

COPY

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 39

MILWAUKEE COUNTY

ERIC S. DEVRIES,

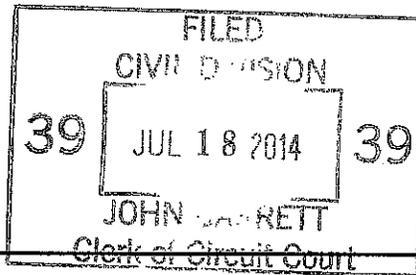
Petitioner,

v.

Case Nos.: 13-CV-5828
13-CV-7593

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

Respondent.



DECISION AND FINAL ORDER

Petitioner Eric S. Devries petitions this Court for review of the Respondent's, Board of Fire and Police Commissioners (FPC), decision sustaining his discharge from the Milwaukee Police Department (Department). Devries brings this petition on both statutory and common-law certiorari grounds. After reviewing the record and the parties' submissions, the Court affirms the decision below.

BACKGROUND

Devries served as a Milwaukee police officer since 2001. On October 19, 2012, while off duty, Devries was involved in a single-car accident when Devries' car crashed into the median on the highway. Both Devries and the passenger of his vehicle, another off-duty officer, suffered injuries from the accident. Specifically, each person sustained lacerations to the head that required medical treatment at a local hospital. Tests later proved that Devries had blood alcohol

content of 0.11. Devries later pled no contest to a misdemeanor charge of operating under the influence of intoxicant causing injury, in violation of Wisconsin Statute sec. 346.63(2)(a).¹

The Department's Internal Affairs Division investigated the accident and charged Devries with two counts of violating internal rules. Devries pled guilty to both counts. Milwaukee Police Chief Flynn (Chief) suspended Devries for thirty days without pay on the first count and discharged Devries for the second rule violation.

Devries appealed only his discharge to the Board. At the Board's hearing, the Chief stated his reasons for discharging Devries were the severity of the offense, including injuring a third party, and sending a message to other officers in the Department for alcohol-related offenses. The Board noted that, despite Devries never requiring discipline prior to this case, it nevertheless affirmed his discharge.

On May 30, 2013, the Board issued its decision affirming Devries discharge. Devries petitions this Court to review the Board's decision.

STANDARD OF REVIEW

Devries petitions for both statutory and certiorari review of the Board's decision. An officer may seek review of the Board's ruling under Wisconsin Statute sec. 62.50. That statute limits the circuit court's review to the question: "Under the evidence is there just cause, as described in sub. (17) (b), to sustain the charges against the accused?" *Id.* at § 62.50(21). Referring to a prior subsection, the statute provides seven factors to determine whether there was "just cause" to discipline the officer. *Id.* at § 62.50(17)(b). Those factors are:

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.

¹ All references to the Wisconsin States are to the 2011-12 version unless otherwise noted.

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.

Id. If any of the (17) (b) factors are absent, then the Board lacked just cause to discipline the officer. *See id.* at § 62.50 (21).

In this case, Devries limits his claim, arguing that only the sixth and seventh just cause factors are not satisfied. As such, this Court's decision on statutory review of the decision is limited to whether the rule was applied "fairly and without discrimination" and whether the decision was "reasonably related" to both the OWI violation and Devries' record. *See Wis. Stat. § 62.50(17)(b)6&7.*

On certiorari, review of the Board's decision is generally limited to "whether the Board (1) acted within its jurisdiction; (2) proceeded on the correct theory of law; (3) was arbitrary, oppressive, or unreasonable; or (4) might have reasonably made the order or finding that it made based on the evidence." *Sliwinski v. Board of Fire and Police Com'rs of Milwaukee*, 2006 WI App 27, ¶ 12, 289 Wis. 2d 422. However, because the legislature provides a statutory means of reviewing the decision the scope of certiorari review is further narrowed. *Gentilli v. Board of Police and Fire Com'rs of Madison*, 2004 WI 60, ¶ 19, 272 Wis. 2d 1. As such, certiorari is limited to "only those strictly legal questions which were not or could not have been raised by way of" statutory review. *State ex rel. Kaczowski v. Board of Fire and Police Com'rs of Milwaukee*, 33 Wis. 2d 488, 500 (1967).

Only two “strictly legal questions” lay outside the scope of statutory review provided in sec. 62.50. *See Sliwinski*, 2006 WI App 27, ¶ 12, 289 Wis. 2d 422. The two “strictly legal questions” are 1) whether the Board acted within its jurisdiction and 2) whether it applied the correct legal theory to the dispute. *Id.* In this case, Devries contends only that the Board failed to apply the appropriate legal theory to his case.

DISCUSSION

Devries asks the Court to review whether the Board applied the correct theory of law and whether the sixth and seventh just cause factors were met in his case. Devries raises two theories: one, that the Board impermissibly deferred to the Chief’s decision and, two, that his punishment is disproportionately severe when compared against similar cases. On review of a Board decision, certiorari addresses foundation issues, while statutory appeal focuses the substance of the decision. Therefore, because certiorari reviews the foundational issues, the Court will address that issue first.

Certiorari Review

Devries contends that the Board failed to apply the correct law to his disciplinary proceeding. In Devries’ view, the Board improperly adopted an erroneous posture of deference to the Chief’s disciplinary decision. However, the Court finds that the Board did not apply any inappropriate deference to the Chief’s decision.

As stated above, the Court’s review on certiorari is limited to whether the Board applied the correct theory of law in Devries’ hearing. *See Sliwinski v. Board of Fire and Police Com’rs*, 2006 WI App 27, ¶ 12, 289 Wis. 2d 422. This issue entitles Devries to the full panoply of due process protections and the concepts of fair play. *Sliwinski*, 2006 WI App 27, ¶ 13, 289 Wis. 2d. 442. However, the Court will presume the Board acted according to the correct theory. *State ex*

rel. Ruthenberg v. Annuity and Pension Bd., 89 Wis. 2d 463, 473 (1979). Further, the Court's limits its scope of review to the facts contained in the record. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 120 (Ct. App. 1980). Therefore, Devries must overcome the presumption using the facts that were available to the Board when it made its decision.

Devries contends that the Board adopted the improper standard of deference in a prior case and then erroneously applied it to his hearing. Prior to Devries' hearing, the Board heard Officer Schoen's disciplinary case. While the facts of *Schoen* are not relevant to this dispute, Devries argues that, in *Schoen*, the Board deferred to the Chief for determining the appropriate discipline for the officer. Thus, according to Devries, deference is incorrect because neither the statute governing the Board nor the Board's own rules indicate that it should apply any deference.

In *Schoen*, the Board did not explicitly state that it adopted a standard of deference. Instead, the Board stated, "we believe it appropriate for us to show a measure of deference to the Chief's disciplinary decisions, at least where it seems that the Chief is acting reasonably and proceeding in a fair and nondiscriminatory fashion." *In re Schoen*, Personnel Order 2012-60, ¶ 27.² However, *Schoen* itself is not before this Court, and is, in fact, currently on review before Milwaukee County Circuit Court Judge David Hansher.

This Court cannot review the *Schoen* decision to determine whether, in fact, it adopted a new deference standard to Board decisions. *Schoen* is not before this court and therefore the Court does not have jurisdiction to determine whether *Schoen* is the correct theory of law to apply. *See* Wis. Stat. § 801.04 (the court may only hear an action if it has jurisdiction over the subject matter). However, even assuming *Schoen* announced a new standard, Devries must still show first, that the Board either applied *Schoen* to his case or deferred to the Chief's decision;

² Available at <http://city.milwaukee.gov/ImageLibrary/Groups/cityFPC/Decisions/SchoenRichardDecision.pdf>

and second, that it would be in error to defer to the Chief. Ultimately, Devries does not sufficiently prove that the Board applied an improper legal theory to his case.

Devries does not sufficiently prove that the Board applied the *Schoen* decision to his case. To begin with, the Board neither cites nor refers to *Schoen* in the Devries' decision. To counter the clear lack of reference, Devries requests the Court to presume the Board applied *Schoen*. Devries reasons that it would be illogical and arbitrary for the Board to adopt a new standard and then not apply it in the next case. Further, Devries points to the Chief's proposal of an automatic discharge when officer's commit OWI violations as evidence that the Board deferred to his decision. However, while it could be incongruous for the Board to adopt a new standard and then not apply it in the subsequent case after adopting, the Court cannot follow Devries' contention.

Further, the Court will not presume the Board applied *Schoen* to Devries' case. Principally, the Court declines to presume so because review starts with the presumption that the Board acted correctly. *Ruthenberg*, 89 Wis. 2d at 473. Additionally, the Court concludes that the Board did not defer to the Chief's disciplinary decision. Instead, the Board based its decision on an independent review of the facts and the just cause factors.

The Board found the just cause factors after its own examination of the testimony and evidence presented in the hearing. The sixth just cause factor asks the Board to determine whether the Chief acted "fairly and without discrimination against" Devries. *See* Wis. Stat. § 62.50 (17)(b)6. This question focuses on the manner in which the Chief investigated the allegations and what specifics factored into the Chief's decision. The sixth factor does not involve a matter for which the Board could defer to the Chief. Thus, even if it is improper for

the Board to apply deference, no deference occurred in relation to the sixth factor.³ Accordingly, the Board did not apply an incorrect theory of law to the sixth just cause factor.

The seventh just cause factor balances the petitioner's record of service against the seriousness of the alleged violation. *See* Wis. Stat. § 62.50 (17)(b)7. The Court reiterates that the Board's decision neither refers to *Schoen* nor states that it is deferring to the Chief. Additionally, the Board independently reviewed both Devries' record and the facts that weigh on the grievousness of Devries' conduct—the OWI causing injury to a third party. The Board did not merely reiterate the Chief's decision. Instead, it laid out the factors it considered. Further, contrary to Devries' contention, the Board did not adopt the Chief's proposed rule of an automatic discharge for OWI violations. In fact, the Board specifically stated that it would not “opine on the merits of such a hypothetical rule” and based its decision “on the facts of this particular case.” As such, the Board did not defer but rather conducted an independent review of the facts and reached the same outcome as the Chief.

The Court's certiorari review starts with the presumption that the Board applied the correct legal theory to the case. *See Ruthenberg*, 89 Wis. 2d at 473. Devries' sole contention is that the Board improperly deferred to the Chief's disciplinary decision. The Court finds that the Board independently reviewed the facts and factors that weighed on its decision. As such, Devries did not overcome the presumption that the Board applied the correct theory of law.

Statutory Review

On statutory review, Devries contends that there was not just cause to discharge him from the police department. As stated above, Wisconsin Statutes sec. 62.50 identifies just cause as the

³ Even if the Board applied *Schoen's* deferential standard to Devries' hearing, it still would not have deferred to the Chief on the sixth factor. In *Schoen*, the Board stated it was appropriate to defer to the Chief's decision when he was “proceeding in a fair and nondiscriminatory fashion.” This phrase parallels the wording of the sixth just cause cause. Thus, the Board indicated that it did not defer to the Chief until after finding the sixth factor fulfilled.

seven factors found in that subsection. Of those seven factors, Devries challenges only the sixth and seventh factors. After reviewing the record, the Court holds that there was sufficient evidence in the record for the Board to find the just cause factors.

The statute limits the court's scope in reviewing the Board's decision. Under the statute, the court is limited to answering the question "[u]nder the evidence is there just cause, as described in [the seven factors], to sustain the charges against the accused?" Wis. Stat. § 62.50 (21). Further, because the Board conducted a hearing where it gathered testimony from witnesses and viewed evidence, the Court will defer to the Board's factual findings and creditability determinations. See *Younglove v. City of Oak Creek Fire & Police Comm'n*, 218 Wis. 2d 133, 141 (Ct. App. 1998). As such, the circuit court's role is to examine the record to determine whether there was sufficient evidence for the Board to find just cause for the discipline. See *id.*

Devries first argues that the sixth just cause factor was not met. That factor asks whether the discipline was arbitrary or discriminatory. Wis. Stat. § 62.50 (17)(b)6. Devries claims his discharge was arbitrary because the Chief based his decision not on the facts of Devries' case, but rather on the history of the police department. According to Devries, his discharge was intended to send a message to the entire department because his punishment is inconsistent with "comparable cases."⁴ The Board asserts that there are sufficient factual differences between Devries' case and the "comparables" to justify different results. The Court agrees with the Board.

⁴ Devries also argues that the Board adopted a new rule, proposed by the Chief, for an automatic discharge for an officer guilty of an OWI. However, because the Board conducted its own review of the record and stated that it did not make its decision based on the Chief's hypothetical rule, that rule is not relevant to the dispute before the Court. Therefore, the Court will not address Devries' arguments related to the hypothetical automatic-discharge rule.

The Board properly found that the Chief did not act arbitrarily or discriminatorily. First, Devries does not allege any personal discrimination. Second, the decision was not arbitrary even though Devries received a more severe punishment than the cases he cites. The factual differences between his case and the others justify the disparity between the results of the cases. There are two major factual differences between Devries' case and the comparables. One key distinction is that Devries injured both himself and a third party—the passenger in his vehicle. None of Devries' comparable cases involves an OWI causing an injury to a third party. Further, despite Devries' contention, the list of comparable cases in the record demonstrates that, in several instances, the Department discharged officers for OWI offenses. Therefore, even if Devries' accident had not caused injury to another, it was not unprecedented for the Department to dismiss an officer for such a violation.

A second major difference is the existence of the Department's OWI awareness program. The program, in place for over a year before Devries' incident, indicates that the Department perceived OWIs as a serious problem among the officers. As such, Devries was aware of the Department's intent to reduce or eliminate drunken driving violations. Thus, contrary to Devries' claim, he was not discharged based on the Department's history, but rather because he failed to respond to the Department's program when it was clear the Department sought to curb OWI violations. Thus, Devries' discharge was not arbitrary because his accident differed from comparable cases and his violation occurred after the Department instituted the awareness program. Therefore, the record illustrates that Board had sufficient evidence to conclude that the facts satisfied the sixth just cause factor.

Devries next contends that the seventh just cause factor was not satisfied in his case. The seventh factor asks, "[w]hether the proposed discipline reasonably relates to the seriousness of

the alleged violation and to the subordinate's record of service" Wis. Stat. § 62.50 (17)(b)7. Devries claims his discipline was not based on his own individual record, but rather the Department's history of OWI problems. Again, Devries contrasts his discharge against the "comparables" and concludes that his discipline does not reasonably relate to his own violation or record of service. The Board responds by alleging that the seriousness of the violation outweighs Devries' record of service, thus satisfying the seventh just factor. The Court concurs with the Board's finding.

On the seventh factor, to determine whether the discipline is proper, the Court balances the seriousness of the offense against Devries' record. *See* Wis. Stat. § 62.50(17)(b)7. Devries was charged with violating Core Value 3 and Guiding Principle 3.05 of the Milwaukee Police Department Rules. However, Devries' rule violation was not only the commission of a crime, but also severely injuring both himself and his passenger. Additionally, operating under the influence poses a serious danger to the public in general. Further, as the Board stated in its decision, Devries' violation was particularly reckless or wanton because Devries drank five 20-oz beers, 100 ounces in total, in the three and a half hours before he drove his vehicle. Finally, Devries' OWI occurred after the Department's attempt to cut down on OWI violations. Therefore, there are numerous facts weighing on the seriousness of the violation.

On the other side of the scale is Devries' record of service for the Department. As the Board noted in the decision, Devries has a good record with no previous violations. Further, he displayed good character throughout his time with the department and in his efforts of personal reformation after the underlying accident. However, the Board found, that the seriousness of Devries' conduct outweighed his service record.

Court finds that the grievousness of the rule violation offsets Devries' record and character. That Devries ignored the Department's attempts to prevent officers from driving while intoxicated, posed a serious danger to the public, and ultimately injured a third party overshadow his respectable record with the department. Thus, while discharge is a serious punishment, it reasonably relates to how the Board balanced the factors. Therefore, the Court finds the seventh just cause factor satisfied.

Accordingly, **IT IS HEREBY ORDERED** that the decision of the Board of Fire and Police Commissioners of the City of Milwaukee is **AFFIRMED**. This is a final order that disposes of the entire matter in litigation.

Dated this 18 day of July, 2014, in Milwaukee, Wisconsin.

BY THE COURT



Jane V. Carroll, Circuit Court Judge

