COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1970

Cir. Ct. Nos. 2016CV379
2016CV1337

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

RYAN T. TRAPP,

PETITIONER-APPELLANT,

V.

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

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 BRENNAN, P.J. Ryan T. Trapp, a former firefighter with the Milwaukee Fire Department, appeals from an order of the circuit court that upheld the decision of the Board of Fire and Police Commissioners of the City of Milwaukee to terminate his employment. Trapp had conceded the fact that he

violated Department rules—he failed to show up for a 24-hour shift on July 17, 2015, because he was intoxicated—but he challenged the penalty imposed as too severe. The Board considered the rule violation "in light of Trapp's problematic record of service, which included a major discipline in 2014 and the subsequent pattern of alcohol-related tardiness and days away from work leading up to the July 17 incident." The Board concluded that the Department satisfied the applicable "just cause" standards set forth in WIS. STAT. § 62.50(17)(b) (2015-2016)[1] and concluded that the "good of the service" required discharge for the violation. In its decision, the Board noted that "deference may appropriately be given to a chief's decision to discharge, assuming that the decision is substantively reasonable, procedurally fair, and not motivated by any improper bias or personal animus." It added, "We think this principle carries the day in favor of the [Fire] Chief in this case."

¶2 Before the circuit court, Trapp brought both a statutory appeal under WIS. STAT. § 62.50(20)[2] and a *certiorari* appeal. The circuit court denied both, and Trapp appeals the *certiorari* decision.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] 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:

(continued)

¶3 On *certiorari* review we review the Board's decision, not the circuit court's. ***Herek v. Police & Fire Comm'n of Menomonee Falls***, 226 Wis. 2d 504, 510, 595 N.W.2d 113 (Ct. App. 1999). Our review is narrower than the usual *certiorari* review because Trapp had a statutory review before the circuit court. ***Id.*** In these 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." ***Id.*** Trapp does not challenge the Board's jurisdiction.

¶4 Trapp argues that the Board proceeded on an incorrect theory of law in two respects. First, he argues that the Board improperly deferred to the Chief's recommendation when it made its "good of the service" determination and that in so doing it violated the law on the preponderance burden. Second, he argues that his right to due process was violated in two ways. He argues he was deprived of his due process right to be judged by an impartial board when the Board "forfeited its independence" and deferred to the Chief on the question of discharge. He also argues that he was deprived of his due process right to fair notice when the Board

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> 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.)

"disregarded both the Chief's own written policies and past disciplinary practices," and sustained discipline that is more severe than Trapp had notice of.

¶5 We conclude that the Board proceeded on a correct theory of the law when it determined that the good of the service required that Trapp be permanently discharged. The Board's written decision makes clear that it properly applied the preponderance of the evidence standard to each of the just cause standards as required by the statute and gave no deference to the Chief on these points. Contrary to Trapp's assertion, the Board's ultimate decision as to "the good of the service" did not violate the statute because the statute does not work the way he thinks it does. We conclude that to the extent that Trapp's due process arguments are about the reasonableness of the discipline, they were addressed by the circuit court and are unreviewable by this court.

BACKGROUND

Trapp's employment history and violations of Department rules.

¶6 The facts the circuit court recited in its decision were undisputed:

> Trapp began working for the Milwaukee Fire Department (the "Department") in 2004. On two occasions, Trapp was honored by the Department for meritorious service. He received a Medal of Valor and a Class B Award for brave service under dangerous circumstances. In 2007, Trapp began suffering with mental health issues. The following year, Trapp was diagnosed with PTSD. Around this time, Trapp began self-medicating his mental health issues with alcohol. Despite a pattern of alcohol dependency, Trapp was not formally disciplined by the Department until 2014.
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> In May 2013, the Department sent Trapp a letter regarding an increase in his use of sick time. In August 2013, Trapp was transferred to a new station, Engine 32. The following month, the Department set a transfer of personnel under which all of the firefighters at Engine 32 would be transferred to other stations. This transfer of personnel was

> based on a concern regarding the culture of Engine 32 due to alleged hazing of probationary officers. The day before the transfer, it was discovered that Engine 32 had been vandalized. Although it was never confirmed that Trapp was involved in the vandalism, Trapp and other firefighters remained silent as to who perpetrated the vandalism violating Department rules. Trapp received a 30-day suspension with 10 days held in abeyance on February 14, 2014, a very severe discipline Trapp chose not to appeal.
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> From 2014 to 2015, Trapp began frequently using sick time. On September 5, 2014, Trapp was formally disciplined for violations of the Sick Leave and Injury Requirements. In March and April 2015, Trapp was tardy for work twice. Subsequently, the Department once again sent Trapp a letter regarding his use of sick time. On June 2, 2015, members of the Department attempted an intervention for Trapp and secured a bed at Rosecrance, a rehabilitation facility that specializes in treating firefighters with substance abuse and mental health issues. Trapp declined the offer to participate in the rehabilitation, in part due to his … joint physical custody of his daughter. From January 1, 2015 until July 17, 2015, Trapp used sick leave for 12 separate 24-hour shifts.
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> On July 17, 2015, Trapp was scheduled to work a 24-hour shift beginning at 8:00 a.m. Trapp did not show up for work. When finally reached by a member of the Department, Trapp indicated that he was still intoxicated from the night before. On September 22, 2015, Chief Rohlfing issued an order discharging Trapp for: (1) failure to perform duties; (2) Unexcused absence from duty - two (2) hours or greater; (3) Core Value Integrity; (4) Core Value Competence; (5) Guiding Principle Accountability; and (6) Tardiness Policy.

The record further reflects that in June 2015, when a bed was secured for Trapp at a treatment center, the Department agreed to rearrange Trapp's work schedule so that he could be off for the thirty days needed for treatment.

¶7 The Board concluded under WIS. STAT. § 62.50(17)(a) and (b) that "just cause" existed to sustain the charges and that the "good of the service" required Trapp's discharge.

Trapp's appeals to the circuit court.

¶8 Trapp brought appeals of the Board's decisions 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 the Police & Fire Comm'rs of Madison***, 2004 WI 60, ¶3, 272 Wis. 2d 1, 680 N.W.2d 335. The circuit court consolidated the appeals.

¶9 In dismissing Trapp's petition on statutory review, the circuit court found that there was just cause for discharge, that the Board's decision was supported by the evidence in the record, and that it saw "nothing unfair or discriminatory in the charges brought and discipline issued, given Trapp's disciplinary record." It noted that the charges at issue made it proper to consider Trapp's history as well as the admitted violations of rules:

> Trapp was not solely charged with unexcused absence from duty and tardiness. In addition … Trapp was charged with: (1) failure to perform duties; (2) Core Value *Integrity*; (3) Core Value *Competence*; and (4) Guiding Principle *Accountability*. Thus, the Department's tardy/AWOL policy is not the sole guidance in determining whether Trapp's discipline was fair.… Beginning in 2014, Trapp's violations of Department rules quickly became more frequent and more severe, including significant use of sick leave in 2015, ultimately culminating in the July 17, 2015 unexcused absence from work due to intoxication.

¶10 In the *certiorari* review, the circuit court rejected Trapp's argument that when the Board gave some deference to the Chief, it misapplied the Chief's burden and violated a requirement that the Board must find by a preponderance of the evidence that discharge is required for the good of the service. The circuit court concluded that the Board acted according to law, first, because "it is indisputable that [the Board] applied that appropriate standard in regard to the 'just cause' determination[,]" and, second, "[b]ecause [the Board] was not required by

statute to apply a preponderance of the evidence standard to the 'good of the service' determination[.]"

¶11 This is a *certiorari* appeal from that order.

DISCUSSION

I. Standard of review.

¶12 *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. Excluded from our review are the circuit court's determinations pertaining to the reasonableness of the Board's actions and the sufficiency of the evidence to support them, which are "final and conclusive." *See* § 62.13(5)(i); ***Herek***, 226 Wis. 2d at 510 n.3.

¶13 Whether the Board proceeded on a correct theory of law is a question of law we review *de novo*. *See* ***Herek***, 226 Wis. 2d at 510. Interpretation of a statute is also a question of law we review *de novo*. ***State v. Steffes***, 2013 WI 53, ¶15, 347 Wis. 2d 683, 832 N.W.2d 101. "[W]e have repeatedly held that statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and

reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46. "[L]egislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation." ***Id.***, ¶51.

II. The Board proceeded on a correct theory of law in making its determination concerning what the "good of the service" required.

¶14 Trapp's first argument is that the Board wrongly concluded that the "good of the service" required that he be discharged because it incorrectly applied the provisions of the applicable statute, WIS. STAT. § 62.50(17)(a) and (b). He argues that the statute sets up a two-part analysis: Phase I is whether "just cause" supports sustaining the charges, and Phase II is whether the "good of the service" requires discharge. The Board agrees with this part of his analysis. However, he differs from the Board in interpreting the statute to impose a "preponderance of the evidence" burden on the Chief for the Phase II determination: whether the "good of the service" requires his discharge. Relatedly, Trapp argues that the statute does not permit the Board to give any deference to the Chief's recommended discipline because that would violate the preponderance burden. By giving such deference to the Chief's recommendation, he argues, the Board failed to base its discipline on the proper preponderance standard and thus, erred.

¶15 We conclude that Trapp misconstrues the statute.

¶16 In brief, we conclude that the plain words of the statute clearly apply the preponderance burden only to the Phase I, "just cause," analysis. The statute plainly requires the Board to consider seven factors to determine whether there exists "just cause" to sustain the charges. Only if the charges are sustained in Phase I does the Board go on to Phase II, where it is required to determine whether

the "good of the service" requires the discipline. The statute does not impose a preponderance standard for Phase II. Rather, it requires the Board to make its own determination of what would be the appropriate discipline for the "good of the service." *See* WIS. STAT. § 62.50(17). Additionally, the statute permits deference to the chief. ***Schoen v. Board of Fire & Police Comm'rs of Milwaukee***, 2015 WI App 95, ¶¶ 8, 22, 366 Wis. 2d 279, 873 N.W.2d 232. We examine the statute in more detail following.

¶17 The first sentence of WIS. STAT. § 62.50(17)(a) states that the board is required to determine by a preponderance of the evidence, after considering all of the factors in paragraph (b), whether the charges are sustained. The statute reads in pertinent part: "[The Board]… shall, by a majority vote of its members and subject to par. (b), determine whether by a preponderance of the evidence the charges are sustained." WIS. STAT. § 62.50(17)(a). The burden is explicit—preponderance—and it falls on the Chief to prove that the *charges* are sustained. Notably, it says nothing about the discipline the Chief recommended—just the *charges*.

¶18 The reference to "subject to par. (b)" in WIS. STAT. § 62.50(17)(a) requires the board to consider seven specific factors spelled out in the next subsection, (b), before deciding whether "just cause" exists to sustain the *charges*:

> (b) No police officer may be … discharged by the board … unless the board determines whether there is just cause, as described in this paragraph, *to sustain the charges*. In making its determination, the board shall apply the following standards, to the extent applicable:
>
> 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.
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> 5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
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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.

WIS. STAT. § 62.50(17)(b) (emphasis added). Again, these seven factors are express, required considerations on whether the *charges should be sustained*.

¶19 Trapp does not dispute that the seven standards were properly considered and that the correct evidentiary burden was applied by the Board in Phase I. The Board, for its part, does not dispute that "the chief had the burden to establish the sixth and seventh just cause standards by a preponderance of the evidence" at the "just cause" phase. And because the circuit court's decision on statutory review affirmed "just cause" to sustain the charges, there can be no appellate review of that issue, as noted. *See* ***Herek***, 226 Wis. 2d at 510 n.3.

¶20 The issue on appeal is the Phase II disciplinary decision and standard to be applied to that issue. Trapp argues that the statutory preponderance burden applies to the "good of the service" analysis because: (1) the statute doesn't say the burden does *not* apply to Phase II; and (2) the Board admitted that it considered "just cause" considerations six and seven, which carry the preponderance burden in Phase I, when it gave deference to the Chief's recommendation, and this imports the burden onto Phase II. We conclude that

Trapp misconstrues the words and context of the statute and misrepresents the Board's reasoning.

¶21 The statute describes Phase II as follows:

> *If* the board or panel determines that the charges are sustained, the board shall at once *determine whether the good of the service requires that the accused be permanently discharged* or be suspended without pay for a period not exceeding 60 days or reduced in rank.

WIS. STAT. § 62.50(17)(a) (emphasis added). It is apparent from a reading of the statute's plain language that Trapp's interpretation of the statute is incorrect. First, we note a difference between the language about the "determin[ation] that the charges are sustained" and the language about the determination of what penalty "the good of the service requires[.]" The Phase I determination of "whether … the *charges were sustained*" specifies the "by a preponderance" standard. But the plain language of the "good of the service" part of the statute says nothing about imposing a preponderance burden. The statute makes clear that the Phase II determination—whether "the good of the service" requires discharge, suspension or reduction in rank—is performed *after*, and only *if*, the board determines that the charges are sustained. When construing a statute we must consider the legislature's words and their context. *See* ***Kalal***, 271 Wis. 2d 633, ¶¶45, 46. Trapp ignores this language and context.

¶22 Instead, Trapp conclusorily states that because the Board considered the sixth and seventh "just cause" considerations of Phase I, that somehow grafts the preponderance standard onto the Phase II "good of the service" analysis. First of all, had the legislature intended that, it would have said so. It did not. Secondly, as noted above, the legislature used preponderance only in the Phase I analysis. And third, there is simply no basis to conclude that just considering

whether the Chief's discipline was reasonable (as is required in the seventh "just cause" consideration) imposes a higher burden in the Phase II analysis.

¶23 As to Trapp's second argument, that the Board erred in giving deference to the Chief's recommended discipline, we disagree. Trapp correctly points out that the statute does not *expressly* authorize the Board to give deference to the Chief's recommended discipline in its Phase II determination. But we conclude that while it may not be *expressly* authorized, it is implicitly permitted by the following: (1) the "good of the service" language; (2) the Board's own Rule XVI that requires it to consider "the impact of the misconduct on the complainant, department, and community"; and (3) our decision in ***Schoen***.

¶24 The statute says that the board shall make the determination as to whether the good of the service requires the discharge. It would not be reasonable for a board to ignore the impact of a discharge on the chief and the department as part of that determination. If "good of the service" means anything, it means that the board must consider the impact on the service. And certainly, part of that analysis is what the chief recommended as discipline.

¶25 Additionally, the Board's own internal rules require it to consider the "impact of the misconduct on the complainant, department, and community." *See* ***Schoen***, 366 Wis. 2d 279, ¶7 (citing Personnel Review Board Rule XVI). The Board here acknowledged that Rule in its reliance on the sixth and seventh considerations, as well as the Chief's recommended discipline.

¶26 In ***Schoen*** we recognized both the above Rule and the implicit authority in the statute to consider the Chief's recommended discipline. We held that the Board was permitted to reconsider, on its own motion, a Phase II discipline decision when it realized it had made an error of law. *See* ***Schoen***, 366

Wis. 2d 279, ¶22. While that holding is not implicated in Trapp's case, we note that our reasoning in ***Schoen*** provides guidance here. There we described the Board's mistake of law as applying "an open-ended reasonableness test" on the Phase II disciplinary decision to the exclusion of considering the Chief's recommendation. ***Id***. We agreed with the Board member who noticed the legal error and brought the case back for reconsideration saying that he had initially thought the chief bore a burden of proof in Phase II and that the chief's recommended discipline was entitled to no deference. Upon further research he determined he was wrong on both points, and we agreed with the member's ultimate conclusion:

> It is now my view that at Phase II, after a rule violation has been established, that the chief does not bear a burden of proof and in fact, that a measure of deference to the chief's decision is permissible and perhaps even required with respect to the disciplinary choice only at Phase II.

Id., ¶8.

¶27 The Board decision reviewed in ***Schoen*** also noted that the "good of the service" encompasses "the impact of the misconduct on the complainant, department and community[.]" ***Id.***, ¶7 (citing Rule XVI). Accordingly, we find that it is well established by our precedent, as well as the statute's clear language, that the preponderance burden does not apply to the second phase of the WIS. STAT. § 62.50(17)(a) analysis.

¶28 Trapp also cites to case law and treatises on the topic of arbitration in the context of a collective bargaining agreement. However, this case does not arise in that context and therefore that law is inapplicable. The Board rightly points out that this disciplinary proceeding is strictly governed by statute and case law interpreting it. There is a small universe of relevant law in these cases, and in

none of these cases do we find an interpretation that supports the analytical approach Trapp seeks to apply.

III. The Board proceeded on a correct theory of law when it gave limited deference to the Chief.

¶29 Trapp next makes two arguments that his right to due process was violated and that this constitutes legal error by the Board. First, he argues that the fact that the Board deferred to the Chief means that he did not have the impartial tribunal that he is entitled to. He cites case law for the proposition that a board that hears discipline cases under WIS. STAT. §§ 62.13 and 62.50 must be "an impartial body that operates independently of the city itself." ***Conway v. Board of Police and Fire Comm'rs of Madison***, 2002 WI App 135, ¶21, 256 Wis. 2d 163, 647 N.W.2d 291 (citation omitted).

¶30 This argument is a variation of the deference argument above, and it fails for two reasons. First, the record is clear that the Board correctly applied the evidentiary standards without deference to the Chief in Phase I of its analysis. And second, the Board's comment about deference was made with the following conditions that presume the application of its independent judgment: "assuming that the decision is substantively reasonable, procedurally fair, and not motivated by any improper bias or personal animus." It is not "simply deferr[ing] to the Chief's recommended discipline," as Trapp characterizes it, because the Board did so only after independently determining that the decision was reasonable, fair, and not improperly motivated.

¶31 Trapp's second due process argument consists of an attack on the fairness of the discipline imposed, framed as an argument that Trapp did not have notice that he could be discharged for this violation. He argues that because the

Board disregarded the Department's written policy's discipline matrix and evidence of discipline from comparable disciplinary cases, the Board proceeded on an incorrect theory of law.

¶32 This is not an argument that is properly made on *certiorari* review, which as noted above is limited 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. It has, in fact, already been raised and decided. As the Board correctly points out, this claim is "encompassed within the statutory just cause standards[.]" The first standard, "[w]hether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct," was met by a preponderance of the evidence, and Trapp conceded the point. *See* WIS. STAT. § 62.50(17)(b)(1).

¶33 Even if it could be made on *certiorari* review, Trapp's notice argument fails because the Board's decision fully addressed the evidentiary basis for that conclusion, candidly considering Trapp's contrary evidence, and noting that the Department's Code of Conduct "expressly states, 'The Fire Chief reserves the right to impose discipline/corrective action up to and including discharge from the department, if after a prompt, thorough, and impartial investigation has been conducted, it is determined that a breach of the Code has occurred.'" The Board concluded after reviewing the evidence in the record that "members are reasonably on notice … that discharge is a potential discipline for *any* violation, especially for a member who has already had a major discipline imposed in the past, as Trapp had." Trapp does not argue he had no notice that he could be discharged.

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

By the Court.—Order affirmed.

Not recommended for publication in the official reports.