COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1995

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3277

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

JOHN A. WOLFGANG,

Plaintiff-Appellant,

v.

THE VILLAGE OF BROWN DEER WISCONSIN POLICE AND FIRE COMMISSION and its members in their official capacities,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. John A. Wolfgang appeals from a circuit court judgment affirming the Brown Deer Police and Fire Commission's decision to terminate his employment as a Brown Deer police lieutenant. On certiorari

review, Wolfgang claims that the Commission proceeded on "an incorrect theory of law" by allegedly: (1) relying on testimony that was incredible as a matter of law; (2) failing to "consistently evaluate" the testimony of one of the complaining witnesses; (3) assuming that Wolfgang's testimony was "fabricated"; and, (4) using the charges against Wolfgang to evaluate his credibility. Wolfgang also argues that the recent amendment to § 62.13(5), STATS., which changed the standard for disciplining a police officer, should be retroactively applied to him. We reject Wolfgang's arguments and affirm.

Wolfgang's discharge stems from written petitions by Sherry Bidney and Janine Gerber that complained of sexual harassment by Wolfgang. The petitions alleged that Wolfgang used profane language that was degrading to women, physically and verbally intimidated women, and created an overall hostile work environment. Following a hearing, the Brown Deer Police and Fire Commission determined that Wolfgang had violated the General Rules and Regulations and Policy and Procedures of the Brown Deer Police Department and §§ 947.013 (harassment), 940.225(3m) (fourth degree sexual assault), and 940.19(1) (battery), STATS. The circuit court affirmed the Commission's decision.

In reviewing a circuit court's decision on a petition for a writ of certiorari, our review is limited to whether the Police and Fire Commission of Brown Deer acted within its jurisdiction and whether it proceeded on a correct theory of law. ***State ex rel. Hennekens v. City of River Falls Police & Fire Comm'n***, 124 Wis.2d 413, 419, 369 N.W.2d 670, 674 (1985). We do not review claims regarding the sufficiency of the evidence. ***Id.*** at 424, 369 N.W.2d at 676. Indeed, a reviewing court must defer to the trier-of-fact's determinations weighing the evidence and assessing the credibility of witnesses. ***State ex rel. Harris v. Annuity & Pension Bd.***, 87 Wis.2d 646, 659, 275 N.W.2d 668, 675 (1979).

Wolfgang concedes that this court cannot rule on the sufficiency of the evidence. He contends, however, that this does not preclude this court from reviewing testimony that he claims was incredible as a matter of law. Wolfgang claims that the testimony of Janine Gerber, Sherry Bidney, and Lynn Sobczak was incredible as a matter of law and, thus, that the Commission should not have considered their testimony.

Wolfgang offers three instances in support of his claim that Gerber's testimony was incredible as a matter of law. First, Wolfgang points to conflicting testimony between Gerber and Brown Deer officer Robert Henckel. Gerber testified that Henckel had witnessed Wolfgang intentionally push her into a dog kennel and cause injury to her. Henckel, however, testified that he had no recollection of this incident. The Commission found that the incident did occur.

Wolfgang also points to contradictory testimony between Gerber and her supervisor at the Menomonee Falls Police Department, Marilyn Woods. Gerber testified that she had overheard a conversation between Woods and Wolfgang regarding her previous employment at Brown Deer. Gerber alleged that Wolfgang was attempting to undermine her new employment with the Menomonee Falls Police Department. Woods, however, testified that no such conversation took place. The Commission determined that no such conversation took place.

Finally, Wolfgang points to the fact that Gerber had not informed Robert Gerber, her husband and a sergeant with the Brown Deer Police Department, that she had encountered such conduct by Wolfgang until after she had left the department.

Wolfgang also argues that the testimony of Sherry Bidney was incredible as a matter of law. In support of this claim, Wolfgang points to the fact that Bidney had lied to her superiors about being ill and taking sick leave when, in fact, she was moving residences and going to restaurants.

Wolfgang also points to the "In the Matter Of" report that Captain Barth submitted recommending that Bidney be terminated for misconduct. According to the report, Bidney had accused Wolfgang of "name calling," but when asked what names he had used, she replied, "none." The report further stated that when Captain Louis Barth requested that Bidney give specific examples of harassment by Wolfgang she replied, "I can't think of anything." Captain Barth concluded that Bidney had fabricated the alleged harassment by Wolfgang and recommended that she be fired.

Finally, Wolfgang argues that the testimony of Lynn Sobczak was incredible as a matter of law. He points to the instance where Sobczak had told Captain Barth that Wolfgang had pointed a gun at her, but then later said that someone else had pointed the gun.

Wolfgang states that the testimony of Gerber, Bidney, and Sobczak constituted the vast majority of evidence of misconduct against him and that "[t]he credibility problems described above are not minor inconsistencies in testimony, but rather, serious failures that cast substantial doubt on the general reliability of Janine Gerber, Sherry Bidney, and Lynn Sobczak as witnesses." Despite his attempt to cast these "credibility problems" as questions of law, Wolfgang's argument clearly demonstrates his desire to have us reexamine the sufficiency of the evidence. We reject his arguments because even if, as he contends, the inconsistencies "cast substantial doubt" on the witnesses' testimony, this would not render their testimony incredible as a matter of law. The Commission as the fact-finder chose to believe these witnesses and several others, including: John Hamlin and John Schneider, who testified that they heard Wolfgang repeatedly refer to Gerber by a particular derogatory slang term used to refer to the female sexual anatomy; and Michael Shea, who testified that on one occasion when the wife of a commission member called requesting to speak with Wolfgang, Wolfgang refused to take the call and advised Gerber to "tell the fat c--t that he wasn't in." The Commission evaluated the credibility of the witnesses in a manner contrary to Wolfgang's preferences; it did not proceed on an incorrect theory of law.

Wolfgang also argues that the Commission "proceeded on an incorrect theory of law when it failed to consistently evaluate Janine Gerber's credibility." In essence, Wolfgang argues that because the Commission rejected Gerber's account of Wolfgang's telephone call to Woods in an attempt to interfere with Gerber's new job with the Menomonee Falls Police Department, the Commission could not find the rest of her testimony credible. As the only authority cited in support of his argument, Wolfgang cites to WIS J I—CIVIL 405, the jury instruction entitled "*Falsus In Uno*," which instructs the jury: "If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you *may, in your discretion*, disregard all the testimony of such witness which is not supported by other credible evidence in the case." (Emphasis added.)

As the jury instruction itself points out, it is within the discretion of the fact-finder to determine the credibility of a witness who is found to have "willfully testified falsely." The Commission, as fact-finder, is allowed to assess whether false testimony is willful and whether any of a witness's testimony is credible. Even assuming willful fabrication, the Commission had no legal obligation to discredit all of Gerber's testimony as a matter of law.

Next, Wolfgang claims that the Commission "proceeded on an incorrect theory of law" when it "assumed without basis that [his] testimony was fabricated" and when it considered the charges against him in evaluating his credibility. He argues that the Commission's determination that "Wolfgang denied that these incidents occurred but, then, that is what would be expected under the circumstances," demonstrates that the Commission assumed that he was lying when he said that no such misconduct ever occurred. The full record, however, does not support the contention that the Commission arbitrarily assumed Wolfgang's testimony was fabricated. Rather, the Commission found Wolfgang less credible than the other witnesses. As previously stated, we cannot review matters of credibility and sufficiency of the evidence when raised on certiorari review. *See* ***Hennekens***, 124 Wis.2d at 424, 369 N.W.2d at 676.

Wolfgang also points to the Commission's statement, "the other conduct of John Wolfgang," as evidence that the Commission used the charges against him to evaluate his credibility. This argument is without merit. The Commission's statement came in the context of the totality of the evidence presented to the Commission.

Finally, Wolfgang argues that the circuit court erred when it failed to review the Commission's determinations under the standards of the recently amended § 62.13(5)(i), STATS. Again, we reject Wolfgang's argument.

When the Commission decided to discharge Wolfgang, the standard under § 62.13(5)(i), STATS., for disciplining a police officer was whether the commission acted reasonably. *See* § 62.13(5)(i), STATS. (1991-92). While the case was pending before the circuit court, however, the standard was changed to a "just cause" standard, employing the following criteria:

> 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.
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> 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.
>
> 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.

See 1993 Wis. Act. 53; § 62.13(5)(em), STATS. Wolfgang requested that the circuit court apply the newer "just cause" standard in place of the former "reasonable" standard that the Commission had applied. The circuit court denied Wolfgang's request.

"As a general rule, legislation is presumed to apply prospectively unless the statutory language reveals, by express language or necessary implication, an intent that it apply retroactively." ***Schultz v. Ystad***, 155 Wis.2d 574, 597, 456 N.W.2d 312, 320 (1990). Changes in legislation that are substantive in nature are to be applied prospectively, while changes that are remedial or

procedural in nature are generally to be applied retroactively. ***City of Madison v. Town of Madison***, 127 Wis.2d 96, 102, 377 N.W.2d 221, 224 (Ct. App. 1985). The distinction between a procedural change and a substantive change is that a procedural change "prescribes the method—'the legal machinery'—used in enforcing a right or a remedy," while a substantive change "creates, defines or regulates rights or obligations." ***Id.***

The change to § 62.13(5)(i), STATS., is clearly substantive and thus should be applied prospectively. The change significantly modified the standards that a commission could consider in disciplining or terminating an employee and redefined rights and obligations of the parties. The circuit court was correct in not retroactively applying the new standard.

Therefore, the judgment of the circuit court affirming the Brown Deer Police and Fire Commission's decision to discharge Wolfgang is affirmed.

By the Court. – Judgment affirmed.

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