COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1696 **Cir. Ct. No. 2008CV12928**

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

GREG KOESTERING,

PLAINTIFF-APPELLANT,

V.

BOARD OF FIRE & POLICE COMMISSIONERS AND CITY OF MILWAUKEE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. On February 13, 2005, Greg Koestering, a City of Milwaukee police officer, repeatedly struck Michael Ramos while Ramos was handcuffed and inside a police van. The City of Milwaukee Chief of Police, Nannette Hegarty, found that Koestering had violated a department rule that

prohibits mistreatment of a prisoner by use of profane language and unnecessary force. Hegarty ordered Koestering's discharge from the department. Pursuant to WIS. STAT. § 62.50(11) (2007-08),[1] her decision was reviewed by the City of Milwaukee Fire and Police Commission. The commission upheld Hegarty's decision. Koestering sought review of the commission's decision in the circuit court pursuant to WIS. STAT. § 62.50(20). The circuit court, the Honorable Jean W. DiMotto, reversed the commission's decision because the commission was unable to hear the audio portion of a videotaped incident that had taken place in a booking room. Judge DiMotto remanded the matter to the commission for a new hearing. After a second hearing, the commission upheld Hegarty's decision to discharge Koestering who again sought review of the commission's decision in the circuit court. The circuit court, the Honorable David A. Hansher, affirmed the commission's decision, and Koestering, acting *pro se*, appeals. For the reasons stated below, we affirm.

¶2 Because the result of this appeal is determined largely by the scope of appellate review of a decision of the commission, we first set forth the law in that regard.

¶3 A police officer may not be discharged "except for cause and after trial" before the commission. WIS. STAT. § 62.50(11).[2] In making its

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The police department in Milwaukee, a first-class city, is the subject of WIS. STAT. § 62.50. Police departments in other cities are discussed in WIS. STAT. § 62.13. The relevant processes for officer discipline and circuit court review mirror each other and, therefore, case law interpreting § 62.13 is persuasive precedent in a § 62.50 review. *Compare* §§ 62.50(17), (20), and (21) *with* § 62.13(5).

determination whether "just cause" for discharge exists, the commission "shall apply … to the extent applicable" the following standards set forth in WIS. STAT. § 62.50(17)(b):

> 1. Whether the [officer] could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
>
> 2. Whether the rule or order that the [officer] allegedly violated is reasonable.
>
> 3. Whether the chief, before filing the charge against the [officer], made a reasonable effort to discover whether the [officer] did in fact violate a rule or order.
>
> 4. Whether the effort described under subd. 3. was fair and objective.
>
> 5. Whether the chief discovered substantial evidence that the [officer] violated the rule or order as described in the charges filed against the [officer].
>
> 6. Whether the chief is applying the rule or order fairly and without discrimination against the [officer].
>
> 7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the [officer's] record of service with the chief's department.

¶4 An officer who is discharged after a hearing before the commission may seek review of that decision in the circuit court. *See* WIS. STAT. § 62.50(20). Statutory review under § 62.50(20) is the "exclusive procedure for a circuit court to determine certain issues, namely whether [the commission's] action was arbitrary, oppressive, or unreasonable, and whether the [commission] could reasonably make the order or determination at issue." *See* ***Gentilli v. Board of Police and Fire Comm'rs***, 2004 WI 60, ¶20, 272 Wis. 2d 1, 680 N.W.2d 335. The circuit court must defer to the credibility determinations made by the commission because it "hear[s] and see[s] the witnesses." ***Younglove v. City of Oak Creek Fire and Police Comm'n***, 218 Wis. 2d 133, 140, 579 N.W.2d 294 (Ct.

App. 1998). If a circuit court upholds a decision of the commission on statutory review, the circuit court's order is "final and conclusive," and it cannot be reviewed by the appellate courts. *See* ***Gentilli***, 272 Wis. 2d 1, ¶18. The circuit court's determination of "the sufficiency of the evidence and the relationship between the discipline imposed and the seriousness of the conduct justifying the discipline" are decisions that are "final and conclusive." *See* ***id.***, ¶34.

¶5 An officer also may seek certiorari review of a commission's decision.[3] Generally, certiorari review of an administrative agency's decision is limited to questions of law, and encompasses the following issues: (1) whether the board kept within its jurisdiction; (2) whether the board proceeded on a correct theory of law; (3) whether the board's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the board might reasonably make the order or determination in question. *See* ***id.***, ¶19. "Certiorari does not lie, however, when the legislature has created an exclusive statutory review procedure." ***Id.*** Because the legislature has created the statutory review procedure of WIS. STAT. § 62.50(20), the circuit court's certiorari review of a commission decision is limited to "those strictly legal questions that were not or could not have been raised through a statutory judicial review proceeding." ***Gentilli***, 272 Wis. 2d 1, ¶20. "[A] circuit court may determine in a certiorari action whether [the commission] kept within its jurisdiction and whether [the commission] proceeded

[3] Koestering's circuit court complaint refers only to statutory review under WIS. STAT. § 62.50(21). In its decision, the circuit court acknowledged that it could consider whether the commission kept within its jurisdiction and whether the commission proceeded on a correct theory of law. Thus, the circuit court liberally construed Koestering's complaint to encompass both statutory and certiorari review.

on a correct theory of law." ***Id.*** ¶21. The third and fourth inquiries of certiorari review are encompassed within the statutory review process and, therefore, the circuit court cannot address those questions on certiorari review. *See* ***id***.

¶6 With those standards in mind, we turn to the arguments raised by Koestering on appeal.

¶7 Koestering contends that the commission did not "fairly, [and] without discrimination" apply the standards found WIS. STAT. § 62.50(17)(b)6 & 7 and that discharge is not "reasonabl[y] related to the seriousness of the alleged offense" in light of his prior service record. Koestering goes to great lengths to discuss the "comparables" that he presented to the commission, namely, offenses committed by other officers and the disciplines imposed on them, all to support his position that he was unfairly treated when Hegarty sought his discharge.

¶8 As noted above, in a statutory review under WIS. STAT. § 62.50(20), the circuit court's order is "final and conclusive" as to whether the commission's decision was arbitrary, oppressive, or unreasonable and whether the commission could reasonably make the decision at issue. *See* ***Gentilli***, 272 Wis. 2d 1, ¶¶18-20. To support his belief that the commission's decision was arbitrary and unreasonable and that that the commission could not reasonably discharge him, Koestering points to the discipline imposed upon other officers. Koestering's argument, which focuses on a comparison of the discipline imposed on him with discipline imposed on other officers, plainly implicates whether the commission's decision was "arbitrary, oppressive, or unreasonable" under the facts. Under the limited scope of appellate review in a § 62.50(20) matter, the circuit court's decision upholding the commission on that issue is not reviewable on appeal and, therefore, it must stand. *See* ***id.***, ¶18.

¶9 Koestering next contends that he was denied due process when the hearing examiner limited his questioning of Deputy Inspector Mary Hoerig. Koestering wanted to ask Hoerig about a pending disciplinary matter involving another officer. In Koestering's view, the other officer violated the same rule as Koestering, in a more serious manner, yet the chief of police was seeking only a suspension, not discharge, of the officer. The hearing examiner refused to allow the questions because the matter had not yet been heard by the commission and the commission had not yet determined the appropriate level of discipline, if any, for the other officer.

¶10 Because Koestering's contention implicates whether the commission kept within its jurisdiction and proceeded on a correct theory of law, this court may consider it under certiorari review. *See* ***id.***, ¶21. We are not persuaded. We agree with the hearing examiner that potential discipline that may or may not be imposed on another officer was not truly a comparable matter that may be relevant to whether just cause for discharge exists under WIS. STAT. § 62.50(17)(b)6. Therefore, the commission did not commit any legal error when the hearing examiner limited Koestering's questioning of Hoerig.

¶11 The final question raised by Koestering on appeal concerns the record before the circuit court. Koestering claims that the record certified by the commission to the circuit court was incomplete and, therefore, the commission violated WIS. STAT. § 62.50(21) which requires the commission to "certify to the clerk of the circuit court … all charges, testimony, and everything relative to the trial and discharge, suspension or reduction in rank of the [officer]." The record contains an affidavit of the executive director of the commission certifying to the circuit court the "true record of all charges and documentation" pertinent to proceedings held in Koestering's case. Koestering did not complain about the

completeness of the record prior to the circuit court's decision. Because the record does not support Koestering's challenge to the sufficiency of the record, his appellate argument fails.[4]

By the Court.—Order affirmed.

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

[4] After this appeal was commenced, Koestering filed a motion to supplement the record to include various items that he believed were missing from the record. Both the circuit court and this court denied his motions. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981) (the appellate record cannot be supplemented with documents or other exhibits that were not before the circuit court when it rendered its decision). Despite those orders, Koestering included many items in his appendices that were not before the circuit court and not in the appellate record. While this court could impose a penalty under WIS. STAT. RULE 809.83 for Koestering's repeated citation to items outside the appellate record, this court chooses not to because Koestering is self-represented.