BY THE COURT:

DATE SIGNED: December 13, 2021

Electronically signed by Honorable Carl Ashley
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 33 MILWAUKEE COUNTY

NIKOLAS B. ZENS,

Petitioner,

v.

Case Nos. 21-CV-602
21-CV-1915

CITY OF MILWAUKEE
BOARD OF FIRE & POLICE
COMMISSIONERS,

Respondent.

DECISION AND ORDER

On January 20, 2021, Petitioner, Nikolas B. Zens ("Mr. Zens") filed a statutory appeal under Wis. Stat. § 62.50 of a decision by Respondent, City of Milwaukee Board of Fire and Police Commissioners ("the Board"), to sustain the charges against him which resulted in his discharge from the Milwaukee Police Department ("the Department"). Mr. Zens also filed a Petition for Writ of Certiorari. Both appeals have been consolidated and are now before this Court. The Court has reviewed the record, evidence, and arguments, and for the reasons set forth herein, AFFIRMS the Board's decision.

BACKGROUND

Mr. Zens became a police officer with the Department in December 2017. The incident that led to Mr. Zens being terminated from the Department occurred on September 8, 2019. At approximately 1:13 am on that date, Department policer officers attempted to stop a vehicle

driven by Kevin Brown ("Mr. Brown"). Mr. Brown fled from police for 19 minutes and reached speeds between 65 and 70 miles per hour. Mr. Zens and his partner learned of the pursuit after it was broadcast over the radio. Mr. Brown crashed his car and reversed into a pursuing squad car. He eventually exited his car and fled on foot. As Mr. Zens and his partner approached the pursuit area, they noticed Mr. Brown running across the front yards of houses. Mr. Zens began pursuing Mr. Brown on foot and noticed that Mr. Brown was keeping his hands in front of him under his shirt. This indicated to Mr. Zens that Mr. Brown may have been armed. Mr. Zens repeatedly asked Mr. Brown to stop and to show him his hands. Mr. Brown ignored these requests. Mr. Brown then ran towards a house located at 3222 N. 26th Street, rounded the corner, and attempted to enter in the back door. Mr. Zens was following about ten feet behind Mr. Brown and it was very dark. Mr. Zens stated that he lost sight of Mr. Brown for half a second. *See Dkt. #15, No. 39 at 5.* As Mr. Brown tried to enter the back door, Mr. Zens again shouted to Mr. Brown to show him his hands. Mr. Zens at the same time noticed another person in the doorway, later identified as Tari Davis ("Mr. Davis"). Both people were backlit by an interior light in the house. Mr. Brown then turned towards Mr. Zens and appeared to extend his arms that caused Mr. Zens to believe that Mr. Brown was aiming a firearm at him. Mr. Zens fired a single shot. After Mr. Zens fired the shot, both Mr. Brown and Mr. Davis fell to the ground. Mr. Zens did not hit Mr. Brown, and instead the shot hit Mr. Davis in the upper leg, injuring him.

Department police officers are required to comply with the law enforcement standards promulgated by the Wisconsin Law Enforcement Standards Board ("LESB"). Mr. Zens was charged with two specifications. Under the first specification, Mr. Zens was charged with failing to abide by the foot pursuit procedures in the LESB Tactical Response Training Guide ("TRT Guide"). Mr. Zens received a twenty day suspension for this charge ("Charge 1"). He is not contesting Charge 1 in his appeal. Under the second specification, Mr. Zens was charged ("Charge 2") with failing to comply with Department Code of Conduct SOP (Standard Operating Procedure) Section 460.10(A)(B), which refers to the LESB's Defense and Arrest Tactics Guide ("DAAT Manual"). Under Charge 2, Mr. Zens was discharged from the Department. The DAAT Manual states that when a police officer has justification for using deadly force the officer must fulfill the following requirements before discharging his or her weapon: (1) target acquisition; (2) target identification; and (3) target isolation. The third requirement is at issue here, which requires the officer to place themselves in a position so they can shoot the target without the

danger of harming innocent people. The DAAT Manual recognizes one exception to the target isolation requirement called the "greater danger exception" ("GDE"). The GDE allows an officer to shoot without first having Target Isolation if the consequence of not stopping the threat would be worse than hitting an innocent person.

After the shooting, the first investigation was conducted by the Milwaukee County District Attorney's Office. Chief Deputy District Attorney Kent Lovern issued a letter dated February 18, 2020 summarizing the investigation's findings. Attorney Lovern stated in the letter that the evidence supported Mr. Zens' reasonable decision making because Mr. Brown raising his arms outwards could reasonably be believed to have been raising a weapon. The letter concluded that the District Attorney's office would not take any further action.

The second investigation was conducted by the Milwaukee Police Department Internal Affairs regarding whether Mr. Zens violated Department rules. Sgt. Vynetta Norberg ("Sgt. Norberg") was the primary investigator. Sgt. Norberg conducted an interview with Mr. Zens in which he stated that he should have stopped when he lost sight of Mr. Brown. Sgt. Norberg also reviewed interviews with Mr. Davis and Mr. Brown. Mr. Brown stated that as he was running, his hands were in front of him because he was attempting to place his cell phone in his pocket. Mr. Davis was Mr. Brown's girlfriend's father. Mr. Davis spoke with Mr. Brown over the phone during the pursuit and told Mr. Brown to pull over. He then advised Mr. Brown to come to his house to make sure that the police behaved appropriately during the arrest. Sgt. Norberg also reviewed a memorandum from Sgt. Allen Groszczyk ("Sgt. Groszczyk"), the Department range master. Sgt. Groszczyk stated that while Mr. Zens did not have proper target isolation, the shooting was justified by the GDE. Sgt. Groszczyk stated that Mr. Zens did not know Mr. Brown's motive in attempting to enter Mr. Davis's home and it could be reasonable to see a greater danger if Mr. Zens did not fire.

Lt. Liam Looney ("Lt. Looney") reviewed Sgt. Norberg's investigation and report and summarized his findings in a report dated July 13, 2020. Lt. Looney concluded that while Mr. Zens' actions were not unlawful, they failed to comply with Department policy. Lt. Looney cited Mr. Zens' failure to comply with proper foot pursuit procedures which placed him in a position of risk. Specifically, Lt. Looney stated that Mr. Zens "failed to meter a corner while chasing [the] suspect whom he lost sight of, putting himself at risk. Because he did not stop after he lost sight

of the suspect nor did he keep a reaction distance, which would have allowed him to disengage." *See Dkt. #15, No. 39 at 5.* Lt. Looney found that Mr. Zens' actions went against Department and LESB training. Chief Alfonso Morales issued his discipline after reviewing the evidence and Mr. Zens was charged with two specifications as stated above.

Mr. Zens appealed his discipline to the Board and hearings were held in December 2020. After reviewing the evidence and hearing the testimony from various witnesses, the Board affirmed Chief Morales' discipline against Mr. Zens. The Board's written decision was completed on January 5, 2021. Two Board members signed the decision on that date, but the third member did not sign it until January 14, 2021. The Board concluded that Mr. Zens violated both the TRT Guide's foot pursuit procedures and the DAAT manual's firearm target requirements. The Board accepted the opinions of Lt. Looney and Inspector Formolo as more credible, who both stated that the GDE did not apply. The Board found that the discipline was appropriate given that Mr. Zens shot and injured and innocent person. The Board also considered a prior incident, where Mr. Zens yelled "I'm going to shoot you" at a fleeing suspect in a different foot pursuit. The Board found that the discharge and suspension were appropriate. Mr. Zens now brings both statutory and certiorari appeals.

STANDARD OF REVIEW

Police Officers appealing a board decision have two options: an appeal under Wis. Stat. § 62.50 and an appeal via common law certiorari review. Officers are permitted to bring both forms of appeal at the same time.

Statutory Appeal

Under Wis. Stat. § 62.50, the court's only inquiry is whether, with the evidence presented, there was just cause for the determination made by the board. Wis. Stat. § 62.50(21). Just cause is defined as comprising 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 is intended to be the "main event" for an officer's appeal, and not a "tryout" for further appeals. *Younglove v. City of Oak Creek Fire & Police Comm.*, 218 Wis. 2d 133, 141, 579 N.W.2d 294 (Ct. App. 1998) (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985). Wisconsin trials courts do not review board decisions for firemen and police officers with the *de novo* standard, and instead look to see if "the Board's decision is supported by the evidence that the Board found credible." *Younglove*, 218 Wis. 2d 133, 138-139, 579 N.W.2d 294 (Ct. App. 1998). The legislative purpose was to ensure that courts just 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 upon the evidence placed before them." *Clancy v. Bd. of Fire & Police Com'rs of Milwaukee*, 150 Wis. 630, 635-36, 138 N.W. 109 (1912).

Certiorari Review

The scope of certiorari review is typically limited to whether the Commission (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, 609 N.W.2d 464. However, when a party uses both a certiorari appeal and statutory appeal, the analysis is limited to whether the commission acted within its jurisdiction and whether the commission 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, 711 N.W.2d 271. A circuit court's role is to determine if the conclusion is supported by the evidence. *Gentilli v. Board of Police and Fire Com'rs of City of Madison*, 2004 WI 60, ¶ 35, 272 Wis. 2d 1, 680 N.W.2d 335.

ANALYSIS

I. Certiorari Appeal

Mr. Zens first argues that the Board proceeded on an incorrect theory of law and exceeded its jurisdiction when it sustained Charge 2. Mr. Zens argues that the Board based its decision on a flawed premise that he violated the requirement of Target Isolation. Mr. Zens argues that the Board did not have a rational basis to reach its holding in sustaining Charge 2. Mr. Zens argues that the Board proceeded on an incorrect theory of law by ignoring critical evidence. Mr. Zens argued that the Board did not take time to consider whether the GDE applied and thus proceeded on an incorrect theory of law. The Board argues that there is substantial evidence to support its conclusion that the GDE does not apply. The Board argues that Mr. Zens improperly conflates state law and Department policies regarding the use of force. The Board also argues that Target Isolation is a requirement under Department policy.

Under certiorari review, the Court does not apply a *de novo* standard to the Board's decision and instead looks to "ensure that the Board's decision is supported by evidence that the Board found credible." *Younglove*, 218 Wis. 2d at 138-39. Additionally, the reviewing court defers credibility determinations to "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 (quoting *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 442, 238 N.W.2d 714, 720 (1976)).

The DAAT Manual lists target isolation as one of the target requirements a police officer must fulfill if he or she has decided to shoot when faced with a threat that permits deadly force. *See Dkt. #7, No. 21 at 81-82*. Additionally, the DAAT Manual gives an example of a situation where the GDE exception would apply. It states:

> For example, if a deranged subject were randomly shooting people, you might be justified in firing without target isolation because if not stopped, the suspect could be expected to continue shooting. The chance that your bullet might strike an innocent person is preferable to the likelihood of the suspect killing or injuring many others.

See Dkt. #7, No. 21 at 81-82.

Lt. Looney testified at the hearing that the example given in the DAAT Manual is an extreme situation. (Hrg. Tr. 296:6-14). In his report, Lt. Looney also stated the following in his

report in regards to the GDE: "The Firearms guide also indicates, 'Can you shoot without hitting an innocent person? Even if the greater danger exception applies, you should always attempt to minimize or eliminate the chance of your rounds striking innocent persons to the degree you are able.'" *See Dkt. #15, No. 39 at 5.*

Here, the Board did not proceed on an incorrect theory of law or exceed its jurisdiction. The Board considered the DAAT Manual rules on target isolation and the GDE exception as it states in its findings of fact. *See Dkt. #17, No. 51 at 4*. The Board further stated there were two opposing views at the hearing whether the shooting was in violation of Mr. Zens' training. The Board agreed with Lt. Looney and Inspector Paul Formolo's ("Inspector Formolo") testimony and reports that the shooting was inconsistent with Mr. Zens' training and was not justified. The Board reasonably concluded that the GDE did not apply. Lt. Looney testified that reasonable minds can differ when considering the GDE. (Hrg. Tr. 297:16-17). Inspector Formolo also testified that he and Chief Morales had sufficient training, knowledge, and expertise to form an opinion regarding the GDE. The Board agreed with Lt. Looney's determination that Mr. Zens' decision to not stop when he lost sight of Mr. Brown was contrary to the training of Department policy. Furthermore, Mr. Zens did not weigh the risk to Mr. Davis when he fired the shot as required by the GDE, leading Lt. Looney to conclude that the exception did not apply in this case. (Hrg. Tr. 284: 1-17). As stated earlier, the Court defers to the Board on credibility determinations for witnesses. While there are differing opinions, the Board's conclusion is supported by evidence that the GDE does not apply in this case.

Mr. Zens next argues that his due process rights were violated because he was not provided certain documents relied on by the Chief at the hearing. Mr. Zens states that none of the Statewide Training Guides were turned over to him before the hearing and were not listed in the exhibit or witness list. The Board argues that Mr. Zens was not denied due process because the relevant portions of the DAAT Manual and the TRT Guide are restated in the Chief's written charges, which Mr. Zens did receive. (Hrg. Tr. 38:5-13); *See Dkt #5, No. 2 at 6-7*. Additionally, Mr. Zens acknowledged that he was notified that he could pick up the documents the Friday before the hearing but did not pick them up. (Hrg. Tr. 37-38). Mr. Zens only counters that it is irrelevant that he did not pick up the documents under the last minute offer. Because Mr. Zens

had the ability to obtain the documents before the hearing and the relevant portions were stated in the written charges, he has not convinced the Court that his due process rights were violated.

Mr. Zens also argues that the Board was biased against him and the Board's conduct shows that it was psychologically wedded to a predetermined disposition against him. The Board argues that it has a presumption of honesty and integrity which Mr. Zens does not overcome from his arguments. The due process clause requires that an adjudicator in an administrative hearing be fair and impartial. *Nu-Roc Nursing Home, Inc. v. State Dep't of Health & Soc. Servs*., 200 Wis. 2d 405, 415, 546 N.W.2d 562 (Ct. App. 1996). There is a presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings. *Id*. An administrative decision can violate due process either by bias in fact on the part of the decision maker or when the risk of bias is impermissibly high. *Id*. There are two situations where risk of bias violates due process if bias in fact is not proved: (1) cases in which the adjudicator has a pecuniary interest in the outcome; and (2) the adjudicator has been the target of personal abuse or criticism by the party before him. *Id.*

Here, Mr. Zens has not shown that the presumption of honesty and integrity regarding adjudicators is rebutted. Mr. Zens argues in reply brief that the *Nu-Roc* case does not apply because the hearing was not a state administrative proceeding. However, the Court in *Nu-Roc* relied on the case *State ex rel. DeLuca v. Common Council*, 72 Wis. 2d 672, 242 N.W.2d 689 (1976), in which the adjudicating body was the Common Council of the City of Franklin. A common council is a similar adjudicating body to the Board in this case. As a result, the rule from the *Nu-Roc* case is applicable. Mr. Zens' argument is that the timing of his charge is suspicious due to the Board issuing a directive to Chief Morales to audit his investigation. Mr. Zens also points to Commissioner Steven DeVougas being concerned about Mr. Zens' actions. Mr. Zens does not demonstrate how these facts show bias which would overcome the presumption of integrity given to the Board as adjudicators in this proceeding. Commissioner DeVougas was not on the Board's panel that heard Mr. Zens' appeal. Furthermore, the Board issuing a directive does not demonstrate that it was biased in preemptively deciding Mr. Zens' appeal. Mr. Zens does not show that Board was psychologically wedded to a predetermined disposition against him.

Finally, Mr. Zens argues that the Board issued a written decision after its jurisdiction had lapsed. Mr. Zens argues the Board issued its written decision eighteen days after its oral decision, whereas the Board's rules state that the written decision should be signed by Board members within ten days of rendering its decision. The Board argues that its jurisdiction to decide Mr. Zens' appeal did not lapse when it took longer than ten days to issue its written decision.

Time constraints that are self-imposed by administrative boards have not been found to be binding, even when they use the word "shall". *Kruczek v. DWD*, 2005 WI App 12, 278 Wis. 2d 563, 692 N.W.2d 286. In *Kruczek*, the petitioner appealed a decision by the Department of Workforce Development. The Petitioner argued that, because the Department did not issue an order within 30 days despite the administrative code stating that the department "shall" issue a decision within 30 days, the decision was invalid. *Id*. at ¶ 11. The court examined four factors, (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 the violation of the time limit, to determine whether or not the use of "shall" was mandatory. *Id*. at ¶ 14-15. The court determined that the Department was not required to issue a decision within 30 days because the department needed time to consider the punishment, there was no language in the code which suggested that immediate compliance was required, the punishment, debarment, was temporary, and the code did not suggest that the department loses jurisdiction if it failed to issue a timely decision. *Id*. at ¶ 15-23.

Here, the Board was not required to issue its decision within ten days similar to *Kruczek*. Mr. Zens does not provide anything to suggest that the ten day deadline *must* be met, such as statutory language which indicates the Board loses jurisdiction if it does not issue a decision within ten days. For this reason, the Board did not lose its jurisdiction because it took longer than ten days to issue its written decision. Because Mr. Zens has not demonstrated that the Board proceeded on an incorrect theory of law or exceeded its jurisdiction, the Court denies his certiorari appeal.

II. Statutory Appeal

Mr. Zens argues that the Board did not have just cause to sustain the charge against him. Under the first factor, Mr. Zens argues that he could not reasonably be expected to have the

knowledge of the probable consequences of his alleged conduct. The Board argues that Mr. Zens could reasonably be expected to have the knowledge that his conduct would result in discipline.

The first factor asks "whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct." The Department Code of Conduct and MPD SOP 460.10 require Department police officers to comply with LESB standards, including the DAAT manual and TRT guide. The DAAT outlines the target requirements, in which a police officer is required to assess the potential harm of the situation. The DAAT Manual and Code of Conduct placed Mr. Zens in a position that he could be reasonably expected to have had the knowledge of the probable consequences of his alleged conduct. For this reason, the first factor favors the Board.

Mr. Zens argues that the second just cause factor cannot be sustained. Mr. Zens argues that his violation of CV1.00/GP1.05 references a training guide, not a rule or order, and the Board failed to analyze the GDE to Target Isolation. The Board argues that the target requirements are reasonable because the DAAT manual allows flexibility for different situations and it did consider the GDE.

The second factor asks "whether the rule or order that the subordinate allegedly violated is reasonable." Here, the target requirements in the DAAT Manual are reasonable because they allow for flexibility as shown with the GDE. The Board considered whether the GDE applied, but ultimately agreed with Lt. Looney and Inspector Formolo that it did not apply in this situation. For this reason, the second factor favors the Board.

Mr. Zens argues that no reasonable effort was made to investigate this case because Sgt. Norberg's report was inadequate. The Board argues that the Chief did make a reasonable effort to discover whether Mr. Zens violated SOP 460.10. The third factor asks "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." Here, Sgt. Norberg's report did consider the GDE because she included Sgt. Groszczyk's analysis in the report, which evaluates the GDE. Chief Morales considered the reports which contained analysis regarding the GDE and whether Mr. Zens violated the target isolation requirement. For this reason, the third factor favors the Board.

Mr. Zens argues that the Board and Chief Morales' efforts were not fair and objective because the GDE was not considered and that his behavior was placed under more scrutiny, while the Board argues the investigation was fair and objective. The fourth factor asks "whether the effort described under the third factor was fair and objective." Here, the effort was fair and objective because the Board did consider the GDE. Furthermore, the Board pointed out that different chiefs have different disciplinary standards and just because Mr. Zens was disciplined for this situation does not mean the investigation was not fair and objective.

Under the fifth factor, Mr. Zens argues there is not substantial evidence that Mr. Zens violated a Department rule, order, or any of the training guides referenced at the hearing. Mr. Zens argues that reasonable minds could not reach the same conclusion as the Board. The Board argues that there is substantial evidence that Mr. Zens violated SOP 460.10. The fifth factor asks "whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate." Here, as stated previously, the Board noted that there were two opposing views whether under Mr. Zens' situation the GDE applied. The Board accepted the opinions of Lt. Looney and Inspector Formolo, which the Court outlined above. The Board found that their opinions constituted substantial evidence. Accordingly, there is substantial evidence that Mr. Zens violated Department rules.

Mr. Zens next argues the Board and Chief Morales did not apply the rule fairly and without discrimination against him. Mr. Zens argues that no other officer was found to have violated any of the target requirements, like Target Isolation, in the Department's recent history. The Board argues that Mr. Zens does not show how Chief Morales was prohibited by issuing the discipline just because it was the first time the rule was applied in discipline. The sixth factor asks "whether the chief is applying the rule or order fairly and without discrimination against the subordinate." Even if there are historical parables for this case, the Chief applying the rule in this case for the first time does not offer evidence of discrimination in itself, as pointed out by the Board. Chief Morales looked at all the evidence in this case as presented to him in the reports and determined that Mr. Zens violated Department rules when he decided to fire the shot during the incident. For this reason, the sixth factor favors the Board.

Lastly, Mr. Zens argues that his termination does not reasonably relate to the alleged violation or his record of service with the Department. Mr. Zens argues that the Board did not

look at his record as a whole and instead focused on his involvement regarding a prior non-disciplinary incident. The Board argues that the primary reason for his punishment was the degree of harm resulting from his misconduct. The seventh factor asks "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." Here, when Mr. Zens fired the shot he unintentionally injured an innocent bystander. The Board considered Inspector Formolo's testimony in which he stated that the primary factor in determining the seriousness of violations is the degree of harm. *See Dkt. # 17, No. 51 at 7-8*. There was a serious degree of harm that occurred in this case when Mr. Davis was shot in the leg and seriously injured. The Board additionally considered the prior incident involving Mr. Zens, in which he repeatedly stated "I'm going to shoot you" to a fleeing suspect. For these reasons, Mr. Zens discharge reasonably relates to both the violation that occurred in this case and his past record. The seventh factor favors the Board.

CONCLUSION

Based on the reasons outlined above, the Court finds that there was just cause for the determination made by the Board. Additionally, the Board did not proceed on an incorrect theory of law or exceed its jurisdiction. Accordingly, it is ordered that the decision of the Board is hereby AFFIRMED.

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