

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2143

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. LEONARD COLLINS,

PETITIONER-APPELLANT,

v.

RICHARD N. POLINSKE, AND RUSSELL LEIK,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
P. CHARLES JONES, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. Leonard Collins, an inmate at the Waupun Correctional Institution, appeals from a circuit court order affirming the decision of Program Review Committee Coordinator Richard Polinske to remove him from his food services job and the decision of Classification Chief Russell Leik to deny his transfer to a medium security prison contrary to the recommendation of the

Program Review Committee (PRC). Collins raises a number of procedural issues on appeal and also challenges the sufficiency of the evidence to support the respondents' determinations. For the reasons discussed below, we reject each of the appellant's contentions and affirm.

BACKGROUND

On October 21, 1976, Collins was sentenced to life in prison for first-degree murder. In 1996, Collins was transferred from a medium security institution to the maximum security institution at Waupun. On February 24, 1997, the PRC at Waupun indicated that it would be willing to consider returning Collins to a medium security institution if he did not receive any major conduct reports before his next recall review.

On August 4, 1997, a female staff member in the food services administration at Waupun filed an informational incident report alleging that Collins had twice said to her, "Can you serve me every day?" The same staff member filed a second incident report the next day alleging that Collins had asked her, "May I ask you two questions? Can you be trusted and do you have business sense?" The authorizing agent who reviewed the first incident report noted, "Unfortunately, Leonard Collins has a history of developing infatuations with female staff. The situation should be closely monitored." Apparently based upon these incidents,¹ the food services administrator requested that Collins be removed from his work assignment in food services for inappropriate behavior toward a female staff person.

¹ The food services administrator's request to remove Collins from his assignment was not included in the certiorari return, but was referred to by the PRC.

On August 21, 1997, after a social worker had interviewed Collins regarding his security classification but not his work assignment, the PRC conducted a combined scheduled recall and program change hearing. The PRC removed Collins from his work assignment, noting, “It appears that Mr. Collins has a history of developing infatuations with female staff and demonstrates a recurring pattern of behaviors found unacceptable.” The PRC recommended that Collins be returned to a medium security institution based upon his improved institutional adjustment, the social worker’s recommendation, and time served. However, the Central Office disapproved the transfer “based on PRC comments regarding inappropriate behavior toward female staff which returned him to maximum custody the last time.” The Central Office also referred Collins to clinical services for an evaluation of his need for treatment “regarding sexual acting out.”²

Collins challenged his job removal through administrative channels on the grounds that he had not been properly interviewed by the social worker on that subject prior to the hearing. On September 23, 1997, the warden agreed, and remanded the work assignment matter to the PRC for a rehearing following a proper interview by the social worker. The social worker recommended that Collins be removed from his food services position based upon the food services administrator’s request, the incident reports, and past documented “inappropriate

² Collins has presented this court with documentation showing that clinical services declined to recommend sex offender treatment for him after the food services incidents because he had not received any conduct report clearly documenting significant sexual misconduct, and that clinical services had previously declined to recommend sex offender treatment based upon Collins’ prior conduct reports because, “although the letters referenced in the two conduct reports [dated May 23, 1996 and January 28, 1991] are grossly inappropriate, they are insufficient for a SOT recommendation.” Because neither of the documents were included in the certiorari return (indeed, the first one was not even in existence at the time the PRC made its initial determination), they are not properly before us on appeal.

behaviors with regard to female staff at CCI and RCI.” The PRC again voted to remove Collins from his position in food services, and the PRC coordinator again approved that determination.

Collins sought certiorari review and the circuit court affirmed. On appeal,³ Collins claims:

- (1) the PRC violated WIS. ADM. CODE § DOC 302.19(1), (2) and (3) by failing to have a social worker interview him about his job removal prior to his initial hearing on that subject; the PRC should not have been allowed to remedy the violation by means of a new hearing; and the circuit court should not have treated the violation as *de minimus* and refused to award nominal damages;
- (2) the classification chief violated WIS. ADM. CODE § DOC 302.14 by basing Collins’ security classification upon the initial job removal determination which was later vacated;
- (3) the classification chief violated a contractual obligation to adjust Collins’ security classification after he met the condition for reclassification previously set forth by the PRC;
- (4) Collins exhausted all of his administrative remedies, but the warden violated WIS. ADM. CODE § DOC 302.19(9) by failing to respond to his appeals.
- (5) the classification chief violated WIS. ADM. CODE § DOC 302.19(11) by failing to specify in writing the criteria upon which he relied when departing from the PRC recommendation;
- (6) the PRC, PRC coordinator and classification chief lacked a sufficient evidentiary basis to conclude that the reported incidents with the food services worker were sexual in nature, or that Collins had a history of infatuation with female staff;
- (7) the PRC coordinator acted arbitrarily by referring him for a sexual treatment needs evaluation, and other unnamed

³ Collins has made essentially the same arguments before this court as he did before the administrative agency and before the circuit court, although he has articulated them in slightly varied forms. We have reorganized and combined some of the related issues he raises on appeal for clarity’s sake.

officials should have corrected false information in his file to prevent similar referrals or an adverse parole determination in the future; and

- (8) the PRC violated the DOC Policy Manual Procedure 025-15A by failing to attach Collins' monthly evaluations, prior conduct reports, or evidence of progressive disciplinary action to his job removal determination.

We will address each contention in turn.

STANDARD OF REVIEW

Our certiorari review 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, 819 (Ct. App. 1990). We will consider only whether: (1) the administrative 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 it might reasonably make the order or determination in question. *Id.* “The facts found by the committee [or other administrative agent] are conclusive if supported by ‘any reasonable view’ of the evidence, and [the court] may not substitute [its] view of the evidence for that of the committee.” *Id.* (internal citations omitted).

ANALYSIS

Interview by Social Worker

The respondents concede that, under WIS. ADM. CODE § DOC 302.19(1), (2) and (3), Collins should have been interviewed about his work assignment by a staff member prior to the initial combined hearing. They assert, however, that granting him a new hearing on the issue of his job removal remedied the error. We agree. A remanded hearing is not, as Collins asserts, an entirely

new proceeding which may only be commenced upon different grounds. It is a continuation of a previous matter which may properly be taken in response to a recognized procedural error. *See, e.g.*, § 227.57(8), STATS. (authorizing a reviewing court to remand a case to an administrative agency upon determining that the agency failed to comply with its own rules). Section DOC 302.19 was satisfied when Collins was interviewed by a social worker prior to his second hearing, and the social worker summarized the interview for the PRC.

Collins' additional claim that the circuit court erred by treating the violation as *de minimus* and refusing to award nominal damages fails for several reasons. First, as we have just noted, the violation was properly remedied by a new hearing. Second, our focus on certiorari review is upon the actions of the administrative agency, not the circuit court. *Whiting*, 158 Wis.2d at 233, 461 N.W.2d at 819. Finally, unlike a civil rights action such as that cited by Collins, damages are not an available remedy in a certiorari review such as this. *See* § 227.57(2), STATS. (court's options on certiorari review are to affirm the agency decision, set it aside, modify it, or remand the matter to the agency).

Rehearing on Security Classification

Assuming that a new hearing on the job removal issue was proper, Collins claims he should also have been granted a new hearing on his security classification, because the classification chief specifically relied upon PRC comments relating to the vacated job removal determination when denying Collins his medium custody status. The problem with this theory is that the procedural error which necessitated a remand on the job removal issue had nothing to do with the accuracy of the evidence which was produced at the joint hearing. There was no reason why evidence which was presented in connection to the job removal

could not also be considered for the purposes of the security classification if it was relevant to that issue. Moreover, because the PRC reached the same job removal decision on rehearing upon essentially the same evidence, Collins cannot establish prejudice from the sequence of events.

Promise to Reduce Security Classification

Collins contends that the comment from his February 24, 1997, recall hearing that the PRC would be willing to consider transferring Collins back to a medium security institution if he remained free of major misconduct before his next recall review constituted a promise or contract that he would be returned to medium security if he did not receive any major misconduct reports. However, without even addressing why the committee's comment fails to rise to the level of a contract, we note that the committee followed through at the recall hearing by noting that Collins' adjustment had improved and recommending his return to a medium security institution on that basis. In other words, Collins in fact received from the PRC the favorable consideration which he had been led to expect that he would receive for avoiding any major misconduct for a period of six months. That consideration did not preclude the classification chief from taking other factors into account under WIS. ADM. CODE § DOC 302.14, and rejecting the PRC's recommendation on the basis of those other factors.

Specification of Criteria Relied Upon

Even if the classification chief had the authority to depart from the PRC recommendation, Collins maintains that he erred by failing to specify the criteria upon which he relied to do so. WIS. ADM. CODE § DOC 302.19(11) provides in relevant part:

To the extent that the classification chief's decision ... differs from the recommendations [of the interviewing staff member and/or the PRC], reasons for the decision shall be provided to the PRC and the inmate in writing and shall include the facts relied upon and the criteria to which the facts were applied.

According to his written notation, the fact upon which the classification chief relied to deny Collins the medium security classification which the PRC had recommended was his "inappropriate behavior toward female staff." The classification chief's further notation that such behavior had "returned him to maximum custody the last time," shows that the similarity of Collins' present conduct with his past conduct was being taken into account under WIS. ADM. CODE § DOC 302.14(7), which allows consideration of an "inmate's prior record of adjustment in a correctional setting." Although not as well-developed as it could have been, the reason given by the classification chief for his decision was sufficient to satisfy § DOC 302.19(11).

Administrative Review

Collins argues that he exhausted all of his administrative remedies, but that the warden did not respond to his requests for review. We agree that Collins exhausted his administrative remedies by obtaining decisions from the PRC coordinator and the classification chief. He was not required to seek review of either his job removal or security classification from the warden, and the warden was not obligated to give any such review, because complaints regarding decisions of the PRC are not within the authority of the Inmate Compliant Review System under WIS. ADM. CODE § DOC 310.08(2)(b).

Sufficiency of the Evidence

Collins asserts that the evidence was insufficient to support the PRC's findings that he had "a history of developing infatuations with female staff" and that he had engaged in "a recurring pattern of behaviors found unacceptable." He argues that the comments he made to the food services staff member were not sexual in nature and did not show that he had developed an infatuation with her. In addition, he notes that the PRC did not have any of his prior conduct reports before it at the hearing, and, in any event, that his prior conduct was not in the same category as his current conduct.

The flaw in Collins' theory is his assumption that his behavior needed to rise to the level of a violation of institution rules against sexual misconduct in order to warrant his removal from food services and a maximum security classification. There is no such prerequisite. A determination that Collins' behavior was "inappropriate" and "disruptive," as alleged by the food services administrator at the second job removal hearing was sufficient to support the PRC coordinator's determination under WIS. ADM. CODE § DOC 302.15; and the incident reports, in conjunction with the social worker's reference to Collins' prior conduct reports at other institutions, were sufficient to justify his security classification under WIS. ADM. CODE § DOC 302.14. Furthermore, as the circuit court observed, although the statements attributed to Collins in the two incident reports were somewhat ambiguous, the PRC viewed them as sexually suggestive and inappropriate, and this court may not substitute its judgment as to the weight of the evidence for that of the PRC. *Whiting*, 158 Wis.2d at 233, 461 N.W.2d at 819. Similarly, contrary to Collins' apparent belief, it was not necessary for him to have been found guilty of sexual misconduct in order for the PRC and the respondents to characterize his past behavior as "inappropriate" with regard to

female staff. Nor did Collins need to be issued conduct reports for identical rule violations in order for his behavior to indicate a “recurring pattern.”

With regard to Collins’ complaint that the conduct reports were not before the PRC at his hearing, we first note the possibility that the absence of the conduct reports from the record could simply reflect an inadequacy in the completeness of the certiorari return. References throughout the record seem to indicate the PRC’s familiarity with Collins’ entire file. However, even assuming that the PRC did not have the conduct reports before it at the hearing, we conclude that the conduct reports themselves are not the only manner in which evidence of Collins’ past behavior could properly be brought before the committee. As mentioned above, the first incident report and the social worker’s comments both refer to Collins’ past conduct. There was thus sufficient evidence in the record to support the respondents’ determinations.

Accuracy of File

As a corollary to his challenge to the sufficiency of the evidence, Collins also claims that his file should be corrected to eliminate “false information,” apparently to prevent the parole board or clinical services from considering his past conduct as indicative of a pattern of infatuation with female staff. Again, Collins mistakenly assumes that it is improper for agency officials to look beyond the actual rules which he has violated to the nature of the underlying conduct. Moreover, even assuming that the PRC mischaracterized the behavior underlying Collins conduct reports,⁴ we lack authority to order the changes which

⁴ Because the conduct reports are not in the record, we cannot more directly address the accuracy of the respondents’ characterization of them. However, if, as is indicated by the briefs, Collins was found guilty of lying about staff based upon letters which he wrote accusing female

(continued)

Collins seeks. The scope of this certiorari action is limited to reviewing the job removal and security classification determinations.

Documentation of Job Performance

Finally, Collins asserts that the food services administrator violated department procedure for staff initiated job changes by failing to adequately document his request to have Collins removed from his position. Procedure No. 023-15A of the DOC Policy and Procedures Manual provides in relevant part:

Any request to remove an inmate from his position must be submitted to the inmate's social worker and must be fully documented. If appropriate, staff must ensure that progressive discipline was followed and that the inmate's monthly evaluations justify a request to remove that worker. Conduct reports directly related to a work assignment and monthly evaluations must be attached to the PRC worksheets....

Collins points out that the record does not show that the food services administrator took any progressive steps to resolve the problem prior to seeking to remove him from his position. Nor were any conduct reports or monthly evaluations attached to the PRC decision.

Collins' argument presumes in part that progressive discipline was "appropriate" and thus required under the circumstances of his case. Although we are not necessarily persuaded such was the case, it nonetheless appears from the portion of the procedure manual cited by Collins that his monthly evaluations and the relevant conduct reports should have been attached to the PRC worksheets. The PRC coordinator does not contest the applicability of the cited procedure or

staff of behaving with sexual impropriety toward him, we agree that this supports a determination that Collins' conduct was inappropriate and could be indicative of sexual fantasies or infatuations.

point to anything in the record which would demonstrate compliance with it. *See State ex rel. Sahagian v. Young*, 141 Wis.2d 495, 500, 415 N.W.2d 568, 570 (Ct. App. 1987) (“Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.”) (internal citation omitted).

We note, however, that the PRC comments for the job removal recommendation indicate:

Mr. Collins was initially referred to PRC at the request of WCI food services. The food services administrator advised the committee that Mr. Collins has demonstrated behaviors that have proven disruptive in the food services department. It is requested by the food services administrator that Mr. Collins be removed from his kitchen assignment.

Since there is no removal request from the food services administrator in the record, and there are no minutes from the hearing to indicate who testified, we are unable to determine whether the food services administrator’s request was in writing. If the request was in writing, it is possible that the appropriate documentation was in fact attached to it. In other words, we cannot determine whether the absence of Collins’ monthly evaluations and any relevant conduct reports from the record indicate a failure to follow Procedure No. 023-15A, or a failure to provide a complete certiorari return of all materials which were before the administrative agency, as required by § 227.55, STATS.

We conclude, however, that it is unnecessary to remand to the administrative agency to resolve this issue, because Collins has provided no authority for the proposition that he is entitled to a remedy for the agency’s failure to follow the cited portion of its policy and procedures manual. Nor does Collins explain how the attachment of the missing documents would in any way have

affected the outcome of the PRC Coordinator's determination. *See* WIS. ADM. CODE § DOC 303.87 (procedural errors may be deemed harmless and disregarded when they do not affect a substantial right of the inmate).

By the Court.—Order affirmed.

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

