COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2289

Cir. Ct. No. 2005CV395
2005CV7355

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

MILWAUKEE POLICE ASSOCIATION, LOCAL 21, IUPA, AFL-CIO AND BARD DECKER,

PLAINTIFFS-APPELLANTS,

V.

NANNETTE HEGERTY, CHIEF OF POLICE FOR THE CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT.

BARD DECKER,

PLAINTIFF-APPELLANT,

V.

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

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 FINE, J. In this consolidated appeal, Bard Decker seeks reversal of the circuit court's order affirming on certiorari-review a decision of the Board of Fire and Police Commissioners for the City of Milwaukee upholding Decker's discharge from his job as a City of Milwaukee police officer. Decker claims that Nannette Hegerty, Chief of Police for the City of Milwaukee, violated his rights when she allegedly considered what he told police-department investigators and evidence flowing from what he told the investigators in deciding to fire him. Additionally, Decker and the Milwaukee Police Association, Local 21, IUPA, AFL-CIO, seek reversal of the circuit court's order dismissing their declaratory-judgment complaint against Hegerty, contending that the circuit court erroneously exercised its discretion when it concluded that the declaratory-judgment action was precluded by the Board's decision upholding Decker's dismissal. As we shall see, everything on this consolidated appeal turns on the Board's finding of fact that Hegerty did not use either what Decker told investigating officers or information gleaned from what he told them in reaching her decision to fire Decker from the police force. We affirm.

I.

¶2 In the spring of 2004, the Milwaukee Police Department and the Milwaukee County district attorney's office investigated rumors that Decker and several other officers had been sledding at a local cemetery while on duty. Karen Dubis, a detective with the Department's Professional Performance Division, interviewed Decker. At first, Decker asked to have a representative with him at

Dubis's interview, as was his right under WIS. STAT. § 164.02.[1] When Decker refused to talk to Dubis without a representative, he was ordered to do so by a Milwaukee police sergeant who told Decker that he would have "immunity." It is the scope of that "immunity" that underlies both actions that are the subject of this appeal.

¶3 Decker admitted to Dubis that in January of 2004 he and other Milwaukee police officers were sledding while on duty. Decker also told Dubis that when one of the officers hurt himself, Decker and the others tried to cover up that they were sledding while on duty. As part of the cover-up, Decker filed a false report with the Department that said that while he was on patrol he found the injured officer at the bottom of stairs leading to a middle school playground. The cover story was that the officer injured while sledding had fallen down the stairs.

[1] WISCONSIN STAT. § 164.02 provides:

> **Interrogation. (1)** If a law enforcement officer is under investigation and is subjected to interrogation for any reason which could lead to disciplinary action, demotion, dismissal or criminal charges, the interrogation shall comply with the following requirements:
>
> (a) The law enforcement officer under investigation shall be informed of the nature of the investigation prior to any interrogation.
>
> (b) At the request of any law enforcement officer under interrogation, he or she may be represented by a representative of his or her choice who, at the discretion of the officer, may be present at all times during the interrogation.
>
> **(2)** Evidence obtained during the course of any interrogation not conducted in accordance with sub. (1) may not be utilized in any subsequent disciplinary proceeding against the law enforcement officer.

¶4 Three days after Decker's interview with Dubis, an officer and a sergeant confessed that they were involved in the sledding incident. Ultimately, other officers also admitted to participating in the on-duty sledding. The Milwaukee County district attorney criminally charged two of the officers and the sergeant, but did not charge Decker. Hegerty fired Decker for violating Department rules against: (1) idling and loafing while on duty, and (2) filing a false official report.

¶5 Decker appealed his firing to the Board. He claimed that Hegerty: (1) violated Decker's rights under WIS. STAT. § 164.02; (2) violated Decker's right to due process, citing ***Franklin v. City of Evanston***, 384 F.3d 838 (7th Cir. 2004); and (3) breached the promise of "immunity."

¶6 The Board held an evidentiary hearing. Milwaukee police Captain Mary Hoerig of the Professional Performance Division testified that she was responsible for the criminal and disciplinary investigations of police officers. Hoerig explained that the investigations are conducted separately and that she ordered "that the statement given by Officer Decker in the criminal investigation not be used in any way in the internal investigation." She further explained that, in fact, the Department "did not rely on [Decker's] statement to bring forth charges of falsifying documents and idling and loafing," but, rather, the Department relied on "only those comments made by other officers."

¶7 Although Decker later asserted his Fifth Amendment privilege not to testify during that part of the Board's hearing that was going to consider the charges surrounding the sledding incident, Decker did testify in support of his contention that he was offered immunity from both criminal and adverse-personnel consequences. On direct-examination by his lawyer, Decker testified

that after he made several requests for union representation, the sergeant who directed that he answer Dubis's questions told him: "'You won't get in trouble at all for anything you say to me.'" Decker told the Board that he understood that statement to mean that he "wouldn't be charged criminally or internally."

¶8 By a two-to-one vote, the Board determined, as set out in its written "Summary of Proceedings" (uppercasing omitted):

> The majority of the Board panel felt that the greater weight of the evidence supported the Department's contention that the "immunity" offered to Decker only extended to immunity from criminal prosecution. In addition, the Board found that the greater weight of the evidence supported the Department's position that no statement or evidence supplied by Decker during the interrogation was used as a basis for this disciplinary action.

¶9 In connection with the sledding incident, the Board unanimously found in its written decision that, "[a] number of the individuals implicated Bard Decker as one of those who went sledding while on duty," and that "[t]here [was] more than enough evidence in the record to support" the idling-and-loafing charge. The Board also found that "[t]here is more than substantial evidence in the record to support the claim that Bard Decker" filed a false official report. The Board upheld Hegerty's decision to fire Decker, explaining:

> Decker's credibility, in our opinion, is damaged beyond the point where he can continue to function as a law enforcement officer. In addition, his actions seriously damaged the reputation of the Milwaukee Police Department. … Honesty is the most basic minimum requirement for every Milwaukee Police Department member. We see no way that Bard Decker, who wrote signed and filed a report knowing it was a lie, can be returned to duty.

¶10 Decker sought from the circuit court statutory and certiorari review of the Board's decision. Statutory review by the circuit court of a decision by the

Milwaukee Board of Fire and Police Commissioners is governed by WIS. STAT. § 62.50(20)–62.50(22). A circuit-court decision affirming the Board on the court's review under § 62.50 is final. Sec. 62.50(22). Thus, we have before us only Decker's certiorari challenge to the Board's decision, and, by consolidation, the circuit court's dismissal of the declaratory-judgment complaint.

II.

A. *Certiorari Review.*

¶11 Our review on certiorari of a decision by the Board is limited to whether the Board: "(1) acted within its jurisdiction; (2) proceeded on a correct theory of law; (3) was arbitrary, oppressive, or unreasonable; or (4) might have reasonably made the order or finding that it made based on the evidence." ***State ex rel. Smits v. City of De Pere***, 104 Wis. 2d 26, 31, 310 N.W.2d 607, 609 (1981); *see also* ***Gentilli v. Board of Police & Fire Comm'rs of Madison***, 2004 WI 60, ¶39, 272 Wis. 2d 1, 19, 680 N.W.2d 335, 344 (scope of certiorari-review survives amendments to statutory-review procedure). Where, as here, an officer has also sought review under WIS. STAT. § 62.50(11)–(17), (20)–(22), certiorari review is limited to whether the Board kept within its jurisdiction or applied correct legal theories, because a circuit court's decision on review sought under those subsections upholding a Board's action "shall be final and conclusive in all cases." Sec. 62.50(22); *see also* ***Umhoefer v. Police & Fire Comm'n of Mequon***, 2002 WI App 217, ¶12, 257 Wis. 2d 539, 547, 652 N.W.2d 412, 415–416 (applying WIS. STAT. § 62.13(5)(i), applicable to cities not of the "1st class," that is, to cities other than Milwaukee). Our review is *de novo.* ***Umhoefer***, 2002 WI App 217, ¶12, 257 Wis. 2d at 547, 652 N.W.2d at 416.

i. *Alleged Violation of WIS. STAT. § 164.02.*

¶12 Decker claims that Hegerty violated WIS. STAT. § 164.02 when, Decker contends, she relied on Decker's statement and the statements of the other officers in deciding to fire him from the force. We disagree.

a. *Decker's Statement.*

¶13 As noted in footnote 1, WIS. STAT. § 164.02 provides:

> **Interrogation. (1)** If a law enforcement officer is under investigation and is subjected to interrogation for any reason which could lead to disciplinary action, demotion, dismissal or criminal charges, the interrogation shall comply with the following requirements:
>
> (a) The law enforcement officer under investigation shall be informed of the nature of the investigation prior to any interrogation.
>
> (b) At the request of any law enforcement officer under interrogation, he or she may be represented by a representative of his or her choice who, at the discretion of the officer, may be present at all times during the interrogation.
>
> **(2)** Evidence obtained during the course of any interrogation not conducted in accordance with sub. (1) may not be utilized in any subsequent disciplinary proceeding against the law enforcement officer.

The parties do not dispute that Decker requested and was questioned without the representation mandated by § 164.02(1). Decker thus claims that Hegerty violated § 164.02(2) because Decker argues that what he told investigating officers was used in the internal disciplinary investigation. The Board found otherwise, and its findings are amply supported by the evidence adduced at the hearing.

¶14 Whether Decker's statement was used in the internal investigation is a fact to be determined by the Board, and the Board's factual findings are

conclusive if they are supported by credible evidence. ***Younglove v. City of Oak Creek Fire & Police Comm'n***, 218 Wis. 2d 133, 139, 579 N.W.2d 294, 296 (Ct. App. 1998); ***State ex rel. Kaczkowski v. Board of Fire & Police Comm'rs of Milwaukee***, 33 Wis. 2d 488, 497, 501, 148 N.W.2d 44, 48, 50 (1967) (Board's findings may not be set aside unless they are not supported by a reasonable view of the evidence). Additionally, the Board determines the witnesses' credibility. ***Younglove***, 218 Wis. 2d at 140, 579 N.W.2d at 296–297.

¶15 As we have seen, the Board found that "no statement or evidence supplied by Decker during the interrogation was used as a basis for this disciplinary action." This finding is amply supported by the Record. As noted, Hoerig testified that she ordered "that the statement given by Officer Decker in the criminal investigation not be used in any way in the internal investigation," and that it was not so used. When asked on cross-examination how she knew that Decker's statement was not used in the internal investigation, Hoerig answered that in addition to her order, the statement was not "part of [Decker's] charging chart, the packet. It was not used in the specs and charges [Hoerig took] to the Chief for her to consider discipline." Hoerig's testimony is substantial and credible evidence for the Board's finding that Hegerty did not use what Decker told the investigating officers in her decision to fire him.

¶16 Decker argues, however, that his statement was included in the copy of his investigatory file submitted to the Board, and claims that "[t]he fact that the coerced statement was contained in the [Milwaukee Police Department]'s official disciplinary file demonstrates that it was, in fact, 'utilized' against [him]." (Record citations omitted.) The Board was entitled to weigh this fact against the other evidence, and, as noted, we are bound by its assessment.

b. *The Other Officers' Statements.*

¶17 Decker also argues that WIS. STAT. § 164.02(2) prohibited Hegerty and the Board from using any evidence indirectly obtained from Decker's unrepresented interrogation, which he claims encompasses statements given by the other officers. He claims that § 164.02 "does nothing to vary the normal Fifth and Fourteenth Amendment exclusionary principles," and, as such, the officers' statements should have been excluded from the internal investigation under the fruit-of-the-poisonous-tree doctrine. *See* ***Wong Sun v. United States***, 371 U.S. 471, 484–486 (1963). Again, we disagree.

¶18 The flaw in Decker's fruit-of-the-poisonous-tree argument is, as we have already seen, that the Board specifically found that what Decker told police investigators without the representative he requested was not used to gather the information that persuaded Hegerty to fire him: the Board found specifically that what Decker told the investigators was *not* exploited to gather the evidence that led to his dismissal from the police force, and *exploitation* is the *sine qua non* of the fruit-of-the-poisonous-tree doctrine. ***Id.***, 371 U.S. at 487–488 ("We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.") (internal quotation marks and quoted source omitted); ***State v. Roberson***, 2006 WI 80, ¶32, 292 Wis. 2d 280, 304–305, 717 N.W.2d 111, 123 ("In general, evidence must be suppressed as fruit of the poisonous tree, if such evidence is obtained *by exploitation of that illegality*.") (internal quotation marks

and quoted source omitted; emphasis added). Thus, there is no fruit from the Decker-interrogation tree, and that ends the matter.

ii. *Alleged Constitutional Violations:* ***Franklin v. City of Evanston***.

¶19 Decker contends that Hegerty and the Board violated his due-process rights under the rationale of ***Franklin***. In ***Franklin***, Edward Franklin, a City of Evanston employee, was arrested and charged with misdemeanor possession of marijuana. ***Id.***, 384 F.3d at 841. Franklin's supervisor found out about the charge, and the City initiated disciplinary proceedings while Franklin's criminal case was pending. ***Id.***, 384 F.3d at 841–842.

¶20 At a disciplinary hearing, Franklin refused to respond because he did not want to jeopardize his criminal defense. ***Id.***, 384 F.3d at 842. Instead, Franklin asked that the hearing be postponed until his criminal case was resolved. ***Ibid.*** The City denied Franklin's request and fired him for violating an internal rule prohibiting the possession of illegal drugs. ***Ibid.*** Evanston denied Franklin his due-process right because it put him between the Scylla of not being able to defend against the disciplinary charge and the Charybdis of criminal incrimination: "[B]ecause the City's admitted policy effectively does not allow employees in Franklin's situation an opportunity to tell their side of the story without penalty, we find that the City violated Franklin's right to procedural due process under 42 U.S.C. § 1983." ***Franklin***, 384 F.3d at 841. That is not the situation here, because, as we have already seen, the Board found specifically that what Decker told the investigators *was not used* to fire him, and also because he was not fired because he refused to give his side of the story at the Board's hearing.

iii. *Alleged Breach of "Immunity Contract."*

¶21 This assertion of Department breach is negated by the Board's express finding that nothing Decker told police investigators was used by Hegerty in her decision to fire Decker. Indeed, Decker points to nothing in the Record that shows he was either promised or was entitled to total immunity from police discipline merely because he talked to the police investigators without the help of a representative. First, WIS. STAT. § 164.02(2) provides: "Evidence obtained during the course of any interrogation not conducted in accordance with sub. (1) may not be utilized in any subsequent disciplinary proceeding against the law enforcement officer." As we have already explained, we are bound by the Board's finding that nothing Decker told the investigators was used by Hegerty in her decision to fire him. Second, even Decker's testimony before the Board indicates that he was told by the sergeant who directed him to answer questions that he, "'won't get in trouble at all *for anything you say to me*'" (emphasis added), and that Decker took this to mean that "I wouldn't be charged criminally or internally." According to the Board's finding, Decker was not "charged … internally" as a result of anything he said to the police investigators. There was no breach.

B. *Declaratory-Judgment Action.*

¶22 The union and Decker claim that the circuit court erroneously exercised its discretion when it concluded that their declaratory-judgment action was barred by issue preclusion. We disagree.

¶23 Issue preclusion prevents relitigation of issues that have actually been litigated in a previous action. ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458, 463 (1994). And issue preclusion applies to administrative agency

decisions as well as to court decisions. ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis. 2d 381, 398, 497 N.W.2d 756, 763 (Ct. App. 1993). The threshold inquiry in determining the applicability of issue preclusion is whether there is an identity of issues in the two actions. ***State v. Miller***, 2004 WI App 117, ¶20, 274 Wis. 2d 471, 486, 683 N.W.2d 485, 493. This presents a question of law that we review *de novo*. ***Id.***, 2004 WI App 117, ¶20, 274 Wis. 2d at 486–487, 683 N.W.2d at 493.

¶24 Four elements must be satisfied before an agency decision may be given preclusive effect:

> 1. the administrative proceeding must have been properly before the agency;
>
> 2. the administrative agency must have been acting in a judicial capacity;
>
> 3. the issues for which preclusion is sought must have been actually determined by the administrative agency; and
>
> 4. the parties must have had an adequate opportunity to litigate those issues before the administrative agency.

Hlavinka, 174 Wis. 2d at 398–399, 497 N.W.2d at 763; *see also* ***Frye v. United Steelworkers of Am.***, 767 F.2d 1216, 1220 (7th Cir. 1985).

¶25 The circuit court in its written decision concluded, among other things, that the declaratory-judgment action was precluded under the four ***Hlavinka*** factors. We agree.

¶26 First, no one asserts that Decker's disciplinary appeal was not properly before the Board. Second, the union and Decker do not dispute that the Board acted in a judicial capacity.[2]

¶27 The union and Decker appear to contend that the third factor, whether the Board actually determined the issues before the circuit court, is not present here. They assert that the Board could not have fully litigated his WIS. STAT. § 164.02 and due-process claims because it decided them within the limited context of determining whether Decker had been fired for just cause. *See* WIS. STAT. § 62.50(17)(b) (just-cause standard). We disagree. The factual issue underpinning Decker's § 164.02 and due-process claims, that is, whether Hegerty violated Decker's rights by using what he told investigators in her decision to fire him, is the same as that underlying the declaratory-judgment claims. *See* ***Frye***, 767 F.2d at 1220 ("it is not the similarity between the types of litigation or actions involved but between the factual issues and their roles in the respective actions that is important" to whether issue preclusion will apply).

¶28 Decker also appears to argue that the fourth element, whether he had an adequate opportunity to litigate his WIS. STAT. § 164.02 and due-process claims, was not met. He contends that there are "clear differences" in the "quality" of the Board's review, pointing out that the Board took approximately

[2] An agency acts in a judicial capacity when it provides the following procedural safeguards: (1) representation by counsel; (2) pre-hearing discovery; (3) the opportunity to present memoranda of law; (4) examination and cross-examination at the hearing; (5) the opportunity to introduce exhibits; (6) the chance to object to evidence at the hearing; and (7) final findings of fact and conclusions of law. ***Reed v. AMAX Coal Co.***, 971 F.2d 1295, 1300 (7th Cir. 1992). These factors were satisfied. Decker was represented by a lawyer, presented a brief with his motion to dismiss, was able to examine and cross-examine witnesses, introduced exhibits, objected to evidence, and received from the Board a decision that included a summary of the proceedings, findings of fact, and conclusions of law.

four hours to hear evidence and consider his motion, while the circuit court, he posits, would have "devote[d] more time and energy" to it. This is specious. Decker was given ample opportunity to present to the Board evidence and legal argument to support his claims. *See* ***Lindas***, 183 Wis. 2d at 556, 515 N.W.2d at 462 (adequate opportunity to litigate includes "'right on behalf of a party to present evidence and legal argument'") (quoted source omitted). Thus, giving preclusive effect to the Board's decision was not "unfair." *See* ***id.***, 183 Wis. 2d at 561, 515 N.W.2d at 464 (fundamental fairness analysis includes whether there was an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action).

By the Court.—Orders affirmed.

Publication in the official reports is not recommended.