COURT OF APPEALS
DECISION
DATED AND RELEASED

November 27, 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. 95-3289

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

STATE OF WISCONSIN EX REL.
DAVID R. BROWN,

Petitioner-Appellant,

v.

GERALD BERGE,

Respondent-Respondent.

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

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. David Brown, an inmate at Fox Lake Correctional Institution, appeals from an order quashing his writ of certiorari. Brown argues that the charges against him were not adequately investigated, that the evidence is not sufficient to support the prison disciplinary committee's decision finding him guilty, and that information in the conduct report was false. We affirm.

According to the conduct report, a prison officer saw Brown carry a vitamin bottle from his room into the bathroom. The officer then saw a second inmate, William Walker, come out of the bathroom with a vitamin bottle. After Walker had taken the bottle to his room, the officer checked the bottle and found that it contained a strong-smelling liquid, which was later identified as acetone, a highly flammable substance. Wood Industries, where Brown worked, was the only location in the institution accessible to inmates where acetone could be found.[1]

Brown was charged with theft, possession of contraband, improper storage and creating a hazard. A prison disciplinary committee found him guilty of the first three charges. Brown sought certiorari review in the trial court, and the court affirmed the committee's decision.

On certiorari review, this court, like the trial court, determines whether the agency acted within its jurisdiction, whether it acted according to applicable law, and whether its actions were arbitrary, unreasonable or capricious. ***State ex rel. Riley v. DHSS***, 151 Wis.2d 618, 623, 445 N.W.2d 693, 694 (Ct. App. 1989).

Brown first argues that the charges against him were not adequately investigated because the officer who wrote the conduct report never checked to see whether there was another vitamin bottle in the bathroom garbage, the one Brown claimed he discarded. Although some investigation is necessary before a disciplinary committee can make a factual determination sufficient to meet constitutional minimum due process requirements, the officer did an adequate investigation here. The officer's observations of Brown and Walker, coupled with the officer's subsequent questioning of Walker, provided an adequate basis for the charges. Although Brown claims that there was a second vitamin bottle in the bathroom trash, the one he threw away, the officer could have reasonably chosen not to check the bathroom because a substantial period of time had apparently elapsed between the time when the officer began

[1] In the statement of reasons for its decision, the disciplinary committee stated that Wood Industries was the only place in the prison accessible to inmates where acetone could be found. Brown disputes this on appeal, but did not exercise his right to present evidence during the hearing to the committee supporting his contention that acetone was available in other places in the prison.

investigating and Brown's request that he check the bathroom garbage, many inmates had access to the bathroom, and another bottle could have been placed there by Brown or another inmate in the intervening time.

Brown next argues that the evidence was insufficient to find him guilty. Where the sufficiency of the evidence to support an administrative determination is challenged, we may not weigh the evidence; we are limited to determining whether there is substantial evidence in the record to support the determination. ***Van Ermen v. DHSS***, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978).

The committee had before it the conduct report in which the investigating officer reported that he saw Brown go into the bathroom with a vitamin bottle and saw Walker come out of the bathroom with a vitamin bottle which contained acetone, a flammable substance available only where Brown worked. The report stated that Walker said that he saw Brown sit the bottle down and walk away so he picked it up and took it to his room so he could return it to Brown later. This evidence is sufficient to sustain the committee's determination of Brown's guilt on the charges.

Brown finally contends that information in the conduct report was false; he contends that Walker never told the investigating officer that he saw Brown place the vitamin bottle in the bathroom, and supplies an affidavit by Walker to this effect. Brown waived his right to be present at the hearing and to challenge information in the conduct report. Because Brown waived his right to challenge the information before the committee, he may not now raise this issue.

By the Court.—Order affirmed.

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