

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 15, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0094

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL.
WILLIAM J. EVERS,**

Petitioner-Appellant,

v.

KEN MORGAN,

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. William J. Evers appeals from an order affirming a prison disciplinary decision. An adjustment committee found Evers guilty of disruptive conduct, in violation of Wis. ADM. CODE § DOC 303.28, and ordered Evers reprimanded.¹ The warden upheld the adjustment committee's decision.

¹ WISCONSIN ADM. CODE § DOC 303.28 provides:

Evers sought certiorari review in the circuit court, and the court upheld the adjustment committee's decision. We affirm.

A disciplinary decision of an adjustment committee is reviewable by certiorari. *State ex rel. Meeks v. Gagnon*, 95 Wis.2d 115, 119, 289 N.W.2d 357, 361 (Ct. App. 1980). This court's scope of review on certiorari is identical to and independent from that of the circuit court. *State ex rel. Staples v. DHSS*, 136 Wis.2d 487, 493, 402 N.W.2d 369, 373 (Ct. App. 1987). Judicial review on certiorari is limited to whether the committee kept within its jurisdiction, whether it acted according to the law, whether its decision was arbitrary, oppressive or unreasonable, and whether the evidence was such that it might reasonably make the determination it did. *State ex rel. Jones v. Franklin*, 151 Wis.2d 419, 425, 444 N.W.2d 738, 741 (Ct. App. 1989).

We first address Evers' argument that the evidence does not support the committee's decision. The underlying conduct report was issued to Evers by the prison librarian, Jean Dushensky. In the conduct report, Dushensky alleged that Evers demanded notary service, despite an earlier announcement that the service was cancelled because of a staff shortage. The report alleged that Evers threatened to sue Dushensky and when told that the conversation was over, Evers "refused to cease [and] persisted in badgering" Dushensky. The report alleged that Evers' conduct "drew the attention of other inmates" in the library.

Dushensky testified at the disciplinary hearing. In addition to affirming the content of the conduct report as true, Dushensky testified that

(..continued)

Disruptive conduct. Any inmate who intentionally or recklessly engages in, causes or provokes disruptive conduct is guilty of an offense. "Disruptive conduct" includes physically resisting a staff member, or overt behavior which is unusually loud, offensive or vulgar, and may include arguments, yelling, loud noises, horseplay, or loud talking, which may annoy another.

WISCONSIN ADM. CODE § DOC 303.84(1)(a) enumerates a "reprimand" as a potential penalty when an inmate is found guilty of violating a disciplinary rule.

Evers was "loud" and "was causing inmates to stop and listen." Evers "was ... argumentative and could be heard in all parts of the library." At the disciplinary hearing, Evers disputed Dushensky's version of the incident. According to Evers' witnesses, Evers was not loud, argumentative or disruptive.

A reviewing court on certiorari does not weigh the evidence presented to the committee. *Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). Our inquiry is limited to whether any reasonable view of the evidence supports the committee's decision. *Jones*, 151 Wis.2d at 425, 444 N.W.2d at 741. The adjustment committee was faced with conflicting evidence. The committee accepted Dushensky's version of the incident as more credible. A reviewing court cannot disturb the committee's credibility determination.

The evidence also supports the committee's finding that Evers' conduct was disruptive. WISCONSIN ADM. CODE § DOC 303.28 enumerates as an example of "disruptive conduct" "arguments, yelling ... or loud talking, which may annoy another." The incident took place in the prison library, typically a quiet setting. The evidence showed that the other inmates in the library could hear Evers' argument with Dushensky, and that Evers persisted despite Dushensky's explanation that notary services had been cancelled. We reject Evers' argument that the evidence does not support a finding that he engaged in disruptive conduct.

Evers contends that the circuit court erred when it refused to consider matters outside the return. In Evers' view, the limited review of certiorari is "meaningless and fundamentally unfair" because the composition of the record is controlled by prison officials. Evers argues that a reviewing court should be permitted to consider matters outside the return and take testimony and evidence. Evers cites no authority for this argument, and we decline to address it. See *In re Estate of Balkus*, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985).

In his appellate brief, Evers makes two arguments that rely on facts outside the certiorari record. He argues that the hearing officer was a "friend" of Dushensky who "fabricated" the record of the disciplinary hearing so that it would support Dushensky. Evers also complains about the performance of the advocate appointed to assist him. We agree with the State that neither of

those issues are properly before this court. Evers did not raise these questions before the adjustment committee. The "facts" cited by Evers in support of those arguments are not found in the record of the disciplinary hearing. We cannot consider matters outside the record, and allegations in an appellate brief cannot add facts which are not in the record. See *State ex rel. Irby v. Israel*, 95 Wis.2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980).

Finally, we address Evers' assertion that the conduct report was issued because he filed an inmate complaint against Dushensky. Evers correctly points out that inmate complaints "shall be confidential" and "[n]o sanction may be applied against an inmate for filing a complaint." WISCONSIN ADM. CODE § DOC 310.13(1) and (6). However, Evers incorrectly characterizes the nature of this disciplinary proceeding. Evers was not disciplined because he filed an inmate complaint. Rather, Evers was disciplined for his disruptive conduct in the prison library.

By the Court.—Order affirmed.

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