

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 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. 98-2667

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. DAVID A. CLARK,

PETITIONER-RESPONDENT,

v.

GARY R. MCCAUGHTRY, WARDEN,

RESPONDENT-APPELLANT.

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

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Gary R. McCaughtry, warden of the Waupun Correctional Institution, appeals from a circuit court order reversing his determination that inmate David A. Clark was guilty of aiding and abetting a violation of the administrative rule against soliciting staff. McCaughtry argues that a letter written by Clark to an inmate at another prison discussing certain

sexual statements which the other inmate wanted Clark to address to female correctional officers at Waupun was sufficient to show that Clark had “agree[d] with another person to give [some]thing of value to a staff member,” within the meaning of WIS. ADM. CODE § DOC 303.26(5)-B. In light of this court’s recent determination that a personal relationship may be a thing of value, *see State ex rel. Sprewell v. McCaughtry*, No. 98-1518 (Wis. Ct. App. April 15, 1999, ordered published May 26, 1999), we agree and reverse the order of the circuit court.

BACKGROUND

While monitoring inmate correspondence in August of 1997, Waupun prison officials discovered the following exchange. Bruce Beiber, an inmate at the Jackson Correctional Institution, wrote Clark a letter which stated in part:

How’s all our girls at Waupun? Did you tell Miss Kreuger I’d miss her. Hey, tell Miss Hansen I still want to lick her where she pee’s. If you don’t want to tell her ... just show her this letter. ... Tell that new little blond that was smiling at me in the kitchen that I want to know where she hangs out ... so in a year & a half I can make her pussy smile the same way. Tell the same thing to Kreuger and Hansen, or just show them this letter & tell them the address is on the envelope & I know how to be discreet. But I think I’ll end up seeing them anyway. Remember I have a fast car & I’m sure I can make it to Waupun & Fond du Lac to find them & watch them quiver and cream.

Clark wrote a letter back to Beiber responding:

All of our girls here are doing just fine! As usuall!! No I haven’t told Miss Kreager what you asked me to because she hasn’t worked in the dining room since you left. But as soon as she comes back, I’ll be sure to tell her. You can count on it!! Your crazier than I thought if you really think I’m going to tell Miss Hanson what you wrote or tell her. First of all since you left she’s been really sweet

to me. ... Depending on how that new blond acts in about 2½ to 3 weeks, depends on if I'll tell her and ask her where she hangs out. She's still too new to tell. — You know with your fast car and my fine looks, we'll have every fine female in Waupun.

Based on the letters and Clark's admission that the women referred to were staff members at Waupun, prison officials issued Clark a conduct report charging him with disrespect and soliciting staff. The Waupun adjustment committee dismissed the disrespect charge, but found him guilty of aiding and abetting soliciting staff. After the warden affirmed the committee's determination, Clark filed a certiorari action in circuit court. The circuit court concluded that there was insufficient evidence to support the agency's finding of guilt and reversed. The warden now appeals.

STANDARD OF REVIEW

On certiorari, we review the decision of the prison adjustment committee, rather than the trial court, and our review is limited to the record created before the committee. *State ex rel. Whiting v. Kolb*, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). We will consider only whether: (1) the agency stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive or unreasonable and represented its will rather than its judgment, and (4) the evidence was such that the agency might reasonably make the order or determination in question. *Id.* We are bound by an agency's factual findings so long as there is substantial evidence in the record to support them. *Currie v. DILHR*, 210 Wis.2d 380, 386-87, 565 N.W.2d 253, 256-57 (Ct. App. 1997). By substantial evidence, we refer to relevant, credible and probative evidence upon which reasonable people could rely to reach a conclusion. *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173 (1983).

ANALYSIS

WISCONSIN ADMINISTRATIVE CODE § DOC 303.26(5) provides that any inmate who “[d]irects another person to give anything of value to a staff member, or agrees with another person to give anything of value to a staff member” is guilty of soliciting staff. An inmate who “[a]ssists another inmate, prior to a rule violation, in planning or preparing for it, with intent that the offense be committed” is guilty of aiding and abetting that offense. WIS. ADM. CODE § DOC 303.07(1)(b). Aiding and abetting the solicitation of staff is a lesser-included offense of soliciting staff which is designated by adding “-B” to the rule number violated. WIS. ADM. CODE §§ DOC 303.03(5) and 303.07(2).

Clark first alleges error by the adjustment committee because he was charged in the conduct report with a violation of WIS. ADM. CODE § DOC 303.26, soliciting staff, but was found guilty of WIS. ADM. CODE § DOC 303.26-B, aiding and abetting the solicitation of staff. However, the administrative rules specifically provide that the lesser-included offense of aiding and abetting another offense need not be charged separately. WIS. ADM. CODE § DOC 303.03(1). There is therefore no merit to Clark’s contention.

Clark next claims the adjustment committee operated under an erroneous view of the law when it concluded that a personal relationship could be a thing of value within the meaning of WIS. ADM. CODE § DOC 303.26. However, we have recently approved as reasonable the adjustment committee’s interpretation of “anything of value” to include personal relationships. *See Sprewell*, No. 98-1518, slip op. at 4. *Sprewell* controls the question here. *See*

Cook v. Cook, 208 Wis.2d 166, 189, 560 N.W.2d 246, 256 (1997) (binding us to the precedent of our own court).

Finally, Clark maintains that there was insufficient evidence to show that he had either given or requested a personal relationship to or from a staff member because his letter was addressed to another inmate rather than any of the women mentioned in the letter. We conclude, however, that Clark's statement that he would "be sure to tell" a female staff worker that Beiber missed her was sufficient to show that he had assisted Beiber in planning to solicit staff with intent that the offense be committed. That is all that was required for a finding of guilt under WIS. ADM. CODE § DOC 303.26-B.

Because the adjustment committee operated under a reasonable view of the law and there was substantial evidence to support its determination, the circuit court erred in reversing the disciplinary action against Clark.

By the Court.—Order reversed.

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

