

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2003

Cornelia G. Clark
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. 02-2913

Cir. Ct. No. 01-CV-2914

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL. TONY G.
MERRIWEATHER,**

PETITIONER-APPELLANT,

V.

GERALD BERGE,

RESPONDENT-RESPONDENT.

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

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Tony Merriweather, an inmate at the Wisconsin Secure Program Facility, appeals from an order that affirms a decision placing him

in administrative confinement.¹ The issues are as follows: (1) whether the administrative confinement review committee (ACRC) that made the decision improperly considered a 1994 conduct report; (2) whether ACRC violated certain administrative rules; (3) whether the evidence supported the decision; (4) whether ACRC violated Merriweather's due process and First-Amendment rights; and (5) whether the decision demonstrates bias.² We affirm on all issues.

¶2 Merriweather commenced serving long-term prison sentences in 1989.³ With one brief exception, he has remained in administrative confinement since 1992.

¶3 Administrative confinement reviews occur every six months. WIS. ADMIN. CODE § DOC 308.04(10). This proceeding concerns an ACRC decision originally made in August 2000, and reconsidered in May 2001 after Merriweather administratively appealed and the warden remanded the matter in November 2000. The May decision reads as follows:

The committee is unanimous in recommending continued placement in Administrative Confinement. Although the committee recognizes that inmate

¹ Administrative confinement is an involuntary nonpunitive status for the segregated confinement of an inmate whose continuing presence in general population poses a serious threat to life, property, self, staff, or other inmates, or to the security or orderly running of the institution. Inmate misconduct shall be handled through the disciplinary procedures.

WISCONSIN ADMIN. CODE § DOC 308.04(1).

² We grant Merriweather's motion to enlarge the time for him to file a reply brief. We have considered that brief.

³ Merriweather becomes parole eligible in 2008, and his mandatory release date is in 2040.

Merriweather did not receive any conduct reports since his last review, however, he did have five (5) entries in his Behavioral Log. The committee notes that inmate Merriweather shows his violent aggressive history during his incarceration on several occasions 05/23/92 and 08/31/94, where staff and inmates alike were his victims that resulted in serious physical injuries. The committee notes that inmate Merriweather was previously taken out of AC, only to resort back to his former behavioral patterns. The committee also notes the inmate's involvement with the disruptive group, Black Gangster Disciples. The committee is unanimous in its belief that if the inmate were released to the general population a disturbance is likely to occur. The committee also notes that compliance alone with DOC rules is not sufficient to indicate that inmate Merriweather is not in need of Administrative Confinement based on inmate Merriweather's past history, there is nothing to suggest that it would be prudent to release Merriweather from Administrative Confinement.

¶4 After pursuing his administrative remedies, Merriweather commenced this judicial review proceeding. His appeal follows the trial court's order affirming the May 2001 decision to continue his administrative confinement.

¶5 On certiorari review, we determine de novo whether the agency making the decision acted within its jurisdiction, whether it followed the applicable law, whether its decision was arbitrary or unreasonable, and whether the evidence supported the determination in question. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980). In making its decision "an agency is bound by the procedural regulations which it itself has promulgated." *Id.* We review the sufficiency of the evidence by determining whether reasonable minds could arrive at the same conclusion reached by the agency. *State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶12, 246 Wis. 2d 814, 632 N.W.2d 878. In applying this test we look for evidence which supports the decision, not for evidence which might support a contrary finding. *Id.*

¶6 Merriweather first contends that ACRC improperly relied on his August 1994 disciplinary infraction because a court order barred it from considering that incident. In a 1998 judicial review proceeding, the trial court ruled that the committee conducting Merriweather's administrative confinement review violated administrative rules by considering statements of confidential informants concerning the 1994 incident. Here, ACRC plainly considered Merriweather's involvement in the incident, in which he and others threatened and assaulted another inmate. However, nothing of record shows that ACRC directly considered the informants' statements describing that incident; unlike the disciplinary record which shows a September 22, 1994 disciplinary disposition for battery, threats and enterprises, and the conduct report against Merriweather. We construe the trial court's 1998 decision to bar consideration of the informants' statements, but not the fact that Merriweather took part in the incident they described, as shown in his disciplinary record.

¶7 WISCONSIN ADMIN. CODE § DOC 308.04(3) provides that an ACRC review must precede an inmate's administrative confinement. WISCONSIN ADMIN. CODE § DOC 308.04(6) provides that the review must occur no later than twenty-one days after the inmate receives notice of the proceeding. Merriweather contends that ACRC lost jurisdiction under § DOC 308.04(6) when it did not act on the warden's November 2000 remand until May 2001. However, by its plain terms, this rule applies to the initial ACRC determination, not to further proceedings ordered on administrative appeal.

¶8 At the time ACRC made its decision, WIS. ADMIN. CODE § DOC 302.10, since amended, provided that the institution could impose solitary confinement for a rule violation only under the care and advice of a physician. Merriweather contends that ACRC violated this provision by putting him in

administrative confinement against his physician's advice. However, § DOC 302.10 applied to confinement for punishment, not to nonpunitive administrative confinement. Additionally, the document Merriweather cites as evidence is equivocal, at best, stating only that the institution should consider releasing him from confinement because of his continued progress in treatment.

¶9 ACRC had sufficient evidence to order Merriweather's continued confinement. Merriweather contends that ACRC lacked evidence to conclude that he has demonstrated a "violent aggressive history during his incarceration," and that he was affiliated with a prison gang. However, his prison disciplinary records include forty-five instances where he was found guilty of violating prison rules. His violations include battery, threats, disruptive conduct, participating in a riot, as well as several gang-related violations. ACRC could reasonably infer from that disciplinary record that Merriweather engaged in violent and gang-related activity.

¶10 Merriweather next contends that DOC rules bar the DOC from punishing him for a rules infraction and also deem that rule infraction as grounds to place him in administrative confinement. That assertion is meritless, as is his contention that ACRC erroneously based its decision on the crimes for which Merriweather is serving his sentence. ACRC's decision refers solely to Merriweather's prison record, not to the crimes that put him in prison.

¶11 Next, Merriweather asserts that his several gang-related conduct reports were based on unconstitutionally vague rules prohibiting gang activity. As the trial court noted, this argument relates to proceedings that occurred several years ago. He has long since waived his right to challenge disciplinary findings made between 1989 and 1992. As for his final complaint of ACRC's bias against

him, nothing of record demonstrates that bias. It is Merriweather's conclusory allegation.

By the Court.—Order affirmed.

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

