

scheduled a trial upon return made by the Board pursuant to Wis. Stats. 62.50(20) et seq., and that trial took place, with the parties' agreement, on January 26, 2022.

The Court has considered the record, the briefs of the parties, and argument by counsel. For the following reasons, Petitioner's statutory appeal and request for certiorari are denied.

STATEMENT OF FACTS

On June 17, 2020, Milwaukee Fire Department Chief Mark Rohlfiing filed a complaint with the Board, seeking to terminate Peden from his position as a heavy equipment operator following an investigation by Assistant Chief Aaron Lipski. (Dkt. 3 at 4-10.) Rohlfiing asserted that Peden had violated various orders relating to service during the June 2020 protests occurring throughout Milwaukee. (Id. at 9.) Specifically, Rohlfiing alleged that on June 5, 2020 Peden was ordered to transfer to a different station, but threatened to "lay up" (or call in sick) if he was made to transfer, and refused to follow the order. (Id. at 8-9.) Peden was not released on approved leave, but rather left his post absent without leave. (Id. at 9.)

On June 5 a "rally command" – a mobile emergency command structure – was in place due to civil unrest. (Dkt. 9 at 37, 92.) The civil unrest created stress for the MFD, and required additional planning and management to ensure that resources were in the right locations to keep MFD personnel safe and respond appropriately to emergency calls. (Id. at 90.) The June protests involved both vehicles and pedestrians, and grew, ebbed and flowed without prior notice. (Id. at 158.) This required the evacuation and relocation of several fire stations. (Id. at 93.)

Carlos Correa-Volkman, who was assigned as acting lieutenant on Med 15 with Peden on the night of June 5, 2020, stated that Med 15 received an order to relocate from

Engine 11 to Engine 12 to avoid being prevented by nearby groups of protesters from being able to answer emergency calls. (Dkt. 3 at 117; Dkt. 9 at 35-39.) Assistant Chief David Vostis added that the order to relocate to Engine 12 came from him and from Assistant Chief Lipski, and was communicated to Correa-Volkman by Battalion Chief Michael Cieciva. (Dkt. 3 at 120.)

Peden told Correa-Volkman he would not go to Engine 12 because of issues he had with Jason Strzelecki, who was scheduled to be at that station. (Id. at 117; Dkt. 9 at 39-40.) Peden further told Correa-Volkman that he would “be laying up,” or using sick leave, if required to go to Engine 12. (Dkt. 9 at 41-42.) However Peden did not state that he was actually ill at the time, or that he would be incapable of doing his job if assigned to Station 12. (Id. at 41-42, 70.) Correa-Volkman testified that he has never before heard of a firefighter refusing to follow a direct order. (Id. at 45-46.)

After being unable to discuss the situation with his assigned battalion chief, Cieciva, Correa-Volkman called Battalion Chief Gardner to discuss the situation. Gardner stated Med 15 could go to Station 7 instead of Station 12. (Id. at 43-46.) Shortly thereafter Correa-Volkman was able to speak to Cieciva, who indicated that he would have a face to face discussion about the matter at Station 7. (Id. at 48.)

Battalion Chief Cieciva testified that, at Station 7, he repeatedly gave Peden a direct order to move Med 15 to Station 12, but Peden responded that he would go home instead. (Id. at 108-110.) Cieciva explained to Peden that a temporary relocation to Engine 12 was necessary to avoid being placed in an unsafe situation by protesters, and that Med 15 would be returned to its usual assignment as soon as possible. (Id.; Dkt. 3 at 120.) Cieciva further told Peden that he could remain in his rig while at Engine 12. (Id.)

Peden refused to follow Ciecwiwa's direct order to change posts, and Ciecwiwa sent him home unpaid. (Dkt. 3 at 120; Dkt. 9 at 110.)

Peden did not tell Ciecwiwa that he would be unable to do his job, that there was a safety concern if he went to Station 12, or that he was sick. (Dkt. 9 at 110-11.) While driving back to Station 11 with Ciecwiwa to get his car, Peden talked about his belief that various MFD personnel had wronged him and that he should not have to sit in his truck in order to avoid contact with them. (Id. at 120.) The Commission found Ciecwiwa's testimony concerning his discussion with Peden to be more credible than Peden's testimony. (Dkt. 3 at 164.)

Ciecwiwa testified that it is extremely important that firefighters follow orders. (Dkt. 9 at 98.) Plans for how to safely deploy resources are made at high levels based on information about the situation throughout the city, and there is not generally time to explain the basis for orders to everyone receiving them. (Id. at 97-98.) Following orders can be a life or death matter, for firefighters and for citizens, and the placement of Med 15 at Station 7 instead of 12 compromised responsive readiness. (Id. at 98, 105.)

Ciecwiwa testified that he is not aware of any other occasion where an MFD employee was permitted to use sick leave during a shift to avoid following an order, or where a person was permitted to ignore an order to avoid working with somebody else. (Id. at 112.) This is the first time in Ciecwiwa's experience that a firefighter has refused to follow a direct order. (Id. at 155.) Ciecwiwa told Peden that he was writing him up for violation of a direct order. (Id. at 121.)

Ciecwiwa instructed Correa-Volkman to drive Med 15 to Station 12, and took Med 15 out of service until another paramedic could be assigned to it. (Id. at 50-51.)

After the incident, Peden stated in an email report that the assignment to Engine 12 created a mental health burden and that his “brain snapped.” (Dkt. 3 at 123.) In a separate report, Peden characterized himself as a PTSD survivor. (Id. at 126.) He stated that his concern with going to Engine 12 stemmed from a belief that Strzelecki had framed him for a crime in the past, and would be motivated to do something to him based on Peden’s plans to sue Strzelecki. (Id. at 127.) Peden testified that he was aware that he was breaking a rule when he disobeyed the order to relocate, and that he expected to be disciplined. (Dkt. 9 at 235.)

Peden’s psychotherapist, Jay Schrinsky, testified that Peden suffers from post-traumatic stress disorder. (Id. at 218.) Nevertheless, Schrinsky stated that he believes Peden is able to perform his job effectively, and does not believe Peden requires formal accommodations. (Id. at 218-219.) Schrinsky testified that Peden was able to follow his superior’s direct orders on June 5, although to do so was not in Peden’s “best interest.” (Id. at 222.)

Assistant Chief Aaron Lipski testified that it was particularly important for fire department personnel to follow orders on June 5, 2020, because of safety concerns related to the ongoing protests at that time and because a separate command and task force had been established to respond to the protests. (Id. at 159-160.) Lipski is not aware of other circumstances where an MFD employee asked to be allowed to take sick leave during a shift due to a conflict with another employee, but is aware of other situations where an employee has been allowed to go home during a shift due to a stressful situation. (Id. at 203.) However the purpose of the department’s sick leave policy is not to

allow personnel to leave duty at any time, but rather to allow people who have fallen ill or been injured to go home or seek medical care. (Id. at 204.)

Lipski conducted an investigation in which he reviewed Correa-Volkman and Ciecwiwa's reports. (Dkt. 9 at 163-165.) Additionally, Lipski testified that he read Peden's own 105 Report, in which Peden explained his reasoning for disobeying orders. (Id. at 166-168.) Lipski also discussed the incident in person with Ciecwiwa prior to deciding to recommend charges. (Id. at 165-169.)

Milwaukee Fire Department Chief Rohlfing made the decision to terminate Peden's employment based on the information developed during Lipski's investigation. (Id. at 170.) Rohlfing alleged that Peden violated the following Department rules:

1. Rule 20.1: It is the duty of all members of the department to support the Constitution of the United States of America and the Constitution of the State of Wisconsin; obey and enforce all the laws of the United States, the State of Wisconsin, the Ordinances of the City and County of Milwaukee, and the rules and regulations of the department; obey all of the lawful orders of superior officers and faithfully discharge the duties of said office to the best of their ability in the conduct of their duties and while off duty, Violation of laws, ordinances, the MFD Code of Conduct, rules, regulations, notices, orders, etc.; conviction of violation of the law or governing bodies is considered a violation of these rules and subjects offenders to department charges and penalties. It is members' responsibility to become familiar with the laws, ordinances, the MFD Code of Conduct, rules, regulations, notices, orders, etc. relating to the department, and particularly to their respective positions, and no plea of ignorance will relieve members from responsibility for their actions.

2. Rule 20.2: In matters of general conduct not within the scope of formal writings, members are governed by the ordinary rules of good behavior expected of all law-abiding citizens. Conduct which brings reproach or unfavorable reflection on the department, failure to respect the proper orders of any agent of the law, untruthfulness, insubordination, misconduct, or resisting lawful arrest, is

considered a violation of these rules, and subjects offenders to department charges and penalties.

3. Rule 20.4: Obedience to the order of a superior in rank must be faithfully observed. Members being subordinate, not obeying such order(s), will be held strictly accountable, unless the order has been properly countermanded. Officers are to transmit orders clearly, and if possible, attempt to determine if they have been received and are understood. Officers, under no circumstances, are to exceed their authority in giving orders. Officers giving orders which cause harmful results will be held liable. Subordinate members, acting in obedience to such orders, will be protected against any penalty, provided it appears to the satisfaction of the Chief that no collusion to commit a wrong existed between the parties, and that the order thus erroneously given was not obviously wrong to a person of ordinary judgment.

4. Rule 20.5: Members are to give due respect to officers of a higher rank, and address them by their proper titles. Acting officers are to be accorded the same consideration as regular officers.

5. Rule 22.7: The hours of duty will be in accordance with existing federal guidelines, City Ordinances, union agreements, and arranged as determined by the Chief. In cases of emergency, the Chief is empowered to make exceptions to the normal procedures. Members not arriving on time for their scheduled assignment are subject to the tardy/AWOL policy.

Members are not to leave their posts of duty unless properly relieved from their work shift.

Members, individually, are not to leave the firehouse at any time without permission granted through a management-approved release or emergency leave, approved pre-arranged time off utilizing members' earned credit, or an exchange of approved work periods (trades). Such changes in work schedule must be properly approved, documented in the firehouse, and recorded appropriately according to current reporting requirements.

6. Rule 23.2: Whenever department members are unfit for, or fail to perform their duties due to incapacity, neglect of duty, or for any other reason (except injury or sickness

which has regular documenting procedures), it is the responsibility of the members' immediate officer/supervisor to submit a complete and detailed report to the Chief.

7. Rule 25.4: Any unexcused absence must be immediately reported through the chain-of-command by members' immediate supervisor to the Chief. An unexcused absence from duty of greater than two (2) hours is considered Absent Without Leave (A.W.O.L.).

8. Rule 25.6: Members not physically or medically qualified to perform their duties could be eligible to be placed on sick leave as provided for in the City Code. The Chief reserves the right to determine whether or not members meet the requirements of the ordinance, and whether or not members have submitted the timely and complete documentation required to qualify for paid sick leave.

Members requesting sick leave must notify their immediate supervisor directly, and no later than one hour before their shift begins. Members returning from sick leave must notify their immediate supervisor directly, and no later than one hour before their shift begins.

9. Core Value 6 ("CV 6"): Members will obey department rules, local ordinances, and state and federal laws, whether on-or off-duty. Members in violation of same in any jurisdiction are to report the violation to their supervisor as soon as practicable.

10. Guiding Principle Competence 1: Members are prudent stewards of the public's grant of authority and resources. Members are accountable for the quality of their performance and the standards of their conduct. Members are exemplary leaders and exemplary followers

11. Guiding Principal Competence 2: Members cooperate with colleagues, agencies, and citizens to ensure fire safety and appropriate medical care. Members work to improve the quality of urban life.

12: Guiding Principal Competence 3: Members will render service to the community promptly and efficiently. When not answering calls for service, members will use their time to accomplish the mission of the department.

13. Guiding Principal Accountability 1: Members will be accountable in the acknowledgement and assumption of responsibility for actions, decisions, and policies including administration, governance, and implementation within the scope of their positions, and encompassing the obligation to report, explain, and be answerable for resulting consequences.

14. Guiding Principal Accountability 2: Members will accomplish work and assignments given to them from verbal or any form of written orders, in a complete, timely, and professional manner.

15. Guiding Principal Leadership 2: Members will work together and set an example that embodies respect, compassion, integrity, and efficiency.

16. Guiding Principal Leadership 5: Members will be role models for delivering truly professional, impartial, and effective service. Members must put the department's mission first, in both word and action, and do nothing to interfere with its accomplishment.

17. Standard Operating Guideline (SOG) 35.7: Once the Hot Zone is identified, an evaluation will need to be made by Car 3 as to Fire Stations adversely affected or at risk. If any stations are considered at risk, Car 3 is to transfer the affected company to a location outside of the Hot Zone.

(Dkt. 3 at 4-8.)

Fundamentally, however, Peden was discharged due to his failure to follow a direct order, which required a paramedic unit to be taken out of service for a period of time. (Dkt. 9 at 205-206.)

The president of the firefighter's union, Captain Michael Bongiorno, testified that while he does not recall any firefighters being terminated as a result of being AWOL, (Id. at 229), a member of the fire department who refused to obey a direct order could expect to be disciplined including, depending on the situation, being discharged. (Id. at 230.)

The Board sustained Peden's dismissal from his position, finding that there was

“just cause” for termination. (Dkt. 3 at 152.) Now, Peden appeals.

STANDARD OF REVIEW

Petitioners appealing a Board decision have two options: an appeal under Wis. Stat. § 62.50 and request for certiorari review. Petitioners may seek both methods of review simultaneously, which Peden has done here.

Certiorari Review

The scope of certiorari review is typically limited to whether the Board (1) acted within its jurisdiction; (2) proceeded on a correct theory of law; (3) was arbitrary, oppressive or unreasonable; or (4) might have reasonably made the order or finding it made based on the evidence. *Antisdel v. City of Oak Creek Police & Fire Comm'n*, 2000 WI 35, ¶ 13, 234 Wis.2d 154. However, when an individual pursues both a request for certiorari and a statutory appeal, the analysis is limited to whether the Board acted within its jurisdiction and whether it proceeded on a correct theory of law. *Sliwinski v. Board of Fire and Police Com'rs of City of Milwaukee*, 2006 WI App ¶ 11, 289 Wis.2d 422.

Review Under Wis. Stat. § 62.50

Wisconsin Statute § 62.50 governs statutory appeals for Milwaukee police officers. The court’s only inquiry on such an appeal is whether, with the evidence presented, there was just cause for the determination made by the Board. Wis. Stat. § 62.50(21). Just cause consists of seven factors:

- 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.

Wis. Stat. § 62.50(17)(b).

The Board's review in this case is intended to be the "main event" for an officer's appeal, and not a "tryout" for further appeals. *See Younglove v. City of Oak Creek Fire & Police Comm.*, 218 Wis.2d 133, 141 (Ct. App. 1998) (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985)). The Court does not apply a *de novo* standard of review, but instead looks to see if "the Board's decision is supported by the evidence that the Board found credible." *Younglove*, 218 Wis.2d 133, 138-139 (Ct. App. 1998). The purpose of the review statute is to ensure that courts simply determine "whether the board had performed its statutory duty and made a reasonable decision upon the evidence, i.e. had acted not necessarily wisely but as reasonable men [and women] upon the evidence placed before them." *Clancy v. Bd. of Fire & Police Com'rs of Milwaukee*, 150 Wis. 630, 635-36 (1912).

ANALYSIS

In reaching its conclusion, the Board relied on testimony from Peden, Acting

Lieutenant Correa-Volkman, Peden's former criminal defense attorney Rebecca Coffee, Chief Cieciva, Assistant Chief Aaron Lipski, Dr. Jay Schrinky, and Captain Michael Bongiorno. (Dkt. 3 at 146.)

Certiorari Review

Peden did not address his request for certiorari review in either his opening or reply briefs,¹ other than to note that certiorari review may appropriately be pursued together with statutory review. (Dkt. 29 at 11.) Accordingly, Peden has abandoned his request for certiorari review. Moreover, the record does not support a conclusion that the Board acted outside its jurisdiction or did not proceed on a correct theory of law. *See Sliwinski v. Board of Fire and Police Com'rs of City of Milwaukee*, 2006 WI App ¶ 11, 289 Wis.2d 422.

Just Cause Analysis

Peden focuses his argument on the contention that there was not just cause for dismissal under Wis. Stat. § 62.50. On review, however, the seven just cause factors clearly support the Board's decision. Each factor will be discussed in turn.

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

The Board found that “[a] reasonable member of the MFD could be expected to know that disobeying a direct order from a Battalion Chief would be a violation of department rules and result in discipline.” Peden argues that the Board “misses the point” in this finding, arguing that the question is whether *Peden specifically* could have had

¹ The January 26, 2022 hearing in this case was limited to the trial to the Court on the statutory review, as provided for in Wis. Stat. § 62.50.

knowledge of the consequences of his actions, including that a consequence could be termination. (Dkt. 26 at 11.)

The applicable standard is not subjective, rather Peden's state of mind is judged based on that of a reasonable person in his situation. The evidence in the record supports the Board's finding that Peden could reasonably be expected to know that his refusal of a direct order would result in termination.

The MFD faced significant pressure on June 5, 2020, due to citywide demonstrations over multiple days. In the midst of those demonstrations, Peden was given a direct order to relocate to Engine 12, for his own safety and to ensure that the approaching demonstration would not hamper his ability to respond to emergencies. Cieciva repeated this order to Peden several times, and made clear that Peden would be in violation of a direct order if he failed to comply. Refusal to follow a direct order of a superior is a significant event – both Correa-Volkman and Cieciva testified that they have no recollection of another occasion when an MFD employee has refused to follow an order. Peden expected to be disciplined for breaking a rule when he disobeyed the order to relocate, and his union president stated that a firefighter who refuses a direct order can expect to be terminated in certain situations.

Peden notes Lipski's testimony that Peden would not reasonably expect to be terminated as a result of asking to take sick leave. (Dkt. 26 at 11.) However Peden was not terminated due to a request to take sick leave, but rather a refusal to follow a direct order to relocate to a different station. The Board found credible Cieciva's testimony that Peden did not tell him he was sick or could not work, but rather that he wanted to go

home to avoid working with another individual.² The record also established that sick leave is intended to be used due to illness or injury, not to avoid a task or order an individual finds distasteful or unusually difficult. Lipski's testimony is not pertinent to the Board's decision.

The record supports the Board's determination on the first just cause factor.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

The Board heard extensive testimony concerning the need for MFD personnel to follow orders, and found that the rules "are necessary to maintain the operational efficiency, integrity, and professionalism of the MFD."

Peden has not presented any evidence contradicting this finding, but argues that the reasonableness of the rules should be evaluated in light of Peden's "emotional reaction given his unique circumstances." (Dkt. 26 at 14.) However Peden's therapist testified that, while Peden suffers from PTSD, he does not require formal accommodations in order to do his job effectively. The therapist further testified that Peden was able to follow his superior's orders on June 5. There is no evidence in the record that Peden disclosed his diagnosis to his superiors, or requested an accommodation beyond an informal request to avoid overlap with other MFD personnel.

The record does not establish that Peden was entitled to a be excused from application of the rules, and the record supports the Board's finding concerning the second just cause standard.

² This Court will not disturb evidence the Board found credible. *See Younglove*, 218 Wis. 2d 133, 138-39.

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.

The Board found that Chief Lipski made a reasonable effort to investigate the facts surrounding the violation. Peden argues that Lipski's investigation was "imperfect" because Peden was not given the opportunity at his disciplinary meeting to explain what had occurred. (Dkt. 26 at 15.) Although he did not make a statement at that meeting, after discussions about having him do so "disintegrated," (Dkt. 9 at 184), Peden already had provided ample written information. (Id.)

Lipski consulted eyewitness reports, discussed findings in person with Cieciewa, and consulted Peden's own report prior to filing charges. (See Dkt. 9 at 163-168.) Lipski testified that he sought clarification where needed, and decided to file charges against Peden for subordination. (Id. at 169.) The Court is satisfied that Lipski made a reasonable effort to investigate.

4. Whether the effort described under subd. 3. was fair and objective.

Peden argues that the Board failed to consider, in its analysis of whether the investigation was fair and objective, the stress created by earlier criminal allegations made against him by coworkers and the ensuing investigation. Peden also argues that he was denied the opportunity to be heard as to his version of events. However, Peden filed an internal memorandum about the criminal investigation that Lipski considered during his investigation. (Dkt. 9 at 166-167.) While Peden devotes considerable space in his briefs to discussion about what he characterizes as an unfair investigation into sexual harassment claims that began in 2017, there is no indication that the sexual harassment investigation colored the 2020 investigation into Peden's insubordination. The record reflects that the MFD was not biased toward Peden and, indeed, that Peden's superiors

made significant efforts to accommodate him on June 5 and avoid the need for discipline.

The Board appropriately found that the investigation 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.

Peden argues that the Board did not properly consider the testimony of his psychologist, Dr. Schrinky, in determining that Peden violated the rules and orders given to him. However, the Board discussed Dr. Schrinky's testimony at length in its decision, including his testimony that Peden was capable of following the assistant chief's order.

Peden himself testified that he knew he was violating an order when he refused to go to Station 12, and that he may be subject to discipline as a result of doing so. The Board found that Peden could have complied with the order while protecting his own mental well-being by separating himself at the station, including by staying in his own rig to avoid interacting with Strzelecki. There is substantial evidence to conclude that Peden violated MFD rules and his superior's orders.

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

With regard to this factor, Peden argues that he was treated differently than other firefighters who have asked to lay up due to personality conflicts or a general desire to avoid an order, noting Bongiorno's recollection of a prior occasion where a member of the MFD was allowed to take unpaid time off to avoid a personality conflict with another employee. (Dkt. 26 at 18.)

The record in this case indicates that Peden's desire to avoid working with certain individuals was generally respected. That was not practical on June 5, when Peden declined to follow a direct order to temporarily relocate to Engine 12 while finding a way to separate himself from other personnel there. There is no evidence in the record that

other MFD personnel have been permitted to use sick time to avoid unwanted contacts with co-workers, or that others have been permitted to refuse to follow orders during a citywide emergency. The evidence supports the Board's finding on this factor.

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.

Finally, Peden argues that his termination from his position was disproportionate to the alleged violation, particularly because he had an excellent discipline record prior to the incident. Additionally, Peden attempts to shift blame for his insubordination by arguing that the MFD was required to permit him to lay up at any time without explanation. (Dkt. 26 at 18.)

To the contrary, Peden's violation was a serious one, and Peden could have taken steps to avoid the conflict that led to it. As already discussed, June 5, 2020 was not a normal day for the MFD, which was working to address civil unrest due to citywide protests. Command sought to transfer Peden to avoid having his rig blocked into the fire station by protests, which would have rendered him unable to respond to emergency calls. Witnesses discussed the importance of following orders as given during such emergency circumstances, and that the outright refusal to follow a superior's direct order is an exceedingly unusual circumstance. Peden's actions were serious enough to overcome his prior record of good service.

Accordingly, all seven of the just cause factors support Peden's termination.

CONCLUSION

For the foregoing reasons, the decision of the Board is affirmed.

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