

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 99-2263

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. EUGENE CHERRY,

PETITIONER-APPELLANT,

V.

DONALD GUDMANSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Jackson County:
ROBERT W. RADCLIFFE, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Eugene Cherry appeals from an order affirming a prison disciplinary decision. He contends that he was found guilty of disciplinary violations because the disciplinary committee refused to consider exculpatory testimony he offered at his hearing. We affirm.

¶2 A female correctional officer issued a conduct report against Cherry alleging that he battered her and sexually assaulted her in a bathroom. According to the report, Cherry struck her, bit her and partially disrobed her. While struggling with him she told him that he was doing himself no good, to which he replied “I don’t give a damn. I’m going to Oklahoma anyway.” The incident ended when the officer was able to push the alarm button on her radio and other officers responded.

¶3 Cherry was charged with battery, sexual assault, prohibited sexual conduct, and disobeying orders. He asked for and received a hearing before a disciplinary committee. The evidence against him included the officer’s conduct report and medical reports that substantiated the injuries she reported from the battery. Cherry’s evidence consisted of his statement that the officer invited him into the bathroom and that he never touched her. The disciplinary committee chose to believe the description of the incident in the conduct report and found Cherry guilty of battery and attempted sexual assault—intercourse. The committee acquitted him of sexual assault—contact, prohibited sexual conduct, and disobeying orders. Cherry appealed and the warden affirmed the disciplinary committee’s decision. On certiorari review of the decision, the trial court affirmed resulting in this appeal.

¶4 Judicial review on certiorari is limited to whether the agency’s decision is within its jurisdiction, the agency acted according to law, its decision was neither arbitrary nor oppressive, and the evidence of record supports the decision. *See State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). We review the evidence using the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion the agency reached. *See id.* at 386. The agency’s fact

findings are conclusive if supported by any reasonable view of the evidence, and we may not substitute our view of the evidence for that of the agency. *See id.*

¶5 Cherry contends that the disciplinary committee should not have accepted the officer's version of the events because the conduct report quotes Cherry as stating that he was going to Oklahoma. However, Cherry asserts, he knew of no plans to transfer him to a prison in Oklahoma, and the conduct report therefore falsely quotes him. Under Cherry's theory, the committee consequently should have dismissed all the other allegations in the conduct report as well.

¶6 Our review of prison disciplinary decisions is limited to the record. *See State ex rel. Peckham v. Krenke*, 229 Wis. 2d 778, 783, 601 N.W.2d 287 (Ct. App. 1999). In this case, the record does not show that Cherry denied making the Oklahoma comment, although his statement to the committee challenged other parts of the conduct report. The record further indicates that after Cherry made his statement, the committee invited him to add any other comments he wished to make about the conduct report, and he offered none. Cherry cannot now contend that the disciplinary committee failed to consider evidence that he never presented to it. Given the evidence of guilt before the committee consisting of the officer's detailed description of the assault, and the medical evidence supporting that version, reasonable minds could conclude that Cherry was guilty of battery and attempted sexual intercourse.

¶7 Cherry's brief also addresses what he contends were errors the trial court committed during the certiorari review proceeding. We need not address those alleged errors. We review prison disciplinary decisions de novo, and, consequently, any trial court errors are nonprejudicial. *See Ortega*, 221 Wis. 2d at 387.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5 (1997-98).

