

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 14, 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. 01-1276  
STATE OF WISCONSIN**

**Cir. Ct. No. 99-CV-142**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN EX REL. DANIEL HARR,**

**PETITIONER-APPELLANT,**

**V.**

**GARY MCCAUGHTRY AND KEN SONDALE,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Dodge County:  
JOSEPH E. SCHULTZ, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ

¶1 PER CURIAM. Daniel Harr appeals from an order affirming a prison disciplinary decision. He raises numerous issues concerning the disciplinary proceeding. We reject his arguments and affirm.

¶2 In June 1998, approximately 250 inmates at Fox Lake Correctional Institution gathered on a softball field to protest prisoner transfers to out-of-state facilities. About 100 of the inmates obeyed an order to return to their cells. The remaining 150 or so, including Harr, remained on the field for three hours, until they were removed under threat of force.

¶3 Consequently, Harr was transferred to Waupun Correctional Institution, and there he received a conduct report charging him with four major disciplinary defenses, including group resistance in violation of WIS. ADMIN. CODE § 303.20. Harr conceded that he participated in the protest. As a defense, he asserted that he was coerced into participating by verbal threats of personal injury from gang members. Before his hearing he requested as witnesses three persons he allegedly reported the threats to during or after the incident. He also asked for testimony from two Fox Lake employees, Poler and Siedschlag, to whom he allegedly expressed his concerns before the demonstration, and two officers who could testify to his exemplary behavior as an inmate. All requests were denied, although written statements were allowed from Poler and Siedschlag. Harr also unsuccessfully requested production of a videotape of the incident.

¶4 Harr received a hearing and was found guilty of three of the four charges against him. On administrative appeal, the warden reversed the decision and ordered a new hearing with a different hearing officer. At the second hearing Harr again testified that he was threatened. The statements by Poler and Siedschlag were introduced, but neither supported his assertion that he had expressed his concerns to them about coercive threats. The disciplinary committee

found him guilty of group resistance and innocent of the other three charges.<sup>1</sup> The committee provided the following reasons for its decision.

We find the reporting officer credible. The inmate did not present any evidence to contradict the report other than to state that he had been threatened to be on the recreation field and had reported it to his witnesses. We do not find the inmate credible. His requested witnesses do not support his claims. Even if there had been verbal threats, we find this irrelevant. He could have secured himself in his room until contacted by a security staff member. We find the staff witnesses credible. He made a conscious choice to be on the recreation field knowing what was taking place.

After a review of the conduct report, the inmate's statement and the evidence, we find that he intentionally participated in an unsanctioned group activity by refusing to leave the recreation field when directed to do so. He acted in conjunction with approximately 150 other inmates to protest out-of-state transfers.

Resulting discipline included four days of adjustment segregation, 180 days of program segregation, and thirty days' loss of exercise.

¶5 Harr presents the following issues on appeal: (1) denying him his witnesses violated his due process rights; (2) excluding the videotape also denied him due process; (3) the presiding officer at his disciplinary hearing was biased against him; (4) he received ineffective assistance from his staff advocate; (5) his due process rights were violated because Fox Lake personnel knew of the demonstration but failed to prevent it; (6) Harr's equal protection right was violated because other protest participants received less punishment; (7) the

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<sup>1</sup> The other three charges were participating in a riot, disobeying orders, and violation of institution policies.

evidence was insufficient to find him guilty; and (8) he received excessive punishment.

¶6 Judicial review of a prison disciplinary decision is limited to whether the committee's decision was within its jurisdiction and according to law, its decision was neither arbitrary nor oppressive, and the evidence of record substantiates the decision. *See Van Erman v. DHSS*, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978). We conclude the evidence is sufficient if the committee reaches a reasonable conclusion. *See State ex rel. Richards v. Traut*, 145 Wis. 2d 677, 680, 429 N.W.2d 81 (Ct. App. 1988).

¶7 Denying Harr his witnesses did not violate his due process rights. Two of the witnesses gave statements showing that they could provide no exculpatory testimony for Harr. Two were allegedly willing to offer character testimony, which was of minimal relevance to Harr's participation in the protest. The remaining three could purportedly testify to Harr's prior consistent statements. Although the rules of evidence do not apply to disciplinary proceedings, those rules generally exclude prior consistent statements because of their unreliability. *See WIS. STAT. § 908.01(4)(a)*. The disciplinary committee could reasonably determine that Harr's prior statements were not only unreliable but cumulative to his testimony at the hearing.

¶8 Excluding a videotape of the demonstration did not violate due process. Harr's participation in the protest was not at issue. His defense was verbal coercion. Nothing in the record indicates that a videotape of the demonstration would have provided any evidence of threats allegedly made before the protest commenced.

¶9 Harr has waived his claim of a biased hearing officer. It is raised for the first time on appeal and we therefore do not consider it. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1983). We note, however, that the “biased” officer presided over a hearing which resulted in acquittal on three of four charges.

¶10 The record fails to support the claim that Harr received ineffective assistance from his staff advocate. There are no facts of record that would allow a determination that the advocate was ineffective, or that his acts or omissions prejudiced Harr.

¶11 Corrections personnel committed no error by charging Harr and subsequently disciplining him for his conduct. Harr contends that because Fox Lake personnel knew of plans for the demonstration in advance, but failed to stop it, none of the protestors bore any responsibility for their subsequent conduct. This is, in effect, an estoppel argument. There is no authority supporting it, and we deem it frivolous on its face.

¶12 Harr lacks any grounds to claim an equal protection violation based on disparate treatment of other demonstrators. There are no facts of record concerning the treatment of the other demonstrators. Our review is limited to facts of record. *See State ex rel. Irby v. Israel*, 95 Wis. 2d 697, 703, 291 N.W.2d 643 (Ct. App. 1980).

¶13 The evidence was sufficient to find Harr guilty of group resistance. As noted, his participation in the demonstration was not disputed. The committee found him guilty because it did not believe his testimony that he was coerced. That credibility determination is not subject to review. *See Robertson Trans. Co., Inc. v. Public Service Comm’n*, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968).

¶14 The committee properly disciplined Harr. Harr received the maximum discipline available for his offense, and contends that this was an excessive punishment. The only reason Harr cites is that this was his first disciplinary offense. We do not conclude, from that one factor, that the committee could not use its discretion to impose maximum punishment. We give great deference to correctional officer's implementation of disciplinary policies. *See Hewitt v. Helms*, 459 U.S. 460, 474 (1983).

*By the Court.*—Order affirmed.

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

