

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2013AP354

Cir. Ct. No. 2012CV1716

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. MELVIN L. BOONE,

PETITIONER-APPELLANT,

v.

**QUALA CHAMPAGNE, DEIDRE MORGAN, ANN KRUEGER AND GARY H.
HAMBLIN,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
MARYANN SUMI, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Melvin Boone appeals a circuit court order affirming a prison discipline decision. We conclude the evidence for the charge was insufficient, and therefore we reverse.

¶2 As described by the respondent warden on appeal, the theory of the case is that Boone asked for a check to be drawn on his prison account and made out to a certain merchant, to pay for a television and typewriter that the merchant would then send to Boone's mother. The warden argues that Boone was attempting to evade rules about gifts by sending his mother merchandise instead of a direct monetary payment. That may be true, but the question here centers on whether Boone violated WIS. ADMIN. CODE DOC § 303.32(3), which reads: "Any inmate who misrepresents facts to another to obtain items of value is guilty of an offense."

¶3 One of Boone's arguments is that the evidence was insufficient to show that he misrepresented any fact. On certiorari review, 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 (Ct. App. 1988).

¶4 To show misrepresentation of fact, the warden relies on two forms that Boone used in the transaction. The first form is the merchant's order form that Boone used to place the order. The form states that it can be used only for orders shipped to Department of Corrections facilities. In the "ship to" area of the form Boone wrote a name that was apparently his mother's. Then, he X'd out the the words "Institution Name" and left blank the remainder of that line. Finally, in the "street address" section he wrote an address that was apparently his mother's. The warden argues that Boone "misrepresented facts by altering" the form.

¶5 We are unable to see how Boone's alteration of the form misrepresented any fact. Boone's use of the form may have been a misuse, but he did not misrepresent facts. Rather, Boone *correctly* represented facts, namely, that

he wanted the items shipped to his mother, rather than to an institution. The warden does not identify any incorrect fact on the form.

¶6 The second form the warden relies on is the Department's disbursement request form that Boone filled out to have the check prepared and sent to the merchant. The warden argues that Boone "misrepresented facts ... by failing to disclose on the disbursement request that at least some of the items ordered were gifts."

¶7 There are two problems with this argument. The first is with the general idea that an omission of requested information on a form can be a "misrepresentation of fact." An omission seems more in the nature of a silence that does not "represent" anything, either true or untrue. If a form has a blank space asking for certain information, and a person leaves that space blank, we do not readily see how that is a "misrepresentation of fact," unless the form indicates in some manner that leaving the space blank will be taken as an assertion of some type. This form does not do so.

¶8 However, even if leaving requested information off forms could be considered a misrepresentation, there is no misrepresentation on the disbursement form at issue here. The disbursement form does not require Boone to state that the purchases were gifts. The warden acknowledges Boone's argument that the form did not require him to include information regarding the recipient of the ordered items. And, it does not appear that Boone's failure to provide that information made any other part of his writings on the form untrue.

¶9 In sum, we conclude that a reasonable mind could not conclude that Boone misrepresented any fact. Therefore, the evidence was insufficient to

support the finding of guilt on this charge. It may be that Boone violated other rules in this transaction, but not the rule he was found guilty of violating.

¶10 In his brief, Boone asks as a remedy that the conduct report be dismissed and expunged from his record, and that he be returned to his status prior to the relevant disciplinary proceeding. The warden does not dispute that this would be an appropriate remedy. Therefore, we reverse and remand with directions for the circuit court to enter an order granting the relief sought.

By the Court.—Order reversed and cause remanded with directions.

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

