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DISTRICT IV

November 30, 2016

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

2015AP2266 State of Wisconsin ex rel. Bryon Cibrario v. Edward Wall
(L.C. # 2015CV394)

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Bryon Cibrario appeals an order affirming a decision of the inmate complaint review system (ICRS). 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 affirm.

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

Cibrario filed an ICRS complaint regarding termination of his work assignment in the canteen. The inmate complaint examiner (ICE) recommended dismissal of the complaint, and that was the ultimate decision by the Secretary. Cibrario sought judicial review by certiorari. The Department of Corrections transmitted the record of the ICRS complaint.

After Cibrario filed his brief, and without order of the court or other stated reason, the department transmitted a supplemental record return that contained records related to a conduct report against Cibrario. Cibrario filed a "motion for amendment of return" in which he argued that the conduct report materials were not properly included in the record because they were not reviewed by anyone during the ICRS process. As far as the court record shows, the Secretary (as respondent in the certiorari action) did not respond to that motion.

The circuit court affirmed the ICRS decision. Its decision did not address Cibrario's motion regarding the record, but the court did rely on the disputed conduct report. Cibrario moved for reconsideration, and argued in part that the conduct report should not be considered. The court denied the motion for reconsideration, but did not specifically address the substance of that motion.

On appeal, Cibrario argues that the supplemental return of the conduct report materials was improper. He correctly points out that the administrative record compiled by the ICE makes no reference to that conduct report. The ICE listed several items in the "Document(s) Relied Upon" section of the form, but the conduct report was not one of them. There is no other indication in the record that any decision maker in the ICRS process saw the conduct report. The fact that the conduct report was not included in the original transmission of the record is consistent with that.

In response, the Secretary argues that "[i]t is the agency that determines what is properly part of the record on return." However, the case law cited by the secretary for that proposition does not contain any such blanket statement giving sole authority to the agency to decide what is part of the record, without regard to whether the material was considered during the administrative process. The normal rule, as we understand it, continues to be that in common law certiorari review the court is confined to the record that was made before the agency. ***State ex rel. Richards v. Leik***, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993).

The secretary also argues that, without the conduct report materials, the record would be "incomplete" because the department "could not have evaluated Cibrario's ICRS challenge to his loss of employment without considering the conduct report." The secretary does not explain why this "could not" have occurred.

To the extent the secretary may now be arguing that the conduct report was, in fact, considered by the department during the ICRS process, that argument fails due to lack of record support. During certiorari review, a dispute may arise between the parties about what materials the agency actually considered during the administrative process. That appears to be a factual question that must be decided first by the circuit court. Here, Cibrario raised that issue by correctly pointing out to the court that the ICRS record itself did not show that the agency used the conduct report. The secretary did not respond to Cibrario's motion, and did not attempt to prove that the conduct report was relied on during the ICRS process. As a result, any current argument that the conduct report was considered then is not supported by factual findings. And, of course, we are not able to make those findings.

The secretary further argues that the circuit court has discretion "to consider supplemental evidence that is necessary for proper disposition of the matter." However, the supporting case law cited by the secretary refers to *statutory* certiorari review in which a statute grants such authority to the court. The secretary does not suggest that any such statute exists here.

Therefore, for the above reasons, we conclude that the conduct report materials were not properly included in the record for certiorari review. We proceed with our review of Cibrario's arguments without considering that material.

Cibrario argues that the decision to remove him from his canteen job was arbitrary. The reason given on the change of employment form was "security concerns." Cibrario does not appear to dispute that department policy provides that this is a proper reason for removal. However, he notes that the form did not say specifically what those security concerns were. Similarly, he notes that the ICE decision states that the ICE interviewed the manager, and then states that Cibrario was removed "due to security concerns," but again did not state what those concerns were, or what evidence supported them.

Although the conduct report materials themselves are not part of the administrative record, that record does contain information about the conduct report that was provided by Cibrario himself. In his ICRS complaint, Cibrario stated that he was "removed from my job … due to CR 2257299." He denied that there were security concerns: "Possession of hobby needles on the living unit is in no way related to working in canteen." This information, although sparse, is sufficient to infer from the administrative record that Cibrario's conduct

report was for possession of needles in his living area, and was the cause of the removal from his job.

We conclude that Cibrario's possession of potential weapons created a reasonable security concern. His interest in potential weapons reasonably suggests that he may attempt to carry and use weapons outside of the living unit, or to transfer them to other prisoners through his canteen job. Therefore, the decision was not arbitrary and was supported by sufficient evidence.

Cibrario also argues that he did not receive due process. However, he did not raise this issue in his original ICRS complaint, and therefore it has not been preserved for judicial review. Furthermore, his reply brief does not dispute the secretary's argument that there is no protected liberty interest in a prison job.

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

Diane M. Fremgen
Clerk of Court of Appeals