

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0242

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. SCOTT F. FROHWIRTH,

PETITIONER-APPELLANT,

V.

**STEPHEN PUCKETT, MARIANNE COOKE AND ROSIE
EICKOFF,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Scott Frohwirth appeals from a circuit court order that affirmed on certiorari review, the decision of the Department of Corrections (DOC) to increase his security classification from medium outside security with

supervision (medium-out) to medium security. *See* WIS. ADMIN. CODE § DOC 302.12(1)(c) and (d). Frohwirth claims his security classification was arbitrarily increased based upon the fact that the Wisconsin Parole Board had deferred his parole eligibility for forty-eight months. We reject Frohwirth's contention that this was an improper factor to consider and affirm.

BACKGROUND

¶2 Frohwirth was sentenced to prison in 1991. In April of 1997, about twenty-two months before Frohwirth was to reach his initial parole eligibility date, the program review committee (PRC) at Kettle Moraine Correctional Institution recommended that Frohwirth's security classification be reduced to medium-out. The DOC central office approved the change.

¶3 On January 15, 1999, the parole board deferred Frohwirth's parole eligibility for a period of forty-eight months. In February, the PRC decided by a split vote to increase Frohwirth's security classification to medium security "based solely on D-48, sent[ence] struc[tur]e." The second-step committee also recommended increasing Frohwirth's security classification, noting that his forty-eight month deferral "creates a security risk against the freedom inherent within the med[ium]-out status." The DOC central office approved the change, stating, "Given defer, med-out is not appropriate."

¶4 After exhausting all available administrative remedies, Frohwirth petitioned for certiorari review in the circuit court. The circuit court affirmed the DOC's decision, and Frohwirth appeals.

STANDARD OF REVIEW

¶5 We review the decision of the administrative agency, not that of the circuit court. *See State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385-86, 585 N.W.2d 640 (Ct. App. 1998). Our certiorari review is limited to the record created before the program review committee. *See 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 DOC officials stayed within their jurisdiction; (2) they acted according to law; (3) their action was arbitrary, oppressive or unreasonable and represented their will rather than their judgment; and (4) the evidence was such that they might reasonably make the order or determination in question. *See id.*

ANALYSIS

¶6 Frohwirth claims it was improper for the DOC officials to increase his security classification based upon the deferral of his parole eligibility date because parole eligibility is not among the criteria listed in WIS. ADMIN. CODE § DOC 302.14. That rule provides that a series of factors identified therein “may be taken into consideration in assigning a security classification to an inmate.” *Id.* We note, however, that these same factors were enumerated in a prior version of the same rule, which provided that the criteria for assigning a security classification “shall include only the following.” *See* WIS. ADMIN. CODE § HSS 302.14 (1979). It is apparent from this modification that the current rule provides only discretionary guidelines for prison officials. It is illustrative, not exhaustive, and does not bar consideration of other factors relevant to security classifications.

¶7 The DOC officials explained that the deferral of Frohwirth’s parole eligibility date was relevant to his security classification due to “the freedom inherent within the med[ium]-out status,” which permits inmates to leave the

institution under supervision. This reasoning parallels that offered in the ch. DOC 302 appendix notes for why length of sentence and time already served were included among the criteria in WIS. ADMIN. CODE § DOC 302.14:

An inmate who is close to release, either because he or she has served close to the expiration of sentence or because of the duration of sentence, may be less of an escape risk or may not need as close supervision as an offender with a substantial period of confinement ahead of him or her.

WIS. ADMIN. CODE ch. DOC 302 Appendix Note: DOC 302.14. While the deferral did not increase the actual length of Frohwirth's sentence, it did increase the amount of time before he would be considered for release, from less than two years to an additional four years. It is the DOC's prerogative to determine the weight to be given to various factors affecting an inmate's security classification. *Cf. State ex rel. Sprewell v. McCaughtry*, 226 Wis. 2d 389, 394, 595 N.W.2d 39 (Ct. App. 1999), *review denied*, ___ Wis. 2d ___, 604 N.W.2d 571 (1999). Thus, it was not irrational or arbitrary for the prison officials to conclude that Frohwirth's temptation to escape increased with the deferral and to increase his security classification based on that fact alone.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

