAT. § 801.02(7) (1995-96) provided that:

No prisoner . . . may commence a civil action or special proceeding against an officer, employe or agent of the department of corrections in his or her official capacity or as an individual for acts or omissions committed while carrying out his or her duties as an officer, employe or

agent or while acting within the scope of his or her office, employment or agency *until the person has exhausted any administrative remedies that the department of corrections has promulgated by rule.*² (Emphasis added.)

¶10 The Department of Corrections was operating under emergency administrative rules at the time of Khan's disciplinary proceedings. Those rules became effective August 4, 1997, and were promulgated as permanent rules effective May 1, 1998. The emergency rules contained two exhaustion provisions. WISCONSIN ADMIN. CODE § DOC 310.04 provided:

Before an inmate may commence a civil action or special proceedings against any officer, employe or agent of the department . . . the inmate shall file a complaint under ss. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14.

WISCONSIN ADMIN. CODE § DOC 310.08(3) provided:

[a]fter exhausting the appeal in s. DOC 302.19, 303.75 or 303.76, an inmate may use the ICRS to challenge the procedure used by the adjustment committee or hearing officer....

We have concluded that because the department's rules made an administrative remedy available under the ICRS, the statutory exhaustion requirement under WIS. STAT. § 801.02(7) made the ICRS remedy a requirement for review of procedural errors committed by a disciplinary committee prior to certiorari review in the trial court. *See State ex rel. Frasch v. Cooke*, 224 Wis. 2d 791, 796, 592 N.W.2d 304 (Ct. App. 1999). It is undisputed that Khan has raised procedural errors regarding

² WISCONSIN STAT. § 801.02(7) was subsequently amended effective September 1, 1998. *See* 1997 WIS. ACT 133, § 44(1).

the disciplinary decisions he now appeals. We, therefore, initially conclude that Khan was required to pursue his procedural challenges through the ICRS. We next determine whether Khan complied with the exhaustion requirement.

¶11 Khan contends that he filed inmate complaints on all four disciplinary actions with the ICRS, but that those complaints were refused and returned. We note that there is no evidence in the return to the writ of certiorari suggesting that Khan complied with the exhaustion requirement. The return demonstrates only that Khan appealed his allegations of error through the warden. To prove his contention that he submitted inmate complaints that were returned, and were, therefore, not included in the return, Khan submitted a statement with his reply brief in the trial court, to which he attached numerous exhibits of various inmate complaints. We turn to these submissions to determine whether Khan complied with the exhaustion requirement.

¶12 We first conclude that Khan's statement is an improper evidentiary submission. Khan's statement is not notarized and is therefore not an affidavit. "An affidavit is any voluntary ex parte statement reduced to writing and sworn to or affirmed before a person legally authorized to administer an oath or affirmation." *See* 3 Am. Jur. 2d *Affidavits* § 1 (1986). It is essential to the validity of an affidavit that it be sworn to or affirmed before an officer authorized to administer oaths or affirmations. *See id.* at § 11. In addition, it appears that the statement is made on information and belief. Although Khan identifies the attached exhibits as "true and correct copies," his affirmation states that he knows "the contents and documents hereto" and *believes* "them to be true and correct to the best of my knowledge and understanding." Affidavits made upon information and belief are improper evidentiary submissions. *See Hopper v. City of Madison*, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977).

¶13 More significantly, the exhibits that are attached to the affidavit do not establish that Khan filed inmate complaints directly corresponding to the particular conduct reports and procedural allegations at issue here, or that those inmate complaints were not accepted because Khan used his Muslim name.

¶14 Exhibit One is an inmate complaint with subsequent ICRS appeal documents appealing a temporary lockup complaint and challenging the constitutionality of WIS. ADMIN. CODE § DOC 303.11. It is unrelated to the substance of the conduct reports at issue here and to Khan's procedural challenges to the processing of those reports. Exhibit Two is a copy of the February 13, 1998 memo directing Khan to use his institution name, John Casteel, and a copy of a letter written to RCI officials by Khan's fiancée. This exhibit does not establish Khan filed complaints with the ICRS. Exhibit Three is an inmate complaint in which Khan appears to be challenging his placement in segregation for using his Muslim name. He also characterizes the February 13, 1998 directive as a scheme to harass him and as retaliation for filing numerous grievances. Again, this complaint does not raise the procedural challenges Khan submitted to the warden on his four conduct reports. In addition, the date of incident or denial of request identified on this complaint does not correspond to the dates of any of the incidents or to the warden's denials in the conduct reports at issue. We cannot conclude, therefore, that this inmate complaint was submitted in association with any of the four conduct reports relevant to this appeal.

¶15 Exhibit Four is an inmate complaint that specifically references the four relevant conduct reports. However, the date of incident or denial of request does not correspond to the dates of any of the incidents or to the warden's denials of those conduct reports. Furthermore, there is no indication in the complaint that it was rejected by the ICRS because Khan submitted it under his Muslim name.

Exhibits Five through Eight are inmate complaints regarding disciplinary matters not before us and, therefore, do not establish that Khan filed inmate complaints regarding the four conduct reports at issue here. We do note, however, that there appear to be formal notations provided on those documents by DOC officials specifically rejecting the complaints because they were considered unsigned as a result of Khan's failure to use his institution name. This suggests that DOC policy is to provide formal documentation of a rejection of an inmate complaint, rather than merely returning the complaint without providing a written reason. Exhibits Nine and Ten are not relevant to our determination.

¶16 In sum, none of the documents Khan submits establishes either that he filed complaints with the ICRS appealing the particular conduct reports challenged in this appeal, or that those complaints were rejected because Khan used his Muslim name. We conclude, therefore, that Khan has failed to establish that he exhausted his administrative remedies by raising in the ICRS his claims of procedural error regarding the four conduct reports. Accordingly, the trial court's order is affirmed.

By the Court.—Order affirmed.

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

