COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2614 **Cir. Ct. No. 2001CV2217**

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

DAVID BARLOW,

PETITIONER-APPELLANT,

V.

BOARD OF POLICE AND FIRE COMMISSIONERS OF THE CITY OF MADISON, ALAN SEEGER, MARCIA TOPEL, ELIZABETH SNIDER, EUGENIA PODESTA, MICHAEL LAWTON, MEMBERS OF THE BOARD, AND DEBRA AMESQUA,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 LUNDSTEN, P.J. David Barlow appeals an order of the circuit court affirming the Madison Board of Police and Fire Commissioners' decision to

terminate Barlow's employment with the City of Madison fire department. The case was before the circuit court on certiorari review. Barlow argues on appeal that he was discharged under fire department rules that are unconstitutionally vague as applied. We disagree and affirm the circuit court.

Background

¶2 Prior to his termination in 2001, David Barlow had been a City of Madison firefighter since 1980. During the course of a police investigation into drug-related activity at Jocko's Rocket Ship bar in 1999, Barlow admitted to having "possessed, used, purchased and distributed cocaine" multiple times between 1988 and 1999. He was also found to have aided in the manufacture of cocaine on one occasion. None of these instances of possession, use, distribution, or manufacturing were alleged to have occurred while Barlow was on duty.

¶3 As a result of the information discovered by the Jocko's police investigation, and following an internal fire department investigation, Fire Chief Debra Amesqua filed disciplinary charges against Barlow with the Board of Police and Fire Commissioners pursuant to WIS. STAT. § 62.13(5)(b) (1999-2000).[1] Chief Amesqua's complaint alleged five counts of misconduct violating four fire department rules.

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[1] WISCONSIN STAT. § 62.13(5)(b) (1999-2000) provides:

> Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by any aggrieved person. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 The applicable fire department rules are rules 18, 39, 51, and 58. Rule 18 states, in pertinent part:

> Members … shall conform to the rules and regulations of the Department, observe the laws and ordinances, and render their services to the city with zeal, courage and discretion and fidelity.

Rule 39 provides, in part:

> Members must conform to and promptly and cheerfully obey all laws, ordinances, rules, regulations, and orders, whether general, special or verbal, when emanating from due authority.

Rule 51 states:

> Officers and members shall at all times conduct themselves so as not to bring the Department in disrepute.

Rule 58 provides:

> It is the duty of every person connected with the Fire Department to note and report to their superior officer or to the Chief any and all violations of the Rules and Regulations which may come under their notice.

¶5 Count 1 alleged use, possession, and purchase of cocaine, in violation of rules 18 and 39. Count 2 alleged participation in the manufacture of cocaine, in violation of rules 18 and 39. Count 3 alleged the illegal distribution of cocaine, again in violation of rules 18 and 39. Count 4 alleged that Barlow's conduct brought the fire department into disrepute, in violation of rule 51. Count 5 alleged that Barlow failed to report violations of the fire department rules to a superior officer, in violation of rule 58.

¶6 The board found that Barlow had committed each of the violations alleged. On Count 4, the board imposed the penalty of a one-year unpaid

suspension. On each of the other counts, the board imposed the penalty of discharge from the fire department.

¶7 Barlow appealed the board's decision to the circuit court, using the statutory review provision in WIS. STAT. § 62.13(5)(i). Under that statute, the circuit court reviews whether the board has "just cause" to impose discipline. The circuit court concluded that the board had just cause, and affirmed the board's decision. Barlow also filed a petition for certiorari review with the circuit court that asserted, among other arguments, that the fire department rules were unconstitutionally vague. The circuit court disagreed, and again affirmed the board's decision. This appeal does not challenge the circuit court's just cause determination, but involves only a challenge to the court's decision, under certiorari review, to affirm Barlow's discharge.[2]

Discussion

¶8 On appeal, much of Barlow's brief is directed at persuading us that he should not have been terminated, but instead given less drastic discipline. However, our review is limited to a more specific question raised by Barlow, that is, whether Barlow was discharged under fire department rules that are unconstitutionally vague as applied.[3]

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[2] Barlow's statutory review under WIS. STAT. § 62.13(5)(i) is not appealable to this court. ***Gentilli v. Board of Police & Fire Comm'rs of City of Madison***, 2004 WI 60, ¶14, 272 Wis. 2d 1, 680 N.W.2d 335.

[3] Chief Amesqua concedes that certiorari review of Barlow's vagueness claim is proper under ***Gentilli***, 272 Wis. 2d 1, ¶¶19-21. Therefore, we do not address the issue.

¶9 Vagueness is a due process issue, and due process determinations are questions of law that this court reviews *de novo*. *See* ***State v. Aufderhaar***, 2005 WI 108, ¶10, __ Wis. 2d __, 700 N.W.2d 4. When discussing vagueness, our supreme court has explained: "'[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process law.'" ***State ex rel. Kalt v. Board of Fire & Police Comm'rs for City of Milwaukee***, 145 Wis. 2d 504, 510, 427 N.W.2d 408 (Ct. App. 1988) (quoting ***Bence v. Breier***, 501 F.2d 1185, 1188 (7th Cir. 1974)). This rule "applies to administrative regulations affecting conditions of governmental employment in the same manner as it applies to penal statutes." ***Kalt***, 145 Wis. 2d at 510.

¶10 The only issue Barlow pursues on appeal is whether the fire department rules identified above are unconstitutionally vague as applied. We agree with Chief Amesqua[4] that Barlow effectively concedes that the fire department rules under which he was dismissed are not unconstitutionally vague on their face. Barlow does not, therefore, argue that the rules are void for vagueness, but instead makes an as-applied vagueness challenge. *See* ***United States v. Powell***, 423 U.S. 87, 92 (1975) (a statute which is void on its face for vagueness is one that "may not constitutionally be applied to any set of facts").

¶11 Barlow claims that the board's previous application of the rules failed to give him "fair notice that his off-duty conduct would constitute a

[4] Both the board and Fire Chief Amesqua are respondents to this appeal. They have submitted separate briefs. However, because much of their respective arguments overlap, we will refer to both parties as Chief Amesqua.

violation of the Rules and subject him to removal from his employment as a Firefighter." We interpret Barlow's argument as having two prongs: first, that Barlow did not receive notice that off-duty conduct could result in a rule violation, and, second, that Barlow did not receive notice that his particular conduct could result in discharge. We reject both prongs.

Whether Barlow Had Fair Notice That The Fire Department Rules Apply to Off-Duty Conduct

¶12 Barlow contends that administrative rules that clearly apply to given conduct on plain reading may *become* vague through the way in which those rules are applied. Thus, Barlow argues that the department's historical failure to apply the rules to off-duty conduct created vagueness because, despite plain language to the contrary, it led employees like Barlow to believe that the rules did not apply to off-duty conduct.[5]

¶13 A party making an as-applied challenge to a statute must "prove, beyond a reasonable doubt, that as applied to him the statute is unconstitutional." ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137. Again, this analysis applies to administrative regulations in the same way it does to statutes. *See* ***Wisconsin Builders Ass'n v. DOT***, 2005 WI App 160, ¶34, __ Wis. 2d __, 702 N.W.2d 433. Thus, Barlow has the burden of proving, beyond a reasonable doubt, that, as applied to him, the rules are unconstitutionally vague. *See* ***Joseph E.G.***, 240 Wis. 2d 481, ¶5.

[5] To the extent that Barlow tries to distinguish off-duty *drug-related* conduct from off-duty conduct generally for purposes of discipline under the rules, we are not persuaded. None of the rules under which he was disciplined expressly refer to drug-related conduct. All are couched in terms of any conduct that would constitute a failure to obey the law, bring the fire department into disrepute, or constitute a failure to inform a superior officer of rule violations.

¶14 As support for his particular as-applied-vagueness theory, that is, that a rule may lose its plain meaning, Barlow cites ***Wolfel v. Morris***, 972 F.2d 712 (6th Cir. 1992), and ***Waters v. Peterson***, 495 F.2d 91 (D.C. Cir. 1973). ***Wolfel*** and ***Waters*** involved prison inmates and government employees, respectively, who engaged in conduct for which they could have been, and were, disciplined under a plain reading of the applicable rules. *See* ***Wolfel***, 972 F.2d at 715, 718; ***Waters***, 495 F.2d at 94, 99. The courts in both of those cases concluded that the disciplinary rules were vague as applied because the rules had not previously been applied to the conduct at issue, even though the parties themselves or other parties had previously engaged in the same conduct. ***Wolfel***, 972 F.2d at 717; ***Waters***, 495 F.2d at 100. In other words, until disciplinary action was taken against the parties in ***Wolfel*** and ***Waters***, the parties and others had engaged in the same conduct on numerous occasions without consequence. The parties, therefore, had no notice that their conduct would subject them to discipline under those rules and, for that reason, the courts concluded that the rules were vague as applied. ***Wolfel***, 972 F.2d at 717; ***Waters***, 495 F.2d at 101.

¶15 ***Wolfel*** and ***Waters*** are not binding on this court, and it is not readily apparent that the vagueness analysis used in those cases flows from an accurate interpretation of the due process clause. However, we need not address that issue because Barlow's argument contains a flaw that does not require resolution of whether ***Wolfel*** and ***Waters*** use a correct as-applied vagueness analysis. Even assuming that the ***Wolfel***/***Waters*** vagueness analysis is correct, to conclude that a rule is unconstitutionally vague as applied requires a record that shows that the past application of the rules would lead a person to believe that the conduct at issue is not subject to the discipline imposed. Here, the record does not show that

the fire department or the Board of Police and Fire Commissioners failed to previously apply the disputed rules to identified instances of off-duty conduct.

¶16 The only significant evidence Barlow points to is testimony before the board by fire department lieutenant Joseph Conway. Conway testified that he believed the rules had not previously been applied to off-duty conduct.[6] Regarding rules 18, 39, and 51, Conway's testimony covered his knowledge of Madison firefighters who had engaged in some type of drug use or possession at some point. Some of the incidents Conway testified about involved random drug and alcohol testing and, for most of the rest of the incidents, it is unclear how the firefighters' drug use was discovered. The firefighters all received some sort of discipline, or entered into a settlement in which they signed a "memorandum of understanding," the terms of which, if violated, could lead to their discharge. One firefighter who signed a memorandum of understanding agreeing to abstain from

[6] Before the circuit court, Barlow submitted an affidavit, with an attached training manual, of Lieutenant Joseph Conway Jr. of the Madison fire department. The circuit court declined to examine those materials. They are, however, in the appellate record. The manual, according to Barlow, is recommended reading for those seeking upper-level positions within the Madison fire department, and recommends treatment as opposed to discipline for firefighters found to be abusing substances. Chief Amesqua moved this court to strike those documents from the record because they were not considered by the circuit court. We denied that motion, and concluded that whether the circuit court properly declined to consider the documents was a question the parties could address in their appellate briefs. Barlow addresses the issue in a footnote in his reply brief, and makes the assertion that we should consider the documents because they were considered by the board in a different case in which a firefighter was disciplined for conduct arising out of the Jocko's investigation. The proposition that this court should consider evidence because it was before the board in a separate disciplinary action is meritless.

alcohol and drug use subsequently tested positive for cocaine and, after considerable discussion, reached a settlement involving resignation.[7]

¶17 Lieutenant Conway's testimony does not show that, under rules 18, 39, and 51, previous off-duty drug violations were not subject to discipline. In fact, Conway's testimony indicates that, in at least some prior instances, off-duty drug use had significant consequences, including the threat of discharge.[8]

¶18 In addition, an examination of case law leads to the conclusion that these rules have previously been applied by the fire department and the board to off-duty conduct. In ***Greer v. Amesqua***, 212 F.3d 358 (7th Cir. 2000), a case involving both conduct and discipline that pre-date a large portion of the conduct in this case, a federal court upheld the board's decision to dismiss a firefighter for off-duty conduct in 1997 that violated, among others, rule 51, which prohibits conduct that would bring the fire department into disrepute. ***Id.*** at 365, 369. Additionally, in 1997, a firefighter was dismissed under the rules directing firefighters to obey all laws (rules 18 and 39) for a crime committed prior to his becoming a firefighter. *See* ***City of Madison v. DWD***, 2002 WI App 199, ¶¶2-3, 257 Wis. 2d 348, 651 N.W.2d 292, *rev'd on other grounds*, 2003 WI 76, 262 Wis. 2d 652, 664 N.W.2d 584.

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[7] Barlow correctly points out that evidence of enforcement that post-dates his illegal drug activities is not relevant to the notice issue he raises. Thus, we do not consider, for example, the treatment of other firefighters who, like Barlow, were disciplined after their conduct was discovered in the course of the Jocko's Rocket Ship police investigation.

[8] In his reply brief, Barlow attempts to recast his argument by contending that the rules had not been applied to off-duty conduct "unless the Firefighter had been wearing a uniform or otherwise publicly been identified as a representative of the Fire Department when the conduct had occurred." Barlow attempts to support this distinction by citing to pages 484-90 of the transcript of the proceedings before the Board of Police and Fire Commissioners. We find no support for Barlow's contention in those pages of the transcript.

¶19 Lieutenant Conway testified that he believed rule 58, requiring firefighters to inform superiors of rule violations, had only previously been applied one time, and then only to on-duty conduct. Even if contrary testimony by Conway and by Chief Amesqua is disregarded, one use of rule 58 in an on-duty context does not show a history of not applying the rule to identified off-duty conduct. Moreover, on its face, rule 58 plainly applies to off-duty conduct because it directs firefighters to report *all* rule violations.

¶20 In his appellate briefs, Barlow effectively admits that a plain reading of the rules informs firefighters that the rules apply to off-duty conduct.[9] Under Barlow's ***Wolfel/Waters*** argument, in order to show that the rules were rendered vague by the lack of prior application, Barlow needed to point to evidence in the record showing that the board allowed off-duty rule violations to go undisciplined. There is no such evidence.

[9] Both parties discuss Barlow's own subjective beliefs. Chief Amesqua argues that Barlow himself admitted that he knew his off-duty conduct was prohibited by the rules. Barlow argues that his ready confession to the conduct shows that he did not anticipate that his conduct was subject to discipline, much less discharge. However, one of the cases that Barlow relies on shows the error in looking to Barlow's subjective beliefs. The court in ***Waters v. Peterson***, 495 F.2d 91 (D.C. Cir. 1973), wrote:

> In ***Bouie v. City of Columbia***, 378 U.S. 347, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964), the Supreme Court found it "irrelevant that petitioners at one point testified that they had intended to be arrested," since the determination whether a statute affords "fair warning ... must be made on the basis of the statute itself and the other pertinent law, rather than on ... an ad hoc appraisal of the subjective expectations of particular defendants." 378 U.S. at 355-356 n.5, 84 S. Ct. at 1703.

Id. at 100.

Whether Barlow Had Fair Notice That His Conduct Could Result In Dismissal

¶21 Barlow also argues that the rules were vague as applied because previous enforcement of the rules led him to conclude that he would not be discharged for his conduct. We disagree.

¶22 WISCONSIN STAT. § 62.13(5)(e) authorizes the discharge of a firefighter if the board determines that rule-violation charges brought against the firefighter are sustained.[10] Further, a rule is not vague so long as one is put on notice of the conduct proscribed and the severity of the penalty that may be imposed. *See* ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 627, 563 N.W.2d 154 (1997); s*ee also* ***State v. Cissell***, 127 Wis. 2d 205, 216-17, 378 N.W.2d 691 (1985) (criminal statutes not unconstitutionally vague because they made clear the range of punishment authorized). Thus, the question we must answer for purposes of Barlow's ***Wolfel/Waters*** fair notice argument is whether Barlow could have reasonably expected that dismissal was within the range of authorized penalties for his rule violations.

¶23 In this context, Barlow again relies on his factual arguments relating to the lack of previous application of the rules to suggest that the board had never before discharged someone for drug use. However, the germane question is not whether, in general, anyone has previously been discharged for drug use, but rather whether someone engaging in conduct comparable to Barlow's conduct,

[10] WISCONSIN STAT. § 62.13(5)(e) provides:

> If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

brought to the attention of the board, was or was not discharged. As is apparent from our discussion above, the record does not reflect that.

¶24 Barlow points to other evidence: Conway's testimony that in 1999 Chief Amesqua stated that "simple drug use would not result in termination"; the city's administrative procedure memorandum, which states that the preferred procedure for first-time positive results from random alcohol and drug tests is to have the city employee submit to rehabilitation; and WIS. ADMIN. CODE § COMM 30.16, which directs the fire department to establish a policy that firefighters with any mental or physical health problems, including alcohol or substance abuse, should be referred to health care services for treatment or rehabilitation.

¶25 Barlow's reliance on Amesqua's comments regarding "simple drug use" is misplaced. Barlow was not engaged in "simple" drug use. The board found that Barlow continually used and possessed cocaine over a twelve-year period, and additionally distributed cocaine on several occasions and aided in its manufacture on one occasion. Barlow could not reasonably assume from Amesqua's statement regarding "simple drug use" that *any and all drug-related conduct* would result in discipline only, as opposed to discharge.

¶26 Barlow's reliance on the policy regarding random drug and alcohol testing in the administrative procedure memorandum is similarly misplaced. First, the administrative procedure memorandum does not preclude resort to discipline or discharge under the fire department rules. Second, the policy is not implicated by Barlow's conduct because the policy comes into play only if a firefighter tests positive during random drug testing. That is not the case here. Furthermore, what

is at issue here is Barlow's conduct, as opposed to Barlow's dependence on controlled substances.

¶27 WISCONSIN ADMIN. CODE § COMM 30.16 also does not preclude resort to discipline and discharge under the fire department rules. Section COMM 30.16 merely directs fire departments to establish a policy regarding treatment for the physical and mental health of firefighters. It does not state a policy preference for treatment, rather than discipline or discharge, in specific fact situations.

¶28 In sum, the record does not show that the practice of either the fire department or the board rendered the rules unconstitutionally vague as applied.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.