COURT OF APPEALS
DECISION
DATED AND RELEASED

October 5, 1995

No. 95-0384

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

STATE OF WISCONSIN
EX REL. JOHN S. BERGMANN,

Petitioner-Appellant,

v.

GARY R. MCCAUGHTRY,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Dodge County: THOMAS W. WELLS, Judge. *Affirmed*.

Before Dykman, Sundby, and Vergeront, JJ.

DYKMAN, J. John S. Bergmann appeals from a judgment dismissing his *certiorari* action. Bergmann is an inmate at Waupun Correctional Institution (WCI) who was disciplined after a Department of Corrections adjustment committee found that he had sent a letter to his son in violation of a no contact order. Bergmann argues that: (1) he was denied his right to due process because one of the hearing officers, Captain Torsella, was also named as

a defendant in a federal civil suit commenced by Bergmann;[1] (2) he was denied his right to confrontation because he could not question the prison officer who filed the conduct report against him; (3) he was denied his right to present a defense; (4) there is insufficient evidence to support the department's decision; and (5) the trial court erroneously exercised its discretion in assessing filing fees and costs for the *certiorari* action after concluding that Bergmann had not prevailed. We reject each of Bergmann's claims, and therefore affirm.

BACKGROUND

In March 1993, Lieutenant G. Schaller issued an order, instructing Bergmann not to communicate with Melinda McCullough, Bergmann's former wife, and their three-year-old son. Schaller issued this order after McCullough informed him that Bergmann had been sending harassing letters to them. On October 28, 1993, Bergmann was notified that pursuant to WIS. ADM. CODE § DOC 309.05(6), all of his outgoing mail would be read. He was also notified that under WIS. ADM. CODE § DOC 309.05(4), mail sent to the President of the United States was exempt and would not be not read.

On December 12, 1993, Bergmann sent a letter to his son enclosed in an envelope addressed to the President of the United States asking that the President's staff forward the letter to his son. The letter which his son received was postmarked from Washington, D.C., and in it Bergmann referred to the "intentional emotional abuse" that McCullough and her husband were inflicting on his son.

At a disciplinary hearing on the matter, Lt. Schaller testified that the contents of his conduct report, outlining what Bergmann had done, were true as written. Bergmann argued that the no contact order violated his parental rights to communicate with his son and that he was being deprived of due process as a result of the enforcement of this order. Bergmann denied that

[1] According to the parties' briefs, Bergmann unsuccessfully contended before a federal district court that the no contact order violated his constitutional rights. Captain Torsella was named as a defendant in that action. Bergmann has appealed that ruling.

he violated the no contact order or that he used the mails in an unauthorized fashion.

The adjustment committee, comprised of Captain Torsella and Gene Nimmer, found Bergmann guilty of knowingly and willingly violating the no contact order, contrary to WIS. ADM. CODE § DOC 303.24(1)(a)[2] and 303.48(1).[3] WCI warden, Gary McCaughtry, affirmed the committee's finding of guilt. Bergmann then filed a writ of *certiorari* with the trial court, and after briefing on the matter, the court dismissed the action, assessing fees and costs against Bergmann. Bergmann appeals.

STANDARD OF REVIEW

Review of the department's decision is by *certiorari* since no statutory provision has been made for judicial review. ***State ex rel. Lomax v. Leik***, 154 Wis.2d 735, 739, 454 N.W.2d 18, 20 (Ct. App. 1990). We may reverse a disciplinary committee's decision only where: (1) the department's decision was arbitrary, oppressive or unreasonable; (2) the inmate was denied due process; (3) the department failed to keep within its jurisdiction; or (4) the evidence was such making the department's decision unreasonable. ***Id.*** at 739-40, 454 N.W.2d at 20-21. Our scope of review of the factual findings is not whether we would have arrived at the same conclusion as the department, but whether reasonable minds could arrive at that conclusion. ***State ex rel. Richards v. Traut***, 145 Wis.2d 677, 680, 429 N.W.2d 81, 82 (Ct. App. 1988).

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[2] WIS. ADM. CODE § DOC 303.24(1)(a), provides:

> (1) Any inmate who disobeys any of the following is guilty of an offense:
>
> (a) A verbal or written order from any staff member, directed to the inmate ....

[3] WIS. ADM. CODE § DOC 303.48(1) provides: "Any inmate who uses the U.S. postal service to communicate with a person who has been declared a prohibited correspondent of that inmate in accordance with ch. DOC 309 is guilty of an offense."

IMPARTIAL HEARING

Bergmann argues that he was denied his right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. According to Bergmann, because one of the hearing officers on the adjustment committee, Captain Torsella, was a defendant in an unsuccessful civil rights action brought by Bergmann in federal district court challenging the no contact order, he could not be impartial.

The adjustment committee must be comprised of an impartial body, but it may contain members of the prison staff. ***Wolff v. McDonnell***, 418 U.S. 539, 571 (1974). In conjunction with this rule, DOC regulations provide that "[n]o person who has personally observed or been a part of an incident which is the subject of a hearing may serve on the committee for that hearing." WIS. ADM. CODE § DOC 303.82(2).

In the instant case, while Captain Torsella was a named defendant in the civil rights action, that alone, is not sufficient to disqualify him from being a member of the adjustment committee. ***Redding v. Fairman***, 717 F.2d 1105, 1112-13 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). Instead, we make a case-by-case analysis of the prison officer's personal involvement in the other lawsuit. ***Id.*** at 1113. *See also* WIS. ADM. CODE § DOC 303.82(2). Other than being a named defendant in the civil rights action, Captain Torsella appears to have no other interest in the matter.[4] Captain Torsella did not issue the orders Bergmann violated and he did not investigate Bergmann's conduct. Thus, Captain Torsella did not personally observe nor was he a part of the incident which is the subject of this hearing. Indeed, if Bergmann's argument were adopted by this court, every time an inmate was disciplined, the inmate need

[4] Bergmann claims that Captain Torsella "was the first WCI official to which [he] appealed to for a reversal of the unconstitutional no contact order of Lt. Schaller's, and was denied." There is no document in the record supporting this claim. We do not know whether Bergmann appealed Schaller's and Torsella's alleged "orders" or, if he did, the result of that appeal. Bergmann also points to the fact that he was not permitted to cross-examine Lt. Schaller to establish Captain Torsella's partiality. As stated below, Bergmann has no right to cross-examine witnesses and it is within the adjustment committee's discretion to prohibit it. Captain Torsella's decision to prohibit cross-examination does not support Bergmann's allegation of partiality.

only name all of the prison staff as defendants, and no one could serve on the adjustment committee. Consequently, we reject Bergmann's argument that he was denied an impartial hearing.

CONFRONTATION

Bergmann also argues that he was denied the right to confront his accuser, Lt. Schaller, because Lt. Schaller was ordered to leave the hearing before Bergmann had the opportunity to fully question him. An inmate may request witnesses to appear and those witnesses shall attend the disciplinary hearing. WIS. ADM. CODE § DOC 303.81(3). But confrontation and cross-examination of witnesses in the context of a prison disciplinary proceeding are matters left within the sound discretion of the prison officials. ***Wolff***, 418 U.S. at 567-69.

Lt. Schaller appeared at the disciplinary hearing and testified to the accuracy of the conduct report. Bergmann had no right to cross-examine him. Consequently, we reject Bergmann's argument that he was denied the right to confront his accuser.

RIGHT TO PRESENT A DEFENSE

Bergmann also argues that he was denied due process because he was removed from the hearing without being able to present a defense. Bergmann contends that the adjustment committee ignored an Indiana judgment establishing his paternity of his son and that the no contact order violates his parental rights established by the judgment of paternity. He also argues that he sent the letter to his son through the President's office because he could not afford an attorney to read letters and forward the acceptable portions to his son as was suggested by an assistant attorney general who represented the State in the federal civil rights action.[5] He contends that this mode of contract was not "direct contact" with his son. We disagree.

[5] In a brief filed by the State in the civil rights action, the State argued that "Defendants

Bergmann has no absolute right to present a defense at a disciplinary hearing. Under WIS. ADM. CODE § DOC 303.76(5), if an inmate refuses to attend or disrupts the hearing, the hearing may be conducted without the inmate being present. Indeed, Bergmann was permitted to present a defense. The disciplinary hearing minutes indicate that Bergmann presented the Indiana paternity judgment as Exhibit A and that Bergmann argued that this document gave him parental rights, including the right to communicate with his son.

Moreover, the no contact rule is not inconsistent with the judgment of paternity. In the judgment of paternity, an Indiana trial court determined that Bergmann was the boy's father and that Bergmann "shall have all rights and responsibilities accorded to him by law as the natural father of [D.] ...." The court did not rule on custody, visitation, child support and payment of medical expenses.[6]

Bergmann also argues that his actions were privileged. According to Bergmann, the government cannot criminally charge and convict an individual for conduct which it has earlier indicated was permissible. To allow such a conviction would be a form of entrapment by the state in violation of a defendant's due process rights. *See* ***Cox v. Louisiana***, 379 U.S. 559, 571 (1965). However, the assistant attorney general's statement did not mean that Bergmann could ask another person to send a letter to his son. This was the very type of direct contact which the no contact order prohibited. Accordingly, we conclude that Bergmann was not denied his right to present a defense.

(..continued)
did not prohibit all contact with [Bergmann's son], but only proscribed *direct* contact by phone or correspondence. [Bergmann] continues to enjoy the ability to contact [his son] through his legal counsel ...."

[6] The only assertion that Bergmann makes is that the Indiana judgment prevents the prison officers from entering any contrary order.

SUBSTANTIAL EVIDENCE

The department's factual findings are conclusive if supported by any reasonable view of the evidence, and we may not substitute our view of the evidence for that of the department. ***State ex rel. Jones v. Franklin***, 151 Wis.2d 419, 425, 444 N.W.2d 738, 741 (Ct. App. 1989). The record before the adjustment committee contains substantial evidence that Bergmann committed these violations. An envelope addressed to Bergmann's son is postmarked from Washington, D.C. Bergmann also bragged about his circumvention of the no contact order in a letter to a friend. The adjustment committee found that Bergmann knowingly and willingly violated Lt. Schaller's order on unwanted correspondence to outside parties. The order was given to him in writing and he knowingly disobeyed this order by sending a letter on December 12, 1993, addressed to his son. The committee found that he used the United States Postal Service to communicate with a person in a manner which violated the no contact order. Bergmann has not claimed that he did not attempt to contact his son by letter. The department's conclusions that Bergmann violated these orders are reasonable and must be sustained.

FEES

The trial court assessed filing fees of $98.00 when it dismissed this *certiorari* action. Under § 814.29(3)(b), STATS., the trial court may order that an inmate pay the filing fees and costs of the *certiorari* action from his or her account if the court enters judgment in favor of the opposing party. Bergmann lost his case before the trial court and this court. Accordingly, the fees and costs were properly assessed against him.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

SUNDBY, J. (*dissenting*). Petitioner, John S. Bergmann, is concededly the father of D. D.'s mother, who has custody, informed Lieutenant G. Schaller that she did not want Bergmann to write or call his son. Schaller also ordered Bergmann not to communicate with "these" parties again. "These" parties include D.'s mother and stepfather. Several of Bergmann's letters were critical of the mother and stepfather. In his letter of December 12, 1993, he implied that they were inflicting intentional emotional abuse upon D.

Bergmann attempted to get around Schaller's order by sending a letter to President Clinton requesting that his letter be forwarded to his son. Apparently, he was successful in having at least one letter mailed to his son. In an adult conduct report issued January 31, 1994, Schaller charged Bergmann with disobeying orders and unauthorized use of the mail. In his report, Lieutenant Schaller states:

> I was informed that on December 12, 1993 Bergmann wrote and mailed [a harassing] letter addressed to this three year old child. Bergmann placed this letter inside another letter which he addressed and mailed to President Clinton. In this letter he requested that the volunteers who he knew opened the mail, to take the letter addressed to the child out and to mail it. Attached are copies of letters written by Bergmann where ... he writes his intent to violate the no contact order by concealing the letter in his exempt mail.

I am satisfied that the administrative regulations do not authorize prison officials to prohibit inmates from contacting by mail or otherwise members of their families. In fact, WIS. ADM. CODE § DOC 309.05(1) provides that the Department of Corrections encourages communication between inmates and their families: "Such communication fosters reintegration into the community and the maintenance of family ties." I do not find any procedure in this section or otherwise authorizing a prison official to prohibit an inmate from contacting a member of the family by mail, telephone or visitation. I do not dissent from the proposition that correctional officials may examine an inmate's incoming and outgoing mail to intercept mail related to gang activities, escape plans, criminal activity, or obscene material. However, the conduct report does not allege that Bergmann's letters fall into any of those categories. Lieutenant Schaller issued to Bergmann a no-contact order solely on the basis of a

communication from D.'s mother and stepfather that they did not want such mail sent to D. or to them. However, a custodial parent does not have veto power over visitation or communications between a child in the parent's custody and the non-custodial parent. ***Lihs v. Lihs***, 504 N.W.2d 890, 892 (Iowa 1993).

A parent who does not maintain contact with his or her child may have his or her parental rights terminated for abandonment. ***In Interest of D.J.R.***, 454 N.W.2d 838 (Iowa 1990). The state cannot by its acts create grounds for termination of parental rights, without offending the parent's liberty interest protected by the Due Process Clause. *See* ***Santosky v. Kramer***, 455 U.S. 745 (1982).

Further, matters of family life are fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment. ***D.J.R.***, 454 N.W.2d at 844 (citing ***Santosky***, 455 U.S. at 753).

In ***In Interest of R.L.F.***, 437 N.W.2d 599, 601 (Iowa Ct. App. 1989), the court based termination upon the inmate father's failure to attempt any correspondence with his child. "Parental responsibilities include more than subjectively maintaining an interest in a child. The concept requires affirmative parenting to the extent it is practical and feasible in the circumstances." ***Id***. at 601-02 (quoting ***In Interest of Goettsche***, 311 N.W.2d 104, 106 (Iowa 1981)).

In ***In Interest of M.M.S.***, 502 N.W.2d 4, 8 (Iowa 1993), the court sustained termination of the inmate's parental rights because the parent had made "feeble contacts." The court further said that the father could not use his incarceration as justification for his lack of relationship with the child. ***Id***. at 8 (citing ***In Interest of J.S.***, 470 N.W.2d 48, 51 (Iowa Ct. App. 1991)).

Bergmann has been declared D.'s father. The record does not show that that determination was appealed. He therefore has the right to maintain contacts with his son, as long as those contacts do not interfere with prison routine or discipline.

At the time Bergmann wrote the allegedly offending letter, his son was three years old. The district court in Bergmann's civil rights action concluded that Bergmann's attempted correspondence with a three-year-old child was "futile." Nonetheless, letters appear to be the only way that Bergmann can demonstrate that he wishes to maintain a father-son relationship with his child. If D.'s mother does not choose to read those letters to D., there is nothing in her duties as custodial parent which requires that she do so. Soon, however, D. will be able to read. Hopefully, Bergmann will realize that his principal responsibility as D.'s father is to establish, as best he can, a parental relationship with the child. Letters such as he has written to D. accusing D.'s mother and stepfather of emotional abuse will not be very good evidence of the sincerity of his desire to parent D. if the state should file a petition to terminate Bergmann's parental rights.

I have further examined WIS. ADM. CODE § DOC 309.05 to determine whether the correctional officials could intercept and destroy or return Bergmann's letters to him. I do not find that any of the reasons enumerated in DOC 309.05(6) permit the correctional officials to refuse to allow Bergmann to mail letters to his son. Therefore, I would reverse the order of the circuit court dismissing Bergmann's *writ of certiorari*. I dissent.