COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP467 **Cir. Ct. No. 2003CV3836**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN EX REL. KENNETH HARRIS,

PETITIONER-APPELLANT,

V.

THOMAS G. BORGEN AND MATTHEW FRANK,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Kenneth Harris appeals an order affirming a prison disciplinary decision. The disciplinary committee found him guilty of attempted solicitation of a correctional officer, and issuing threats to the same officer. He

raises a number of substantive and procedural issues concerning the disciplinary proceeding. We reverse in part because the evidence was insufficient to find him guilty of attempted solicitation. We affirm that part of the decision finding him guilty of issuing threats.

¶2 The conduct report alleged that on August 11, 2003, Harris told corrections officer B. Lang that he was suing the institution because some of his mail was not being forwarded to the addressees. He told Lang "I know you didn't do anything wrong, but when this lawsuit goes through you will be included unless you sign an affidavit clearing you." Two days later Harris gave Lang an affidavit to sign, stating, "I am not forcing you to sign it, but by signing it you will be exempt and won't have to worry." Lang refused to sign the affidavit, and the institution subsequently charged Harris with attempting to solicit staff and issuing a threat to staff.

¶3 At a hearing on the charges, Harris conceded that he asked Lang to sign the affidavit but denied threatening him. The disciplinary committee found Harris guilty based on the information provided in the conduct report and Lang's statements at the hearing, both of which the committee found credible. Harris exhausted his administrative remedies and commenced this judicial review proceeding. His appeal follows the circuit court's order affirming the disciplinary decision.

¶4 We review the institution's disciplinary decision independently of the circuit court. *See* ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). Our review is confined to: (1) whether the disciplinary committee acted within its jurisdiction; (2) whether it acted according to law; (3) whether its decision was arbitrary, oppressive or unreasonable and

represented its will and not its judgments; and (4) whether the evidence demonstrates a reasonable decision. ***Id.*** In reviewing the sufficiency of the evidence we determine whether reasonable minds could arrive at the same conclusion the committee reached. ***Id.*** Our review under these standards is limited to the record of the disciplinary proceeding. ***Id.***

¶5 We conclude that under the facts as found by the committee, Harris is not guilty of attempting to solicit staff. An inmate violates the solicitation rule by requesting or accepting anything from a staff member unless authorized by rules or institutional policy and procedure. WIS. ADMIN. CODE § DOC 303.26(2). It is undisputed, and the committee acknowledged, that Harris asked Lang to sign the affidavit after consulting a manual entitled "Prisoner's Self-Help Litigation Manual," which Harris found in the prison library. The manual advises prisoners to seek affidavits from cooperative prison employees in anticipation of litigation. The manual does not, technically, set forth institutional rule, policy or procedure. However, the fact that the manual is in the institution's library makes the advice contained within it the functional equivalent of institutional policy. Although the committee found that Lang was not a "cooperative" officer because he refused to sign the affidavit, Harris had no way of knowing that until he asked.

¶6 However, we conclude the evidence was sufficient to find Harris guilty of threatening Lang. An inmate violates the rule against threats, WIS. ADMIN. CODE § DOC 303.16, by conduct that includes communicating a plan to intimidate another person. The committee reasonably found that a statement of intent to sue someone, used as a coercive tool, is a "threat" under WIS. ADMIN. CODE § DOC 303.16. Lang in fact testified that he felt intimidated and feared employment consequences when Harris uttered his threats.

¶7 In addition to challenging the sufficiency of the evidence, Harris raises procedural issues including his assertion that, when a remand to the disciplinary committee occurred during his administrative proceeding, the committee did not comply with the directions on remand. However, the record demonstrates that the committee did comply. In any event, the remand occurred merely to correct minor procedural omissions. It had no bearing on the substance of the charges and, even if error occurred on the remand, it had no effect on the outcome of this proceeding.

¶8 Harris next contends the disciplinary committee erred by excluding from the evidence a number of federal case citations Harris presented. Case citations are not evidence. If the holdings in the cases had any bearing on the legal issues in the proceeding, Harris was free to cite and argue those holdings on judicial review.

¶9 Harris next contends the committee erroneously excluded a videotape recording of his conversations with Lang. The institution stated then, and states now, that no such recording exists. Harris contends that the purported recording would show that his discussion with Lang was quiet and peaceful. However, the manner in which their discussions were conducted was not material. It was the substance of the conversation that was at issue.

¶10 Next, Harris asserts the certiorari return to the circuit court omitted parts of the administrative record. Harris does not develop this argument further, and we decline to consider it. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (citation omitted).

¶11 Harris also takes issue with the manner in which he was found guilty. He asserts that the committee initially found him not guilty of threats, and

announced that decision at the hearing, only to change the finding to guilty later. Nothing of record supports his allegation of an initial determination of not guilty. If, in fact, the committee did change its mind, Harris still received ample notice of the guilty determination and was able to administratively appeal it.

¶12 Harris raises other procedural issues concerning the adequacy of the conduct report, the institution's compliance with WIS. ADMIN. CODE § DOC 303.81(2), whether he received adequate written notice of certain aspects of the proceeding, and whether the hearing officer's impartiality was compromised by his participation in investigating the incident. Harris did not raise these issues in the circuit court, and this court finds no indication he raised them during the administrative proceeding. We therefore deem them waived and decline to address them. *See* ***Omernick v. DNR***, 100 Wis. 2d 234, 248, 301 N.W.2d 437 (1981); ***State v. Polashek***, 2002 WI 74, ¶25, 253 Wis. 2d 527, 646 N.W.2d 330.

¶13 Our decision makes it unnecessary to address whether the attempted solicitation charge violated Harris' First Amendment rights. On remand the circuit court shall direct the respondents to amend the disciplinary decision by deleting the guilty finding for attempted solicitation of staff, and expunging this violation from his record.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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