

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 1998

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. 96-2059

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. BERRELL FREEMAN,

PETITIONER-APPELLANT,

v.

GARY R. MCCAUGHTRY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County:
JOSEPH E. SCHULTZ, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. Berrell Freeman appeals from an order quashing his petition for a writ of certiorari. The issue is whether the hearing officer violated Freeman's due process rights because he: (1) processed the conduct report as a major violation of the disciplinary code; and (2) failed to consider the code's

dispositional guidelines. We conclude that Freeman's due process rights were not violated. Therefore, we affirm.

Freeman was charged with violating WIS. ADM. CODE §§ DOC 303.35 (alteration of property) and 303.47 (possession of contraband) following the search of his cell, in which a set of broken headphones and a cassette tape were found with Freeman's inmate numbers scratched onto them. The security director decided to process the conduct report as a major violation of the disciplinary code. The hearing officer found that Freeman "knowingly and intentionally had altered cassette tapes in his possession and he also had an altered headset." Freeman was found guilty of both offenses and was placed in adjustment segregation for three days and program segregation for ninety days.

The warden affirmed the decision, and Freeman filed a petition for a writ of certiorari with the circuit court. The circuit court quashed the petition and ruled that Freeman's failure to exhaust his administrative remedies compelled dismissal under § 801.02(7), STATS. Freeman appeals.¹

Freeman contends that he was denied due process of law because his conduct report was processed as a major violation of the disciplinary code. *See* WIS. ADM. CODE § DOC 303.76. However, Freeman waived this objection because he waived his right to a formal due process hearing and failed to raise this issue until he challenged the decision in circuit court. *See Saenz v. Murphy*, 162 Wis.2d 54, 63-64, 469 N.W.2d 611, 615-16 (1991).

¹ Because we are not persuaded that § 801.02(7), STATS., necessarily applies to Freeman's challenge, we resolve this appeal on the due process issues which are fully briefed.

Freeman also contends that the disposition imposed was unduly harsh and that the hearing officer failed to consider the dispositional guidelines of WIS. ADM. CODE §§ DOC 303.83 and 303.84. Because he had not been charged with any major disciplinary violations during the preceding year, Freeman contends that the only explanation for such an allegedly harsh disposition is that the hearing officer disliked him.

Certiorari review of a prison disciplinary decision focuses on whether there was substantial evidence to support the decision,² and allows reversal if: (1) there was a denial of due process; (2) the decision was arbitrary, oppressive or unreasonable; or (3) the violation was not processed in compliance with the applicable rules. *See State ex rel. Staples v. DHSS*, 128 Wis.2d 531, 534, 384 N.W.2d 363, 364 (Ct. App. 1986).

We conclude that the decision was supported by substantial evidence and that there was no denial of Freeman's due process rights. The maximum disposition for the alteration of property is eight days of adjustment segregation and 180 days of program segregation, and for possession of contraband, six days of adjustment segregation and 120 days of program segregation. WIS. ADM. CODE § DOC 303.84. For both violations, Freeman received a total of three days adjustment segregation and ninety days program segregation. Because this disposition was less than one-third of the collective maximum permissible disposition, we are not persuaded by Freeman's contentions that the disposition was arbitrary, oppressive or unreasonable, or that the dispositional guidelines were ignored.

² *See State ex rel. Palleon v. Musolf*, 120 Wis.2d 545, 549, 356 N.W.2d 487, 489 (1984).

By the Court.—Order affirmed.

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

