

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

July 17, 1997

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-0127**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN EX REL. VANCES H. 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, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Gary R. McCaughtry, Warden of Waupun Correctional Institute, appeals from an order entered on Vances H. Smith's petition for writ of certiorari. The circuit court ordered major conduct report #617788-965 expunged from Smith's record because Smith's conduct in failing to stand for a cell count was not behavior prohibited by WIS. ADM. CODE § DOC

303.63. Although we disagree with the circuit court's analysis, we nevertheless affirm. See *State v. Holt*, 128 Wis.2d 110, 124-25, 382 N.W.2d 679, 687 (Ct. App. 1985) (If the circuit court came to the right result, we will affirm).

#### APPLICABLE LAW

WISCONSIN ADM. CODE § DOC 303.63 states in relevant portion:

(1) Each [correctional] institution may make specific substantive disciplinary policies and procedures relating to:

....

(d) Movement within and outside the institution.

....

(2) Violations of any specific policies or procedures authorized under sub. (1) are offenses.

Page 6, section 7 of the Waupun Correctional Institution handbook states in relevant portion:

#### COUNT PROCEDURES

Standing counts will be announced by bell *and voice* in the cell halls ... after ... evening meals (5:00 p.m. count). At these times, inmates will be required to assemble in a specified place in their assigned area.

In all cell halls, inmates will stand in clear view at the bars of their cell during count....

Inmates will remain in their cells/housing area until count has been cleared.

(Emphasis added; underlining in original.)

## BACKGROUND

On May 12, 1995, by major conduct report #617788-965, Smith was charged with failing to stand for a cell count. Smith's failure to stand was alleged to be a violation of § DOC 303.63, as well as page 6, section 7 WCI handbook.

At the conduct hearing and in his pleadings, Smith argued first that § DOC 303.63 regulating "movement" does not apply to authorize standing cell counts. Second, he argued that although he heard the buzzer, he did not hear a voice call for "C range." The committee found Smith guilty on the grounds that he admitted hearing the buzzer sound and intentionally failed to stand. In our examination of the entire return, we find no evidence advanced to contradict Smith's argument that no voice call occurred, although a voice call is required by page 6, section 7 WCI handbook.

## ANALYSIS

Construction of administrative regulations is governed by the same principles as statutory construction. *State ex rel. Staples v. Young*, 142 Wis.2d 348, 353, 418 N.W.2d 333, 336 (Ct. App. 1987). Interpretation of a statute is a question of law which we review *de novo*. *Blackbourne v. School Dist. of Onalaska*, 174 Wis.2d 496, 499, 497 N.W.2d 460, 461 (Ct. App. 1993). There is no need to resort to statutory interpretation if a statute is clear on its face. *Matter of C.G.F.*, 168 Wis.2d 62, 70 n.6, 483 N.W.2d 803, 806 (1992).

Section DOC 303.63 on its face permits correctional institutions to regulate "movement within ... the institution." The purpose of cell counts is to regulate such movement by ascertaining that inmates are where they belong—in their cells—at certain times. The institutional policy, page 6, section 7 effectuates

this by requiring further movement by inmates to “specified place[s] in their assigned area,” namely, the bars of their cells. Because the policy on its face regulates movement as permitted by § DOC 303.63, we conclude that Smith’s assertion that it does not fails.

As stated previously, if the circuit court’s result is correct, we will affirm. *Holt*, 128 Wis.2d at 124-25, 382 N.W.2d at 687. We conclude that a basis exists to affirm the result in this appeal.

Specifically, Smith argued that he never heard the voice call. The committee found nothing to the contrary, finding only that Smith admitted hearing the buzzer. Page 6, section 7 requires on its face that standing counts be announced by “bell and voice.”

Under *State ex rel. Whiting v. Kolb*, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990), our review is limited to whether the hearing committee exceeded its jurisdiction, whether it acted according to law, whether the decision made was arbitrary, oppressive or an unreasonable determination, representing its will rather than its judgment, or whether a determination is made which is unsupported by the evidence.

We conclude that the committee ran afoul of this last factor.<sup>1</sup> As stated above, we have carefully analyzed the record and find no evidence to support a finding that a voice call occurred. Stated alternatively, no evidence was entered to controvert Smith’s contention that no voice call occurred.

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<sup>1</sup> Because Smith raised this contention in his brief-in-chief, and the state failed to file a reply brief, the state has effectively conceded this point. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

*By the Court.*—Order affirmed.

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

