

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 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. 98-2534

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ROBERT J. AUCHINLECK,

PLAINTIFF-RESPONDENT,

V.

TOWN OF LAGRANGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
MICHAEL S. GIBBS, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. The Town of LaGrange appeals from the judgment of the circuit court reversing the finding of a hearing examiner and reinstating Robert J. Auchinleck as Chief of Police of the Town of LaGrange. The Town argues on appeal that the circuit court did not have jurisdiction to conduct a certiorari review and that the court erred in concluding that the hearing examiner had acted contrary to law. We conclude that the circuit court properly conducted a

certiorari review and that the hearing officer's determination was contrary to law. Therefore, we affirm.

This is not the first time these parties have been before this court on this same matter. *See Town of LaGrange v. Auchinleck*, 216 Wis.2d 84, 573 N.W.2d 232 (Ct. App. 1997), *review denied*, 217 Wis.2d 519, 580 N.W.2d 689 (1998). The matter involves a dispute between the Town and the Chief of Police, Robert J. Auchinleck. In the previous case, the Town attempted to remove Auchinleck from his position without following the mandated statutory procedures. *See* § 60.56(1)(am), STATS. The circuit court concluded that the Town's actions were without force and that Auchinleck remained Chief of Police. *See Town of LaGrange*, 216 Wis.2d at 89-90, 573 N.W.2d at 234. We affirmed. *See id.* at 99, 573 N.W.2d at 238.

Merely nine days after the circuit court determined that the Town had improperly attempted to remove Auchinleck from his position, the Town issued six orders directed at Auchinleck. All of the orders threatened removal from office for noncompliance. Auchinleck refused to comply with the orders.

The Town then brought charges against Auchinleck and the matter was heard by a hearing examiner. The hearing examiner determined that Auchinleck had violated three of the six orders and ordered Auchinleck terminated from his position as Chief of Police. Auchinleck then sought review in the circuit court.¹ The circuit court determined that the orders were another attempt by the Town to remove Auchinleck without following the mandated statutory procedures.

¹ The Town did not challenge the hearing officer's determination on the other three orders. Therefore, only those orders which Auchinleck was found to have violated were considered by the circuit court and on appeal.

The court further ordered that Auchinleck be reinstated effective immediately. The Town appeals.

The first issue for review is whether the circuit court had jurisdiction to conduct a certiorari review of the hearing examiner's order. The Town argues that the matter was not properly before the circuit court on certiorari review. Auchinleck argues that the circuit court heard the matter as a direct appeal under § 62.13(5), STATS., and, therefore, there is no jurisdiction for this appeal. When the issue of whether the matter was an appeal under § 62.13(5) was raised by the circuit court, however, both sides conceded that the matter was properly before the circuit court on certiorari review.² We agree.

Section 62.13(5)(i), STATS., provides that any person disciplined or discharged from his or her position by a board “may appeal from the order of the board to the circuit court.” *See Younglove v. City of Oak Creek Fire and Police Comm’n*, 218 Wis.2d 133, 135, 579 N.W.2d 294, 295 (Ct. App.), *review denied*, 219 Wis.2d 924, 584 N.W.2d 124 (1998). The person may also seek review by means of certiorari. *See id.* at 136 n.2, 579 N.W.2d at 295; *State ex rel. Reedy v. Law Enforcement Disciplinary Comm.*, 156 Wis.2d 600, 606, 457 N.W.2d 505, 508 (Ct. App. 1990). In this case, Auchinleck sought review by means of certiorari. The record establishes that the parties below agreed they were before the court by way of certiorari review, and the circuit court decided the matter as such. Therefore, the matter is properly before this court.

² While both parties conceded this matter before the circuit court, we note that neither party mentioned the agreement in their briefs to this court.

On review of certiorari when the party has a right of direct appeal, we confine our review to whether the Town acted in excess of its jurisdiction or proceeded under an incorrect theory of law. *See Owens v. Board of Police & Fire Comm'rs*, 122 Wis.2d 449, 451, 362 N.W.2d 171, 173 (Ct App. 1984). We conclude that the circuit court properly determined that the Town acted contrary to law and reversed the hearing examiner's finding that Auchinleck had violated three orders.

The first order at issue told the Chief that he was deemed off duty until he provided details of his on- and off-duty schedule to the Town. The effect of this order was to suspend Auchinleck. The Town, however, once again did not follow the required statutory procedures to suspend its Chief of Police. *See* § 60.56(1)(am), STATS. The order is therefore invalid and Auchinleck retains his position of Chief of Police.

The Town argues that it was not taking disciplinary action against Auchinleck because he was neither discharged nor terminated. As the circuit court noted, however, the Town was effectively taking disciplinary action against Auchinleck by reducing his status and authority. Further, Auchinleck was suspended until he complied with the order. Section 60.56(1)(am), STATS., establishes the procedure the Town must follow before it suspends, reduces, suspends and reduces, or removes the police chief. The Town did not follow the statutory procedure.

The second order at issue required Auchinleck to turn his law enforcement records over to the town clerk. This order was based on a Town ordinance which this court later concluded was invalid. *See Town of LaGrange*, 216 Wis.2d at 98, 573 N.W.2d at 238. The Town argues that even though the

ordinance on which this order was based was later declared invalid, at the time Auchinleck disobeyed the order the ordinance was in full force and effect. His refusal to comply with the order, the Town argues, constituted insubordination and he was rightfully terminated.

Prior to the date the Town issued this order, however, the circuit court had determined that Auchinleck remained Chief of Police; and, therefore, he did not have to turn the records over to the Town. Because Auchinleck had a court order stating that he did not have to turn over the records, it was not insubordination for him to refuse to comply with the order. Therefore, the hearing examiner's determination that Auchinleck should be terminated as Chief of Police for failing to comply with this order was contrary to law.

The third order required Auchinleck to stop using his home address as the Police Chief's official address. The circuit court found that this was another attempt by the Town to circumvent the statutory requirements for the removal of the Chief of Police; in fact, the court stated that it was "a means to justify the end." The court found that this was merely an attempt to interfere with the Chief's responsibilities and a violation of § 60.56(1)(am), STATS. We agree.

Because we conclude that the hearing examiner's findings were contrary to law, we affirm the judgment of the circuit court.

Auchinleck moves this court to find the Town's appeal to be frivolous and award him costs and fees under RULE 809.25(3), STATS. While we decline to grant the motion, we do so somewhat reluctantly. Simply put, it is time for this matter to be finished.

By the Court.—Judgment affirmed.

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

