

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-2187

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JOHN C. THEAMA,

PLAINTIFF-APPELLANT,

V.

**POLICE AND FIRE COMMISSION OF THE
VILLAGE OF STURTEVANT,**

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
STEPHEN A. SIMANEK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. John C. Theama appeals from an order affirming the Village of Sturtevant Police and Fire Commission's (the Commission) decision to discipline him by removing him as chief of the fire department and reducing his rank to captain. We affirm.

The discipline arose out of an April 14, 1996, incident in which a firefighter damaged a firehouse door. The Commission alleged in its charges against Theama that when the Village president, Carolyn Milkie, and the chair of the Police and Fire Committee, Denise Blanchard, learned of the damage on April 16 at a Village Board meeting, they asked Theama which firefighter's personal vehicle damaged the door. Theama responded that he did not know whose vehicle was involved and that it would be extremely difficult to find out. Theama's written statement on the incident contradicted this response. In the statement, Theama advised that the involved firefighter called him on April 14 to inform Theama that he had damaged the door with his vehicle. Theama was charged with dishonesty concerning damage to public property.¹

In proceedings on the dishonesty charge, the Commission found that on April 16 Theama was asked by Village officials to identify the involved firefighter. Theama did not identify the firefighter despite having knowledge of the identity of the involved firefighter as evidenced by his April 14 written statement on the incident. The Commission found that Theama's answers to the Village officials' inquiries "were false, misleading, or both, concerning the extent of his knowledge of this incident." Applying the just cause criteria of § 62.13(5)(em), STATS., the Commission concluded, inter alia, that "Theama could reasonably be expected to know that providing false or misleading information to Village Trustees, even in an informal conversation, is improper behavior carrying with it probable adverse consequences to his continued employment as Fire Chief." The Commission further found that it was "reasonable for Village

¹ Although other misdeeds in office were alleged, this was the only charge on which Theama was found guilty by the Commission.

Trustees to expect complete and truthful answers to questions they pose, especially to a Department Head.” The Commission found that there was substantial evidence in the record to support the Commission’s misconduct findings. The Commission then removed Theama as fire chief and demoted him to captain.

Theama appealed to the circuit court under § 62.13(5)(i), STATS., and by a petition for a writ of certiorari.² The circuit court reviewed the Commission’s just cause criteria determinations and acknowledged Theama’s admission in a circuit court brief that he would expect to be disciplined if he lied to Village officials. Under § 62.13(5)(i), if the circuit court sustains the Commission’s order, the order is “final and conclusive” and this court may not review the just cause determinations. *See Owens v. Board of Police & Fire Comm’rs*, 122 Wis.2d 449, 451, 362 N.W.2d 171, 172 (Ct. App. 1984). Accordingly, our review is limited to the circuit court’s disposition of the petition for a writ of certiorari.

Where both a statutory appeal and certiorari review are sought, the scope of the circuit court’s certiorari review is limited to whether the commission kept within its jurisdiction and whether it proceeded under a correct theory of law. *See Reedy v. Law Enforcement Disciplinary Comm.*, 156 Wis.2d 600, 605, 457 N.W.2d 505, 508 (Ct. App. 1990). We review these questions without deference to the circuit court’s decision. *See id.* at 606, 457 N.W.2d at 508.

Theama argues that members of the Commission were biased against him. This is an issue which can be addressed on certiorari review. *See id.* at 607,

² A party may file both a statutory appeal under § 62.13(5)(i), STATS., and a petition for a writ of certiorari to challenge the commission’s decision. *See Reedy v. Law Enforcement Disciplinary Comm.*, 156 Wis.2d 600, 606, 457 N.W.2d 505, 508 (Ct. App. 1990).

457 N.W.2d at 508. Theama's argument is based on the deposition testimony of a Commission member, Marianne Mitchell, who contended that the Commission was "dirty" or biased against Theama. She alleged that two of the five commissioners met separately with the complaining Village officials before, during and after the disciplinary hearings and formed their opinions prior to the Commission's evidentiary hearings on the charges against Theama. Mitchell also noted that one commissioner implied that Theama would not get a fair hearing before the Commission and that Theama "was gone anyway."

The five-member Commission held an evidentiary hearing on July 22, 1996. A second evidentiary hearing was held on August 19. On August 20, Mitchell submitted a letter of resignation to protest the Commission's bias against Theama. Notwithstanding her resignation, she participated in the Commission's deliberations and voted against disciplining Theama on August 22. The vote was four to one (Mitchell) to discipline Theama.

Even if Theama's and Mitchell's bias allegations are correct, which we need not decide, this alleged bias does not invalidate the Commission's disciplinary decision. Theama must "overcome the presumption of honesty and integrity in those serving as adjudicators." *Id.* at 607, 457 N.W.2d at 509 (quoted source omitted). The Commission voted four to one to discipline Theama. Theama alleges that two of the five members of the Commission were biased against him. However, Theama does not point us to evidence that the other two Commission members who voted against him were biased. In the absence of evidence in the record indicating that the latter two Commission members were biased and in the presence of the presumption that the unchallenged members acted fairly and impartially, the Commission's decision will not be overturned. *See id.* at 608, 457 N.W.2d at 509 (citing *State ex rel. Richey v. Neenah Police &*

Fire Comm'n, 48 Wis.2d 575, 584-85, 180 N.W.2d 743, 748-49 (1970)). If only the unchallenged members' votes are considered, the vote still would have been two to one against Theama.³

Theama next argues that the trial court failed to address certain legal and jurisdictional issues when it conducted its statutory and certiorari review. He challenges the trial court's disposition of his bias claim and his claim that the charges against him were vague. He also contends that the Commission erred when it reopened evidence after the first hearing and allowed uncharged conduct into evidence.

The bias claim has been addressed. As to Theama's claim that the charges were vague, we are concerned only with the charge on which he was tried and disciplined by the Commission: dishonesty concerning damage to public property. In its findings and order, the Commission stated that it did "not consider any other allegations of wrongdoing" in its disposition of the dishonesty charge against Theama. The Commission found that Theama's answers to the Village officials regarding the property damage "were false, misleading, or both, concerning the extent of his knowledge of [the garage door] incident." Theama admitted in a circuit court brief that he would expect to be disciplined if he lied to Village officials. Here, there was evidence (the April 14 written statement) that Theama knew the identity of the involved firefighter prior to the date that he told

³ Mitchell contended in her deposition that because two of the members were biased and she had resigned, the Commission did not have a quorum because three out of the five members could not vote. This contention is at odds with Mitchell's participation in the August 22 deliberations and vote two days after she tendered her resignation letter, which stated her resignation was effective on August 20.

the Village officials he did not know who was involved. We do not agree that the dishonesty charge was vague.

We also reject Theama's focus on the fact that there was no authority which compelled him to aggressively investigate the incident and to be disciplined for failing to do so. We note that the Commission did not find him guilty of failing to investigate. Rather, the Commission found that his failure to aggressively investigate "was consistent with not making a full and complete disclosure to the Village Trustees about his knowledge of the incident."

We conclude that the Commission's reopening of the evidence and admission of uncharged conduct into evidence are matters relating to the just cause determination and subsequent review under § 62.13(5)(i), STATS. We are barred from reviewing these issues. *See Owens*, 122 Wis.2d at 451, 362 N.W.2d at 172. However, we note that the uncharged conduct evidence related to whether Theama knew that the door was damaged by a go-cart rather than a motor vehicle. Theama concedes that he was not charged for disciplinary purposes relating to the go-cart evidence. The Commission was charged with disciplining Theama for false or misleading statements relating to who caused the damage, not how it was caused.

By the Court.—Order affirmed.

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

