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DISTRICT IV

February 15, 2019

To:

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

2018AP1224

Brian Pheil v. Daniel J. Gabler, Chairperson, Wisconsin Parole Commission and Wisconsin Parole Commission (L.C. # 2017CV2840)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brian Pheil appeals a circuit court order upholding a Parole Commission decision by the Commission chairperson that denied Pheil parole and deferred further consideration of parole for a 30-month period. 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 809.21.¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

The Commission based its decision on four factors in WIS. ADMIN. CODE § PAC 1.06(16) (Dec. 2011), https://docs.legis.Wisconsin.gov/code/admin_code/pac/1 (through January 2019). Specifically, it determined that (1) Pheil had not served sufficient time such that release would not depreciate the seriousness of his offense; (2) Pheil failed to demonstrate satisfactory conduct while in prison; (3) Pheil had not participated in necessary programming; and (4) Pheil's release would pose an unreasonable risk to the public. *See* § PAC 1.06(16)(b), (c), (e), and (h).

Our review of the Commission's decision is limited to whether "(1) the Commission kept 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 it might reasonably make the order or determination in question." *State ex rel. Hansen v. Circuit Court for Dane Cty.*, 181 Wis. 2d 993, 998-99, 513 N.W.2d 139 (Ct. App. 1994).

Pheil relies on the third of these four review criteria, arguing that the Commission's decision was arbitrary and capricious. "An agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion." *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994). "A proper exercise of discretion contemplates a reasoning process based on the facts of record 'and a conclusion based on a logical rationale founded upon proper legal standards.'" *Id.* (quoted source omitted). "We may not substitute our judgment for that of the [agency]; we inquire only whether substantial evidence supports [its] decision." *Id.* "If substantial evidence supports [the agency's] determination, it must be affirmed even though the evidence may support a contrary determination." *Id.* "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Id.* (quoted source omitted).

Pheil argues that the Commission's decision was arbitrary and capricious because the Commission made several factual errors. We conclude that, regardless of these claimed errors, the Commission's decision was not arbitrary and capricious and was supported by substantial evidence. More specifically, there was substantial evidence to support the Commission's determinations as to each of the four factors it considered under WIS. ADMIN. CODE § PAC 1.06(16), and each of those factors supports the Commission's decision.

As to the first factor, whether Pheil served sufficient time such that release would not depreciate the seriousness of his offense, Pheil claims no factual errors. Regardless, the Commission reasonably determined that the time Pheil had so far served—approximately 30 years on a life-plus sentence—was insufficient given the severity and nature of Pheil's crimes. As summarized in the Commission's decision, Pheil's conduct included playing a "key role in the vicious killing of a 60 y/o man that involved beating the victim on the head with a fire extinguisher, choking him with the cord of a vacuum cleaner, stabbing him w/a knife, cutting his throat, and discharging a fire extinguisher in his nose and mouth."

We turn to the second factor, whether Pheil demonstrated satisfactory conduct in prison. The claimed factual errors relate to this factor. For example, Pheil asserts that the Commission relied on a disproven allegation that, in 2011, Pheil possessed a knife blade for use as a weapon. With or without these claimed factual errors, however, there was substantial evidence to support the Commission's determination that Pheil's prison conduct was not satisfactory. Returning to the knife blade example, although Pheil asserts that a prison disciplinary panel found that Pheil did not possess the blade for use as a weapon, it is undisputed that he possessed the blade as contraband in violation of prison rules. The remaining claimed factual errors are similar in that Pheil asserts that the Commission relied on disproven or inaccurate allegations as to his prison

conduct, but Pheil does not dispute that the evidence before the Commission showed that he repeatedly violated prison rules and received several major conduct reports.

As to the third factor, whether Pheil participated in necessary programming, the Commission acknowledged that Pheil completed some programming, but relied on evidence that Pheil was in need of cognitive intervention programming and was still on the wait list for that programming. Pheil does not claim that the Commission made any factual errors or otherwise acted unreasonably with respect to its programming determination.

Turning to the fourth and final factor, whether Pheil's release would pose too great a risk to the public, Pheil argues that the Commission's determination that Pheil remained violent was heavily influenced by the claimed factual errors already discussed. With or without the claimed errors, however, the Commission reasonably determined that Pheil's release would pose too great a risk to the public. It is true that the Commission referenced Pheil's prison conduct in assessing his dangerousness, but the Commission expressed equal if not greater concern with the nature of Pheil's crimes and with Pheil's history of prior offenses. The evidence before the Commission on those topics was, by itself, enough to support the Commission's determination that Pheil's release would pose too great a risk to the public.

Finally, Pheil makes a minimally developed argument that the factual errors in the Commission's decision show that the Commission chairperson was biased. We reject this argument as inadequate to overcome the "presumption of honesty and integrity" that applies to administrative adjudicators. See *Guthrie v. WERC*, 111 Wis. 2d 447, 455, 331 N.W.2d 331 (1983); see also *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 27-30, 498 N.W.2d 842

(1993) (concluding the presumption was rebutted after thorough examination of all of the facts in the individual case).

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals