

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 12, 1995

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(1), 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. 95-1395-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ADRIAN LOMAX,

Plaintiff-Appellant,

v.

WARDEN, RACINE CORRECTIONAL INSTITUTION,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Sundby, and Vergeront, JJ.

PER CURIAM. Adrian Lomax appeals from an order affirming the decision of a prison adjustment committee.¹ We affirm on one charge and reverse on the other.

The conduct report alleged that Lomax, while being transferred between different parts of the prison, said the name "Karl Rode" and indicated that Lance Luedtke, a crisis intervention worker who was present, had killed him. Lomax was found guilty of disrespect and lying about staff.

Review on *certiorari* is limited to whether: (1) the agency kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the order or determination in question. *Coleman v. Percy*, 96 Wis.2d 578, 588, 292 N.W.2d 615, 621 (1980). We apply the substantial evidence test, that is, whether reasonable minds could arrive at the same conclusion reached by the department. *State ex rel. Richards v. Traut*, 145 Wis.2d 677, 680, 429 N.W.2d 81, 82 (Ct. App. 1988).

An inmate may not knowingly make a false written or oral statement about a staff member with the intent to harm the staff member and make that false statement public. WIS. ADM. CODE § DOC 303.271. The committee wrote: "Regarding the 271 charge, Mr. Luedtke had no part in what was called an accidental death. Furthermore, no evidence has ever been shown at any time that Mr. Luedtke was a factor in the death." Lomax argues that there was no evidence in support of this part of the decision. We agree. We first note that the committee did not find that Lomax knew his statement was false, one of the elements of the charge. Lomax argues that there was no evidence that the statement was, in fact, false. The respondent replies that Lomax submitted no evidence showing his statement was true. However, the burden is not on the inmate to prove a disciplinary charge false. "The institution is required to establish guilt by a preponderance of the evidence." WIS. ADM. CODE § DOC 303.76(6).

¹ This is an expedited appeal under RULE 809.17, STATS.

The warden argues that the committee properly took notice that "the Rode incident" was ruled an accidental death. However, the rules provide that the committee shall consider "only the evidence presented to it and the inmate's records." *Id.* There is no indication in the record that any ruling on "the Rode incident" was before the committee. Our review is limited to the record brought up by the writ. *State ex rel. Richards v. Leik*, 175 Wis.2d 446, 455, 499 N.W.2d 276, 280 (Ct. App. 1993). Because this record does not show any evidence that Lomax's statement was false, the committee's decision on the lying charge was not supported by substantial evidence.

Lomax was also found guilty of disrespect under WIS. ADM. CODE § DOC 303.25, which provides:

Any inmate who overtly shows disrespect for any person performing his or her duty as an employe of the state of Wisconsin is guilty of an offense Disrespect includes, but is not limited to, derogatory or profane writing, remarks or gestures, name-calling, spitting, yelling, and other acts intended as public expressions of disrespect for authority and made to other inmates and staff. Disrespect does not include all oral or written criticism of staff members

Lomax argues that his comment that Luedtke killed Rode was not disrespect, but oral criticism of staff. We disagree. While Lomax's allegation might, under some circumstances, be legitimate criticism, the committee could reasonably find that in the circumstances of this case his remarks were intended to be public expressions of disrespect for authority.

Lomax argues that the disrespect rule, WIS. ADM. CODE § DOC 303.25, is unconstitutionally vague and overbroad. We disagree. The rule provides ample notice of the conduct prohibited.

In summary, we reverse as to the lying charge and affirm as to disrespect. On remand, the circuit court shall order the committee to expunge

the finding of guilt on the lying charge, and shall order it to reconsider its disposition in light of that conclusion.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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