

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

September 18, 1997

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.

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

No. 95-3324

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. VANCES H. SMITH,

PETITIONER-APPELLANT,

V.

GARY MCCAUGHTRY,

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. Vances H. Smith, an inmate at Waupun Correctional Institution (WCI), appeals a circuit court order resolving Smith's certiorari action by affirming the findings of the WCI adjustment committee. Because we reject Smith's arguments about WIS. ADM. CODE § DOC 303.63, sufficiency of the evidence and abuse of sentencing discretion, we affirm.

APPLICABLE LAW

WISCONSIN ADM. CODE § DOC 303.63 states in relevant portion:

(1) Each [correctional] institution may make specific substantive disciplinary policies and procedures relating to:

...

(d) Movement within and outside the institution.

...

(2) Violations of any specific policies or procedures authorized under sub. (1) are offenses.

Page 6, section 7 of the Waupun Correctional Institution Handbook states in relevant portion:

COUNT PROCEDURES

Standing counts will be announced by bell and voice in the cell halls ... after the dinner (noon count) and evening meals (5:00 p.m. count). At these times, inmates will be required to assemble in a specified place in their assigned area.

In all cell halls, inmates will stand in clear view at the bars of their cell during count....

Inmates will remain in their cell/housing area until count has been cleared.

(Underlining in original.)

BACKGROUND

By major conduct report #571879-631, Smith was charged with failing to stand for cell count on March 25, 1995. By major conduct report #571893-643, Smith was again charged with failing to stand for cell count on March 27, 1995. Both reports alleged that failure to stand was a violation of WIS. ADM. CODE § DOC 303.63, and page 6, WCI Handbook. Prior to the March 25, 1995 incident, Smith had been warned several times to stand during cell count.

ANALYSIS

In proceedings below, Smith argued that WIS. ADM. CODE § DOC 303.63 does not authorize standing cell counts. Before this court, Smith argues that there was insufficient evidence to find that the voice order for cell count had been given, and that the penalties imposed were excessive. We reject each of these arguments.

WISCONSIN ADM. CODE § DOC 303.63

Construction of administrative regulations is governed by the same principles as statutory construction. *State ex rel. Staples v. Young*, 142 Wis.2d 348, 353, 418 N.W.2d 333, 336 (Ct. App. 1987). Statutory interpretation is a question of law which we review *de novo*. *Blackbourn v. Onalaska School Dist.*, 174 Wis.2d 496, 499, 497 N.W.2d 460, 461 (Ct. App. 1993). There is no need to resort to statutory interpretation if a statute is clear on its face. *In re C.G.F.*, 168 Wis.2d 62, 70 n.6, 483 N.W.2d 803, 806 n.6 (1992).

WISCONSIN ADM. CODE § DOC 303.63 on its face permits correctional institutions to regulate “movement within ... the institution.” The purpose of cell counts is to regulate such movement by ascertaining that inmates

are where they belong—in their cells—at certain times. The institutional policy, page 6, section 7 effectuates this by requiring further movement by inmates to “specified place[s] in their assigned area,” namely, the bars of their cells. Because the policy on its face regulates movement as permitted by WIS. ADM. CODE § DOC 303.63, we reject Smith’s assertion that it does not.

SUFFICIENCY OF THE EVIDENCE

Smith argues that the record contains no evidence that a voice call was made before cell count. If a reasonable view of the evidence supports the finding made, we will affirm. *Nufer v. Village Bd. of Village of Palmyra*, 92 Wis.2d 289, 301, 284 N.W.2d 649, 655 (1979) (citation omitted). Our examination of the record of the March 25, 1995 incident shows that a witness testified that a voice call was made.¹ The record of the March 27, 1995 incident also contains evidence that a voice call was made.² Therefore, we affirm on this issue.

PENALTIES

Smith was sentenced to three days adjustment segregation for the March 25 incident, and the same penalty plus ninety days program segregation for the March 27 incident. Smith argues that these penalties are excessive because these incidents should not have been processed as major conduct reports. We disagree. If the misconduct charged shows a flagrant disrespect for authority, or

¹ Specifically, an inmate witness testified: “Time dude did count. Hollered....”

² The committee found: “Smith is not credible. An incredibly loud buzzer goes off to sound count, officer then walks past 31 cells to get to Smith, even though officer yells count only several cells from Smith when he starts second half of range.”

seriously disrupts the routine of the institution, a major penalty may be assessed. *State ex rel. Irby v. Israel*, 95 Wis.2d 697, 707, 291 N.W.2d 643, 648 (Ct. App. 1980).³ The committee here found that Smith had been previously warned several times, that his behavior created a security risk, and that he had the attitude that the rules simply do not apply to him. A guard in the March 27 incident also noted that he had to stop his count to get Smith standing. Refusal to stand after several warnings is “flagrant disrespect,” and not standing when required creates “disrupt[ion]” when a guard has to stop his count to get an inmate standing who ought to be standing already. Therefore, we reject this argument also.

By the Court.—Order affirmed.

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

³ Another factor is whether the violation is “a repeated (more than twice) infraction of ... institution rules which resulted in imposition of a minor penalty.” *Id.* Although no minor penalties were previously assessed, there is no dispute that Smith’s violation was “repeated.”

