

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 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. 98-2340

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

BRUCE D. GOLEMBIEWSKI,

PLAINTIFF-APPELLANT,

v.

**CITY OF MILWAUKEE AND
CITY OF MILWAUKEE FIRE & POLICE COMMISSION,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Bruce Golembiewski appeals from the trial court's judgment affirming the decision of the City of Milwaukee Fire & Police Commission (FPC) that upheld the Milwaukee Fire Chief's termination of

Golembiewski for violating the City ordinance requiring him to maintain his bona fide residence in the City of Milwaukee.

¶2 Golembiewski argues that: (1) the FPC acted contrary to law and contrary to a City of Milwaukee ordinance by relying on a nine-factor guideline contained in a Milwaukee personnel policy, which conflicts with the definition of “residency” found in *Eastman v. City of Madison*, 117 Wis.2d 106, 342 N.W.2d 764 (Ct. App. 1983), and conflicts with the city ordinance definition of “residency”; and (2) the FPC’s ruling was unconstitutional because it determined that Golembiewski was not a bona fide resident of the City of Milwaukee solely because Golembiewski’s wife and children lived elsewhere.¹ Because the record reveals that the FPC’s decision encompasses the city ordinance definition and the *Eastman* definition of residency and there is no conflict between the definitions and the nine factors, and because the record reflects that the FPC did not base its decision on an incorrect belief that Golembiewski’s family had to live in the city in order for him to maintain a bona fide residence, we affirm.

¹ Golembiewski also contends that the FPC lacked jurisdiction because it conducted an illegal investigation, and he argues that if this court fails to reverse the trial court’s determination affirming the FPC’s decision that, in the alternative, this court should revisit the standard of review for these matters originally promulgated in *State ex rel. Kaczkowski v. Board of Fire & Police Comm’rs*, 33 Wis.2d 488, 148 N.W.2d 44 (1967), and remand this matter to permit the trial court to determine whether the FPC’s decision was arbitrary or oppressive and represented its will and not its judgment. These issues have been raised for the first time on appeal and, thus, are deemed waived. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Parties to an administrative proceeding in Wisconsin must raise known issues and objections and direct their efforts toward developing a record that is as complete as possible in order to facilitate subsequent judicial review. *See Omernick v. DNR*, 100 Wis.2d 234, 248, 301 N.W.2d 437, 444 (1981). This is true even if the administrative agency is without power to decide them. *See id.*

I. BACKGROUND.

¶3 Golembiewski was employed as a City of Milwaukee firefighter. He began his service for the city on July 18, 1983. A City of Milwaukee rule, applicable to Milwaukee firefighters, requires city employees to live in the City of Milwaukee. *See* Section 5-02-1 of the Milwaukee City Charter. Golembiewski and his family lived in a home he and his wife owned located in Milwaukee until December 1995, when his wife and children moved to a home in Muskego that the Golembiewskis built. Golembiewski remained in the Milwaukee home until it was sold. He then temporarily moved to his mother's home in Milwaukee, and eventually Golembiewski relocated to an apartment in a four-family apartment building in Milwaukee which he later purchased. The Golembiewskis also moved their family business, Raysons, Inc., which had been operated from their Milwaukee home, to the new Muskego residence.

¶4 In early 1997, the FPC received an anonymous phone call questioning Golembiewski's residency. As a result, the FPC launched an investigation. After the investigation was completed, the staff for the FPC contacted the Fire Department and advised the Fire Department that they suspected Golembiewski might be living outside the city. The Fire Department then conducted an investigation to determine whether Golembiewski was violating the residency rule. After a preliminary recommendation was made that he was violating the rule, a formal hearing was held by the Fire Department Board of Investigations. At the hearing, Golembiewski, represented by a union representative, called witnesses on his behalf. At the conclusion of the hearing, the Fire Department Board of Investigation unanimously found that Golembiewski was violating the residency rule. On June 6, 1997, the Fire Department Chief, after reviewing the pertinent information, terminated Golembiewski, basing the

termination on Golembiewski's violation of the Milwaukee rule requiring a bona fide residence in the city.

¶5 Golembiewski appealed his termination to the FPC, which also held extensive hearings on the matter. Golembiewski, now represented by an attorney, called witnesses to testify on his behalf. The FPC, however, in a written decision, found that Golembiewski had failed to establish and maintain his actual bona fide residence in the city and upheld the Fire Chief's termination of Golembiewski. Golembiewski then appealed that decision to the circuit court. He sought both a review provided under § 62.50(20), STATS.,² and he brought a writ of certiorari. The trial court, in a written memorandum decision, affirmed the FPC.

Standard of Review

¶6 Golembiewski appealed the FPC's ruling to the circuit court via two procedural vehicles. He appealed under the provisions of § 62.50(20), STATS., and by way of a writ of certiorari. However, § 62.50(22), STATS., prohibits this court from reviewing the trial court's decision under § 62.50(20). Section 62.50(22) directs that: "If the decision of the board is sustained [by the circuit court], the order of discharge ... shall be final and conclusive in all cases." Thus, this court only has jurisdiction over the writ of certiorari claim.

² Section 62.50(20), STATS., provides:

Police and fire departments in 1st class cities.

....

(20) CIRCUIT COURT REVIEW; NOTICE. Any officer or member of either department discharged, suspended or reduced, may, within 10 days after the decision and findings under this section are filed with the secretary of the board, bring an action in the circuit court of the county in which the city is located to review the order.

¶7 We note that while “[t]he general scope of review pursuant to the writ of certiorari is limited to whether a 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,” *State ex rel. Smits v. City of De Pere*, 104 Wis.2d 26, 31, 310 N.W.2d 607, 609 (1981), our review of an administrative body’s decision brought by a writ of certiorari is even further limited.

“Where the legislature provides for a final and conclusive judicial review of the action of a board, commission or other nonjudicial body, the courts have jurisdiction to review by certiorari only those strictly legal questions which were not or could not have been raised by way of the judicial review proceeding provided by the legislature.”

Id. at 31, 310 N.W.2d at 609 (quoted source omitted); *see also Herek v. Police & Fire Comm’n*, 226 Wis.2d 504, 510, 595 N.W.2d 113, 115-16 (Ct. App. 1999) (limiting review by writ of certiorari of dismissal of police officer to whether police and fire commission kept within its jurisdiction and proceeded on correct theory of law; finding that issues that fell within the statutory review process, such as whether the evidence was sufficient and whether commission’s decision was reasonable, were not reviewable by writ of certiorari). Consequently, this court is foreclosed from reviewing the FPC’s action to see whether there is sufficient evidence to sustain its decision or whether the FPC’s determination was reasonable.

¶8 Further, on petition for writ of certiorari, the court of appeals reviews the FPC’s decision, not the circuit court’s decision. These are questions of law which we review *de novo*. *See State ex rel. Sprewell v. McCaughtry*, 226 Wis.2d 389, 393, 595 N.W.2d 39, 41 (Ct. App. 1999). However, we will “accord

deference to the agency's interpretation and application of its own administrative regulations unless the interpretation is inconsistent with the language of the regulation or is clearly erroneous." *Id.* at 394, 595 N.W.2d at 41.

II. ANALYSIS.

¶9 The FPC determined that Golembiewski was properly terminated from his employment by the City of Milwaukee Fire Department Chief because he failed to abide by the city ordinance which requires city employees to maintain their bona fide residence in the city. Section 5-02-1 of the Milwaukee City Charter reads:

Residency Requirements. 1. RESIDENCY REQUIRED.
All employes of the city of Milwaukee are required to establish and maintain their actual bona fide residences within the boundaries of the city. Any employe who does not reside within the city shall be ineligible to [sic] employment by the city and his employment shall be terminated in the manner hereinafter set forth.

Inasmuch as there has been no properly raised challenge to the FPC's jurisdiction in this case, the only issue before us is whether the FPC proceeded on a correct theory of law. With regard to this issue, Golembiewski contends that the FPC erred in several respects.

¶10 Golembiewski seeks a reversal of the FPC's findings, claiming that the FPC "disregarded the testimony of Mr. Golembiewski's friends and family" and "disregarded the testimony of neighbors and acquaintances." Golembiewski argues that the FPC, by ignoring the testimony of key witnesses, proceeded on an incorrect theory of law. Golembiewski posits that the FPC failed to abide by the definitions of "residence" found in the city ordinance and in the *Eastman* case

and, instead, used a nine-factor policy guideline in deciding that Golembiewski was not maintaining his bona fide residence in Milwaukee.

¶11 First, we decline Golembiewski's invitation to review the credibility of the various witnesses. We do so because our limited review on a writ of certiorari does not permit us to review the testimony to determine the credibility of the various witnesses or the weight to be given to their testimony. In addressing Golembiewski's claim that the FPC proceeded on an incorrect legal theory, we have reviewed the FPC's written decision and we note the nine-factor policy guideline referred to by Golembiewski and a summary of the evidence relating to each factor is pivotal to the FPC's decision that Golembiewski was not maintaining a bona fide Milwaukee residence.³ However, contrary to

³ The nine factors are found in Personnel Policy #87/4 of the City of Milwaukee, which reads:

DUAL RESIDENCY POLICY STATEMENT

....

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 employe's family reside and attend school?
2. At which location does the employe keep his or her tangible personal property and effects?
3. At which location does the employe receive his or her correspondence?
4. At which location does the employe spend his or her time?
5. Which location does the employe 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?
9. In the event that one location is owned and the other is rented, some presumption of residency shall be applied to the owned property.

(continued)

Golembiewski's assertions, the personnel policy factors do not conflict with the definitions of residency found in either the city ordinance or relevant case law. In fact, the wording of the personnel policy incorporates much of the definition of residence found in Milwaukee City Charter § 5-02-2 (12/17/96). Specifically, compare the personnel policy which asserts that:

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 employe 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.*

(emphasis added), with Milwaukee City Charter § 5-02-2 (12/17/96):

2. DEFINITION. 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 and his family. *Neither voting in the city nor the payment of taxes of any kind by itself by an employe shall be deemed adequate to satisfy the requirements of this section, nor shall the provisions of this section be satisfied by the maintaining of a rented room or rooms by an employe solely for the purpose of establishing residence in*

Decisions involving dual residency require judgment based upon the totality of circumstances present in each case. The aforementioned are among the indicia which 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.

the city when it appears that his residence is outside of the city. Ownership of real property within the city, when not coupled with maintaining of actual living quarters in the city as herein required, shall be deemed insufficient to meet the requirements of this section.... No consideration shall be given by the city service commission to the fact that such employe intends to maintain a residence in the city if actually he does not maintain such a residence as herein provided for.

(emphasis added). Moreover, as noted by the trial court, the FPC's decision: (a) addresses the residence definition found in the city charter, (b) is consistent with the *Eastman* holding defining "residence," and (c) none of the nine factors found in the personnel policy conflicts with either definition of "residence." We adopt, as our own, the thoughtful analysis of the trial court on these issues. The trial court explained:

Golembiewski cites Eastman v. City of Madison, 117 Wis.2d 106 (Ct. App. 1983) to determine what is intended by the term residency.

The key issue here is what was intended by "actual bona fide residence" when it was included in the Charter. The Eastman case appears to be instructive in this situation. In Eastman the city of Madison decided to enforce its residency requirements and fired a number of employees who did not reside inside the city as required by the ordinance. The court found that the term "reside" was not unconstitutionally vague. Eastman at 115. The [Eastman] court quoted Black's Law Dictionary as defining residence as "personal presence at some place of abode with no present intention of definite and early removal...Residence implies something more than mere physical presence...." Id. at 116. The [Eastman] court observed that the [Madison] mayor had enumerated specific criteria for determining residency, and indicated that such criteria were appropriate to consider in determining residency. Id. It was significant to the reviewing court that the employee's family lived outside of the city. In addition the site of his children's schooling and where the employee spent most of his off-duty time were important to the determination of residence.

In this case, the City of Milwaukee Charter does more than just use the term residence. It modifies "residence"

with the words “actual bona fide”. Black’s Law Dictionary defines the term “bona fide residence” as “residence with domicillary [sic] intent”. Domicillary [sic] intent typically includes features of permanency. In addition the Charter defines residence as “actual living quarters which must be maintained in the city by an employee...” Finally the city went further, as [did] the mayor in Eastman, and outlined criteria to be considered for determining residency in its Personnel Policy #87/4. Contrary to Golembiewski’s assertions these criteria are not different than the residency requirement, but rather are guidelines and explanations of the residency requirement and include many of the criteria that are generally used for determining domicile. Thus it was not error in this case for the Board to consider such things as where Golembiewski’s wife and children lived, where they went to school and church, where most of his personal items were located, and where his home based business was situated. It was also not error to consider evidence concerning statements of intent made by Golembiewski’s wife concerning their intention to evade the residency requirement.

Having adopted the reasoning of the trial court, we, too, are unpersuaded by Golembiewski’s argument.

¶12 Next, Golembiewski submits that the FPC’s decision was unconstitutional because the FPC’s decision that Golembiewski lived outside the City of Milwaukee was based on its incorrect view that Golembiewski’s residency had to be the same as that of his wife and children. Golembiewski’s argument is premised on the fact that a circuit court decision decided fifteen years ago determined that the wording of the then-existing rule, which read, “[t]he term ‘residence’ employed in this ordinance shall be construed to mean the actual living quarters which must be maintained within the city by an employe *and his family*,” was unconstitutional. *See Leitner v. Breier*, No. 605-760 (Milwaukee County Cir. Ct. Jan. 25, 1984) (emphasis added). Although it appears the city has amended the ordinance and removed the words “and his family” from the ordinance, the city’s

practices clearly reflect that the city permits dual residences.⁴ Indeed, the nine-factor personnel policy was developed to fairly address situations like those presented here, where a city employee owns more than one property. Milwaukee City Charter § 5-02-3 (3/20/98) reads in part:

The city service commission shall make final determination in dual or multiple residence cases as to which location constitutes an employe's actual living quarters, and it shall be the location which will be considered in establishing whether an employe complies with the intent of this section and city service rules relating to residency.

Further, Milwaukee City Charter § 5-02-2 implicitly allows an employee to live away from his family and not violate the rule when it declares: “Whenever the facts disclose the existence of dual residences, the decision of the city service commission shall be final in respect to whether or not such employe's residence satisfies the provisions and requirements of this section.”

¶13 Finally, the FPC's decision reveals that the FPC believed that Golembiewski and his wife and children were not all required to live in the city for Golembiewski to fulfill the ordinance's requirement. The FPC's use of the personnel policy nine-factor test developed for dual residency situations in its decision demonstrates its understanding that a city employee may qualify for residency even though the city employee's family lives elsewhere. Further, the decision clearly states that “an employee” not “an employee and his family” must establish and maintain a bona fide residence in the city. In the decision, the FPC announced that the nine questions found in the personnel policy were being used

⁴ A copy of Milwaukee City Charter § 5-02-2, found in the record supplied by the city, has redacted the words “and his family.” The Milwaukee City Charter § 5-02-2, effective March 20, 1998, does not contain the words “and his family.”

as factors only. The first asks, “At which location does the employe’s family reside and attend school?” Had the FPC believed that Golembiewski’s claim failed because his family was obligated to live with him, there would have been no reason for the FPC to address the remaining factors. For these reasons, we conclude that the FPC did not reach its decision via an erroneous view of the law.

¶14 Finally, in his reply brief, Golembiewski argues that this court should vacate the circuit court’s decision and, pursuant to § 752.35, STATS., grant a discretionary reversal. We decline to address this request because it was raised for the first time in the reply brief. *See Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis.2d 278, 294 n.11, 528 N.W.2d 502, 508 n.11 (Ct. App. 1995) (asserting that courts consistently refuse to consider arguments raised for the first time in a reply brief because such arguments violate the Rules of Appellate Procedure); *Swartwout v. Bilsie*, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981) (appellate court will generally not consider issues raised for first time in reply brief). Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

