

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 11, 1998

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. 97-2587

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DOUGLAS J. RICHER,

PETITIONER-APPELLANT,

V.

DONALD GUDMANSON, WARDEN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Jackson County:
ROBERT W. RADCLIFFE, Judge. *Reversed and cause remanded with
directions.*

Before Vergeront, Deininger and Nowakowski,¹ JJ.

¹ Circuit Judge Michael N. Nowakowski is sitting by special assignment pursuant to the Judicial Exchange Program.

PER CURIAM. Douglas J. Richer appeals from an order affirming a prison disciplinary decision. We conclude that the record does not support the finding of guilt, and therefore we reverse. The conduct report charged Richer with violating WIS. ADM. CODE §§ DOC 303.17 (fighting) and 303.28 (disruptive conduct). The conduct report stated that the author observed five other inmates striking Richer. They knocked him to the ground, and he fought with them. The offenses were charged as major offenses, but Richer waived his right to a due process hearing and thus the conduct report was disposed of under the hearing procedures for minor violations. *See* WIS. ADM. CODE § DOC 303.76(2). Richer denied he was guilty of either charge.

The hearing officer found Richer not guilty of fighting because he was acting in self-defense, but guilty of disruptive conduct. The only evidence the officer relied on, according to the checked box on the preprinted form, was the conduct report. The hearing officer's statement of the reason for his guilty finding was as follows:

By information received in the investigation and the events which occurred as a result of this event. It is concluded that Inmate Richer, by his actions, provoked others to act against him. His presence in the courtyard in relation to those who took action against him and his previous activities led to the fight. It was a serious disruption to the institution in the presence of many inmates in the courtyard. This activity was disruptive.

Richer appealed to the warden, arguing that the evidence presented at the hearing did not support the finding of guilt. The warden denied the appeal, and Richer sought certiorari review. Richer argues on appeal that the hearing officer's decision was not supported by the evidence. Review on certiorari includes whether the evidence was such that the agency might reasonably make the

order or determination in question. *Coleman v. Percy*, 96 Wis.2d 578, 588, 292 N.W.2d 615, 621 (1980). 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, 82 (Ct. App. 1988). Our review is limited to the record brought up by the writ. *State ex rel. Richards v. Leik*, 175 Wis.2d 446, 455, 499 N.W.2d 276, 280 (Ct. App. 1993).

Even though Richer waived a due process hearing, the rules still require that the “institution shall establish guilt based on the preponderance of the evidence.” WIS. ADM. CODE § DOC 303.75(5)(b) (emphasis added). The conduct report may be considered evidence, WIS. ADM. CODE § 303.86(2)(a), and it alone may be sufficient to establish guilt. Here the hearing officer indicated he was relying only on the conduct report as evidence, but in his statement of reasons he referred to “the investigation.” The officer found that some unspecified action by Richer before the fight was disruptive. The conduct report makes no mention of this. The record brought up by the writ contains no evidence of what information was discovered in “the investigation.” There is therefore, no evidence in the record to support the finding that Richer took any action, disruptive or otherwise, before the fight. Therefore, we must reverse the finding of guilt. On remand, the circuit court shall enter an order reversing the hearing officer’s decision and ordering that Richer’s disciplinary record be expunged of this offense.

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

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

