
ROBERT J. KOCH,

Petitioner,

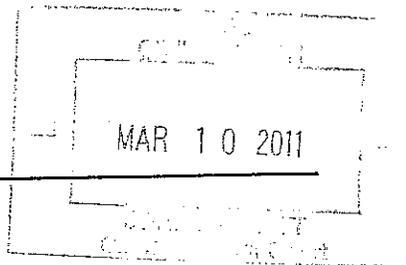
v.

Case No. 10-CV-11215

BOARD OF FIRE AND POLICE
COMMISSIONERS OF THE
CITY OF MILWAUKEE,

Respondent.

DECISION AND ORDER



Pursuant to Wis. Stat. § 62.50(20), Robert J. Koch, Petitioner, filed a petition for judicial review of the June 17, 2010 decision by the Board of Fire and Police Commissioners of the City of Milwaukee (the "Board" or the "Commission"), Respondent. In its decision, the Board sustained the charges of Chief Douglas Holton (the "Chief") of the Milwaukee Fire Department (the "Department") that Mr. Koch had violated certain Department rules and regulations and ultimately sustained the Chief's decision to terminate Mr. Koch from his employment as a fire equipment dispatcher. After Mr. Koch filed his petition for judicial review on July 9, 2010, he filed an amended petition on November 12, 2010 additionally seeking certiorari review of the Board's decision.

Despite the fact that the certiorari action was not properly commenced, since Mr. Koch could have just filed another action seeking certiorari review since he was within the time limits, the Board did not object to the addition of the certiorari review. Therefore, in the interests of judicial economy and based upon the stipulation of the parties, this Court has conducted both statutory and certiorari reviews. Based on a review of the record, evidence, and arguments, and for all the reasons stated herein, this Court finds that there was just cause to sustain the charges, but that the Board's decision regarding the discipline imposed is hereby set aside and remanded for further proceedings consistent with this decision.

STATEMENT OF FACTS

I. The Triggering Events

Mr. Koch worked as a fire equipment dispatcher for the Department from May 22, 2006 until his termination on October 23, 2009. His ultimate termination stemmed from events that occurred on September 9-10, 2009, the details of which are far from clear due to the existence of five possible versions of what happened that evening. What is clear is that Mr. Koch's shift was to begin at 11:30 p.m. on September 9, 2009. At some point that evening, Mr. Koch started not feeling well, and so he called in sick to work shortly after 10:00 p.m. At approximately 11:27 p.m., Mr. Koch called in to work and informed the Department that he was going to the hospital.

Mr. Koch never made it to the hospital that evening, and was instead unconscious until approximately 3:00 a.m. on September 10, 2009. Mr. Koch claims he does not remember much because he was unconscious, but he vaguely remembers being sexually assaulted and he could not locate his car or some of his credit cards when he regained consciousness. At approximately 3:42 a.m. on September 10, 2009 the Department received a call from a Milwaukee Police Department telecommunicator, who advised that she was handling a call from Mr. Koch who had just woken up from unconsciousness and was reporting his vehicle and two credit cards stolen. Mr. Koch voluntarily submitted to a drug test on September 10, 2009 at 6:42 p.m.

II. The Subsequent Investigation and Appeals

After Mr. Koch allegedly violated sick leave requirements September 9-10, 2009 by not being at home or the hospital after he called in sick, the Department commenced an investigation. During the investigation, Mr. Koch made inconsistent statements to members of the Department, triggering other charges. Since the existence of inconsistent versions of events played a role in his ultimate termination, they are worth noting.

a. Version 1: September 10, 2009 Police Department Report (R. at 23, p. 21-22)

According to the report, Mr. Koch called in sick around 10:00 p.m. because he had been drinking and was not feeling well. He then remembered going to Vitucci's cocktail lounge for a bit. Around 11:30 p.m. he remembered being at a Clark gas station but did not know how he got there. He remembered that a black female was at the gas station in a taxi-type vehicle and he sat in the front passenger seat with the black female in the front driver's seat. The next thing Mr. Koch remembers is that he woke up around 3:30 a.m. in front of his apartment, was missing

credit and debit cards, but did not remember anyone taking them. No report regarding the vehicle was filed since Mr. Koch supposedly had the keys to the vehicle and based on his intoxication, thought the vehicle might be at one of the places he had been the previous night.

b. Version 2: September 14, 2009 Report to the Assistant Chief (R. at 23, p. 19)

Mr. Koch filed a form with the Department explaining his absence on September 9-10, 2009. According to the September 14, 2009 report, on September 9, after going to dinner with some friends, Mr. Koch started getting a headache. He said he did not order or receive from anyone any alcoholic beverages. He called in sick at 10:06 p.m. and called back at 11:27 p.m. to notify the fire dispatch supervisor that he was going to the hospital because he felt miserable. Because he felt like he could not drive, he got in a taxi and the next thing he remembers is at 3:30 a.m. when he woke up in his lawn. His wallet was next to him, but two credit cards, cash, and his truck were missing. Mr. Koch called the police immediately. Mr. Koch expressed disappointment that the police did not encourage him to go to the hospital immediately to get treated and tested. He felt he was drugged somehow through food or his soda, or the person in the cab did something that he could not remember.

c. Version 3: September 25, 2009 Board of Investigation Interview (R. at 24)

On September 25, 2009, Deputy Chief Michael Romas convened a Board of Investigation to determine whether Mr. Koch had violated Department Rule 26.6, which governs sick leave usage. Prior to the interview, he signed a truth statement that failure to be truthful and provide full disclosure would result in termination from the Department. He was also advised that what the investigation revealed could result in charges up to and including termination. Mr. Koch proceeded to give the following version of events.

On September 9, 2009 he went out to dinner with friends at Oakland Trattoria. As he was leaving the restaurant around 10:00 p.m. he started to get a headache. He went home and called in sick to work. He claimed he did not consume any alcohol. He then said his friends called him and asked for a ride from the restaurant to a bar. Because Mr. Koch intended to go to the hospital, he told his friends he would pick them up and drive them on his way to the hospital. He called the Department to notify them he was going to the hospital. After dropping his friends off, he felt lightheaded so he decided to take a cab to the hospital. The next thing he remembers is at 3:30 a.m. when he is laying in front of his apartment. He had no recollection of what happened between the time he got in the cab and when he woke up on his lawn and discovered

credit cards missing. He claimed that the keys to his truck were lying next to him, but he reported his truck missing. Eventually, the truck was retrieved at a city tow lot. Mr. Koch could not explain why he never made it to the hospital. He told the Board that on the evening of September 10, 2009 he went to a medical clinic and had a urine test and went on to say that no signs of alcohol or being drugged were found. Later submission of the test results revealed that it was positive for amphetamines.

Based on information obtained during the interview, the Board of Investigation recommended that charges be brought against Mr. Koch for violations of Department Rules 24.1, 24.2, 26.6, and 27.2. The Board also recommended that Mr. Koch be terminated. On October 7, 2009, the Chief placed Mr. Koch on administrative leave. On October 20, 2009, Mr. Koch was served with charges consistent with the September 25, 2009 recommendation of the Board of Investigation. Mr. Koch requested a pre-termination hearing.

d. Version 4: October 23, 2009 Pre-termination Hearing and Discharge (R. at 25)

At the hearing, Mr. Koch told that Board that he had previously lied about his use of alcohol and told the following version of the facts. Earlier on September 9, 2009, Mr. Koch had been at a hospital in Prairie du Sac with a friend. He stayed with his friend until about 4:00 p.m. and then came back to Milwaukee to work his shift. Once he returned to Milwaukee, a friend called him and asked to meet him for a drink. At about 9:30 p.m., Mr. Koch realized he was too drunk to go to work so he called in sick and stayed out drinking. Once 11:30 p.m. approached, Mr. Koch realized that the Department may do a house check to make sure he was home while claiming sick leave. He then called the Department and lied by saying he was going to the hospital, but stayed out instead. Then, at about 11:45 p.m. he blacked out and does not remember what happened until he woke up on the 2500 block of Oakland, not on the front lawn of his apartment. When he could not find his truck, he went back to his apartment and called the police because he noticed two credit cards were missing and he could not find his truck.

Mr. Koch admitted that there was no excuse for the lies previously told, and that he was covering a serious alcohol problem and had just attended his first counseling session with the city's Employee Assistance Program that day. After the pre-termination hearing, the Chief discharged Mr. Koch for rule violations.

e. Version 5: May 12, 2010 Appeal Hearing Before the Board (R. at 32)

Mr. Koch appealed his discharge to the Board. At the appeal hearing, Mr. Koch's testimony provided yet another version of what occurred on September 9-10, 2009. This time, he claimed that he had driven back from Prairie du Sac the morning of September 9, 2009 and was home when a friend called around 5:00 or 6:00 p.m. to go out for pizza. He met his friend at Oakland Trattoria. Then, he felt medically impaired, called in sick, and then became unconscious. However, despite being unconscious, he testified that he thought someone drugged him, robbed him, and sexually assaulted him. He claimed that he became conscious during the act of the assault, at approximately 3:00 or 3:30 a.m. on September 10, 2009. When he woke up, his pants were unzipped and he had a condom on. He then testified that he called the police because he did not know where his truck was and he was missing some credit cards.

III. The Present Circuit Court Review

After the appeal hearing before the Board on May 12, 2010, the Board unanimously upheld Mr. Koch's discharge on October 23, 2009 for violations of Department Rules 24.1 ("Rules, Orders, Laws, Ordinances, Etc."), 24.2 ("General Conduct, Insubordination"), 26.6 ("Sick and Injury Leave Requirements"), and 27.2 ("Untruthfulness"). The Board found that the seven "just cause" standards had been met and issued a written decision on June 17, 2010. Mr. Koch filed the petition for judicial review with this court on July 9, 2010 and amended his petition on November 12, 2010 to include a request for certiorari review of the Board's decision.

STANDARD OF REVIEW

I. Statutory Review

a. Just Cause Standards

Appeal of the Board's decision has been made to the circuit court pursuant to Wis. Stat. § 62.50(20). Pursuant to Wis. Stat. § 62.50(21), the court is limited in its statutory review and will only determine: "Under the evidence is there just cause, as described in sub. 17(b), to sustain the charges against the accused?" Wis. Stat. § 62.50(17)(b) provides as follows:

(b) No police officer may be suspended, reduced in rank, suspended and reduced in rank, or discharged by the board under sub. (11), (13) or (19), or under par. (a), based on charges filed by the board, members of the board, an aggrieved person or the chief under sub. (11), (13) or (19), or under par. (a), unless the board determines whether there is just

cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent applicable:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3. was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

Mr. Koch is not necessarily convinced that the above just cause standards apply to members of the fire department. Mr. Koch asserts that if the seven standards are permissible, even if not mandatory, he has no objection to their use in this case.

This Court does not see any reason why the use of the just cause standards in this case would be impermissible. The issue over their applicability arises simply because Wis. Stat. § 62.50(17)(b) refers to police officers, and Mr. Koch was not a police officer, he worked for the fire department. Nevertheless, in general, Wis. Stat. § 62.50 is titled: "Police and fire departments in 1st class cities." Under the statute, the circuit court is directed when performing a statutory review to limit its review to whether, under the evidence, there is "just cause, *as described in sub. (17)(b)*, to sustain the charges against the accused." Wis. Stat. § 62.50(21) (emphasis added). The provision referring to circuit court review procedures clearly applies to a member of either department. This Court is not convinced that it would be specifically required under the statute to limit its review of the record to evidence of just cause under the standards listed in (17)(b) in a petition for review brought by a member of the fire department, if the Board should not have applied those same standards to its initial determination of charges against that department member. Furthermore, (17)(b) refers to (17)(a) and other subsections of § 62.50 that apply to members of either the fire or the police department. Even the subsections of (17)(b), which list the seven just cause standards, refer generally to "the subordinate," "the chief," and "the chief's department."

Lending further support to this interpretation of the statute is that subchapter one of Chapter 62, which refers to general charter law (rather than specifically to first class cities) has a parallel provision to § 62.50(17)(b). In Wis. Stat. § 62.13(5)(em), the parallel provision, the subsections of the statute list seven standards that are identical to those listed in § 62.50(17)(b). The parallel provision in § 62.13(5)(em) does not differentiate between fire and police department members, and begins: “No subordinate may be suspended, . . .” This Court does not see that there is any reason that the legislature would have intended fire department members in first class cities to be treated differently than those in other cities. After reviewing the statute and the circuit court’s limited task upon judicial review, this Court is not convinced that the Board’s application of the seven just cause standards listed in Wis. Stat. § 62.50(17)(b) were impermissible in Mr. Koch’s case simply because he was a member of the fire department. Thus, this Court will proceed with the statutory review as required, by looking at whether there was just cause, under the seven standards addressed by the Board, to sustain the charges.

b. Sufficiency of Evidence

Judicial review provided by Wis. Stat. § 62.50(21) is limited to determinations of “the sufficiency of the evidence and the relationship between the discipline imposed and the seriousness of the conduct justifying the discipline.” *Gentilli v. Bd. of the Police and Fire Comm’rs of the City of Madison*, 2004 WI 60, ¶ 34, 272 Wis. 2d 1, 17, 680 N.W.2d 335. The circuit court’s role in analyzing just cause is to ensure that “the Board’s decision is supported by the evidence that the Board found credible.” *Younglove v. City of Oak Creek Fire & Police Comm’n*, 218 Wis. 2d 133, 139, 579 N.W.2d 294 (Ct. App. 1998). With respect to credibility determinations, “[r]eviewing tribunals defer to credibility determinations made by those who hear and see the witnesses because of the latter’s ‘superior opportunity . . . to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.’” *Id.* at 140.

The test is “simply whether the board had performed its statutory duty and made a reasonable decision upon the evidence.” *Clancy v. Bd. of Fire & Police Comm’rs of Milwaukee*, 150 Wis. 630, 111, 138 N.W. 109 (1912). “[T]he determination of what inference to draw from evidence when there is more than one reasonable inference” is for the agency to determine. *Stein v. State Psychology Examining Bd.*, 2003 WI App 147, ¶ 33, 265 Wis. 2d 781, 800, 668 N.W.2d 112. The circuit court must reject findings it concludes are not supported by substantial

evidence. *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶ 51, 278 Wis. 2d 111, 692 N.W.2d 572.

II. Certiorari Review

When a statutory review pursuant to Wis. Stat. § 62.50 has been filed and addressed, certiorari review is limited to whether the commission kept within its jurisdiction and whether the commission proceeded on a correct theory of law. *See State ex. rel. Kaczowski v. Bd. Of Fire & Police Comm'rs of the City of Milwaukee*, 33 Wis. 2d 488, 501-02, 148 N.W.2d 44 (1967). On certiorari review, there is a presumption that the commission acted according to the law and that the decision reached was correct. *State ex. rel. Ruthenberg v. Annuity and Pension Bd. of the City of Milwaukee*, 89 Wis. 2d 463, 473, 278 N.W.2d 835 (1979). The weight and credibility of the evidence cannot be assessed on certiorari review. *Id.* Courts have found that “writs of certiorari should be issued sparingly and only when those issues clearly appear.” *Gentilli*, 2004 WI 60, ¶ 21.

When both a statutory appeal pursuant to Wis. Stat. § 62.50 and a certiorari proceeding are commenced, the circuit court is permitted, because they are discrete issues, to decide whether to address the statutory appeal or certiorari proceeding first. *State ex. rel. Heil v. Green Bay Police and Fire Comm'n*, 2002 WI App 228, ¶ 1, 256 Wis. 2d 1008, 652 N.W.2d 118. This Court has chosen to address the statutory appeal first.

ANALYSIS

I. Statutory Appeal – Whether there is Just Cause to Sustain the Charges

Mr. Koch asserts in his petition for judicial review that there was not just cause to sustain the charges against him, the Board’s findings of fact are not supported by evidence, and that the penalty was improper. Essentially, he takes issue with every subsection of Wis. Stat. § 62.50(17)(b), except for subsection (2). This Court will first address the sufficiency of evidence as it relates to sustaining the charges under the challenged just cause standards (1), (3), (4), and (5) (“Phase I” of the Commission’s proceeding). Then, this Court will address whether the penalty imposed on Mr. Koch was proper under just cause standards (6) and (7) (“Phase II” of the Commission’s proceeding).

a. Rule Violations: Phase I

i. (17)(b)(1): Probable Consequences of the Alleged Conduct

Mr. Koch asserts that the Board framed just cause standard (1) incorrectly because it referred to “a reasonable duty regarding the consequences of the alleged conduct,” which resulted in a substantive change in the standard. (May 12, 2010 Hr’g Tr. at 185; Pet’r Br. 16.) The actual just cause standard requires knowledge of the *probable* consequences of the alleged conduct, not knowledge of *possible* consequences or *a* consequence. This Court is not convinced that the Board’s brief reiteration of this standard prior to orally making its decision, which happened to leave out the word “probable,” is any indication that the Board actually deliberated under an inaccurate standard. Furthermore, the evidence relied in support of its findings shows that Mr. Koch had knowledge of the probable consequences anyways, so any alleged misinterpretation, if any, is harmless error.

However, Mr. Koch asserts that knowledge of “probable consequences” means that Mr. Koch must have reasonably expected to have had knowledge that termination was an effect or result that was *more likely than not* to follow from his actions. Because this was not reasonable, Mr. Koch asserts that the Board erred under this standard. According to Mr. Koch, he had some attendance-related incidents in the past during his employment with the Department, and had not previously been terminated. (R. at 30.) Thus, he could not have had knowledge that the probable consequences of violating sick leave policies would be termination. In addition, he was not aware his actions could even be considered violations of Rules 24.1, 24.2, and 27.2, so he could not have been aware that the probable consequence of his conduct under those rules would be termination.

This just cause standard does not necessarily require that the subordinate could reasonably be expected to have had knowledge that the probable consequences of the alleged conduct would be the *actual consequences* imposed. The standard is rather “[w]hether the subordinate could reasonably be expected to have had knowledge of *the probable consequences* of the alleged conduct.” Wis. Stat. § 62.50(17)(b) (emphasis added). The probable consequences of alleged conduct could simply be seen as discipline of some sort, not necessarily termination. If there was only a single probable form of discipline stemming from each specific rule violation, then the Department would never have to hold a hearing on the appropriateness of

the penalty imposed and just cause standards (6) and (7) would serve no purpose. This is clearly not the case.

Mr. Koch should have been aware of the Department rules, and his testimony from the pre-termination hearing indicates he even knew that he might lose his job. (Oct. 23, 2009 Hr'g Tr. 17. 23-25.) He admitted that he told the police dispatcher after calling in sick while out having drinks that "this is going to be big trouble." (*Id.* at 17.) He also admittedly knew that truthful and straightforward employees are needed when running an emergency service. (*Id.* at 24.) Mr. Koch voluntarily signed a document on September 25, 2009 before providing a statement to the Board of Investigation that clearly advised that "failure on your part to be truthful, and provide full disclosure, will result in termination from the Milwaukee Fire Department." (R. at 23, p. 25.) Mr. Koch signed the exact same document again on October 23, 2009 prior to his pre-termination hearing. (*Id.*, p. 53) It is clear that Mr. Koch reasonably knew or could have been expected to know that the probable consequence of untruthfulness regarding his sick leave was not only more likely than not to result in some form of discipline, but that it was nearly certain to result in termination.

Mr. Koch asserts that he was not being intentionally untruthful during the investigation, and therefore he could not have known that his statements would result in termination. The Board noted that Mr. Koch testified he did not know what happened between the hours of midnight and 3:30 a.m. (R. at 33.) However, Mr. Koch did admit at the pre-termination hearing that he had lied. (Oct. 23, 2009 Hr'g Tr. 12, 19.) When five different versions of facts can be traced to the same person, it would be reasonable for the Board to infer that at some point the person was being untruthful. Mr. Koch even signed a statement acknowledging that he knew that failure to be truthful would result in termination. This Court finds the Board did not err under this standard.

ii. 17(b)(3-4): Reasonable, Fair, Objective Effort to Discover Rule Violation

Mr. Koch alleges that the Chief did not undertake a thorough investigation of the events of September 9-10, 2009 to discover whether he did, in fact, violate a rule or order. In its decision, the Board states that these standards were met by a preponderance of the evidence as to each of the Rules alleged to have been violated. (R. at 33.) This Court finds that there is sufficient evidence that the effort made was reasonable. Mr. Koch was given several opportunities to explain the events that occurred on September 9-10, 2009 in a truthful manner.

First, Mr. Koch explained himself to the Police Department, documented in the police incident report. (R. at 23, pp. 20-22.) Then, he filed a form on September 14, 2009 with the Department explaining his absence. (*Id.*, p. 19.) Next, the Department convened a three person board to investigate the matter before any charges were even brought. The Board of Investigation gathered written documentation from Mr. Koch, reviewed it, and determined that they needed to bring in Mr. Koch for an interview. The Board notes in its Findings of Fact that “The respondent was interviewed by representatives of the Fire Department.” (R. at 33.) The Board also acknowledged that “The Respondent gave a statement to the Fire Department Board of Investigation on September 25, 2009.” (*Id.*) After the interview on September 25, 2009, charges were recommended. Mr. Koch had a union representative at the hearing. At the beginning of the hearing the Board of Investigation explained the purpose of the investigative hearing and that its goal was to find out what went on so that it could make educated decisions based on fact. (Sept. 25, 2009 Hr’g Tr. 3.) The panel let Mr. Koch explain what happened and asks numerous questions throughout in an effort to discover whether a rule was actually violated. Mr. Koch then requested a pre-termination hearing which was held on October 23, 2009 at which he had yet another opportunity to convince the Department that he did not, in fact, violate any Department rules.

The panel allowed Mr. Koch every opportunity to tell his narrative. It was not until after the trial-by-chief hearing on October 23, 2009 that Mr. Koch was terminated. Mr. Koch asserts that the Department should have gone further in its effort to discover whether he violated the rules: e.g., force him to seek medical attention right away, take a breathalyzer test to see if he had actually been drinking on the night in question, interview the friend he was out with, etc. (May 12, 2010 Hr’g Tr. 174-184.) While the Department could certainly have gone further to discover the details of the night in question, the standard does not require that the Department make *every* possible effort to discover rule violations; the standard only requires that the effort be reasonable. This Court agrees that in order to get a clearer picture of the events on September 9-10, 2009, a breathalyzer or an interview with the friend he was out with would possibly have been helpful. However, the statute does not require an exhaustive effort on the Chief’s part to discover whether the Petitioner violated a rule or order; it is sufficient under the standard if the Chief has made a “reasonable effort.” It is clear from the record and the Board’s written decision that the

Department made reasonable efforts to investigate the charges and considered the testimony and evidence with all members of the Board of Investigation and the Chief prior to termination.

iii. (17)(b)(5): Chief's Discovery of Substantial Evidence of Rule Violation as Described in the Charges

Mr. Koch asserts that no evidence was presented to support any violation of Rules 24.1 or 24.2. He contends that Rule 24.1 does not appear to stand on its own, and the only assumption to be made for Rule 24.2 is that it was violated because of his untruthfulness, which is redundant of the charge under Rule 27.2. He also asserts that there is not substantial evidence that he violated the sick leave policy, and takes issue with many of the Board's findings of fact.

With regards to Mr. Koch's explanation of his untruthfulness through Dr. Ishii's testimony that he suffered from post-traumatic stress disorder ("PTSD"), the Commission was certainly authorized to give the expert's credibility appropriate weight. Although there may arguably be substantial evidence that Mr. Koch's inconsistent recollections are the result of a diagnosed medical condition, this Court's task is not to search the record for substantial evidence that goes against the Commission's decision or to decide whether this Court would decide the same way upon the evidence as the Commission. Rather, this Court is limited to "whether the board had performed its statutory duty and made a reasonable decision upon the evidence." *Clancy*, 150 Wis. 630. The circuit court's role is to ensure that "the Board's decision is supported by the evidence that the Board found credible." *Younglove*, 218 Wis. 2d at 139. This Court looks at the evidence the Board used to support its decision, rather than search the record for evidence supporting another decision, even if that other decision may also be reasonable.

This case is unique, in that there are multiple versions of factual events that have been recounted. Indeed, the issues Mr. Koch has with the Board's findings of fact reflect this. This Court cannot find that the Board found any facts that are erroneous. Even Mr. Koch prefaced some of his objections to the Board's findings of fact with, "While technically accurate..." or some variation thereof. (Pet'r Br. 5-6.) His objections to the Board's factual findings appear to simply highlight the various interpretations of the facts that are available, rather than point out clear error.

To determine whether the evidence of rule violations is substantial, this Court must consider the entire record of all evidence taken. *Clancy*, 150 Wis. 630. The Board agreed with the Chief that there was substantial evidence to support Mr. Koch's violation of the sick leave

policy and untruthfulness; this Court finds the Board's decision reasonable based upon the evidence. From the Board's written decision, a review of the record, and the language of the sick leave rule allegedly violated, it was reasonable for the Commission to uphold the rule violation. The relevant portion of Rule 26.6, governing sick and injury leave, states:

A member on sick or injury leave shall not leave their residence on any scheduled on-duty date during such leave. If such member is required to leave their residence to visit their personal physician or a department physician or for any other justifiable reason, they shall notify or arrange to notify their immediate superior of their actual whereabouts prior to their leaving...

The Board's findings of fact show, and the record indicates, that Mr. Koch called in sick on an on-duty date prior to his shift, and also called to say that he was leaving to go to the hospital. (R. at 33.) Mr. Koch is correct that this, by itself, does not show any violation of the sick leave rule.

However, since the rule requires notification of "*actual* whereabouts prior to [] leaving" (emphasis added), Mr. Koch could have been in violation of the sick leave rule if he did not intend the hospital to be his "actual whereabouts" prior to leaving his home. At Mr. Koch's pre-termination hearing, he admitted he was actually out with a friend drinking, called in sick, and when he realized that the Department may check up on him he said he lied and about going to the hospital but stayed out drinking instead. (Oct. 23, 2009 Hr'g Tr. 16-17.) This, coupled with the inferences the Commission could have reasonably drawn from the reported events in the September 15, 2009 Police Department report that Mr. Koch remembered going to a cocktail lounge after he called in sick and that he was intoxicated, are enough to support the Commission's determination that Mr. Koch violated the sick leave rule.

From the initial allegations stemmed an investigation which led to additional charges for violations of Rules 24.1 (Rules, Orders, Laws, Ordinances, Etc.), 24.2 (General Conduct, Insubordination), and 27.2(14) (Untruthfulness). In its written decision, the Board makes general factual findings, and then proceeds to note each one of the times Mr. Koch made a statement. (R. at 33.) In reviewing the statements Mr. Koch made between the initial incident on September 9-10, 2009 and the imposition of charges, there is sufficient evidence that Mr. Koch was untruthful. According to the police report, Mr. Koch "stated that he was intoxicated" and no report regarding his truck was filed because he "had all the keys to the vehicle, and his level of intoxication" so he assumed it was just left at one of the places he had been to. (R. at 23, p. 22.) In his written statement on September 14, 2009, Mr. Koch stated that while he felt intoxicated,

he “didn’t order, or receive from anyone, any alcoholic beverages.” (R. at 23, p. 19.) The Board’s finding of fact that Mr. Koch “went to a tavern where he consumed alcohol” indicates that it found the reports that he consumed alcoholic drinks/was intoxicated to be credible. (R. at 33.) Whether this Court would find the other written or oral statements similarly made by Mr. Koch prior to the charges being filed as the more reasonable or credible interpretations of the night in question is not for this Court to determine in its review. Even Mr. Koch admits in his brief that some evidence may show a violation of Rule 27.2. (Pet’r Br. 21.) Based on the record, this Court must find that the Chief discovered substantial evidence that Mr. Koch violated Rule 27.2(14) for untruthfulness as described in the charges.

Because there is substantial evidence of violations of Rule 26.6 (sick leave) and 27.2 (untruthfulness), it necessarily follows that there was also substantial evidence that Mr. Koch violated 24.1 for failure to obey all rules, and 24.2 for untruthfulness and “conduct which brings reproach or unfavorable reflection on the department.” (R. at 23, p. 2-3.) This Court cannot say that the Commission erred in finding there was just cause to sustain the charges.

b. Discipline Imposed: Phase II

i. 17(b)(6): Fair and Nondiscriminatory Application of the Rule

Mr. Koch asserts that the Department provided no evidence that the rules were applied fairly to Mr. Koch, and that it, in fact, misconstrued the standard. This Court will address whether the Board proceeded under a correct theory of law in its later certiorari review. For purposes of its statutory review, this Court will assume that the standard was correctly applied. At the hearing, counsel of Mr. Koch presented examples of various other members of the fire department who had been disciplined for similar sick leave violations and untruthfulness. In one such instance, the conduct only resulted in a one-day suspension. (May 12, 2010 Hr’g Tr. 200.) In another, the charges were completely dropped because they were not brought within 15 days. (*Id.* at 195.) The Department presented a single example of a firefighter convicted before the Commission of untruthfulness who was terminated for his conduct. (*Id.* at 201.) However, at the hearing it was made clear that this previous termination was not only for untruthfulness, but also included the employee’s involvement with the making of an offensive video that occurred while he was on duty and was broadcast to the public. (*Id.* at 203-05.)

The comparables presented by both sides at the hearing could be seen as factually distinguishable from this event both in number and severity of violation. While this Court is not

in a position to second-guess the discipline decisions of the Department, it must reject findings it concludes are not supported by substantial evidence. *Gehin*, 2005 WI 16, ¶ 51. In this case, even if this Court assumes that the Board deliberated under the correct standard, there is no evidence that the sick leave, untruthfulness, and even the 15-day rule have been applied similarly to people in Mr. Koch's position. The Board made no findings of fact with regard to this point, and the record is devoid of the actual comparables presented to the Board. There is a letter in the record from the city attorney referencing the "comparable charge information" that was supposedly presented to the Board at the hearing; however, the enclosure is not attached. (R. at 13.) Based on the limited discussion of comparable examples at the actual hearing, and no copies of any of the actual comparables data compiled by either side, this Court finds that there is not substantial evidence that there was fair and nondiscriminatory application of the rules to Mr. Koch. While the application of the rules may have been completely fair and nondiscriminatory, this Court cannot make such a determination based on the current record.

ii. 17(b)(7): Reasonable Relation to Seriousness of Violation and Record

Mr. Koch does not seem to dispute that truthfulness is important to the fire department, especially dispatchers because they receive information and must be trusted to disseminate it truthfully and accurately. (May 12, 2010 Hr'g Tr. 192.) However, since his alleged untruthfulness did not occur while he was on duty, he asserts that there is nothing to support that termination reasonably relates to untruthfulness. (Pet'r Br. 25-26.) Mr. Koch then cites the case of a police officer who responded to a citizen complaint that led him to encounter Jeffrey Dahmer and one of his victims, a minor. After conducting a brief investigation, the officers released the minor into Dahmer's care. *See Balcerzak v. Bd. of Fire and Police Commissioners for the City of Milwaukee, et al.*, 2000 WI App 50, ¶ 2, 233 Wis. 2d 644. The circuit court ultimately found that discharge was unreasonable discipline. Mr. Koch asserts that if the termination of a police officer whose actions resulted in a young man's murder to be unreasonable discipline, this Court must be within its authority to find that termination of Mr. Koch, which did not result in harm to anyone was unreasonable. Furthermore, numerous individuals testified as to Mr. Koch's commendable record of service. He went approximately two years with a clean record and positive performance, out of a total of three and a half years with the Department. (R. at 30.) Mr. Koch contends that termination after one incident does not reasonably relate to his record of service.

The Department asserts that Mr. Koch's termination can be sustained by this Court on only one piece of evidence – the truth statement he signed prior to both of his interviews and then subsequently violated. Mr. Koch has not responded to this assertion. This Court tends to agree that the Department did not provide sufficient information at the hearing regarding comparables to convince this Court that termination in Mr. Koch's situation was reasonable, at least for the underlying charges of violating sick leave and untruthfulness on September 9-10, 2009. The Department only responded to its lack of comparables by asserting that it provided an example of a firefighter who was found guilty of lying and was discharged. (Resp't Br. 37.) Mr. Koch pointed out that the example, however, involved numerous other violations much more egregious than Mr. Koch's.

Nevertheless, Mr. Koch voluntarily signed a truth statement on September 25, 2009 and October 23, 2009 before speaking to the Board of Investigation that clearly advised Mr. Koch that "failure on your part to be truthful, and provide full disclosure, will result in termination from the Milwaukee Fire Department." (R. at 23, pp. 25, 53.) Clearly, the investigation is meant to get at the truth underlying the allegations. However, the discipline imposed must still be reasonable. This Court is not in a position to determine that the penalty attached to untruthfulness during an investigation is necessarily unreasonable; however, this Court is unaware of a Department Rule that provides that failure to be truthful during an investigation results in *automatic* termination.

Mr. Koch's violation of the voluntarily signed truth agreement on September 25, 2009 may be enough to sustain the termination, but the Commission has not shown substantial evidence that this is the case. If violation of the "truth statement" was the Department's deciding factor in terminating Mr. Koch, then the complaint filed against him on October 26, 2009 reciting the specifications of his charges would have at the very least made a specific mention of the violation of the "truth statement." It never does. (*Id.*, pp. 2-4.) Nothing in the pre-termination hearing transcript or the Commission's appeal hearing transcript indicates that the termination decision was as black and white as the Commission would now like this Court to believe. This Court will not take such a limited view of the evidence and rely solely on breach of the "truth statement," something neither the Chief nor the Commission did at earlier stages. The Board's only written findings of fact related to the reasonableness of the discipline imposed include (1) that Mr. Koch's work performance was performed in a professional and competent

manner and (2) that he was considered highly qualified by his supervisors. (R. at 33.) This is hardly sufficient evidence that termination reasonably related to Mr. Koch's past record of service.

II. Certiorari Review – Jurisdiction and Correct Theory of Law

a. Jurisdiction to Act

Because this Court has already addressed the statutory appeal, it will now focus on the limited request for certiorari review, first based on the issue of whether the Chief's alleged violation of Department Rule 27.4, failure to bring charges within 15 days, necessitates a dismissal of such charges. Mr. Koch asserts that even if there is just cause, the charges cannot be sustained because they were not brought within 15 days. Based on this fact alone, he contends that the charges should have been dismissed immediately. The Board found at the hearing that Rule 27.4 is not jurisdictional and merely requires a supervisor to act within a certain period of time if he or she is aware of potential rule violations, but does not diminish the Chief's authority to discipline.

The events that led to Mr. Koch's ultimate termination were based on events that occurred September 9-10, 2009. The Board of Investigation met to interview Mr. Koch on September 25, 2009. Charges were not formally filed, however, until October 20, 2009. The charges were brought 25 days after the Chief had received all of the information, more than 15 days after receiving the information. Rule 27.4 states:

Section 27.4 Time Limit to Charges. Charges for known violations shall be preferred as soon as possible after the information is received. Superior officers who fail to prefer charges within 15 days after receiving such information, shall be deemed to be in violation of this section.

When a similar objection was raised in briefs prior the hearing, and again at the hearing, the hearing examiner found both times that the rule did not mandate dismissal if charges are not brought within 15 days. (May 12, 2010 Hr'g Tr. 10-15.) While this Court is not bound by the agency's legal conclusions, it will generally give some deference to an agency's interpretation of its own rules unless it is inconsistent with the language of the regulation or clearly erroneous. *Kruczek v. Wisconsin Dept. of Workforce Dev.*, 2005 WI App 12, ¶ 12, 278 Wis. 2d 563, 692 N.W.2d 286. In this case, this Court is not convinced that an interpretation of the time limit as directory rather than mandatory is clearly erroneous.

When interpreting administrative rules, the court generally uses the same rules as those used for statutory construction. *Id.* ¶ 13. Even when a statute includes the word “shall,” courts have found it to be construed as directory unless the statute denies the exercise of power after such time or the nature of the action or language shows that the time was meant to be a limitation. *Id.* ¶ 14. There are four general considerations to be used when determining whether the word “shall” is mandatory or directory. The court usually considers (1) the objectives to be accomplished by the statute or regulation, (2) the statute’s history, (3) consequences of an alternate interpretation, and (4) whether a penalty is imposed for violation of the time limit. *Id.* Mr. Koch has provided no authority, and the Court is unaware of any, that suggests that Rule 27.4 must be construed as mandatory, or that the Department’s interpretation of it as directory was “clearly erroneous.” While Rule 27.4 uses mandatory language “shall” for bringing charges “as soon as possible after the information is received,” if a superior officer fails to bring charges within 15 days, *the superior officer* “shall be deemed to be in violation of this section.” The rule never removes the Department’s ability to bring charges after fifteen days, and Mr. Koch suffered no economic injury in the intervening ten days between when the charges should have been brought under the rule and when they actually were. Although he was placed on administrative leave effective October 7, 2009, it was with pay.

This Court will give the appropriate deference to the Commission’s interpretation of a Fire Department rule. If the Rule was meant to act as a necessary bar to charges ever being brought, the second portion of the rule, which describes what happens “if a superior officer fails to bring charges within 15 days,” would deny exercise of power to bring charges after fifteen days, rather than simply direct that the superior officer is in violation of the section. The rule at issue appears to be more directory to bring charges “as soon as possible,” rather than mandatory. The consequences of an alternate interpretation could be harmful. If mandatory, the rule would seem to create a perverse incentive to allow a superior officer, who may likely have subordinate friends, to single-handedly allow select individuals to escape disciplinary charges for rule violations, simply by delaying bringing the charges until the sixteenth day. While Mr. Koch’s concerns with the interpretation are noted, this Court is not convinced that the interpretation of the Fire Department time limit rule as directory was clearly erroneous or inconsistent with the language of the rule, especially in light of the rules of statutory construction regarding the use of the word “shall.”

b. Correct Theory of Law

Mr. Koch asserts that Hearing Examiner Carter ignored the language of Wis. Stat. § 62.50(17)(b)(3-4) and failed to allow evidence on these standards regarding Mr. Koch's union activities, thus precluding the Board from proceeding correctly on those legal standards. Mr. Koch alleges that the decision to investigate him was motivated by retaliation for his involvement in union activities, specifically his initiative of a group grievance, rather than by his violation of Department rules. Admission of evidence by an administrative agency is a matter of discretion. *Stein v. State Psychology Examining Bd.*, 2003 WI App 147, ¶ 28, 265 Wis. 2d 781, 668 N.W.2d 112. The Board never credited Mr. Koch's testimony of retaliatory motives at the hearing, evidenced by its total lack of any finding of fact regarding this point. The Board did not consider detailed testimony on union activity probative or relevant to its determination under these standards. This Court finds that the Board did not abuse its discretion in stopping testimony of union activity when determining whether the investigation was reasonable, fair and objective. During the May 12, 2010 appeal hearing before the Commission, Chief Romas was even asked whether Mr. Koch's involvement with the union had any bearing on the decisions made in the case and he made clear that it did not and that he bears no ill will toward union members. (Hr'g Tr. 166, May 12, 2010.) Mr. Koch wanted to assert that the investigation was not fair and objective compared to other employees who were found untruthful and yet did not have to undergo an investigative hearing. Whether an investigation is or is not required in any instance appears to be incredibly fact-specific. A procedure utilizing a Board of Investigation that is aimed at getting reliable information to make the correct factual determination is hardly unreasonable. The Board did not err in failing to allow testimony of union activities.

Mr. Koch also contends that the standard in Wis. Stat. § 62.50(17)(b)(6) was misapplied by the Board, who asked whether "[t]he discipline applied by the chief was fair and without discrimination." (May 12, 2010 Hr'g Tr. 251.) This Court is inclined to agree that the Commission erred in its deliberation under this standard. It appears as though the Board had a copy of the just cause standards when they deliberated at the hearing. (May 12, 2010 Hr'g Tr. at 185). Although the Board's written decision does not improperly state just cause standard (6) or any others, perhaps this is because it never actually quotes the statutory language. This Court would not be convinced that the Board's brief reiteration of the standard prior to orally making its decision is any indication that the Board actually deliberated under an inaccurate standard.

However, a letter to the parties from the Hearing Examiner contains a document used in pretrial to attempt to obtain stipulations lists all seven just cause standards. (R. at 15.) In that document, standard six is described as “The discipline applied by the Chief was fair and without discrimination.” (*Id.*). In fact, Mr. Carter and Mr. Koch’s attorney discussed the discrepancy in the wording at the hearing. (May 12, 2010 Hr’g Tr. 246-247.) The exchange at the hearing and the pretrial document lend support that the Board may not have been operating under the correct standard. (*Id.*)(Hearing Examiner Carter stated: “Isn’t it the discipline? Not the rule, but the discipline. Address the discipline, not the rule....The discipline. It is part of the state statute and it is part of the city ordinances.”) While the change may have little or no effect on the ultimate outcome, this Court must ensure that the Commission is operating under the correct theory of law. Since this is called into doubt from the record, this Court must remand this case to the Commission for further findings on just cause standard six, under the standard as it is actually articulated in Wis. Stat. § 62.50(17)(b)(6).

CONCLUSION

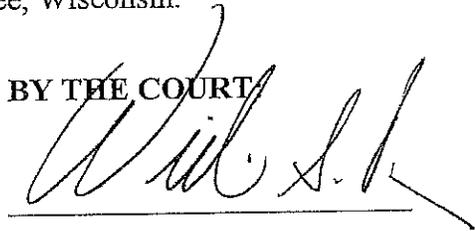
Based on a thorough review of the record and arguments of the parties as set forth in their briefs, the Court finds that the Board of Fire and Police Commissioner’s determination that there was just cause to sustain all charges is upheld. However, the Court finds that, at this time, the Commission’s decision to sustain the Chief’s decision to terminate Mr. Koch as fair and reasonably related to the seriousness of violation and his record of service under Wis. Stat. § 62.50(17)(b)(6-7) has not been supported by sufficient evidence. In addition, the Court finds that the Commission may have deliberated under an erroneous standard for Wis. Stat. § 62.50(17)(b)(6).

Accordingly, it is ordered (1) that the decision of the Board of Fire and Police Commissioners that there is just cause to sustain the charges against Mr. Koch is affirmed, and (2) that its decision that termination is proper is hereby set aside. Therefore, this case is remanded to the Commission to conduct such further proceedings as necessary to reconsider its Phase II findings under the correct Wis. Stat. § 62.50(17)(b)(6) standard and to revise and/or supplement its written decision as is necessary to be consistent with this Order.

SO ORDERED.

Dated this 10th day of March, 2011, at Milwaukee, Wisconsin.

BY THE COURT

A handwritten signature in black ink, appearing to read "William S. Pocan", written over a horizontal line.

**William S. Pocan
Circuit Court Judge**

THIS IS A FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL