COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1313

Cir. Ct. Nos. 2013CV2024
2014CV407

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

GEORGE DILLENBERG,

PETITIONER-APPELLANT,

V.

HOBART/LAWRENCE POLICE AND FIRE COMMISSION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 REILLY, P.J. George Dillenberg was a police officer with the Hobart/Lawrence Police Department from June 2007 to December 10, 2013, when

he was terminated for cause by the Hobart/Lawrence Police and Fire Commission (PFC). Dillenberg challenges his termination by certiorari. We affirm.

¶2 The following facts are undisputed. Pursuant to WIS. STAT. § 62.13(5)(b) (2013-14),[1] Hobart/Lawrence Police Chief Randal Bani filed a statement of charges against Dillenberg with the PFC, alleging nine counts of misconduct based on police department rule violations. Bani's statement of charges recommended that Dillenberg be terminated from the police department. The PFC complied with § 62.13(5)(d) in noticing and holding Dillenberg's disciplinary hearings.

¶3 Following five days of public evidentiary hearings, extensive legal briefing, and deliberations, the PFC rendered a decision that addressed each of the seven standards it must use to determine whether there is "just cause" to sustain charges against an officer[2] and applied those standards to all nine counts of

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Under § 62.13(5)(em), the PFC must apply the following standards when making a "just cause" determination:

> 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.

(continued)

misconduct, finding "just cause" to sustain the charges that Dillenberg violated the department rules. The PFC discharged Dillenberg from the police department. Dillenberg appeals.

STANDARD OF REVIEW

¶4 One who is aggrieved by a decision of a police and fire commission has two avenues of appeal: (1) statutory appeal under WIS. STAT. § 62.13(5)(i) and/or (2) a common law appeal by writ of certiorari. ***Gentilli v. Board of the Police & Fire Comm'rs***, 2004 WI 60, ¶21, 272 Wis. 2d 1, 680 N.W.2d 335. Dillenberg appeals under both avenues, the ramifications of which will become apparent.

¶5 A statutory appeal under WIS. STAT. § 62.13(5)(i) provides for a new trial before the circuit court and is given precedence over other cases in the circuit court. Following a de novo trial, the circuit court makes a decision as to whether there is "just cause" (as described in § 62.13(5)(em)) to sustain the charges against the accused. Sec. 62.13(5)(i). Judge Zuidmulder determined that there was "just cause" to sustain the charges against Dillenberg and affirmed Dillenberg's discharge from the police department under his § 62.13(5)(i) appeal.

¶6 A circuit court's determination of a statutory appeal under WIS. STAT. § 62.13(5)(i) is "final and conclusive" and appellate courts have no jurisdiction to review the circuit court's decision. ***Gentilli***, 272 Wis. 2d 1, ¶14.

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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.

While Dillenberg's § 62.13(5)(i) statutory appeal is not before us given lack of jurisdiction, Dillenberg's statutory appeal to the circuit court impacts our standard of review on Dillenberg's common law writ of certiorari claim. *See* ***Gentilli***, 272 Wis. 2d 1, ¶¶14, 19-20.

¶7 Judge Zuidmulder, in a separate decision, affirmed the PFC on Dillenberg's writ of certiorari. Dillenberg appeals his certiorari claim, although he misstates the issue before this court as whether "the *circuit court* erred when concluding that the Board of Police and Fire Commissioners' role was to try the case against Officer Dillenberg." (Emphasis added.) On review of a writ of certiorari we do not review the decision of the circuit court; we review the agency's (in this case the PFC's) decision. ***Kraus v. City of Waukesha Police & Fire Comm'n***, 2003 WI 51, ¶10, 261 Wis. 2d 485, 662 N.W.2d 294.

¶8 Normally our scope of review for a certiorari action would be four distinct determinations as to whether a police and fire commission "(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." ***Kraus***, 261 Wis. 2d 485, ¶10. However, when an accused makes a statutory appeal under WIS. STAT. § 62.13(5)(i) that is resolved by the circuit court (as in this case), our certiorari review is limited to (1) whether the PFC acted within its jurisdiction and (2) whether the PFC proceeded under a correct theory of law. ***Kraus***, 261 Wis. 2d 485, ¶10; ***Gentilli***, 272 Wis. 2d 1, ¶21. These are questions of law which we review de novo. ***Kraus***, 261 Wis. 2d 485, ¶10; ***Herek v. Police & Fire Comm'n***, 226 Wis. 2d 504, 510, 595 N.W.2d 113 (Ct. App. 1999).

¶9 We offer what is hopefully a cautionary note to litigants. If an aggrieved files a statutory appeal under WIS. STAT. § 62.13(5)(i) and also seeks common law certiorari review of a police and fire commission determination, two results flow from that decision. One, the aggrieved receives a de novo trial in circuit court on the issue of whether there was just cause to sustain the charges; however, the circuit court's decision is "final and conclusive" on that issue. ***Gentilli***, 272 Wis. 2d 1, ¶14. An appellate court has no jurisdiction to hear any argument as to whether there was "just cause." ***Id.*** Two, the aggrieved receives a decision from the circuit court on the common law certiorari review but only as to the commission's jurisdiction or whether the commission proceeded on a correct theory of law. ***Id.*** at ¶21. Any appeal to this court goes solely to those same two issues: whether the commission acted within its jurisdiction and whether it proceeded on a correct theory of law. ***Id.***

DISCUSSION

¶10 Dillenberg's sole argument on appeal is that the PFC proceeded on an incorrect theory of law as it "tried" the case against him rather than acting as an impartial body. Dillenberg makes no argument that the PFC exceeded its jurisdiction. Dillenberg's theory is that the PFC was biased against him because the PFC used the word "try" in its decision. The PFC, in its decision, stated, "[w]e must construe this statute as consistently as possible with our straightforward conventional duty to try the case against [Dillenberg]." Dillenberg argues that based upon this statement the PFC erroneously abrogated its role as a fact finder and decision maker and acted as a prosecutor. Dillenberg argues that the evidence against him was insufficient and that Bani's and the PFC's actions were unreasonable, and, therefore, the PFC was biased in finding against him.

¶11 Dillenberg's argument misses the mark as it goes to the third and fourth prongs of common law certiorari review—arbitrary, oppressive, or unreasonable acts by the PFC. Based on the procedural posture of this case, we are without jurisdiction to review whether the PFC was arbitrary, oppressive, or unreasonable or whether the PFC's findings were reasonable based on the evidence. As such, our analysis could stop here. We will, however, consider Dillenberg's argument and demonstrate that the PFC proceeded under a correct theory of law.

¶12 We disagree with Dillenberg's characterization that by using the word "try" in its decision the PFC was biased against him. When accusing an adjudicatory body of bias, "[the objector] must overcome the presumption of honesty and integrity in those serving as adjudicators." ***State ex rel. Reedy v. Law Enf't Disciplinary Comm.***, 156 Wis. 2d 600, 607, 457 N.W.2d 505 (Ct. App. 1990) (alteration in original; citation omitted). Dillenberg's only example of "bias" is his reference to the statement in the PFC's decision that it had a "straightforward conventional duty to *try* the case *against* [Dillenberg]." (Emphasis added.) WISCONSIN STAT. § 62.13(5) outlines a clear procedure that must be adhered to when conducting disciplinary hearings against police officers. While the statute does not use the word "try," it does require that a hearing be held "in light of the applicable statutes and due process requirements." ***State ex rel. Ruthenberg v. Annuity & Pension Bd.***, 89 Wis. 2d 463, 473, 278 N.W.2d 835 (1979). Both Dillenberg and Bani had legal counsel and the PFC gave both parties ample opportunity to present their case, all in accordance with the dictates of § 62.13(5).

¶13 Dillenberg does not identify a single alleged act of bias or partiality by the PFC—just the PFC's use of the words "try" and "against," which he takes

out of context. Given the lack of any objective evidence that the PFC was biased and based on the presumption that the PFC acted fairly and impartially, Dillenberg's accusation that the PFC was biased against him is unsupported. The PFC followed the proper procedures and reached a decision that comports with the statutory and due process requirements of WIS. STAT. § 62.13(5). Accordingly, we conclude the PFC proceeded on a correct theory of law.

¶14 We next consider if the PFC acted within its jurisdiction, which requires us to "determine whether the [PFC] acted within the scope of its powers." ***Ruthenberg***, 89 Wis. 2d at 472. Dillenberg makes no argument that the PFC acted outside its jurisdiction, except to suggest that the PFC was confused regarding its function under WIS. STAT. § 62.13(5). Dillenberg again implies that by using the word "try" in its decision the PFC was acting not as a fact finder and decision maker but as a prosecutor. We disagree.

¶15 WISCONSIN STAT. § 62.13(5) definitively describes the role of the PFC in disciplinary proceedings. The PFC proceeded on a correct theory of law as it properly followed all § 62.13(5)(d)-(em) statutory procedures in Dillenberg's disciplinary action. Dillenberg's characterization of the PFC as confused regarding its role is without basis in the record; the PFC acted precisely as it should under the statute. As Dillenberg offers no objective evidence that the PFC exceeded the scope of its authority, we find that the PFC acted within its jurisdiction in discharging Dillenberg from the police department.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.