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DISTRICT IV

April 23, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP676 State of Wisconsin ex rel. Harlan Richards v. Gary Hamblin (L.C. # 2012CV3159)

Before Lundsten, Sherman and Kloppenburg, JJ.

Harlan Richards appeals an order denying his certiorari petition. 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 (2011-12).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

This appeal relates back to our opinion in ***Richards v. Graham***, 2011 WI App 100, 336 Wis. 2d 175, 801 N.W.2d 821. There, we held that a decision to raise Richards' security classification from "minimum-community" to "minimum" was arbitrary, and we remanded for a "new review." ***Id.***, ¶36. In that new review, which was limited to the facts in existence at the time of the original decision, the director of the Bureau of Offender Classification and Movement reached the same decision to assign Richards to "minimum."

Richards first argues that the decision is again arbitrary because, in ***Richards***, we held that the director is not permitted to base the reclassification solely on the fact that the parole commission had increased Richards' deferral from ten months to twelve months. However, Richards overstates our earlier holding.

Richards' argument appears to be based mainly on the following two sentences in our opinion. "Because the record shows that the PRC's elevation of Richards' risk rating to moderate was based solely on the Parole Commission's decision to set the deferral period at twelve months, we conclude that the risk-rating decision was arbitrary." ***Id.***, ¶31. "Because the PRC's decision to elevate Richards' custody classification was based on its arbitrary risk-rating determination, we conclude the PRC's decision to elevate Richards' custody classification from minimum-community to minimum was arbitrary." ***Id.***, ¶36.

However, the first of those sentences was followed by these: "The PRC *did not explain* in its decision how the length of Richards' deferment affected his security risk. Because, as the Parole Commission argued and we agreed, the increase in the defer period from ten to twelve months was purely administrative, *we see nothing obvious* about the change that would suggest the need for an increase in Richards' risk assessment." ***Id.***, ¶31 (emphasis added).

The emphasized phrases show that our focus was on what appeared, at that time, to be a lack of connection between the increase in the parole deferral period and the higher security classification. We did not hold that a reclassification can never be based entirely on a longer deferral, but only that we had not been provided with an explanation of how that fact supports a decision to increase a security classification.

In the new review, the director explained that the increased deferral period could be interpreted by an inmate as indicating a decreased likelihood of future parole, and therefore there is "concern for escape from an unfenced location given this parole action." We understand this to mean that a reduced likelihood of parole might increase an inmate's motivation to escape. This is a rational and non-arbitrary reason to draw a link between the longer deferral period and the higher security classification. Accordingly, the decision is not arbitrary.

Richards also argues that the director's decision on remand should have been implemented immediately upon being made in 2011. As we understand the situation from the parties' briefs, if we were to agree with this argument and order the 2011 decision implemented, it could have the effect of reducing Richards' classification from what has since been increased again to "medium."

Richards' argument for immediate implementation is based on our conclusion in ***Richards*** that the appeal in that case was not made moot by the fact that Richards had been given at least one additional security classification review after the one we were reviewing. We stated that "a decision in Richards' favor on the merits may afford him relief that he has yet to receive in the subsequent PRC reviews." ***Id.***, ¶12. Richards argues that this statement makes sense only if we expected the director's decision on remand to be implemented immediately. If we did not

so intend, he argues, then there is no sense in which the decision on remand could "afford him relief that he has yet to receive."

Richards may be correct that the director's decision on remand does not now afford him additional relief, but that is only because the director reached the *same* decision. If the director's new decision had been to a lower classification, that potentially would have affected later classification decisions because time the inmate has been in a particular custody classification is a relevant factor in classification decisions. WIS. ADMIN. CODE § DOC 302.07(7) (Nov. 2010). And, we suspect that if the director's decision had been to an even *higher* classification, one that was higher than where Richards found himself at the time of writing his brief, Richards would not be arguing for its immediate implementation. Accordingly, we conclude that our earlier analysis, holding that the ***Richards*** appeal was not moot, did not imply that the director's decision on remand in 2011 must be implemented immediately.

Finally, Richards argues that certain administrative rules violate his right to due process in the reclassification decision. However, Richards has not persuaded us that he has a liberty interest in his security classification and, therefore, we are not persuaded that he has a right to due process.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals