COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1598 **Cir. Ct. No. 2015CV5081**

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

CHRISTOPHER E. MANNEY,

PETITIONER-APPELLANT,

V.

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

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 BRENNAN, P.J. Christopher E. Manney, a former officer with the Milwaukee Police Department (the Department), appeals from an order of the circuit court that, on *certiorari* review, upheld the decision of the Board of Fire

and Police Commissioners for the City of Milwaukee (the Board). The Board sustained charges against Manney of two rules violations and concluded that discharge was required. The discipline stemmed from an encounter that ended in a citizen's death. The encounter took place in Red Arrow Park when Manney, while on duty, approached Dontre Hamilton, who was lying on the ground. Based on Hamilton's odd behavior and the look in his eyes, Manney consistently told investigators, he thought Hamilton was impaired by alcohol or drugs or suffering from a mental disorder. Manney said he told Hamilton to stand up and conducted a pat-down search. As the encounter escalated into a physical struggle, Hamilton disarmed Manney and hit Manney with his own baton, and Manney shot Hamilton multiple times, killing him.

¶2 Chief Edward Flynn found Manney's use of deadly force to be justified in self-defense. Manney was not charged with any crime. The basis for the charges that led to Manney's termination was his failure to follow two Milwaukee Police Department rules: (1) Standard Operating Procedure (SOP) 085.25(a), a rule that governs when an officer may conduct a pat-down search; and (2) SOP 460.05(1) which requires an officer to consider certain tactics for approaching subjects in circumstances like those here—approaching an emotionally disturbed or impaired person alone. The Chief concluded that in his approach to Hamilton and his conduct of an out-of-procedure pat-down, Manney's violations of the SOPs "led to a physical confrontation and resulted in the use of deadly force." The Board sustained the discharge based on Manney's violation of the above two SOPs, and Manney appealed to the circuit court.

¶3 Before the circuit court, Manney brought both a statutory appeal under WIS. STAT. § 62.50(20) (2015-2016)[1] and a *certiorari* appeal. The circuit court denied his statutory appeal finding sufficient evidence to support just cause for his discharge. The circuit court also denied Manney's *certiorari* review. Manney appeals the *certiorari* decision to this court.

¶4 On *certiorari* appeal to this court, Manney argues that this court should reverse the Board's decision for four main reasons.[2] First, as to SOP 085.25(a), he argues that neither Wisconsin nor constitutional law requires an

[1] WISCONSIN STAT. § 62.50(20) states that "[a]ny officer or member of either department discharged … 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." Where such an action is brought, the circuit court's review is limited, under WIS. STAT. § 62.50(21), as follows:

> CERTIFICATION AND RETURN OF RECORD; HEARING. Upon the service of the demand under sub. (20), the board upon which the service is made shall within 5 days thereafter certify to the clerk of the circuit court of the county all charges, testimony, and everything relative to the trial and discharge, suspension or reduction in rank of the member.…. The action shall be tried by the court without a jury and shall be tried upon the return made by the board. In determining the question of fact presented, the court *shall be limited in the review thereof to the question: "Under the evidence is there just cause, as described in sub. (17)(b), to sustain the charges against the accused?*" The court may require additional return to be made by the board, and may also require the board to take additional testimony and make return thereof.

(Emphasis added.) All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] On *certiorari* review we review the Board's decision, not the circuit court's. Our review is narrower than the usual *certiorari* review because Manney had a statutory review below. In such cases, *certiorari* review is limited to two questions: "whether the [Board] kept within its jurisdiction and whether it proceeded on a correct theory of the law." ***Herek v. Police & Fire Comm'n Vill. of Menomonee Falls***, 226 Wis. 2d 504, 510, 595 N.W.2d 113 (Ct. App. 1999). The arguments Manney makes that are properly before us all address questions of law and therefore fall within the second of those two questions.

officer to have a reasonable basis to believe a suspect has a weapon before conducting a pat-down search, and the Board cannot ignore state law and discipline him for violating a Department rule that imposes such a requirement. Relatedly, he argues that the pat-down rule he was disciplined for violating is "unconstitutionally vague." Second, he argues that SOP 460.05(1) is not a rule, only a suggestion for consideration, and therefore cannot be the basis for discharge. Third, he argues that his due process rights were violated by the Board basing its decision on an uncharged SOP, 001.05 Fair and Impartial Policing, which Manney was never charged with. Finally, he raises a belated challenge to the Board's jurisdiction.

¶5 For the following reasons we affirm the Board's decision discharging Manney.

BACKGROUND

The shooting of Hamilton and its aftermath.

¶6 Manney does not dispute the underlying facts, set forth by the circuit court in its order as follows:

> Officer Manney was a City of Milwaukee police officer for approximately fourteen years. During the last eight years of his service, he worked a beat patrol in downtown Milwaukee.
>
> On the afternoon of April 30, 2014, Officer Manney responded to a complaint from an employee of the Starbucks shop at Red Arrow Park that a homeless person was asleep on the ground in the park not far from a temporary Starbucks kiosk. Officer Manney responded, alone and on foot. The subject of the complaint was Dontre Hamilton. As Officer Manney approached Mr. Hamilton, he saw Mr. Hamilton lying on the ground amidst some belongings. He was lying on his back with his arms at his sides and his palms facing up. His eyes were closed.

When Officer Manney came closer, Mr. Hamilton's eyes opened abruptly. Officer Manney's impression in this moment was that Mr. Hamilton was under the influence of a drug or alcohol or was suffering from a mental disorder. He directed Mr. Hamilton to stand up and began to pat down his clothing to determine whether he was armed. A scuffle ensued that led to Mr. Hamilton wresting Officer Manney's baton from him and attacking him with it. Officer Manney drew his sidearm and shot Mr. Hamilton, killing him.

Officer Manney was not charged with a crime. Both Chief [Edward] Flynn and the Milwaukee County District Attorney concluded that once Mr. Hamilton began attacking Officer Manney with his baton, his use of deadly force was privileged and justified.

However, on October 15, 2014, even before the District Attorney decided not to charge Officer Manney, the Chief fired him, on the ground that he violated two MPD rules: (1) Standard Operating Procedure 085.25(a), a rule governing when an officer may conduct a pat-down search for weapons, which requires that the officer "has reason to believe that the suspect possesses weapons … and poses a threat to the police member's or another member's … safety"; and (2) Use of Force Standard Operating Procedure 460.05(1), which requires an officer to consider certain tactics for approaching certain subjects in certain circumstances, and in particular, not to approach an emotionally disturbed person alone, not to stand up a subject who is lying on the ground if doing so causes the officer to lose a tactical advantage over the subject, and to keep control over and a safe distance from a subject who is causing the officer to fear for his own safety.

Officer Manney appealed his firing to the Board, which conducted a trial in March, 2015. The Board unanimously found that Chief Flynn had just cause to fire Officer Manney. It concluded that when Officer Manney decided to frisk Mr. Hamilton he did not have reason to fear Mr. Hamilton or suspect that he was armed, and therefore the pat-down violated SOP 085.25(a). Further, it concluded that Officer Manney failed to follow the department's guidance on how to approach subjects like Mr. Hamilton in circumstances like those that presented themselves on April 30, 2014, and therefore he acted in violation of SOP 460.05(1). The Board agreed with the Chief that Officer Manney should be discharged.

(Footnotes omitted.) Additional facts will be included as necessary to the discussion.

Manney's appeals to the circuit court.

¶7 Manney brought appeals of the Board's decision in the circuit court under both mechanisms of review: the statutory review process, *see* WIS. STAT. § 62.50(20), and common law *certiorari* review, *see* ***Gentilli v. Board of Police & Fire Comm'rs of the City of Madison***, 2004 WI 60, ¶3, 272 Wis. 2d 1, 680 N.W.2d 335. The circuit court consolidated the appeals.

¶8 In its order dismissing Manney's petition for statutory review, the circuit court noted that Manney's "violations of department rules … resulted from serious mistakes in professional judgment" and "escalated a routine police encounter into a catastrophe of community-wide proportions with serious consequences for the public's confidence in the police department." It concluded that "[s]ubstantial evidence in the record supports the Board's conclusion that discipline commensurate with such serious consequences was justified." The circuit court's determinations pertaining to the reasonableness of the Board's actions and the sufficiency of the evidence to support them are "final and conclusive." *See* WIS. STAT. § 62.13(5)(i), ***Herek v. Police & Fire Comm'n Vill. of Menomonee Falls***, 226 Wis. 2d 504, 510 n.3, 595 N.W.2d 113 (Ct. App. 1999). Therefore, no further arguments can be made concerning the reasonableness of its actions or the sufficiency of the evidence to support them. In ***Gentilli***, 272 Wis. 2d 1, ¶20, our supreme court explained the limited focus of *certiorari* review in cases where WIS. STAT. § 62.13(5)(i) applies. Because the broader sufficiency of the evidence and reasonableness considerations addressed on *certiorari* review in

other circumstances are subsumed into the § 62.13(5)(i) process, the only issues reviewable on *certiorari* where § 62.13(5) applies are legal questions:

> In ***State ex rel. Kaczkowski v. Fire & Police Commissioners of Milwaukee***, the court concluded that statutory appeal under [WIS. STAT. § 62.13(5)(i)] provided *an exclusive procedure* for a circuit court to determine certain issues, namely whether a board's action was arbitrary, oppressive, or unreasonable, and whether the board could reasonably make the order or determination at issue. These issues, the court held, are encompassed by the standard of review, namely "under the evidence was the decision of the board reasonable." Circuit courts retained jurisdiction to review by certiorari, however, those *strictly legal questions that were not or could not have been raised through a statutory judicial review proceeding* under [§ 62.13(5)(i)].

Gentilli, 272 Wis. 2d 1, ¶20 (citing ***State ex rel. Kaczkowski v. Fire & Police Comm'rs of Milwaukee***, 33 Wis. 2d 488, 500-02, 148 N.W.2d 44 (1967)) (emphasis added) (footnotes omitted).

¶9 The circuit court's *certiorari* review addressed Manney's arguments that (1) the Board had imposed on him a pat-down search standard that is contrary to state statute and constitutional law; (2) the Board's finding of a violation of SOP 460.05(1) is contrary to the law because it is a suggestion only; (3) the Board had unlawfully based its decision on an uncharged rule violation for which Manney had received no notice, which constituted a violation of Manney's due process rights; and (4) the Board had no jurisdiction. The circuit court rejected Manney's arguments and affirmed. This is a *certiorari* appeal from that order.

DISCUSSION

I. The Board sustained the charge of violating SOP 085.25(a) under a correct theory of law.

A. Standard of review.

¶10 As noted above, *certiorari* review of this type of case is limited strictly to "legal questions that were not or could not have been raised through a statutory judicial review proceeding under [WIS. STAT. § 62.13(5)(i)]." ***Gentilli***, 272 Wis. 2d 1, ¶20. Manney properly appealed from the *certiorari* review by the circuit court. Some of his arguments to this court, however, appear to resurrect issues that were decided by the circuit court in the statutory appeal and cannot be further appealed. *See* § 62.13(5)(i); ***Herek***, 226 Wis. 2d at 510, n.3 (circuit court's determinations pertaining to the reasonableness of the Board's actions and the sufficiency of the evidence to support them are "final and conclusive").[3]

¶11 The questions of law properly before us are whether the Department's pat-down rule is contrary to Wisconsin law or unconstitutional, whether SOP 460.05(1) is a rule for which discipline can be imposed, and whether Manney's right to due process was violated.

[3] We address only the arguments appropriate to raise on *certiorari* review. Manney included in his brief to this court arguments pertaining to various attacks on the sufficiency of the evidence to sustain the charges. However, these arguments were not made in the certiorari case at the circuit court and cannot be presented here. *See* ***Gentilli v. Board of Police & Fire Comm'rs of the City of Madison***, 2004 WI 60, ¶20, 272 Wis. 2d 1, 680 N.W.2d 335. (They include an argument that the Board should have given dispositive weight to certain testimony by the Chief that Manney views as favorable; an argument that the Board should have given greater weight to Manney's account of his personal experience with homeless people; and an argument that there was insufficient evidence to sustain the second charge, the violation of SOP 460.05(1)). In short, they are arguments about the weight of the evidence, and they are not properly before us. The substance of an argument, and not the label a party attaches to it, determines what kind of argument it is. *See*, e.g., ***Wesolowski v. Erickson***, 5 Wis. 2d 335, 339, 92 N.W.2d 898 (1958) (the nature of an action is determined by the allegations of the pleading rather than its caption).

¶12 Whether the Board proceeded on a correct theory of law is a question of law that we review *de novo*. *See* ***Herek***, 226 Wis. 2d at 510.

B. The Department's pat-down rule, SOP 085.25(a), does not impose a greater requirement than that imposed by Wisconsin or Constitutional law.

¶13 Manney argues that the Board applied incorrect law–imposing a greater requirement than Wisconsin or constitutional law would apply–when it imposed the element of a "reason to believe that the suspect possesses weapons on his or her person and poses a threat" prior to conducting a pat-down. He argues that neither WIS. STAT. § 968.25 nor ***Terry v. Ohio***, 392 U.S. 1, 30 (1968), imposes the condition of reasonable belief of possession of a weapon, and therefore the Department cannot impose that greater, and more restrictive, search standard.

¶14 The State counters that the requirement of a reasonable belief of a weapon is consistent with Wisconsin and constitutional law, and we agree.

¶15 The Board found that "Manney never articulated that he suspected or believed Mr. Hamilton had a weapon." Manney provided a statement to the Department on the day of the shooting, April 30, 2014. In that statement, Manney gave no indication that there was evidence that Hamilton had a weapon. It was not until his subsequent two interviews with Internal Affairs investigators, conducted three and four months later on July 30 and August 27, 2014, that he mentioned that "bulges" in Hamilton's pockets could have been a knife or shards of glass.

¶16 The rule regarding pat-down searches is SOP 085.25(a). It states in relevant part,

> Law enforcement officers have the right to perform a pat-down search of the outer garments of a suspect for weapons

> if the suspect has been legitimately stopped with reasonable suspicion and *only when the police member has reason to believe that the suspect possesses weapons on his or her person and poses a threat* to the police member's or another person's safety.

(Emphasis added.)

¶17 The relevant statute is WIS. STAT. § 968.25, which states,

> When a law enforcement officer has stopped a person for temporary questioning … and *reasonably suspects that he or she or another is in danger of physical injury, the law enforcement officer may search such person for weapons or any instrument or article or substance readily capable of causing physical injury* and of a sort not ordinarily carried in public places by law abiding persons.

(Emphasis added.)

¶18 The constitutional rule setting the limitations for a pat-down search supported only by reasonable suspicion is set forth in ***Terry***:

> We merely hold today that *where a police officer observes unusual conduct which leads him reasonably to conclude* in light of his experience that criminal activity may be afoot and *that the persons with whom he is dealing may be armed and presently dangerous*, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Terry, 392 U.S. at 30 (emphasis added).

¶19 Manney argues that the Board ignored the standard in WIS. STAT. § 968.25, Wisconsin case law, and ***Terry*** and instead enforced a different standard set forth in the SOP. The Board's position is that there is no difference.[4]

¶20 Manney's argument is that SOP 085.25(a) merely requires an officer's "reasonable suspicion of danger." His argument is based on isolated phrases from WIS. STAT. § 968.25 ("reasonably suspects that he or she or another is in danger of physical injury") and ***Terry*** ("whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger"), *see* ***Terry***, 392 U.S. at 27, as well as similar language in other cases applying ***Terry***, e.g., ***State v. Moretto***, 144 Wis. 2d 171, 174, 423 N.W.2d 841 (1988) (limited warrantless search for weapons in vehicle permitted "where … the officer 'reasonably suspects that he or another is in danger of physical injury'"). Manney does not dispute that the point of a pat-down search is to find weapons; his argument is simply that a police officer is not required to have a reasonable basis to believe a person has a weapon in order to do so.

¶21 The circuit court concluded that ***Terry*** and WIS. STAT. § 968.25, like SOP 085.25(a), impose "both the officer peril prerequisite and the suspected

[4] Alternatively, the Board argues that it does not matter if the two standards are different. It concluded in its decision that there was not "any inconsistency" between the two and also that "[s]tates, cities and other municipalities can adopt policies that are more restrictive than those promulgated" by federal or state courts. Because we conclude that the Department rule is identical to the constitutional and statutory rules for pat-down searches, we need not address the parties' arguments about the Board's conclusion about its power to enforce search standards that are more restrictive than those under state and federal law. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (typically, an appellate court should decide cases on the narrowest possible grounds). As the circuit court recognized, neither party's position on this issue was supported by legal authority that clearly addressed the question of whether a municipality can establish "rules [for employees] that are more restrictive than what state law otherwise permits."

weapon prerequisite." A pat-down search *for weapons* makes no sense otherwise. As the United States Supreme Court stated in ***Terry***:

> [T]here must be a narrowly drawn authority to permit a reasonable search *for weapons* for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Terry, 392 U.S. at 27 (emphasis added).

¶22 ***Terry*** thus held that an officer was "entitled for the protection of himself and others" to conduct a limited search where the officer reasonably concluded "that the persons with whom he is dealing may be armed and presently dangerous." ***Id.*** at 30. *See also* ***State v. McGill***, 2000 WI 38, ¶19, 234 Wis. 2d 560, 609 N.W.2d 795 (limited search for weapons constitutional "[w]here an officer reasonably believes that his safety may be in danger because the suspect he is investigating may be armed"), and ***Moretto***, 144 Wis. 2d at 179 (central policy for pat-down search statute is to "provide for the safety of the officer *by permitting a search for weapons*" (emphasis added)).

¶23 We conclude that SOP 085.25(a) states the same requirement for officers as Wisconsin law and ***Terry***. Accordingly, we conclude that the Board proceeded on a correct theory of law when it sustained the first charge against Manney.

C. The Board applied the proper objective standard to the question of whether Manney reasonably believed Hamilton possessed a weapon.

¶24 In a second, related, argument Manney contends that the Board made an error of law by improperly applying a subjective standard to the question of whether reasonable suspicion supported the pat-down search. Manney points to ***Terry***'s requirement that "the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" ***Terry***, 392 U.S. at 21-22. Manney appears to argue that the Board wrongly applied a subjective approach because it "focused on what Manney stated he knew and observed at the time of the incident" and thus relied on his own account of "the facts available to the officer at the moment."

¶25 We reject Manney's characterization of the Board analysis as subjective. It is true that for the facts available to the officer, the Board relied on Manney's own observations and thoughts. While ***Terry*** states that the court is not to restrict its *reasonableness analysis* to the officer's subjective thoughts, it also clearly requires that the analysis *include* the "facts available to the officer at the moment of the seizure or the search[.]" ***Id.*** This is precisely what the Board did here. The Board gleaned the facts of the incident from Manney's observations at the time of the incident. He and Hamilton were the only witnesses. And notably, on appeal Manney does not argue that there are any *other* facts in the record that the Board should have, but did not, consider. As the circuit court noted, Manney "doesn't explain" how this legal argument, applied to the facts here, would require a different result.

D. SOP 085.25(a) does not require a reasonable belief of multiple weapons.

¶26 In another, related argument on SOP 085.25(a) , Manney argues that the SOP departs from state and federal law because it prohibits pat-down searches unless the subject is reasonably believed to possess *multiple* weapons—it authorizes pat-downs "only when the police member has reason to believe that the suspect possesses *weapons* on his or her person." As a preliminary matter, Manney was not disciplined for failing to establish a reasonable basis for suspecting that Hamilton had multiple weapons. The Board's finding was that "Manney never articulated that he suspected or believed Mr. Hamilton had *a weapon*." (Emphasis added.) Manney attacks the rule for requiring something that a commonsense reading shows that it does not require. It would be absurd to interpret the rule to prohibited officers from a pat-down search where they had reason to believe a suspect had only one weapon, and we "avoid absurd or unreasonable results." *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

¶27 Further, we note that the plural use of *weapon* in various formulations of the rule has never given rise to the interpretation that Manney gives to the SOP language. ***Terry*** itself uses the plural form in its *holding*: a limited search is permissible "in an attempt to discover *weapons* which might be used to assault [the officer.]" ***Terry***, 392 U.S. at 30 (emphasis added). Yet no interpretation of ***Terry*** requires reason to believe a subject is possessed of more than one weapon before a ***Terry*** stop frisk is permitted. Likewise, the statute uses the plural form ("the law enforcement officer may search such person for *weapons*" (emphasis added)), yet it would be absurd to read that language as

meaning that a law enforcement officer may not search such a person for a single weapon.

¶28 Because the SOP states the same requirement as the statute and ***Terry***, Manney has not shown that the Board proceeded under an incorrect theory of law when it sustained the first charge.

E. SOP 085.05(a) is not unconstitutionally vague.

¶29 Manney's third, related argument is that the Board cannot discipline him for violating a pat-down search rule that is unconstitutionally vague. The basis for his vagueness argument is that SOP 082.25(a) is inconsistent with two other SOP subsections because unlike the other two subsections, SOP 085.00 and SOP 085.05, it "*requires* that the suspect be armed with *multiple weapons*," whereas the others only require a single weapon. The multiple-weapon requirement in one section, he argues, "render[s] the SOP *in its entirety* unconstitutionally vague" because an officer does not know which subsection to comply with.

¶30 Our analysis above, that SOP 082.25(a) does no such thing, is dispositive of this argument as well. We reject Manney's reading of the SOP as imposing a "multiple weapon" requirement, and without that, the three subsections are harmonious. Like the circuit court, we conclude that there is neither internal inconsistency nor conflict between the SOP subsections and the law and therefore "no basis for a finding that SOP 085.25(a) is unconstitutionally vague."

II. SOP 460.05(1) is a rule, not merely a suggestion.

¶31 Manney argues that the Board violated his due process notice rights by disciplining him for violation of SOP 460.05(1) because it is merely a

suggestion, not a rule.[5] To the extent that his argument attacks the Board for applying an incorrect legal principle, we address his argument. To the extent that his argument is a challenge to the Board's action as "arbitrary, oppressive, or unreasonable," *see* WIS. STAT. § 62.50(17)(b), or to a deficiency of proof, we do not review those issues because they were decided by the circuit court in the statutory review appeal, which we do not review here. *See* ***Gentilli***, 272 Wis. 2d 1, ¶20.

¶32 First we note that even if Manney was not properly disciplined for violation of SOP 460.05(1), he would still be discharged due to the fact that only one violation of a rule is sufficient for an officer's discharge, and he was found to have violated SOP 085.25(a).

¶33 But additionally, as to the merits of Manney's claim that the SOP is not a rule, we conclude to the contrary. SOP 460—Use of Force states that it is enacted pursuant to General Order 2014-02, issued January 27, 2014. It states, "It is the policy of the Milwaukee Police Department that *all uses of force will comply* with the State of Wisconsin Defense and Arrest Tactics (DAAT) Disturbance Resolution Model, Intervention Options[.]" (Emphasis added.) The rule covers three parts of disturbance resolution: "(1) Approach Considerations," "(2) Intervention Options," and "(3) Follow-through Considerations." The Board concluded that "there was substantial evidence" that he violated the rule referencing "Standard Operating Procedures Relating to Use of Force-Section

[5] In his brief to this court, Manney has inserted a one-paragraph argument that he did not make at the circuit court: that the SOP he was accused of violating in the second charge was also unconstitutionally vague. We do not address arguments raised for the first time on appeal. *See* ***Bunker v. LIRC***, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864.

460.05(1).” Manney does not argue that he did follow them. He does not claim that he did not know the DAAT approach considerations. Manney acknowledged receiving DAAT training in his fourteen years on the job. Rather he confines his argument to his contention that the DAAT model is a suggestion for consideration, not a rule, and therefore under due process principles, discharge cannot be based on a suggestion. He is not correct. All officers must comply with the Use of Force approach considerations stated in 460.05(1). He did not comply. Therefore, Manney’s discipline for a violation of SOP 460.05(1) is not a violation of his due process rights.

III. Manney’s discipline was not based on an uncharged rule violation.

¶34 Next, Manney argues that he was unfairly disciplined by the Board for an uncharged rule violation–SOP 001.05 “Fair and Impartial Policing,” which prohibits profiling. It states that police “shall not consider race, color, ethnicity, national origin, economic status … in carrying out law enforcement activities[.]” Manney’s argument is based on a statement the Board made in its decision, *after* finding he had violated SOPs 085.25(a) and 460.05(1), that Manney “profiled Mr. Hamilton based on his perceived economic status as a homeless person[.]” The Board’s conclusion on this point was based on Manney’s statement, “I really didn’t have a reason to pat him down except he looked like he was homeless[.]”

¶35 The Board concluded that both SOP 085.25(a) and SOP 460.05(1) were reasonable. It then stated that SOP 001.05 was “likewise” reasonable and that “Manney was found to have profiled Mr. Hamilton based on his perceived economic status as a homeless person[.]” The Board mentioned SOP 001.05 in connection with its analysis of the “reasonableness” of the two rules allegedly

violated, which is one of the seven "just cause" standards from WIS. STAT. § 62.50(17)(b) that govern the Board's review of the charges.

¶36 Manney argues that without notice and an opportunity to respond, as required by due process principles, the Board could not have found him in violation of SOP 001.05. He argues essentially that the fact that the SOP was referenced in the decision means that the Board considered it a necessary finding without which the other charges could not stand. He asserts that "the only reason for the Board to have concluded that Manney had violated the Fair and Impartial Policing SOP (because he allegedly 'profiled' Hamilton), would have been to discipline him for something which he was never accused of violating prior to the Chief issuing discipline." The Board argues that due process notice requirements "do not apply under these circumstances"—namely, where Manney was neither charged nor disciplined for violation of a rule.

¶37 Manney's argument is premised on his assumption that the Board's reference to the profiling SOP is *per se* proof that the discipline imposed was really discipline for profiling Hamilton even though he was not charged with doing so. The circuit court gave two reasons it disagreed with Manney's assertion:

> First, to the extent that Officer Manney deserved notice, he received it when he was served with Charge 1, which explicitly states that Officer Manney "acted contrary to training he received on February 22, 2012" regarding encounters with homeless people and cited the department procedure the Board invoked in its decision, that "members [of the Department] should approach homeless individuals as they would any other citizen. Homelessness, on its own, does not constitute reasonable suspicion."
>
> Second, to the extent the [D]epartment was required to state this charge separately and failed to do so, the lack of notice was immaterial. The Board's conclusions regarding Charges 1 and 2 stand on their own, and can be sustained

> without regard to whether Officer Manney also was engaged in prohibited profiling.

It went on to add that neither finding sustaining the charges "depend[ed] on any finding about Officer Manney profiling Mr. Hamilton[.]" We adopt the circuit court's reasoning on this point and conclude that Manney was not disciplined for an uncharged rule violation.

IV. Because Manney did not raise the issue of jurisdiction before the Board, he forfeited the argument that the Board lost jurisdiction due to certain discovery violations.

A. Standard of review and relevant law.

¶38 *Certiorari* review includes review of whether the Board kept within its jurisdiction. *See* ***Herek***, 226 Wis. 2d at 510. This is a question of law that we review *de novo*. ***Id.*** Determining whether the Board kept within its jurisdiction requires comparing the terms of the authorizing statute with the actions of the Board; this "inquiry … considers whether the applicable [statute] grants the [Board] the authority to take the action it took." *See* ***AllEnergy Corp. v. Trempeleau Cty. Env't & Land Use Comm.***, 2017 WI 52, ¶37, 375 Wis. 2d 329, 895 N.W.2d 368. The authorizing statute in this case, WIS. STAT. §§ 62.13(1), (5)(e), provides for the creation of a board and states that in cases involving disciplinary charges brought by a police chief, "[i]f the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require." § 62.13(5)(e).

¶39 "It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency." ***Bunker v. LIRC***, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864 (citations omitted). "[W]hen objections to evidence or procedure are not made before the fact-finding tribunal, the trier of fact does not have the opportunity to correct possible errors." ***Id.***, ¶17. "[C]ertiorari review is strictly limited to the record made before the administrative agency." ***State ex rel. Gunsolus v. Young***, 140 Wis. 2d 738, 742, 412 N.W.2d 145 (Ct. App. 1987).

B. Manney's argument concerning jurisdiction.

¶40 Manney asserts[6] that the Board has a rule, Rule XVI § 2(a), located under the heading of "Jurisdiction," that says a person who is the subject of a disciplinary order "shall … receive" "any exculpatory evidence in the Chief's possession" related to the discipline "at the same time" the person is served with the disciplinary order. The rule mirrors the language of WIS. STAT. § 62.50(13).

¶41 Manney was served with the disciplinary order on October 15, 2014. Manney argues that two documents disclosed to him on February 27, 2015, constituted exculpatory evidence. The documents were a review of the

[6] Manney cites to a document in his appendix without providing any citation to the record. The appendix page to which he cites is titled "Rules of the Board of Fire and Police Commissioners City of Milwaukee" and is followed by a page titled "Rule XVI." Neither the brief nor the appendix directs us to where in the record this document exists, and we did not locate it. A citation that refers only to an appendix that fails to contain any record citation whatsoever is inadequate. *See* ***Roy v. St. Luke's Med. Ctr.***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256. "We have no duty to scour the record to review arguments unaccompanied by adequate record citation." ***Id.***

Department's investigation of Hamilton's shooting prepared by the Los Angeles Police Department at the request of the Chief and a memo that summarized the opinion of one Department investigator that Manney had not erred in his approach to Hamilton.

¶42 Before the circuit court, Manney argued for the first time that because this requirement is located under the heading of "Jurisdiction," the Board's jurisdiction is contingent on satisfying this requirement. He further argued that the fact that he did not receive the purportedly exculpatory evidence "at the same time" constituted a violation of this rule and that such a violation deprived the Department of jurisdiction.

¶43 We note that Manney makes no argument comparing the Board's actions to the language of the authorizing statute as is necessary to decide a jurisdictional challenge. *See* ***AllEnergy Corp.***, 375 Wis. 2d 329, ¶37. We further note that he either has failed to enter a document critical to this argument into the record or has failed to tell us where to find it. Like the circuit court, we decline to address this argument or the various questions it raises because Manney failed to preserve it. The circuit court concluded that the issue was forfeited and that no exception to the forfeiture rule was warranted in this case. *See* ***Bunker***, 257 Wis. 2d 255, ¶16. We likewise decline to reach an unpreserved issue.

¶44 Accordingly, the order of the circuit court is affirmed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.