COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2448 **Cir. Ct. No. 2013CV2501**

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

STATE OF WISCONSIN EX REL. JESUS ALBA A/K/A JESSE ALBA,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

CITY OF WAUKESHA BOARD OF POLICE AND FIRE COMMISSION,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Stark, JJ.

¶1 PER CURIAM. Jesus "Jesse" Alba sought to be reinstated as City of Waukesha Fire Department (the Department) fire chief and provided back pay.

The circuit court denied his statutory appeal under WIS. STAT. § 62.13(5)(i) (2013-14),[1] but on certiorari review found a fundamental due process violation and remanded the case to the City of Waukesha Board of Police and Fire Commission (the PFC) for rehearing. Alba appeals the circuit court's remedy of a rehearing. The PFC cross-appeals from the portion of the order finding a due process violation and ordering a remand. We affirm in all regards.

¶2 In July 2013, two months after Alba had been promoted to the rank of fire chief, the City of Waukesha mayor filed charges alleging that Alba had violated Department rules and the City's anti-harassment policy. Alba had not volunteered during his interview for the position that he and a Department employee under his command had an affair in 2012 or that, when they decided to end it, he asked her to resign to avoid the "distraction" of encountering each other at work. During the ensuing investigation, Alba provided e-mails from the woman showing that the affair had been mutually pursued. The independent investigator nonetheless concluded that resignation requests to a subordinate reasonably could be construed as an implied threat of an adverse job action.

¶3 A series of hearings followed. Alba acknowledged the affair and resignation requests. The PFC unanimously found just cause to discipline him. Although the mayor favored termination, the PFC voted to demote him to firefighter.

¶4 Alba appealed to the circuit court pursuant to WIS. STAT. § 62.13(5)(i) asserting that his demotion was not supported by just cause. *See*

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

§ 62.13(5)(em). He also sought review by writ of certiorari. *See* ***State ex rel. Enk v. Mentkowski***, 76 Wis. 2d 565, 571, 252 N.W.2d 28 (1977) (an aggrieved person may both file appeal and petition for writ of certiorari).

¶5 The court agreed that just cause existed for the demotion and denied Alba's statutory appeal. It also concluded that Alba's due process rights were violated, reasoning that PFC members concluded that Alba was not forthcoming during the fire chief selection interview, based on their personal recollections of the questions and responses at the untranscribed hiring interview rather than basing the disciplinary finding solely on evidence presented at the hearings. The court thus granted the writ of certiorari and remanded the case to the PFC for rehearing. It ordered that the PFC as constituted could rehear "any and all" charges other that the issue of Alba's candor in and during the interview by the PFC for the position of fire chief. Alba appeals.

¶6 As stated, Alba appealed the PFC's ruling to the circuit court via two procedural vehicles: WIS. STAT. § 62.13(5)(i) and writ of certiorari. The court's § 62.13(5) appeal decision is "final and conclusive" and we therefore have no jurisdiction to review that determination. ***Younglove v. City of Oak Creek Police & Fire Comm'n***, 218 Wis. 2d 133, 136, 579 N.W.2d 294 (Ct. App. 1998).

¶7 Usually, the scope of our certiorari review is limited to whether the PFC acted within its jurisdiction, proceeded on a correct theory of law, was arbitrary, oppressive or unreasonable, or, based on the evidence, reasonably might have made the order or finding it did. ***State ex rel. Hennekens v. River Falls Police & Fire Comm'n***, 124 Wis. 2d 413, 419, 369 N.W.2d 670 (1985). But the circuit court's disposal of a WIS. STAT. § 62.13(5) direct appeal further limits our certiorari review to whether the PFC kept within its jurisdiction and proceeded on

a correct theory of the law. ***Herek v. Police & Fire Comm'n Village of Menomonee Falls***, 226 Wis. 2d 504, 510, 595 N.W.2d 113 (Ct. App. 1999). These are questions of law we review de novo. ***Id.***

¶8 "[A] minimal rudiment of due process is a fair and impartial decisionmaker." ***Guthrie v. WERC***, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983). "This applies to administrative agencies [that] adjudicate as well as to courts." ***Withrow v. Larkin***, 421 U.S. 35, 46 (1975).

¶9 Alba contends that remanding to the original PFC is a futile remedy because the PFC already has formed the opinion that he was dishonest and the bell cannot be unrung. He concedes there is no statutory recusal mechanism, but argues that the members have a common-law obligation to disqualify themselves.

¶10 Those serving as adjudicators enjoy a presumption of honesty and integrity. ***Id.*** at 47. Mere familiarity with the facts of a case gained by an agency's performance of its statutory role does not disqualify it as decision maker with respect to actions that may affect another's property rights. ***Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n***, 426 U.S. 482, 493 (1976). Alba does not establish that the PFC members are "psychologically wedded" to a preordained conclusion such that the risk of unfairness is intolerably high. *See* ***State ex rel. DeLuca v. Common Council***, 72 Wis. 2d 672, 691-92, 242 N.W.2d 689 (1976). On rehearing, the PFC may not consider the issue of Alba's alleged lack of candor during the interview. The issue is off the table.

¶11 We also note that WIS. STAT. § 62.13 does not provide for PFC member recusal, a substituted panel, or any other alternative to having the current membership serve. A common-law duty of disqualification nonetheless may apply in some cases, e.g., where the adjudicator has a direct pecuniary or personal

interest, has a kinship relationship to a party, or formerly represented one of the parties. *See* ***Guthrie***, 111 Wis. 2d at 456-57. None of those situations exist here. We thus presume the PFC members will operate with the honesty and integrity expected of their office and will fairly rehear and decide the matter on the basis of the evidence.

¶12 Alba also argues that the "significant" involvement in the investigation and prosecution of his case by the city attorney and city attorney's office violated his due process rights. His contention that the city attorney's office took part in the investigation is not precisely accurate. One of the part-time assistant city attorneys also is the City's human resource manager. Consistent with her responsibilities as HR manager, she conducted an initial review of the allegations. Once she concluded that further investigation into the personnel matter was warranted, an independent investigator was appointed. There was no due process violation.

¶13 Alba saves most of his ammunition for City Attorney Curt Meitz. He contends Meitz wore "many hats," providing advice and legal counsel to the mayor, the city administrator, and to the PFC. He claims Meitz's involvement—sitting with the PFC at the hearings and, he alleges, participating in its closed-session deliberations and authoring its decision—at a minimum created the appearance of impropriety. *See* ***State ex rel. Heil v. Green Bay Police & Fire Comm'n***, 2002 WI App 228, ¶¶2, 16-17, 256 Wis. 2d 1008, 652 N.W.2d 118 (participation in PFC deliberations by mayor's appointed representative as liaison between city council and the PFC, "tainted the appearance of the PFC's independence" and gave "a sufficient appearance of impropriety to taint the entire proceedings"). Alba also asserts that Meitz's involvement with the PFC coupled with being counsel for the City impermissibly made him counsel and decision

maker in the same proceeding. *See* ***Guthrie***, 111 Wis. 2d at 460 (if decision maker previously was counsel to any party in same action or proceeding, due process violated without proof of partiality or bias because possibility of it too high to be constitutionally tolerable).

¶14 Alba's arguments are overblown. An inappropriate supervisory connection similar to the mayor-liaison link in ***Heil*** simply does not exist here. Meitz is an independently elected official who "shall conduct all the law business in which the city is interested" and "shall when requested by city officers give written legal opinions." WIS. STAT. § 62.09(12)(a), (c). The PFC is a city officer. Sec. 62.09(1)(a). The mayor, who filed the charges, sought separate outside counsel and did not appoint Meitz to his position as city attorney or to represent the PFC, nor did the mayor supervise Meitz. That Meitz has represented the City in the past does not align him with or pit him against the City in this proceeding.

¶15 The record does not support a conclusion that Meitz represented the mayor's interests or acted on his behalf to the detriment of the PFC, played any part in adjudicating the matter, or created a ***Heil***-like appearance of impropriety in his advising or representing the PFC. Alba thus has not overcome the high burden to rebut the presumption that the PFC acted with honesty and integrity so as to demonstrate that the risk of unfairness was intolerably high under the circumstances. *See* ***DeLuca***, 72 Wis. 2d at 691-92; ***Larkin***, 421 U.S. at 47.

¶16 In something of an about-face, Alba complains that the circuit court erred in denying his motion to conduct additional limited discovery because, to demonstrate a due process violation, he needed to ascertain the "unknown" extent of Meitz's role with the PFC. This argument, too, is unpersuasive.

¶17 Certiorari lies only to review a final determination. ***State ex rel. Czapiewski v. Milwaukee City Serv. Comm'n***, 54 Wis. 2d 535, 539, 196 N.W.2d 742 (1972). Generally speaking, "the circuit court is limited to the facts contained in the record from the proceeding under review, unless a statute expands the scope of review." ***Donaldson v. Board of Comm'rs***, 2004 WI 67, ¶75, 272 Wis. 2d 146, 680 N.W.2d 762.

¶18 Here, WIS. STAT. § 62.13(5)(i) grants the circuit court the discretion to order expansion of the record. The public policy of promoting confidence in impartial tribunals may justify expanding the certiorari record where evidence outside of it demonstrates procedural unfairness. ***Sills v. Walworth Cnty. Land Mgmt. Comm.***, 2002 WI App 111, ¶42, 254 Wis. 2d 538, 648 N.W.2d 878. Alba argued in his motion to permit additional discovery that "[w]hat is unknown, and could not have been known, was City Attorney Meitz's role in the investigation prior to the hearing, whether he sat in the deliberations, or whether he prepared the PFC's written decision." Speculation about Meitz's unknown role does not make a prima facie showing of wrongdoing. *See* ***id.*** Denying the motion to undertake discovery was not an erroneous exercise of discretion.

¶19 The PFC found that Alba violated Department rules of conduct and Core Value Statement by failing to disclose to the independent investigator and to the PFC during his hiring interview that he sought a subordinate's resignation for nonperformance reasons. Alba asserts that the circuit court should have vacated the decision because the Statement and rules are vague and unconstitutional and do not apply to off-duty behavior. He also claims "it is unclear what facts the City introduced to support a violation of the Core Values Statement."

¶20 Administrative rules such as those challenged here are unconstitutionally vague when persons of common intelligence must guess at their meaning and differ as to their application. *See* ***State ex rel. Kalt v. Board of Fire & Police Comm'rs***, 145 Wis. 2d 504, 510, 427 N.W.2d 408 (Ct. App. 1988). They are presumed constitutional and the challenger must prove unconstitutionality beyond a reasonable doubt. ***State v. McCoy***, 143 Wis. 2d 274, 285, 421 N.W.2d 107 (1988).

¶21 The PFC gave specific examples of Alba's self-acknowledged "embarrassing" and "selfish" behavior that demonstrated a lack of honesty, integrity, professionalism, self-discipline, and maturity and by which he used his position for personal gain, engaged in an adversarial employment practice, and created an intimidating working environment. It identified each rule and value violated. His claim that it is unclear what evidence the City introduced is preposterous. We will not further entertain a constitutional vagueness challenge where the alleged conduct plainly falls within a rule or statutory prohibition, *see* ***State v. Burris***, 2004 WI 91, ¶53, 273 Wis. 2d 294, 682 N.W.2d 812, especially where the argument is so poorly developed, *see* ***W. H. Pugh Coal Co. v. State***, 157 Wis. 2d 620, 634, 460 N.W.2d 787 (Ct. App. 1990).

¶22 Alba also raises several issues we need not address. He contends: (1) his due process rights were violated because, by failing to thoroughly investigate the allegations and provide him a summary of the facts, the independent investigator did not follow the City's internal procedures; (2) the PFC improperly relied on hearsay evidence; (3) the evidence was insufficient to establish that he violated Department rules; and (4) his discipline was excessive or unreasonable. These issues are improper on certiorari review, as they fall within the statutory review questions of whether a reasonable effort was made to discover

a rule violation, the investigation was fair and objective, and the discipline reasonably related to the offense and took into account Alba's years of service. *See* WIS. STAT. § 62.13(5)(em)3., 4., 7. The circuit court sustained the PFC's decision, making it "final and conclusive." Sec. 62.13(5)(i); ***Younglove***, 218 Wis. 2d at 136.

¶23 The PFC cross-appeals the finding of a due process violation when, during Alba's disciplinary hearing, the PFC concluded that he was dishonest based on responses he made or failed to make to interview questions a few months earlier. It argues that merely being exposed to evidence providing the basis for the charges does not constitute a violation of due process.

¶24 Alba and PFC president Attorney Cheryl Gemignani recalled the interview colloquy differently. Alba maintained he was asked only about matters in his professional life that could embarrass the City or Department and thus said nothing about the affair, which he considered a personal matter. Gemignani insisted she also asked broader questions about "mistakes" and "skeletons in [his] closet" that gave him "numerous opportunities" to be forthcoming but he "chose not to do it."

¶25 One of the findings of fact from the disciplinary hearing stated that the PFC considered as evidence the responses Alba gave to Gemignani's questioning. We agree with Alba that this constituted a due process violation. PFC members essentially were witnesses at the interview, then used their recollections when they sat as adjudicators at his disciplinary hearing. The PFC undisputedly made a finding based on personal knowledge and perception rather than on evidence presented at the hearing and available to the public. A judge

"cannot be a witness and the finder of fact, too." ***Rahhal v. State***, 52 Wis. 2d 144, 150, 187 N.W.2d 800 (1971).

¶26 The circuit court fashioned a proper remedy. It ordered a remand to the PFC for a new disciplinary hearing at which Alba's veracity during the hiring interview may not be considered. Should the City choose to address his truthfulness, the PFC as currently constituted would not be an appropriate fact finder and the City will have to determine how to proceed.

¶27 No costs to either party.

By the Court.—Order affirmed.

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