COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0618

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

STATE OF WISCONSIN EX REL.
URBAN A. HUBERT, JR.,

PETITIONER-APPELLANT,

V.

GARY R. MCCAUGHTRY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Urban Hubert, an inmate at Waupun Correctional Institution, appeals from a circuit court order denying and dismissing his petition for a writ of certiorari. We affirm because: (1) we reject Hubert's contention that a corrections officer who had previous experience with Hubert and sat on the

institutional disciplinary committee showed biased against him; and (2) under the applicable standard of review, the conduct report itself is sufficient credible evidence in the record to support the finding of the disciplinary committee.

By major conduct report dated April 26, 1996, Hubert was accused of "grabbing" Corrections Officer Mark Gerber's buttock as both were ascending a staircase in violation of WIS. ADM. CODE § DOC 303.14 (sexual assault—contact). At a due process hearing before the disciplinary committee under WIS. ADM. CODE § DOC 303.78, Hubert theorized that Gerber exaggerated an unintentional contact into a sexual assault in retaliation for a previous unrelated disciplinary suspension imposed for giving Hubert ice cream bars.

Hubert called two witnesses: a social worker and a corrections sergeant. The social worker testified that he had seen Hubert just prior to the event and had been concerned that Hubert was depressed. The corrections sergeant testified that the day before the incident he had advised Hubert to stay away from Gerber when Hubert expressed concern about returning to a hall where Gerber apparently was stationed. The sergeant also testified that Hubert had never put his hand on anyone during the course of a nearly three-year association. Gerber did not testify but did file the conduct report stating that Hubert had "grabbed" him without permission.

Judicial review of certiorari actions is limited to determining: (1) whether the administrative hearing committee kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was "arbitrary, oppressive or unreasonable and represented its will and not its judgment"; and (4) whether the evidence was such that the committee might reasonably make the determination in question. ***City of West Bend v. Continental***

IV Fund Ltd. Partnership, 193 Wis.2d 481, 485, 535 N.W.2d 24, 26 (Ct. App. 1995) (quoted source omitted). As to this last issue, "[t]he test is whether reasonable minds could arrive at the same conclusion reached by the administrative tribunal." ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Adjustment Bd.,*** 131 Wis.2d 101, 120, 388 N.W.2d 593, 600 (1986) (citation omitted). *See also* ***Van Ermen v. DHSS,*** 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). A reviewing court on certiorari does not weigh the evidence presented to the adjustment committee. ***Van Ermen***, 84 Wis.2d at 64, 267 N.W.2d at 20. Our inquiry is limited to whether any reasonable view of the evidence supports the committee's decision. ***State ex rel. Jones v. Franklin,*** 151 Wis.2d 419, 425, 444 N.W.2d 738, 741 (Ct. App. 1989).

Hubert argues that the committee was prejudiced against him because it was chaired by Captain Schaller, who presided over Gerber's suspension and with whom he has a long-standing history of animosity dating to Hubert's pre-institution days. We reject this argument.

As Hubert acknowledges, WIS. ADM. CODE § DOC 303.82(2) prohibits from service on a disciplinary committee those who have "personally observed or been a part of an incident which is the subject of a hearing." Neither Schaller's alleged animosity nor his alleged involvement in Gerber's suspension prevents Schaller from serving on the committee to determine whether Hubert assaulted Gerber in an unrelated incident. *See* ***Merritt v. De Los Santos***, 721 F.2d 598, 601 (7th Cir. 1983) ("the requirement of impartiality mandates the disqualification of an official who is directly … or ... substantially involved in the incident, but does not require the disqualification of someone tangentially involved").

Hubert argues that the evidence is insufficient to conclude that he assaulted Gerber. He notes that Gerber never testified. He implies that his social worker's testimony could support an inference that the touching was unintentional due to Hubert's depressed mental state, and that the corrections sergeant's testimony could support an inference that Gerber sought revenge on Hubert.

As indicated, we do not weigh the evidence presented to the adjustment committee, limiting our inquiry to whether any reasonable view of the evidence supports the committee's decision. In this case, we find that a reasonable view of the evidence does support the committee's decision. Neither of Hubert's witnesses testified with first-hand knowledge about the incident itself. The only evidence about the incident was the written report and Hubert's testimony. We conclude that the conduct report was sufficient evidence upon which reasonable minds could find Hubert guilty, because an adjustment committee may rely on a conduct report when the only issue is whether the account about the incident in the report is more credible than a differing account offered by the inmate. *See* ***Culbert v. Young***, 834 F.2d 624, 631 (7th Cir. 1987), *cert. denied*, 485 U.S. 990 (1988).[1]

By the Court.—Order affirmed.

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

[1] Because we so conclude, we need not address Hubert's argument that the committee wrongly assessed credibility and wrongly considered matters outside the hearing itself. *See* ***State v. Castillo***, 213 Wis.2d 488, 492, 570 N.W.2d 44, 46 (1997).