

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 21, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0700

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ROBERT GAREL,

PETITIONER-APPELLANT,

v.

**MICHAEL SULLIVAN, WILLIAM GROSSMAN, WAYNE
MIRDORF,**

RESPONDENTS-RESPONDENTS.

ROBERT GAREL,

PETITIONER-APPELLANT,

v.

MICHAEL SULLIVAN, DAVID H. SCHWARZ,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. Robert Garel appeals from an order denying his consolidated petitions for certiorari review of his probation and parole revocations.¹ Garel was assigned to the Department of Intensive Sanctions program (DIS) as an alternative to the revocation of his parole (ATR) which was imposed for various felony convictions. *See* § 301.048(2)(d), STATS. The Department of Corrections (DOC) revoked Garel's parole without having previously terminated his DIS placement. He contends that a standard ATR agreement requires termination of his DIS placement prior to revocation. Consequently, the issue is whether standard language in an ATR agreement precludes DOC from revoking Garel's parole without having previously terminated his DIS placement. We conclude that the plain language of the ATR agreement does not warrant such a construction, which also would contravene statutory authority and DOC rules. Therefore, we affirm.

Incident to Garel's DIS assignment, he signed an ATR agreement which provided, in pertinent part:

A violation of any of the above-mentioned rules, including the Department of Corrections rules governing behavior o[f] a probation or parolee which I previously signed, may lead to a termination of my stay at the facility. *If my stay is terminated by the facility, a recommendation for revocation of my probation or parole may be made by the Division of*

¹ This appeal challenges the revocation of two probations and one parole. Because the issues raised do not distinguish among the probations and the parole, we refer to them collectively as "parole," unless the context requires separate references.

Probation and Parole, based on my above-acknowledged violation and/or my conduct in the facility.

(Emphasis supplied.) While assigned to DIS, Garel tested positive for cocaine, in violation of his parole. Consequently, the DOC commenced revocation proceedings.

When reviewing probation revocation determinations, we defer to the division's determinations. The scope of review is limited to the following questions: (1) whether the division kept within its jurisdiction; (2) whether the division acted according to law; (3) whether the division's actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the division might reasonably make the order or determination in question.

Von Arx v. Schwarz, 185 Wis.2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994) (citation omitted).

The board is presumed to have had before it information which warranted the order of revocation, and its determination of the matter is conclusive unless the prisoner can prove by a preponderance of the evidence the board's action was arbitrary and capricious. That burden rests squarely on the prisoner, and if he fails to sustain the burden, the courts will not interfere with the board's decision....

State ex rel. Johnson v. Cady, 50 Wis.2d 540, 550, 185 N.W.2d 306, 311 (1971) (citation omitted).

Garel contends that the ATR agreement requires termination from the DIS program as a condition precedent to revocation of his parole. In other words, Garel claims that the DOC acted contrary to law because it lacked personal jurisdiction to revoke his parole and that he was denied due process of law because he was not terminated from DIS prior to revocation. The trial court disagreed and so do we.

WISCONSIN ADM. CODE § DOC 333.09(2) requires termination of DIS placement as an alternative to revocation if an inmate's probation or parole is revoked.² Moreover, § 301.048(4)(a) and (am), STATS., provides:

(4) STATUS. (a) A participant is in the custody and under the control of the department, subject to its rules and discipline.... A participant entering the program under sub. (2)(d) is a prisoner, except that he or she remains a probationer or parolee, whichever is applicable, for purposes of revocation.

(am) A participant who is a parolee for purposes of revocation is subject to revocation for violation of any condition of parole or any rule or condition applicable because he or she is a program participant. A participant who is a probationer for purposes of revocation is subject to revocation for violation of any condition of probation or any rule or condition applicable because he or she is a program participant.

“Statutes are to be construed so as best to effectuate the plain meaning of their terms.” *Bartus v. DHSS*, 176 Wis.2d 1063, 1074, 501 N.W.2d 419, 425 (1993).

Construction of administrative rules is governed by the same principles that apply to the construction of statutes. Construction of an administrative provision is a question of law. Applying the rules of statutory construction to administrative rules, the primary source for determining the scope and applicability of a rule is the rule itself.

² WISCONSIN ADM. CODE § DOC 333.09(2) provides:

If an inmate is placed in DIS as an alternative to revocation of probation or parole, pursuant to s. 301.048(2)(d), Stats., or is placed in DIS as a condition of parole by the parole commission pursuant to s. 301.048(2)(c), Stats., the placement in DIS *shall* be terminated if the inmate's probation or parole is revoked under ch. DOC 331.

(Emphasis supplied.)

State ex rel. Staples v. Young, 142 Wis.2d 348, 353-54, 418 N.W.2d 333, 336 (Ct. App. 1987) (citations omitted).

Here, the plain language of § 301.048(4)(am), STATS., authorizes DIS termination of a participant who violates any condition of parole. Likewise, WIS. ADM. CODE § DOC 333.09(2) expressly authorizes DIS termination upon a participant's revocation.

By signing the ATR agreement, a participant acknowledges that violation of an ATR rule *may* lead to termination in DIS. Similarly, termination in DIS *may* lead to a recommendation for revocation. The plain language of the ATR agreement notifies a participant of a potential consequence of violating a DIS rule. It does not elevate that potential consequence to a condition precedent to revocation. If it did, the ATR agreement would supersede statutory and code authority and contravene common sense. *See* § 301.048(4)(am), STATS.; WIS. ADM. CODE § DOC 333.09(2). Garel's placement in DIS is a privilege, not an obstacle to revocation.

We conclude that Garel's violation of a condition of his parole is sufficient to authorize commencement of revocation proceedings. However, there is no authority, including the ATR agreement, which requires DIS termination to precede revocation.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

