

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 41

MILWAUKEE COUNTY

DANIEL J. VIDMAR,

Plaintiff,

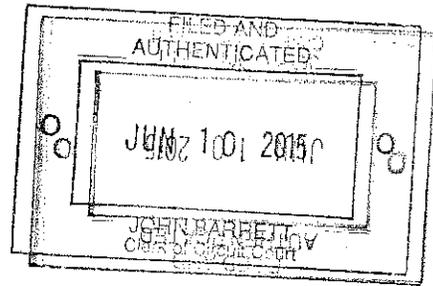
Case No. 14-CV-6481 (*certiorari*)

Case No. 14-CV-6204 (statutory)

v.

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

Defendant.



DECISION AND ORDER

INTRODUCTION

Daniel Vidmar (Vidmar) seeks judicial and *certiorari* review of a decision of the Board of Fire and Police Commissioners for the City of Milwaukee (Board) to discharge him from the Milwaukee Police Department (MPD). Vidmar argues the Board’s actions subjected him to employment double jeopardy because he had already been disciplined for wrongly obtaining a bicycle by his commanding officer, Captain Regina Howard (Howard). If employment double jeopardy does not void the Board’s actions, Vidmar contends that “just cause” does not exist to sustain his discharge. For the reasons stated below, this Court affirms the decision of the Board.

Vidmar joined the MPD in December 2004 and during his tenure primarily worked as a bicycle officer. In August 2012, Vidmar attempted to obtain one of the unclaimed citizen bicycles which was on inventory with the MPD. Vidmar alleges he

contacted the MPD's Property Control Division (PCD) and was advised a bicycle could be acquired if it went unclaimed for thirty days and someone other than Vidmar was listed as the bicycle's claimant. After waiting thirty days, Vidmar filled out a form to claim the bicycle using the name of one of his friends. Another officer recognized the name on the form, conducted a follow-up inquiry, and discovered that Vidmar was actually in possession of the bicycle.

Vidmar met with Howard, regarding the incident, although it is disputed who initiated this meeting. Howard advised Vidmar that his actions were improper and provided him with a copy of the Code of Conduct. The incident was not referred to Internal Affairs for further investigation and this one conversation would likely have marked the end of the matter if not for an anonymous letter sent to the Board complaining about how the situation had been handled. This letter triggered a more thorough investigation of the incident by the MPD.

The case was brought to the Milwaukee District Attorney's Office where Chief Deputy District Attorney Kent Lovern (Lovern) declined to criminally charge Vidmar for theft. However, Lovern did notify Police Chief Edward Flynn (Flynn) that the Milwaukee District Attorney's Office would no longer use Vidmar as a prosecutorial witness, as his actions in obtaining the bicycle necessarily raised questions about his credibility and, in Lovern's opinion, undermined Vidmar's ability to testify in future proceedings.

On January 8, 2013, Flynn, discharged Vidmar for the following violations of

MPD Rules and Procedures:

1. Core Value 3.00 – Integrity, referencing Guiding Principle 3.05: Failure to obey the laws in effect in the State of Wisconsin.
2. Core Value 3.00 – Integrity, referencing Guiding Principle 3.10: Failure to be forthright and candid on an official department report.
3. Core Value 1.00 – Competence, referencing Guiding Principle 1.02: Lacking the capacity to enforce federal and state laws, and city ordinances.

Vidmar appealed his discharge to the Board. The Board conducted two appeal hearings pursuant to Wis. Stat. § 62.50(17). With respect to the first charge, the Board found that the City did not prove by a preponderance of the evidence that Vidmar “could reasonably be expected to have had knowledge of the probable consequences” of taking an unclaimed bicycle from District 7 and dismissed this charge. With respect to the second charge, the Board found that the City proved by a preponderance of the evidence that Vidmar violated Core Value 3.00, Guiding Principle 3.10, in his falsification of an official form and sustained the second charge. However, the Board reduced the penalty as to the second charge to a 60-day suspension. With respect to the third charge, the Board found that Vidmar’s inability to be called as a prosecutorial witness was a violation of Core Value 1.00, Guiding Principle 1.02 and sustained the third charge. The Board also affirmed the discharge determining “that the good of the service requires that Vidmar be discharged.” *Record of Appeal (“ROA”), R. 65 ¶51.*

Vidmar made a timely appeal of the Board’s decision in accordance with Wis. Stat. § 62.50(20) and additionally filed a corresponding petition for a writ of *certiorari*. These appeals have been consolidated into this single action. Vidmar does not contest his

guilt as to the second charge but contests the discipline imposed under the theory of employment double jeopardy. He contests both his guilt and the discipline imposed as to the third charge.

STANDARD OF REVIEW

I. *Statutory Review*

The Court's statutory review of the Board's decision under Wis. Stat. § 62.50(21) is limited to a review of the evidence and whether that evidence supports the charges under the just cause standard. Section 62.50(21) Wis. Stat. provides: "In determining the question of fact presented, the court shall be limited in review thereof to the question: 'Under the evidence is there just cause, as described in sub. (17)(b), to sustain the charges against the accused?'" There are seven just cause standards enumerated in Wis. Stat. § 62.50(17)(b):

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 sub. 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.

Under this statutory review, the circuit court determines “whether an order of a board of police and fire commissioners is supported by the evidence.” *Gentilli v. Board of Fire & Police Comm’rs of the City of Madison*, 2004 WI 60, ¶5, 272 Wis. 2d. 1, 680 N.W.2d 335. This evidentiary review is confined to the questions of (1) whether the Board’s actions were arbitrary, oppressive, or unreasonable; and (2) whether the Board could reasonably make the determination at issue. *Id.* at ¶20.

Under a just cause standard, the Court must give deference to the Board’s findings of fact and credibility determinations. *Younglove v. City of Oak Creek Fire & Police Comm.*, 218 Wis. 2d 133, 141, 579 N.W.2d 294 (Ct. App. 1998). Therefore, Wis. Stat. § 62.50(21) authorizes only limited judicial review directed to the reasonableness of the Board’s decision. *Clancy v. Bd. of Fire & Police Comm’rs of Milwaukee*, 150 Wis. 630, 635–636, 138 N.W. 109 (1912). The function of a circuit court in a statutory appeal proceeding is to decide whether the Board performed the duty imposed upon it by law. *Id.* That the Court might have reached a different conclusion is not grounds for reversal. *Id.*

II. *Certiorari* Review

A *certiorari* action may be commenced by a person seeking judicial review of an administrative decision that adversely affected him or her. Wis. Stat. § 68.13. However, the scope of review on *certiorari* is very limited. *George v. Schwarz*, 2001 WI App 72, ¶ 13, 242 Wis. 2d 450. *Certiorari* is not a de novo review. *Van Erman v. State Dept. of Health and Human Services*, 84 Wis. 2d 57, 64 (1978). Rather, circuit court review on *certiorari* is “supervisory in nature.” *George*, 2001 WI App 72, ¶13, 242 Wis. 2d 450 (quoting *Winkelman v. Town of Delafield*, 2000 WI App 254, ¶5, 239 Wis. 2d 542).

Indeed, the circuit court is confined to reviewing the “regularity of the inferior tribunal’s proceeding,” that is, whether “the tribunal has kept within the boundaries prescribed by the express terms of the ordinance, statute or law of this state.” *Id.*

Under this limited review, the court is restricted to four inquiries with regard to the decision of the agency: (1) whether it was within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary; and (4) whether the evidence provides reasonable support for the decision. *Id.* at ¶10. Because Vidmar has a direct appeal right via Wis. Stat. § 62.50, the scope of *certiorari* review is narrowed to: (1) whether the Board kept within its jurisdiction; and (2) whether the Board proceeded on a correct theory of law. *Sliwinski v. Bd. of Fire & Police Comm'rs of City of Milwaukee*, 2006 WI App. 27, ¶ 12, 289 Wis. 2d 422, 711 N.W. 2d 271 (2006). Under *certiorari* review, there is a presumption that the Commission acted according to law and that the official decision is correct; the weight and credibility of the evidence cannot be assessed by the circuit court. *State ex rel. Ruthenberg v. Annuity & Pension Bd.*, 89 Wis. 2d 463, 473, 278 N.W.2d 835 (1979).

This Court is limited to determining whether there is substantial evidence to support the Board’s decision. *Van Erman*, 84 Wis. 2d at 64. Substantial evidence is evidence which is “relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.” *Cornwell Personnel Assoc. v. LIRC*, 175 Wis. 2d 537, 544 (Ct. App. 1993). Accordingly, on *certiorari* review, the court evaluates the record to determine whether there is sufficient substantial evidence such that reasonable minds could arrive at the same conclusion as the Board. *George*, 2001 WI App 72, ¶13, 242 Wis. 2d 450. Furthermore, the findings of fact of the Board “are

conclusive if supported by ‘any reasonable view’ of the evidence, and [the court] may not substitute [its] view of the evidence” for that of the Board. *Id.* In short, the test is whether the evidence reasonably supports the decision. *State ex rel. Harris v. Annuity and Pension Bd., Emp. Retirement System of City of Milwaukee*, 87 Wis. 2d 646, 652 (1979).

The reasonableness of the evidence is directly related to whether an agency’s decision may be deemed arbitrary. *Id.* A decision is arbitrary if it “represent[s] [the agency’s] will and not its judgment.” *Van Erman*, 84 Wis. 2d at 64. An action that requires the use of judgment, as opposed to will, entails an exercise of discretion. *Id.* An exercise of discretion is a reasoning process whereby a conclusion is reached that is “based on a logical rationale founded upon proper legal standards.” *Id.* (quoting *McCleary v. State*, 49 Wis. 2d 263, 277 (1971)). Thus, an agency that exercises its discretion using a rational basis for its decision, with a proper legal foundation, will not be found to have acted arbitrarily. *Id.*

ANALYSIS

When both a statutory appeal pursuant to Wis. Stat. § 62.50 and a certiorari proceeding are commenced, the circuit court is permitted 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, 1001, 652 N.W.2d 118. The statutory appeal will be addressed first.

I. *Statutory Review*

Vidmar argues that he was subjected to employment double jeopardy in violation of Wis. Stat. § 62.50(17)(b)4. which asks “whether the effort . . . was fair and objective.” He further contends that even if his discipline did not constitute double jeopardy, there was nevertheless no just cause to sustain the third charge (lack of capacity to enforce federal law, state law or local ordinances). In arguing lack of just cause, Vidmar takes particular issue with Wis. Stat. § 62.50(17)(b)5. and §62.50(17)(b)6. which require substantial evidence of a rule violation and a fair and non-discriminatory application of the rule.

In his brief, Vidmar claims that the concept of “double jeopardy,” as cited in arbitration cases, prevents him from being discharged. In doing so, Vidmar challenges the Board’s finding that the encounter between Vidmar and Howard did not constitute discipline. Without addressing whether double jeopardy applies to disciplinary hearings under Wis. Stat. § 62.50(17), this Court must give deference to the Board’s finding and credibility determinations. *Younglove*, 218 Wis. 2d at 141. The Board provided five rationales that, when considered together as a whole, led the Board to conclude that the conversation between Howard and Vidmar did not constitute discipline. The Board’s reasoning is set forth in paragraph 26, listing:

First, there was no written complaint or other documentation of charges against Vidmar. Second, there was no permanent record made of the incident or Howard’s response to it in Vidmar’s personnel records. (Trans. at 33) Third, Internal Affairs had no involvement in the matter. Fourth, the Police Chief, the only person in the Department with the authority to discharge or suspend an officer without pay, also had no involvement. And, fifth, Howard’s response to the misconduct seemed hasty and off-the-cuff; for instance, on Vidmar’s own account, (Ex.3), Howard informed him that it was the end of the matter immediately after she heard his side of the story, without taking any time to reflect on the best course of action or confer with others.

R. 65. The Board additionally noted in paragraph 27 that it “cannot be the case that each time [a supervisor issues a verbal correction to an employee] there has been discipline that categorically precludes additional sanctions.” *Id.*

In response, Vidmar argues that none of the rationales proffered by the Board are dispositive in their own individual right. While the Board admits as much, it is not the role of this Court to weigh evidence, but to review the reasonableness of the Board’s decision. *Clancy*, 150 Wis. at 635–636. Vidmar also contends in his response brief that the inconsistencies in Howard’s recollection of events render her testimony not credible. In particular, Vidmar notes that Howard “forgot” about a number of incidents (a preliminary investigation, having a conversation with Lt. Menzel about contacting Internal Affairs and ordering Vidmar into her office) that would have substantiated Vidmar’s claim that he was disciplined. Yet, the evidence regarding the course of events leading up to Vidmar’s meeting with Howard involves the issue of witness credibility and the Court must defer to the Board in determinations of credibility.

This Court finds that the Board considered the relevant facts and made factual findings that are supported by credible and substantial evidence in finding that the meeting between Vidmar and Howard was not disciplinary. Although none of the rationales proffered by the Board are dispositive on their own, in considering them together, the Board came to a reasonable conclusion that no discipline had occurred. The Court agrees with the Board’s determination that Vidmar was not subjected to employment double jeopardy and “all indications point to a fair and objective process,” satisfying the requirement of Wis. Stat. § 62.50(17)(b)4.

Vidmar next asserts that just cause does not exist in this case because there is not substantial evidence of his violation of Core Value 1.00, Guiding Principle 1.02 (Charge Three; lacking capacity to enforce the law). He further contends that the third charge is not being applied fairly and without discrimination against him. For the foregoing reasons, the Court finds Vidmar's arguments unpersuasive.

First, Vidmar contends that the Board erred when it reasoned that "enforcing the law" really implies working in the field, thus concluding that Vidmar was "unable, as a practical matter, to enforce the law." R. 65, ¶49. While Vidmar concedes that he was "Giglio-impaired" at the time of his discharge, he nevertheless asserts that this impairment does not, in and of itself, preclude him from testifying in court.¹ Further, Vidmar points to the desk-work he did after his suspension as demonstrating his continued capacity to enforce the law and serve the MPD.

This Court generally agrees with the position of the Board that "for a police officer, 'enforcing the law' really implies working in the field—patrol, investigation, arrests, and the like." R. 65, ¶49. "Enforcing the laws" is the broad spectrum of what a police officer may be called upon to do, among which are the responsibilities the Board labels "working in the field." It is the position of this Court that the capacity to "enforce the laws" is the capacity to engage in the full spectrum of responsibilities an officer could be called upon to undertake and one of the most critical responsibilities is giving testimony in court that is worthy of belief. If an officer's capacity to work in the field, which includes giving credible testimony in court, has been permanently compromised,

¹ Vidmar is referring to the mandates of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

then his ability to engage in the full spectrum of responsibilities of a police officer has also been compromised. Thus, he cannot be said to have the capacity to enforce the laws.

The Court does not disagree with Vidmar's contention that he remained a contributing member of the MPD while assigned to desk duty, however, the Court does not find this makes up for his inability to conduct field work and give believable testimony in court. It is not the best use of the MPD's resources to retain an officer to do non-police work indefinitely when, as noted by the Board, "there are other employees available to do this sort of work, including civilians, police aids, and officers in temporary disability or suspension of police powers." R. 65, ¶51.

The Board provides "substantial evidence" that Vidmar lacks the capacity to enforce the law because he will no longer be called as a witness by the Milwaukee County District Attorney, nor by the City Attorney's Office. In referencing the August 6, 2013 letter sent by Lovern to Flynn, the Board noted that "whatever the wisdom of its decision, the DA's Office has decided that Vidmar's credibility has been so badly compromised that he will not be used as a witness by that Office in the future." R. 65, ¶46. Next, referencing the two letters sent by Assistant U.S. Attorney Paul Kanter to Lieutenant Derrick Harris of the MPD Internal Affairs, the Board finds that the evidence establishes that the U.S. Attorney's Office may continue to use Vidmar as a witness but that the "present incident would have to be disclosed to defense counsel and that Vidmar's 'severe credibility issues' would have to be considered by that Office on a case-by-case basis." *Id.* Lastly, the Board concludes that the evidence (a MPD Memorandum from Police Lieutenant Johnny Sgrignuoli regarding his meeting with Chief Deputy City Attorney Rudolph Konrad) also establishes that the City Attorney's office "would not

rely on or call on [Vidmar] as a witness in a case pending in municipal court” because the bicycle incident would render him a non credible witness. *Id.* (citing Ex.14).

“Substantial evidence’ is evidence of such convincing power that reasonable persons could reach the same decision as the board.” *Oneida Seven Generations Corp. and Green Bay v. City of Green Bay*, 2015 WI 50 ¶47, ___Wis.2d___. This Court finds that there is sufficient evidence that a reasonable person could conclude that Vidmar’s inability to “be called on to testify in support of his arrests and investigations except possibly and in deeply impaired ways by the U.S. Attorney’s Office” renders himself “unable, as a practical matter, to enforce the law.” R. 65, ¶¶47, 49.

In arguing that the third charge is not being applied fairly and without discrimination in violation of Wis. Stat. § 62.50(17)(b)6., Vidmar does not contend that the investigation was unfair but that he was treated differently. More specifically, Vidmar asserts he was treated differently from Officer Kurt D. Kezeske (Kezeske). In its decision, the Board notes that Flynn discharged Kezeske on the same theory of incapacity (inability to be called as a prosecutorial witness) but that the Board overturned that decision.

The Board justifies its decision to overturn Kezeske’s discharge by noting that “the City failed to produce a clear statement from the DA’s Office, as it did [in the Vidmar case], that Kezeske would not be called to testify in the future.” R. 65, ¶50. The Court finds Vidmar’s case is distinguishable from Kezeske’s case. Furthermore, it is important to note that the sixth just cause standard does not inquire whether *the Board* has acted in a non-discriminatory manner, but “whether *the chief* is applying the rule or order fairly and without discrimination against the subordinate.” Wis. Stat. §

62.50(17)(b)6. (emphasis added). The relevant inquiry is thus: “Did Chief Flynn apply Core Value 1.00, Guiding Principle 1.02 fairly and non-discriminatorily in discharging Officer Vidmar?” The Board notes that the evidence establishes Flynn discharged Kezeske for the same rule violation and based on the same reasoning as in his discharge of Vidmar. The Court therefore agrees with the Board that the third charge was applied fairly and without discrimination.

II. *Certiorari Review*

In this case, Vidmar does not assert that the Board exceeded its jurisdiction in making its decision. For the *certiorari* review, Vidmar only contends that the Board failed to proceed on a correct theory of law. On this point, Vidmar reiterates his argument that he was subjected to employment double jeopardy and that just cause does not exist to sustain the third charge which is in violation of due process.

As previously stated, on *certiorari* review, the Court is limited to determining whether there is substantial evidence to support the Board’s decision to discharge Vidmar. The Court already considered whether there was substantial evidence to support the Board’s decision, starting at page 7, above, and determined that there was substantial evidence. The Court will not repeat it here.

Based on the record before it, the Court finds that:

- 1) MPD’s actions did not violate Vidmar’s right to due process.
- 2) There was substantial evidence that Vidmar was not punished by Howard, and therefore not subjected to employment double jeopardy.

- 3) There was substantial evidence that Vidmar violated Core Value 1.00, Guiding Principle 1.02 (Charge Three; lacking capacity to enforce the law) and that this third charge was applied fairly and non-discriminatorily.

The record reveals that the decision of the Board resulted from:

- 1) An exercise of its discretion using a rational basis for its decision;
- 2) A reasoning process based on a logical rationale founded upon proper legal standards.

The record reveals that the decision of the Board represented its judgment, not its will and therefore, for the reasons set forth above, this Court finds that the Board acted according to law during the proceeding.

CONCLUSION

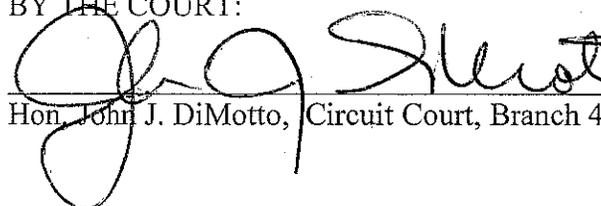
There is no dispute that Vidmar was a “good officer” with a “commendable record of service to the Department and the people of Milwaukee.” *Record on Appeal (“ROA”), R. 65, ¶ 1.* However, based upon a thorough review of the record, and for all the reasons stated above;

IT IS HEREBY ORDERED that the decision of the Board of Fire and Police Commissioners for the City of Milwaukee to discharge Vidmar for his violation of Core Value 1.00 – Competence, referencing Guiding Principle 1.02: Lacking the capacity to enforce federal and state laws and city ordinances is hereby **affirmed**.

THIS IS A FINAL DECISION AND ORDER FOR THE PURPOSES OF APPEAL.

Dated at Milwaukee, Wisconsin, this 10th day of June, 2015.

BY THE COURT:


Hon. John J. DiMotto, Circuit Court, Branch 4

