

No. 95-0079

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

**LYDIA SANTIAGO, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF JAIME SANTIAGO,**

Plaintiff-Respondent,

v.

ERRATA SHEET

**KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL
AND DENNIS DANNER,**

Defendants-Appellants.

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PLEASE TAKE NOTICE that the attached pages 37 through 41 are to be substituted for pages 37 through 41 in the above-captioned opinion which was released on September 30, 1996.

Dated this 13th day of December, 2006.

Santiago received a ten-day extension of his mandatory release date and a referral to the program review committee which resulted in termination of CRC status. Santiago failed to seek judicial relief by way of certiorari. Instead, he proceeded directly to the § 1983 and negligence action before us.

The *Irby* court held that certiorari review provided an adequate remedy for Irby's loss of earned good time because the circuit court can order restoration of any lost good time and can expunge the prisoner's disciplinary record. *Id.* at 847, 522 N.W.2d at 15. We see no reason why certiorari would not be equally available to remedy the wrongful ten-day extension of Santiago's mandatory release date. As in *Irby*, expungement could be ordered by a certiorari court.¹

IV.

STATE CLAIMS

Public employees are immune from personal liability for injuries resulting from the negligent performance of a discretionary act within the scope of the individual's public office. *C.L. v. Olson*, 143 Wis.2d 701, 710, 422 N.W.2d 614, 617 (1988). A discretionary act is one that involves choice or judgment. *Kimps v. Hill*, 200 Wis.2d 1, 23-24, 546 N.W.2d 151, 161 (1996) (quoting *United States v. Gaubert*, 499 U.S. 315, 325 (1991)).

An exception to immunity exists for ministerial acts. *Kimps v. Hill*, 187 Wis.2d 508, 513, 523 N.W.2d 281, 284 (Ct. App. 1994), *aff'd*, 200 Wis.2d 1, 546 N.W.2d 151 (1996). A public employee's duty is ministerial "only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Lister v. Board of Regents*, 72 Wis.2d 282, 301, 240 N.W.2d 610, 622 (1976). Whether a duty is ministerial is a question of law which

¹ Having disposed of the issues on other grounds, we do not decide whether the rehearing held in February 1993 before Danner was a complete cure for any constitutional deprivation that occurred during the first hearing.

we review without deference to the trial court. *Larsen v. Wisconsin Power & Light Co.*, 120 Wis.2d 508, 516, 355 N.W.2d 557, 562 (Ct. App. 1984). The state does not challenge the court's findings that the defendants negligently performed their duties.

We turn first to Ware's claimed immunity.² Santiago acknowledges that a decision to classify an offense as major or minor involves choice "in some cases," and is therefore discretionary. He argues, however, that Ware had a ministerial duty to look first at the list of offenses automatically classified as major under WIS. ADM. CODE § DOC 303.68(3) to see if it included the offenses charged against him. Citing *Lister v. Board of Regents*, Santiago contends the automatic major provision limits choice and imposes a duty with such certainty that nothing remains for judgment or discretion.

In *Lister*, University of Wisconsin law students sued a university official, alleging he had negligently performed a ministerial duty of determining their residency status. *Lister*, 72 Wis.2d at 288-89, 240 N.W.2d at 616. The court reviewed the official's duties under the relevant statutes.

Section 36.16(1)(a) provided that "a bona fide resident of the state for one year next preceding the beginning of any semester for which such student registers at the university ... shall while he continues a resident of the state be entitled to exemption from nonresident tuition." Under sec. 36.16(3), in determining bona fide residence, several activities of the student "shall be considered." However, a student from another state who was in this state "principally to obtain an education" was not to be considered to have established a residence in Wisconsin by virtue of attendance at educational institutions.

² Prior to trial, the court granted Ware summary judgment on Santiago's negligence claim on the ground that she had discretionary immunity. In its statement of the case, the State says this decision was reconsidered. We have been unable to locate such a reconsideration. Nonetheless, we deem Ware to have waived the summary judgment decision in her favor.

Id. at 301, 240 N.W.2d at 622. The court held, "The statute did not prescribe the classification *process* with such certainty that nothing remained for the administrative officer's judgment and discretion." *Id.* (emphasis added).

Like the official in *Lister*, Ware engaged in a classification process. Ware exercised judgment in selecting and applying the relevant provisions of the administrative code to the facts presented. We reject Santiago's portrayal of the automatic classification as a threshold ministerial decision required for the later exercise of choice or judgment to determine if a non-automatic offense is major or minor. The classification determination is itself the *result* of choice and judgment, not a prerequisite.

The administrative code establishes a process for the classifying prison offenses as major or minor. Ware first had to review the appropriateness of the charges. WIS. ADM. CODE § DOC 303.67(3). For a minor offense, she could have dismissed the conduct report if the inmate was either unfamiliar with the rule, had not violated recently the same or a closely related rule, was unlikely to repeat the offense if warned or counseled, or the purposes of the prison disciplinary code would not be furthered by writing a conduct report. WIS. ADM. CODE §§ 303.67(3)(a) and 303.65. Ware had to strike offenses not supported by the facts alleged, or could add offenses supported by the facts. WIS. ADM. CODE §§ 303.67(3)(b)-(c). She could refer the conduct report for further investigation. WIS. ADM. CODE § DOC 303.67(3)(e). After completing this review, involving judgment and choice, Ware then was required to "divide all remaining conduct reports into major and minor offenses." WIS. ADM. CODE § DOC 303.67(4).

That Ware may have been required to exercise her judgment, or that she may have done so wrongly, does not transform her exercise of judgment into a ministerial act. *See Lister*, 72 Wis.2d at 302, 240 N.W.2d at 622. Ware's exercise of judgment was an act of discretion.

Santiago argues that both Zangl and Danner had a non-discretionary duty to look at the waiver form to see if there had been a proper waiver.³ An evaluation of Santiago's waiver form required analysis and

³ Santiago does not argue that Zangl had a non-discretionary duty to stop the waiver hearing even if, as the trial court found, Santiago voiced his objections to Zangl and requested a due process hearing. The State challenges that finding as clearly erroneous.

judgment. The box indicating Santiago waived his right to a formal due process hearing had been checked, then crossed out. Interpreting the resulting composite mark required judgment. Moreover, as Santiago states in his recitation of facts, "[Zangl] did not ask Santiago about the incomplete waiver form, or whether he intended to waive his right to a formal due process hearing. There is no rule or regulation requiring hearing officers to verify that an inmate has waived his due process rights before holding a waiver hearing." Thus, it can hardly be said that the law imposed a duty upon Zangl that was "absolute, certain and imperative."

As to Danner, we again reject Santiago's attempt to isolate the evaluation of his waiver form from Danner's responsibilities as appeal officer. WISCONSIN ADM. CODE § DOC 303.76(7)(b) requires appeal officers to "review all records and forms pertaining to the appeal and make his or her decision within 10 days following receipt of the request." A review of the entire record on appeal involves judgment. As with Ware, that Danner may have been required to exercise judgment or that he did so wrongly does not transform his duties from discretionary to ministerial.

We need not reach that issue.