

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

May 29, 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.

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

No. 97-0101

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL. DOUGLAS J.
RICHER,**

PETITIONER-APPELLANT,

v.

MARIANNE COOKE,

RESPONDENT-RESPONDENT.

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

Before Dykman, P.J., Vergeront and Deininger, JJ.

VERGERONT, J. Douglas Richer, currently an inmate at the Jackson Correctional Institute, appeals from an order quashing his writ of certiorari. Richer argues that the proceedings against him were arbitrary and capricious, his due process rights were violated, and the agency failed to follow its

own rules in processing his alleged violation. We reject each contention and affirm.

While confined at another facility, Richer was charged with violating the following prison disciplinary rules: WIS. ADM. CODE § DOC 303.24,¹ disobeying orders; WIS. ADM. CODE § DOC 303.25,² disrespect; and WIS. ADM. CODE § DOC 303.28,³ disruptive conduct. According to the conduct report, on November 9, 1995, a prison guard observed Richer and another inmate standing in a hallway arguing and yelling at one another, on the verge of fighting. The guard broke up the confrontation, stating that if he saw this type of action from either one of them again, he would write conduct reports. Richer replied,

¹ WISCONSIN ADM. CODE § DOC 303.24 provides in relevant part:

Disobeying orders. (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 or to a group of which the inmate is or was a member;

² WISCONSIN ADM. CODE § DOC 303.25 provides in relevant part:

Disrespect. Any inmate who overtly shows disrespect for any person performing his or her duty as an employe of the State of Wisconsin is guilty of an offense Disrespect includes, but is not limited to derogatory or profane remarks ... yelling, and other acts intended as public expressions of disrespect for authority

³ WISCONSIN ADM. CODE § DOC 303.28 provides:

Disruptive conduct. Any inmate who intentionally or recklessly engages in, causes or provokes disruptive conduct is guilty of an offense. "Disruptive conduct" includes physically resisting a staff member, or overt behavior which is unusually loud, offensive or vulgar, and may include arguments, yelling, loud noises, horseplay, or loud talking, which may annoy another.

“[p]ut me away right fucking now I don’t care, I want out of here anyway.” The guard issued Richer a conduct report, #692104.

After a disciplinary hearing on November 14, 1995, the adjustment committee found Richer not guilty of disobeying orders, but guilty of disrespect and disruptive conduct. The committee imposed a five-day adjustment segregation and a ten-day extension of Richer’s mandatory release date. Richer appealed that decision the same day to the warden.

Apparently after further investigation of the same incident that occurred on November 9, 1995, Richer received a second conduct report on November 17, 1995, #692123, charging him with threats and possession, manufacture and alteration of weapons contrary to WIS. ADM. CODE §§ DOC 303.16⁴ and 303.45.⁵ A second disciplinary hearing was conducted on this conduct report on November 27, 1995. The adjustment committee found Richer guilty of the charges. The committee imposed an eight-day adjustment segregation, a 360-day program segregation and added a twenty-day extension to Richer’s mandatory release date. The adjustment committee also referred the

⁴ WISCONSIN ADM. CODE § DOC 303.16 provides in relevant part:

Threats. Any inmate who intentionally does any of the following is guilty of an offense:

(1) Communicates to another an intent to physically harm or harass that person or another;

⁵ WISCONSIN ADM. CODE § DOC 303.45 provides in relevant part:

Possession, manufacture and alteration of weapons.

(1) Any inmate who knowingly possesses any item which could be used as a weapon, with intent to use it as a weapon, is guilty of an offense.

results of the second conduct report to the Program Review Committee (PRC).⁶ Richer appealed this decision to the warden on November 27, 1995.

⁶ WISCONSIN ADM. CODE § DOC 302.18 provides in relevant part:

Program review. (1) The security classification, assignment to an institution and program assignment of each resident shall be reviewed by the program review committee (hereinafter “PRC”) not more than 6 months from the last review of classification and assignment.

(2) The purposes of such review are:

(a) To provide systematic review of the resident’s academic, vocational, medical, social, treatment, and security needs and progress;

(b) To monitor the implementation and revision of plans developed during A & E and previous PRC meetings;

(c) To provide supplemental or alternative program recommendations;

(d) To provide supplemental recommendations regarding security needs; and

(e) To aid the resident’s reintegration into society.

(3) Such review may occur before the time designated for the review:

(a) At the designation of the PRC or at its own direction, upon the recommendation of a staff member; or

(b) At the request of the resident or a staff member, provided there is a significant change of circumstances relevant to the classification or program assignment of the resident. A request for early review by the resident shall be made to the resident’s social worker who shall forward it to the PRC.

WISCONSIN ADM. CODE § DOC 302.20(2) provides:

The PRC may review the security classification and program assignment and consider a resident for transfer due to a disciplinary infraction, only after disposition of the disciplinary case is completed by the adjustment committee. Before the PRC review, the adjustment committee shall inform the resident that such review may occur, and that the results and findings of fact

(continued)

On December 19, 1995, the warden responded to the appeals of both conduct reports. With respect to the first conduct report, the warden affirmed the adjustment committee's finding of guilt and disposition stating: "Finding of guilt substantiated in conduct report. Disposition is appropriate." With respect to the second conduct report, the warden reversed the adjustment committee's finding of guilt, and ordered that no punishment be given and that all records of the adjustment committee be removed from the inmate's file pertaining to the second conduct report. The reasons for the decision were:

Conduct Report 692104 issued 11/9/95 and magistrated 11/14/95 is the same incident covered in CR #692123 issued on 11/17/95. Although the second CR more clearly documents the seriousness of the event, the incident had already been given due process. Inmate should be referred to PRC as a result of CR #692104.

Apparently Richer was then referred to the PRC and subsequently transferred to another institution.

Richer sought review of both conduct reports in circuit court by writ of certiorari. Richer argued that the proceedings involving the first conduct report were arbitrary and capricious because the other inmate involved was never issued a conduct report, and because the adjustment committee found him guilty of two separate charges for the same actions and comments. Richer also argued that, in accordance with WIS. ADM. CODE DOC § 303.85(2),⁷ the entire record of the

at the disciplinary hearing may be considered in the program review process.

⁷ WISCONSIN ADM. CODE § DOC 303.85 provides in relevant part:

Recordkeeping. (1) Records of disciplinary infractions may be included in an inmate's case record only in the following situations:

....

(continued)

second conduct report should have been removed from his file, including the language: “Inmate should be referred to PRC as a result of CR #692104.” The trial court affirmed the decision of the superintendent on the first conduct report and quashed Richer’s writ.

On certiorari, we review the action independently of the trial court. *State ex rel. Whiting v. Kolb*, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). Our review is limited to determining whether the agency kept within its jurisdiction, whether it acted according to law, whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment, and whether the evidence was such that it might reasonably make the order or determination in question. *Id.*

Richer argues that the proceedings involving the first conduct report were arbitrary and capricious because the other inmate involved was never issued a conduct report. There is no merit to this contention. Whether the other inmate involved in the confrontation received a conduct report is irrelevant to whether Richer’s actions constituted a violation of WIS. ADM. CODE §§ DOC 303.25 and 303.28.

Richer also argues that the decision of the adjustment committee on the first conduct report was arbitrary and capricious because he was found guilty of violating both WIS. ADM. CODE §§ DOC 303.25 and 303.28, based upon the

(2) Records of alleged disciplinary infractions which have been dismissed or in which the inmate was found not guilty may be kept for statistical purposes, but they may not be considered in making program assignment, transfer, or parole release decisions, nor may they be included in any inmate’s case record.

same incident. An inmate cannot be found guilty of two offenses or punished for two offenses based on a single incident if one offense is a lesser included of the other. WISCONSIN ADM. CODE § DOC 303.33(3). Disrespect is not a lesser included offense of disruptive conduct. *See* WIS. ADM. CODE § DOC 303.03(4). Under § DOC 303.25, disrespect requires that the inmate overtly shows disrespect for any person performing his or her duty. On the other hand, § DOC 303.28 requires that the inmate intentionally or recklessly engage, cause or provoke disruptive conduct by overt behavior which is unusually loud, offensive or vulgar, and may include arguments and yelling. Therefore, an inmate may violate both §§ DOC 303.25 and 303.28 during the same incident, as Richer did in this case, by yelling and arguing with another inmate and by responding to Sgt. Westover with, “[P]ut me away right fucking now I don’t care, I want out of here anyway.”

Next Richer argues that the entire record of the second conduct report should have been removed from his file, including the language “Inmate should be referred to PRC as a result of CR #692104 [first conduct report],” because the charges in the second conduct report were dismissed. Richer relies on WIS. ADM. CODE § DOC 303.85(2) which provides that “[r]ecords of alleged disciplinary infractions which have been dismissed ... may be kept for statistical purposes, but they may not be considered in making program assignments, transfer ... nor may they be included in the inmate’s case record.” We reject Richer’s contention that this provision prevents the warden from referring Richer to the PRC for the first conduct report.

On certiorari, the reviewing court may not consider matters outside the record on return of the writ. Allegations in the written petition cannot supply facts that do not appear in the record. *State ex rel. Irby v. Israel*, 95 Wis.2d 697, 707, 291 N.W.2d 643, 646 (Ct. App. 1980). Therefore, we do not consider

documents attached to Richer's petition or to other submissions by him, or assertions in his brief about what the PRC did or did not do. Instead we confine our analysis to the documents contained in the return of the writ. These relate to the disciplinary proceedings on the two conduct reports.

Richer is apparently of the view that because a conduct report that is dismissed may not be considered by the PRC in making transfer decisions, that WIS. ADM. CODE § DOC 303.85 also prevents referral to the PRC by other staff persons based on that conduct. We do not interpret the rules in this way. Although referral to the PRC may be one consequence of a finding of guilty after a disciplinary hearing, *see* WIS. ADM. CODE § DOC 302.20(2), referral to the PRC is not punishment for the disciplinary infraction. The PRC is not referred to in ch. DOC 303 "Discipline." Rather the provisions on the PRC are contained in ch. DOC 302 "Assessment and Evaluation, Security Classification and Sentence Computation." The purpose of the PRC is to provide a continuing review of the security classification, institution assignment and program assignment that are made when an inmate initially enters the system or an institution. *See* WIS. ADM. CODE §§ DOC 302.01-302.18. Under § DOC 302.18(3), a staff member may recommend PRC review at any time. Nothing in the regulations limits the authority of the warden, or any other staff person, to refer an inmate to the PRC under § DOC 302.18(3).

WISCONSIN ADM. CODE § DOC 303.85(2) does limit what the PRC can consider as a basis for a transfer. Since the warden dismissed the second conduct report, under § DOC 303.85(2) the second conduct report cannot be considered by the PRC in a decision on Richer's transfer or program assignment. However, § DOC 303.85(2) does not prevent the warden from deciding that Richer should be referred based on the first conduct report, even though the

adjustment committee did not make a referral as a result of the hearing on the first conduct report. The notice Richer received along with the first conduct report contained the notice required by WIS. ADM. CODE § DOC 302.20(2) that a referral to the PRC committee, including transfer to another institution, could result in a finding of guilty by the adjustment committee.

If Richer's complaint is that the PRC impermissibly relied on information from the second conduct report, we cannot address that contention in this review by certiorari of the decisions on the two conduct reports.

Richer also contends that the warden violated WIS. ADM. CODE § DOC 303.76(7)(b) because the warden did not make the decision of his appeals "within 10 days following the receipt" of each appeal. It does not appear that Richer raised this issue before the trial court. Moreover, we observe that the warden's response to each appeal states that December 19, 1995, was the "Date Appeal Received." That is also the "Date of Decision" for each appeal. Finally, even if the ten-day limit were not complied with, Richer has not shown that this resulted in any prejudice. *See* WIS. ADM. CODE § DOC 303.87 ("If a procedural requirement under this chapter is not adhered to by staff, the error may be deemed harmless and disregarded if it does not [result in] prejudice"). For all these reasons, we reject this argument.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

