

---

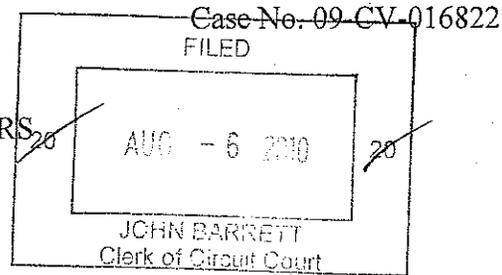
MILWAUKEE POLICE ASSOCIATION,  
DAVID GRYCOWSKI,

Petitioners,

v.

EDWARD FLYNN, CHIEF OF POLICE,  
BOARD OF FIRE AND POLICE COMMISSIONERS,  
OF THE CITY OF MILWAUKEE,  
CITY OF MILWAUKEE,

Respondents.



---

### DECISION AND FINAL ORDER

---

Petitioners David Grycowski and the Milwaukee Police Association (collectively “Grycowski”) petition for a *writ of certiorari*, asking this Court to order the Board of Fire and Police Commissioners of the City of Milwaukee (“Board”) to give him a due process hearing in accordance with Wis. Stat. § 62.50. This Court has reviewed the record along with all the submissions from the parties, and for the reasons stated herein, this Court denies Grycowski’s *writ of certiorari*.<sup>1</sup>

### BACKGROUND

Grycowski was employed by the Milwaukee Police Department (“MPD”) beginning in 1992, and in 1994 he was placed on “permanent limited duty” status after a duty-related injury to

---

<sup>1</sup> The Board has also filed a motion for summary judgment on the basis that Grycowski’s *writ of certiorari* is not proper because the board did not hold a “just cause” hearing. However, a *writ of certiorari* is proper to determine whether the Board proceeded on a correct legal theory. See *Kraus v. City of Waukesha Police and Fire Com’n*, 261 Wis.2d 485, 492 (Wis. 2003) (addressing, pursuant to a *writ of certiorari*, whether the Board proceeded on a correct legal theory when it refused to hold a “just cause” hearing after an officer’s probationary-period demotion). THEREFORE, the Board’s motion for summary judgment is DENIED.

his spine. In 2005, he was assigned to Central Records, where he was responsible for data entry regarding stolen and recovered vehicle reports.

On May 2, 2009, Deputy Inspector of Police Mary Hoerig filed a report noting that she and others had observed Grycowski sleeping on duty. According to the report, Grycowski indicated that his medical condition required him to be on prescription medication that impeded his ability to stay awake for a full shift, and his physician was attempting to correct the issue. On May 4, 2009, Administrative Specialist Senior Drita Spahiu filed a report noting that Grycowski had been observed sleeping on several occasions throughout the previous four months.

In a June 22, 2009, letter to Spahiu, Grycowski stated that he had been drowsy at work and reiterated that the drowsiness was due to medications prescribed as a result of his "on-going duty related back problems." On August 19, 2009, Spahiu filed a report titled "In the matter of: Idling and Loafing – P.O. David Grycowski." The report indicated that Grycowski had been observed sleeping and snoring by coworkers. Spahiu woke Grycowski and told him that if he could not stay awake, he could go home on sick leave. The report indicated that Grycowski had been sleeping on August 17, 2009, as well, and he was sent home on sick leave at that time.

On August 25, 2009, Grycowski was ordered to attend a Fitness for Duty Evaluation conducted by Dr. Theodore Bonner resulting from MPD's belief that "Grycowski's ability to attend work or perform essential job functions may be impaired by a medical condition." Following the review, Dr. Bonner concluded that Grycowski was "permanently disabled from performing the job functions of a police officer." As a result, Grycowski was placed on an unpaid leave of absence pursuant to the Family Medical Leave Act ("FMLA") for a period of up to 12 weeks, and his police powers were suspended. Under the FMLA, he was allowed to continue receiving health insurance benefits. Grycowski was advised that he could return to

work at anytime if he was cleared by his doctor. Grycowski subsequently requested an extension of his FMLA, noting that his doctor agreed with Dr. Bonner's conclusions and would not release him for work.

On September 23, 2009, Grycowski delivered written notice requesting a review of his "suspension" to the Board. On September 29, 2009, the Board's Executive Director responded, noting that the leave was not a suspension and was not disciplinary in nature. He noted that no department order had been issued for a suspension and, as such, there was no appealable issue.

### STANDARD OF REVIEW

A Circuit Court's scope of review pursuant to the *writ of certiorari* is 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. *Antisdel v. City of Oak Creek Police and Fire Com'n*, 234 Wis.2d 154, 162 (2000) (citation omitted). Because the Board determined that a "just cause" hearing was not applicable, the issue before this Court is whether the Board proceeded on a correct theory of law when it determined not to apply Wis. Stat. § 62.50. *Id.* This legal issue is reviewed *de novo*. *Kraus v. City of Waukesha Police and Fire Com'n*, 261 Wis.2d 485, 492 (2003).

In interpreting a statute, the inquiry begins with the plain meaning of a statute. *Kalal v. Circuit Court for Dane County*, 271 Wis.2d 633, 663 (2004). In order to interpret a statute, the entire statutory section must be read in context, an interpretation should give effect to every word, and courts should strive to avoid absurd results. *Id.* Further, statutory language is given its "common, ordinary, and accepted meaning, except that technical or specially-defined words

or phrases are given their technical or special definitional meaning.” *Id.* In construing statutes, courts favor constructions that fulfill the purposes of statutes over those that undermine the purposes. *County of Dane v. LIRC*, 315 Wis.2d 293, 316 (Ct. App. 2009).

Pursuant to Wis. Stat. § 62.50:

**(11) Discharge or suspension.** No member of the police force or fire department may be discharged or suspended for a term exceeding 30 days by the chief of either of the departments except for cause and after trial under this section. . . .

**(13) Discharge or suspension; appeal.** The chief discharging or suspending for a period exceeding 5 days any member of the force shall give written notice of the discharge or suspension to the member and, at the same time that the notice is given, and shall also give the member any exculpatory evidence in the chief's possession related to the discharge or suspension. The chief shall also immediately report the notice of the discharge or suspension to the secretary of the board of fire and police commissioners together with a complaint setting forth the reasons for the discharge or suspension and the name of the complainant if other than the chief. Within 10 days after the date of service of the notice of a discharge or suspension order the members so discharged or suspended may appeal from the order of discharge or suspension or discipline to the board of fire and police commissioners, by filing with the board a notice of appeal . . . .

**(17) Decision, standard to apply.** (a) Within 3 days after hearing the matter the board, or a 3-member panel of the board, shall, by a majority vote of its members and subject to par. (b), **determine whether by a preponderance of the evidence the charges are sustained. If the board or panel determines that the charges are sustained, the board shall at once determine whether the good of the service requires that the accused be permanently discharged or be suspended without pay for a period not exceeding 60 days or reduced in rank.** If the charges are not sustained the accused shall be immediately reinstated in his or her former position, without prejudice. The decision and findings of the board, or panel, shall be in writing and shall be filed, together with a transcript of the evidence, with the secretary of the board.

(b) No police officer may be suspended, reduced in rank, suspended and reduced in rank, or discharged by the board under sub. (11), (13) or (19), or under par. (a), based on charges filed by the board, members of the board, an

aggrieved person or the chief under sub. (11), (13) or (19), or under par. (a), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent 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.

(Emphasis added). Pursuant to MPD Rules and Regulations 2/450.00, “[a]ny member of the Department may be ordered to submit to an examination, at any time, to determine whether a member is physically, mentally, or emotionally fit for the proper performance of duties.”

### ANALYSIS

As indicated above, the issue before this Court is whether the Board proceeded on a correct theory of law when it determined that a “just cause” hearing, pursuant to Wis. Stat. § 62.50(17), was not required in this case. When reading § 62.50 in its entirety, it is clear that Grycowski’s leave of absence was not a suspension that required a “just cause” hearing. First, the leave of absence had no definite period of time. While Grycowski was given 90 days of leave pursuant to the FMLA, he was allowed to return any time a doctor cleared him for duty.

Therefore, the length of his leave was not dependent on any decision by the MPD, and he could have returned for work at any time if his doctor had disagreed with Dr. Bonner's assessment of his health. Furthermore, in discussing suspensions and "just cause" hearings, § 62.50 refers repeatedly to an officer's conduct, rule violations, and charges. The language of the statute, when read in whole, indicates that a "just cause" hearing is triggered by some kind of MPD action beyond placing an officer on leave following a doctor's finding that the officer is not fit for duty.

This determination finds further support within the context of the entire statute, because treating a forced medical leave of absence as a suspension requiring a "just cause" hearing would not work procedurally within the framework of § 62.50. Since an officer's return to work is controlled by a doctor's opinion, and the officer could be returned to work by his doctor at any time, it is not clear when the requirement for a hearing would be triggered. Furthermore, once a hearing was held, the board would have no other options except returning the unfit officer to work after a maximum of 60 unpaid days or permanently discharging him or her. See Wis. Stat. § 62.50(17)(a). On the other hand, as part of Grycowski's FMLA leave, he was able to use sick days, until they expired, and he maintained his health insurance coverage.

Grycowski argues that § 62.50(13)'s allowance of an appeal "from the order of discharge or suspension or discipline" shows that an appealable suspension need not be disciplinary in nature to require a "just cause" hearing. However, even if any suspension triggered a right to a "just cause" hearing, Grycowski has failed to show that he was actually suspended within the meaning of the statute, as noted above. He also argues that charges should have been filed against him for idling and loafing instead of his being forced to submit to a fitness for duty examination. He argues that other officers charged with idling and loafing have received "just

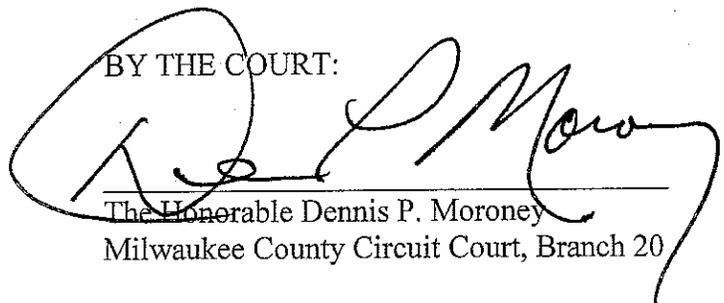
cause” hearings. However, he has failed to show that any other officer charged with idling and loafing had failed a fitness for duty evaluation, which was the basis for Grycowski’s leave. Furthermore, he does not challenge the MPD’s ability to order a fitness for duty examination. Finally, he argues that a forced leave of absence, in essence, allowed the MPD to suspend him while ignoring § 62.50’s requirement for a “just cause” hearing. However, as noted above, while the fitness for duty exam was ordered by the MPD, the leave of absence was actually triggered by Dr. Bonner’s examination and recommendation, and it would have ended at any point had Grycowski’s doctor disagreed with Dr. Bonner’s conclusion. Accordingly, the Board proceeded on a correct theory of law when it determined that Grycowski’s forced leave of absence did not require a “just cause” hearing pursuant to § 62.50.

#### CONCLUSION

THEREFORE, based on a thorough review of the record and the arguments of the parties, IT IS HEREBY ORDERED that the Decision of the Board of Fire and Police Commissioners for the City of Milwaukee is hereby AFFIRMED.

Dated at Milwaukee, Wisconsin this 6<sup>th</sup> day of August 2010.

BY THE COURT:



The Honorable Dennis P. Moroney  
Milwaukee County Circuit Court, Branch 20