



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

February 1, 2016

To:

Hon. Ellen K. Berz
Circuit Court Judge
215 South Hamilton, Br.11, Rm. 5103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Jennifer L. Vandermeuse
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Bryon Cibrario 435667
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

New Lisbon Correctional Institution
2000 Progress Drive
New Lisbon, WI 53950

Special Litigation & Appeals Unit
P.O. Box 7857
Madison, WI 53707-7857

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

2015AP1327

State of Wisconsin ex rel. Bryon Cibrario v. Edward Wall
(L.C. # 2014CV2041)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Bryon Cibrario, pro se, appeals the circuit court's order affirming, on certiorari review, a decision of the Department of Corrections (DOC) that dismissed Cibrario's inmate complaint. 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 (2013-14).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Cibrario filed an inmate complaint asserting that he had been wrongly denied delivery of the 2014 Sports Illustrated Swimsuit Issue. The inmate complaint examiner recommended dismissing the complaint, explaining that the publication had been reviewed and denied on the ground that it featured nudity. The warden accepted the recommendation, and dismissed the inmate complaint. Cibrario appealed to the corrections complaint examiner, arguing that DOC had ignored his complaint that the publication was wrongly denied. The corrections complaint examiner recommended dismissing the appeal on the grounds that DOC had reasonably addressed Cibrario's complaint and that Cibrario had provided no basis to overturn the decision. The office of the secretary accepted the recommendation, and dismissed the inmate complaint. The circuit court affirmed on certiorari review.

Our review in a certiorari action is limited to the record created before the administrative agency. *State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). We will consider only whether: (1) the agency stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive, or unreasonable, and represented its will and not its judgment; and (4) the evidence was such that the agency might reasonably make the order or determination in question. *Id.* “The test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion [DOC] reached.” *Id.* Our analysis includes whether due process of law was afforded and whether the agency followed its own rules. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980).

Cibrario contends that he was denied due process during the inmate complaint review process. He contends that, at each stage of review, DOC failed to follow its own policies and consider the evidence. Specifically, Cibrario contends that DOC failed to follow its own policy

allowing inmates to receive the Sports Illustrated Swimsuit Issue, and that the record lacks evidence that the administrative review included consideration of that policy or the magazine itself. We are not persuaded.

We conclude that Cibrario has not established that due process required more than the review he obtained through the inmate complaint review system. Cibrario argues that his due process rights during the inmate complaint review process are not controlled by *Procunier v. Martinez*, 416 U.S. 396 (1974), which held that due process was satisfied where inmates were notified of the letters written to them that were withheld, the inmates were given a reasonable opportunity to complain, and the inmates' complaints were "referred to a prison official other than the person who originally disapproved the correspondence." *Id.* at 417-19. Rather, Cibrario argues that we should be guided by *State ex rel. Madison Airport Co. v. Wrabetz*, 231 Wis. 147, 285 N.W. 504 (1939). *Wrabetz* held that due process is not afforded in administrative proceedings where "the one who determines the facts which underlie the order has not considered evidence or arguments." *Id.* at 153 (quoted source omitted). However, *Wrabetz* was not an inmate mail delivery case, and Cibrario does not develop any argument as to why the standards in *Wrabetz* would apply in the context of this case. Moreover, whether we look at *Procunier* or *Wrabetz*, Cibrario does not explain what due process he was denied in the inmate complaint review process.

Cibrario also contends that DOC wrongly denied him the 2014 Sports Illustrated Swimsuit Issue because DOC failed to follow its own rules and policies. He contends that the magazine does not "feature" nudity under WIS. ADMIN. CODE § DOC 309.02(7m) because it does not "promote[] itself based upon depictions of nudity." Cibrario argues that the magazine does not promote itself based on nudity because the cover of the magazine does not depict any actual

nudity. He then contends that the decision denying him the magazine was contrary to Department of Adult Institutions (DAI) policy number 309.00.50(C)23., effective April 29, 2011, which listed the Sports Illustrated Swimsuit Issue under “[e]xamples of publications which as currently published do not feature nudity or are otherwise currently allowed.” Again, we disagree.

We conclude that reasonable minds could decide that the 2014 Sports Illustrated Swimsuit Issue promotes itself based on nudity. *See Kolb*, 158 Wis. 2d at 233. While the cover does not display nudity as defined under WIS. ADMIN. CODE § DOC 309.02(14), reasonable minds could decide that the cover—displaying women wearing only bikini bottoms, with their backs or sides towards the camera—advertises that nudity will be contained inside the magazine. *See Kolb*, 158 Wis. 2d at 233 (test on review is “whether reasonable minds could arrive at the same conclusion [DOC] reached”); WIS. ADMIN. CODE § DOC 309.02(7m) (an individual issue of a publication “features” nudity if it “promotes itself based upon depictions of nudity”) and § DOC 309.02(14) (“[n]udity” includes “the showing of the female breast with less than a fully opaque covering of the areola or nipple”). Additionally, the 2011 DAI policy allowing the Sports Illustrated Swimsuit Issue “as currently published” speaks to the 2011 issue, but does not preclude a different view of the 2014 issue. In sum, Cibrario has not persuaded us that DOC acted contrary to its rules and policies in this case.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals