COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP87 **Cir. Ct. No. 2006CV2796**

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

RYAN LEMKE,

PETITIONER-APPELLANT,

V.

CITY OF MILWAUKEE BOARD OF FIRE AND POLICE COMMISSIONERS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

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

¶1 WEDEMEYER, J. Ryan Lemke appeals from a circuit court order affirming the Board of Fire and Police Commissioner's decision to discharge Lemke from the Milwaukee Police Department. Lemke claims there was insufficient evidence to support the charges against him, and the Board proceeded

on an incorrect theory of law, exceeded its jurisdiction, and deprived him of his right to due process. Because the record supports the decision made by the Board, we affirm.

BACKGROUND

¶2 On October 24, 2004, Lemke (while off-duty) attended a party held at Officer Andrew Spengler's house. During the party, as Frank Jude, Jr., and his acquaintances were leaving, an incident occurred between Jude and off-duty police officers. The officers confronted Jude asserting that Spengler's badge was missing. Jude denied having any knowledge regarding the missing badge and an assault ensued, which, in the end, left Jude badly beaten.

¶3 Lemke asserts that his involvement in the encounter with Jude was simply to restrain Jude's legs in an attempt to control them and to deliver two focused kicks to Jude's right thigh in an attempt to gain compliance, so that Jude could be placed in handcuffs. After Jude had been secured, Lemke left the scene to search for an off-duty officer who had given chase to one of Jude's acquaintances.

¶4 On May 23, 2005, after investigating the incident, the Chief of Police, Nannette Hegerty, found Lemke guilty of not abiding by the laws and ordinances of the City, failing to restore order, failing to report his use of force to the proper authority, and untruthfulness. The Chief then discharged Lemke from the department. Lemke sought review of the Chief's decision discharging him from the department, pursuant to WIS. STAT. § 62.50(13) (2005-06).[1] The Board

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

conducted a trial in January 2006, and ultimately affirmed the Chief's decision, discharging Lemke. Lemke then filed an appeal pursuant to WIS. STAT. § 62.50 and sought *certiorari* review in the circuit court. The circuit court affirmed the Board in all respects. Lemke now appeals from the circuit court's order.

DISCUSSION

¶5 We review the decisions of the administrative agency, not those of the trial court. *See* ***WPSC v. Public Serv. Comm'n***, 156 Wis. 2d 611, 616, 457 N.W.2d 502 (Ct. App. 1990). Our review on statutory certiorari is limited to: "(1) whether the Board kept within its jurisdiction; (2) whether it proceeded on the 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 Board might reasonably make the order or determination in question, based on the evidence." ***State v. Waushara County Bd. Of Adjustment***, 2004 WI 56, ¶12, 271 Wis. 2d 547, 679 N.W.2d 514. An agency's findings of fact are conclusive on appeal if they are supported by credible and substantial evidence. *See* WIS. STAT. § 102.23(6). Credible evidence is that evidence which excludes speculation or conjecture. *See* ***Bumpas v. DILHR***, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (1980). Evidence is substantial if a reasonable person relying on the evidence might make the same decision. *See* ***Bucyrus-Erie Co. v. DILHR***, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979) (citation omitted). Because we conclude that the agency's findings of fact in this case are supported by credible and substantial evidence in the record, we are bound by them.

A. Due Process.

¶6 Lemke's first contention is that he was denied due process because he was not given pre-trial access to evidence that could have aided his case.

Specifically, Lemke contends that the Chief's use of a matrix and reenactment of the incident should have been disclosed to him prior to trial. We are not convinced.

¶7 A "matrix" is a document created to ensure that discipline imposed is fair and equitable. It classifies particular conduct into categories of seriousness from "minor" to "major." The Chief testified that dismissal would be the appropriate punishment in this case based on the failure of the officers to protect life. Lemke contended that the matrix should have been made available to him as it contained exculpatory information.

¶8 The trial court conducted an *in camera* proceeding to examine the matrix and determine whether it should be admitted into evidence. Following the hearing, the trial court ruled regarding the matrix:

> I don't need to listen to any more argument. This is what I'm going to do. First of all, there's been multiple arguments here and I am going to try to separate them out. I am going to conclude as I previously indicated this is not exculpatory. I do not believe this is exculpatory evidence. There's nothing alleged or argued that anything on this document went to the issue of whether or not the officers' conduct was not what the city alleged it to be.
>
> On the issue of this document, I am going to sustain the … city's objection to … produce something that may or may not exist. The Chief has testified yesterday and again in camera today about the document and how she relied on it or didn't. If the officers' attorneys want to recall her and ask those kinds of questions in front of the commission, I will let them do that. She's testified that … it's a working product that she uses to sort of consult and to keep track of what's going on … she's not bound by it, she doesn't necessarily follow where the discipline that's in the boxes.
>
> I am going to find first … that I think … the testimony is sufficient and secondly that the waste of time and sort of the chase of this document is outweighed by the time that's going to be spent on this issue.

Based on our review, we agree with the trial court's analysis. The document would not have provided Lemke with exculpatory evidence and the testimony in the record was sufficient.

¶9 Lemke's next contention is that his due process rights were violated when he was neither advised of, nor permitted pre-trial access to the Chief's "reenactment" of the incident. The Chief testified that when she began to read the eighty-two page summary of the incident, it was difficult to follow so she asked a police captain to set up a reenactment of the crime. This was done in the basement of the Milwaukee Police Training Bureau by using members that were part of the professional performance division. The purpose of the reenactment was to give the Chief a picture of what the scene looked like so that she could make appropriate charging decisions.

¶10 Lemke argues that the reenactment erroneously had Lemke laying on Jude's legs in a parallel position, rather than in a perpendicular fashion. Thus, Lemke contends his head was facing away from Jude, preventing Lemke from seeing Jude's injuries and what the other officers were doing. Citing ***Sliwinski v. Board of Fire and Police Comm'rs***, 2006 WI App 27, 289 Wis. 2d 422, 711 N.W.2d 271, Lemke claims that not producing the reenactment unlawfully prevented him from confronting potential witnesses who might have corroborated his version of the event.

¶11 We are not convinced. The reenactment was not part of the investigation, but only done to help the Chief visualize the incident. The Chief testified at trial and was available for cross-examination by Lemke. Further, Lemke's main contention that the reenactment was erroneous regarding how he laid across Jude's legs was immaterial to the charges. Lemke was fired in part for

needlessly kicking Jude, not for laying on his legs. When Lemke kicked Jude, Lemke was standing up, looking at Jude. In such a position, Lemke would have been able to see Jude's injuries and what was taking place.

¶12 In ruling on this issue, the trial court found that "there is no indication that either the reenactment or the matrix contained exculpatory information." Citing ***State v. Hoffman***, 106 Wis. 2d 185, 316 N.W.2d 143 (Ct. App. 1982), the trial court held that when evidence withheld is not exculpatory, any "alleged violation of … discovery rights … [does] not rise to constitutional dimensions." Accordingly, failure of the Chief to provide Lemke with the reenactment or the matrix did not deprive Lemke of due process.

B. Incorrect Theory of Law.

¶13 Lemke's next contention is that the Board proceeded on an incorrect theory of the law when it concluded he had been untruthful. Lemke asserts that the Chief erroneously relied on his statement regarding Jude flailing his arms wildly prior to being cuffed and the cuff itself flailing after one wrist had been cuffed, when the Chief charged Lemke with untruthfulness.[2]

[2] Lemke spends most of his argument mincing words regarding Lemke's statement about Jude waiving his arms and resisting arrest, and later his concern that flailing one cuffed arm could have caused the cuffs to be used as a weapon. Testimony in the record completely refutes Lemke's contentions. The on-duty officer, who came to the scene and was placing cuffs on Jude, testified that Jude's arms were in his coat, which was pulled up over him, which made it difficult to get him cuffed. When the officer did manage to get Jude's right arm behind him and cuffed, he never lost control of the right arm. Thus, this testimony supports the Board's conclusion that Lemke was untruthful about the situation. Lemke's claims that his focused kicks were necessary to gain compliance is completely negated by the testimony of the on-duty officer who was actually handcuffing Jude.

¶14 The Board heard Lemke's version of what happened, along with the testimony of the other witnesses. They heard Lemke's explanation for entering into the incident and his reason for kicking Jude. It was the Board's job to resolve any differences in the testimony. ***Younglove v. Oak Creek Fire and Police Comm'n***, 218 Wis. 2d 133, 139-40, 579 N.W.2d 294 (Ct. App. 1998). The Board concluded that Lemke's version of events was incredible. The Board is the final arbiter of credibility. ***State ex rel. Ruthenberg v. Annuity & Pension Bd. of the City of Milwaukee***, 89 Wis. 2d 463, 473, 278 N.W.2d 835 (1979).

¶15 As long as there is evidence to support the Board's determination, it is the function of this court to affirm the Board's decision. The record demonstrates that Lemke did not report what happened, and insisted that the force he used to subdue Lemke was not excessive. Lemke also said that he saw no inappropriate behavior by other members of the Milwaukee Police Department. The other testimony in the record revealed that Jude was being repeatedly beaten and kicked, including to his groin. Blood sprayed into the air from the blows to Jude's body. Jude spent three days in the hospital following the encounter with the officers. There was testimony that the injuries inflicted on Jude were inconsistent with the force necessary to restrain someone. Thus, there was evidence in the record to support the Board's finding that Lemke's story was completely unbelievable, and that he was untruthful. Accordingly, we conclude that the Board did not proceed on an incorrect theory of law.

C. Ballot.

¶16 Lemke next contends that the ballots used by the Board to determine his guilt actually referred to conduct for which Lemke was never charged. Lemke asserts that the ballot asks whether he was untruthful about his use of force, but the

actual charge refers to his untruthfulness about the flailing handcuff. We are not convinced that this distinction requires reversal of the Board's decision.

¶17 Lemke's explanation for *using force*—the two focused kicks-was based on his claim that Jude was flailing his arms when the on-duty officer was attempting to handcuff him. As noted above, the testimony of the on-duty officer refutes Lemke's version of events. Lemke's explanation for his use of force was found to be untrue. The interrelationship between the untrue statement and the use of force renders the ballots used acceptable. Based on these facts, we are not convinced that the Board acted upon its will, rather than its judgment.

¶18 Moreover, as pointed out by the City, this issue was raised at the end of the hearing when the Board voted on a penalty. Lemke could have requested that the Board revote on the correct charge. He did not. Accordingly, he waived any defect in the language of the ballot.

D. Board Exceeded its Jurisdiction on "manhandling" charge.

¶19 Lemke claims the evidence was insufficient to sustain the charge of unnecessarily "striking or manhandling a prisoner" because the kicking technique used was consistent with police training, and because Jude was not a "prisoner" at the time the force was used. We are not convinced.

¶20 The test to determine whether someone is "in custody" is not dependent on specific spoken statement to a person that he or she is under arrest. Rather, "[t]he test is 'whether a reasonable person in the [suspect's] position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.'" ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998) (citation omitted; brackets in ***Mosher)***. The

circumstances clearly demonstrate here that at the time Lemke kicked Jude, Jude was in custody. Jude was told he could not leave the party and that the people retaining him were "cops." Jude was physically removed from the vehicle and shoved to the ground. He was repeatedly punched and kicked, and had three people holding him down. To argue that Jude was not in custody under these circumstances is simply absurd.

¶21 We also conclude that Lemke's contention that his kicks were consistent with police training does not alter our analysis. We have already concluded that the kicks inflicted constituted unnecessary force, and thus, they were inconsistent with police training. Even if the kicks were consistent with the technique taught, they were inappropriately used here because Jude was already restrained.

E. Vague "cowardice" Rule.

¶22 Lemke next contends that the Board acted on an incorrect theory of law when it applied an unconstitutionally vague version of the "cowardice" rule. More specifically, Lemke argues that the rule known as the "cowardice" rule was interpreted for the first time in his case to include "gross neglect of duty." As a result, he argues it was unconstitutionally vague because no reasonable officer could possibly have known that the rule would be so interpreted. We are not convinced.

¶23 The rule at issue requires officers to:

> discharge their duties with composure and determination, and in time of extreme peril they shall act together and assist and protect each other in the restoration of peace and order. Whoever shrinks from danger or responsibility shall be considered guilty of gross neglect of duty and unworthy of a place in the service.

The purpose of the rule, based on the plain language, is to have officers work together to restore peace and order where it does not exist. If an officer does not do that, he is guilty of gross neglect of duty. In order to find a rule to be vague and ambiguous, it must be such that a person of common intelligence is unable to discern what action to take in a particular situation. *See* ***Bence v. Breier***, 501 F.2d 1185, 1188 (7th Cir. 1974).

¶24 In applying the rule to the instant case, Lemke's obligation under the rule was to work with fellow officers to restore peace and order. The record here reflects that Lemke heard escalating levels of argument, but did not intervene because the situation did not involve an actual physical fight. The rule cited above, does not state officers should hold off on restoring order until a physical fight ensues. Lemke could have behaved responsibly and intervened to restore peace before the physical attack began. He did not. Further, after on-duty officers arrived, Lemke inflicted unnecessary and excessive force.

¶25 We are not persuaded by Lemke's contention that in the past this rule was used in different situations or is so vague that he had to guess at its meaning. The language of the rule is clear as to the duty of an officer. Lemke neglected that duty by his admitted failure to act. Moreover, Lemke has the burden to prove that the rule is unconstitutionally vague beyond a reasonable doubt. ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137. Lemke has not so proven.

¶26 He contends that the rule does not satisfy the ***State v. Pittman***, 174 Wis. 2d 255, 496 N.W.2d 74 (1993), two-part test which states that: (1) the rule must sufficiently warn that conduct comes near the proscribed area; and (2) can the rule be enforced without creating individualized standards. ***Id.*** at 276. We do

not agree. The rule sufficiently warns officers that they may not "shrink" from duty and must act to restore peace and order. We also believe the rule can be properly enforced. An officer who fails to prevent an assault or joins in that assault should know that his conduct violates the plain language of the rule at issue.

F. Board Bias.

¶27 Lemke's last claim is that the Board was biased and should have disqualified itself from presiding in this matter. Specifically, he contends that because Jude was suing the City and the police department, and the Board is responsible for hiring, disciplining, and employing officers who the State had criminally charged with inflicting Jude's injuries, the Board could not fairly and impartially sit in judgment in this case. We are not convinced for three reasons.

¶28 First, in the event the Board was sued on some theory of negligent hiring or supervision, the Board would most likely be immune pursuant to WIS. STAT. § 893.80(4). Second, even if the Board was found liable in a civil suit, the City of Milwaukee (and not the individual board members) would be paying any resultant damages. Third, WIS. STAT. § 62.50(12) and (17)(a) assigns the responsibility to hold the hearing to the Board. No provision is made for any alternative. Where no alternative provision is provided bias objections will not lie against a board. *See* ***State ex rel. Richey v. Neenah Police & Fire Comm'n***, 48 Wis. 2d 575, 584, 180 N.W.2d 743 (1970). The argument of the plaintiff that the Commission is therefore biased against him because of the speculative nature of future possible litigation is just too remote to warrant recusal. Under the circumstances of this case, Lemke cannot prove bias. Bias cannot be established on the basis of speculation, but must be based on actual evidence. ***Id.*** at 584-85.

¶29 Based on the foregoing, we conclude that the Board did not err in rendering its decision that Lemke should be discharged from serving as a police officer. We therefore affirm.[3]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[3] We note that during the pendency of this appeal, a motion was filed by the City to dismiss the appeal on the basis that Lemke pled guilty to a criminal felony charge in this matter in the federal court. Based on our disposition of the case, the motion to dismiss is moot and we therefore deny the request to dismiss the appeal.