

**FILED**  
**10-14-2021**  
**CLERK OF WISCONSIN**  
**SUPREME COURT**

STATE OF WISCONSIN  
SUPREME COURT

---

ERIK A. ANDRADE

Plaintiff-Appellant-Respondent,

v.

CITY OF MILWAUKEE BOARD OF FIRE AND  
POLICE COMMISSIONERS

Defendant-Respondent-Respondent.

---

**RESPONSE TO PETITION FOR REVIEW**

---

**FROM THE DISTRICT I COURT OF APPEALS  
DECISION DATED AND FILED AUGUST 31, 2021,  
AFFIRMING THE TRIAL COURT'S JUDGMENT  
HON. JEFFREY A. CONEN, MILWAUKEE COUNTY  
CIRCUIT COURT, PRESIDING**

---

**COURT OF APPEALS CASE NO. 2020-AP-333  
TRIAL COURT CASE NO. 2019-CV-564**

---

STACIE H. ROSENZWEIG  
State Bar No. 1062123

HALLING & CAYO, S.C.  
320 East Buffalo St., Ste. 700  
Milwaukee, WI 53202  
(414)271-3400

Attorneys for Defendant-  
Respondent-Respondent City of  
Milwaukee Board of Fire and Police  
Commissioners.

## **TABLE OF CONTENTS**

TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE .....	1
I.    NATURE OF THE CASE.....	1
II.   STATEMENT OF FACTS.....	2
ARGUMENT .....	12
I.    ANDRADE RECEIVED APPROPRIATE DUE PROCESS PROTECTIONS AND REVIEW IS NOT WARRANTED.....	12
A.  THESE ARE NOT NOVEL ISSUES OF STATEWIDE IMPACT .....	18
B.  THERE IS NOTHING TO DEVELOP, CLARIFY, OR HARMONIZE WITH REGARD TO WIS. STAT. § 62.50(13).....	19
C.  THIS ISSUE DOES NOT REQUIRE COURT INTERVENTION TO AVOID RECURRENCE .	20
CONCLUSION .....	21
CERTIFICATIONS.....	22
I.    CERTIFICATION AS TO FORM AND LENGTH. .	22
II.   CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	22
III.  CERTIFICATION AS TO CONFIDENTIALITY. ....	22

## TABLE OF AUTHORITIES

### Cases

<i>Andrade v. City of Milwaukee Bd. of Fire &amp; Police Comm'rs</i> , No. 2020AP333, 2021 Wisc. App. LEXIS 764, at *1, ¶1 .....	11
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963) .....	11
<i>Cleveland Bd of Educ. V. Loudermill</i> , 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed. 2d 494 (1985).....	2, 13, 14, 17
<i>Doe v. Archdiocese of Milwaukee</i> , 2005 WI 123, ¶ 35, 284 Wis. 2d 307, 328, 700 N.W.2d 180, 190 .....	16, 19
<i>Giglio v. United States</i> , 405 U.S. 150 (1972) .....	11
<i>State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals</i> , 2018 WI 25, ¶43, 380 Wis. 2d 354, 909 N.W.2d 114 .....	20

### Statutes

Wis. Stat. § 62.50.....	16
Wis. Stat. § 62.50(13).....	12, 19
Wis. Stat. § 802.02.....	16, 19
Wis. Stat. § 809.19(8).....	22
Wis. Stat. § 809.62(1r) .....	19
Wis. Stat. § 809.62(1r)(a).....	2, 19
Wis. Stat. § 809.62(1r)(c)2.....	19
Wis. Stat. § 809.62(1r)(c)3.....	1, 20

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE

Plaintiff-Appellant-Petitioner Erik A. Andrade (“Andrade”) seeks review of the August 31, 2021 Order of the Wisconsin Court of Appeals, District I. This order affirmed an order on *certiorari* review entered by the Hon. Jeffrey Conen in the circuit court for Milwaukee County on November 18, 2019. This matter arose from the January 4, 2019 decision of the Milwaukee Board of Fire and Police Commissioners (the “Board”) to terminate Andrade from his employment as an officer with the Milwaukee Police Department (the “Department”).

The Board opposes this petition. Review by this Court is not necessary to help “develop, clarify or harmonize the law” or to prevent recurrence of similar legal issues. Wis. Stat. § 809.62(1r)(c)3. The undisputed facts of this case support the underlying orders.

Additionally, review is not necessary to address “[a] real and significant question of federal or state constitutional law.” *Id.* § 809.62(1r)(a). The law is established and Andrade’s reliance on *Cleveland Bd of Educ. V. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed. 2d 494 (1985) is misplaced. Andrade received the process he was due, both pre-termination and at the hearing.

## II. STATEMENT OF FACTS

On January 26, 2018, Milwaukee police were called to a Walgreens parking lot to find that a car driven by Milwaukee Bucks basketball player Sterling Brown had been double parked in a handicap spot. Numerous police officers reported to the scene, and Mr. Brown was Tased and forcefully arrested.

Erik Andrade was a police officer with the City of Milwaukee Police Department (the “Department”) until his termination on September 12, 2018. (R-4 pp. 5-10.) Andrade arrived at the scene and conveyed Brown

following the arrest. (R-16 pp. 7-8; FF<sup>1</sup> 2, P-Ap. 113-14.)

Andrade's conduct at the scene and during transport is not at issue here. Instead, Andrade misused a personal Facebook account, where he was connected with 1,200 "friends" who were generally aware he was a Department officer. (R-12, Tr. p. 426; R-16 p. 9, FF3.)

The Department maintains a social media policy, Standard Operating Procedure ("SOP") 685-Social Networking Sites (SNS) (R-15 pp. 15-19). This policy permits officers to use social media for personal use, with limits. "Members are free to express themselves as private citizens on SNSs to the degree that their speech is not disruptive to the mission of the department." (SOP 685.15(A)(5), R-15 p. 16; R-16 p.12 FF 12.) The policy also warns officers, "Members must be aware that their communication on SNSs can be used by a skilled defense attorney in impeaching testimony in association with their professional duties as a member of the department." (SOP 685.15(A)(10), R-15 p.16.)

---

<sup>1</sup> "FF" refers to the Board's Findings of Fact recited in its

Between January and May, 2018, Andrade made several posts, or shared posts from others, with inappropriate and at times racist content. (R-8 pp.31-41, R-Ap. 1-11.) Just hours after the arrest, Andrade posted: “Nice meeting Sterling Brown of the Milwaukee Bucks at work this morning! Lol#FearTheDeer[.]” (R-8 p. 39; R-16 FF 3(a), R-Ap. 9.)

Many of the posts were far more inflammatory. For example, on April 16, 2018, he posted a graphic reading “SICK AND Tide OF THESE HOES” (with the “Tide” represented by the logo of the laundry detergent) (R-8 p. 34; FF 3(c) R-Ap. 4), and with a caption supplied by Andrade, stating “What comes to mind when I’m at work and I’m driving down Greenfield Avenue, SMH.”

On April 24, 2018, Andrade posted a graphic featuring a picture of Golden State Warriors basketball player Kevin Durant and comparing his hair texture to an ice cream cone, captioned within the graphic, “WHO WORE IT BETTER?” (R-8 p. 33.; FF 3(d), R-Ap. 3.)

---

January 4, 2019 Decision. (R-46, P-Ap. 112-119.)

Andrade shared this graphic with the comment, "Damn. More naps than preschool. Laughing my ass off."

Some of these posts involved comments to videos he shared or was "tagged" in. On May 3, 2018, Andrade shared a video regarding an altercation involving Milwaukee Police and a subject on the City's north side. Andrade was not involved in the incident, but commented and referred to readers as "social media educated fools" and implored people to "Educate yourselves on an incident before you dummies want to voice your opinion about it." (R88 p.31; FF 3(e), R-Ap. 1.) This post occurred while there was an internal affairs investigation pending regarding the incident. (*Id.*)

On May 27, 2018, a video regarding the Sterling Brown incident was posted by an account called "Mind of Jamal," with the comment by this account: "The epidemic of the black community lying on the police need to be addressed. Yes, whenever something happens, it's always an epidemic of racism, police brutality or whatever lie these failed liberal hand picked so called liberal black



leaders come up with this epidemic crap to cover up the fact they have failed the black community.” (FF 3(g), R-8 p. 35, R-Ap. 5.) Andrade commented in response, “A little truth to those who wanted to listen,” and shared the video and comments to his Facebook friends. (*Id.*)

On May 26, 2018, then- Common Council president Ashanti Hamilton tendered copies of the Facebook posts, which he had been provided, to police, and an investigation began. (R-10 pp. 7-8; FF 7.) The Internal Affairs investigation proceeded in standard fashion. Andrade was served a PI-21 form informing him of the accusations. (R-5 p. 17.) Andrade was interviewed by Sergeant Thomas Hines (R-12, R-15; FF 9). During the interview, Andrade admitted that he made the posts in question, but stated he “didn’t think in advance” about whether his posts would be offensive (R-12 p. 18) and that “it wasn’t my intent” (R-12 p. 22) to offend.

He repeatedly denied that his posts violated the Code of Conduct (R-12 pp. 19, 23, 26, 26, 34, 37, 42, 45; R-15 p. 3). However, Andrade did acknowledge that his

posts had caused “backlash” (R-12 p. 11), and that he was “being portrayed as a racist in the media nationwide” (R-12 p. 41). This “backlash” led him to take his Facebook page down around June 19, 2019 (R-12 p.4; FF 6), the same day the Milwaukee Journal Sentinel published an article about Andrade’s Facebook activity (R-10; FF 5.).

Following the interview and Hines’ review of the Facebook posts, Hines wrote a summary of the investigation and conferred with command staff. (R-50 p. 20.) A lieutenant reviewed the investigation and determined that the allegation that Andrade “made defamatory and offensive comments regarding public citizens that is disruptive to the mission of the department” could be sustained by the preponderance of the evidence. (R-12 p. 4; FF 9.) After this discussion with command staff, Hines wrote a cover report memorializing the rule violations. (R-50 p. 23.) The report was then presented to then-Chief Alfonso Morales (the “Chief” or “Morales”) for his review. (See R-50 p. 23) Morales reviewed the report and agreed with its conclusions. (R-50

p. 96.) He viewed the investigation as comprehensive and agreed rules had been violated. (R-50 p. 98-99.)

In determining the appropriate level of discipline for these violations, the Chief consulted with various Department leaders. The Department also reached out to the Milwaukee County District Attorney's (DA) office. (R-50 p. 100; FF 13.) The DA office told the Department that Andrade could no longer be used as a witness in prosecutions. To Morales, this was a big problem, as he could not risk having a case in which an officer, a key witness, cannot testify. (R-50 p. 101-102.)

While the posts alone would have resulted in "heavy discipline," Morales indicated that the DA's refusal to use Andrade as a witness in court, a *consequence* of Andrade's posts, meant that Andrade should no longer remain on the force. (R-50 pp. 111-112.) "In the Chief's judgment it would be disruptive to the mission of the department to keep an officer on the force who could not be called upon to testify in court." (FF 10, summarizing Morales' testimony.)

On September 12, 2018, the Chief issued Personnel Order 2018-111 (R-4 pp. 2-3), along with a Complaint to the Fire and Police Commission (R-4 pp. 5-10), both of which recited the charges that Andrade had violated Code of Conduct Core Value 1.00-Competence, referencing Guiding Principle 1.05 and SOP 685.15(A)(5) (“posting content to a social networking site that was disruptive to the mission of the department”), and Core Value 3.00—Integrity, referencing Guiding Principle 3.01 (failure to inspire and sustain the confidence of our community). These documents indicated that the charges were substantiated, that Andrade was found guilty, and that he would be suspended 30 days without pay for the violation of the social networking policy (Charge 1) and discharged for his failure to inspire and sustain the confidence of the community (Charge 2). (R-4 pp. 2-10.)

Andrade appealed the Chief’s determination to the Board. (R-4 p. 12.) A hearing was held on December 18 and 19, 2019; the Board found against the Andrade in full by oral decision rendered December 19, 2019. (R-52 pp.

308, 460-61.) A written decision followed on January 4, 2019. (R-46, P-Ap. 112.)

A statutory appeal to Milwaukee County Circuit Court was filed January 18, 2019 (R-2), and a petition for writ of *certiorari* was filed March 19, 2019; the matters were consolidated (R-25). This circuit court appeal only concerned Charge 2, which led to Andrade's termination.

The Board's decision to discipline and terminate Andrade was affirmed on November 18, 2019 (R-46, P-Ap. 102-111). The trial court found that Andrade did not establish that the board exceeded its jurisdiction, proceeded on an incorrect theory of law, or that the evidence in the record could not logically support the Board's decision, and none of his arguments warranted reversal. (R-46, P-Ap. 108-110.)

Andrade then appealed to the Court of Appeals on February 13, 2020. (R-48.) That court affirmed the trial court on August 31, 2021, and held that Andrade did not "show that the Board acted outside of its jurisdiction or did not proceed on the correct theory of law." *Andrade v.*

*City of Milwaukee Bd. of Fire & Police Comm'rs*, No. 2020AP333, 2021 Wisc. App. LEXIS 764, at \*1, ¶1 (Ct. App. Aug. 31, 2021) (unpublished).

Relevant to this petition, the appeals court held that Andrade had received appropriate due proces. The court found Andrade's argument unpersuasive "because the record makes clear that the reason he was discharged was his conduct on social media, conduct that *triggered* the DA's officer to determine that calling Andrade as a witness would require *Brady/Giglio*<sup>2</sup> disclosures and that the DA's office would not call him as witness," *Id.* at ¶ 37 (emphasis added). The Board properly found Andrade had violated Code of Conduct Core Value 3.00 for integrity, because the Facebook posts "'managed to repeat every negative stereotype plaguing big city police departments, i.e., racism, use of excessive force, disregard for ethnic sensitivities, distrust of the public, and incurring excessive overtime.'" The Board concluded "that the posts

---

<sup>2</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) (both part of a body of case law requiring prosecutors to turn over potentially

and comments undermined trust in the department, disrupted the mission of the department, undermined public confidence, discredited the department, and created the appearance of impropriety and corruption in the department." *Id.* at ¶ 38. "Andrade's conduct undermined the confidence in the community with regard to his credibility as a witness and discredited the department. We conclude that the Board proceeded on a correct theory of law in concluding that Andrade violated count two for Core Value 3.00." *Id.* at ¶ 39.

### **ARGUMENT**

#### **I. ANDRADE RECEIVED APPROPRIATE DUE PROCESS PROTECTIONS AND REVIEW IS NOT WARRANTED**

Andrade's Issues Presented for Review (Pet. at 1) sets forth two interrelated due process issues he wants this Court to determine: whether the Chief provided an adequate explanation of the evidence supporting his decision to discharge, and whether he complied more generally with Wis. Stat. § 62.50(13), requiring the Chief to

---

exculpatory evidence to the defense in criminal cases).

set forth the reasons for discharge in the complaint he filed with the Board.

Both of these issues hinge on whether the Chief was actually required to articulate in his discharge notice or the Complaint that Andrade's violations of the rules pertaining to social media use rendered him unable to credibly testify. Andrade has argued that because the charging documents did not explicitly detail each evidentiary fact the Chief intended to use at trial (i.e. that Andrade would no longer be used as a witness by the District Attorney) that these documents were somehow defective, tainting the entire process. In doing so, Andrade also conflates an *effect* of the violation (being unable to testify) with the *acts* constituting the violation (posting inflammatory content on social media).

For his argument, Andrade has cited *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), a case arising under Ohio law and holding that public employees with a property right in continued employment are entitled to due process before a



government can terminate that employment. The holding is unremarkable. Employees in this situation are entitled to a pre-termination process, which Andrade concedes is informal and minimal, requiring “notice and opportunity to respond.”

*Loudermill* is distinguishable from the instant matter in that in *Loudermill*, the employee was offered *no* opportunity to present his side before he was discharged for failing to disclose a grand larceny conviction on his job application. *Id.* at 535. The Supreme Court held that this lack of *any* opportunity violated due process, and remanded the case for further proceedings. *Id.* at 548.

However, the Court stated that a full evidentiary presentation was not required at the pre-termination stage: “[T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Id.* at 545–46.

Andrade had that opportunity here; he was interviewed, provided his explanation for the Facebook posts, and also provided a written Response to Charges. He was well acquainted with and responded in detail to the allegations against him. The relevant documents set forth explicitly and plainly the violations for which Andrade was eventually suspended and discharged and the factual basis therefor. He acknowledged in his pre-termination interview being aware of the Standard Operating Procedures (R-12), including SOP 685.15(A)(10), which warned that a skilled defense attorney could use social media posts to impeach testimony. He was on notice that his potential inability to testify was a consequence of violating the rules.

Personnel Order 2018-111, notifying Andrade of the Chief's decision, recites the Core Values violated (R-1). The Complaint (R-2) spells out these Core Values as well as the referenced Guiding Principles, and the specifications for finding the violation.

The Complaint is intended as a summary document. Wisconsin generally only requires notice pleadings, see, e.g., *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶ 35, 284 Wis. 2d 307, 328, 700 N.W.2d 180, 190, citing Wis. Stat. § 802.02. Neither Wis. Stat. § 62.50 nor case law interpreting it has required more presentation.

If the Complaint was intended as a comprehensive presentation of evidence, there would be little need for a hearing. That is clearly not the process mandated by statute or by Board rules. That Andrade has been deemed unusable as a witness in a criminal case is not an element of the charge; it is one consequence of his failure to inspire and sustain the confidence of the community and the harm he has done to the department's mission. The Chief's testimony that Andrade's inability to act as a witness in state court was a determining factor or even *the* determining factor as to whether Andrade failed to inspire and sustain confidence is not something that requires notice and formal pleading. Morales was a fact witness; his testimony as to his thought process was factual

testimony to be evaluated by the trier of fact and given appropriate weight.

Throughout his Petition, Andrade has claimed that he was unable to adequately defend himself because the Complaint did not contain this information. However, this claim is belied by the record – Andrade was given ample notice, even pre-termination, that his ability to testify in state court could be an issue for trial. He acknowledged in his interview that he was familiar with SOP 685.15(A)(10) as well as the Code of Conduct and Core Values, which is sufficient under *Loudermill*'s requirement of notice and an opportunity to respond. The Court of Appeals agreed.

Regardless, the Complaint recited the grounds for his discipline and termination, all stemming from his social media posts violating those policies. Andrade's Petition suggests that notice that he was being terminated for violating the policy was insufficient because it did not articulate the Chief's view about a specific *consequence* of violating the policy.

The chief, along with Deputy DA Kent Lovern who testified regarding Andrade's exclusion from acting as a witness, were disclosed as witnesses well in advance of the hearing. (R-8.) Moreover, Trial Exhibit 13 (R-30), which Andrade's counsel demanded and received prior to the hearing, was the District Attorney's list of current and former police officers determined by the DA to be subject to so-called *Giglio* or *Brady* disclosures—i.e. officers for whom the DA would have an obligation to turn over information during discovery. The list also included comments about several individuals for whom the information was so damaging that the office would no longer call them (R-50 pp. 242-244).

Even if Andrade had the exaggerated entitlement to notice and formal pleading he claims, he was still fully aware of the issues. He specifically prepared a related defense and he fully litigated the issues. The legal premises and asserted factual basis for Andrade's arguments fail and this Petition should be denied.

A. THESE ARE NOT NOVEL ISSUES OF STATEWIDE

## IMPACT

The criteria for review under Wis. Stat. § 809.62(1r) are not met here, for either issue presented.

This is not a novel or significant constitutional issue (see Wis. Stat. § 809.62(1r)(a) and (c)2); at most this is a question of a pleading standard, which is well settled. Wisconsin's default in civil matters is notice pleading and nothing more. See *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶ 35, 284 Wis. 2d 307, 328, 700 N.W.2d 180, 190, *citing* Wis. Stat. § 802.02.

There is no reason for this Court to create a different, higher standard for this set of circumstances.

### B. THERE IS NOTHING TO DEVELOP, CLARIFY, OR HARMONIZE WITH REGARD TO WIS. STAT. § 62.50(13)

Two lower courts have already weighed in and determined that the notice provided to Andrade both pre-termination and before and during the hearing was sufficient to afford Andrade an opportunity to respond and defend himself. This Court does not need to disturb the Court of Appeals' common-sense holding. The lower

court simply applied well-settled principles to a particular factual situation.

To the extent that Andrade believes that the lower courts' decisions were erroneous, error correction is not the function of this Court. *See, e.g., State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals*, 2018 WI 25, ¶43, 380 Wis. 2d 354, 909 N.W.2d 114.

C. THIS ISSUE DOES NOT REQUIRE COURT INTERVENTION TO AVOID RECURRENCE

Andrade employs a slippery-slope argument here, warning that police chiefs will run amok and “assault” the law without this Court’s intervention. Overheated rhetoric aside, the Court should decline this invitation to micromanage personnel decisions or the process that the Legislature delegated to boards of police and fire commissioners.

Andrade was provided ample warning that his Facebook posts violated Department rules in such an offensive way as to warrant termination. Andrade’s citation to Wis. Stat. § 809.62(1r)(c)3 is a red herring here.

If this situation is to recur, it is because another police officer disciplined because of his own egregious conduct elects to nitpick the language of a complaint instead of conforming his conduct to the rules in the first place.

### CONCLUSION

For the reasons set forth above, the petition for review should be denied.

Dated this 14<sup>th</sup> day of October, 2021

HALLING & CAYO, S.C.



By: \_\_\_\_\_

STACIE H. ROSENZWEIG  
State Bar No. 1062123  
shr@hallingcayo.com

HALLING & CAYO, S.C.  
320 East Buffalo St., Ste. 700  
Milwaukee, WI 53202  
(414)271-3400

Attorneys for Defendant-  
Respondent-Respondent City of  
Milwaukee Board of Fire and Police  
Commissioners.



### CERTIFICATIONS

#### I. CERTIFICATION AS TO FORM AND LENGTH.

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 3319 words.

#### II. CERTIFICATION OF COMPLIANCE WITH 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 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.

#### III. CERTIFICATION AS TO CONFIDENTIALITY.

I hereby certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last

initials instead of full names of persons, 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 at Milwaukee, Wisconsin, this 14<sup>th</sup> day of October, 2021,

HALLING & CAYO, S.C.



By: \_\_\_\_\_  
STACIE H. ROSENZWEIG  
State Bar No. 1062123  
shr@hallingcayo.com

HALLING & CAYO, S.C.  
320 East Buffalo St., Ste. 700  
Milwaukee, WI 53202  
(414)271-3400

Attorneys for Defendant-  
Respondent-Respondent City of  
Milwaukee Board of Fire and Police  
Commissioners.