

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2000

Cornelia G. Clark
Acting 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. 99-1997

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN EX REL. WILLIE M. WILLIAMS,

PETITIONER-APPELLANT,

v.

**DANIEL R. BERTRAND, WARDEN, GREEN BAY
CORRECTIONAL INSTITUTION,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Willie Williams, an inmate of the Green Bay Correctional Institution, appeals an order denying a writ of certiorari. He raises several issues concerning a disciplinary hearing conducted by a Green Bay prison adjustment committee involving his conduct while incarcerated in Milwaukee. A

hearing officer makes preliminary decisions in these proceedings, and one of the issues Williams raises is that the hearing officer assigned to review his case violated due process by refusing to allow him to call two relevant witnesses. Because we conclude that this issue is meritorious and requires reversal, we remand without addressing his other arguments.

¶2 Our independent review of the documents Williams submitted with his brief leads us to the following factual background.¹ While in custody at the Milwaukee County Jail, Williams was written up for rules violations on three consecutive days.² The first report indicates that on November 9, 1998, Williams resisted a sheriff's deputy's efforts to handcuff him. According to the incident report, the deputy observed Williams without handcuffs contrary to jail policy. The deputy approached Williams and informed him that he would need to be handcuffed. Williams ignored the deputy, who then attempted to secure Williams's right wrist. Williams stated, "nobody's gonna cuff me," removed his glasses and attempted to punch the deputy with a closed fist. The deputy, along with other staff, subdued Williams and transported him to his jail cell. The rules

¹ Attached to Williams's brief are various documents concerning the disciplinary hearing that are not a part of the record. We generally do not consider documents outside the record. *See Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981). Although nothing suggests that Williams complied with the requirements of WIS. STAT. § 781.03 (1997-98) and properly ensured an adequate record for appeal, the State has explicitly agreed that the copies provided by Williams are accurate. Based on the State's concession, we address the merits of Williams's arguments. The record does contain a handwritten letter to the clerk of Brown County Circuit Court requesting that documents be filed. The clerk, however, would not be the person in possession of the necessary documents. *See id.*

² The trial court and State's rendition of the facts indicates that all the violations charged in the Green Bay conduct report arose out of incidents occurring on one day. The submitted documentation, however, does not support this interpretation. There are three separate violation reports involving three consecutive dates of incidents that report different violations for each day. The Green Bay conduct report, from which this appeal arises, specifically incorporates the incidents that occurred on the first and last incident days.

violation report charged Williams with assault, disobeying orders, committing an act that necessitates a security scare, fighting and committing an act that requires staff to use force. The report indicates that Williams was provided a copy of the report on November 10 and given notice that a hearing was scheduled for November 14. Williams contends that the hearing occurred on November 10; however nothing in the record supports that contention.

¶3 A second report indicates that Williams continued his misconduct on November 10. On that day, Williams made highly offensive statements to a sergeant on staff. The report lists the violation as verbally disrespecting a staff member, but does not indicate that Williams was ever provided a copy of the report or given a hearing date.

¶4 Williams was again accused of jail violations on November 11. He began kicking his cell door, verbally disrespecting the jail staff and lighting toilet paper on fire. A violation report from that day indicates that he was charged with using obscene language to jail staff, disobeying verbal/written orders from sworn staff and possessing and/or using smoking materials. Again, there is no indication that Williams received a copy of the violations report or a hearing date.

¶5 Apparently back in Green Bay, Williams received a DOC conduct report on November 13 charging him with violations from the November 9 and 11 incidents.³ Therefore, it appears that Williams did not have a disciplinary hearing on the first incident in Milwaukee, or at least not on November 14 as indicated in the violation report. The conduct report charged Williams with attempted battery,

³ WISCONSIN ADMIN. CODE § DOC 303.76(4) provides that a due process hearing may take place at an institution where an inmate has been transferred.

disobeying orders, disrespect, disruptive behavior and causing an explosion or fire. It does not appear that the Green Bay conduct report referenced the November 10 incident.⁴

¶6 Williams denied that the incidents occurred as reported and claimed that he already had a disciplinary hearing on his conduct in Milwaukee. He requested that two Milwaukee County sheriff's deputies appear as witnesses by telephone at his disciplinary hearing. The request was denied, however, on the grounds that the deputies were not DOC employees. A disciplinary hearing was held on November 24, and the committee found Williams guilty of all five violations.

¶7 Williams claims that DOC denied him due process by denying his request to present witnesses. He claims that the two deputies witnessed the November 9 incident and could have offered a contrary view of what occurred. 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 (Ct. App. 1990). We will consider only whether the committee: (1) failed to stay within its jurisdiction, (2) failed to act according to law, (3) acted in an arbitrary, oppressive or unreasonable manner that represented the committee's will and not its judgment, and (4) relied on evidence that could not reasonably support the order or determination in question. *See id.*

¶8 As the State concedes, an inmate facing disciplinary proceedings should ordinarily be allowed to call witnesses and present documentary evidence

⁴ Complicating our analysis is the failure of the violations listed in the Green Bay report do not correspond directly with violations listed in the Milwaukee reports.

in his or her defense. *See Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). *Wolff* explained that an inmate who properly requests a relevant witness should be allowed to present that testimony unless the appearance would be “unduly hazardous to institutional safety or correctional goals.” *Id.*

¶9 WISCONSIN ADMIN. CODE § DOC 303.81(1) provides that an accused inmate may request witnesses and then present as many as two witnesses, except for good cause. After witness requests have been made, a hearing officer reviews the requests and investigates if necessary. The hearing officer then determines whether the witnesses should be called. “The hearing officer may only call witnesses who possess relevant information.” WIS. ADMIN. CODE § DOC 303.81(2).

¶10 The hearing officer explained in his report that Williams would not be allowed to present witness testimony because Williams’s proposed witnesses were not DOC employees.⁵ The denial was based on WIS. ADMIN. CODE § DOC 303.81(8), which states: “Witnesses other than inmates or staff may not attend hearings but they may be contacted by [the inmate’s advocate] with the hearing officer’s permission.” The note to subsec. (8), explains the reason behind the rule.

[Members of the public] are usually employes and school officials who are involved in work and study release. There is no authority to compel their involvement in hearings. More importantly, requesting their involvement or permitting adversary interviewing seriously jeopardizes the programs by making people unwilling to cooperate. It also creates the possibility that there will be harassment of such people. Instead, the work release coordinator should

⁵ The note to WIS. ADMIN. CODE § DOC 303.81 states that the adjustment committee or hearing officer is required “to state on the record its reason for determining that a witness need not be called. It is hoped that stating on the record the reasons for refusing to call a witness will facilitate review of disciplinary proceedings.”

get whatever information these people have and provide it to the committee.

The potential for harassment and lack of authority to compel attendance justifies the stringent procedural barriers for interviewing members of the general public. None of these reasons, however, apply to the situation presented here—where the proposed witnesses were sheriff's deputies in the institution where the alleged misconduct occurred, the Milwaukee County Jail.

¶11 WISCONSIN ADMIN. CODE ch. DOC 350 provides the minimum standards and due process protections for inmates subjected to disciplinary proceedings for violating jail rules. *See* WIS. ADMIN. CODE § DOC 350.01. WISCONSIN ADMIN. CODE § DOC 350.15(1) provides that every jail shall have written rules of behavior for inmates. Each of the Milwaukee reports charged Williams with violating jail rules. These violations were different from, and explain the somewhat incompatible conversion to, the disciplinary rules promulgated in WIS. ADMIN. CODE ch. DOC 303. Furthermore, under jail procedures, Williams would have had the authority to present the two deputies' testimony, assuming their testimony was relevant and not cumulative. *See* WIS. ADMIN. CODE § DOC 350.15(3)(g).

¶12 We conclude that the reason the hearing officer gave for denying Williams's request was unreasonable and contrary to law. Williams has alleged that his witnesses had material evidence and, without investigation or other information to the contrary, the committee's decision must be reversed. On remand, Williams must be placed in his original position before the disciplinary proceedings were commenced. The hearing officer is directed to consider any

request from Williams to present witness testimony.⁶ Furthermore, a record will be necessary to explain which charged violations arise out of which incident dates and whether Williams has already been the subject of a disciplinary hearing for his November 9 conduct.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

⁶ A hearing officer may also deny an accused's request because the proposed testimony would be irrelevant or unnecessary, among other reasons. *See* WIS. ADMIN. CODE § DOC 303.81(3).

