COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2001

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. 00-1536

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

STATE OF WISCONSIN EX REL. MARK PRICE,

PETITIONER-APPELLANT,

V.

GARY R. MCCAUGHTRY,

DEFENDANT-RESPONDENT.

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

Before Dykman, P.J., Deininger and Leineweber,[1] JJ.

[1] Circuit Judge Edward E. Leineweber is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. Mark Price appeals from an order dismissing his petition for certiorari review of a prison disciplinary decision. He claims that the adjustment committee at Waupun Correctional Institution (WCI) failed to follow applicable law when it found him guilty of using intoxicants because there was an error on the label of his urine sample and a five minute discrepancy in the chain of evidence. We conclude that a minor clerical error on the label did not render it improper and there is no factual basis for concluding the chain of evidence form was inaccurate. Accordingly, we affirm.

BACKGROUND

¶2 On June 21, 1999, a correctional officer at WCI filed an incident report stating that another correctional officer had observed an inmate passing a package that appeared to contain intoxicants into Price's cell. The cell was searched, but no contraband was found. The following day, Price was required to produce a non-routine urine sample. The label placed on the sample erroneously listed Price's prison number as 173671 instead of 173621. The sample was tested by the Department of Corrections Drug Testing Center several days later, revealing the presence of cannabinoids (marijuana). As a result, Price was issued a conduct report for violating prison regulations against the use of intoxicants. *See* WIS. ADMIN. CODE § DOC 303.59. The prison adjustment committee found Price guilty of the violation and imposed four days of adjustment segregation and 120 days of program segregation. After exhausting his administrative remedies, Price sought certiorari review in the circuit court. The trial court affirmed the administrative decision and this appeal followed.

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 (Ct. App. 1990). 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, representing its will rather than its judgment, and (4) the evidence was such that the committee might reasonably make the order or determination in question. ***Id.*** An agency acts outside of its authority when it fails to follow its own rules. ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶17, 234 Wis. 2d 626, 610 N.W.2d 821. We apply the substantial evidence test to determine whether the evidence before the committee was such that it could reasonably make the determination it made. ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998).

ANALYSIS

¶4 Price contends that the disciplinary action should be invalidated because DOC officials failed to follow their own rules when collecting the evidence used against him. WISCONSIN ADMIN. CODE § DOC 306.16(1)(d) requires prison officials to adhere to division procedures when conducting body contents searches, including urine tests. The division procedures are set forth in an Internal Management Procedure (IMP) Manual. IMP # 4(C)(3)(b) states in relevant part:

> A label will be placed on the specimen container in the offender's presence with the offender's name and number, the date, and the name of the staff witness. This information shall be typed or written in ink. A Chain of Evidence form, DOC-1496, will be filled out on each sample and will accompany the sample at all times.

IMP # 4(C)(4)(a)(2) states:

> A Chain of Evidence, DOC-1496, shall be completed on each specimen. It shall include the name of staff taking the urine, name and number of the offender, date, time, and medications. All individuals handling the specimen after the initial collection must record in sequence all changes of possession of the urine (to include name, time, date, and place). The specimen shall be secured either by the presence of staff or in a secured container.

IMP # 4(D) states in relevant part:

> Specimens in containers which are improperly sealed and/or labeled or are accompanied by an inaccurately completed Chain of Evidence will not be tested. A record of the rejected specimen will be entered on the Testing Log and the Warden/designee will be notified.

¶5 Price first claims that his urine sample should have been discarded because it was improperly labeled. The Respondent concedes that there was a mistake in the prisoner number on the label, but maintains that the clerical error did not render the label improper. We conclude that the agency's interpretation of its rule is entitled to deference. *See* ***Irby v. Bablitch***, 170 Wis. 2d 656, 659, 489 N.W.2d 713 (Ct. App. 1992) ("An administrative agency's interpretation of its own rules is entitled to controlling weight unless inconsistent with the language of the regulation or clearly erroneous.").

¶6 As the adjustment committee noted, there was no other inmate at WCI with the prisoner number on the label which was placed on Price's urine sample. Furthermore, the same inaccurate number appeared not only on the label,

but also on the chain of custody form, the test results, and the incident report. In addition, Price himself signed the chain of custody form with the inaccurate prisoner number, noting that the label had been placed on the sample in his presence. Therefore, there was no question that the same sample taken from Price was the one tested. Under these circumstances, we are satisfied that it was not clearly erroneous or inconsistent with the regulation for the Respondent to determine that the single digit mistake did not render the label "improper" within the meaning of IMP # 4(D). The label properly identified the sample as belonging to Price.

¶7 Price next claims that the Chain of Evidence form was inaccurate because it did not account for five minutes of time between the 7:50 p.m. "time of search" listed on the Person Searched / Nonroutine Urinalysis Report form, and the 7:55 p.m. "time collected" listed on the Chain of Evidence – Urinalysis form. He asserts that another correctional officer who was not listed on the Chain of Evidence form, Lieutenant Pearce, handled the specimen during that time.

¶8 Taking the second assertion first, we note that there was no evidence before the adjustment committee that Pearce ever handled the sample.[2] Allegations in the petition cannot supply facts which do not appear in the record. ***State ex rel. Irby v. Israel***, 95 Wis. 2d 697, 703, 291 N.W.2d 643 (Ct. App. 1980). This court cannot make factual findings on certiorari review, and certainly cannot resolve a factual dispute which was never even presented to the adjustment committee. Quite simply, the adjustment committee had no factual basis from which it could have concluded that the Chain of Evidence form inaccurately

[2] The only reference to Pearce on the paperwork is his signature as the supervisor approving the search. Price did not mention Pearce when he addressed the adjustment committee.

omitted the name of a correctional officer who had handled the sample, and thus the Respondent made no error in that regard.

¶9 With regard to the time frame, we are persuaded that there is no discrepancy between initiating a urine search at 7:50 p.m. and collecting the sample produced at 7:55 p.m. IMP # 4(C)(4)(a)(2) requires that custody of the sample be recorded "after the initial collection." There was no evidence in the record to suggest that the urine sample was "collected" prior to 7:55 p.m., and no gap in the subsequent chain of custody listed on the form. Again, the Respondent had no facts before it that would have compelled it to conclude that there was any inaccuracy in the Chain of Custody form requiring disposal of the sample.

By the Court.—Order affirmed.

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