

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1669

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JOHN J. MITTEN,

PLAINTIFF-APPELLANT,

v.

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

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. John J. Mitten appeals from an order of the circuit court affirming the decision and order of the Board of Fire and Police Commissioners (FPC), which discharged Mitten for engaging in illegal activity in violation of Rule 4, § 88 of the Milwaukee Police Department. Mitten claims that

the FPC did not act according to law and, therefore, violated his right to due process when it concluded that he had possessed marijuana and/or cocaine. Because the FPC acted according to law and within its jurisdiction, we affirm.

I. BACKGROUND

Mitten was employed by the Milwaukee Police Department as a police aide directly out of high school in 1983. He became a police officer in 1985. Between 1990 and 1994, Mitten suffered tremendous personal loss involving the death of his only child, his wife's several miscarriages and information that he and his wife would not be able to have any more children. As a result, Mitten began using marijuana regularly and cocaine on occasion.

Contemporaneously, the Special Investigative Unit (SIU) of the police department began receiving information that Mitten was using drugs. An investigation into the complaints was started. In March 1995, the SIU conducted a sting operation, where drugs and money were planted in a reported stolen car and Mitten was sent to investigate. Mitten discovered the drugs in the car, but also discovered the surveillance camera and realized it was a sting operation. Mitten inventoried all the items he found in the car.

On April 4, 1995, Inspector Vincent Partipilo ordered Mitten to appear at the police academy and report to the SIU. Detective Joseph Lagerman met with Mitten to ask him questions relating to his alleged drug use. Mitten was advised that he was not in custody, that he did not have to talk to Lagerman, that he was free to leave at any time, and that he was the subject of a criminal investigation.

Mitten told Lagerman that he had used marijuana for a long period of time and that he had tried cocaine. Mitten also told Lagerman that he had not used marijuana since March 13, 1995, when he became aware that he was being investigated and disposed of all of his drug paraphernalia and started taking heavy doses of vitamins to conceal any drugs in his system. Mitten was then suspended by Internal Affairs.

On April 24, 1995, Mitten wrote a report to then Police Chief Philip Arreola in which he admitted he used illegal drugs regularly and offered his reasons for doing so. On January 18, 1996, Mitten was dismissed by the police chief for violating Rule 4, § 88. Mitten appealed his dismissal to the FPC, which permanently discharged him, concluding that he had violated Milwaukee Police Department Rule 4, § 88 as it then existed. This rule provided:

Members of the Police Department shall conform to and abide by the Rules and Regulations of the Department, observe the laws and ordinances in force in the City of Milwaukee, and render their services to the City with zeal, courage, discretion, and fidelity. Members of the Police Department shall also observe the laws and ordinances in effect in any other jurisdiction while within such jurisdiction.

In addition to appealing the FPC's decision under § 62.50, STATS., Mitten also filed a complaint for review of the FPC's decision by a *writ of certiorari*. The two cases were consolidated for a hearing and a decision by the circuit court. The circuit court affirmed the FPC decision and order. Mitten now appeals.

II. DISCUSSION

Mitten does not challenge the circuit court's decision on his statutory appeal. Accordingly, our decision will address only his certiorari appeal. Therefore, our review is limited to questions of jurisdiction and whether the FPC

acted according to law. *See State ex rel. Smits v. City of De Pere*, 104 Wis.2d 26, 32, 310 N.W.2d 607, 609 (1981). The phrase “according to law” includes due process guarantees. *See State ex rel. Wasilewski v. Board of School Dirs.*, 14 Wis.2d 243, 263, 111 N.W.2d 198, 209 (1961).

Mitten asserts that the FPC did not act according to law and that it violated due process because it based its decision solely on his confession and admissions. He argues that in order to discharge him, the FPC must have evidence of all three elements of the crime of possession of a controlled substance. The elements are: (1) he knowingly had actual physical control of a controlled substance; (2) the controlled substance was actually marijuana or cocaine; and (3) Mitten knew or believed that the substance was a controlled substance. Mitten contends that his confession can satisfy the first and third, but not the second element. We disagree.

Regarding elements one and three, Mitten confessed on three separate occasions that he repeatedly used marijuana and occasionally used cocaine while he was a police officer. He denied that he ever used the controlled substances when he was on duty. Mitten admitted to knowingly engaging in an illegal activity over a period of five years, which is a violation of the rules and regulations of the Milwaukee Police Department. His confession was a statement against interest, and therefore reliable. For the purposes of the administrative hearing, this evidence was sufficient to prove that Mitten had violated the rules of the police department.

As to the second element, we conclude that the confession evidence was sufficient to prove by a preponderance of the evidence that the drugs Mitten used were actually marijuana and cocaine. Mitten was a trained police officer who

was not unfamiliar with these substances. Although a lawyer could possibly convince a jury that reasonable doubt exists as to the exact chemical makeup of the substances Mitten used, that is not the standard here. Mitten's testimony and confession were sufficient to prove that he violated Rule 4, § 88 in the administrative proceeding.

Mitten's reliance on *Layton School of Art & Design v. WERC*, 82 Wis.2d 324, 262 N.W.2d 218 (1978) is misplaced. Although that case does require proof of the elements of the "underlying charge," it does not govern Mitten's case because Mitten's confession did provide sufficient proof of all the elements of the "underlying charge."

Further, we are not convinced that the proceedings conducted here were somehow violative of due process. Mitten was afforded all the procedural protections set forth in § 62.13, STATS., allowing for a public hearing at which the police officer can be represented by counsel, can subpoena witnesses, and can then appeal the decision to the circuit court. These procedural protections satisfy the requirements of due process. See *Owens v. Board of Police and Fire Comm'rs*, 122 Wis.2d 449, 452-54, 362 N.W.2d 171, 173-74 (Ct. App. 1984). Thus, we conclude Mitten was afforded due process.

We also conclude that the FPC did not exceed its jurisdiction and that it acted according to law. We therefore affirm the FPC's order. Although we echo the sentiments of the tribunals below that Mitten undoubtedly has suffered through tragic circumstances, this fact cannot excuse his illegal actions. As noted by the FPC:

As a police officer, John Mitten was duty bound to enforce laws and ordinances fairly and equitably. He repeatedly failed to do this, over a period of several months if not

years, when he observed and took part in illegal drug sales, possession and use. Public confidence in law enforcement is essential if the Milwaukee Police Department is to be effective. John Mitten knew that his illegal activities could seriously hamper his effectiveness in performing his duties. Mitten also knew that if his actions became known it would impact his credibility among his peers, and destroy the ability of many of his fellow officers to trust him in the future. Despite this knowledge, it was only after he believed he was under suspicion that he ceased using illegally [sic] drugs. It was only after he was told by Detective Lagerman that he faced probable discharge from the Department that he sought assistance for substance abuse.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

