

RICHARD SCHOEN,

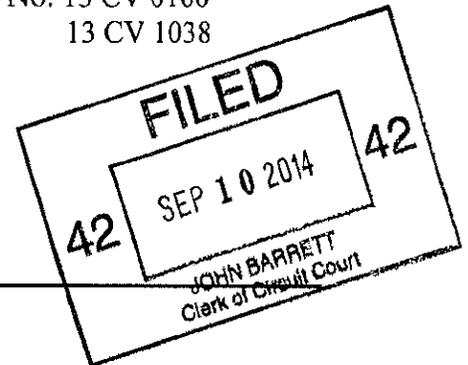
Plaintiff,

v.

Case No. 13 CV 0100
13 CV 1038

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

Defendants.



DECISION AND ORDER

Richard Schoen (“Schoen”) petitioned this Court for certiorari review and for statutory review under Wis. Stat. § 62.50 of the Board of Fire and Police Commissioners of the City of Milwaukee (“the Board”) decision of December 11, 2012 to permanently discharge him from his duties as a police officer. The Court treats these consolidate cases as one solely for certiorari review and disposes of the entire case with this decision and order. *See State ex rel. Enk v. Mentkowski*, 76 Wis. 2d 565, 574-75, 252 N.W.2d 28 (1977) (Court may sua sponte amend plaintiff’s pleadings to certiorari review where such review was timely filed). At a hearing on March 12, 2014, this Court found Plaintiff made a prima facie case supporting the contention that he was denied procedural due process during his hearing before the Board in that its decision was possibly improperly influenced by outside political forces. The Court thereupon granted Plaintiff’s motion to supplement the record by discovery, specifically allowing the deposition of Michael Tobin (“Director Tobin”), the Executive Director of the Board.

This Court has reviewed the record and parties’ arguments and for the reasons stated herein, affirms the Board’s December 11, 2012 decision.

STATEMENT OF FACTS

On May 1, 2012, Police Chief Edward A. Flynn discharged Schoen for the use of excessive force in violation of the Milwaukee Police Department’s Core Vale 6.00. Schoen

appealed that decision to the Board. On December 3, 2012, the Board voted to sustain the charges against Schoen. However, the Board voted 2-1 to reverse the decision of the Police Chief with respect to Schoen's penalty for excessive use of force. In lieu of discharge, the Board instituted a 60-day suspension for Schoen. Public outcry ensued in the wake of the Board's December 3, 2012 decision, including a press conference in which Mayor Barrett criticized the decision. On December 11, 2012, the Board reconvened and reconsidered its prior decision relating to Schoen's discipline. This time, the Board voted 2-1 to discharge Schoen as a result of his use of excessive force. Commissioner O'Hear, a professor at Marquette Law School, indicated he misunderstood the law at the time of the December 3 decision and changed his vote to uphold the discharge.

The Board's reconsideration decision prompted Schoen to file the instant appeals. On April 25, 2013, Schoen filed a Motion to Permit Discovery in the Plaintiff's Certiorari Action. Schoen argued that discovery by deposition of Mayor Barrett was necessary to prove that he was denied procedural due process with respect to the Board's reconsideration of its December 3, 2012 decision. Schoen argued that the Board's decision to reconsider was the result of improper influence asserted by Mayor Barrett (or someone on his behalf). Schoen's motion was heard and denied by Judge Witkowiak on June 27, 2013. Judge Witkowiak reasoned that Schoen had failed to make out a prima facie case of wrongdoing so as to justify supplementing the certiorari record.

The parties then proceeded to brief the merits of Schoen's appeals. On March 17, 2014, Schoen filed a Motion to Stay Issuance of Decision on the Merits Pending Additional Return and Motion to Require Additional Testimony and Return pursuant to Wis. Stat. § 62.51, relating to his statutory appeal. Specifically, Schoen requested that the Court stay the issuance of its decision on the merits regarding both appeals and order the Board to take additional testimony with respect to whether the Mayor (or someone on his behalf) improperly influenced the Board's December 11, 2013 decision.

On April 11, 2014, the Court denied Schoen's motion to the extent that he wanted to supplement the record with respect to his statutory appeal. With respect to Schoen's certiorari review, the Court indicated that it would entertain the possibility of revisiting parts of Judge Witkowiak's June 27, 2013 ruling in light of several new documents filed with the Court as well as several representations made by Schoen's counsel at the motion hearing. The documents consist of copies of three e-mails that attach drafts of Mayor Barrett's press release in the wake

of the Board's initial decision regarding Schoen. The emails are all dated December 4, 2012, which was the day after the Board's initial decision. The emails were generated by the Mayor's Office and are copied to Director Tobin.

The first draft press release circulated to Director Tobin clearly expresses the Mayor's dissatisfaction with the Board's initial decision. The first draft included the following statement: "It is obvious to me that the Fire and Police Commission needs to revisit and strengthen its Excessive Force policies and the application of those policies to Police Officers who clearly violate them." The subsequent draft press release, while unequivocally expressing the Mayor's disagreement with the Board's initial decision, omits the above quoted language.

In addition to the above e-mails, counsel for Schoen made several representations to the Court about a conversation he recently had with Attorney John Carter. Carter served as Hearing Examiner throughout Schoen's appeal before the Board. The substance of the conversation appeared to relate to a disagreement that took place between Carter and Director Tobin about re-opening the record on Schoen's appeal. However, Schoen's counsel could only offer inadmissible hearsay to that effect.

Based on these new documents and representations, the Court adjourned the matter so that Schoen's counsel could properly authenticate the documents and submit an affidavit curing any hearsay deficiencies. On April 18, 2014, Schoen submitted the Affidavit of Brendan P. Matthews, along with three exhibits. The Board, through its counsel, Assistant City Attorney Maurita Houren, filed a letter brief in response to Schoen's submissions. It was the Board's position that Schoen has not made a prima facie showing that discovery is warranted in this case.

On June 9, 2014, the Court concluded that Schoen had produced evidence sufficient to establish a prima facie showing of an impermissible risk of bias in that the Board might have been influenced by something more than the application of the evidence to the proper standard of review. The Court ordered additional discovery to supplement the record in the form of a deposition of Director Tobin limited to what he may or may not have known about the reconsideration of the Board's original decision of December 3, 2012.

Director Tobin's deposition was conducted in the Court's chambers on July 9, 2014. The deposition failed to produce any direct evidence linking the Mayor's comments and emails to the change in Commissioner O'Hear's vote. Yet, Schoen contends that Director Tobin's deposition testimony reinforced the notion that the Board's actions do not pass the "smell test" in that

Commissioner O'Hear is "meticulous" and yet claims not to have remembered the rules and regulations before issuing the December 11 decision in this case. Based on this, Schoen asks this Court to reverse the Board's December 11 decision, reinstate its December 3 decision, and reinstate Schoen to his duties as a police officer pending the completion of the 60 day unpaid suspension.

STANDARD OF REVIEW

The determinations of a fire and police commission may be reviewed by means of a writ of certiorari. *State ex rel. Enk v. Mentkowski*, 76 Wis. 2d 565, 571, 252 N.W.2d 28 (1977). The general scope of review pursuant to the writ of certiorari is limited to whether the Board (1) acted within its jurisdiction, (2) proceeded on a correct theory of law, (3) was arbitrary, oppressive or unreasonable, and (4) might have reasonably made the order or finding that it made based on the evidence. *Antisdell v. City of Oak Creek Police and Fire Com'n*, 2000 WI 35, ¶ 13, 234 Wis. 2d 154, 609 N.W.2d 464 (citations omitted). The first two certiorari prongs are questions of law which courts review independently from the determinations rendered by the municipality. *Ottoman v. Town of Primrose*, 2011 WI 18, ¶ 54, 332 Wis. 2d 3, 796 N.W.2d 411.

In determining whether a tribunal proceeded on a correct theory of law, the term "law" "refers not only to the applicable statutes but also to the guaranties of due process found in the state and federal constitutions." *Donaldson v. Bd. of Comm'rs of Rock-Koshkonong Lake Dist.*, 2004 WI 67, ¶ 79, 272 Wis. 2d 146, 680 N.W.2d 762 (citations omitted). Due process requires a "fair trial in a fair tribunal," regardless of whether the adjudication is before an administrative body or a court. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). "It is...undisputable that a minimal rudiment of due process is a fair and impartial decisionmaker." *Marder v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2005 WI 159, ¶ 27, 286 Wis. 2d 252, 706 N.W.2d 110 (citation omitted).

The Court presumes that those serving as adjudicators in administrative proceedings do so with honesty and integrity. *Bunker v. Labor and Indus. Review Comm'n*, 2002 WI App 216, ¶ 19, 257 Wis. 2d 255, 650 N.W.2d 864. However, when the adjudicator in an administrative proceeding exhibits bias in fact or when the risk of bias is impermissibly high, the administrative decision can violate due process. *Nu-Roc Nursing Home, Inc. v. Dept. of Health and Social Services*, 200 Wis. 2d 405, 415-16, 546 N.W.2d 562 (Ct. App. 1996). A plaintiff demonstrates an impermissible high risk of unfairness or bias, overcoming the presumption of honesty and integrity and succeeding on a due process challenge, by presenting special facts and

circumstances which show that the adjudicator has become “psychologically wedded” to a predetermined disposition of the case. *Id.* at 420 (citations omitted), *Guthrie v. Wisconsin Employment Relations Comm'n*, 111 Wis. 2d 447, 454, 331 N.W.2d 331, 335 (1983).

ANALYSIS

Schoen now moves this Court to reverse the Board’s December 11 decision as contrary to law because the Board was not impartial because Mayor Barrett (or someone on his behalf) contacted, interfered with and/or influenced the adjudicatory function of the Board. The Board disagrees, arguing that there was no actual bias or risk of impermissible bias because Mayor Barrett did not, nor anyone on his behalf, assert any influence on the Board.

Here, Schoen contends that the following facts prove an impermissible risk of on the part of the Board: (1) Public outcry ensued in the wake of the Board’s December 3, 2012 decision; (2) Mayor Barrett’s statements to the public in the wake of the outcry; (3) three e-mails that attach drafts of Mayor Barrett’s press release in the wake of the Board’s initial decision, all dated December 4, 2012, the day after the Board’s initial decision, generated by the Mayor’s Office and including Director Tobin as a recipient; and (4) alleged inconsistency between Commissioner O’Hear’s reputation for being meticulous and not knowing absolutely or completely the rules and regulations governing a decision he was to make.

But these three facts and one allegation, either alone or together, do not establish an impermissible risk of bias. Nor do they demonstrate that the Board had become “psychologically wedded” to a predetermined disposition of the case, which is the showing needed to overcome the presumption that the Board acted honestly and with integrity. *See Nu-Roc Nursing*, 200 Wis. 2d at 420. The Court previously stated that these allegations created the perception of possible undue influence from Mayor Barrett on the Board and that this was enough for a deposition of Director Tobin to seek evidence to support such a contention. However, no “smoking gun” was found linking the Mayor’s statement and emails to Commissioner O’Hear’s decision to change his vote. As such, this Court is bound by Commissioner O’Hear’s explanation that he changed his vote due to his misunderstanding of the law..

In addition, the Board has a right to change its mind and reconsider its previous decision. *See City of Oak Creek v. PSC*, 2006 WI App 83, ¶ 27, 292 Wis. 2d 119, 716 N.W.2d 152 (citations omitted). Wis. Stat. § 62.50 does not preclude the Board from reconsidering its

decisions, but explicitly gives the Board the power to create its own rules. Since the power to reconsider its decision is inherent in its adjudicative authority, an explicit rule is unnecessary and it is logical that the Board has not created such a rule.

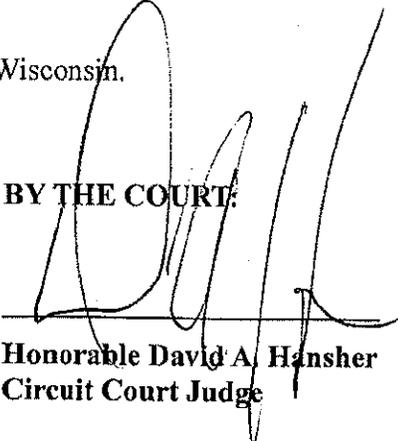
CONCLUSION

Based upon a review of the record and the briefs of the parties, the Court finds that the Board acted according to law, there was no proven impermissible risk of bias, and Schoen was afforded his due process rights. The Board is allowed to reconsider its decisions and the fact that it did so does not call the validity of its decision into question. Accordingly, the Board's decision is hereby AFFIRMED.

SO ORDERED.

Dated this 20th day of September, 2014, at Milwaukee, Wisconsin.

BY THE COURT:



Honorable David A. Hansher
Circuit Court Judge

THIS DECISION AND ORDER IS FINAL FOR THE PURPOSES OF APPEAL