STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP0275

THE HONORABLE
WILLIAM M. GABLER, SR.,

Petitioner-Respondent,

v.

CRIME VICTIMS RIGHTS
BOARD,

Respondent-Appellant.

WISCONSIN DEPARTMENT OF JUSTICE,

Respondent

APPEAL FROM AN ORDER ENTERED IN
THE EAU CLAIRE COUNTY CIRCUIT COURT,
THE HONORABLE JAMES J. DUVALL, PRESIDING

REPLY BRIEF OF CRIME VICTIMS RIGHTS BOARD

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ARGUMENT

I. The Board had jurisdiction over K.L.'s complaint.

Judge Gabler argues the Crime Victims Rights Board ("the Board") lacked jurisdiction over K.L.'s complaint because it did not verify that DOJ completed mediation activities in conformity with Wis. Stat. § 950.08(3). *See* Wis. Admin. Code § CVRB 1.05(1). The Board did what was required.

Gabler contends CVRB1.05(1) required the Board to determine whether DOJ's activities conformed to Wis. Stat. § 950.08(3). But the rule did not require the Board to review the correctness of DOJ's actions.

The Board's interpretation of its rule is entitled to controlling weight, unless inconsistent with the language of the regulation or clearly erroneous. *See Plevin v. Dep't of Transp.*, 2003 WI App 211, ¶ 13, 267 Wis. 2d 281, 671 N.W.2d 355. The Board reasonably construes CVRB 1.05(1) as requiring it only to verify that DOJ has completed its activities, not to review the correctness of DOJ's actions. Because the Board's interpretation is consistent with the rule's language and not clearly erroneous, it is entitled to controlling weight. The Board had jurisdiction over K.L.'s complaint.

II. The Board did not violate procedural due process or commit reversible procedural error.

A. The Board's actions did not implicate protected liberty or property interests.

Gabler argues the Board's ability to reprimand him threatened his protected liberty interest in his reputation, and its ability to impose a forfeiture threatened his protected property interests. Both arguments fail.

Under the "stigma plus" approach to reputation-based due process claims, Gabler's liberty interest was not implicated because the Board did not alter his legal status. *See* Board's opening brief at 28–31. Gabler argues "stigma plus" does not apply, citing the treatment of reputational harm in *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), and *Wieman v. Updegraff*, 344 U.S. 183 (1952). That approach to reputational harm, however, was superseded by *Paul v. Davis*, 424 U.S. 693 (1976), which established the "stigma plus" analysis. After *Paul*, reputational harm, standing alone, is insufficient to trigger a constitutional right to procedural due process. *See id.* at 712; *cf. Woznicki v. Erickson*, 202 Wis. 2d 178, 208 n.7, 549 N.W.2d 699 (1996) (recognizing the change created by *Paul*).

Gabler contends *Weber v. City of Cedarburg*, 129 Wis. 2d 57, 384 N.W.2d 333 (1986), is distinguishable because it involved reputational harm to a private citizen, rather than a public employee, but "stigma plus" applies to public employees. *See Hinkle v. White*, 793 F.3d 764 (7th Cir. 2015) (sheriff); *Siegert v. Gilley*, 500 U.S. 226 (1991) (government employed psychologist). Gabler asserts *Hinkle* is factually distinguishable, but fails to specify which facts matter or why.

Under "stigma plus," no liberty or property interest was implicated because the Board did not have power to alter Gabler's legal status or impose a forfeiture. All the Board can do on its own is issue a reprimand or a report and recommendation. *See* Wis. Stat. § 950.09(2)(a), (3). Professional discipline of a judge requires a referral to the Judicial Council. *See* Wis. Stat. § 950.09(2)(b). Equitable relief or forfeiture requires a court action. *See* Wis. Stat. § 950.09(2)(c)–(d).

B. Alternatively, the Board gave Gabler due process.

1. The Board did not violate due process by receiving information from DOJ.

Gabler contends the Board violated due process by conducting a prohibited investigation when it received information from DOJ. The Board did not conduct an investigation. It received documentation from DOJ, as permitted by CVRB § 1.05(4). The Board also received much of the same information from Gabler.

The information on which the Board based its decision also did not include statements about Gabler by the Assistant District Attorney (ADA) or the County Victim-Witness Coordinator (VW), as recounted in the DOJ narrative report. The material facts were derived from the transcript of the January 18, 2012, scheduling conference and the letters exchanged by DOJ and Gabler on June 19 and July 3, 2012. (App. 214–26, 23–38.) That information was submitted to the Board by Gabler, as well as by DOJ.

2. The Board did not violate due process by not sending Gabler copies of the documentation from DOJ.

The Board's decision was based on portions of the record submitted not only by DOJ, but also by Gabler. He was not harmed by not receiving documentation he already possessed and independently submitted.

The Board's failure to send Gabler copies of the DOJ narrative report containing the statements by the ADA and the VW coordinator did not violate due process because those statements were not material to the Board's actions.

3. The Board did not violate due process by denying Gabler's hearing request.

Gabler argues the Board violated due process by not giving him a hearing on several factual issues. Those issues, however, present no disputed questions of material fact for which a hearing was required.

Gabler's reasons for not articulating all his grounds at the scheduling conference are not material. The Board rightly limited its analysis to the grounds Gabler stated on the record. There are no factual disputes about those grounds, and they were inadequate for reasons the Board explained.

Gabler insists he should have been allowed to add additional grounds later because the issue came up without warning at the scheduling conference. But he could have taken the matter under advisement and later made a decision on the record with all supporting grounds.

The veracity of the statements made by the ADA and the VW coordinator is not material because the Board did not rely on those statements.

The earliest Gabler could have sentenced Beebe after he received the June 19, 2012, letter from DOJ is not material. The issue before the Board was whether the delay in Beebe's sentencing violated K.L.'s speedy disposition right. That injury logically must be measured from the time the delay began. If Gabler had granted the initial request, Beebe could have been sentenced in early April 2012. (App. 219–20.) That was the legally material point from which to measure the delay.

C. Any procedural errors did not require reversal or allow the circuit court to order dismissal of K.L.'s victim rights complaint.

The procedural errors alleged by Gabler, even if true, did not require reversal of the Board's decision because they were not prejudicial. He was not prejudiced by the documentation from DOJ because he also submitted the portions on which the Board relied. He was not prejudiced by being denied opportunity to dispute the statements by the ADA and the VW coordinator, because the Board did not rely on those statements.

Moreover, even if the Board committed errors requiring that its decision be vacated, the circuit court was not authorized to command that K.L.'s victim rights complaint be dismissed.

Gabler argues the circuit court's action was justified by *Guthrie v. WERC*, 111 Wis. 2d 447, 457, 331 N.W.2d 331 (1983). *Guthrie* held the court had authority to vacate an administrative decision violating standards of due process. *Guthrie* did not hold, however, that the existence of a due process violation allows a reviewing court to substitute its own judgment on the merits of the proceeding under review. To the contrary, the circuit court in *Guthrie* had remanded the proceeding in accordance with Wis. Stat. ch. 227, and the supreme court affirmed that action. *See* 111 Wis. 2d at 448. Similarly, here, even if there were prejudicial procedural errors, the circuit court should have remanded, rather than ordering dismissal of K.L.'s complaint.

III. The Board correctly applied the law to substantial evidence in the record.

Gabler does not challenge the existence of substantial evidence in the record, but contends the Board did not correctly apply the law to it. The Board's decision, however, was legally sound.

A. The Board's decision is entitled to great weight deference.

Gabler argues that the Board's decision deserves no deference. Actually, it is entitled to great weight.

First, Gabler argues no deference is warranted because the Board had not previously applied the speedy disposition right to the factual circumstances at issue here. But that does not mean the Board is not entitled to deference. "To determine whether great-weight deference is due, the test 'is not ... whether the commission has ruled on the precise—or even substantially similar—facts in prior cases.'" *Wisconsin Bell v. Public Serv. Comm'n*, 2004 WI App 8, ¶ 18, 269 Wis. 2d 409, 675 N.W.2d 242 (quoting *Barron Elec. Coop. v. Public Serv. Comm'n,* 212 Wis. 2d 752, 764, 569 N.W.2d 726 (Ct. App. 1997)). "[I]t is an agency's experience with related rules and similar circumstances that equips it to evaluate new facts and evolving regulatory systems." *Id.*, ¶ 18.

Here, the Board applied the analysis it has used in other cases involving the right of victims to a speedy disposition. (App. 162; *see also* prior Board reports cited at pages 14–15 of the Board's opening brief.) The Board also applied its established practice of relying on Wis. Stat. § 971.105 in construing the rights of a child victim. (App. 169–71; *see also* Board's Report of January 15, 2010, cited at page 14 of the Board's opening brief.)

Second, Gabler argues the Board has no expertise in determining whether a victim in a multi-count case has a right to have the defendant sentenced before all counts are adjudicated. The Board did not hold, however, that K.L. had an absolute right to have Beebe sentenced before other charges were tried. The Board applied its established analysis, under which an *unreasonable* delay violates a victim's speedy disposition right. The Board examined the

grounds for delay Gabler gave on the record and concluded they did not reasonably justify the delay in sentencing Beebe.

Third, Gabler argues the Board has no expertise in reviewing the application of sentencing factors by a criminal court. But that is not what the Board did. The Board reviewed Gabler's decisionmaking process and concluded he did not properly weigh and balance the victim's interests with competing interests. (App. 163–71.) Determining whether a public official has given adequate consideration to a victim's interests is the very heart of the Board's expertise.

B. The Board properly considered only the grounds stated by Gabler on the record and was not required to apply a discretionary standard of review to Gabler's actions.

Gabler contends the Board erred (1) by considering only the grounds he stated at the January 18, 2012, scheduling conference, and not the additional grounds added in his July 3, 2012, letter to DOJ; and (2) by not applying a discretionary standard of review to his scheduling decision. Both contentions fail.

First, the Board properly considered only the grounds stated by Gabler on the record. Gabler's reliance on *Hefty v. Strickhouser*, 2008 WI 96, 312 Wis. 2d 530, 752 N.W.2d 820, is unavailing. *Hefty* is distinguishable because it involved routine scheduling, not decisions implicating a person's constitutional rights. Moreover, *Hefty* requires a court to explain its decision where, as here, the scheduling was contested. Gabler suggests a court need explain only some of its reasons, but that would defeat the purpose of requiring an explanation.

Second, the Board was not required to apply a discretionary standard of review. The Board was not simply reviewing an exercise of scheduling discretion by Gabler; it

was determining whether his action violated K.L.'s speedy disposition right. In order to exercise his discretion consistent with K.L.'s rights, Gabler was required to give proper weight to K.L.'s interests as a victim, to consider the statutory requirements for proceedings involving child victims, and to properly balance K.L.'s interests with competing interests. The Board concluded that Gabler did not properly consider, weigh, and balance the relevant interests. (App. 163–71.) Under these circumstances, the Board was not required to defer to Gabler's discretion.

IV. The Board's decision did not violate separation of powers.

A. Pleading an "as applied" challenge does not affect the presumption of constitutionality here.

Gabler argues no presumption of constitutionality applies here, on the theory that he pleaded an as-applied, not a facial, challenge to the Board's actions. The distinction between facial and as-applied challenges, however, "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010).

In *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), plaintiffs pleaded an as-applied challenge to the application of a state public records law to referendum petitions. The Court observed that this claim had both facial and as-applied characteristics: "The claim is 'as applied' in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is 'facial' in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions." *Id.* at 194. The Court concluded the facial and as-applied labels were not controlling. Rather, to the extent "the plaintiffs' claim

and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs," the claim "must . . . satisfy our standards for a facial challenge." *Id.*

The present case is similar. Gabler's claim is as-applied in that it does not seek to invalidate Wis. Stat. § 950.09(a), (c)–(d), and (3) in all applications, but only to the extent they cover the activities of judges. Gabler's claim is nonetheless facial in that it is not limited to Gabler's specific circumstances, but more broadly challenges all application of those provisions to judges. As in *John Doe No. 1*, to the extent Gabler's claim and the relief following from it reach beyond his particular circumstances, he must meet the standards for a facial challenge—including the presumption of constitutionality.

B. The Board has not interfered with the power of judicial review.

Gabler argues the Board has unconstitutionally usurped the judiciary's power of judicial review. He has inaccurately characterized the Board's role.

When the Board reviews a complaint that an action by a judge in a criminal case has violated a victim's rights, the Board does not engage in judicial review of the judge's determinations in the criminal case. The Board examines the collateral issue of whether the judge's action violated the victim's right. The Board is not empowered to legally invalidate any action taken by the judge in the context of the criminal case. *C.f.* Wis. Stat. § 950.09(2)(c) ("The board may not seek to appeal, reverse or modify a judgment of conviction or a sentence in a criminal case.").

C. The Board has not interfered with any exclusive judicial power over scheduling.

Gabler contends this case is controlled by *In re Complaint Against Grady*, 118 Wis. 2d 762, 348 N.W.2d 559 (1984), which held that a statute conditioning payment of judges' salaries upon compliance with a time limit for deciding cases unconstitutionally intruded upon the exclusive power of the judiciary to administer the efficient functioning of the court system. *Grady* is distinguishable.

First, a victim's speedy disposition right, as construed by the Board, does not impose a rigid, prescribed limitation on the administration of court proceedings. Rather, it requires a judge, when scheduling a criminal case, to take into account the victim's interest in a speedy disposition and to balance that interest with competing interests.

Second, judicial compensation does not depend on a judge's observance of a victim's rights, and a forfeiture for intentionally violating a victim's right can occur only through a court action against the public official. *See* Wis. Stat. § 950.09(2)(d).

Third, *Grady* involved a restriction imposed on the courts by statute. Here, the Wisconsin Constitution has been amended to protect the rights of crime victims and to give the Legislature the power to provide remedies for violations of those rights. No specific reference overruling *Grady,* an earlier court decision arising in a different context, is necessary to give effect to the language of Wis. Const. art. I, § 9m.

D. The Board has not interfered with the judiciary's exclusive power of judicial discipline.

Gabler asserts that the power to reprimand, sanction, or fine a sitting judge for actions while performing judicial functions belongs exclusively to the judiciary. This overlooks

the fact that Wis. Const. art. I, § 9m, plainly gives victims certain constitutional rights in court proceedings and expressly empowers the Legislature to provide remedies. Under the constitutional amendment, the power to enforce the rights of crime victims against judges is not an exclusive judicial power.

E. The power to remedy violations of victim rights by judges is not restricted to the Judicial Commission.

Gabler suggests that victims can simply seek recourse from the Judicial Commission, but that remedy would deprive victims of a remedy in cases in which the violation of the victim's rights did not rise to the level of judicial misconduct.

Even if SCR 60.04(1)(h), which requires a judge to "dispose of all judicial matters promptly and efficiently," incorporated a victim's speedy disposition right, a violation of that provision still would not rise to the level of judicial misconduct unless it was willful. Wisconsin Const. art. I, § 9m, and Wis. Stat. ch. 950 provide remedies for non-willful violations of victims' rights, whereas Wis. Stat. § 757.81(4) defines misconduct, in pertinent part, to include only a willful violation of the code of judicial ethics. The narrower scope of judicial misconduct fails to satisfy the constitutional requirement that the Legislature provide remedies for violations of victims' rights.

CONCLUSION

For the reasons stated, the Board asks the Court to reverse the decision of the circuit court and affirm the July 26, 2013, decision of the Board on K.L.'s complaint.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2941 words.

Dated this 10th day of August, 2016.

THOMAS C. BELLAVIA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of August, 2016.

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