Joint Committee
AUG 23 2001

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 7

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CIRCUIT COURT
DANE COUNTY, WI

State of Wisconsin ex rel.
Jay Thomas Widmer-Baum
Petitioner

01CV2106

Case No: 01 CV 0082
(Unclassified 30703)

v.

Jon Litscher, Secretary DOC
and
Thomas Borgen, Warden FLCI
Respondents

THIS IS AN AUTHENTICATED COPY OF THE ORIGINAL DOCUMENT FILED WITH THE DANE COUNTY CLERK OF CIRCUIT COURT.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI AND DECLARATORY RULING

TO: Honorable Judge Moria G. Krueger
330 City – County Building
210 Martin Luther King, Jr. Boulevard
Madison, WI 53709

COMES NOW, Jay Thomas Widmer-Baum, Petitioner Pro Se, and MOVES this Court to issue an ORDER granting a writ of certiorari. In support thereof, the Petitioner states the following:

1. Petitioner is currently confined in the Johnson County Jail, Iowa City Iowa.
2. The Petitioner was an inmate at the Fox Lake Correctional Institution at all times relevant to the conduct report and events which form the basis of this review. Petitioner arrived at FLCI on or about August 18, 1999 and remained there until being transferred to the Columbia Correctional Institution on or about March 20, 2001

in relation to the conduct report detailed herein. Petitioner remained at CCI until released to Iowa authorities on 24 May 2001.

3. Respondent Litscher is the Secretary of the Wisconsin Department of Corrections.
4. Respondent Borgen is the Superintendent of the Fox Lake Correctional Institution.
5. Petitioner respectfully requests this Court to review the disciplinary decision, and all actions related to the conduct report detailed herein, including the action(s) of the respondent(s) and those under his/their supervision.
6. Further, that the actions of those WDOC staff responsible for ensuring that the due process rights of inmates are upheld be reviewed. These individuals report to one or both of the Respondents, hence do not need to be named parties to this action.
7. Additionally, that those responsible for the administration of the Inmate Complaint Review System (Wis. Admin. Code § Doc 310) be required to justify or explain their actions. These individuals are under the direct supervision of one or both of the Respondents and do not need to be named parties in this action. Also rule-making review is requested.

8. Because Petitioner seeks review of three facets of the underlying matter, each facet will be presented individually. It is believed that the connection between the three will be evident.
9. The Petitioner asserts that all administrative remedies available to him have been exhausted and Petitioner further contends that no non-judicial remedies are available to him as an inmate under the care and supervision of the Respondents.

ISSUE I

Availability of Wis. Stat §227 to Inmates in the care and custody of the WDOC.

10. On or about 1 December 2000 Division of Adult Institutions Administrator Dick Verhagen issued a memorandum concerning upcoming changes in Wis. Admin. Code § Doc 303.
11. The memorandum did not provide any specific information about the changes, only that Wis. Admin. Code § Doc 303 was being repealed and recreated pursuant to Wis. Stat. §227.11(2) with an effective date of 1 January 2001.
12. The Petitioner secured a copy of the newly created rules from an individual outside of the institution on 6 December 2000.
13. Upon review of the "New 303", the Petitioner was disturbed by many of the changes which would directly affect him as an inmate.

14. On or about 8 December 2000 the Petitioner sent an Interview/Request form (Doc-761) to the Institution Complaint Examiner Thomas Gozinske asking if a review of the "New 303" was within the scope of the Inmate Complaint Review System (ICRS) as created by Wis. Admin. Code § Doc 310.
15. The Petitioner was informed that the ICRS was not the right forum because the rules were not yet in effect.
16. The Petitioner then prepared a Petition for a Declaratory Ruling pursuant to Wis. Stat. §227.41 and forwarded it to Respondent Litscher at his office in Madison, WI.
17. The petitioner sought a ruling on many of the promulgated changes to rules, definitions, and procedures.
18. On or about 18 December 2000, Thomas G. Van de Grift-Assistant DOC Counsel issued a decision on behalf of Respondent Litscher.
19. Said decision denied the request stating that the request sought a ruling on a <u>proposed</u> change to a rule, therefore must be denied.
20. The decision also stated that the public had an opportunity to comment on proposed changes at the public hearing stage per Wis. Stat. §227.16.
21. That is presumably in response to the Petitioner's request for the dates and locations of the required public hearings and the minutes of said meetings if they had already been held.

22. Upon review of the decision, Petitioner in an attempt to avoid seeking judicial intervention, requested Respondent to reconsider the decision.

23. The request cited a recent ruling by U.S. District Court Judge Barbara Crabb which made clear that the WDOC not only should, but must accept an inmate complaint of which a proposed change is the subject if the inmate alleges that the change itself must result in violation of the inmate's constitutional rights. (Aiello *et al* v. Litschen & Verhagen, 104 F.Supp 2d 1068).

24. On or about 8 January 2001, Assistant Legal Counsel Gregory Smith issued a decision on behalf of Respondent Litscher.

25. The decision stated that the original decision would stand because Wis. Stat. §227 does not provide for reconsideration of a decision.

26. Like the first decision, none of the requested information about the public hearing was provided.

27. Interestingly, the initial decision was premised upon the Petition for Declaratory Ruling being filed pre-maturely, the second decision essentially adopted the language of the first.

28. The second decision was issued on or about 8 January 2001, seven days after the rule changes became effective.

29. Petitioner continued to correspond with Office of Counsel trying to avoid litigation.

30. On or about 6 March 2001 Assistant Legal Counsel Julie Kane denied review because a portion of the request asked for enforcement of a provision contained in the appendix.

31. Petitioner eliminated the reference to the appendix note and re-submitted the request.

32. As of today's date no decision has been issued to the Petitioner.

33. On or about 26 March 2001, Assistant Legal Counsel Thomas Van de Grift issued a statement on behalf of Respondent Litscher saying that the, "Secretary of the Department does not issue declaratory rulings to inmates."

34. Van de Grift also instructed Petitioner to file a complaint pursuant to Wis. Admin. Code § Doc 310.09.

35. Petitioner had infact submitted an inmate complaint concerning the new rules. (ICRS File # FLCI-2001-8370).

36. The complaint was dismissed as being untimely filed as, "those changes were made effective December 2000."

37. The decision reflects the signatures of Respondent Borgen and Thomas Gozinske.

38. The two individuals referred to in ¶ 37 are the same two who informed the Petitioner that he could not file an inmate complaint in December.

39. In a final attempt to have Respondent Litscher resolve this matter within the agency, Petitioner again wrote expressing his frustration with the situation.

40. Petitioner pointed out that Respondent Litscher had argued the availability of Wis. Stat. §227 to inmates in Aello v. Litscher (W.D. Wis.); Forstner v. Litscher and Borgen (Dodge County); Joe v. Sondalle (Dodge County).

41. In Forstner, Respondent Litscher goes so far as to argue that the Dodge County Circuit Court is bound by the provisions of Wis. Stat. §227.

42. In a 3 April 2001 letter, Assistant Legal Counsel Van de Grift states that the operative word in Wis. Stat. §227.41(1) is, "May".

43. While true that the word, "May", typically connotates discretion, both the Wisconsin Supreme Court and Wisconsin Court of Appeals have held that discretion is not automatically intended with the use of the word, "May".

44. One example of this is found in Bouchard v. Bouchard, 107 Wis.2d 632, 634,321 N.W. 2d 330, 331 (ct. App 1982).

45. The Petitioner asserts that the word, "May" as used in Wis. Stat. §227 is directory, and not intended to afford discretion, thereby assisting to relieve the congestion on the court docket.

46. Alternatively, if the Agency is given discretionary power in Wis. Stats. §227.41, then this discretion was abused when Respondent Litscher, by and through counsel, decided he would not issue any rulings to any inmate under his care and custody citing inadequate resources.

47. If discretion is afforded Respondent Litscher, it is asserted that the decision issued in the 26 March 2001 correspondence is in violation of constitutional and statutory protections.

48. Nothing in the language of Wis. Stats. §227 grants the head of an agency the authority to exclude an entire group of individuals from seeking a Declaration Ruling.

49. The only two groups of individuals affected by WDOC rules are WDOC staff and WDOC inmates.

50. When one group is excluded, the Agency effectively eliminates the protections afforded other persons who are also subject to the administrative rules.

51. It is unclear how Respondent Litscher came to the conclusion that he could, after four months, simply avoid issuing a ruling by deciding that he wouldn't rule on any inmate petitions.

ISSUE II

The rule changes which took effect on 1 January 2001 are violative of U.S. and Wisconsin Constitutions and Wisconsin statutory provisions. (Originally submitted to Respondent Litscher for review).

52. Prior to the changes taking effect on 1 January 2001, Wis. Admin. Code § Doc 303.45(3) stated that in inmate could be found guilty of possessing a weapon if (s)he was found to possess an item designed for use as a weapon.

53. The change in Wis. Admin. Code §303.45(3) now leaves the determination of what constitutes a weapon to the opinion of WDOC staff.

54. Petitioner contends this is overly vague, (i.e., pencils, tongue depressors, tweezers, etc may now be deemed weapons.) An example of this may be reviewed in a CCI conduct report written when inmate Michael Wallerman was found to be in possession of a pair of tweezers and determined to be a weapon.

55. One section eliminated by the implementation of the "New 303" was Wis. Admin. Code § Doc 303.04 which focused on an offender's state of mind at the time of offense.

56. The elimination of this section denies an offender the ability to inform the adjustment committee of causes of his/her behavior.

57. With the increase of mentally ill offenders, the adjustment committee must be allowed to at least review an offender's state of mind as it related to the alleged offense.

58. Another section eliminated when the new rules took effect on 1 January 2001 was Wis. Admin. Code § Doc 303.05.

59. The aforementioned section provided affirmative defenses an offender was able to present to the adjustment committee.

60. The elimination of this section denies offenders the ability to raise an affirmative defense and have it considered by the adjustment committee.

61. Denying an offender the right to marshal an affirmative defense, and have it considered by the adjustment committee, infringes upon the offender's basic due process rights.

62. The section dealing with evidence was significantly changed.

63. Wis. Admin. Code § Doc 303.86, in its new form, provides that regardless of how evidence may be secured, it may be presented to the adjustment committee for consideration.

64. Specifically the new provisions states that any relevant evidence may be considered by the adjustment committee, "whether or not it would be admissible in a court of law and whether or not violation of any state law(s) or any Doc administrative code provisions occurred in the process of gathering the evidence."

65. The fact that the above section grants any individual gathering evidence for a prison administrative hearing permission to violate any state law goes far beyond any authority vested in a state agency.

66. An administrative rule change cannot render void existing state law.

67. To believe otherwise is to hold that persons sent to prison for violating state laws may be kept there by their keepers violating state laws.

68. This change is not only dangerous, it violates the separation of power doctrine of the Constitution.

69. Specifically the new provision permits DOC staff to violate state laws which were enacted by the legislature to be upheld by the judiciary without the danger of recourse.

70. Petitioner is unaware of any law bestowing authority with a member of the executive branch to usurp the laws of the state.

71. The same section grants permission for DOC staff to violate properly promulgated rules of the agency.

72. It has been a long established fact that a state agency may not violate the rules it has itself promulgated. (See Vitrelli v. Sutton 359 U.S. 535 79 S.Ct.968 (1959)).

73. If the Respondents are permitted to enact rules protecting the few remaining due process rights offenders have and then disregard

those rights by enacting a subsequent rule, do offenders retain any protection in disciplinary matters?

74. Wis. Admin. Code § Doc 303.11 governs temporary lock up of inmates.

75. Prior to the change the only extension of time in the TLU which was available was available was a one time extension of 21 days made by the warden with notice to the division administrator.

76. The revision allows the administrator to extend an additional 21 days, for a total of 63 days.

77. At no time must the inmate be notified of these extensions.

78. This change extends TLU beyond the total segregation penalty for some offenses.

79. To prevent abuse of TLU through vindictive exercise, the inmate must be notified of the extension and the reason for it.

80. Wis. Admin. Code § Doc 303.71 and 303.75 establish the hearing procedures for disciplinary matters.

81. Prior to the 1 January 2001 revisions, the agency had 21 days after an offender was served a conduct report to hold the hearing.

82. The failure to hold the hearing within the allotted time resulted in the mandatory dismissal of the conduct report.

83. The 1 January 2001 changes to the above cited sections included adding the following: "The institution may not hold the hearing

more than 21 days after the inmate receives the approved conduct report and hearing rights notice unless otherwise authorized. The security director may authorize a hearing beyond the 21-day limit, either before or after the 21st day. The 21 day limit is not jurisdictional".

84. An Appendix note to this section states that, "This provision specifically overrules State ex.rel Jones v. Franklin, 151 Wis. 2d 419, 444 N.W. 2d 738 (Ct. App 1989)".

85. A rule promulgated by an agency of the state's executive branch violates the separation of powers doctrine when it "overrules" a decision of the second highest court in the state.

86. The revision allows indefinite segregation without a hearing; none of the time in TLU is allowed to be credited to an offender's sanction.

87. Wis. Admin. Code § Doc 303.15 deals with sexual conduct of offenders.

88. Clearly a typographical or proof reading error permits the punishment of an inmate for sexual intercourse only if it involves a staff member.

89. Although an error, it was promulgated with the error therefore binding the agency to its language.

90. That contention is further supported by the fact that it was presented to the Register in that form.

91. There is no provision in Wis. Admin. Code § Doc 303 excusing errors of this nature.

92. The Petitioner is not suggesting that inmates have any expectation of having the section enforced in that manner, rather the agency should take the steps necessary to correct the error.

93. The Appendix to Wis. Admin. Code § Doc 303 contains valuable information about the logic and application of many of the sections.

94. Several passages in the Appendix contain directory or mandatory language in the form of the words shall and must.

95. The mandatory language is selectively enforced and is not uniform between DOC institutions.

96. It is the varying application of the provisions that needs to be resolved.

97. A decision must be made concerning whether or not the provisions and directives found in the Appendix are binding upon the agency and/or offenders.

98. The Petitioner contends the changes to Wis. Admin. Code § Doc 303.86 are violative of U.S. and Wisconsin Constitutional provisions.

99. The changes which were implemented on 1 January 2001 also eliminated the requirement that offenders be informed of changes in the rules they must abide by.

100. If no notice is required in relation to changes in the rules, then responsibility and culpability cannot attach.

101. The aforementioned change does not bear any rational relationship to any penological goals.

102. The change does not further any security objectives.

103. Prior to 1 January 2001, if an offender was found guilty of an offense, the allegation, and any references to it, were removed from the offender's file and face card (Doc 120).

104. Effective 1 January 2001 when an offender is found not guilty of an alleged offense, the information relating to the allegation remains on the offender's face card as a warning.

105. Per DOC Rule (Doc 303.83) any warnings on an offender's face card may be considered in deciding a sanction for the offender in an unrelated disciplinary matter.

106. A finding of not guilty by the hearing committee should not result in the punitive use of the dismissed conduct report in the future.

107. The fact the administrative body held that not enough evidence was presented to reach a finding of guilt should render

the allegation dismissed with prejudice and not subject the offender to punishment at some future date.

108. Wis. Admin. Code §303.66 previously stated that any physical evidence related to the conduct report must be forwarded, with the report, to the security director (or his designee) for review.

109. The 1 January 2001 revision of the rules eliminated that requirement.

110. This change eliminates the opportunity for the security director to review the evidence when deciding if the report is to be processed as a major or minor report, or if it should proceed at all.

111. It is not beyond imagination that some DOC staff could fabricate the existence of evidence and forward the report to the reviewing authority with an explanation that the evidence had been disposed of.

112. It is the position of the Petitioner that the U.S. Supreme Court has held that inmates are entitled to review the evidence to be used against them in prison disciplinary matters. (See: Wolff v. McDonnell, 418 U.S. 539 94 S.Ct 296(1974)).

113. An administrative code revision cannot strike down the decision of the highest court in the nation.

114. The denial of the availability of evidence to an offender cuts to the very core of the idea of due process protection in the correctional setting.

115. One of the few changes that directly affects every inmate in the custody of the WDOC who receives a conduct report, is the change in the burden of proof the reporting staff member must meet for a finding of guilt.

116. Prior to 1 January 2001 an offender had to be found guilty by a preponderance of the evidence.

117. The newly implemented rules require a finding that it is more likely than not the accused committed the alleged offense.

118. Already on one occasion the Respondent has argued that the standard permits a finding of guilt based entirely upon the statement of the reporting staff member in the conduct report. (See Forstner v. Litscher and Borgen-Dodge County 00-cv-0346).

119. The Wisconsin Supreme Court has already opined that the contents of a conduct report alone as the basis of a finding of guilt is not enough to meet the requirements of Wolf. (State *ex rel.* Meeks v. Gragnon, 95 Wis 2d 115, 289 NW2d 357 (1980)).

120. The new, "more likely than not" standard places the bar so low that the agency cannot help but get over it.

121. Although it is clearly understood that the threshold of guilt in an administrative hearing is far lower than in a court of law, the agency must at least appear to consider an offender's defense and not dismiss it out of pocket as the new standard encourages.

122. The agency bears some burden in demonstrating that the accused offender actually committed some wrong before the offender may be found guilty.

123. Another elimination from Wis. Admin. Code § Doc 303 is the word "knowingly" from all sections.

124. Prior to 1 January 2001 an offender could be found guilty by certain offenses only if they had been knowingly committed.

125. The elimination of this requirement coupled with the fact that the offenders will not be notified of rule additions and/or changes establishes an extremely dangerous maze for offenders to find their way though.

126. Each of the forgoing changes, in and of themselves, is shocking when viewed in the arena of due process and fairness.

127. Taken as a whole these changes are at least shocking to the public sentiment, more correctly however, they in some instances, they are criminal in application.

128. Petitioner asserts that Wis. Admin. Code § Doc 303 as implemented on 1 January 2001 must be suspended until such time

as Respondent Litscher is able to bring it back within the confines of the U.S. and Wisconsin Constitutions and existing state law.

129. Petitioner has been involved in rhetoric with Respondent Litscher and office of counsel in excess of five months trying to resolve this matter at the administrative level.

130. Petitioner attempted to utilize the ICRS on two occasions; first the attempt was said to be premature (Dec.00) then too late (Mar.01).

131. Thomas Gozinske was the ICE in both instances – first informing the Petitioner that the 8 December 2000 filing was too soon, then in the March instance informed the Petitioner that the correct time for filing a complaint in relation to Wis. Admin. Code § Doc 303 was in fact in December 2000.

132. Each issue presented in this section has been presented to the Respondents via the ICRS and Wis. Stat §227 without result.

ISSUE III

Matters relating to adult conduct report number 1093979.

133. On or about 18 January 2001 Petitioner returned to housing unit 1 (at FLCI) to find several items of his property in the unit 1 a/b office at approximately 11:00 A.M.

134. Petitioner went to his assigned living quarters and found that all of his clearly identified legal materials in disarray.

135. At this point several inmates approached the Petitioner with different versions of what had taken place while the officer was searching the Petitioner's living area.

136. An inmate complaint was filed pursuant to Wis. Admin. Code § Doc 310 (ICRS) on the same morning.

137. On or about 19 January 2001 Thomas Gozinske called the Petitioner's work area and requested that the Petitioner be directed to report to him.

138. Petitioner did as instructed.

139. Upon arrival, the Petitioner was questioned about the complaint which had been filed in relation to the room search.

140. Petitioner made clear that he had not been present when the search was conducted and had relayed information given to him.

141. Mr. Gozinske stated that he would like the Petitioner to sign a statement he had prepared concerning the previous days incident.

142. The Petitioner reviewed the prepared statement and informed Mr. Gozinske he was not comfortable with signing it because he was not present at the time of the search.

143. Mr. Gozinske stressed the importance of the statement and Petitioner again refused to sign it.

144. On or about 22 January 2001 the Petitioner was again called to Mr. Gozinske's office in the morning and asked if he had had time to think about the statement over the weekend.

145. Petitioner stated that he was not comfortable, again stating that he had not been present at the time of room search.

146. Mr. Gozinske again urged the Petitioner to sign the statement asserting that it was important to do so.

147. The Petitioner refused to sign it.

148. In the afternoon of the same date, the Petitioner was again sent to Mr. Gozinske's office.

149. What had now become routine, was again repeated.

150. Mr. Gozinske informed the Petitioner after he again refused to sign the form, that the statement on the complaint could be used in an investigation and that the Petitioner may then be viewed as interfering with an investigation.

151. Petitioner took this to be a threat of possible disciplinary action if he refused to cooperate.

152. The Petitioner signed the statement.

153. All visits to Mr. Gozinske's office are documented on institutional – inmate movement logs used at FLCI.

154. The following morning the Petitioner was directed to report to his living unit by Officer M. Gozinske.

155. Upon returning to the living unit, Petitioner was informed by one of the inmates named in the inmate complaint that he'd been interrogated by the institutional investigators and that he'd told them he didn't know much other than he was upset by the manner in which the officer had searched the room.

156. A short time later the Petitioner was again sent to the administration building to report to the investigator's office.

157. Petitioner was questioned about the other inmate as far as the more than platonic relationship that was alleged to exist between the inmate and Petitioner.

158. Petitioner stated that nothing other than a platonic friendship existed and cited the fact that it was common knowledge that the Petitioner is involved in a monogamous relationship with an individual not at FLCI.

159. Petitioner was asked if he believed that anyone involved in the investigation would, "be out to get [petitioner]".

160. Petitioner stated that he'd recently filed a federal lawsuit naming a few people at FLCI as defendants in relation to sexual harassment, religious discrimination, discrimination [equal protection] based upon sexual orientation and a First Amendment

claim relating to the Petitioner's assistance to another inmate on legal work. (Widmer-Baum v. Gozinske, et al. 00-c-0733-c).

161. When asked who he believed had been involved in the investigation that was also involved in the federal matter, the Petitioner provided the names of Dennis Meier, Mary Neuman, Thomas Gozinske and Respondent Borgen.

162. Petitioner was instructed to wait in the hall.

163. A short time later the Petitioner and two other inmates were placed in temporary lock up pursuant to Wis. Admin. Code § Doc 303.11.

164. The TLU Notice stated that placement was based on the belief Petitioner would interfere with an ongoing investigation into the possible conspiracy to lie about staff in violation of Wis. Admin. Code §303.271.

165. On or about 1 February 2001 adult conduct report number 109397 was written and allegedly served to the Petitioner.

166. Petitioner selected the option of a full due process hearing.

167. Accordingly, Petitioner was assigned staff advocate Sgt. Lyyski.

168. On or about 15 February 2001 the Petitioner sent a request form to Respondent Borgen asking if his TLU time had been extended.

169. The response was, "none requested, none granted." It bore the stamped signature of Respondent Borgen.

170. On or about 21 February 2001 the due process hearing in this matter was held.

171. The Petitioner was found not guilty of § Doc 303.27 (lying) but guilty of §303.271 (staff).

172. The sanction imposed by the committee was 8 days adjustment time and 360 days program time, at FLCI that totals 180 days because inmate do one half of their program time and PRC to Max.

173. During the hearing, the adjustment committee refused to accept two inmate written statements from staff member Linda Kuehn who testified on behalf of Petitioner.

174. The adjustment committee refused to accept evidence confirming that the staff member whose behavior gave rise to the initial complaint has a record of such disrespectful behavior.

175. The adjustment committee refused to allow the Petitioner or his advocate to ask questions which would have benefited the Petitioner.

176. Neither the Petitioner nor his advocate were given the adjustment committee's decision or record of witness testimony until three days after the hearing.

177. The fact that the adjustment committee did not provide these two documents to the Petitioner until three days after the hearing via mail denies the Petitioner any opportunity to raise concerns to the committee prior to the appeal to the Warden (§ Doc 303.76(7)).

178. Upon receipt of the record of testimony and decision, the Petitioner immediately contacted the adjustment committee concerning the fact that the record was extremely incomplete.

179. Further, the Petitioner sent a list of concerns about the record of testimony and requested the committee provide the verbatim transcript created by committee member Mulligan using greg shorthand.

180. The transcript was never produced.

181. A follow up request was sent to committee member Mulligan about two weeks after the first raising the same complaints and concerns.

182. It was returned with a note explaining that the original request had been forwarded to committee member Meier for a response.

183. One of the issues raised is the fact that the investigator determined that it was not possible for inmate Eisenhauer to have been present on unit 1 a/b at the time of the room search.

184. The investigator supported this conclusion with copies of the inmate movement log and other testimony.

185. The disciplinary committee reached the conclusion that inmate Eisenhauer had in fact been present for the room search. A conclusion in direct conflict with the results of the investigation of this matter.

186. A conflict of this magnitude between conclusions of the committee and the investigator puts the integrity of the report and subsequent hearing in question.

187. No rationalization for the two bodies reaching exact opposite conclusions is even offered in the record.

188. The appeal submitted to Respondent Borgen was decided by Deputy Warden Steven Beck.

189. The decision affirmed the decision of the adjustment committee without comment.

190. Following receipt of the decision affirming the adjustment committee's findings, Petitioner filed a series of inmate complaints with ICE Gozinske.

191. After some disagreement on how the complaints should be grouped for filing, all issues considered by the Petitioner to be procedural were submitted.

192. Petitioner will not detail each complaint's contents as there are seven separate complaints.

193. The record will contain each complaint and corresponding decision.

194. Each of the aforementioned complaints was dismissed or rejected by ICE Gozinske and Respondent Borgen and appeals were filed.

195. Respondent Litscher, through his designee Cindy O'Donnelle affirmed the decisions of Respondent Borgen.

196. As was previously stated in the petition, attempts to raise concerns about certain revised rules and their application to Respondent Litscher were denied by Office of Counsel.

197. On file in the Clerk of U.S. District Court's office are the written and signed statements of inmates alleged to have been involved in this matter who claim to have been threatened in relation to their testimony. (Case No.-00-C-733-C)

198. Individuals named in the aforementioned federal civil action and involved in this matter are: Cindy O'Donnell, John Ray, Thomas Borgen, Steven Beck, Dennis Meier, Mary Neuman & Thomas Gozinske.

199. Further, a complaint was filed concerning Mr. Gozinske's administration of the ICRS at FLCI.

200. The allegations against the Petitioner were lodged just days after Mr. Hoonstra had been made aware of the pendancy of the federal matter and made FLCI staff aware of the matter.

201. Petitioner has filed numerous complaints about situations involving his sexual orientation via the ICRS and they were not handled in the manner this complaint was.

ISSUE TO BE RESOLVED

202. Petitioner contends that many of the promulgated changes to Wis. Admin. Code § Doc 303 are unconstitutional either on their face or in application.

203. Petitioner asserts that Respondent Litscher's refusal to rule on the Declaratory Ruling request violates state law and the equal protection clause of the U.S. Constitution.

204. Petitioner believes Respondent Litscher lacked the power or authority to exclude all inmates under his supervision and care from utilizing the statutory provision for requesting a Declaratory Ruling.

205. Petitioner asserts that Respondent Litscher, and the agency he heads must adhere to provisions set forth in the Appendix to Wis. Admin. Code § Doc 303 as readers are directed to it in the very first line in the revised rules.

206. Petitioner contends that if the agency does not follow the Appendix directives, then said directives may not be enforced upon inmates.

207. Petitioner contends that if Respondent Litscher is not obligated to follow the provisions of Wis. Stat. §227, then the agency, by and through counsel, should be barred from basing arguments upon it when defending inmate litigation.

208. Petitioner's position is that if Respondent Litscher takes actions at the administrative level which require inmates to seek judicial review, his agency should bear a significant portion of the fees and costs related to the action.

209. Petitioner holds that Respondent Litscher erred in failing to provide information about the public hearing related to changes in Wis. Admin. Code § Doc 303.

210. Petitioner believes that Respondent Litscher erred in instructing the Petitioner in changes needed to his petition over the course of four months, then deciding he didn't have to issue a ruling and directing the Petitioner to the ICRS well outside the time frame for utilization of the ICRS.

211. Clarification of the word, "may" as used in Wis. Stat. §227.41 is needed.

212. Petitioner asserts that since the complaint he tried to file within the ICRS was refused as being premature (December) that it must be accepted now because the same individual who refused it in December, now says it should have been filed in December.

213. Petitioner holds that there is no language in Wis. Stat. §227 allowing an entire group of individuals subject to the agency's rules to be excluded from utilizing the review process provided therein.

214. Petitioner asserts that many of the rule changes promulgated by Respondent Litscher are violative of Constitutional safeties as well as statutory provisions. Each rule will not be listed here. However, not listing them does not negate the challenges raised under **ISSUE II**.

215. Petitioner strongly asserts that no constitutional or statutory provision permits an agency head to alter or ignore existing state law in promulgating administrative rules.

216. Petitioner believes that it is not permissible for an agency to enact a rule granting the agency permission not to comply with rules already in place.

217. Petitioner holds that no penological or security objectives are furthered by the promulgation of rules which mandate that inmates do not have to be aware of, or informed about changes to, rules.

218. Petitioner asserts that Wis. Admin. Code § Doc 303 must be suspended until the Court has an opportunity to review each change which was effective on 1 January 2001.

219. Petitioner asserts that the handling of the complaint (FLCI-2001-2195) and disciplinary matter were retaliatory in nature due to the filing of a federal civil suit in which many of the defendants were the individuals involved in the disciplinary process.

220. Petitioner believes that Respondent Borgen and Mr. Gozinske erred when deciding Mr. Gozinske would not recuse himself from reviewing the complaints related to the conduct report he played an instrumental role in investigating.

221. Petitioner contends that being called into an administrator's office on three occasions; and being told that his lack of cooperativeness could be viewed as interfering with an investigation – an offense (§ Doc 303.07(1)(d)) is coercion.

222. Petitioner contends that the involvement of Thomas Borgen, Steven Beck, Thomas Gozinske, Mary Neumann, Dennis Meier, Cindy O'Donnell and John Ray, each of whom was a named defendant in a federal lawsuit in which the integrity and behaviors of the defendants is at issue, should not have been permitted involvement in the disciplinary proceedings or review thereof.

223. Petitioner's statement, as prepared by Mr. Gozinske was a sworn statement notarized by Mr. Gozinske, a file review conducted on or about 18 April 2001 under the supervision of the CCI Records Administrator, revealed that nothing in the record created by the adjustment committee overcomes the sworn statement.

224. Petitioner contends that his being held in TLU beyond the 21- limit renders the disciplinary report dismissed as there was no ongoing investigation as the conduct report was written 7 February 2001.

225. Petitioner asserts that the statement made was written by ICE Gozinske, prepared by ICE Gozinske in the ICRS office, given to the Petitioner by ICE Gozinske, notarized by ICE Gozinske, and surrendered to ICE Gozinske without Petitioner implicitly or explicitly giving any degree of permission to take or give the statement to any other person at the institution. Therefore, the Petitioner's statement was not public nor outside the ICRS.

226. Petitioner asserts that the only statement made by him to the adjustment committee was one prepared by Petitioner's advocate, Sgt Lyyski, and the statement contained on the adjustment committee's decision lacks any resemblance to the actual statement submitted to the committee; the Petitioner did not testify at any point in the hearing.

227. Falsification of the record is grounds for the court to reverse the committee's decision.

228. Petitioner holds that Respondent Borgen's written and signed reply indicating that TLU had not been extended supports dismissal of the conduct report.

229. Petitioner asserts that the adjustment committee's refusal to permit questions to be answered which would be helpful to the Petitioner is prejudicial to the Petitioner as well as unfair.

230. Adjustment Committee's refusal to accept written inmate statements offered into evidence by staff member Linda Kuehn is a violation of due process.

231. The Adjustment Committee's refusal to accept staff generated documentation of prior discriminatory statements of the unit sergeant denied the Petitioner due process and equal protection.

232. Petitioner and his advocate were never afforded the opportunity to address the issues and/or concerns with the committee's record of the hearing because the record was not provided until three days after the hearing, Respondents may not argue that the Petitioner failed to raise issues or concerns to the committee prior to appealing to the Warden are waived.

233. Petitioner asserts that the record created by the committee using greg shorthand is a part of the record and should have been surrendered upon the Petitioner's request and statement that he could transcribe the shorthand himself. This document is also missing from the Record's file.

234. Petitioner holds that his complaint about Mr. Meier and Mrs. Mulligan failing to provide the transcript created by Mrs. Mulligan is not an open records request.

235. Petitioner believes that the fact inmates put in writing and signed complaints about being threatened by staff in relation to the investigation detailed herein supports the contention that the integrity of the investigation itself is suspect.

236. The complaint filed with Mr. Ray about Mr. Gozinske and officer Gozinske (wife) details the many errors committed within the ICRS at FLCI.

237. The complaint that was the catalyst for the disciplinary action (FLCI-2001-2195) was not ever answered or decided.

238. Petitioner renews each issue complained of in each ICRS complaints filed (All begin – FLCI-2001; 8365, 2195, 7339, 7673, 8178, 8370).

239. Petitioner maintains that in relation to ICRS file FLCI-2001-8178 that when he complained about the manner in which his

statement was secured he was advised by Mr. Gozinske that the statement was part of a disciplinary investigation and could not be filed until the disciplinary matter was resolved and appealed.

240. In relation to ICRS file CCE-2000-0005 there is no appeal for review, Petitioner asserts that in excess of two months passed between the date of the decision (19 January 2001) and the time Petitioner was mailed his copy (23 March 2001).

241. Petitioner takes the position that Respondents Borgen, Ms. O'Donnell, Mr. Ray and Mr. Gozinske have made a mockery of the WDOC ICRS by ignoring promulgated rules which govern, at least in theory, the ICRS. Time frames are ignored by those who work within the ICRS deciding complaints – if an inmate attempts to file a day late it's simply not allowed. Inmate fails to appeal on time, too bad.

242. Petitioner renews each complaint or issue raised in the appeal to Respondent Borgen.

243. Petitioner reserves the right to raise additional issues and/or arguments when the record is submitted by the respondents due to their failure to provide access to the records upon request.

THE RECORD

244. Petitioner begs the Court's indulgence in this matter as the period of time covered by this petition is several months.

245. Each and every document generated in response to the Petitioner's request for Declaratory Ruling; to include correspondence.

246. Complete copy of Wis. Admin. Code § Doc 303 as it existed before and after the revisions were effective; to include any and all notes and Appendix references.

247. Copy of each and every source the Respondents believe grant then authority to disregard state law in the administration of inmate discipline.

248. Copy of each and every source the Respondents interpret as granting then the authority to interpret state law as enacted by the legislature.

249. Each and every document created by any person (staff or inmate) related to conduct report number 1093979. Please identify the person(s) creating each document submitted. (Including, but not limited to shorthand transcript; non-confidential statements made by staff or inmates, correspondence between Petitioner and staff).

250. Each and every ICRS complaint listed herein. To include the complaint and all decisions and appeals related thereto; investigation notes or reports related thereto. (FLCI-2001-5365, 7339, 7673, 8178, 8370-CCE-005)

251. Any other document which would benefit the court in reviewing these matters.

252. In the event that the Respondents are not able to locate certain documents, the Petitioner requests that the court accept his copies of the documents subject to verification.

253. ICRS complaint file FLCI-2000-35553 to substantiate the Petitioners position that the officer discussed herein has been found guilty of making discriminatory remarks about inmate's sexual orientation in the past.

254. Upon review of the record, the Petitioner reserves the right to move to supplement or strike the record.

RELIEF SOUGHT

255. This is a certiorari matter so the relief is limited.

256. Petitioner requests that the adjustment committee's decision be reversed with prejudice.

257. Petitioner requests that Respondent Litscher's decision to exclude all inmates from seeking review under Wis. Stat. §227 be reversed.

258. Petitioner asks that the changes to Wis. Admin. Code § Doc 303 be suspended until they are in compliance with established constitutional and statutory provisions.

259. Petitioner asks the court to direct Respondents that they are bound by the rules which the agency has promulgated in relation to inmate complaints and discipline.

260. Petitioner requests that due to the Respondents roles in this matter being brought before the court, that a portion of the fees in this matter be collected from them.

261. Due to the relatively short time the Petitioner has left in the custody of the WDOC, it is asked that the briefing schedule be accelerated. (30 days/30 days/15 days).

262. After the courts initial review of this matter it may be decided that the taking of testimony may be beneficial, Petitioner does not object.

263. That the Court issue Declaratory Ruling as to the constitutionality of each rule change implemented on 1 January 2001.

264. That the Court issue a Declaratory Ruling that the Respondents and their agents or designees, are obligated to adhere to the properly promulgated administrative rules governing the WDOC.

265. During the pendancy of this matter, it is requested that the Petitioner be returned to FLCI population so that access to the documents and people involved in this matter is ensured and also

to permit the Petitioner access to a law library so he may adequately litigate this matter. (Once he is returned to WDOC custody).

WHEREFORE, it is prayed that this Honorable Court will grant the Petitioner's request for a Writ of Certiorari and Declaratory Ruling. Further that the Petitioner be returned to FLCI for the duration of this matter upon his return to WDOC Custody.

Submitted this 16 day of June, 2001.

Respectfully Submitted,

Jay Thomas Widmer-Baum, Pro Se
Johnson County Jail
P.O. Box 2540
Iowa City, IA 52240-2540

JTWB/dae

State of Iowa)
) S.S.
County of Johnson)

Subscribed and sworn before me this 18 day of June, 2001 by an individual known to me as Jay Thomas Widmer-Baum (D.O.B. 7 May 1968)

Notary Public, State of Iowa My commission expires 1-24-2003.

DAVID M. WAGNER
Commission Number 172798
My Comm. Exp.

Cc:
Jon E. Litscher
Thomas Borgen
Joint Committee on Review of Administrative Rules