

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2002

Cornelia G. Clark
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. 01-3370
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-97

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. WILLIAM JAMES, SR.,

PETITIONER-APPELLANT,

V.

GARY MCCAUGHTRY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

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

¶1 PER CURIAM. William James, Sr., appeals an order affirming a prison disciplinary decision. He challenges various aspects of the administrative proceeding. We reject his arguments and affirm.

¶2 While imprisoned at Waupun Correctional Institution, James was charged with violating provisions of WIS. ADMIN. CODE § 303 prohibiting inciting a riot, conspiracy, and group resistance. The conduct report relied on statements from two confidential informants. Both identified James as a prison gang leader, and accused him and other gang leaders of planning a prison riot by members of four gangs. A corrections officer confirmed James's gang leadership role, and reported his opinion that the informants were credible based on knowledge gained from the officer's position as "gang coordinator" at the prison.

¶3 James requested and received a staff advocate to assist him in defending against the charges. The advocate informed James he was free to contact her, but did nothing else to assist James. After considering the evidence presented at James's hearing, including exculpatory affidavits from other inmates, the committee made the following decision:

We find the reporting staff credible.

We find Captain Muraski credible based on his experience and extensive training.

The inmate wrote that either Captain Muraski or the informants have provided false information.

We do not find the inmate credible.

We find that C/I #1's statement is corroborated by C/I #2's statement. We specifically note that both informants state that inmate James was acting in a leadership position ... and was directing inmates to participate in a disturbance in which staff and inmates were to be injured. We note that inmate James has been identified as occupying a position of authority with the Mickey Cobra Stones, which is a 5-point affiliate.

After a review of the conduct report, the evidence, and all of the testimony, we find the inmate intentionally directed inmates to participate in a disturbance in which staff and inmates were to be injured.

James was found guilty of inciting a riot, and not guilty of the other two charges.

¶4 Following administrative appeals, James commenced this action. The issues on appeal of the trial court's decision are: (1) whether the disciplinary committee could find James guilty of inciting a riot when no riot actually occurred; (2) whether James received sufficient notice of his hearing; (3) whether James received effective assistance from his staff advocate; and (4) whether the warden timely decided James's administrative appeal.

¶5 Judicial review of a prison disciplinary decision is limited to whether the disciplinary committee acted within its jurisdiction, followed the law, did not issue an arbitrary or oppressive decision, and heard sufficient evidence to support the decision. *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). The disciplinary committee is required to follow its own procedural rules. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980). We review the disciplinary decision in the same manner as the trial court, and decide the appeal independently of the trial court's decision. *Ortega*, 221 Wis. 2d at 385.

¶6 The committee properly found James guilty, although the planned riot never occurred. WISCONSIN ADMIN. CODE § DOC 303.18 defines the offense of inciting a riot as encouraging, directing, or otherwise causing one or more other persons to participate in a riot. By its plain language, the rule does not require that the riot actually occur. An administrative rule will be construed according to its plain meaning. *State v. Bucheger*, 149 Wis. 2d 502, 506-07, 440 N.W.2d 366 (Ct. App. 1989).

¶7 James received adequate notice of his hearing. James asserts he should have received two notices of his hearing, as once required by WIS. ADMIN.

CODE § DOC 303.81(9). However, that provision had been repealed by the time of this proceeding, as he now concedes. Additionally, he was not, as he now contends, entitled to notice of that repeal before his hearing. In any event, he was not prejudiced by the absence of a second notice.

¶8 The performance of James’s staff advocate is not grounds to reverse his disciplinary decision. James effectively presented his case with testimony, affidavits, motions, and a seven-page brief. He won acquittal on two of the three charges against him. An error in a disciplinary proceeding is deemed harmless if it does not substantially affect the rights of the inmate. WIS. ADMIN. CODE § DOC 303.87. That is what occurred here.

¶9 James received timely review of his administrative appeal. WISCONSIN ADMIN. CODE § DOC 303.76(7)(b) allows the warden sixty days to decide an appeal. James filed his appeal on September 19, 2000, and received his decision on October 13, 2000. James relies on an outdated rule to support his timeliness argument.

¶10 Finally, the respondent moves for a decision declaring the appeal frivolous, and therefore a “strike” against James under WIS. STAT. § 801.02(7)(d) (1999-2000).¹ We conclude that the trial court was correct in its analysis of this issue. The respondent’s motion is denied.

By the Court.—Order affirmed.

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

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

