COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2265 **Cir. Ct. No. 2016CV503**

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

JASON BLEICHWEHL,

PLAINTIFF-APPELLANT,

V.

CITY OF MILWAUKEE EMPLOYE'S RETIREMENT SYSTEM,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Jason Bleichwehl appeals from a circuit court order affirming the final decision of the City of Milwaukee Employe's Retirement System ("the City") denying him a duty disability retirement allowance. He argues that the City's interpretation of its ordinance governing eligibility for duty disability is unreasonable when applied to the facts of this case. Because the City's interpretation of its ordinance is reasonable, we reject his arguments and affirm.

BACKGROUND

¶2 The basic facts are as follows. Bleichwehl was hired as a police officer for the Milwaukee Police Department ("the department") in 2007. In July 2011, he was one of several officers involved in the in-custody death of a civilian. Along with the other officers, Bleichwehl was placed on administrative duty pending investigation and then returned to active duty after being cleared of wrongdoing in November 2011. In September 2012, the County Medical Examiner amended its autopsy report to change the civilian's cause of death from "natural causes" to "homicide." Bleichwehl and the other officers were again placed on administrative leave pending further investigation. The officers were eventually cleared of wrongdoing and allowed to return to active duty in June 2013. However, Bleichwehl did not return to active duty and instead began requesting medical leave. He eventually filed for duty disability retirement.

¶3 The City determined that Bleichwehl was not eligible for a duty disability retirement allowance. The City's final decision includes ninety findings of fact relating to Bleichwehl's disability and his dealings with the department and the City. The key facts for our review, which neither party challenges, are as follows.

¶4 In December 2011, five months after the in-custody death and a month after returning to active duty, Bleichwehl began therapy for relationship problems. During the first few months of therapy, he told his therapist that he "like[d] his job very much" and was looking forward to a new assignment. However, after several months of therapy, Bleichwehl began complaining of work stress. His therapist believed that these complaints related to an ongoing investigation into illegal strip searches and did not relate to the in-custody death.

¶5 After the County issued its amended autopsy report in September 2012, Bleichwehl increased the frequency of his therapy sessions. The amended report led to "a huge public outcry" and a "great deal of media attention," which included calls for termination of Bleichwehl's employment and for his prosecution. This created a "crisis situation" for Bleichwehl. He was devastated by feelings of betrayal because he believed that the publicity surrounding the in-custody death did not accurately portray his actions during the incident. The media coverage caused him to feel so angry and depressed that he pointed an unloaded handgun at himself as he watched news coverage.

¶6 During this period, Bleichwehl was working administrative duty assignments pending the results of the various investigations. In June 2013, when he had been cleared of wrongdoing and was about to return to full duty, Bleichwehl saw a memo regarding the promotions of his supervisors. Bleichwehl felt very betrayed and distrustful because of his perception that he had been used as a political pawn to appease the community. Instead of returning to full duty, Bleichwehl began making requests for medical leave.

¶7 Bleichwehl's first two requests stated that his condition was not chronic. After two requested periods of medical leave expired, his therapist

recommended that he return to work on a limited basis with no citizen contact. The therapist further stated that the recommendation that he return to work was "based more on Mr. Bleichwehl's financial status than on his clinical condition." The department did not interpret the therapist's recommendation as a medical opinion that Bleichwehl was capable of returning to work and also questioned the "no citizen contact" recommendation as vague and difficult to accommodate. The department informed Bleichwehl that he would need a medical release in order to return to work and that a requirement of "no citizen contact" was unreasonable. At that point, Bleichwehl "'gave up'" and applied for duty disability because he did not trust anybody and felt betrayed. The medical opinions in the record support the proposition that Bleichwehl's mental condition prevents him from returning to work as a police officer.

¶8 After several stages of decisions and appeals, Hearing Examiner Gary Gerlach issued a decision denying Bleichwehl a duty disability allowance, which was adopted by the City as its final decision. Gerlach concluded that Bleichwehl was disabled due to a phobia of police work and that his disability was likely to be permanent. However, he further concluded that Bleichwehl was not eligible for a duty disability allowance under MCC § 36-05-3-a because his mental condition was not the result of an injury occurring at a definite time and place while in performance of duty. Gerlach specifically rejected Bleichwehl's assertion that the in-custody death in July 2011 was the sole cause of Bleichwehl's disability. Instead, he concluded that the medical testimony "indicate[d] a cumulative rather than a specific incident basis," and that Bleichwehl's mental condition was "the result of a series of events that began to evolve in September 2012[,] some 15 months after" the in-custody death. Gerlach further determined that the phrase "'at some definite time and place'" required that the disability be

from a single, identifiable incident and did not include cumulative or progressive injuries. Bleichwehl sought certiorari review in the circuit court, which affirmed the City's final decision. Bleichwehl now appeals.

DISCUSSION

¶9 When reviewing a municipal decision in a certiorari action, our review is limited to: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. ***Ottman v. Town of Primrose***, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411. When the municipal decision depends on the interpretation of an ordinance that is unique to the municipality, we defer to the municipality's interpretation as long as it is reasonable. ***Id.***, ¶ 60.

¶10 Bleichwehl's main argument is that the City erred when it deemed him ineligible for duty disability under MCC § 36-05-3-a because of its determination that his disability had more than one cause. He contends that the City proceeded under an incorrect theory of law. *See* ***id.***, ¶35 (a municipal decision may be reversed if the municipality did not proceed on a correct theory of law). Bleichwehl also contends that the City acted unreasonably in interpreting MCC § 36-05-3-a to deny him duty disability despite the fact that work stress caused him to become disabled. *See* ***id.*** (a municipal decision may be reversed if the evidence was not such that it might reasonably make the order or determination in question). Bleichwehl's brief conflates these two contentions, but we are able to resolve them in a discussion addressing both.

¶11 Bleichwehl supports his contentions with three arguments about the meaning of the key language in MCC § 36-05-3-a. He first argues that the City has misinterpreted the relevant language of the ordinance to exclude injuries resulting from a series of events that trace back to a single cause. Specifically, he contends that the in-custody death in June 2011 was the "'but for'" cause of his mental condition, and that he is therefore entitled to a duty disability. This argument would make sense if the ordinance defined duty disability more broadly. For example, Milwaukee's ordinance could provide that any disability that occurs as a result of an injury while in the performance of duty is eligible for a duty disability allowance. But the operative language of Milwaukee's ordinance is narrower, limiting eligibility to "[a]ny member in active service who shall become permanently and totally incapacitated for duty as the natural and proximate result of an injury occurring at some definite time and place while in the actual performance of duty." MCC § 36-05-3-a. We will not rewrite the ordinance to expand eligibility beyond what Milwaukee intended with this narrowing language.

¶12 Second, Bleichwehl argues in conclusory fashion that this operative language "means that the officer must be injured from the performance of duty, not that the officer's injury is from one incident while in the performance of duty." This interpretation would be reasonable if the ordinance did not expressly limit a duty disability to "an" injury "occurring at some definite time and place." But Bleichwehl's interpretation renders these words entirely superfluous. We therefore cannot agree that this is a natural reading of the ordinance. *See* ***Klemm v. American Trans. Co., LLC***, 2011 WI 37, ¶18, 333 Wis. 2d 580, 798 N.W.2d 223 ("Statutes are interpreted to give effect to each word and to avoid surplusage.").

¶13 Third, Bleichwehl argues, also conclusorily, that reasonable people could interpret the phrase "an injury occurring at some definite time and place" to include either "one incident or subsequent incidents put into motion from the on duty injury." If so, he argues that MCC § 36-05-3-a is ambiguous and that we should therefore examine its history, context, subject matter, scope, and objective in order to determine its meaning. *See* ***Teriaca v. Milwaukee Emps.' Ret. Sys./Annuity and Pension Bd.***, 2003 WI App 145, ¶¶19-21, 265 Wis. 2d 829, 667 N.W.2d 791. He contends that the intent of the ordinance is to provide employees who are disabled while performing City duties a better pension than employees who are disabled for other reasons. Bleichwehl points to various communications between the City and duty disability applicants to support his argument that the clear intent behind the ordinance is to provide duty disability benefits to police officers like him who have become disabled through a series of service-related incidents.

¶14 Setting aside the conclusory nature of this argument, we reject it for the threshold reason that it ignores our standard of review. In ***Ottman***, our supreme court held that a municipality's decision is entitled to a presumption of correctness. *See* ***Ottman***, 332 Wis. 2d 3, ¶48. Among other things, this means that the City's interpretation of its own unique ordinance is entitled to deference, as long as it is reasonable. *See* ***id.***, ¶60. Bleichwehl acknowledges, correctly, that this deference "'does not mean that the court accepts the [municipality's] interpretation without a critical eye.'" ***Id.***, ¶61 (quoted source omitted). However, Bleichwehl has the burden of convincing us that the municipality's interpretation is unreasonable. ***Id.***, ¶50 ("On certiorari review, the petitioner bears the burden to overcome the presumption of correctness."). His argument on this score is that the City's interpretation is unreasonable because it means that "a police officer

disabled as a result of his job service" will not receive a duty disability benefit. This circular reasoning once again fails to grapple with the precise language of an ordinance that expressly limits duty disability to "an injury occurring at some definite time and place." MCC § 36-05-3-a. In sum, none of Bleichwehl's arguments about the meaning of MCC § 36-05-3-a convince us that the City's interpretation of its ordinance is unreasonable.

¶15 In a final attempt to convince us that the City acted unreasonably, Bleichwehl argues that the City's final decision failed to correctly analyze the decisional law from other states. The City in turn argues that it drew proper conclusions from the relevant cases. This debate over the nuances of decisional law is largely beside the point because cases from other states interpreting similar but not identical language is at best persuasive authority for how the City might choose to interpret its own ordinance language. But once the City has chosen an interpretation, the presumption of correctness puts the burden on Bleichwehl to convince us that the municipality's interpretation is unreasonable. *See* ***Ottman***, 332 Wis. 2d 3, ¶50. The mere fact that another municipality interpreted similar but not identical language differently does not in itself demonstrate that the City's interpretation is unreasonable, and Bleichwehl has not identified any decisional law to support that specific proposition. We therefore disregard Bleichwehl's arguments about how courts in other states have interpreted similar language.

CONCLUSION

¶16 For the foregoing reasons, we affirm the circuit court order affirming the City's decision to deny Bleichwehl a duty disability allowance.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).