STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**

BRANCH 5

MATHEW PALMER,

Petitioner,

Case No. 13-CV-7485

vs.

BOARD OF FIRE & POLICE COMMISSIONERS for the City of Milwaukee

Respondents.

FILED AND AUTHENTICATED
FEB 12 2014
JOHN BARRETT
Clerk of Circuit Court

DECISION AND ORDER

Petitioner, Matthew Palmer, filed a writ of certiorari and a statutory appeal of a decision of Respondent, Board of Fire and Police Commissioners for the City of Milwaukee ("the Commission"). Mr. Palmer argues that the Commission failed to act according to the law and failed to act reasonably in terminating his employment with the Milwaukee Fire Department ("MFD"). Upon thorough review of the record, this court AFFIRMS the Commission's decision under both the writ of certiorari and the statutory appeal.

CASE BACKGROUND

Mr. Palmer does not dispute the facts of this case. Mr. Palmer was appointed to the MFD on August 6, 2000. During his tenure with the MFD, Mr. Palmer was the subject of approximately fifteen (15) disciplinary actions for varying degrees of severity. Many of the disciplinary actions were for tardiness. However, a few of the disciplinary actions were for more serious violations.[1]

Mr. Palmer was eventually terminated due to an incident that took place on the night of March 18-19, 2013. On the evening of March 18, Mr. Palmer and Captain Mike Ambroch (another member of the MFD) had some drinks at a local bar while both were off-duty. Based

[1] Mr. Palmer's more serious violations included untruthfulness relating to the Moore/Nelson investigation, violating "sick and injury leave requirements" while on probation, and making inappropriate and harassing comments to others. Mr. Palmer was suspended twice and put on probation twice.

on their conversation, Mr. Palmer felt that the MFD was not supportive of Captain Ambroch as he recovered from certain injuries. Later, at about 2:30 a.m. (on March 19), Mr. Palmer rang the doorbell at the quarters of Engine 2. He went to the Fire Station to discuss Captain Ambroch's situation with Chief Aaron Lipski.

Brian Giegerich (also a member of the MFD) was on duty at the time and responded to the bell. Mr. Giegerich briefly spoke with Mr. Palmer inside the Fire Station. MFD cameras recorded a video (but no audio) of the conversation. The conversation lasted a little less than two minutes and Mr. Palmer spoke with "considerable animation." However, Mr. Palmer was not violent or physically aggressive. Mr. Giegerich testified that he did not feel threatened during the encounter and that Mr. Palmer was not disrespectful to him or anyone else.

Mr. Giegerich testified that Mr. Palmer was intoxicated. He stated that Mr. Palmer had a peppermint smell on his breath and that he had some difficulty walking. The Commission found Mr. Giegerich's testimony to be highly credible based on the video of the encounter and based on inferences it drew from Mr. Palmer's intent to speak with Chief Lipski at 2:30 a.m. about a personnel matter that did not involve him. Because Mr. Giegerich intervened, Mr. Palmer did not speak to Chief Lipski that night.

Based on the events from that night, Chief Lipski charged Mr. Palmer with various MFD rule violations. The Commission dismissed all but three: (1) intoxication, (2) an act contrary to good order and discipline, and (3) conduct negative and harmful among personnel. The Commission found that Mr. Palmer committed all three violations.

On the first violation, the Commission concluded that it was "commonsensical" that the MFD be able to discipline a member of its own staff for being intoxicated while on MFD's own property. On the second violation, the Commission concluded that Mr. Palmer's arrival at the Fire Station at 2:30 a.m. disturbed Mr. Giegerich's sleep and was contrary to good order and discipline. On the third violation, the Commission concluded that Mr. Palmer challenged a manager's handling of another member's personnel matter in a loud and open fashion, at an inappropriate time and place, and was negative and harmful among personnel.

The Commission decided that termination was the only appropriate form of discipline. It considered Mr. Palmer's fifteen (15) other disciplinary actions and concluded that it could not see past Mr. Palmer's long disciplinary history. The Commission stated that it had little confidence that Mr. Palmer's present violations would be his last.

STANDARD OF REVIEW

The standard of review in this matter is unique in that it involves both a petition for writ of certiorari and a statutory appeal under Wis. Stat. §62.50(21). The standards of review converge in large part. Therefore, for the reasons explained below, we analyze whether the Commission "acted according to the law" under the writ of certiorari, and we analyze whether the Commission's decision was "reasonable" under Wis. Stat. §62.50(17)(a)-(b).

I. The Standard of Review Under A Writ of Certiorari.

A circuit court's review under a writ of certiorari is limited to: (1) whether the Commission acted within the bounds of its jurisdiction; (2) whether the Commission acted according to law; (3) whether the Commission's action was arbitrary, oppressive, or unreasonable, and represented its will and not its judgment; and (4) whether the evidence was such that the decision was reasonable. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 63-64, 267 N.W.2d 17 (1978). Whether the Commission "acted according to the law" encompasses a due process inquiry. *State ex rel. Ball v. Mcphee*, 6 Wis.2d 190, 199, 94 N.W.2d 711 (1959).

To determine whether the Commission's action was arbitrary, oppressive, or unreasonable, the court only looks at whether the decision was based on "facts that are of record or that are reasonably derived by inference from the record" and "logical rationale founded upon proper legal standards." *Van Ermen,* 84 Wis. at 64-65. To determine whether the Commission's decision was reasonable, the court only looks for "substantial evidence." *Id.* at 64. The court determines whether there is *some* evidence on the record such that "reasonable minds could arrive at the same conclusion as the agency." *See RURAL v. PSC,* 2000 WI 129, ¶20, 239 Wis. 2d 660, 676 (2002).

II. The Standard of Review Under WIS. STAT. §62.50.

A circuit court's statutory review under §62.50(21) is limited to whether there is "just cause" to sustain the charges against the accused. WIS. STAT. §62.50(21) (2011-12). The Commission must support a finding of "just cause" by a preponderance of the evidence, and must analyze the following factors to the extent applicable:

1. Whether the subordinate could reasonably be expected to have the 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 sub. 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; and
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.

§62.50(17)(a)-(b).

The Wisconsin Supreme Court noted that judicial review under "just cause" is no different than review under a "reasonableness" standard. *Gentilli v. Bd. Of Fire & Police Comm. Of the City of Madison*, 2004 WI 60, 272 Wis.2d 1, 680 N.W.2d 335. "A circuit court continues to determine whether an order of a board of police and fire commissioners is supported by the evidence...and is reasonable." *Id.*, ¶¶ 35-36. To that end, the seven factors enumerated in §62.50(17)(b) give the circuit court a framework to work within in conducting its "reasonableness" analysis. *See id.*

III. <u>The Standard of Review In This Case.</u>

The standards of review discussed above converge in that a decision that passes muster under §62.50(17)(a)-(b) also passes muster under prong three and prong four of the writ of certiorari. *State ex rel. Kraczkowski v. Bd. Of Fire & Police Comm'rs*, 33 Wis.2d 488, 501-02, 149 N.W.2d 547 (1967). This is true because analysis under prong three is broad in scope and is not limited by specific factors that determine "reasonableness." *Van Ermen*, 84 Wis. 2d at 63-65. Moreover, analysis under prong four asks the court to identify "some" evidence to support the Commission's decision. *Id.* It does not require the stricter "preponderance of evidence" standard required under §62.50(17)(a). *Id.*; WIS. STAT. 62.50(17)(a). As a result, this court limits its analysis under the writ of certiorari to prongs one and two, i.e., whether the Commission kept within its jurisdiction and whether the Commission acted according to the law. *State ex rel. Kraczkowski*, 33 Wis.2d at 501-02. Analysis of prong three and prong four is done under §62.50(17)(b) for "just cause." *Id.*

DISCUSSION

Mr. Palmer asks this court to reverse the Commission's decision to terminate this employment. He argues that the Commission failed to act according to the law because it violated due process. He also argues that the Commission's decision was unreasonable because it failed to identify "just cause" for terminating his employment. We disagree.

I. Writ of Certiorari.

Mr. Palmer argues that the Commission violated his right to due process because it terminated his employment based on a "rule not yet enumerated." Mr. Palmer claims that during the hearing on this case, the MFD created a new rule which prohibited intoxication at the Fire Station while off-duty. He claims that because the rule did not exist prior to the hearing, he did not have adequate notice of the rule.

a. The Rule Prohibiting Intoxication At The Fire Station While Off-Duty Existed Prior To The Hearing.

The MFD enumerated "General Rules" that all MFD employees are required to follow. The structure of the rules indicates that the rules apply in the context of employment. This means, at a minimum, that the rules apply at the place of employment, i.e., at the Fire Station.

MFD Rule §24.1 states "it is the duty of all members of the department to *obey all rules*, orders, instructions, the laws of the United States and the State of Wisconsin, the Ordinances of the City of Milwaukee, and all applicable regulations of governing bodies, both in the conduct of their duties *and while off duty.* " Another rule, MFD Rule §27.2(2), prohibits "Intoxication." Thus, when read together, the MFD rules do prohibit intoxication at the place of employment while off-duty.

As the City noted in its brief, this specific issue (intoxication on MFD property while off-duty) never arose in the past. As a result, neither the MFD nor the Commission ever interpreted or enforced this rule. The novelty of the issue largely explains the Commission's line of questioning and apprehension at the hearing. The Commission's apprehension, however, does not mean that such a rule did not exist. Indeed, a general rule prohibiting intoxication at the place of employment encompasses a more specific rule prohibiting intoxication at the place of employment while off-duty. As the Commission aptly noted, this notion is "commonsensical." Accordingly, a rule prohibiting intoxication at the Fire Station while off-duty did exist prior to the hearing.

b. The Rule Prohibiting Intoxication At The Fire Station While Off-Duty Satisfies Due Process Notice Requirements.

Due process requires that individuals be on notice of the government's laws. *Greer v. Amesqua*, 212 F.3d 358 (7th Cir. 2000). Generally, this means that laws cannot be vague. *Id.* at 369. However, due process in the employment context is slightly different. *Id.*

As the Seventh Circuit wrote in a Madison Fire Department case, "[a]lthough a government regulation is void for vagueness if people of common intelligence must necessarily guess at its meaning and differ as to its application, the government acting in the role of employer enjoys much more latitude in crafting reasonable work regulations for its employees." *Id.* The court continues "a government employer 'may, consistently with the *First Amendment*, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large." *Id.*

The MFD's general rule prohibiting intoxication at the place of employment was sufficient to put Mr. Palmer on notice that he should not be intoxicated at the place of employment even while off-duty. The MFD, as an employer, is not required to explain its rules of employment with the same specificity that is expected of the City of Milwaukee for its citizens. Consistent with due process, the MFD can ask its employees to sign a document which enumerates general Department rules and expect that employees are on notice of more specific rules that logically follow from the general rules. The MFD was not required to explicitly delineate the differences between conduct that is prohibited on MFD property while on-duty and conduct that is prohibited on MFD property while off-duty. This is especially true when the conduct relates to an issue as obvious as intoxication. Thus, Mr. Palmer had adequate notice of the rule prohibiting intoxication at the Fire Station while off-duty. Accordingly, the Commission acted according to the law.

II. Statutory Appeal Under Wis. Stat. §62.50(21).

Mr. Palmer also argues that the Commission's decision to terminate his employment was unreasonable because it did not satisfy "just cause" under Wis. Stat. §62.50(17)(a)-(b). He only has issue with §62.50(17)(b)1 which provides that an employee "reasonably be expected to have the knowledge of the probable consequences of the alleged conduct." Mr. Palmer claims that the MFD could not have reasonably expected him to know that intoxication at the Fire Station while off-duty could result in termination.

Mr. Palmer was reasonably expected to know that any conduct violation, no matter how minor, could result in his termination. Given Mr. Palmer's poor employment record (15 prior disciplinary actions, including two suspensions and two probation periods) any reasonable person would have known that even one additional conduct violation could result in termination. Even if this court disregards the intoxication violation, Mr. Palmer's other conduct violations

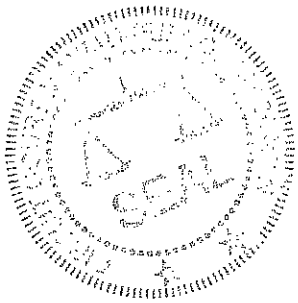
from that night (acting contrary to good order and discipline and conduct negative and harmful among personnel) are sufficient to terminate his employment given his employment record. As the Commission noted, this incident was the "straw that broke the camel's back." Although the discipline imposed may appear disproportionate to the conduct violations from that night, when viewed in conjunction with Mr. Palmer's entire disciplinary record, termination was reasonable. Accordingly, we affirm the Commission's decision.

CONCLUSION AND ORDER

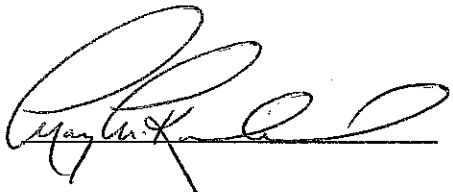
Based on a thorough review of the record, this Court finds that the Commission acted lawfully and satisfied "just cause" in its decision to terminate Mr. Palmer. Accordingly, the decision of the Board of Fire and Police Commissioner in the City of Milwaukee is **AFFIRMED.**

SO ORDERED.

Dated this 10th day of February, 2014, at Milwaukee, Wisconsin.



BY THE COURT:



Mary M. Kuhnmuench
Circuit Court Judge

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