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DISTRICT IV

October 10, 2024

To:

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Circuit Court Judge
Electronic Notice

Jeff Okazaki
Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2024AP697 State of Wisconsin ex rel. Michael D. Bartz v. Elizabeth Tegels (L.C. # 2023CV1433)

Before Blanchard, Graham, and Taylor, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael Bartz appeals a circuit court order affirming a prison discipline decision. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.[1] We reverse and remand with directions.

The conduct report alleged, as relevant to this appeal, that Bartz violated WIS. ADMIN. CODE § DOC 303.38(2) (March 2018), which provides: "Any inmate who damages, destroys,

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

alters, or disposes of the inmate's own property, contrary to department policy, is guilty of damage or alteration of property." The report alleged that Bartz violated this code provision by making an engraving that read "I [heart] you" on the back of a wristwatch that belonged to him. The hearing committee found Bartz guilty. Bartz appealed to the warden, who affirmed the decision. Bartz sought certiorari review in the circuit court, and the court affirmed the decision.

On appeal from a certiorari decision, we review the decision of the agency, not the circuit court. *See* ***State ex rel. Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). A certiorari petitioner may prevail by showing that the agency decision was "'arbitrary, oppressive or unreasonable and represented [the agency's] will and not its judgment.'" *See* ***Coleman v. Percy***, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980) (quoted source omitted).

Bartz argues that the agency decision should be reversed under that standard because it imposed discipline on him without a finding that he was the person who committed the alleged violation. We agree that the agency failed to make such a finding, and therefore we reverse on that basis.

The parties disagree about whether we should review the decision of the hearing committee or, instead, the warden. However, we need not resolve this point, because neither decision contains the necessary finding that Bartz was the person who committed the alleged violation.

As to the hearing committee, its decision noted the presence of a "homemade" engraving on the back of the watch, and found that it was not done by an outside vendor. The committee acknowledged Bartz's testimony that the watch was engraved by his mother and given to him by her while visiting him at a prior institution. The committee then stated: "It is unknown to the

hearing committee when the inscription was engrave[d] on the back of the watch or who did it…. The watch was altered by another person or by Bartz."

This is not a finding that Bartz was the person who engraved the watch. To the contrary, it appears to be an admission that the committee could not determine who engraved the watch. The statement that the engraving was done either by Bartz or by somebody else only states the obvious, and does not communicate a decision about the identity of the engraver. To constitute a finding that Bartz engraved the watch, the committee must choose between those two possibilities. Here, there is no clear statement that the committee did so and, instead, the committee concluded that it is "unknown … who did it."

The warden's decision was similarly vague. As relevant to this issue, it stated:

> [I]t is more likely than not the alteration (engraving) occurred sometime after the initial receipt [from his mother during a visit] and during his possession of the watch without staff authorization. The finding of guilt … is upheld noting it is more probable than not the item was altered after … Bartz received it and without staff authorization to alter it.

This statement makes a finding as to a broad period of time *when* the alteration occurred, but there is no finding as to *who* made the alteration during that time.

Further, neither the committee nor the warden in their respective decisions identified any manner in which Bartz directed or otherwise actively participated in the engraving while incarcerated, even if he did not personally perform the engraving.

The respondents offer no substantive response to this argument by Bartz. They acknowledge Bartz's argument that the department did not specifically find that Bartz was responsible for the engraving while incarcerated. However, they do not attempt to rebut that argument by pointing to a finding that Bartz was responsible. Instead, they begin their argument

by stating that the "DOC's determination that Bartz altered the watch himself was reasonable based on the evidence." The brief then goes on to argue that there is substantial evidence to support that supposed "determination." That section of the brief ends by asserting that the warden "reasonably concluded … that Bartz was the person who did it." However, this argument misses the point, because Bartz's argument on appeal is not based on a lack of substantial evidence. As noted above, neither the hearing committee nor the warden found that it was Bartz who engraved the watch.

For these reasons, we conclude that the discipline decision must be vacated because there was no finding that Bartz was the person who committed the violation.

In addition, we observe that we would also reverse due to the lack of substantial evidence, if that were the issue. While there is evidence that Bartz *could* have made the engraving, we do not regard as substantial the evidence that he *did* make the engraving. Opportunity and ability alone do not amount to substantial evidence here, and particularly not when the engraving on the watch was "I [heart] you," which we regard as an uncommon statement for one to engrave on one's own watch.[2]

[2] Separately, as a final observation on the property alteration rule under which Bartz was charged, we note language in that rule that is not referenced in the arguments on appeal, but which seems potentially significant. As quoted above, the rule bars inmates from altering or disposing of their own property "contrary to department policy." WIS. ADMIN. CODE § DOC 303.38(2) (March 2018). We see no mention in the briefs or record of any "department policy" that was alleged to have been violated by the watch engraving. If the department here interpreted this rule, standing alone, as barring all alterations of inmate property, without a further connection to a department policy, that reading would appear to have the absurd result of turning routine events of prison life into violations. For example, inmates alter their own property by applying a stick deodorant or squeezing toothpaste from a tube; and, when this property is altered to the point that it becomes useless, the inmate disposes of it. The rule's reference to a department policy may be intended to prevent this kind of absurd result and, therefore, it may be necessary for the department to show a connection between an alteration or disposal and a department policy to find that the rule was violated.

Bartz's brief concludes with a short argument that the evidence was insufficient to support a finding of guilt on a different charge, possession of intoxicants. However, Bartz did not exhaust his administrative remedy as to that charge, because he did not include it in his appeal to the warden. That omission is consistent with his statement at the hearing that he was contesting only the property alteration charge. Therefore, we do not discuss the merits of this argument about the possession charge.

For the above reasons, we reverse the circuit court order affirming the respondents' decision, and we remand with directions to enter an order directing the respondents to expunge the decision that Bartz violated that rule, and to otherwise refrain from taking or continuing to take administrative actions that are based on that decision, including continuing to hold onto Bartz's watch. In Bartz's reply brief, he argues that we should order the watch returned to him. If this discipline decision is the only reason the institution continues to hold the watch, that decision will no longer serve as a justification for the institution to continue to hold the watch, once this decision is reversed.

IT IS ORDERED that the order appealed from is summarily reversed under WIS. STAT. RULE 809.21 and the cause is remanded with directions.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals