THE SUPREME COURT OF WISCONSIN

ERIK A. ANDRADE

Petitioner-Appellant-Petitioner,

v.

CITY OF MILWAUKEE BOARD OF FIRE AND POLICE COMMISSIONERS,

Respondent-Respondent.

RESPONDENT-RESPONDENT'S RESPONSE TO BRIEF OF PETITIONER-APPELLANT-PETITIONER

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

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1. Did the Chief deprive Officer Andrade of Due Process by failing to provide an explanation of his evidence supporting his decision to discharge Officer Andrade?

   Answered by the Trial Court: No

   Answered by the Court of Appeals: No

2. Did the Chief Deprive Officer Andrade of Due Process by Failing to Comply with Wis. Stat. § 62.50(13)?

   Answered by the Trial Court: No

   Answered by the Court of Appeals: No

STATEMENT OF THE CASE

Nature of the Case

This matter originated in Milwaukee County Circuit Court as a *certiorari* and statutory appeal from a decision by the City of Milwaukee Board of Fire and Police Commissioners (the "Board"). In a written decision dated January 4, 2019, the Board properly found that there was just cause to sustain the charges against Petitioner-Appellant-Petitioner Erik Andrade ("Andrade"), and that a 30-working-day suspension without pay and discharge from the Milwaukee

Police Department were appropriate sanctions for his conduct. (R-16 pp. 6-17, R-Ap. 1-12.)[1]

On January 18, 2019, Andrade appealed to the Milwaukee County Circuit Court. (R-2, R-Ap. 13.) The Milwaukee County Circuit Court issued a decision dated November 18, 2019 which sustained the Board's determination. (R-46, R-Ap. 14-23.)

After briefing by both parties, the Court of Appeals sustained the Board's determination by decision dated August 31, 2021. (P-Ap. 5-39.) Andrade filed a petition for review with this Court on September 30, 2021, which was held in abeyance pending the decision in *Green Bay Professional Police Assoc. v. Green* Bay, 2023 WI 33, 407 Wis. 2d 11, 988 N.W.2d 664. That case was decided April 27, 2023 and this Court ordered the parties in the instant matter to supplement their briefing.

On June 22, 2023, this Court granted Andrade's petition for review.

[1] P-Ap. refers to the Petitioner's Appendix, and R-Ap. refers to the Respondent's Appendix.

Statement of Facts and Procedural History

Early morning on January 26, 2018, Milwaukee Police were called to a Walgreens parking lot to find that a car driven by Sterling Brown, then a Milwaukee Bucks basketball player, had been double parked in a handicap spot. In response, numerous police officers responded to the scene. Brown was tased and forcefully arrested. Because of his status as a basketball player and the significant issues surrounding the arrest, not surprisingly, this arrest drew local and national media attention. (R-16 p.7; FF[2] 1, R-Ap. 2.)

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, R-Ap. 27-32.)) Although he did not arrest Brown or discharge the Taser, Andrade arrived at the scene and conveyed Brown following the arrest. (R-16 pp. 7-8; FF 2, R-Ap. 29-30.)

The arrest itself is not what gave rise to the disciplinary action against Andrade. Instead, Andrade maintained and misused a personal Facebook account. The Department maintains a social media policy, Standard Operating Procedure

[2] "FF" refers to the Board's Findings of Fact, as recited it its January 4, 2019 Decision. (R-46, Ap. 14-23.)

("SOP") 685-Social Networking Sites (SNS) (R-15 pp. 15-19, R-Ap. 35-39.) While the policy permits police officers to use social media sites (SNSs) including Facebook for personal use, the policy requires officers to use SNSs with appropriate limits given their role at the Department. "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, R-Ap. 36.)

Andrade's privacy settings may have restricted his posts to only "friends" (i.e. people who had connected with him on Facebook), but he had roughly 1,200 friends. (R-52, Tr. P. 426, R-Ap. 45.) Additionally, his friends were generally aware that he was a Milwaukee Police Department officer, and if they were not, his profile picture included a badge with a memorial band on it. (R-16 p. 8- 9, FF 3; R-Ap. 3-4.)

Andrade frequently used SNSs. Between January and May 2018, he made several posts, or shared posts from others,

which he has attempted to characterize as "meant as jokes" but contained content that ranging from clearly inappropriate to blatantly racist. (R-8 p. 39, R-Ap. 57.; R-16 FF 3(a).)

For example, after Andrade conveyed Brown following his arrest, he posted a text post with a blue background, reading "Nice meeting Sterling Brown of the Milwaukee Bucks at work this morning! Lol#FearTheDeer[.]" *Id*.

While Andrade's post regarding Brown's arrest is inappropriate, it is arguably the least inflammatory post brought to the Board's attention. For example, on April 16, 2018, Andrade posted a graphic reading "SICK AND *Tide* OF THESE HOES" (with the "Tide" represented by the logo of the laundry detergent of the same name) (R-8 p. 34, R-Ap. 51.; FF 3(c).), 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."[3] When asked whether this post was "mocking the way people of a certain race pronounced the word 'tired,'" he said that he wasn't, but that he found the meme "funny." (R-50 p. 29, R-Ap. 105.) Andrade further

[3] Greenfield Avenue is a street in Milwaukee known for prostitution. "SMH" is shorthand for "shaking my head." (R:12 p. 24.)

attempted to explain that this post as referring to "kids eating Tide pods." *Id*.

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 that of an ice cream cone, captioned within the graphic, "WHO WORE IT BETTER?" (R-8 p. 33.; FF 3(d), R-Ap. 50.) Andrade shared this graphic with the comment, "Damn. More naps than preschool. Laughing my ass off." Sgt. Thomas Hines, the investigator who interviewed Andrade, understood "more naps than preschool" to refer to the hair texture of Mr. Durant, who is African American. (R-50 p. 31, R-Ap. 107.) When confronted, Andrade attempted to explain that "who wore it better?" was generally a popular meme on Facebook. (R-12 p. 27-28, R-Ap. 79-80.)

Some posts, including the one about Sterling Brown described earlier (R-8 p. 39, R-Ap. 57.), were created by Andrade rather than shared from others. On May 31, 2018, Andrade posted about Cleveland Cavaliers basketball player J.R. Smith, in text on a red background, "I hope JR Smith double parks in Walgreens handicap Parkin [*sic*] spots when he's in Milwaukee!" (R-8 p. 40; FF 3(h), R-Ap. 58.) JR Smith

is also African American. Again, Brown was parked in a handicapped spot in a Walgreens parking lot when he was tased and arrested, and the investigator interpreted this to mean that Andrade hoped the same thing would happen to Smith. (R-50 p. 37, R-Ap. 55.)

In another post of his own creation, Andrade wrote, "Had a great time workin [*sic*] replacement over in D5 the other day. . . 5+ OT and a use of force. Lol." (R-8 p. 38; FF 3(i), R-Ap. 56.) "D5" is District 5, a police district on the City's north side. Andrade had posted about substituting for another officer in District 5, getting five hours of overtime, and the fact he had used force. "Lol" stands for "laughing out loud." The investigator interpreted the post to indicate a "celebratory attitude toward the opportunity he got to use force." (R-50 p. 39.)

Some of Andrade's posts involved comments to videos that he shared to his page or was "tagged" in, but still appeared on his Facebook page. On May 3, 2018, Andrade shared a video regarding an alteration involving Milwaukee Police and a subject on the City's north side, occurring on May 2, 2019. Andrade was not involved in the incident. He commented:

> Let's see the whole video now since people are crying police brutality and how officers are beating an innocent black man for no reason. You social media educated fools are too much sometimes. Time after time, people rush into judgment and make comments after seeing a short clip of an incident and all of a sudden, you all act like you were there and give an expert opinion. Educate yourselves on an incident before you dummies want to voice your opinion about it.

(R-8 p.31; FF 3(e), R-Ap. 48.) 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 individual going by the name of "Mind of Jamal," with the comment by this individual: "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. 52.) Andrade commented in response, "A little truth to those who wanted to listen," and shared the video and comments to his Facebook friends. *Id*. The investigator interpreted Andrade's statement, in addition to his post of Mind of Jamal's text, as Andrade

"adopt[ing] of the message this post, video, and comment carried." (R-50 p. 36, R-Ap. 112.) He further deemed the message as "inappropriate" when "coming from a police officer." *Id.*

In addition to adding comments, Facebook users may also "react" to posts, by clicking an emoji such as a "like," "laughing" or "surprise." Viewers of Andrade's posts reacted in various ways—for instance, the post regarding J.R. Smith received 29 comments and 65 or 66 "reactions" as of the time it was printed. (R-8 p. 40, R-Ap. 58.)

Whenever any Facebook user posts anything, even if they restrict it only to "friends," it leaves their hands and they have no control over it. Viewers may take screen shots or make printouts of a post and share them with others. That is apparently what happened here, and the posts made their way into the hands of City of Milwaukee Common Council then-president Ashanti Hamilton, from an "unnamed [police department] member." On May 26, 2018, Hamilton provided copies of the Facebook posts to police and an investigation began. (R-10 pp. 7-8; FF 7.)

The Internal Affairs investigation of Andrade's social media activities proceeded in standard fashion. Andrade was

served a PI-21 form informing him of the accusations. Andrade provided a written Response to Charges. (R-50 pp. 52, R-Ap. 116.) Andrade was also interviewed by Sgt. Thomas Hines on June 28, 2018. (R-12, R-15; FF 9). In his investigative interview, Andrade acknowledged that he was familiar with SOP 685.15, as well as Core Value 3.00-Integrity, and 3.01 (requiring officers' behavior to "inspire and sustain the confidence of our community," whether off duty or on). (R-12, p. 13-15.)[4]

During the interview, Andrade admitted that he made the posts in question, but "didn't think in advance" about whether his posts would be offensive (R-12 p. 18, R-Ap. 72.) and that "it wasn't my intent" (R-12 p. 22, R-Ap. 76.) to offend.

However, when asked about how people might react to the post regarding comments that he made about police brutality when he shared the May 3, 2018 video, he admitted that "some people might find it offensive; some might find it—or might agree with me." (R-12 p. 18, R-Ap. 72.) He also admitted that he thought the public would be "enlightened" (R-12 pp. 17, 21, R-Ap. 71, 75.) or educated (R-12 p. 15, R-Ap.

[4] Then-Police Chief Alfonso Morales testified that policies are periodically updated and that officers are expected to electronically acknowledge that they have read the policy. (R-50 p. 114.

69.) by his post. While he did state that he "now" regrets posting the May 3, 2018 video with that comment, he confirmed that post was "[his] opinion" and "what [he] believe[s] is right." (R-12 p. 19. R-Ap. 73.)

He continued to deny during his interview that the post involving the Tide logo might be offensive, either generally or specifically coming from a police officer (R-12 p. 25, R-Ap. 79.), and that "it's just a joke" (R-12 p. 27, R-Ap. 81.) He did not believe that the post regarding Kevin Durant could be perceived as "offensive or even racist," or that his post, coming from a police officer, could damage the reputation of the department (R-12 pp. 29, R-Ap. 83.) 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).

Andrade further acknowledged that his posts had caused "backlash" (R-12 p. 11, R-Ap. 63.), and that he was "being portrayed as a racist in the media nationwide" (R-12 p. 41, R-Ap. 95.). This "backlash" led him to take his Facebook page down around June 19, 2018[5] (R-12 p. 4; FF 6.) and surrender

[5] On June 19, 2018, Sterling Brown filed a civil rights complaint pursuant to 42 U.S.C. § 1983 in the Eastern District of Wisconsin. Andrade was named as a defendant in that action and the Facebook posts were referenced and excerpted in several paragraph. (R-5 p. 45-49, R-9 p. 1-35; FF4.)

his Milwaukee Bucks season tickets. (R-12 p. 41, R-Ap. 95.; FF 6.) On June 19, 2019, the Milwaukee Journal-Sentinel published an article reporting on Andrade's Facebook activity, characterizing Andrade's post as "racist memes." (R-10; FF 5.) Sgt. Hines confirmed that he had a sense that "some or all of those posts or comments were widely viewed among the public as racist." (R-50 p. 50, R-Ap. 114.) He characterized the public attention as "negative attention" and saw online comments "that were pretty negative regarding [the] department as a whole." *Id*.

Following the interview and Sgt. Hines' review of the Facebook posts, Sgt. Hines wrote a summary of the investigation and conferred with command staff, including the captain and lieutenant. (R-50 pp. 21. R-Ap. 102.) The 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, it was decided that the allegations would be sustained and Sgt. Hines wrote a cover

report[6] memorializing the rule violations that the three agreed would be supported by the evidence. (R-50 p. 23, R-Ap. 104.)

The report was then presented to Chief Alphonso Morales for his review. (*See* R-50 p. 23, R-Ap. 104.) He conferred with Captain Paul Kavanagh, the captain who oversaw the Internal Affairs Division. (R-50 p. 96, R-Ap. 117.) Morales reviewed the cover report and agreed with its conclusions. After reviewing the cover report and agreeing with its conclusions, Morales viewed the investigation as comprehensive and agreed that the rules had been violated. (R-50 pp. 98-99, R-Ap. 119-120.)

At Andrade's disciplinary hearing, Morales explained further. He testified that some of Andrade's posts were "offensive and defamatory." (R-50 pp 103-104, R-Ap. 124-125.) Specifically, he testified that he is focused on "community trust." (R-50 p. 104, R-Ap. 125.) He publicly promoted "us[ing] very little force," and interpreted Andrade's post about District 5 to "brag" about using force and "boast" about overtime. *Id*. Morales explained that because the African

[6] Hines referred to his role as "ghostwriting," as he wrote the report, but it was ultimately signed by a lieutenant. (R-50 p. 51.)

American community generally has difficulty trust law enforcement, Andrade's District 5 post

> in an African American community, would disprove what [he] argue[s], in that the police is not out using force on the African American community unbiasedly—or biasedly and that it contradicts what [he] promote[s] publicly with that community that has great distrust toward the Milwaukee Police Department and law enforcement in general.

(R-50 p. 105, R-Ap. 126.)

In determining the appropriate level of discipline for these violations, Morales consulted with his executive staff, Internal Affairs leadership, as well with Captain Alex Ramirez, the captain for the police district in which Andrade was assigned. Morales testified that

> in my career in law enforcement is that the discipline that is imposed and how it varies, one thing I want under my –under my command is to be as fair as possible and to take in all the information I can as far as where we go. We do have comparables, but I also want the input from the department.

(R-50 p. 100, R-Ap. 121.)

The Department, through Kavanagh, also reached out to the Milwaukee County District Attorney's office, to discuss whether Andrade could remain a witness for the department in prosecutions. (R-50 p. 100, R-Ap. 121.; FF 13.) The DA office told Kavanagh that Andrade could no longer be used as

a witness in prosecutions. To Morales, this was a serious *consequence* of Andrade's violations:

> It is extremely serious because that is -- that is like an additional -- To be able to testify in court is a tool that is needed, no different than a firearm. If I can't use a firearm or I am prohibited from using a firearm, how can I have that officer or that member be operational or useful for the Milwaukee Police Department? To be able to testify, we come across several types of investigations on a daily basis and a person who loses the ability to testify in court, I cannot risk having a high-profile case where that person is the key witness and person to testify in court that can ruin that case. So it is extremely important that our membership, our officers, have the ability to testify in court.

(R-50 p. 101, R-Ap. 122.) If the DA will not use an officer as a witness, the officer "cannot do the day-to-day work of policing as he had done previously." (R-50 pp. 101-102, R-Ap. 122-123.)

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, R-Ap. 127-128.) "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, Morales issued Personnel Order 2018-111 (R-4 pp. 2-3, R-Ap. 24-25.), along with a Complaint to the Police and Fire Commission (R-4 pp. 5-10, R-Ap. 27-32.), 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 and discharged for his failure to inspire and sustain the confidence of our community. (R-4 pp. 2-10, R-Ap. 24-32.)

Andrade timely appealed the Chief's determination to the Board. (R-4 p. 12, R-Ap. 34.) A hearing was held on December 18 and December 19, 2019 in two phases. Phase 1 involved an adjudication of guilt on the two charges, and Phase 2 involved a determination that the discipline, including termination, was warranted.

Testimony at hearing was largely consistent with the investigation. At the hearing, the Chief presented an expert defense attorney witness who testified as to how he would utilize the Facebook posts to impeach Andrade's credibility (just as SOP 685.15(A)(10) sets forth). (R-15 p.16, R-Ap. 36.)

At the hearing, Kent Lovern, Chief Deputy District Attorney for Milwaukee County, testified that he was asked by Captain Kavanagh to review the photos and posts made by Andrade and give his decision to whether he would, "in future criminal prosecutions, call Officer Andrade as a witness for the state in any of [the] prosecutions." (R-51 p. 71, R-Ap. 127.) Lovern "concluded that the posts—at least some of the posts were damaging enough to Officer Andrade's credibility that [he would] not use Officer Andrade in future prosecutions handled by the Milwaukee County District Attorney's Office." (R-51 p. 72, R-Ap. 128.) Lovern testified that in reaching this conclusion, Andrade's comment as to the "Mind of Jamal" video

> in particular suggest that any claim of excessive force by police that would be brought by an African American would be a dishonest claim and I think certainly create that impression that claims made by black people against police officers don't have credibility and I think certainly, combined with [the Kevin Durant post], which I believe the individual in the photo of the family

> basketball player, but it could very well have been—just as well have been any African-American male here in Milwaukee, really, in terms of the nature of what that was suggesting.

(R-51 p. 73, R-Ap. 129.) Lovern concluded that the District Attorney's office would need to turn over all of this information to the defense in any case in which [Andrade] was a witness, also known as *Brady*[7] material. (R-51 p. 77, R-Ap. 133.)

Notably, prior to the hearing, in November of 2018, Andrade's counsel had subpoenaed the then-current *Brady* list. He questioned Lovern about it during the hearing. (R-51 p. 84-87, R-Ap. 136-139.) In the categories on the *Brady* list, Lovern testified that Andrade would have been labeled "no testify." (R-51, 87, R-Ap. 139.) When asked about a scenario where the DA's one and only stay witness was on the "no call"/"no testify" list, Lovern testified that "if the case is built around that officer's work, that case will not be in a position—the case won't be prosecuted if it relies upon that officer." (R-51 pp. 106-107, R-Ap. 138-139.)

The Board found against Andrade in both phases by oral decisions rendered December 19, 2019. (R-52 pp. 308, 460-61.)

[7] As noted by the Court of Appeals, *Brady* disclosures refer to *Brady v. Maryland*, 373 U.S. 83 (1963). (P. App. 16)

A written decision followed on January 4, 2019. (R- 46, R-Ap. 14-23.)

A statutory appeal to Milwaukee County Circuit Court was filed January 18, 2019 (R-2, R-Ap. 13.), and a petition for writ of *certiorari* was filed March 19, 2019; the matters were consolidated into the *certiorari* case on April 4, 2019 (R-25). Briefing on the merits of the decision followed. (R-29; R-38; R-41.) 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 via a written decision dated November 18, 2019 (R-46, P-Ap. 14-23.)The trial court found that Andrade did not meet his burden to establish that the board exceeded its jurisdiction, or had 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. 14-23.)

On February 13, 2020, Andrade timely filed a Notice of Appeal, only as to the *certiorari* decision. (R-48.) The Court of Appeals affirmed the Board's decision to discipline and terminate Andrade on August 31, 2021. (P-App 5-39.) The Court of Appeals held that "the Board proceeded on a correct

theory of law in concluding that Andrade violated count two for Core Value 3.00." (P-App 25.) The Court of Appeals reasoned that the inability of Andrade to testify as a witness "is a consequence of his failure to inspire and sustain the confidence of the community and the harm he has done to the department's mission." (P-App 23.)

On September 30, 2021, Andrade filed a Petition for Review with this Court. The Supreme Court ordered that the matter be held in abeyance pending disposition of *Green Bay Pro. Police Ass'n v. City of Green Bay*, 2023 WI 33, 407 Wis. 2d 11, 988 N.W.2d 664 (*"Weiss"*). After issuing a decision in *Weiss*, this Court instructed the parties to submit letters on the impact, if any, on this matter. The Court then granted review as to the following issues:

1. Whether Andrade was afforded due process, and
2. Whether the statutory process was followed.

In reviewing whether Andrade was afforded due process, the Court granted review to explore whether the Chief provided an explanation of the evidence that supported the decision to discharge Andrade. Similarly, in reviewing whether the statutory process was followed, the Court granted review to

explore whether the complaint set forth the reasons for Andrade's discharge.

ARGUMENT

I. LEGAL STANDARDS

At the trial and appellate court level, and accordingly, in this Court, Andrade's appeal solely concerns Charge 2, which resulted in his termination from the department. He initially appealed that determination under two theories—a writ of *certiorari* and statutory review under Wis. Stat. § 62.13(5)(i). However, only the writ of *certiorari* is before this Court, because if the Board's decision is sustained in the statutory appeal to the circuit court, "the order of discharge, suspension, or reduction shall be final and conclusive in all cases." Wis. Stat. § 62.50(22).

"When reviewing a petition for a writ of *certiorari*, we review the board's decision, not the decision of the circuit court." *Vidmar v. Milwaukee City Bd. Of Fire Police Comm'rs*, 2016 WI App 93, ¶ 13, 372 Wis. 2d 701, 889 N.W.2d 443. The review at the appellate level is more limited than at the trial court level. When a trial court has disposed of a statutory appeal along with a *certiorari* appeal as happened here, this

Court's *certiorari* review is "is further limited to whether the Commission kept within its jurisdiction and whether it proceeded on a correct theory of law." *Umhoefer v. Police & Fire Comm'n of City of Mequon*, 2002 WI App 217, ¶ 12, 257 Wis. 2d 539, 547, 652 N.W.2d 412, 415 (citing *Herek v. Police & Fire Comm'n Village of Menomonee Falls*, 226 Wis. 2d 504, 510, 595 N.W.2d 113 (Ct. App. 1999)). This Court's review of these questions is *de novo. Umhofer* at ¶ 12.

"[W]hen used in conjunction with certiorari review, the phrase 'acted according to law' includes the common law concepts of due process and fair play." *Id.* at ¶ 19. It does *not* include statutory factors that were conclusively decided by the trial court. *Id.* at ¶ 12. However, this only means that Andrade must "be provided a hearing applying minimal due process or fair play standards…including the opportunity to confront and cross-examine adverse witnesses." *Id.* at ¶ 19, citations omitted.

Also included is a timely and adequate notice of the reasons for the discharge and an impartial decisionmaker. *State ex rel. De Luca v. Common Council of Franklin*, 72 Wis. 2d 672, 679, 242 N.W.2d 689 (1976). Wisconsin courts have previously held "the notice requirement of due process cannot

be defined with any rigid formula." *State ex rel. Messner v. Milwaukee County Civil Service Com.*, 56 Wis. 2d 438, 444, 202 N.W.2d 13 (1972). The courts have "stressed the reasonableness requirements of notice," focusing on that if the notice is "reasonable calculated…to apprise interested parties of the pendency of the action and afford them to present their objections," then the notice comports with due process requirements. *Id*. Further, Wisconsin courts have held that providing an officer with a letter merely stating that his conduct was "conduct unbecoming of an officer," but did not specify the conduct, "[was] not too vague to define a cause for discharge." *State ex. Rel. Richey v. Neenah Police & Fire Com.*, 48 Wis. 2d 575, 582, 180 N.W.2d 743 (1970). The *Richey* court reasoned that the charges or cause for discharge "need not be technically drawn nor meet the requirements of a criminal indictment." *Id*.

II. ANDRADE'S DUE PROCESS RIGHTS WERE PROTECTED BECAUSE ANDRADE HAD ACTUAL NOTICE THAT AN OFFICER'S ABILITY TO SERVE AS A CREDIBLE WITNESS WAS A CONCERN FAR BEFORE THE HEARING.

A. Officer Andrade was Afforded Full Due Process.

There is no dispute that Andrade was entitled to due process; rather, the dispute is whether Andrade's due process rights were protected. Andrade's argument relied on the three-factor test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (and as analyzed in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)).

There is no dispute regarding the first factor, the private interest that will be affected by the by the official action. The majority of Andrade's argument is rooted in the second *Mathews* factor: "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguard." *Mathews*, 424 US at 395.

Andrade has continuously asserted that he lacked meaningful notice of the issues presented for the hearing, and an explanation of the employer's evidence, in order to mount a defense. However, these continued assertions are incredible on their face and defy the many undisputed facts in the record. Andrade argues that the Board's reliance of his inability to testify in future police cases in imposing the discipline received violated his due process right (as the initial complaint did not

specifically enumerate that the inability to testify was a consequence of his actions). He argues that he "was not given any notice, written, oral or otherwise, that he was being fired for [his inability to testify]." Brief of Petitioner-Appellant-Petitioner at 15. However, Andrade had proper notice of the rules that he violated and the conduct alleged to violate them. The Court of Appeals appropriately "reject[ed] that Andrade was ambushed by the chief's case against him." (P-App p. 24 n 9.) "The records reflect that Andrade has actual notice that an officer's ability to serve as a credible witness was a concern far before the hearing." *Id*.

In his interview with Sgt. Hines on June 28, 2018 (before the complaint was issued), Andrade specifically acknowledged that he was "familiar with the department's standard operating procedure on social networking sites." (R-12 p. 13.) Not only did he acknowledge the procedure, but he was asked to read the subsection of the SOP that stated "Members must be aware that their communication on social networking sites can be used by a skilled defense attorney in impeaching testimony and association with their professional duties as a member of the department." (R-12 pp. 13-14.) As Andrade read out loud and acknowledged, the Department's

social media procedure specifically warned officers that social media communication could be used for impeachment in criminal trials. By acknowledging this procedure, Andrade had actual notice that his violations would lead to problems giving testimony.

Second, despite the Complaint reciting Core Value 3.00 and Guiding Principle 3.01 *in their entirety*,[8] Andrade claims he could not possibly know that the Department was concerned about his inability to testify, or a consequence of violating rules prohibiting behavior "that a reasonable person would expect that discredit could be brought upon the department" or that his behavior could create the "appearance of impropriety or corruptive behavior." At the very least, even prior to the Complaint, Andrade was aware of the public perception of himself, as he saw his name on CNN and ESPN, and "was

[8] CORE VALUE 3.00 - INTEGRITY: We recognize the complexity of police work and exercise discretion in ways that are beyond reproach and worthy of public trust. Honesty and truthfulness are fundamental elements of integrity. It is our duty to earn public trust through consistent words and actions. We are honest in word and deed.
REFERENCING GUIDING PRINCIPLE 3.01: Our behavior shall inspire and sustain the confidence of our community. Whether on or off duty, department members shall not behave in such a way that a reasonable person would expect that discredit could be brought upon the department, or that it would create the appearance of impropriety or corruptive behavior.

getting calls from everybody." (R-12 p. 35.) He returned his Milwaukee Bucks season tickets in response to the public perception and media attention towards him because he didn't "like to be portrayed as a racist nationwide." *Id*. At this time, he was aware that the public did not feel "inspired" of "confident" by his actions, based on what he saw about himself through the media and his corresponding actions of giving up his tickets.

Third, Andrade's counsel knew when the parties submitted their exhibit and witness list that Deputy DA Lovern could testify regarding Andrade's exclusion from acting as a witness. (R-8.) These materials were exchanged well prior to the hearing; Andrade cannot argue, then, that he did not have notice that evidence would be presented against him regarding his ability to testify.

In response to the witness disclosure, Andrade's counsel demanded and received prior to hearing the DA's list of current and former police officers determined by the DA to be subject to the *Brady* disclosures (the police officers for whom the DA would have an obligation to turn over information to discovery). (R-50.) While Andrade argues that knowing Lovern would testify and receiving the *Brady*

disclosures do not give Andrade notice, this argument is illogical and contrary to the thorough cross-examination of Lovern, by Andrade's counsel, concerning the *Brady* disclosures and testimony that occurred at the hearing. Further, notably, Andrade "fails to explain why he would request the *Brady* disclosure list if he was unaware that it was a concern." (P-App p. 24 n 9.)

The third *Mathews* factor is "the Government's interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. 319, 335. Andrade argues that this factor "weighs heavily in [his] favor" because "providing [him] with an opportunity to respond to the testimony allegation prior to his discharge from the Milwaukee Police Department would not have imposed any burden-significant or otherwise-on anyone involved." Brief of Petitioner-Appellant-Petitioner at 18. However, this argument is misplaced; as stated above, he had ample "opportunity to respond to the testimony allegation prior to his discharge." Andrade had notice that his ability to serve as a credible witness was at issue far before the hearing occurred.

Even at the hearing, Andrade's counsel was provided the opportunity to examine any witness that discussed Andrade's inability to testify, including Morales and Lovern. Both Morales and Lovern testified as to "the critical importance of being able to serve as a credible witness as a sworn police officer." (P-App p. 24.):

> The chief stated that the ability 'to testify in court is a tool that is needed, no different than a firearm.' He questioned how an officer who could not use a firearm or who could not testify 'be operational or useful to the Milwaukee Police Department?' Lovern testified that Andrade's social media posts would require his office to disclose this evidence as potentially exculpatory in any case in which he served as a witness."

Id.

Even assuming *arguendo* that Andrade did not have adequate notice before or during his hearing, Andrade has not presented an argument for how his hearing presentation at the hearing would have changed (because it would not).

It is impossible for the Board to respond to the implied allegation that Andrade's proposed pre-termination course "would not have imposed any burden—significant or otherwise" on the Board for the same reason: Andrade *was* provided with the appropriate information.

However, Andrade's post-hoc allegations, if accepted by this Court, would impose a significant burden on City of Milwaukee agencies and personnel—they would need to provide notice of not just the policies and rules violated, not just the consequences of the violations, not just the witnesses and documentary evidence they had against the employee (all of which were provided here) but they would need to anticipate every sentence of testimony and every question the board or hearing examiner may find interesting, lest the charged party complain later that they could not possibly have adequately prepared for the hearing. This is an unreasonable burden for the City, the Board, and any similarly situated government employer. "To require more than [notice, an explanation of evidence, and an opportunity to be heard] prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Laudermill*, 470 U.S. 532, 546.

Plainly put, there is absolutely no merit to the argument that Andrade did not know the basis for his discharge, or the evidence that would be presented against him, prior to the hearing and was unable to respond. That his inability to testify took on greater prominence at the hearing than it did in the

charging documents or prehearing exchanges is a function of the vagaries of trial. Accordingly, Andrade was provided due process.

B. The Board Proceeded on a Correct Theory of Law.

Andrade argues that "the Board proceeded on an incorrect theory of law with respect to how it handled Officer Andrade's disciplinary appeal" based on *Loudermill,* 470 U.S. 532. Brief of Petitioner-Appellant-Petitioner at 21. Andrade argues that "no documents prior to the hearing cited Officer Andrade's perceived inability to testify as having anything to do with his discharge." *Id*. However, Andrade's argument both misstates the documents available and conflates an *effect* of his violations (being unable to testify) with the *acts* constituting the violation (posting inflammatory content on social media).

Andrade was charged with violating two sections of the Code of Conduct: Core Value 1.00 (competence), referencing SOP relating to § 685.15(A)(5) for use of social networking sites; and Core Value 3.00 for integrity. Both of these counts related to his racist and inflammatory posts on Facebook. The Court of Appeals appropriately noted that "the Board properly considered Andrade's social media posts when assessing the entirety of Andrade's conduct alleged for both counts." (P-App

p. 23.) Andrade's focus on the perceived unfairness in the proceedings (i.e. that he was not charged with being unable to testify) is contradicted by "the Board's reasoning in its written decision show[ing] that it relied upon the theory of law within the Code of Conduct, Core Value 3.00 for integrity, in its analysis of count two." (P-App 25.)

Loudermill provides a public employee "the opportunity to present reasons, either in person, or in writing, why proposed action should not be taken is a fundamental due process requirement." 470 U.S. at 546. Andrade was provided with the PI-21 form (R-5 p. 17) and he provided a response to them (R-50 pp.52), prior to the filing of the charges against him.

Importantly, *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.

The relevant documents set forth explicitly and plainly the violations for which Andrade was eventually suspended and discharged and the factual basis therefore. 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 presented with the document and read it aloud. He was on notice that his potential inability to testify was a consequence of violating the rules.

Andrade argues that the alleged absence of an explicit mention of his ability to testify "denied [him] the ability to 'make any plausible arguments that might prevent the discipline'" under *Loudermill*. Brief of Petitioner-Appellant-Petitioner at 22 (citing *Loudermill,* 470 U.S. at 544).[9]

[9] The Brief utilizes quotation marks and no introductory signal, suggesting a direct quote.

However, Andrade misstates *Loudermill*, effectively changing its instruction on how to analyze a situation in the process. The actual quote from *Loudermill* is "Both respondents had plausible arguments to make that that might have prevented their discharge." *Loudermill*, 470 U.S. at 544. Notably, the word "any" is missing from the actual opinion, but inserted in Andrade's quote.

Andrade materially changes how one might interpret what "plausible arguments" means. With selective use of the quote, one could read *Loudermill* as requiring a charged party be able to make *any* argument to prevent discipline.[10] In effect, this would allow a charged party to respond to allegations with *any* argument—relevant or not, so long as it is "plausible"—and hope that it prevents discipline. Under this read, if the argument does not succeed, then the charged party could claim they thought of a new argument and if they did not make the argument, then they were not afforded due process, even if the charges have not changed. Andrade's manipulation of *Loudermill's* language is further apparent when he argues that

[10] Andrade also cites *Loudermill* on page 20 of his brief stating the "while the pre-termination process may be informal, it nonetheless requires that the employer give the employee an opportunity to make **any plausible arguments** that might prevent the discipline." (Emphasis in original.) This citation does not appear to be a direct quote.

"no where in [his] response to the charges was there mention about his ability to testify." Brief of Petitioner-Appellant-Petitioner at 22. Andrade's failure to include something in his response does not mean he did not have the *opportunity* to respond.

However, the *Loudermill* court did not intend to provide a party with opportunity to argue anything and everything and see what sticks. *Loudermill* provides that when a charged party has the opportunity to make "plausible arguments" that may prevent discipline, then they were afford due process. It does not provide for unlimited kicks at the cat to find an argument that succeeds. Only if the party had an argument that it was unable to make due to lack of notice should the court find the party was not afforded due process.

As discussed *infra*, Andrade had ample notice that his inability to testify was a consequence of his actions on multiple occasions and was able to respond to it on multiple occasions. Unlike the employee in *Loudermill,* he was interviewed, provided his explanation for the Facebook posts, and also provided a written response to charges, all before attending and presenting numerous arguments at a two-day trial before the Board. He was well acquainted with and responded in detail to

the allegations against him. Accordingly, and as the Court of Appeals held, the Board proceeded on the correct theory of law.

III. ANDRADE WAS PROVIDED WITH THE REASONS FOR HIS DISCHARGE AS REQUIRED BY WIS. STAT. § 62.50(13).

Officer Andrade was provided the reason for his discharge pursuant to Wis. Stat. §62.50. Wisconsin remains a notice pleading state. *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. Neither Wis. Stat. § 62.50 nor case law interpreting it has required more specific presentation.

If the Complaint was intended as a comprehensive presentation of the evidence, a hearing would not be necessary. But, 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 serious 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.

As stated in *State ex rel. Messner*, notice is not rigid, but notice must be reasonable. *State ex rel. Messner.*, 56 Wis. 2d at 444. As discussed at length above, Andrade was given ample notice, even pre-termination, that his ability to testify in state court could be an issue for trial. Regardless, the Complaint recited the grounds for his discipline and termination, all stemming from his social media posts that violated those policies.

Wisconsin courts have held that a complaint setting forth the sentence "conduct unbecoming of an officer" was not too vague to define a cause for discharge because the cause for discharge "need not be technically drawn nor meet the requirements of a criminal indictment." *State ex. rel. Richey*, 48 Wis. 2d at 582. The Complaint in this matter contained much more than only a statement that Andrade's conduct was unbecoming of an officer, and accordingly conforms with precedent.

The Court of Appeals appropriately noted that "Andrade's argument fails 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* disclosures and that the DA's office would not call him as a witness." (P-App p. 24.) Moreover, "The record reflects the critical importance of being able to serve as a credible witness as a sworn police officer." (P-App p. 24.)

Further, "Andrade's conduct undermined the confidence in the community with regard to his credibility as a witness and discredited the department." (P-App p. 25.) "Andrade's posts 'managed to repeat every negative stereotype plaguing big city police department, i.e. racism, use of excessive force, disregard for ethnic sensitivities, distrust of the public, and incurring excessive overtime.'" (P-App p. 25 (*citing* R-16 p. 14.)) Additionally, "the posts 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." ((P-App p. 25 (*citing* R-16 p. 14.))

Andrade's attempt to conflate a notice of a consequence for violating the Department's core principles—i.e. that he could no longer be called as a witness in criminal prosecutions—with notice of the violations themselves is misguided at best. The requirements of Wis. Stat § 62.50 were met and the Board's decision, along with the decisions of the courts below, should be affirmed.

CONCLUSION

Notably, it is undisputed that Andrade violated the rules of his profession and of the City of Milwaukee Police Department in an egregious way. The posts he made on Facebook were inflammatory, racist, and played into negative stereotypes about urban policing. The Board of Fire and Police Commissioners proceeded within its jurisdiction and according to law in making its determination to discharge Andrade. That determination should not be disturbed now. As set forth above, Andrade's due process rights were not violated because he had proper notice of the rules that he violated, the conduct alleged to violate them, and ample notice, in advance of the hearing, of what evidence the Chief intended to use against him.

Thus, for the reasons set forth, Respondent-Respondent City of Milwaukee Board of Fire and Police Commissioners respectfully requests that this Court sustain the Board's action in discharging Andrade and affirm the decision of the courts below.

Respectfully submitted this 14th day of August, 2023.

Electronically signed by
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CERTIFICATION

Certification as to Form and Length

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,865 words (utilizing the word count feature of Microsoft Word.)

Dated this 14th day of August, 2023.

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