

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 4, 1999

Marilyn L. Graves  
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 § 808.10 and RULE 809.62, STATS.

**No. 98-1547**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN EX REL. VANCES SMITH,**

**PETITIONER-RESPONDENT,**

**v.**

**GARY R. McCAUGHTRY,**

**RESPONDENT-APPELLANT.**

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

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. Gary McCaughtry, the warden at Waupun Correctional Institution, appeals an order reversing a disciplinary decision of the Institution's Adjustment Committee. On administrative appeal, McCaughtry affirmed the decision finding inmate Vances Smith guilty of an unauthorized transfer of \$1.60 worth of stamps to another inmate. On certiorari review, the trial

court reversed, however, finding that Smith's conduct was not serious or substantial enough to constitute a violation of the disciplinary code. We disagree and therefore reverse.

Smith's offense consisted of hiding five thirty-two cent stamps in an envelope sent to another inmate. Upon discovery of the hidden stamps, a corrections officer issued a conduct report charging Smith with violating WIS. ADM. CODE § DOC 303.40, which prohibits the unauthorized transfer of "any property." On review of the charge, the security director classified it as a major offense, for purposes of Smith's hearing.

At the hearing, Smith and other inmates testified that Smith was merely a go-between in the return of the stamps to their rightful owner. The committee found, however, that Smith and the other inmates did not present credible testimony. The decision noted that the stamps were hidden in the envelope, and the committee plainly inferred that the fact they were hidden proved a knowing and intentional offense. After finding Smith guilty, the committee imposed punishment of thirty days loss of recreation, which is classified as a minor penalty under WIS. ADM. CODE § DOC 303.72.

On review of an administrative decision, we determine whether the agency kept within its jurisdiction; acted according to law; reached a decision that was not arbitrary, oppressive or unreasonable, representing its will and not its judgment; and whether the decision was reasonable given the evidence. *See State ex rel. Richards v. Traut*, 145 Wis.2d 677, 679-80, 429 N.W.2d 81, 82 (Ct. App. 1988). We directly review the agency's decision, without deference to the trial court's decision. *See Gordie Boucher Lincoln-Mercury Madison, Inc. v. City of*

*Madison Plan Comm'n*, 178 Wis.2d 74, 84, 503 N.W.2d 265, 267 (Ct. App. 1993).

In the trial court, Smith first argued that the security director improperly classified his offense as major. That issue was not raised before the adjustment committee, however, and is therefore waived. See *Saenz v. Murphy*, 162 Wis.2d 54, 63, 469 N.W.2d 611, 615 (1991), *overruled on other grounds by Casteel v. Vaade*, 167 Wis.2d 1, 481 N.W.2d 476 (1992). Additionally, Smith was not harmed by the decision, because the punishment ultimately imposed did not exceed that allowed for a minor offense.

The committee reasonably chose to punish Smith for his violation of WIS. ADM. CODE § DOC 303.40. The rule defines a violation to include the intentional giving of “any property” without authorization. The comment to § DOC 303.40 notes that:

Some would argue that ... this section condemns much harmless or even beneficial activity (such as friendly sharing, trading and gift giving) .... However, the experience in Wisconsin has been that this section is necessary to prevent abuses [such as theft, gambling or selling of favors].

The purposes of this section should be borne in mind and conduct reports not written for petty and harmless violations such as exchanging single cigarettes, when there is no evidence that the exchange is related to any abuse such as those mentioned earlier.

WIS. ADM. CODE § DOC 303 app. note 303.40. The trial court concluded that Smith’s offense was a “petty and harmless” violation that the note instructs should not be charged. However, courts must give great deference to an administrative agency’s interpretation and application of a rule if it is intertwined with value and

policy determinations inherent in the agency's function. *See Telemark Dev. Inc. v. DOR*, 218 Wis.2d 809, 818, 581 N.W.2d 585, 588 (Ct. App. 1998). When great deference is given, the agency's application is sustained if it is reasonable, even if another conclusion would be more reasonable. *See id.* Here, under the facts as found by the adjustment committee, we cannot deem unreasonable the determination that the secret transfer of five postage stamps violated the rule barring the intentional transfer of "any property."

*By the Court.*—Order reversed.

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

