

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP2865

Cir. Ct. No. 2004CV353

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. DANIEL AGUILAR,

PETITIONER-APPELLANT,

V.

MATTHEW J. FRANK AND DANIEL BENIK,

RESPONDENTS-RESPONDENTS.

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

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Wisconsin Department of Correction officials issued Daniel Aguilar a conduct report for battery and for possession, manufacture and alteration of a weapon, based on allegations that Aguilar had attacked a fellow inmate with a padlock wrapped in a white cloth while housed at the North Folk

Correctional Facility in Oklahoma. Aguilar now appeals from a circuit court order dismissing his action for certiorari review of the resulting prison disciplinary decision. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Due to the number of issues Aguilar raises, we will discuss the facts necessary to decide each issue along with that issue.

STANDARD OF REVIEW

¶3 Our certiorari review is limited to the record created before the committee. *State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). With regard to the substance of the prison disciplinary decision, we will consider only whether: (1) the committee stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented the committee's will and not its judgment, 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

Jurisdiction

¶4 Aguilar first contends the Department of Corrections lacked jurisdiction to discipline him for rule violations which occurred out of state. He claims that only Oklahoma prison officials had jurisdiction to discipline him for

any rule violations that occurred while he was in their physical custody. What Aguilar fails to understand is that two states may share concurrent jurisdiction over some matters. Here, the Wisconsin Administrative Code explicitly provides that “[t]he department may discipline inmates in its legal custody,” so long as the inmates have not already been disciplined for the same incident in another jurisdiction. WIS. ADMIN. CODE § 303.01(1). The department retains ultimate legal custody of inmates who are transferred to out-of-state facilities pursuant to contract. *State ex rel. Griffin v. Litscher*, 2003 WI App 60, ¶13, 261 Wis. 2d 694, 659 N.W.2d 455. In other words, even though Oklahoma prison officials may have had jurisdiction to discipline Aguilar based on their physical custody of him, Wisconsin officials also had jurisdiction to discipline Aguilar based on their legal custody of him, so long as Oklahoma had not disciplined him first. Oklahoma prison officials did not discipline Aguilar for the incident at issue here. Therefore, we are satisfied the department did have jurisdiction to discipline Aguilar once he returned to this state.

Specificity of Conduct Report

¶5 Aguilar claims the facts alleged in the Wisconsin conduct report were insufficiently specific to satisfy due process. We disagree. The report specified what Aguilar was alleged to have done (hit fellow inmate Anthony Hernandez with a padlock wrapped in a cloth), when and where he was alleged to have done it (July 23, 2003 at the North Fork Correctional Facility), who was alleging Aguilar had done it (the chief of security at North Fork, who forwarded an incident report to Wisconsin prison officials), what rules Aguilar was alleged to have violated by his conduct (WIS. ADMIN. CODE § DOC 303.12 and 303.45), and additional evidence supporting the allegations gathered by Wisconsin prison officials (letters written by Aguilar to the two inmate witnesses to the incident,

stating Aguilar “had to make it happen,” that Oklahoma prison officials “knew the whole scoop,” and that Aguilar “just wish[ed] he could’ve inflicted more damage”). The allegations were sufficient to put Aguilar on notice as to the nature of the charges against him.

Timeliness of Conduct Report

¶6 Aguilar claims he was prejudiced by a fourteen-day delay between the incident and the issuance of the conduct report in Wisconsin, because the Oklahoma facility apparently closed shortly after the conduct report was issued, making it very difficult to obtain witness statements. Aguilar acknowledges, however, that there is no set deadline for filing a conduct report, and we are satisfied that fourteen days is a reasonable amount of time to allow prison officials to investigate or consider an alleged offense before filing a conduct report. Moreover, Aguilar was able to obtain statements from two of the witnesses he named.

Timeliness of Hearing

¶7 Aguilar appears to complain that his disciplinary hearing was not held within twenty-one days after he was issued an incident report in Oklahoma. We agree with the circuit court, however, that the twenty-one day period specified under WIS. ADMIN. CODE § DOC 303.76(3) did not begin to run until Wisconsin officials had served Aguilar with their conduct report. The hearing was held on August 17, 2003, eleven days after Aguilar was given a copy of the conduct report.

Copy of Incident Report from Oklahoma

¶8 Aguilar complains that he was not given a copy of the Oklahoma incident report. As he himself acknowledges, however, there is no administrative requirement that prison officials provide inmates with copies of evidence to be produced at a disciplinary hearing. *See State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 394-96, 585 N.W.2d 640 (Ct. App. 1998). Nor was there any requirement that the Oklahoma incident report—which was used merely as evidence in the Wisconsin proceedings and not as the charging document—be signed or comply with other requirements for a Wisconsin conduct report.

Witnesses

¶9 Aguilar contends that he was improperly required to turn in his witness list within two days after the conduct report was issued, instead of two days after an advocate was assigned to him, as provided in WIS. ADMIN. CODE § DOC 303.81. He claims this prevented his advocate from investigating potential witnesses. Aguilar does not, however, identify any additional witnesses he would have requested if he had had more time to submit his witness list, much less show that they would have been available to appear at the disciplinary hearing, or explain what favorable testimony they could have provided. Therefore, he has not shown that any procedural irregularity in this regard affected his substantial rights.

¶10 Aguilar also claims that he was denied due process because prison officials refused several of his requested witnesses. Aguilar's witness request form shows, however, that he wanted the denied witnesses to testify about the rules and procedures at the prison in Oklahoma. Such testimony would have been irrelevant because, as we have explained, Aguilar was properly charged with

violations of the Wisconsin rules. Therefore, the witnesses were properly denied under WIS. ADMIN. CODE § DOC 303.81(2).

¶11 Aguilar further claims he was denied due process because prison officials did not provide signed statements from other inmate witnesses he had requested, instead providing unsworn written summaries of interviews with those witnesses conducted by Oklahoma correctional personnel. Prison officials could properly rely on written statements from the other inmate witnesses Aguilar requested because they had both been transferred and were thus unavailable. *See* WIS. ADMIN. CODE § DOC 303.81(4) (allowing the adjustment committee to consider a written statement, transcript of written statement or tape recorded statement if the witness is unavailable to testify); WIS. ADMIN. CODE § DOC 303.81(6) (allowing other evidence of what a witness would say if it is not possible to get a signed statement); *see also Whitlock v. Johnson*, 153 F.3d 380, 388 (7th Cir. 1998) (unsworn statements summarizing witnesses testimony are not an acceptable substitute for live testimony *when the witness is available*). Although it may have been the better practice for the witness statements to have been signed by the inmates themselves, we are satisfied that any error in that regard was harmless because Aguilar, himself, did not dispute any of the content of their statements at his disciplinary hearing. *See* WIS. ADMIN. CODE § DOC 303.87 (an error is harmless if it does not substantially affect a finding of guilt or the inmate's ability to provide a defense). Because Aguilar did not offer the adjustment committee any alternate account of the incident, the committee was not called upon to make credibility determinations to resolve a factual dispute. Therefore, the fact that the witnesses did not sign their statements was not prejudicial.

Advocate

¶12 An inmate may have a constitutional due process right to a staff advocate if he is illiterate or “the complexity of the issue makes it unlikely that the inmate will be able to collect and present evidence necessary for an adequate comprehension of the case.” *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974). However, the duties of an advocate are limited and general in nature. *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 398, 585 N.W.2d 640 (Ct. App. 1998).

¶13 Aguilar complains that the segregation officer assigned to assist him was unfamiliar with jurisdictional issues and disciplinary procedures and did not make any attempt to contact witnesses on his behalf. The principal issue, however, was whether Aguilar did or did not attack a fellow inmate with a padlock. This was not a complicated matter that required any great amount of investigation. Indeed, Aguilar was able to obtain witness statements from two inmates who were present during the incident. The advocate met with Aguilar to discuss the charges, and appeared with him at the hearing. We are not persuaded that Aguilar was constitutionally entitled to anything more from his advocate.

Adequacy of the Investigation

¶14 The reasonableness of an investigation into a disciplinary charge may present a due process issue. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 126, 289 N.W.2d 357 (Ct. App. 1980). Here, after reading the incident report from Oklahoma, Wisconsin prison officials searched Aguilar’s cell and found two letters from Aguilar addressed to two inmates who witnessed the incident, which made indirect references to Aguilar’s role in the incident. It was not unreasonable for Wisconsin officials to rely primarily upon the prior investigation by Oklahoma officials.

Sufficiency of the Evidence

¶15 Aguilar contends the evidence was insufficient to support the charges because there was nothing to show any incident occurred in Wisconsin; the Oklahoma incident report was unsigned and dated only ten minutes after the incident took place (which Aguilar claims demonstrates a lack of adequate investigation); the author of the Wisconsin conduct report did not contact anyone in Oklahoma; there was no physical evidence before the committee; and Aguilar's letters fell short of a confession. We have already explained that Wisconsin officials could properly charge Aguilar with a violation of Wisconsin rules, which continued to apply to him even when he was out of state, so long as he had not already been punished for the same incident by Oklahoma officials. The incident report did not need to be signed because it was not the charging document and the rules of evidence do not apply at prison disciplinary hearings. Moreover, the record did include two witness statements which had been signed by the interviewing Oklahoma correctional personnel, which corroborated the unsigned incident report. There was no reason why the incident report could not be drafted immediately after the incident, which was directly witnessed by both inmates and correctional personnel. There was no specific requirement that Wisconsin prison officials contact Oklahoma officials, or that they have physical evidence, particularly once their investigation revealed letters from Aguilar which indirectly confirmed his role in the incident. In short, the evidence was more than sufficient to support the charges.

Sufficiency of the Written Reasons for the Committee's Decision

¶16 Aguilar claims the committee failed to adequately explain the basis for its decision. Again, we disagree. The committee stated that it relied upon the

conduct report, which related both the observations of Oklahoma correctional personnel and statements made by Aguilar and the other inmate involved in the altercation, the letters Aguilar had written indicating that he wished he had inflicted more damage, and Aguilar's failure to dispute the allegations in the incident report in his statement or at the hearing.

ICE's Modification

¶17 During the administrative appeal process, the inmate compliant examiner ordered the record to be supplemented with photographs that were supposedly sent with the incident report and directed that the committee decision be amended to note that the photographs were relied upon. Aguilar claims the ICE lacked authority to make this modification because the photographs were not, in fact, before the committee or relied upon by it. The photographs are not included in the certiorari return, and it is unclear to this court whether they were in fact before the committee. We are satisfied that any error in this regard was harmless, however, because the evidence was sufficient to find Aguilar guilty without the photographs.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

