

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 8, 2009

David R. Schanker
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. 2008AP478

Cir. Ct. No. 2007CV2333

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. DARNELL JACKSON,

PETITIONER-APPELLANT,

V.

MATTHEW J. FRANK,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Darnell Jackson appeals from a circuit court order that affirmed a prison administrative confinement decision on certiorari review. We affirm for the reasons discussed below.

BACKGROUND

¶2 Prison officials notified Jackson that his ongoing administrative confinement was due for a six-month review based upon a packet of materials that included a number of Jackson's past conduct reports. Two of the conduct reports included charges of which Jackson had been found not guilty and one relied upon evidence from confidential informants. Jackson asked to be able to question a reporting staff member at the review hearing, but did not request any other witnesses. The Administrative Confinement Review Committee (ACRC) recommended continued placement in administrative confinement, noting that Jackson had "established a pattern of negative behavior and noncompliance" including having been found guilty on conduct reports of Inciting a Riot, during which staff was seriously assaulted; Possession of Intoxicants; Disruptive Conduct; Disobeying Orders; and multiple instances of Disrespect. The ACRC reasoned that "Jackson's disregard for institution rules and regulations and his inability to conform to them are dangerous acts that threaten the overall security and safety of both staff and other inmates within the institution."

¶3 Jackson appealed to the warden, who affirmed. He then appealed to the Division of Adult Institutions (DAI) Administrator, who referred the matter back to the warden on the grounds that Jackson had been in confinement for twelve months by that time. After the warden reaffirmed his decision, the DAI Administrator also affirmed. Jackson next filed an Inmate Complaint Review System (ICRS) complaint seeking review of the DAI Administrator's decision. The Inmate Complaint Examiner (ICE) directed that the matter be returned to the hearing officer to check the "Other Testimony" box on the decision form in recognition of the fact that the staff member requested by Jackson had in fact testified, and affirmed as modified. Jackson appealed the ICE's decision to the

Corrections Complaint Examiner (CCE), who recommended the ICRS complaint be dismissed on its merits. The Secretary of the Department of Corrections adopted the CCE's recommendation as his decision on April 4, 2007.

¶4 According to documents which were attached to the certiorari petition, but were not included in the certiorari return, Jackson repeated the entire administrative review process after the administrative confinement decision had been modified as directed by the ICE. This ultimately resulted in a second decision by the Secretary of the Department of Corrections dated May 16, 2007. Jackson filed the present certiorari petition on June 22, 2007, thirty-nine days later.

STANDARD OF REVIEW

¶5 A motion to quash a writ of certiorari is akin to a motion to dismiss, testing the legal sufficiency of the facts alleged in the complaint. *Fee v. Board of Review*, 2003 WI App 17, ¶7, 259 Wis. 2d 868, 657 N.W.2d 112. Certiorari review is limited to considering whether the record created before the committee shows that: (1) the committee stayed within its jurisdiction; (2) it acted according to law; (3) its action was not arbitrary; and (4) the evidence was such that the committee might reasonably make the order or determination in question. *State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). The inquiry into whether the committee acted according to law includes consideration of whether due process was afforded and the committee followed its own rules. *State ex rel. Curtis v. Litscher*, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43 (citing *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980)).

DISCUSSION

¶6 As a threshold matter, the State claims that Jackson's certiorari petition is untimely because it was not filed within forty-five days of the Secretary's first decision. *See* WIS. STAT. § 893.735(2) (2005-06);¹ *State ex rel. Collins v. Cooke*, 2000 WI App 101, ¶5, 235 Wis. 2d 63, 611 N.W.2d 774. It is not immediately apparent whether that first decision would have been appealable as of right given the direction that the original decision be modified. However, since Jackson is ostensibly seeking review of the Secretary's second decision, and the exhaustion of remedies documents attached to the petition show that prison officials themselves directed Jackson to engage in a second administrative appeal process following the modified decision, we are not inclined to decide the present appeal on the basis that the petition was untimely. In any event, it is unnecessary to decide the timeliness issue because we conclude that Jackson's petition fails on its merits.

¶7 Jackson raises four challenges to the extension of his administrative confinement. He claims: (1) the Secretary violated WIS. ADMIN. CODE § DOC 303.85(2) (Dec. 2006),² and thus denied him due process by considering conduct reports on which he had been found not guilty of some charges; (2) the Secretary violated WIS. ADMIN. CODE § DOC 308.04 and thus denied him due process when by failing to follow the procedures for consideration of confidential informant statements during an administrative confinement proceeding; (3) the Secretary

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² All references to the Wisconsin Administrative Code are to the December 2006 version unless otherwise noted.

violated his due process rights by refusing to provide him a copy of a videotape showing the riot which was the subject of one of the conduct reports; and (4) the Secretary violated his due process rights by failing to provide an adequate written explanation for his decision. We will address each contention in turn.

Conduct Reports With Dismissed Charges

¶8 WISCONSIN ADMIN. CODE § DOC 303.85(2) provides:

The department may keep conduct reports which have been dismissed or in which the inmate was found not guilty for statistical purposes, and security reasons, but the department may not consider them in making program assignment, transfer or parole release decisions

Jackson argues that this provision should have prevented the department from considering the two conduct reports on which he was found not guilty of some charges. We disagree. Those conduct reports were not “dismissed” in their entirety because Jackson was found guilty of other charges in the reports. Moreover, the ACRC’s decision specifically states that it “did not consider any dismissed conduct reports or charges he was found not guilty of.” The department was certainly entitled to consider any charges in the conduct reports of which Jackson had been found guilty.

Confidential Informants

¶9 WISCONSIN ADMIN. CODE § DOC 308.04(4) and (5) provide procedures for the department to follow when a witness in an administrative confinement proceeding is a confidential informant. Jackson complains that the department failed to follow those procedures with respect to the confidential informant statements underlying his riot conduct report. The problem with this theory is that the informants did not testify or give any additional statements *in the*

administrative confinement proceeding. Nor did Jackson name them, even by their confidential informant designation, on his requested witness list. Therefore, they were not witnesses in the administrative confinement proceeding, and were not subject to the procedures set forth in § DOC 308.04. To the extent that the department indirectly relied upon confidential informant statements by considering the riot conduct report, it was entitled to do so because Jackson had been found guilty of that charge. Jackson may not collaterally challenge that finding of guilt or the prior use of confidential informant statements within the context of the administrative confinement proceeding.

Videotape of Riot

¶10 Jackson contends that he had a right to see a copy of the videotape of the riot underlying one of his conduct reports because it was evidence against him. However, there is nothing in the certiorari record to support the contention that the videotape itself was introduced *in the administrative confinement proceeding*. Rather, the ACRC decision states that the only physical evidence it considered was the inmate's conduct record. Again, Jackson may not relitigate the conduct report in the context of the administrative confinement proceeding. The department was entitled to rely upon Jackson's conduct report for rioting — including any references in the written materials to the evidence that supported that charge — because the charge had not been reversed through administrative review or the appellate process.

Written Decision

¶11 Finally, Jackson contends that the ACRC failed to adequately articulate the reasons for its decision. WISCONSIN ADMIN. CODE § DOC 308.04(8) requires the reasons for the decision to be “based upon the evidence and given to

the inmate in writing.” Here, Jackson was provided with a written decision explaining that the ACRC’s decision that Jackson presented an ongoing threat to institutional security was based upon the pattern of behavior established by his conduct reports, which were properly in evidence. The decision satisfied the administrative rule and due process.

By the Court.—Order affirmed.

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

