COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2102 Cir. Ct. No. 2008CV6517

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MARK VASQUEZ,

PLAINTIFF-APPELLANT,

MILWAUKEE POLICE ASSOCIATION,

INTERVENOR-PLAINTIFF-APPELLANT,

V.

MILWAUKEE CITY BOARD OF FIRE AND POLICE COMMISSIONERS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Mark Vasquez and the Milwaukee Police Association (collectively, "Vasquez" unless otherwise noted) appeal from a circuit court order and judgment affirming a decision of the Milwaukee City Board of Fire and Police Commissioners. The Board's decision terminated Vasquez's employment with the Milwaukee Police Department for violating Milwaukee

City Charter § 5-02.1., requiring him to maintain his bona fide residence in the City of Milwaukee.

¶2 Vasquez argues that the Board proceeded on an incorrect theory of law by: (1) upholding the discharge based on inappropriate use of free time when there was no rule or regulation against the use of an employee's free time; (2) applying the dictionary definition of "residence" rather than the definition of "residence" set forth in the Milwaukee City Charter; and (3) predetermining discharge as the only available discipline. Because we conclude that Vasquez was notified that where he spent his free time was a factor in determining his bona fide residence; that the dictionary definition of "residence" is consistent with the definition in the Charter; and that the Board properly considered whether discharge was an appropriate remedy, we affirm.

BACKGROUND

¶3 On July 6, 2007, Vasquez was issued a personnel order discharging him from his employment with the Milwaukee Police Department. At the time of the discharge, Vasquez had been employed by the police department for over twenty-one years and held the position of Identification Technician. Vasquez was charged and was found guilty of a violation of Milwaukee Police Department Rule 4, § 2/040.00, which states that all employees of the police department "shall reside in the [C]ity of Milwaukee except when on vacation, or as otherwise provided in these rules." Rule 4, § 2/040.00 was promulgated consistent with Milwaukee City Charter § 5-02.1., requiring "[a]ll employe[e]s of the [C]ity of Milwaukee ... to establish and maintain their actual bona fide residences within the boundaries of the [C]ity." Vasquez appealed the personnel order to the Board. A fact-finding hearing was held before a hearing examiner on February 13, 2008.

¶4 At the fact-finding hearing, Vasquez testified that at some time prior to July 1, 2005, he and his wife made a "family decision" to move their daughters to Mukwonago. They sold their home in Milwaukee, took out a substantial loan, bought an empty lot, and designed a five-bedroom, three and one-half bathroom home in Mukwonago. On July 15, 2005, Vasquez's wife and daughters moved into the new home in Mukwonago.

¶5 On July 1, 2005, Vasquez began renting a two-bedroom apartment in Milwaukee. He

kept his car insured at the Milwaukee apartment, used the Milwaukee address for his voter's registration and fishing license, and received his mail there. He testified that all of his personal belongings were kept at the Milwaukee apartment. However, Vasquez also testified that upon his retirement from the police department he intends to join his wife and family in Mukwonago if they still reside there.

¶6 The Board found, based on evidence admitted at the hearing, that Vasquez maintained the following routine during a "'normal'" work week:

> 4 out of 5 nights prior to work days he slept at the Milwaukee apartment and went to work the next morning from that location. He left work each day and either stopped briefly at the Milwaukee apartment or drove directly to Mukwonago where he spent several hours with his wife and children. He then drove back to Milwaukee to sleep and repeat the routine once again. On his final work day of the week, ... Vasquez would normally leave the Milwaukee apartment that morning to go to work and not return to the Milwaukee apartment until the night after his next work day, an absence of more than 3 ½ days.

¶7 Vasquez disagrees with the Board's findings to the extent that it found he only slept at the Milwaukee apartment four nights a week. He argues that he slept at the apartment five nights a week—each night preceding a shift at the police department.

¶8 Prior to building the home in Mukwonago, Vasquez sought the advice of the union regarding the City's residency requirements. In response to his inquiry, the union provided Vasquez with "criteria" regarding residency. During the hearing, when shown a copy of a document entitled "City Residency Requirement," which included Personnel Policy #87/4 (9/16/87) and its "Dual Residency Policy Statement," Vasquez did not believe that was the information that he received from the union, but admitted that he had seen the document and believed he "met the [listed] criteria [for] ... maintaining [his] home in Milwaukee." The Dual Residency Policy Statement reads as follows:

> In cases in which dual (or multiple) residency is an issue, a determination shall be made as to which location constitutes the actual residence and it shall be that location which will be considered in establishing whether an employee is in conformity with the intent of the Charter Ordinance and Civil Service Rule. Maintaining a rented room or rooms or maintaining living quarters with a friend or relative, when done principally for the purpose of establishing City residency shall not be considered as conforming. Neither ownership of real property in the City with payment of taxes, nor voting in the City shall be deemed adequate, unless the actual living quarters are in the City. *The*

> *determination of actual residency shall include but not necessarily be limited to an overall consideration of the following factors*:
>
> 1. At which location does the employee's family reside and attend school?
>
> 2. At which location does the employee keep his or her tangible personal property and effects?
>
> 3. At which location does the employee receive his or her correspondence?
>
> 4. At which location does the employee spend his or her time?
>
> 5. Which location does the employee list for official documents?
>
> 6. Which location is more suitable in terms of aesthetics, habitability, comparative comfort, convenience and regular access?
>
> 7. At which location is habitation fixed without any present intent to move?
>
> 8. At which location is there an apparent intent to make a permanent domicile?
>
> In the event that one location is owned and the other is rented, some presumption of residency shall be applied to the owned property.
>
> Decisions involving dual residency require judgment based upon the totality of the circumstances present in each case. The aforementioned are among the indicia that will be considered in applying that judgment on a case-by-case basis. This underscores the fact that the intent of the Rule and Ordinance is to ensure that all employees are actual bona fide residents of the City of Milwaukee and that the City Service Commission will not tolerate subterfuge as a means of evading this unequivocal intent.

(Emphasis added.)

¶9 Following the fact-finding hearing, the Board unanimously sustained the charges set forth in the personnel order. On February 20, 2008, the Board conducted a dispositional hearing, after which it unanimously concluded to discharge Vasquez. In a written order issued by the Board on April 3, 2008, it concluded that "the actions taken by ... Vasquez ... were not a good faith effort to maintain his bona fide residence in the City of Milwaukee as required, but were instead an attempt to spend enough time and leave enough 'evidence' in the City to skirt the applicable Charter provision and MPD rule." Having reached that conclusion, the Board further stated that it believed its "only available alternative is to dismiss [Vasquez] from the Milwaukee Police Department." Therefore, it did so.

¶10 Vasquez filed a petition for a writ of certiorari and a statutory appeal pursuant to WIS.

STAT. § 62.50 (2007-08)[1] with the circuit court. The circuit court affirmed the Board. Vasquez appeals.

STANDARD OF REVIEW

¶11 Vasquez appealed the Board's ruling to the circuit court via two procedural vehicles: WIS. STAT. § 62.50(20) and writ of certiorari. However, § 62.50(22) prohibits us from reviewing the circuit court's decision under § 62.50(20), stating that "[i]f the decision of the [B]oard is sustained [by the circuit court], the order of discharge ... shall be final and conclusive in all cases." Thus, we only have jurisdiction over the writ of certiorari claim.

¶12 Our review on certiorari is normally 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 that it made based on the evidence.'" ***Sliwinski v. Board of Fire and Police Comm'rs***, 2006 WI App 27, ¶12, 289 Wis. 2d 422, 711 N.W.2d 271 (citation omitted). Here, because Vasquez also sought review under WIS. STAT. § 62.50(20), our review on certiorari is further "limited to whether the Board kept within its jurisdiction or applied correct legal theories."[2] *See* ***Sliwinski***, 289 Wis. 2d 422, ¶12. These are questions of law that we review *de novo*, ***id.***, reviewing the Board's decision, not the circuit court's decision, *see* ***State ex rel. Sprewell v. McCaughtry***, 226 Wis. 2d 389, 393, 595 N.W.2d 39 (Ct. App. 1999). However, we will "accord deference to the [Board]'s interpretation and application of its own administrative regulations unless the interpretation is inconsistent with the language of the regulation or is clearly erroneous." *See* ***id.*** at 394.

DISCUSSION

I. Inappropriate Use of Free Time

¶13 Under WIS. STAT. § 62.50(17)(b), the Board was required to provide Vasquez with a hearing to determine whether there was "just cause ... to sustain the charges." The statute enumerates seven factors the Board needed to consider when determining whether just cause existed. *See* § 62.50(17)(b)1.-7. Vasquez's first claim—that the Board proceeded on an incorrect theory of law when it upheld the discharge for inappropriate use of free time—implicates the first of

the seven just-cause factors: "Whether [Vasquez] could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct." *See* § 62.50(17)(b)1.

¶14 Vasquez argues that the Board's decision to uphold his discharge hinged on its conclusion that the majority of his free time was not spent at the Milwaukee apartment but instead at the Mukwonago home. He contends that the Board's reliance on where he spent his free time created a new rule that was unknown to him before the hearing, and therefore, the Board did not have just cause to discharge him under WIS. STAT. § 62.50(17)(b)1. He relies on the testimony of Sergeant Peter Mulock, who testified that "[t]here is no rule that regulates where we spend our free time," for the proposition that the rule did not exist before the hearing.

¶15 In response, the Board argues that ***Eastman v. City of Madison***, 117 Wis. 2d 106, 118-19, 342 N.W.2d 764 (Ct. App. 1983), held that where an officer spends his free time is a proper consideration in determining bona fide residency. However, Vasquez does not argue that the Board could *not consider* where he spent his free time but instead argues that he was *not informed* that the Board would consider where he spent his free time. Because he claims he was not informed, he argues that he "could [not] reasonably be expected to have had knowledge of the probable consequences of [his] alleged conduct," and therefore, his discharge was not based on "just cause." *See* WIS. STAT. § 62.50(17)(b)1.

¶16 First, Sergeant Mulock's testimony that "[t]here is no rule that regulates where we spend our free time" does not amount to an admission by the Board that no such rule exists. As a lay witness, Sergeant Mulock could only testify to his personal knowledge of the rules. *See* WIS. STAT. § 906.02. Whether such a rule exists is a question of law for the Board to decide and for us to review.

¶17 Second, while the residency rules do not expressly use the words "free time," one of the factors set forth in the Dual Residency Policy Statement expressly states that the Board "shall ... consider[]" "[a]t which location does the employee spend his or her time?" During the hearing, Vasquez acknowledged being familiar with all of the factors set forth in the Dual Residency Policy Statement. That testimony belies Vasquez's claim that he was not informed that the Board would consider where he spent his free time when determining his bona fide residence.

¶18 We also reject Vasquez's argument that where he spent his free time was "[k]ey" to the Board's decision. The location at which an employee spends his time was only one of eight different factors the Board was to consider when determining Vasquez's bona fide residence under the Dual Residency Policy Statement. The Board considered all eight factors, and found the following facts to support its finding that Vasquez's bona fide residence was in Mukwonago: (1) his wife and children reside and go to school in Mukwonago; (2) the Mukwonago home was more suitable in terms of aesthetics, habitability, and comparative comfort; (3) the Mukwonago home was more convenient and accessible to almost all important aspects of his life outside of his job; (4) the Mukwonago home was the central focus of family activities; (5) the Mukwonago home was owned by Vasquez and his wife while the Milwaukee home was rented; and (6) Vasquez testified that when he retires he will move to the Mukwonago home and that is the home he intends to make a permanent domicile.

II. Dictionary Definition of "Residence"

¶19 Next, Vasquez argues that the Board misapplied the law by utilizing a dictionary definition [3] of "residence" rather than the definition of "residence" set forth in Milwaukee City Charter § 5-02.2. Section 5-02.2. states: "The term 'residence' employed in this section shall be construed to mean the actual living quarters which must be maintained within the city by an employe [e]." Vasquez argues that this definition requires only "'intent' and 'physical presence' as a prerequisite to residency" and that the dictionary definition used by the Board, defining "residence" as "made up of fact and intention" and "impl[ying] something more than mere physical presence," is incompatible with § 5-02.2. He asserts that by looking to the dictionary, the Board improperly, and on its own initiative, "supplant[ed]" the definition of residence provided in § 5-02.2. "with one of its own choosing." Vasquez makes this argument without citing to any supporting authority. Regardless, we conclude the two definitions are not at odds.

¶20 The Board's decision focused on the section of the Milwaukee City Charter concerning dual residency. In other words, the Board recognized that both the Milwaukee and Mukwonago homes qualified as "residences" and the Board was left to determine, under the dual residency policy, which residence was Vasquez's bona fide residence for purposes of compliance

with Milwaukee City Charter § 5-02.2. The Board's citation to the dictionary appears to be an attempt to determine which residence was Vasquez's bona fide residence.

¶21 As we have noted, the Dual Residency Policy Statement provides eight different factors for the Board to consider when determining an employee's bona fide residence. Those eight factors require the Board to consider a multitude of objective facts from which the Board can determine an employee's intent and physical presence at a particular location. For instance, the Board is to consider: the location at which the employee's family resides; the location at which the employee spends his time; and the location which is more suitable in terms of aesthetics, habitability, and comparative comfort. Because the Board properly considered all of these factors when determining that Vasquez's bona fide residence was in Mukwonago, and the factors are compatible with the dictionary definition utilized by the Board, the Board did not proceed on an incorrect theory of law.

¶22 Vasquez also argues that the definition of residency utilized by the Board does not comport with the law of the State set forth in ***State ex rel. Ferebee v. Dillett***, 240 Wis. 465, 3 N.W.2d 699 (1942). There, the court stated that

> [t]he intention required [to establish a bona fide residence] need not be one to remain in a given place for all time, it is generally sufficient if the intent be to make presently the given location one's home even though one may have in mind the possibility of making a change should future events demand.

Id. at 468. Based upon this definition of bona fide residence, Vasquez takes particular issue with the Board's reliance on his testimony that he did not intend to reside in the Milwaukee apartment after his retirement. He believes that because he intended to live in the Milwaukee apartment while working for the police department he had complied with the policy.

¶23 In short, ***Dillett*** does not apply. ***Dillett*** defines bona fide residence for purposes of jurisdiction and venue. *See **id.*** Its definition has no place in a review of what consists of a bona fide residence for purposes of compliance with the Board's residency requirements. Vasquez's testimony that he did not intend to remain in the Milwaukee apartment was absolutely relevant to the Board's decision because factors seven and eight in the Dual Residency Policy Statement required the Board to consider "[a]t which location is habitation fixed without any present intent to move" and "[a]t

which location is there an apparent intent to make a permanent domicile." His intentions to move upon retirement were relevant to both considerations.

III. Discipline

¶24 Finally, Vasquez argues that the Board proceeded on an incorrect theory of law when it determined that discharge was the only penalty permitted. He argues that the Board improperly relied on three authorities for that determination: (1) WIS. STAT. § 17.03(4); (2) Milwaukee City Charter § 5-02.1.; and (3) City of Milwaukee Board of Fire and Police Commissioners Rule XIV, § 2 (Board Rule XIV, § 2).

¶25 To begin, Vasquez contends that the Board's reliance on WIS. STAT. § 17.03(4) is misplaced because police officers hold a public position and not a public office and, therefore, do not fall within the purview of § 17.03(4).[4] Section 17.03(4) states that "[e]xcept as otherwise provided, a public office is vacant when ... [t]he incumbent ceases to be a resident of ... [the City if] residency is a local requirement." Even if Vasquez was not in a "public office" and § 17.03(4) is not applicable to him, we nonetheless conclude that the Board correctly found that Vasquez's termination was warranted under the remaining rules.

¶26 Vasquez next asserts that the remaining authorities, Milwaukee City Charter § 5-02.1. and Board Rule XIV, § 2, both mandating termination, do not apply because they conflict with WIS. STAT. § 62.50(17)(b)7., requiring the Board to consider "[w]hether 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." We conclude that § 5-02.1. and Rule XIV, § 2, do not conflict with § 62.50(17)(b)7.

¶27 We agree with Vasquez that while the City of Milwaukee and the Board have authority to promulgate ordinances and rules, they may not infringe upon state law by conflicting with a statute. *See* ***Local Union No. 487 v. City of Eau Claire***, 147 Wis. 2d 519, 523-526, 433 N.W.2d 578 (1989); ***State ex rel. Castaneda v. Welch***, 2007 WI 103, ¶43, 303 Wis. 2d 570, 735 N.W.2d 131. We disagree with Vasquez, however, when he contends that Milwaukee City Charter § 5-02.1. and Board Rule XIV, § 2, conflict with the statutory mandates of WIS. STAT. § 62.50(17)

(b)7.

¶28 Vasquez contends that to the extent Milwaukee City Charter § 5-02.1. and Board Rule XIV, § 2, *require* termination for a residency violation they conflict with WIS. STAT. § 62.50(17)(b) 7.'s imperative that the Board consider whether discharge "reasonably relates" to a residency violation or whether suspension or demotion would be more appropriate. *See* § 5-02.1. (stating that "[a]ny employe[e] who does not reside within the [C]ity shall be ineligible to employment by the [C] ity and his employment *shall be terminated*") (emphasis added); Rule XIV, § 2 (stating that "failure of any employee of the ... Milwaukee Police Department to reside within the boundaries of the City ... shall render that employee ineligible for continued employment and *shall result in termination*") (emphasis added). The Board counters that residency in the City is an eligibility requirement and that ineligibility to hold a position warrants termination; that the Board exercised its discretion by enacting Rule XIV, § 2; and that suspension or demotion while allowing an employee to remedy a residency violation would render the residency requirement a nullity. We agree with the Board.

¶29 We conclude that the Board's promulgation of Board Rule XIV, § 2, mandating termination for a failure to abide by the residency requirement, demonstrates that the Board considered the possible punishments available for a violation of the residency requirement. The Board's conclusion that either suspension or demotion would nullify the residency rule is reasonable and does not violate WIS. STAT. § 62.50(17)(b)7.

¶30 Vasquez also argues that the Board wrongly interpreted Milwaukee City Charter § 5-02.1. as mandating termination—even though it explicitly states that "[a]ny employe[e] who does not reside within the [C]ity ... *shall be terminated.*" (Emphasis added.) He contends that Milwaukee City Charter § 5-02.6. permits other disciplines. Section 5-02.6. states:

> EXTENSION. Whenever it shall appear to the city service commission that good cause exists for granting extensions of time to employe[e]s of the [C] ity to obtain residences within the [C]ity, or if it shall appear to the city service commission that a new or prospective employe[e] of the [C]ity would require a reasonable period of time in order to acquire a residence in the [C]ity so as to qualify for a position in city service, the city service commission may allow such employe[e] a period of not to exceed 6 months in which to satisfy the requirements of this section.

¶31 By its plain language, Milwaukee City Charter § 5-02.6. does not apply to the facts of

this case. First, the section is marked "EXTENSION" and at no time did Vasquez apply for an extension of time in which to comply with the City's residency requirements. In fact, from the beginning he has argued that he has complied with the City's policy, and therefore, no extension would be necessary. Second, after twenty-one years of employment, Vasquez could hardly be considered "a new or prospective employe[e]," allowing him additional time to acquire residency in the City. Section 5-02.6. simply does not apply.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[1]
All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2]
In his initial brief before this court, Vasquez also contended that the Board's decision should be reversed because it was "arbitrary, oppressive and unreasonable." However, in his reply brief Vasquez concedes that particular issue is not properly before the court. *See* ***Sliwinski v. Board of Fire and Police Comm'rs***, 2006 WI App 27, ¶12, 289 Wis. 2d 422, 711 N.W.2d 271. Accordingly, we do not address the issue.

[3]
The Board's written decision states that it utilized the BLACK'S LAW DICTIONARY definition of the word "residence." However, the Board's decision does not indicate which edition it relied on, and the definition it provided is not compatible with the edition utilized by this court. *See* BLACK'S LAW DICTIONARY 1335 (8th ed. 2004) (defining "residence" as "[t]he act or fact of living in a given place for some time").

[4]
Vasquez cites to an unpublished slip opinion released prior to July 1, 2009, for support of this proposition. He contends that he is entitled to cite to the case because it is used to support a claim of issue preclusion. *See* WIS. STAT. RULE 809.23(3) (eff. July 1, 2009). We need not address this contention because we decide the claim on other grounds.