

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 27, 2005

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. 2005AP956

Cir. Ct. No. 2004CV2936

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. TOMMY BROWN,

PETITIONER-APPELLANT,

V.

GARY R. McCAUGHTRY AND MATTHEW FRANK,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tommy Brown appeals an order denying his petition for certiorari review of a prison disciplinary decision. A disciplinary committee at Waupun Correctional Institution found him guilty of three disciplinary offenses. The issues are whether the committee violated Brown's due

process right to present evidence, whether the committee heard sufficient evidence to find Brown guilty of the three offenses, and whether WIS. ADMIN. CODE § DOC 303.32(1) (May 2003)¹ is unconstitutionally vague. We affirm on these issues.

¶2 Brown's conduct report included the following assertions of fact. Waupun corrections officers discovered a pamphlet on prison grounds in which an organization calling itself the Coalition Against Exploiting and Mistreating Prisoners and Prisoners' Families, or CAEMPPF, announced itself to be a prisoner advocacy group. Subsequent investigation revealed that CAEMPPF's address was registered to Brown's wife, Cindy Brown. Further investigation consisted of reviewing 76 taped telephone calls between Tommy and Cindy over a two-month period.

¶3 The telephone calls between the Browns included detailed discussion about forming and maintaining CAEMPPF as an organization that would accept money from inmates. Topics of discussion included rules and bylaws, officers, a mission statement, tax status, membership forms, and solicitation of inmates. On one occasion, the following exchange occurred:

[Tommy:] Things will start blossoming and money will start coming in.

[Cindy:] It would be nice.

[Tommy:] Yup, and hopefully you will be able to take out whatever money there is for certain uses like your gas and other things [you are] using in your home to help fund or help run the place or the business, even the rent to some extent, cause the more money you can save and put aside, the better off it'll be.

¹ All references to the Wisconsin Administrative Code are to the May 2003 No. 569 Register.

In a subsequent conversation between Tommy, Cindy, and Tommy's brother Billy, the following was stated:

[Tommy:] As you know Billy, next year I plan on putting my case back into court. And hopefully in the next 2 or 3 months my wife will try to open me an account to start some type of collection of money to try to help me get a lawyer, so I can get out of here.

[Billy:] How much do you think it will cost?

[Tommy:] It's probably gonna be quite a bit, but it's gonna take a while for a lot of money to accumulate. We're gonna try and raise most of it ourselves through different things we're doing In a sense, we started somewhat of a business. O.K., it's not a business, but it's like a business and we put a lot of money into it. You know, to try and get it started. But now it's up and running – then we're gonna try and generate some money – we're getting ready to make some gigantic financial strides ourselves – having faith and hope in this business of sorts.

¶4 A week after this conversation, Tommy instructed Cindy to prepare introductory material and applications and to mail the material out to inmates, including Tommy. They discussed whether Cindy or another would sign the name of CAEMPPF Vice President Debi Zindars on the material.

¶5 During questioning about the matter, Tommy conceded receiving the CAEMPPF introductory letter, signed with Zindars' name, but Tommy said he had no idea how Zindars got his name.

¶6 During their telephone calls, the Browns also expressed concerns about Waupun Correctional's water supply. Tommy believed he became ill from drinking prison water, and Cindy took a sample of it for testing, with negative results. Tommy apparently believed that Waupun Correctional's water came from two different sources, and the following dialog occurred as a result.

[Tommy:] I wonder if they're willing, through us, to proposition someone who has the ability to provide them what they need. Cause if so, I might know, well I don't know the individual, but a friend of mine knows the individual. They're pretty close and the individual could be persuaded that way.

[Cindy:] They need it in the containers like I talked about.

[Tommy:] Ya, I know that. Because of that individual's situation, and the individual could do that, because he's part of, you know and they are allowed to bring in gear.

[Cindy:] She'll be getting back to me.

[Tommy:] Cause if she mentions financial propositions to throw at the individual ya know, he may find, because of the low risk and Christmas is right around the corner and he may need the extra cash. He may not go for it, but it won't hurt to put it out there, cause he does do certain sneaky things.

The conduct report refers to the above dialog as “a clear reference by Cindy and Tommy Brown to solicit an unnamed staff member by offering a bribe or gratuity.” Based on that interpretation, and the corrections officer's belief that the earlier dialogs show an intent to run CAEMPPF as a business, the conduct report charged Brown with conspiracy to solicit staff under WIS. ADMIN. CODE § DOC 303.26C, lying under WIS. ADMIN. CODE § DOC 303.27, enterprises and fraud under WIS. ADMIN. CODE § DOC 303.32, and counterfeiting and forgery under WIS. ADMIN. CODE § DOC 303.41.

¶7 Brown received a hearing on the charges and, at the hearing, an officer testified to the accuracy of the quoted material from the taped telephone calls. Brown sought access to a transcript of all of the tapes, but the Waupun security director refused that request. The disciplinary committee found Brown guilty of the first three charged offenses, and acquitted him of counterfeiting and forgery. In its decision, the committee found the conduct report credible and

relied on that report for its decision. The committee found that Brown engaged in a business or enterprise by participating in CAEMPPF's founding and in the decision to solicit funds for it, that Brown conspired with two or more others to solicit staff to act on their behalf, and that Brown lied in a manner that could affect the integrity, safety, or security of the institution when he stated he had no idea why he was sent the CAEMPPF letter.

¶8 Brown exhausted his administrative remedies, and commenced this proceeding with a petition for certiorari review. This appeal results from the circuit court's denial of that petition.

¶9 Our review is limited to whether the DOC acted within its jurisdiction, acted according to law, issued an arbitrary or oppressive decision, and had sufficient evidence to make the disciplinary decision in question. *See State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). We review the record in the same manner as the trial court, and we independently decide whether to uphold the agency decision. *Id.* at 385-86. On a challenge to the sufficiency of the evidence supporting the disciplinary decision, we affirm if reasonable minds could arrive at the same conclusion that the disciplinary committee reached. *Id.* at 386. In other words, we accept the decision if it is supported by any reasonable view of the evidence, and we do not substitute our view of the evidence for the committee's. *Id.*

¶10 The committee adequately afforded Brown the opportunity to present evidence. Brown contends that his inability to obtain full transcripts of the telephone calls for use at the hearing violated due process. However, although Brown had a due process right to present evidence at the hearing in his own defense, *see Wolff v. McDonnell*, 418 U.S. 539, 566 (1974), there is no authority

for the proposition that his right extended to compelling production of transcripts. Brown had the opportunity to testify concerning the taped conversations, and to present his wife's version of those conversations. He therefore had a sufficient opportunity to put on his defense. In particular, he had the opportunity to rebut those portions of the telephone calls relied on by DOC.

¶11 The evidence was sufficient to find Brown guilty of conspiring to solicit staff. The committee reasonably inferred from the relevant taped conversation that Brown conspired with his wife to bribe a staff member to obtain and remove a water sample from the prison. Under WIS. ADMIN. CODE § DOC 303.26, inmates cannot offer anything to a staff member or request anything from a staff member. A conspiracy to commit that offense is committed when two or more inmates or others agree to commit it. WIS. ADMIN. CODE § DOC 303.05(1) and (2). Under the committee's reasonable inference, Brown's conversation with his wife satisfied these criteria for the offense. Brown contends that the committee had no evidence of an overt act on his part. However, unlike criminal conspiracy, the administrative rule at issue here prohibiting conspiracy does not require evidence of an overt act. The conspiracy violation is complete upon agreement to commit the underlying violation.

¶12 There was also sufficient evidence in the conduct report to find Brown guilty of the offense of lying. WISCONSIN ADMIN. CODE § DOC 303.27 provides that "[a]ny inmate who makes a false ... oral statement which may affect the integrity, safety or security of the institution is guilty of an offense." Here, under any reasonable view of the evidence, Brown lied about his knowledge of the CAEMPPF letter. The committee could also reasonably find that the lie affected the integrity, safety, or security of the institution because it directly interfered with the institution's investigation into the matter.

¶13 There was sufficient evidence to find Brown guilty of enterprises and fraud. WISCONSIN ADMIN. CODE § DOC 303.32(1) provides discipline for any inmate who “engages in a business or enterprise, whether or not for profit.” The taped conversations revealed that Brown was directly and significantly involved in setting up CAEMPPF. Brown contends that the evidence shows that he was only marginally involved in what was actually his wife’s enterprise, but the committee could reasonably have determined otherwise.

¶14 Finally, Brown contends that the term “engages in a business or enterprise” is unconstitutionally vague, such that it provides insufficient notice to the prisoner of what WIS. ADMIN. CODE § DOC 303.32(1) prohibits. His contention is without merit. “Engages” is not subject to misinterpretation. It plainly prohibits inmates from planning and forming a business or enterprise. There is no other reasonable meaning of the term under the circumstances in which it appears. If the ordinary rules of construction result in a practical or sensible meaning for the law in question, it is not unconstitutionally vague. *See State v. Chippewa Cable Co.*, 21 Wis. 2d 598, 606, 124 N.W.2d 616 (1963).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

