

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1386

Cir. Ct. No. 2012CV3428

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. HARLAN RICHARDS,

PETITIONER-APPELLANT,

V.

CATHY JESS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

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

¶1 PER CURIAM. Harlan Richards appeals an order that denied his petition for certiorari review of a change in the security level of his custodial classification. We affirm for the reasons discussed below.

BACKGROUND

¶2 Richards began serving a life sentence for first-degree murder in 1984. By 2010, he had completed all available institutional programming without incurring any conduct reports and, due to that positive institutional adjustment, had been granted a minimum security level custodial classification with work release privileges in the community.

¶3 In January of 2011, the parole commission increased Richards' deferment period for his next parole consideration from eight months to twelve months. Shortly thereafter, the Director of the Bureau of Offender Classification and Movement (BOCM) elevated Richards' custodial classification to the medium security level based upon the recommendation of the program review committee (PRC). After the administrator of the Division of Adult Institutions (DAI) affirmed the BOCM's decision, the circuit court vacated the classification decision on certiorari review, concluding that the elevation of Richards' security level was arbitrary under an analysis set forth by this court in a related case, *Richards v. Graham*, 2011 WI App 100, 336 Wis. 2d 175, 801 N.W.2d 821.

¶4 Upon remand, the PRC held a new hearing on Richards' security level and custodial classification. The committee again recommended that Richards be classified at the medium security custodial level; the BOCM director again adopted the committee's recommendation; and Richards sought administrative review from the DAI administrator. After a DAI assistant administrator affirmed the substance of the classification decision, Richards also sought relief through the Inmate Complaint Review System (ICRS) for alleged procedural errors. Specifically, Richards complained that the DAI assistant administrator lacked authority to review his complaint and also considered

evidence outside the record. Richards' complaints were rejected by the institution's complaint examiner as being outside the scope of the ICRS procedures, and Richards' administrative appeals of the rejected complaints were denied by the institution warden. Richards then commenced the present certiorari action, challenging both the substance of the classification decision and the procedures employed.

¶5 The circuit court observed that it appeared the DAI administrator had, in fact, erroneously delegated his reviewing authority to an assistant, and that ICRS had erroneously refused to address that alleged procedural error, but concluded any error was harmless. Richards now appeals the circuit court's denial of his certiorari claims.

STANDARD OF REVIEW

¶6 Our certiorari review of a prison custodial classification is limited to reviewing the administrative record to determine whether administrative officials acted: (1) within their jurisdiction; (2) according to law; (3) in a non-arbitrary manner; and (4) based on substantial evidence upon which reasonable minds could rely to reach the same conclusion. *Richards*, 336 Wis. 2d 175, ¶¶5-6.

DISCUSSION

¶7 Richards raises three issues before this court. First, Richards claims that BOCM and DAI officials acted arbitrarily and contrary to this court's decision on Richards' prior certiorari action by once again increasing his custodial classification based upon the increase in his parole deferment period. Second, Richards argues that the DAI official who decided his administrative appeal erred in obtaining and considering details about a prior manslaughter conviction

contained in materials that had previously been purged from Richards' prison file and were not presented at the PRC hearing, without providing Richards an opportunity to address the accuracy or context of those details.¹ Third, Richards complains that the DAI official who decided his substantive administrative appeal was not authorized to do so. None of these claims warrant relief.

¶8 Richards' first argument misconstrues this court's prior opinion and the PRC's actions. In our opinion vacating the previous elevation of Richards' custodial classification, we determined that the timing of the PRC's early review of Richards' custodial classification in 2011, immediately after the increase in his parole deferment period—coupled with the committee's failure to meaningfully address other factors set forth in WIS. ADMIN. CODE § DOC 302.07 or to apply an advisory risk assessment instrument developed by the Department of Corrections—showed that the increased parole deferment was in reality the sole basis for the custodial classification. We then concluded that the PRC's decision was arbitrary because the committee “did not explain in its decision how the length of Richards' deferment affected his security risk.” *Richards*, 336 Wis. 2d 175, ¶31. We did not, as Richards appears to believe, hold that it was improper for the PRC to consider an inmate's parole deferment period as part of his risk assessment, or that the topic could not be relevant. Nor did our decision to vacate the 2011 classification determination in any way limit the PRC's ability to

¹ The parole commission decision that the PRC explicitly considered stated that Richards was “previously confined for a '73 conviction of Manslaughter in which you killed your brother.” The DAI assistant administrator stated in his decision that Richards had “previously served a sentence for manslaughter, in which you shot your brother Russell eight times using a 32-caliber pistol. You shot Russell twice in the head, and several times in the back, and did not warn him before shooting him.” The DAI assistant administrator did not specify the source of his knowledge of the additional details of the past homicide.

consider all relevant factors set forth in the administrative code or applicable risk assessment tools in its next periodic review.

¶9 In the classification decision currently on review, the PRC considered the change in Richards' parole deferment period *in conjunction with* other administrative guideline factors that had not changed, including the severity of Richards' offense, his other criminal history, and the fact that he is serving a life sentence. The PRC noted that a deferment of less than twelve months, along with the parole commission's comments, indicates that the commission is considering a parole release in the near future. Conversely, then, an increased deferment period can signal that the parole commission is no longer considering granting parole in the near future, which can elevate an inmate's incentive for flight. The PRC reasoned that, even though Richards' flight risk might still be low given his past conduct, the nature and seriousness of his offenses "indicates that extreme caution must be used when considering public safety." The PRC concluded that Richards' risk would be most appropriately managed in a medium security site until there was some indication that a parole grant was forthcoming, at which time it would be appropriate to prepare Richards for reentry into the community.

¶10 The BOCM director concurred with the PRC's analysis, and further enumerated facts relevant to several of the applicable guideline criteria set forth in WIS. ADMIN. CODE § DOC 302.07, emphasizing that the murder for which Richards is currently incarcerated involved stabbing the victim twenty-one times. The DAI assistant administrator erroneously stated that it was error for the PRC and BOCM director to have considered Richards' increased parole deferment, but went on to conclude that the risk associated with Richards' current offense is high and the risk associated with his offense history is moderate, not only because of

the level of violence involved in each incident, but also due to Richards' minimization of his conduct by continuing to claim that he killed in self-defense in both incidents. We conclude that the classification decision was not arbitrary because the administrative officials adequately explained the basis for their decision—namely, that even a small change in flight risk signaled by an increased parole deferment period warranted an increased security-level classification given the extreme violence of Richards' offenses.

¶11 Richards' second and third claims are not properly before this court because Richards has not advanced any argument disputing that those claims are procedural in nature, as opposed to errors involving the merits, and Richards failed to name the final ICRS decision maker on those claims in his writ petition. *See State ex rel. Myers v. Smith*, 2009 WI App 49, ¶10, 316 Wis. 2d 722, 766 N.W.2d 764 (writs must be directed at final decision maker); WIS. ADMIN. CODE § DOC 310.08(3) (ICRS may be used to challenge procedural errors by the PRC); *State ex rel. Grzelak v. Bertrand*, 2003 WI 102, ¶14, 263 Wis. 2d 678, 665 N.W.2d 244 (the Secretary of the Department of Corrections is the final decision maker in ICRS process).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

