STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP0275

THE HONORABLE
WILLIAM M. GABLER, SR.,

Petitioner-Respondent,

v.

CRIME VICTIMS RIGHTS BOARD,

Respondent-Appellant.

WISCONSIN DEPARTMENT OF JUSTICE,
Respondent

APPEAL FROM AN ORDER ENTERED
IN THE EAU CLAIRE COUNTY CIRCUIT COURT,
THE HONORABLE JAMES J, DUVALL, PRESIDING

BRIEF OF RESPONDENT-APPELLANT CRIME VICTIMS RIGHTS BOARD

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INTRODUCTION

A crime victim has a constitutional and statutory right to a timely and speedy disposition of the criminal case in which she is a victim. The Crime Victims Rights Board ("the Board") may review a complaint regarding a violation of that right. Here, a sexual assault victim, K.L.—who was a child at the time of the crime—complained that Judge William M. Gabler, Sr., violated her right when he delayed the offender's sentencing for a period of approximately six months. The Board concluded that the delay violated K.L.'s speedy disposition right. Judge Gabler petitioned for judicial review and the circuit court reversed the Board's decision, holding, among other things, that the Board's statutory power to directly remedy violations of victims' rights cannot be constitutionally applied to judges without violating the constitutional separation of powers.

The circuit court wrongly reasoned that the power of courts to control their dockets and the Wisconsin Supreme Court's power to discipline judges must be *exclusive* powers of the judicial branch, even where they implicate the constitutional rights of crime victims and the constitutional power of the Legislature to provide remedies for violations of those rights. The court failed to understand that, when the people ratified Wis. Const. art. I, § 9m, they created new constitutional restrictions on the discretion of courts with regard to the treatment of crime victims in criminal proceedings, and expressly provided that the power to provide

remedies for violations of those new restrictions would not be the exclusive province of the judiciary, but rather would be *shared* with the legislative branch. This Court should restore the constitutional balance reflected in that provision.

The circuit court also held that the Board committed procedural errors that violated Judge Gabler's due process rights and required reversal on statutory grounds, that the Board lacked jurisdiction over K.L.'s complaint, and that the Board's decision on the merits of the complaint was not supported by substantial evidence.

The circuit court erred on all these points. The Board did not violate Judge Gabler's due process rights because it did not infringe any constitutionally protected interest and because it afforded him all the process he was due. Any statutory procedural errors by the Board did not require reversal because they did not impair the fairness or correctness of the Board's decision. The Board satisfied the statutory condition for exercising jurisdiction over K.L.'s complaint. And the Board's decision on the merits of the complaint was supported by substantial evidence.

The circuit court decision should be reversed and the Board's decision should be affirmed in all respects.

ISSUES PRESENTED

1. Do the Board's remedial powers under paragraphs (a), (c), and (d) of Wis. Stat. § 950.09(2), as applied to judges, unconstitutionally intrude upon the powers of the judicial branch?

The circuit court answered yes.

2. Did the Board violate Judge Gabler's right to procedural due process?

The circuit court answered yes.

3. Did the Board commit any statutory procedural errors that impaired the fairness or correctness of the Board's actions?

The circuit court answered yes.

4. Did the Board properly fail to confirm that DOJ had completed its activities under Wis. Stat. § 950.08(3) before exercising jurisdiction over K.L.'s complaint?

The circuit court answered yes.

5. Was the Board's decision on the merits of K.L.'s complaint not supported by substantial evidence in the administrative record?

The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because this appeal can be decided on the basis of the arguments presented in the parties' briefs. Publication is requested because the Court's decision will clarify the constitutionality of the Board's remedial powers and provide guidance on the interpretation and application of the constitutional and statutory rights of crime victims.

STATEMENT OF FACTS AND OF THE CASE

I. Criminal Court Background.

On July 29, 2011, the Eau Claire County District Attorney's Office filed a criminal complaint against Leigh M. Beebe, alleging that he committed a sexual assault against K.L., a minor, on July 22, 2011. (R. 39:2 ¶ 1, App. 148 ¶ 1.) The case was assigned to Judge Gabler. On August 8, 2011, the State amended the complaint to add additional criminal charges involving a second victim, K.H. (R. 39:2–3 ¶ 2, App. 148–49 ¶ 2; R. 39:169–72.)

On September 8, 2011, Beebe entered a not guilty plea and the next day a trial was scheduled for January 10, 2012. (R. 39:3 ¶ 3.) On November 28, 2011, Beebe moved to sever the charges against him and, on December 14, 2011, Judge Gabler ruled that the counts involving K.L. and those involving K.H. would be tried separately and that the crime against K.L. would be tried first. (R. 39:3 ¶ 4, App. 149 ¶4.)

On January 10 and 11, 2012, a jury trial was conducted and Beebe was found guilty of sexually assaulting K.L. (R. 39:3 ¶ 5, App. 149 ¶ 5.)

On January 18, 2012, there was a scheduling conference at which Judge Gabler scheduled a trial on the remaining charges against Beebe for August 7–8, 2012. (R. 39:3 ¶ 6, App. 149 ¶ 6; R. 39:205–17, App. 214–26.) During this conference, the prosecutor requested that Beebe be sentenced for the crime against K.L. before the remaining charges were tried. The prosecutor noted K.L.'s rights as a

crime victim and her interest in bringing finality and closure to the proceedings involving the crime against her. (R. 39:209 line 19–210 line 15, 213 lines 1–13, App. 218 line 19–219 line 15, 222 lines 1–13.) Judge Gabler denied the request, ruled that Beebe would not be sentenced for his crime against K.L. until after the second trial, and explained on the record his reasons for delaying sentencing. (R. 39:3–7 ¶ 7, App. 149–53 ¶ 7; R. 39:214–16, App. 205–06.)

On August 6, 2012, Beebe pleaded no contest to the remaining charges against him. (R. 39:7 ¶ 8, App. 153 ¶ 8.) On October 18, 2012, Gabler sentenced Beebe for all of the crimes of which he had been convicted. (R. 39:7 ¶ 9, App. 153 ¶ 9.)

II. Informal complaint proceedings before the Department of Justice.

On or about April 13, 2012, K.L. submitted an informal complaint about the delay in Beebe's sentencing to the Wisconsin Department of Justice (DOJ). (R. 39:7 ¶ 10, App. 153 ¶ 10; R. 128 ¶ 9.) DOJ's Victim Resource Coordinator subsequently gathered information about the circumstances surrounding the complaint, including obtaining a copy of the transcript of the January 18, 2012, scheduling conference and speaking with the prosecutor and the victim witness coordinator for Eau Claire County. (R. 39:282, App. 228; R. 116:69 lines 18–21 and 70 lines 2–19.)

On June 19, 2012, DOJ sent Gabler a letter informing him of K.L.'s concerns and asking him to consider sentencing Beebe as soon as possible. (R. 39:7 ¶ 11, App. 153 ¶ 11; R. 39:299–300, App. 230–31.)

On July 3, 2012, Gabler sent DOJ a written response in which he declined the request to expedite Beebe's sentencing and explained his reasons, including several reasons that he had not stated on the record at the January 18, 2012, scheduling conference. (R. 39:8–10 ¶¶ 12–14, App. 154–56 ¶¶ 12–14; R. 39:301–07, App. 232–38.)

On or about July 11, 2012, DOJ completed its activities under Wis. Stat. § 950.08(3) regarding K.L.'s informal complaint. (R. 39:10 ¶ 15, App. 156 ¶ 15; R. 128 ¶¶ 21–22.)

III. Formal complaint proceedings before the Crime Victim Rights Board.

On August 2, 2012, K.L. filed with the Board a written complaint alleging that Gabler's decision to delay sentencing Beebe had violated her speedy disposition rights. (R. 39:10 ¶ 16, App. 156 ¶ 16; R. 39:326–28, App. 240–42.)

On August 20, 2012, the Board's Operations Director communicated with DOJ's Victim Resource Coordinator, confirmed that DOJ had completed its activities regarding K.L.'s informal complaint, and requested a summary of action taken by DOJ. (R. 116:143 lines 11–19; R. 39:317.)

On September 25, 2012, DOJ's Victim Resource Coordinator supplied the Board with a narrative of DOJ's actions regarding K.L.'s informal complaint, along with copies

of the transcript of the January 18, 2012, scheduling conference; the exchange of letters between DOJ and Judge Gabler on June 19 and July 3, 2012; and CCAP entries for the criminal case. (R. 39:281–315.)

On October 23, 2012, the Board provided Judge Gabler with a copy of K.L.'s complaint and requested a response. (R. 39:10 ¶ 17, App. 156 ¶ 17; R. 39:276–80.)

On November 20, 2012, Judge Gabler submitted a written response in opposition to K.L.'s complaint, attaching his exchange of letters with DOJ on June 19 and July 3, 2012. (R. 39:11 ¶¶18–19, App. 157 ¶¶ 18–19; R. 39:260–70.)

Also on November 20, 2012, Judge Gabler's attorney submitted a separate written response in opposition to K.L.'s complaint. (R. 39:11–12 ¶¶18, 21–22, App. 157–58 ¶¶ 18, 21–22; R. 39:164–68.) Attached were copies of several documents from the criminal court record, including the transcript of the January 18, 2012, scheduling conference, and a copy of a January 15, 2010, report by the Board regarding crime victims' speedy disposition right. (R. 39:11 ¶ 20; R. 39:169–259.) On December 19, 2012, Gabler's attorney submitted a supplemental response to K.L.'s complaint. (R. 39:12 ¶ 23, App. 158 ¶ 23; R. 39:160–63.)

On February 11, 2013, the Board issued a determination that there was probable cause to believe that Gabler violated K.L.'s speedy disposition right. (R. 39:68–113.) The Board offered each party the opportunity

to identify any disputed issues of material fact and indicated that it would convene an evidentiary hearing if it found that there were any material factual disputes or, if no material factual disputes were found, would issue a final decision and remedial order based on the findings and conclusions in the probable cause determination. (R. 39:12–13 ¶ 24, App. 158–59 ¶ 24; R. 39:110–11.)

On March 8, 2013, Gabler moved to dismiss K.L.'s complaint and made an alternative request for an evidentiary hearing. (R. 39:13–14 ¶ 25, App. 159–60 ¶ 25; R. 39:126–43.)

On July 24, 2013, the Board denied Gabler's motion to dismiss and his hearing request, and directed issuance of a final decision and remedial order. (R. 39:14 ¶ 26, App. 160 ¶ 26; R. 39:44–67, App. 190–213.)

On July 26, 2013, the Board issued a Final Decision and Order regarding K.L.'s complaint. (R. 39:1–39, App. 147–85.) The Board concluded that Gabler's decision to delay sentencing Beebe had violated K.L.'s right to a timely and speedy disposition under Wis. Const. art. I, § 9m and Wis. Stat. § 950.04(1v)(k). (R. 39:33–35 ¶¶ 29–37, App. 179–81 ¶¶ 29–37.) As a remedy, the Board issued a Report and Recommendation setting forth best practices for protecting a victim's speedy disposition right. (R. 39:36 ¶ 1, App. 182 ¶ 1; R. 39:40–43, App. 186–89.)

IV. Circuit court proceedings

On August 21, 2013, Judge Gabler filed a petition for judicial review of the Board's decision, initiating Eau Claire

County Circuit Court Case No. 13–CV–473. The petition asked the circuit court to vacate the Board's final decision and to declare certain actions by the Board unconstitutional. (R. 25.)

On September 30, 2013, Gabler filed a Complaint for Declaratory and Injunctive Relief seeking a declaratory judgment against DOJ for its actions regarding K.L.'s informal complaint, initiating Eau Claire County Circuit Court Case No. 13–CV–584. (R. 1.)

On May 6, 2014, the circuit court consolidated the judicial review proceeding and the declaratory judgment proceeding. (R. 69.) Judge Gabler subsequently moved to supplement the administrative record in the judicial review proceeding with evidence of alleged procedural irregularities in the proceedings before the Board and, on February 27, 2015, the court held a hearing to take testimony regarding the alleged procedural irregularities. (R. 116.)

Briefing on the merits in both cases took place between July 1 and September 29, 2015. (R. 124–31.) On December 18, 2015, the circuit court issued findings of fact and a final decision and order in the consolidated cases. (R. 136–37, App. 100–46.)

With regard to the declaratory judgment proceeding, the court held that DOJ exceeded its statutory authority by failing to mediate K.L.'s informal complaint under Wis. Stat. § 950.08(3), by inaccurately reporting to the Board that it had completed such mediation activities, and by wrongly

disclosing investigative materials and statutorily confidential information to the Board. (R. 137:2–10, App. 109–17.) DOJ did not appeal and the court's holdings regarding DOJ's activities are not at issue in this appeal.

With regard to the judicial review proceeding, the court held:

- paragraphs (a), (c), and (d) of Wis. Stat. § 950.09(2), as applied to judges, unconstitutionally intrude upon the exclusive power of courts to control their dockets and the exclusive power of the Supreme Court to regulate and sanction the judiciary. (R. 137:23–30, App. 130–37);

- the Board lacked jurisdiction over K.L.'s complaint because DOJ inaccurately reported that it had completed mediation activities. (R. 137:7, App. 114);

- the Board violated Gabler's procedural due process rights

    - by using confidential information that was wrongly disclosed to the Board by DOJ (R. 137:13–14, App. 120–21),

    - by improperly accepting investigative materials compiled by DOJ before the Board had made its probable cause determination (R. 137:14–15, App. 121–22),

    - by denying Gabler's request for a formal evidentiary hearing (R. 137:15–21, App. 122–128), and

    - by failing to provide Gabler with copies of all the documentation it had received from DOJ. (R. 137:16, 36, App. 123, 143);

- the Board's procedural errors impaired the fairness or correctness of its actions. (R. 137:22–23, App. 129–30); and

- the Board's decision on the merits of the complaint was not supported by substantial evidence in the record because

    - it is appropriate for a judge not to sentence an offender until all counts against him have been tried (R. 137:32–34, App. 139–41), and

    - the delay in sentencing from the time when Gabler rejected DOJ's request to expedite was minimal. (R. 137:34–35, App. 141–42.)

On the above grounds, the circuit court reversed the Board's decision and remanded the matter to the Board with instructions that it be dismissed with prejudice. (R. 137:36, App. 143.) The present appeal from the circuit court's final decision and order of December 18, 2015, was filed by the Board on January 28, 2016.

STANDARD OF REVIEW

I. General scope of judicial review under Wis. Stat. ch. 227.

On appeal from a judicial review decision under Wis. Stat. ch. 227, the appellate court reviews the decision of the administrative agency, not the decision of the circuit court. *Stafford Trucking, Inc. v. ILHR Dept.*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). The scope of review of agency decisions is generally limited to the administrative record,

except where the court permits the record to be supplemented under Wis. Stat. § 227.56(1.) *See* Wis. Stat. § 227.57(1.)

The decision of the agency is presumed correct, and may be reversed or modified only if the reviewing court finds one or more of the reasons enumerated in Wis. Stat. § 227.57(4)–(8). *See* Wis. Stat. § 227.57(2). The result reached by the agency can be upheld upon any legal rationale, including one not argued to or decided by the agency. *See Cty. of La Crosse v. WERC*, 174 Wis. 2d 444, 455, 497 N.W.2d 455 (Ct. App. 1993), *rev'd on other grounds*, 182 Wis. 2d 15, 513 N.W.2d 579 (1994). The burden of persuasion is on the party petitioning for review. *Sterlingworth Condo. Ass'n, Inc. v. DNR*, 205 Wis. 2d 710, 726, 556 N.W.2d 791 (Ct. App. 1996).

II. Sufficiency of the evidence.

The standard for reviewing the sufficiency of the evidence to support a finding of an administrative agency is the substantial evidence test. *Robertson Transp. Co. v. PSC*, 39 Wis. 2d 653, 657–58, 159 N.W.2d 636 (1968). A reviewing court must accept the agency's findings if there is substantial evidence in the record to support them. *See* Wis. Stat. § 227.57(6); *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54–55, 330 N.W.2d 169 (1983).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gilbert v. Med. Examining Bd.*, 119 Wis. 2d 168, 195, 349 N.W.2d 68 (1984) (citation omitted). The substantial evidence test is satisfied if the evidence in the entire

administrative record, including the inferences therefrom, is such that a reasonable person *might* have reached the same decision as the agency. *Omernick v. DNR*, 100 Wis. 2d 234, 250, 301 N.W.2d 437, *cert. denied*, 454 U.S. 883 (1981). The agency's decision need not be supported by a preponderance of the evidence, as long as a reasonable finder of fact could reach the same conclusion as the agency. *Verhaagh v. LIRC*, 204 Wis. 2d 154, 163–64, 554 N.W.2d 678 (Ct. App. 1996). In applying this test, the Court must search the record to find substantial evidence supporting the agency's decision. *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

III. Questions of law.

A court is not bound by an agency's conclusions of law. *Richland Sch. Dist. v. DILHR*, 174 Wis. 2d 878, 890, 498 N.W.2d 826 (1993). Courts are required, however, to accord due weight to the experience, technical competence, and specialized knowledge of the agency. Wis. Stat. § 227.57(10).

Agencies do not have specialized knowledge or competence in matters of constitutional law. Accordingly, courts review constitutional questions de novo. *Coulee Catholic Sch. v. LIRC*, 2009 WI 88, ¶ 31, 320 Wis. 2d 275, 768 N.W.2d 868. On legal questions connected to an agency's statutory responsibilities, however, a court applies one of three levels of deference, depending on the extent of the agency's relevant experience and competence: (1) great weight; (2) due weight; or (3) de novo. *Brown v. LIRC*, 2003 WI

142, ¶ 13, 267 Wis. 2d 31, 671 N.W.2d 279; *Kitten v. DWD*, 2002 WI 54, ¶¶ 27–29, 252 Wis. 2d 561, 644 N.W.2d 649; *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996); *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 659–60, 539 N.W.2d 98 (1995).

Here, the Board's decision should be accorded great weight. Great weight deference is appropriate because the Legislature charged the Board with the duty to review complaints regarding crime victims' rights. *See* Wis. Stat. § 950.09. The Board's experience in interpreting those rights is longstanding—having existed since shortly after ratification of Wis. Const. art. I, § 9m. *See* 1997 Wis. Act 181.

The Board has also developed expertise and specialized knowledge in reviewing complaints specifically alleging violations of the right to a speedy disposition, which have produced a uniform and consistent application. *See, e.g.,* Crime Victims Rights Board, *Report and Recommendation of the Wisconsin Crime Victims Rights Board: The Right to Speedy Disposition*, Jan. 15, 2010; *Reports and Recommendations of the Wisconsin Crime Victims Rights*

Board, dated Jan. 11, 2013, Apr. 13, 2011, Mar. 13, 2009, and Aug. 3, 2006.[1]

Under the great weight standard, the agency's interpretation will be sustained if it is reasonable, even if the Court finds a different interpretation to be more reasonable. *See Harnischfeger Corp.*, 196 Wis. 2d at 661.

ARGUMENT

I. The Board's remedial powers under paragraphs (a), (c), and (d) of Wis. Stat. § 950.09(2), as applied to judges, do not unconstitutionally intrude upon the powers of the judicial branch.

The circuit court held that the Board's remedial powers under paragraphs (a), (c), and (d) of Wis. Stat. § 950.09(2), as applied to judges, unconstitutionally intrude upon the exclusive power of courts to control their own dockets and upon the exclusive power of the Supreme Court to regulate and sanction the judiciary. (R. 137:23–31, App. 130–38.) The court erred.

First, the court erroneously concluded that the Board's remedial powers intruded upon exclusive powers of the judiciary and failed to examine those powers under a shared

[1] These documents are a matter of public record and readily ascertainable, such that this Court may take judicial notice of them. *See Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667. They are available at http://tinyurl.com/zvd7dsl, http://tinyurl.com/zl8zftm, http://tinyurl.com/z2s42hs, http://tinyurl.com/z42rl4n, and http://tinyurl.com/zzond2y. (*See also* Patrick J. Fiedler Aff. (Oct. 15, 2014), R. 92, Ex. 4.

power analysis. Second, even under a shared powers standard, the Board's powers would pass constitutional muster because Petitioner did not show beyond a reasonable doubt that the legislatively prescribed remedial scheme, as applied to judges, unduly burdens or substantially interferes with the constitutional functioning of the judicial branch. Third, the court's holding that the Board may remedy a violation of a victim's rights by a judge only by referring a complaint to the Wisconsin Judicial Commission (R. 137:24–26, App. 131–33) is contrary to Wis. Const. art. I, § 9m because it deprives crime victims of any remedy where the judge's violation does not rise to the level of judicial misconduct.

A. Separation of powers analysis under Wisconsin law.

The doctrine of separation of powers in Wisconsin is not expressly provided for in the state constitution. *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360, 441 N.W.2d 696 (1989). Rather, it is embodied in the clauses of the Wisconsin Constitution providing that: "[t]he legislative power shall be vested in a senate and assembly;" "[t]he executive power shall be vested in a governor;" and "[t]he judicial power of this state shall be vested in a unified court system." Wis. Const. art. IV, § 1; art. V, § 1; and art. VII, § 2; *see also State v. Washington*, 83 Wis. 2d 808, 816, 266 N.W.2d 597 (1978). In general, the legislative branch determines policies and programs and reviews performance of previously authorized programs, the

executive branch carries out the programs and policies, and the judicial branch adjudicates any conflicts that might arise from the interpretation or application of the laws. Wis. Stat. § 15.001(1).

The basic principle of separation of powers is "to maintain the balance between the three branches of government, to preserve their respective independence and integrity, and to prevent concentration of unchecked power in the hands of any one branch." *State v. Washington*, 83 Wis. 2d 808, 825–26, 266 N.W.2d 597 (1978). The Wisconsin Supreme Court has repeatedly held, however, that the doctrine does not compel the complete disassociation of the branches. *See, e.g.*, *Rules of Court Case*, 204 Wis. 501, 504, 236 N.W. 717 (1931). It is acknowledged, rather, that "governmental functions and powers are too complex and interrelated to be neatly compartmentalized." *Panzer v. Doyle*, 2004 WI 52 ¶ 49, 271 Wis. 2d 295, 680 N.W.2d 666. Accordingly, the separation of powers doctrine is not strict and absolute, but rather envisions a system of separate but interdependent parts of government, reciprocally sharing some powers while jealously guarding the autonomy of certain others. *See State ex rel. Friedrich v. Circuit Court for Dane Cty.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32 (1995) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

In determining whether a statute unconstitutionally infringes upon the power of a separate branch, a court must first consider whether the subject matter of the

challenged statute falls within any exclusive, core powers constitutionally granted to the other branch. *See State v. Horn*, 226 Wis. 2d 637, 644–45, 594 N.W.2d 772 (1999). If the power in question is an exclusive one, then any intrusion upon it is invalid. *Id.* at 645. If the statute occupies a zone of power shared between the legislature and another branch, then it will be invalidated only if the party challenging the statute proves beyond a reasonable doubt that it unduly burdens or substantially interferes with the constitutional powers of the other branch. *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 546, 552, 576 N.W.2d 245 (1998).

B. The power to remedy violations of crime victims' rights by judges is not an exclusive power of the judicial branch.

The circuit court held that the Board's power to directly remedy violations of crime victims' rights cannot be constitutionally applied to judges because article VII of the Wisconsin Constitution gives the Supreme Court exclusive authority to regulate and sanction the judiciary. (R. 137:24–27, App. 131–34.) That is wrong because the people of Wisconsin have amended the Wisconsin Constitution in a way that restricted how judges may treat crime victims in court proceedings and that expressly empowered the Legislature to provide remedies for violations of victims' rights.

In 1993, Wisconsin voters ratified Wis. Const. art. I, § 9m, which provides (emphasis added):

> This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy. *This state shall ensure that crime victims have all of the following privileges and protections as provided by law: timely disposition of the case*; the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant; reasonable protection from the accused throughout the criminal justice process; notification of court proceedings; the opportunity to confer with the prosecution; the opportunity to make a statement to the court at disposition; restitution; compensation; and information about the outcome of the case and the release of the accused. *The legislature shall provide remedies for the violation of this section.* Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.

When interpreting a constitutional provision, a court seeks "to give effect to the intent of the framers and of the people who adopted it." *Schilling v. Crime Victims Rights Bd.*, 2005 WI 17, ¶ 13, 278 Wis. 2d 216, 692 N.W.2d 623 (citation omitted). To determine intent, a court examines (1) the language of the constitutional provision; (2) the constitutional debates and practices at the time of writing the provision; and (3) the first law enacted after the provision's ratification. *Id.* ¶ 16; *see also Polk Cty. v. State Pub. Def.*, 188 Wis. 2d 665, 674, 524 N.W.2d 389 (1994).

The language of Wis. Const. art. I, § 9m gives crime victims certain constitutionally protected rights, and creates a constitutional requirement that the Legislature provide by law for those rights.

Many of those rights arise during the course of judicial proceedings, where a judge determines whether the right is protected or violated. Examples include the opportunity to attend court proceedings unless the court finds that sequestration is necessary to a fair trial, notification of court proceedings, and the opportunity to make a statement to the court at disposition. Wis. Const. art. I, § 9m. The language of Wis. Const. art. I, § 9m thus imposes a constitutional restriction on the power of the judiciary, in court proceedings, to treat crime victims in ways that are contrary to those constitutional and statutory rights.

The language of Wis. Const. art. I, § 9m also expressly empowers the Legislature to provide remedies for violations of the rights of crime victims: "The legislature shall provide remedies for the violation of this section." Because those rights protect crime victims against violations by judges, the remedies that the Legislature may provide must also apply to judges. The sovereign people have given the Legislature the power to establish remedies against judges for violating the constitutional rights of crime victims in court proceedings.

The constitutional debates and practices at the time of the creation of Wis. Const. art. I, § 9m also show that the framers intended to give the Legislature discretion and flexibility to create a mechanism to enforce crime victims' rights. Senator Barbara Ulichny sought to amend the constitution because even well–meaning public professionals treated crime victims with insufficient consideration and

sensitivity. *Schilling*, 278 Wis. 2d 216, ¶¶ 18–19 (citing 1989 Wis. S.J. Res. 94). Prior to ratification, "many victims vowed that they would never again become embroiled in the system, and that they would tell their friends and loved ones to stay away from the courts." *Id.* ¶ 19 (citation omitted). In 1990, Eau Claire County Supervisor Gerald L. Wilke advocated for the amendment because it provided victims with a mechanism for enforcement. *Schilling*, 278 Wis. 2d 216, ¶ 22. A drafting record showed that the language of the amendment was intended to give the Legislature "a substantial amount of discretion and flexibility in carrying out the intent of this amendment." Gary Watchke, Wis. Legis. Reference Bureau, Brief 93-4, *Constitutional Amendments and Advisory Referenda to Be Considered by Wisconsin Voters* April 6, 1993 at 4 (Mar. 1993).[2]

The first law interpreting Wis. Const. art. I, § 9m enacted after ratification of that amendment was 1997 Wis. Act 181. *Schilling*, 278 Wis. 2d 216, ¶ 23. In that legislation, the Legislature carried out the constitutional mandate to provide remedies for violations of crime victims' rights by creating the Crime Victims Rights Board, composed of five members chosen by the executive branch. 1997 Wis. Act 181, § 1 (creating Wis. Stat. § 15.255(2)).

Under the Act, the Board is authorized to review complaints regarding violations of the rights of crime victims.

[2] This document is available at http://tinyurl.com/zykz5ar.

See Wis. Stat. § 950.09(2). After review of each complaint, the Board may:

(1) Issue a private or a public reprimand to the public official, employee, or agency that violated the rights of a crime victim;

(2) Refer to the Judicial Commission a judge who violated or allegedly violated the rights of a crime victim;

(3) Seek appropriate equitable relief on behalf of a victim when such relief is necessary to protect the victim's rights; and

(4) Bring a civil action to assess a forfeiture.

Wis. Stat. § 950.09(2)(a)–(d). The Board also may issue a report or recommendation concerning crime victims' rights and services. Wis. Stat. § 950.09(3). The Board may not "seek to appeal, reverse or modify a judgment of conviction or a sentence in a criminal case." Wis. Stat. § 950.09(2)(c).

Prior to passage, the Legislature rejected an amendment that would have prevented the Board from reviewing a complaint made against a judge. *Compare* S. Amend. 1 to 1997 A.B. 342 *with* 1997 Wis. Act 181. This choice shows that the Legislature understood Wis. Const. art. I, § 9m as authorizing it to give the Board power to directly remedy violations of crime victims' rights by judges.

The constitutional language, debates and practices at the time of authorship, the first law enacted after ratification, and rejected legislative alternatives all show that the power

to remedy a judge's violation of a crime victims' rights is not an exclusive power of the judicial branch.

C. The Board's remedial powers under Wis. Stat. § 950.09(2)(a), (c), and (d) have not been shown to unduly burden or substantially interfere with the constitutional functioning of the judicial branch.

Because the circuit court incorrectly believed that the Board's remedial powers under Wis. Stat. § 950.09(2)(a), (c), and (d) intruded upon *exclusive* constitutional powers of the judicial branch, it did not examine those powers under a *shared* power analysis. Even under that standard, however, the Board's powers pass constitutional muster because it has not been shown beyond a reasonable doubt that they unduly burden or substantially interfere with the functioning of the judicial branch.

To the extent that the power to provide remedies for violations of victims' rights is shared between the legislative and judicial branches, the challenged statutory provisions could be found unconstitutional only if it were proved beyond a reasonable doubt that they unduly burden or substantially interfere with the constitutional powers of the judiciary. "[A]n 'adverse impact' is not, by itself, proof of an undue burden or substantial interference much less proof beyond a reasonable doubt." *Flynn*, 216 Wis. 2d at 553. Even where the Legislature has burdened and interfered with another branch in a way that makes it more difficult for the other branch to accomplish its goals, the legislative act may not be invalidated unless it

is shown beyond a reasonable doubt that the burden is undue and the interference is substantial. *Id.* at 554–55.

In this case, it has not been shown beyond a reasonable doubt that the ability of the judiciary to oversee the administration of justice is unduly burdened or substantially interfered with by the legislatively-prescribed remedial procedures in Wis. Stat. § 950.09(2)(a), (c), or (d).

First, contrary to the circuit court's view, when the Board considers a complaint like K.L.'s, it does *not* review the correctness of a judge's exercise of discretion in scheduling a court proceeding such as sentencing. What the Board does is determine whether a particular exercise of scheduling discretion by a judge was consistent with the constitutional *limitations* on judicial discretion created by Wis. Const. art. I, § 9m.

Likewise, because the Board is not conducting judicial review of a judge's exercise of discretion, the usual standard of review for discretionary decisions does not restrict the Board's consideration of a crime victim's complaint. Rather, where a scheduling decision affects the constitutional rights of an individual, a judge's discretionary decisionmaking is subject to greater scrutiny. (R. 39:17, ¶ 16, App. 163 ¶ 16.)

In addition, although the Board itself is an executive branch agency, its decisions are subject to judicial review under Wis. Stat. ch. 227. The Legislature, therefore, has not delegated to an executive branch entity an unfettered power to discipline members of the judiciary. On the contrary, the

Legislature has provided for judicial supervision of the Board's decisions through judicial review actions, followed by appellate review.

For these reasons, even if the power to provide remedies for violations of crime victims' rights is viewed as a power shared between the legislative and judicial branches, Wis. Stat. § 950.09(2)(a), (c), and (d) still can be applied to judges without violating the constitutional separation of powers. The circuit court's contrary holding is erroneous and should be reversed.

D. The limitation imposed on the Board's remedial powers by the circuit court would deprive crime victims of any remedy in many cases involving judges.

The circuit court held that the Board's power to remedy violations of crime victims' rights by judges is limited to its power, under Wis. Stat. § 950.09(2)(b), to refer a complaint to the Judicial Commission for further action. That holding is contrary to Wis. Const. art. I, § 9m because it deprives crime victims of any remedy at all in cases in which the violation of a victim's rights by a judge does not rise to the level of judicial misconduct over which the Judicial Commission has jurisdiction.

Under Wis. Stat. § 757.85(1), the Judicial Commission has the power to investigate any possible misconduct of a judge. If the Commission finds probable cause that a judge has engaged in misconduct, then it may file a formal complaint against the judge with the Supreme Court.

Wis. Stat. § 757.85(5). It follows that the Judicial Commission can exercise jurisdiction over a complaint that a judge has violated a crime victim's rights only if that violation constitutes misconduct within the meaning of the statutes governing the Judicial Commission.

For purposes of those statutes, "misconduct" is defined in Wis. Stat. § 757.81(4):

> "Misconduct" includes any of the following:
>
> (a) Willful violation of a rule of the code of judicial ethics.
>
> (b) Willful or persistent failure to perform official duties.
>
> (c) Habitual intemperance, due to consumption of intoxicating beverages or use of dangerous drugs, which interferes with the proper performance of judicial duties.
>
> (d) Conviction of a felony.

Under that definition, a violation of a crime victim's rights would be likely to rise to the level of judicial misconduct only if the judge's action was also a violation of the code of judicial ethics and only if that violation was willful.

Many of the rights of crime victims under Wis. Const. art. I, § 9m and under Wis. Stat. § 950.04(1v) are not protected by the code of judicial ethics. Where a judge is alleged to have violated one of those rights, the Judicial Commission would have no jurisdiction to investigate the allegations or to file a complaint against the judge with the supreme court.

In addition, in even those cases in which a crime victim's right might also be protected by the code of judicial ethics, a violation of that right by a judge still would not be

subject to the powers of the Judicial Commission unless that violation was willful.

Here, for example, the Board found probable cause that Judge Gabler violated K.L.'s timely and speedy disposition right under Wis. Const. art. I, § 9m and Wis. Stat. § 950.04(1v)(k). Under the circuit court's holding, the Board's only option at that point was to refer K.L.'s complaint to the Judicial Commission.

Had the Board made such a referral, however, it is likely that the Judicial Commission would have lacked jurisdiction over K.L.'s complaint, for two reasons.

First, although SCR 60.04(1)(h) requires a judge to "dispose of all judicial matters promptly and efficiently," it is not clear that Judge Gabler's decision to postpone Beebe's sentencing on his first conviction pending his second trial on additional charges could rightly be found to have violated that rule, even if that decision violated K.L.'s speedy disposition right.

Second, even if Judge Gabler's violation of K.L.'s speedy disposition right also violated SCR 60.04(1)(h), that violation still would not rise to the level of judicial misconduct, within the meaning of Wis. Stat. § 757.81(4), because there is no evidence that Judge Gabler acted willfully in violating K.L.'s right.

As previously shown, Wis. Const. art. I, § 9m was intended, in part, to cover insufficiently considerate and sensitive treatment of crime victims by even well-meaning

public professionals. *See Schilling*, 278 Wis. 2d 216, ¶¶ 18–19. The Judicial Commission's power to investigate and prosecute willful misconduct by judges simply does not provide a sufficient remedy for judicial violations of the rights of crime victims to satisfy the constitutional mandate that "[t]he Legislature shall provide remedies for the violation of [Wis. Const. art. I, § 9m]." The restriction imposed on the Board's remedial powers by the circuit court is contrary to that constitutional provision.

II. The Board did not violate Judge Gabler's right to procedural due process.

In addition to invalidating the Board's statutory authority to directly remedy crime victim rights violations by judges, the circuit court also held that the Board committed procedural errors that violated Judge Gabler's due process rights. (R. 137:13–21, App. 120–28.) That holding is incorrect for two reasons.

First, any procedural errors by the Board did not implicate Judge Gabler's due process rights because the Board's actions did not alter his legal status and, therefore, did not infringe any constitutionally protected liberty interest he has in his profession as a judge.

Second, even if the Board had made errors that implicated a protected liberty interest, there was no due process violation because the Board afforded Judge Gabler all the process he was due by giving him notice of the charge against him and of all the evidence on which it was relying,

and by affording him a full and fair opportunity to respond to the charge and the evidence.

A. The Board did not infringe Judge Gabler's liberty interest in his profession because the Board's actions did not alter his legal status.

A procedural error violates due process only if it injures a constitutionally protected interest. Here, even if the Board's decision harmed Judge Gabler's professional reputation, any procedural errors did not alter his legal status and, therefore, did not infringe any constitutionally protected liberty interest he has in his profession as a judge.

The Fourteenth Amendment to the United States Constitution and article I, § 1 of the Wisconsin Constitution prohibit government actions that deprive any person of life, liberty, or property without due process of law. *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 80, 237 Wis. 2d 99, 613 N.W.2d 849. To prevail on a procedural due process claim, a claimant must establish that state action has deprived him of a constitutionally protected liberty or property interest and that the procedures attendant upon that deprivation were constitutionally insufficient. *Id.* If the court determines that the claimant has not been deprived of a constitutionally protected interest, it does not reach the second step of the analysis. *Id.*

Neither the circuit court nor Judge Gabler has identified the constitutionally protected interest allegedly infringed by the Board. In support of his standing to seek

judicial review of the Board's decision, however, Judge Gabler argued to the circuit court that his professional reputation had been significantly damaged by the Board's determination that he had violated a citizen's constitutional rights. That interest, without more, is not protected by due process.

The liberty interests protected by constitutional due process include the liberty to follow a trade, profession, or other calling. *Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (7th Cir. 1992). To prevail on his procedural due process claims, Judge Gabler must establish that any reputational harm deprived him of a constitutionally protected liberty interest in his profession as a judge and that the Board's procedures were constitutionally inadequate.

Judge Gabler fails the first step of this analysis because he has not shown that the Board's actions infringed his liberty interest in his profession. A state-caused injury to reputation alone does not deprive a person of constitutionally protected liberty, even if it seriously impairs the person's future employment. *Hinkle v. White*, 793 F.3d 764, 767 (7th Cir. 2015). Rather, Gabler must show that the Board caused both an injury to his reputation and an alteration of his legal status, such as the deprivation of a previously held right. *Id.* at 768; *see also Weber v. City of Cedarburg*, 129 Wis. 2d 57, 73, 384 N.W.2d 333 (1986) ("Reputation by itself is neither liberty nor property within the meaning of the due process clause of the fourteenth amendment."); *Stipetich v. Grosshans*, 2000 WI App 100,

¶ 24, 235 Wis. 2d 69, 612 N.W.2d 346 (requiring "alteration or elimination of a right or status").

Here, the Board did nothing to alter Judge Gabler's legal status. The Board issued a Report and Recommendation, pursuant to Wis. Stat. § 950.09(3), setting forth best practices for protecting a victim's speedy disposition right. (R. 39:36 ¶ 1, App. 182 ¶ 1; R. 39:40–43, App. 186–89.) That remedy did not deprive Judge Gabler of a previously held right or otherwise alter his legal status.

Nor did the Board's determination that Judge Gabler violated K.L.'s speedy disposition right deprive him of a constitutionally protected liberty interest. Judge Gabler maintains that the Board's conclusion substantially harmed his reputation as a member of the judiciary, but such reputational damage alone is not enough. Even if the Board's finding that he violated K.L.'s speedy disposition right were deemed to be practically equivalent to a public reprimand under Wis. Stat. § 950.09(2), that finding still did not alter his legal status in any way.

Because the Board did not alter Judge Gabler's legal status, any damage to his reputation is not a deprivation of a protected liberty interest, and Gabler's procedural due process claims fail without need for the Court to address whether the Board's procedures were constitutionally adequate.

B. Even if a protected liberty interest had been implicated, the Board gave Judge Gabler all the process he was due.

Even if the Court were to proceed to the second step of the procedural due process analysis, Judge Gabler's due process claims would still fail because the Board gave him all the process he was constitutionally due.

It has long been recognized that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). "'Due process,' unlike some legal rules, is not a technical conception with a fixed content, unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citation omitted). Instead, what process is due is a fluid concept that calls for such procedural protections as the particular circumstances demand. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Before the state finally deprives a person of a protected liberty or property interest, due process requires notice and an opportunity to be heard. The type of notice required is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The opportunity to be heard must be one that is meaningful under the circumstances of the particular case.

Mathews, 424 U.S. at 349. Even if a person's position of public employment is on the line, an informal opportunity to be heard may suffice, as long as, under the particular circumstances, it gives the person a meaningful opportunity to contest the adverse state action. *Id.*; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

In this case, the Board gave Judge Gabler notice of the charge against him and of all the evidence on which it was relying, and afforded him a full and fair opportunity to respond to that charge and to the relevant and material evidence.

It is undisputed that the Board, before making its probable cause determination, provided Judge Gabler with a copy of K.L.'s complaint and afforded Gabler and his attorney an opportunity to submit written responses to the complaint and supporting documentation. (R. 39:10–12 ¶¶ 17–23, App. 156–58 ¶¶ 17–23; R. 39:164–270.)

After receiving and considering those responses and supporting materials, the Board issued a 43-page probable cause determination that set out in detail the factual and legal grounds of the Board's finding of probable cause that Judge Gabler had violated K.L.'s speedy disposition right. (R. 39:68–111.) The Board then afforded both K.L. and Judge Gabler the opportunity to identify any disputed issues of material fact and to request a hearing on any such issues. (R. 39:12–13 ¶ 24, App. 158–59 ¶ 24; R. 39:110–11.)

Judge Gabler subsequently submitted a motion to dismiss K.L.'s complaint on separation-of-powers and vagueness grounds. (R. 39:13 ¶ 25, App. 159 ¶ 25; R. 39:126–43.) The Board denied that motion in a written decision that explained in detail the grounds of denial. (R. 39:45–63, App. 191–209.)

In the alternative, Judge Gabler requested an evidentiary hearing and identified five issues that he claimed were disputed and undeveloped factual issues that were material to the Board's consideration of K.L.'s complaint. (R. 39:140–41.) The Board denied Gabler's hearing request, concluding that none of the issues identified by Gabler was actually a disputed issue of material fact and explaining in detail its reasons for reaching that conclusion. (R. 39:63–66, App. 209–12.)

The Board proceeded to make a final decision on K.L.'s complaint on the basis of the undisputed issues of material fact that had already been identified in the February 11, 2013, Probable Cause Determination. (R. 39:66, App. 212.) The Board thereafter issued a Final Decision and Order that again set forth in detail the factual and legal grounds of the Board's conclusions. (R. 39:1–37, App. 147–83.)

The above procedures gave Judge Gabler detailed notice of the charge against him and of the factual and legal grounds of the Board's consideration of that charge. Those procedures also gave him a full and fair opportunity to be heard that was meaningful in light of all the circumstances.

The Board thus afforded Judge Gabler all the process he was constitutionally due.

The circuit court nonetheless found that the Board made several procedural errors that, according to the court, violated Judge Gabler's due process rights. None of those procedural issues, however, rises to the level of a due process violation.

First, the court found that the Board violated due process (1) by receiving statutorily confidential information that had been gathered by DOJ during the informal complaint process and that was wrongly disclosed to the Board by DOJ, in violation of Wis. Stat. § 950.095(1)(a), and (2) by accepting investigative materials that had been compiled by DOJ before the Board had made its own probable cause determination, in violation of Wis. Stat. § 950.09(2). (R. 137:13–15, App. 159–61.)

Between the date on which K.L. submitted her formal complaint to the Board and the date on which the Board made its probable cause determination, the Board received from DOJ's Victim Resource Coordinator a narrative of DOJ's actions regarding K.L.'s informal complaint, along with copies of the transcript of the January 18, 2012, scheduling conference; the exchange of letters about K.L.'s complaint between DOJ and Judge Gabler on June 19 and July 3, 2012; and CCAP entries for the criminal case. (R. 39:281–315.)

Even assuming that the receipt of these materials was a statutory procedural error by the Board, any such error did not violate Judge Gabler's due process rights.

First, any procedural error the Board may have committed in making a probable cause determination does not implicate due process because such a preliminary finding does not alter one's legal status and thus does not harm a constitutionally protected liberty interest. *Cf. Hinkle*, 793 F.3d at 768.

Second, the Board's consideration of the January 18, 2012, scheduling conference transcript, other documents from the criminal court record, and the exchange of letters between Judge Gabler and DOJ, did not violate Gabler's due process rights because Gabler and his attorney themselves attached those materials to their submissions to the Board and thus invited the Board to consider them. (R. 39:11–12, ¶¶ 18–022, App. 157 ¶¶ 11–12.) Judge Gabler's constitutionally protected interests cannot have been harmed by the Board's consideration of materials of which he was fully aware and that he expected and asked the Board to consider.

Third, the Board's receipt of any confidential or investigatory material in the narrative report that DOJ gave to the Board did not harm Judge Gabler's constitutional interests because the Board did not base its decision on such information. The Board's Probable Cause determination and its Final Decision and Order set forth the factual and legal bases of the Board's action in exhaustive detail. There is no

indication in the record that the Board's decision was influenced by any unfavorable statements about Judge Gabler made to DOJ by the prosecutor in the criminal case or by the Eau Claire County victim witness coordinator. Gabler's constitutional interests were not harmed by information that the Board did not consider in making its decision.

The circuit court also found that the Board violated due process by failing to provide Judge Gabler with copies of all the documentation it had received from DOJ. (R. 137:16, 36, App. 123, 143.) The record shows, however, that much of that documentation was already known and possessed by Gabler and that the Board did disclose to him everything on which it relied in making its decision. Any failure by the Board to provide Gabler with copies of documentation that did not form part of the Board's decision did not violate due process.

Finally, the Board did not violate due process by denying Judge Gabler's request for a formal evidentiary hearing. As previously shown, what due process requires is notice and an opportunity to be heard that is meaningful under all the circumstances of the particular case. Only in cases involving the deprivation of welfare benefits does due process automatically require a full adversarial, judicial-type proceeding. *See Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970); *Mathews*, 424 U.S. at 343. In other contexts, a formal evidentiary hearing is required only where necessary to bring to the attention of the governmental decision–maker potential factual errors that could change the pertinent governmental

action. *See Dixon v. Love*, 431 U.S. 105, 113–15 (1977). In other words, where there is no disputed issue of material fact, due process does not require an evidentiary hearing.

The circuit court identified six issues that, in its view, were disputed and material issues that deserved an evidentiary hearing:

1. Whether DOJ wrongly disclosed statutorily confidential records to the Board;

2. Whether the Board relied on such confidential records;

3. Whether DOJ properly conducted and concluded mediation of the dispute between K.L. and Judge Gabler, pursuant to Wis. Stat. § 950.08(3), before the Board accepted and considered K.L.'s formal complaint;

4. Whether statements about Judge Gabler made to DOJ by the Eau Claire County victim witness coordinator were accurate;

5. Whether statements about Judge Gabler made to DOJ by the prosecutor in the underlying criminal case were accurate; and

6. The impact on Judge Gabler's communications with DOJ and with the Board of the Code of Judicial Conduct's restrictions on ex parte communications

(R. 137:16-17, App. 123–24.) None of the above issues constitutes a disputed issue of material fact requiring an evidentiary hearing before the Board.

Issues 1, 2, 4, and 5 are a restatement of some of the procedural issues underlying the circuit court's due process

ruling. None of those issues constitutes a disputed issue of material fact because the information in question was not relied on by the Board in reaching its decision.

Issue 3 is not a material issue because, as shown in Section IV below, the Board had jurisdiction over K.L.'s formal complaint regardless of whether DOJ had properly conducted and concluded mediation of the dispute between K.L. and Judge Gabler.

Issue 6 is not a material issue for the simple reason that, as the circuit court itself concluded, the Code of Judicial Conduct regulates only the conduct of judges, not the conduct of DOJ or of the Board. The circuit court believed that the ex parte communication issue was material because Judge Gabler could not simultaneously comply with the confidentiality restrictions of Wis. Stat. § 950.095(1) and with SCR 60.04(1)(g)'s requirement to disclose his communications with DOJ to all parties in the criminal case.

The circuit court was wrong on this point. Wisconsin Stat. § 950.095(1)(a) expressly provides that "records of the department relating to a complaint made under s. 950.08 (3) are confidential *unless the subject of the complaint waives the right to confidentiality in writing to the department*." In this case, the "subject of the complaint" was Judge Gabler. If he believed that he needed to disclose his communications with DOJ to the parties in the criminal case, all he had to do was waive the right to confidentiality under Wis. Stat.

§ 950.095(1). No evidentiary hearing on any "factual" issues about ex parte communications was necessary.

The Board gave Gabler notice of the charge against him and of the evidence on which it relied, and afforded him a full and fair opportunity to respond to that charge and to the relevant and material evidence. There were no disputed issues of material fact requiring an evidentiary hearing. The Board gave Judge Gabler all the process he was due.

III. Any statutory procedural errors by the Board did not impair the fairness or correctness of the Board's actions, and thus do not provide grounds for overturning the Board's decision.

The circuit court held that the same procedural errors by the Board which violated Judge Gabler's due process rights also prejudiced him and, therefore, constituted statutory grounds for reversing the Board's decision. (R. 137:22–23, App. 129–30.) In so doing, the circuit court misapplied the statutory standard for relief under Wis. Stat. ch. 227 and afforded a remedy not offered under the statute.

A circuit court "shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure." Wis. Stat. § 227.57(4). Here, the circuit court erred in finding that this standard was met.

As shown in the preceding section of this brief, none of the procedural errors found by the circuit court was actually material to the outcome of the complaint proceeding before

the Board. Those errors thus did not materially prejudice Judge Gabler.

Further, even if the board had committed errors that materially prejudiced Judge Gabler, the proper remedy under Wis. Stat. § 227.57(4) would be to "remand the case to the agency." The circuit court, however, did not remand the case to the Board for further action, but instead reversed the Board's decision and instructed that the complaint proceeding against Judge Gabler be dismissed with prejudice. The circuit court thus ordered an improper remedy for any statutory procedural errors.

IV. The Board had jurisdiction over K.L.'s complaint because it confirmed that DOJ had completed its action under Wis. Stat. § 950.08(3) before proceeding with its own consideration of the complaint.

Under Wis. Stat. § 950.09(2), a party may not ask the Board to review a complaint regarding a violation of the rights of a crime victim until DOJ "has completed its action on the complaint under s. 950.08(3)." The circuit court held that the Board lacked jurisdiction over K.L.'s complaint because DOJ inaccurately reported to the Board that it had completed mediation activities between K.L. and Judge Gabler under Wis. Stat. § 950.08(3), when it actually had never asked Judge Gabler if he would consent to mediation. (R. 137:7, App. 114.)

The circuit court is incorrect. Wisconsin Stat. § 950.09(2) does not require that DOJ must complete mediation under Wis. Stat. § 950.08(3) before the Board may

review a complaint. It says that DOJ must complete "*its action* on the complaint under s. 950.08(3)." Wis. Stat. § 950.09(2). In this case, the only action that DOJ took on K.L.'s informal complaint was to gather information and send a letter to Judge Gabler informing him of the complaint and asking him to consider expediting the sentencing of Beebe. When Judge Gabler replied to DOJ and declined the request to expedite sentencing, DOJ took no further action under Wis. Stat. § 950.08(3). DOJ's actions on K.L.'s informal complaint thus were completed before K.L. filed her formal complaint with the Board and the Board, accordingly, had jurisdiction under Wis. Stat. § 950.09(2) to review K.L.'s complaint.

The circuit court nonetheless reasoned that the only actions DOJ is authorized to take under Wis. Stat. § 950.08(3) are actions related to mediation and that DOJ did not complete such actions because it never even attempted to begin mediation by asking Judge Gabler for his consent. Under that reasoning, however, Wis. Stat. § 950.09(2) would require the Board, before reviewing a complaint, not only to confirm that DOJ had completed its action on the complaint under Wis. Stat. § 950.08(3), but also to conduct a detailed inquiry into the statutory propriety of DOJ's activities. The plain language of Wis. Stat. § 950.09(2) does not require the Board to police the activities of DOJ. The Board confirmed that DOJ had completed its action and that was all that was statutorily required. The Board had jurisdiction over K.L's complaint.

V. The Board's decision on the merits of KL's complaint is supported by substantial evidence in the administrative record.

Finally, the circuit court held that the Board's decision on the merits of K.L's complaint was not supported by substantial evidence in the record because (1) it is appropriate for a judge not to sentence an offender until all counts against him have been tried; and (2) the delay in sentencing from the time when Judge Gabler rejected DOJ's request to expedite sentencing was minimal. (R. 137:32–35, App. 139–42.) The court was wrong for several reasons.

First, the court did not properly apply the substantial evidence standard because it did not search the record for evidence that would support the Board's decision, but instead examined only reasons for overturning it. The court substituted its own opinion that Judge Gabler's scheduling decision was appropriate and that the delay was minimal without addressing whether the record contained evidence from which the Board could reasonably have reached its contrary conclusions.

Second, in determining that it was appropriate for Judge Gabler not to sentence Beebe until he possessed any information that might result from the second trial, the court erroneously rejected the Board's decision not to consider that reason because it was an after-the-fact justification not articulated on the record at the January 18, 2012, scheduling conference. (R. 137:18, App. 125.)

In support of its position, the circuit court relied on *Hefty v. Strickhouser*, 2008 WI 96, ¶¶ 15, 49–50, 312 Wis. 2d 530, 752 N.W.2d 820, which held that circuit courts are not required to explain their reasons on the record every time they exercise their discretion to depart from the statutory deadlines for summary judgment motions. That holding does not apply here.

Hefty involved the scheduling of summary judgment motions, which typically does not implicate substantive constitutional and statutory rights of individuals. Here, in contrast, the timing of Beebe's sentencing for his crime against K.L. directly impacted her constitutional and statutory right to a timely and speedy disposition. Where an individual has constitutional and statutory rights in a scheduling decision, it is proper to require the court to place the reasons for its decision on the record. To allow courts not to state their reasons and then to come up with new justifications when a victim makes a complaint would deny crime victims the fair and dignified treatment urged by Wis. Const. art. I, § 9m. *Cf. Schilling*, 278 Wis. 2d 216, ¶ 27 (constitutional mandate to treat crime victims with fairness dignity, and respect for their privacy "functions to guide Wisconsin court's interpretation of the state's constitutional and statutory provisions concerning the rights of crime victims").

Furthermore, the *Hefty* court reasoned that, where a court is making an informal scheduling decision in the

presence of the parties and no party expresses disagreement, there is no need for the court to create a record of the reasons for that decision. *Hefty*, 312 Wis. 2d 530, ¶ 52. Where a party disagrees with or moves for relief from the scheduling order, however, *Hefty* requires the court to explain its decision. *Id.* ¶ 53.

Here, the prosecutor disagreed with Judge Gabler's decision to delay Beebe's sentencing for the crime against K.L., invoked K.L.'s rights as a crime victim and her interest in obtaining closure, and asked Judge Gabler to expedite sentencing. Faced with such objections, Judge Gabler was required under *Hefty* to explain on the record his reasons for delaying sentencing. The reasons that Judge Gabler articulated on the record included no suggestion that he could not properly sentence Beebe for the crime against K.L. until he possessed information that might result from the second trial. After he was faced with K.L.'s informal complaint to DOJ, Gabler tried to supplement the reasons for his scheduling decision, but the Board properly rejected those after-the-fact justifications.

Finally, the circuit court erred in concluding that Judge Gabler's scheduling decision had caused only a minimal delay in Beebe's sentencing. The court measured that delay only from June 25, 2012—when Gabler received the letter from DOJ asking him to reconsider his earlier decision to delay sentencing—until August 6, when Beebe entered a no contest plea to the remaining charges against him and the sentencing

process on all charges could begin. Measured in that way, the court concluded that the delay was only 42 days.

This measurement of the delay was unreasonable. For a crime victim's speedy disposition right to be meaningful, the length of a delay in disposition must be measured from the time when disposition would have been obtained had the victim's right been honored until the time of the actual disposition. K.L.'s right was asserted by the prosecutor at the scheduling conference on January 18, 2012. Had Judge Gabler granted the prosecutor's scheduling request, Beebe could have been sentenced for his crime against K.L. in early April 2012. Because of Judge Gabler's scheduling decision, however, Beebe was not sentenced for that crime until October 18, 2012. The Board thus determined that the delay caused by Judge Gabler's decision was the approximately six-month period from early April to October 18, 2012. (R. 39:19 ¶ 19, App. 165 ¶ 19.) That determination was supported by substantial evidence in the record, and the circuit court erred in substituting its own judgment in place of the Board's.

CONCLUSION

The Crime Victim Rights Board asks this Court to reverse the December 18, 2015, decision of the circuit court and to affirm in all respects the July 26, 2013, decision of the Board on K.L.'s complaint.

Dated this 2nd day of June, 2016

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,832 words.

Dated this 2nd day of June, 2016.

/s/ Thomas C. Bellavia
THOMAS C. BELLAVIA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of June, 2016.

/s/ Thomas C. Bellavia
THOMAS C. BELLAVIA
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of June, 2016.

/s/ Thomas C. Bellavia
THOMAS C. BELLAVIA
Assistant Attorney General