

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 42

GREGORY A. KOESTERING,

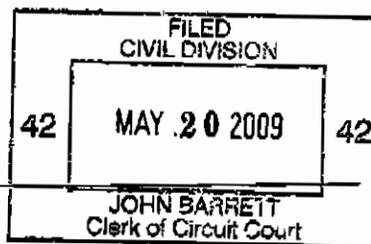
Petitioner,

Case No.08-CV-012928

v.

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

Respondent.



DECISION

Petitioner, Gregory A. Koesting, seeks judicial review of a decision by the Board of Fire and Police Commissioners (the "Board") which upheld his discharge for violating Milwaukee Police Department Rule 4, Section 2/455.00, mistreating a prisoner by using profane language and unnecessarily striking a prisoner.¹ The Court has reviewed the record and, for the reasons stated herein, affirms the decision of the Board.

BACKGROUND

On February 13, 2005, Petitioner, together with his partner, Officer Randall Perez, responded to a domestic violence call at the residence of Michael Ramos. The officers determined that Mr. Ramos should be arrested for battery domestic violence, and taken into custody. Petitioner began handcuffing Mr. Ramos; however, after securing the first cuff, Mr. Ramos fled. In an attempt to thwart Mr. Ramos' escape, Petitioner held onto the open handcuff, and was pulled down some stairs by Mr. Ramos as he was fleeing.

¹ Petitioner was charged with misdemeanor battery relating to this incident, as noted in 2005CM1172. However, Mr. Ramos did not appear on the scheduled court date, so Petitioner's motion to dismiss the charges was granted.

Mr. Ramos was eventually apprehended by other officers, with Petitioner's handcuff still secured around one wrist. He was arrested and placed inside the back of a patrol wagon. Petitioner then entered the patrol wagon, to identify Mr. Ramos by checking the handcuffs. Mr. Ramos claims that Petitioner began beating him at that point, and threatening to kill him. There is evidence that other officers saw the wagon shaking and heard the threats. Additionally, Sergeant Pamela Holmes, a superior who was present at the time of the arrest, testified that Petitioner told her upon exiting the van, "Sorry Sarge, he got what he deserved." Furthermore, Officer Perez, Petitioner's partner, testified that Petitioner had disclosed to him the night of the incident that Petitioner had beaten Mr. Ramos in the back of the wagon.

Petitioner claims that when he attempted to check the handcuffs, Mr. Ramos became combative, kicking him in the leg. At that point, Petitioner admits to delivering two focused knee strikes to Mr. Ramos' chest and torso, for purposes of subduing him and to get a positive identification by the handcuffs. He states that his story is corroborated by the testimony the patrol wagon driver, Officer Hernandez. Officer Hernandez had closed the rear door of the wagon after the Petitioner had gone inside. He heard a commotion which caused him to reopen the door; he testified that he saw Petitioner standing over Mr. Ramos, but that everything looked fine.

The Board also took into consideration an allegation by Mr. Ramos that the two officers that took him into custody, who were African-American, kicked him several times in the ribs, prior to the beating he claims was administered by the Petitioner. This incident was also investigated; however, it was concluded that there was not sufficient evidence to substantiate Mr. Ramos' claim.

The evidence was first reviewed by Police Chief Nanette Hegerty, who determined that dismissal was the proper remedy for Petitioner's alleged conduct. The Board upheld this decision on November 2, 2006. However, upon appeal by Petitioner to the Milwaukee County Circuit Court, heard by the Honorable Jean DiMotto, the case was remanded back to the Board, on grounds that Petitioner had not been afforded the opportunity to fully present his case. Specifically, Petitioner had submitted into evidence a booking-room video of Mr. Ramos after his arrest, which was relevant to Mr. Ramos' credibility as a witness. Due to faulty equipment, the audio portion of the video was not heard during the hearing. The Court found this to be a violation of Petitioner's right of due process, and remanded the matter for new proceedings, to include a transcript prepared by Petitioner of the relevant portions of the booking-room video.

After the hearing on remand on June 11, 2008, the Board again ruled to uphold Petitioner's discharge, finding that the force used by Petitioner was unnecessary and a "blatant attempt to punish a handcuffed subject who had fled during the course of an arrest." (Board of Fire and Police Commissioners of the City of Milwaukee, Findings of Fact, ¶ 8.) Based on its findings, the Board agreed that discharge was the "only appropriate remedy." (*Id.*)

Petitioner again appeals this decision to the Court, arguing that his conduct did not warrant dismissal. He claims the force he admits to using against Mr. Ramos, namely the two knee strikes to the torso, was reasonable. Thus, he asserts that his only violation was using profane language towards Mr. Ramos, for which he submits that an unpaid suspension would be a more appropriate penalty. In addition, he cites several examples

of disciplinary actions against other officers for what he deems to be more serious violations, who were not discharged.

STANDARD OF REVIEW

Pursuant to Wis. Stat. §62.50(20), a petitioner may appeal the Board's decision to the circuit court. The court, however, is limited in its evaluation of the questions of fact presented to the review of one question: "Under the evidence is there just cause, as described in sub. (17)(b), to sustain the charges against the accused?" Wis. Stat. § 62.50(21).

According to § 62.50(17)(b), the determination of just cause is to be based on the following standards, as applicable:

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.

Under this statutory review, the circuit court determines "whether an order of a board of police and fire commissioners is supported by the evidence."

Gentili 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; or (2) whether the Board could reasonably make the determination at issue. *Id.* at ¶ 20.

Determinations of evidence credibility are deferred by the circuit court to “those who hear and see the witnesses.” *Younglove v. City of Oak Creek Fire & Police Commission*, 218 Wis.2d 133, 139-40, 579 N.W. 2d 294, 296 (Ct. App. 1998). Thus, the circuit court’s duty is to determine whether the decision of the agency was reasonable based upon the evidence. *See Clancy v. Bd. of Fire & Police Comm’rs of Milwaukee*, 150 Wis. 630, 138 N.W. 109, 111 (1912). Even if multiple interpretations of the evidence are conceivable, it is for the agency to determine which “inference to draw.” *Stein v. State Psychology Examining Bd.*, 2003 WI App 147, ¶ 33, 265 Wis.2d 781, 668 N.W.2d 112.

Additionally, the circuit court retains jurisdiction for review by certiorari of questions not based on the statutory standards. *Gentilli*, 2004 WI 60, ¶ 21, 272 Wis. 2d. 1, 680 N.W. 2d 335. Specifically, the circuit court may consider (1) whether the Board kept within its jurisdiction; and (2) whether the Board proceeded on the correct theory of law. *Id.* Nevertheless, writs of this nature should be issued sparingly. *Id.*

ANALYSIS

Based on the statutory review established in Wis. Stat. § 62.50(21), the Court finds that the evidence is sufficient to establish that there is just cause to sustain the charges against the Petitioner. Much of Petitioner’s argument focuses on disputing the accuracy of statements made the night of the incident by Mr. Ramos and other police officers involved. This evidence, which clearly involves the issue of witness credibility,

was heard by the Board, which determined that there was a "substantial amount" of credible evidence from other officers which indicated that Petitioner "unnecessarily initiated a physical altercation with the prisoner." (Board of Fire and Police Commissioners of the City of Milwaukee, Findings of Fact, ¶ 7.)

Specifically, the Board found Petitioner's testimony regarding his reason for entering the patrol wagon to be implausible. (Board of Fire and Police Commissioners of the City of Milwaukee, Decision, 7.) It noted that the evidence indicated that Petitioner was on the scene prior to Mr. Ramos being placed inside the patrol wagon, and could have checked his handcuffs at that point. Consequently, the Board found that Petitioner had no legitimate purpose for entering the patrol wagon and, as such, his sole reason for entering the patrol wagon was to punish Mr. Ramos for running from him. (*Id.*) As noted above, the Court defers to the Board in its determination of witness credibility. *Younglove*, 218 Wis.2d at 139-40, 579 N.W. 2d at 296.

Furthermore, the Board determined that even the force that Petitioner admits to using on Mr. Ramos was unnecessary. (Board of Fire and Police Commissioners of the City of Milwaukee, Decision, 7.) At the time Petitioner admits to striking Mr. Ramos, he was in custody, wearing handcuffs, and inside the patrol wagon. The Board states that at that point, no force at all was necessary. (*Id.*) Therefore, based on the credible evidence as well as the reasoning of the Board, the Court agrees with the Board's determination that Milwaukee Police Department Rule 4, Section 2/455.00, mistreating a prisoner by using profane language and unnecessarily striking a prisoner, was violated by Petitioner.

Petitioner next argues that the punishment of being discharged from the force was excessive, and applied to him unfairly. The Board addressed this argument in its

statement that the use of excessive force “is among the worst decisions that a law enforcement officer can make.” (*Id.*) Indeed, there were incidents in Petitioner’s record with the Milwaukee Police Department that he had, on more than one occasion, made poor decisions. (Board of Fire and Police Commissioners of the City of Milwaukee, Findings of Fact, ¶ 8.) Further, Petitioner does not dispute that he was aware that discharge was a penalty for a violation of Rule 4.

Additionally, Petitioner alleges that the decision to discharge him was the result of discrimination. To explain, he contends that Mr. Ramos’ claim that he was beaten by the African-American officers who took him into custody was not fully investigated; instead, Petitioner asserts that the investigation into Mr. Ramos’ allegations focused entirely on him, presumably because he is Caucasian. (Pet. Br., 30.) Petitioner claims that, as a result of this racial discrimination, § 62.50(17)(b)6, regarding a fair and non-discriminatory application of the rule, was not met in making the determination on his case.

Yet, Petitioner provides no evidence to support these allegations, rendering them mere speculation. The Board noted the existence of Mr. Ramos’ claims against the arresting officers, and acknowledged that it is “more likely than not” that he was struck during the course of his arrest, “quite possibly unnecessarily.” (Board of Fire and Police Commissioners of the City of Milwaukee, Decision, 6.) However, there was insufficient evidence against those officers to go forward with a rule violation proceeding. (*Id.*) On the contrary, Mr. Ramos’ claim against Petitioner is corroborated by several officers, and further, was deemed to be absolutely unnecessary by the Board. (*Id.*)

In a similar vein, Petitioner alleges discriminatory conduct in that other officers facing similar charges were not given the harsh penalty of discharge for their actions. The Board, in its brief, raises the possibility that this is a due process argument, appropriate for certiorari review by this Court. However, at the hearing, the Board viewed this claim in the context of § 62.50(17)(b)6, whether Chief Hegerty applied the rule fairly and without discrimination against Petitioner. This Court agrees that the statutory standard, and not certiorari review, is the appropriate consideration for this claim.

In support of his argument, Petitioner submitted a chart of comparable rule violations and their outcomes to the Board for its consideration. (Hearing Tr., 59:10-60:3.) The Board allowed this evidence; indeed, it even permitted an updated version of the comparables chart to be admitted at the subsequent remand hearing. (*Id.* at 62:18-25.) However, the Board noted that each rule violation is “fact driven”; that is, just because the violation is the same, the specific circumstances surrounding violations may warrant different penalties. (*Id.* at 71:8-12.) In any event, Petitioner’s evidence was received and considered by the Board. The fact that it was not found to be compelling does not render the Board’s decision in violation of § 62.50(17)(b)6 or, for that matter, a violation of Petitioner’s due process rights.

For these reasons, the Court finds that the evidence supports the order by the Board to discharge Petitioner. Its findings regarding Petitioner’s credibility, as well as the credibility of other witnesses, are well within its realm of its responsibilities, and this Court defers to those findings. Moreover, its rationale for imposing the sanction of discharge on the Petitioner is reasonable, under the circumstances. Accordingly, this

Court finds that the Board's order that Petitioner be discharged meets the standards enumerated in § 62.50(17)(b).

CONCLUSION

THEREFORE, based upon a thorough review of the record and the arguments of the parties as set forth in the parties' briefs, it is hereby ORDERED that the decision of the Board of Fire and Police Commissioners of the City of Milwaukee is hereby AFFIRMED.

Dated at Milwaukee, Wisconsin, this 20 day of May, 2009.

BY THE COURT:

DAVID A. HANSHER

Hon. David A. Hansher
Circuit Court Judge, Branch 42