STATE OF WISCONSIN
COURT OF APPEALS DISTRICT I
Case No. 2022AP1086

MICHAEL S. PEDEN

Petitioner-Appellant,

v.

CITY OF MILWAUKEE BOARD OF FIRE AND POLICE COMMISSIONERS

Respondent-Respondent.

BRIEF OF PETITIONER-APPELLANT

APPEAL FROM THE FINAL ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, HON. LAURA GRAMLING PEREZ PRESIDING, CIRCUIT COURT CASE NO. 20-CV-6800

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ISSUES PRESENTED FOR REVIEW

1. WERE HEO PEDEN'S DUE PROCESS RIGHTS VIOLATED?

   Answered by the Circuit Court: No.

2. DID THE BOARD EXCEED ITS JURISDICTION?

   Answered by the Circuit Court: No.

3. WAS THE BOARD'S DECISION TO TERMINATE HEO PEDEN BASED ON AN ERRONEOUS INTERPRETATION OF THE LAW, REPRESENTING ITS WILL, NOT JUDGMENT?

   Answered by the Circuit Court: No.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Oral argument is requested. Publication is appropriate, as this case meets the criteria of §§809.23(1)(a)(4) and (5), Stats.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal of the denial of a Petition for a Writ of Certiorari (App. 105) following the City of Milwaukee Board of Fire and Police Commissioners ("Board" or "FPC") decision (App. 101) to permanently discharge HEO Michael S. Peden ("Peden") from his employment as a City of Milwaukee ("City") Firefighter.

Statement of Facts

A. The Dismissed False Felony Allegation Against Peden

To fully appreciate the circumstances of June 5, 2020, a brief review of the history of Peden with the Milwaukee Fire Department ("MFD") is helpful. In 2017 a firefighter assigned to Peden's crew, Aleah Ellis, falsely accused him of sexual assault. After relatively little investigation Peden was charged with Second Degree Sexual Assault, a Class C felony punishable by forty years in prison. (R.9-85:20-25) The allegation was made close in time to an honest, albeit not very positive, review of the Ellis' job performance Peden was required to prepare as her supervisor. Ellis, along with Firefighter Jason Strzelecki, Assistant Chief Gerard Washington and Captain Sharon Purifoy, made statements to the Milwaukee Police Department investigators in support of the sexual assault allegations. As noted above, the allegations were untrue. (R.30-67; App. 107)

While the criminal prosecution was pending the MFD refused to turn over exculpatory evidence obtained as part of its employment investigation. The criminal case, pending for almost two years, was dismissed after transcripts of the interviews were turned over to the prosecutor. Peden was then permitted to return to his job but the employment investigation was still open. It remained open at the time of the June 5, 2020 events, and was closed on October 14, 2020, two days after Peden's disciplinary hearing.

When Peden returned to his job he was under strict orders not to discuss the pending investigation which had led to his prosecution. This continued through the Board hearing, placing limitations on his ability to call MFD witnesses who were similarly not permitted to speak about the matter.

B. Peden Returns to Work at the MFD

The felony sexual assault charge was dismissed on July 11, 2019. (R.9-84:17-24; 85:14-16) When Peden returned to work on July 23, 2019 he met with Assistant Chief Lipski ("Lipski"). (R.30:15-44; App. 107).[1] During the meeting Peden told Lipski he did not feel the MFD was necessarily a safe environment for him. Lipski told Peden to put his concerns on paper and ordered him not to have any discussions regarding the incidents under investigation with anyone other than the designated union representative until informed by the chief or assistant chief that the investigation is complete. This would include the Fire and Police Commission. (R.30-19; App. 107). When Peden identified his concerns in the F-105 document on July 25, 2019 Lipski had directed him to prepare he was verbally reprimanded and told to focus on getting back to work. (R.3-135).

[1] This audio file was requested but not produced by MFD until December 18, 2020, more than two months after the disciplinary hearing.

Peden advised his supervisors he could not work under Captain Sharon Purifoy who had supported the false allegations against him, nor with FF Ellis or FF Jason Strzelecki. (R.9-235:6-9) By checking his assignments in MFD's computer scheduling program, Telestaff, before he started each of his shifts, he was able to either avoid being assigned or obtain a trade such that he would never have to work with those individuals. (R.9-239:1-10)

C. The Events of June 5, 2020

On June 5, 2020 Peden checked Telestaff before starting his shift and confirmed Strzelecki was assigned to Station 12 that day, a different station than Peden was assigned to work.

Later that day Dispatch indicated the ambulance Peden and Acting Lt. Carlos Correa-Volkmann ("Correa-Volkmann") were in should go to Station 12. Peden advised Correa-Volkmann of his concern, and Correa-Volkmann contacted Battalion Chief Michael Cieciwa ("Cieciwa") but he had to respond to a call before they were able to complete the conversation. Correa-Volkmann then contacted Battalion Chief Gardner ("Gardner") and explained Peden's concern. Gardner told them they could go to Station 7. When Cieciwa returned from his call he countermanded Gardner's directive and ordered Peden and Correa-Volkmann to report to 12. Cieciwa knew or should have known Strzelecki was not at 12 as he had likely been the one to have reassigned Strzelecki that morning. (R.9-134:6-14)

Peden had already told Correa-Volkmann he would lay up if he was required to go to Station 12. (R.9-41: 22-25 and 42:1). Cieciwa acknowledged knowing of Peden's concern as Correa-Volkmann had advised him of Peden's intention to "lay up", which he explained as follows:

Cieciwa:	A "lay up" is our term for going on sick leave. So if someone calls and said, "hey, I am laying up," you know what that means. It is sick leave. It goes the same as saying "sick leave." So when Correa-Volkmann told me Mr. Peden was going to "lay up," that means he was going to attempt to use his sick leave balance to go home and remain paid until the next morning off of his sick leave hours instead of active regular duty pay.
Blumenfield:	If an employee becomes actually ill during the course of a shift, it is possible for them to go home on sick leave in the middle of a shift. Right?
Cieciwa:	Absolutely. It happens. It happens not super frequently, but it happens. (R.9-111:9-25)

There was thus consensus that once a member of the MFD indicated they wanted to lay up their request was to be honored without question. Peden's request should also have been honored. But it was not.

Additionally, Cieciwa believed that if he had told Peden that Strzelecki was not at Station 12 Peden would have gone to Station 12 without objection. (R.9-138:2-8)

Cieciwa agreed that both he and Peden had been mistaken, that there in fact had been a mutual mistake. (R.9-138:9-12) He also indicated that while he was waiting for Peden to arrive at Station 7, where Cieciwa's office was located, he could have quickly checked the Telestaff program during the three to five minutes he was waiting for Peden to arrive, or even after Peden arrived, but never did so. (R9-139:1-4) In fact, when he later called Car 3 and spoke to a Deputy Chief, he was immediately advised Strzelecki was not at 12. He knew Peden was having a stressful reaction to the reassignment order but chose to countermand Battalion Chief Gardner's approval of Peden going to Station 7, from which he could have covered any calls that might have come in while he was at Station 12. (R.9-138:9 – 141:12)

Peden was of the belief that rather than facing any possible discipline Cieciwa had given him approval to go home:

> Blumenfield: When you expressed that you wanted to lay up, were you, essentially, saying you wanted to go on sick leave?
>
> Peden: Yes.
>
> Blumenfield: And when [Cieciwa] said in response to your statement that you had – that you had to go to work at the firehouse that Strzelecki was at, that you'd rather go home, when he said, "then, go home," did you understand him to be giving you a directive that you were approved to go home?
>
> Peden: Yes.
>
> Blumenfield: Did you indicate if you refused to follow his direct order, that you would be subject to discipline?
>
> Peden: No. He didn't tell me I was going home unpaid until after Carlos Correa-Volkmann had left and I wasn't thinking clearly enough, with the stress I was under, to even consider that myself. (R.9-249:8-23)

Cieciwa knew he was not entitled to inquire as to Peden's reason for asking to lay up:

> Blumenfield: But when someone says that they want to take sick leave in the middle of the shift, the department isn't necessarily entitled to know what it is that is the cause, is it?
>
> Cieciwa: No.
>
> Blumenfield: And so you weren't entitled to say to Peden, "tell me what your reason for taking sick leave is," were you?
>
> Cieciwa: No.
>
> Blumenfield: In fact, your discussion with him is simply about his statement that he wouldn't go to 12, he'd

> rather go home, but within that "I'd rather go home, I won't go to 12, I'd rather go home," was a vast chasm of stressful concern that that individual didn't have any obligation to tell you about. Fair?
>
> Cieciwa: Fair. (R.9-142:20-25 to 143:1-9)

Assistant Chief Aaron Lipski ("Lipski") agreed with Cieciwa. When Peden mentioned to Correa-Volkmann he would lay up if required to go to station 12 a sick leave protocol should have been initiated:

> Blumenfield: So at the point that Mr. Peden told acting Lieutenant Firefighter Paramedic Carlos Correa-Volkmann that he wanted to lay up if he was required to go 12, Correa-Volkmann was obligated, under this policy, to initiate a sick leave protocol. Correct?
>
> Lipski: Yes. (R.9-177:24-25 and 178:1-4)

Lipski further acknowledged he was aware of other situations where individuals requested leave during a shift due to stress and were permitted to "lay up". (R.9-203: 8-16)

Peden was charged with being AWOL, yet the original entry in Telestaff was "unpaid time off". Lipski ordered the change without telling Peden. (R.9-198:2-20) He agreed the MFD policy for any department member charged therewith consisted of a 4-step process with the first step being an oral reprimand with no special duty for 30 days, and the 2nd step being a one-day suspension and doubling the no special duty and no trades period. (R.9-193:22-194:22; 196:6-13) Peden was not given the benefit of that progressive discipline.

Michael Bongiorno, the President of Local 215, the firefighters' union, testified no member had been disciplined for being AWOL with termination, or not allowed to "lay up" when having made such a

request. (R.9-229:8-22) He provided the Board with an example of a situation that MFD handled differently:

> Bongiorno: The one I can recall that has been brought to our attention is four hours of unpaid time, not sick leave. Someone was coming in for a four-hour trade. The driver of that firehouse didn't like that person, had a conflict with that person that was coming in. The battalion chief made arrangements for that person to leave the firehouse for four hours and they had another person from another firehouse come and act as drive for that four hours.
>
> Blumenfield: Was that person discipline(d) in any way?
>
> Bongiorno: No. (R.9-225:21-25 and 226:1-6)

Peden testified he had absolutely no expectation of termination as a probable consequence of asking to lay up. "Nobody has ever been fired for going home." Nor for being AWOL. In fact, under the circumstances he had no expectation he would even be subject to discipline. The following day he thought he may be reprimanded.

> Blumenfield: At the time that this discussion was ongoing, did you have an expectation or knowledge of the probable consequences of your conduct?
>
> Peden: None.
>
> Blumenfield: Why not?
>
> Peden: Nobody has ever been fired for going home. I wasn't in the right state of mind. I thought maybe with the circumstances as they are and what has been done to me in the past, that that would be taken into consideration. Apparently, I was wrong.
>
> Blumenfield: And do you know any other similar situations where individuals have violated the sick leave or AWOL orders and been subjected to suspension-- or termination?
>
> Peden: Termination, no.

> Blumenfield: You understand there might have been -- Let me ask you. Did you expect that there would be some potential discipline as a result of your failure to follow the directive to go to 12?
>
> Peden: Not at the time. After -- The next day when I was thinking about it, I thought there possibly could be maybe a reprimand or something, but I never thought it would be anything like this. (R. 3- 252: 12-25 to 253:1-13)

At no time did anyone with MFD advise him that he would be subject to termination for laying up. He noted his decision was not because he was unwilling to work, but rather because he felt he could not go to Station 12 due to the traumatic experience he had gone through. (R.9-262:20-24)

Lipski agreed there would have been no way for Peden to have such knowledge:

> Blumenfield: … Could Mr. Peden reasonably expect knowledge of the probable consequences of asking to lay up? Asking to take sick leave. That the probable consequence of that would be that he would be terminated?
>
> Lipski: If that is what happened, I would imagine no, he doesn't think that. (R.9-190:16-12)

Lipski further acknowledged he was aware of other situations where individuals requested leave during a shift due to stress and were permitted to go home, or "lay up" as the term is known in the MFD. (R.9-203:8-16)

This matter should never have been treated as a failure to follow an order to go to a particular station. Peden was treated differently than others who had sought to lay up mid-shift. Both Lipski and Cieciwa agreed Peden could not have known the potential consequence of his action would be discharge.

D. Peden's PTSD

Peden's psychotherapist, Dr. Jay Schrinsky, who has more than thirty years' experience and a subspecialty in counseling law enforcement officers and firefighters (R.9-209:20-23; 216:1-12), testified Peden had been diagnosed with Post-Traumatic Stress Disorder ("PTSD") due to the false allegations brought against him and being charged with a serious criminal offense.

When Peden was returned to work Schrinsky was concerned MFD had failed to perform a fitness for duty evaluation on Peden, given the history of what had occurred. (R.9-216:1-6) He noted Peden was hyper-vigilant and explained that one result of that condition was to check Telestaff to determine where each of his accusers were assigned before starting each of his shifts. (R.9-217:5-15)

Schrinsky noted Peden's feelings related to PTSD aren't necessarily rational feelings, but "based on the history of what happened, that there were allegations made that ostensibly were untrue and if they were able to do it then, what would stop them from doing it again?" (R.9-218:11-14) He explained to the FPC the impact of such a PTSD condition:

> Another characteristic of posttraumatic stress disorder are flashbacks or re-emergence of the feelings connected to the original episode. My concern would be on two levels. If he was exposed to Mr. Strzelecki, one would be his level of hyper-vigilance and whether or not he was, in fact, in physical harm as he believed he was. The other would be that as a result of the overwhelming stress, I would question whether or not his decision-making and concentration would be impaired which might become a safety issue with the job that he has. (R.9-220:3-21)

Upon being questioned about his testimony by one of the FPC members the following colloquy occurred:

> Wilson: I guess I am a little confused as to capable. If I am capable of picking up this pencil, but it is not in my best interest -- I am kind of confused. Could you elaborate on that?
>
> Schrinsky: If that pen is red hot, you are capable of picking it up, but it is certainly not in your best interests. (R.9-222:10-16)

Peden had actually called Schrinsky for assistance on June 5, 2020 to help him deal with the situation and reached him. But Peden had to go out on a call. (R.9-214: 10-14) He did his job, but then was placed in an untenable situation, even after his request to go to a station other than 12 had been approved by Battalion Chief Gardner.

Union President Michael Bongiorno noted how individuals can be suffering from other than physical pain or conditions:

> "People are not only physically hurt, but they can be emotionally and mentally hurt and need to leave work because they can't concentrate on work would be my opinion and the department, per the contract, has the authority to ask any member at any time using sick leave to produce a sick slip." (R.9-233: 2-13)

At no time did the MFD request that Peden provide a medical certificate, the equivalent of a "sick slip". (R.9-180:17-23)

E. Discovery Violations

Attorney Rebecca Coffee represented Peden against the criminal charge. She noted that after the criminal case was dismissed she was required to return all of the records produced under the protective orders to the City. (R. 84:25-85:1-6) She noted the seriousness of the original allegations supported, falsely, by Strzelecki:

> "[Peden] was facing a 40-year potential maximum possible penalty and lifetime registration as a sex offender if he were convicted of the offense that he was charged with. ….I view somebody who is fighting a charge an accusation that seriously as fighting for their freedom, fighting for their life." (R.86:20-25 and 87:1-2)

Peden timely appealed the order of discharge. After having previously sought the documents relating to the sexual assault case, including all departmental interviews including those of his accusers, Peden reiterated that request on September 4, 2020 and additional documents relating to the June 5th incident.

Despite having the materials readily available, as they had all been produced previously to Peden but he was forced to return them after the criminal charge was dismissed, Rohlfing and Lipski refused to provide any documents pursuant to the request. On September 21, 2020, seventeen days after the reiterated request for production of documents and the recordings of the interviews, Lipski advised he would respond as soon as practicable. He failed to do so.

On October 2, 2020, just ten (10) days prior to the disciplinary hearing, Peden filed a Motion to Compel Discovery (R.3:49-73; App. 103), seeking production of relevant documents and other materials which he deemed essential in order to properly defend against the pending disciplinary charges. The FPC denied the motion, claiming it had no ability to compel any such production. (R.3-159).

Over a month having passed since his Open Record Request had been filed on September 4, 2020, and no documents or other materials of any sort having been produced, Peden filed a Motion for Immediate Production of Exculpatory Evidence on October 11, 2020, the day before the hearing (R.3:108-111; App. 104). That motion was considered by the FPC panel at the beginning of the hearing on October 12, 2020. (R.9-25:1-25) Peden told the FPC he was being denied due process of law as a result of the department's refusal to provide relevant documents and other materials essential for Peden to properly defend himself against the charges. Lipski thereupon opened his laptop computer and produced several of the requested records on the spot. (R9:25-26)

This very limited production was wholly inadequate and prevented proper review and an opportunity to investigate, evaluate or utilize the records in preparation for the FPC hearing. The vast majority of the requested materials were not produced at the hearing, including audio of critical oral and written communication between administrators which would bear directly on the June 5th incident, and have yet to be produced.

At the conclusion of the hearing, the FPC sustained the charges against Peden and ordered his discharge despite Peden having had no prior discipline during his ten years of excellent service to the citizens of Milwaukee as a member of the Milwaukee Fire Department. (R.3-165) In doing so, the FPC failed to take into proper consideration the dictates of § 62.50 (17)(b)(7) Stats. and failed to adhere to the usual policy of progressive discipline, demonstrating the exercise of its will, not its judgment.

Several months following the FPC hearing, the MFD finally produced records relating to their internal investigation. Copies of a selected portion were submitted to the Circuit Court. (R.30; App. 107)

On October 23, 2020, the FPC issued a written Decision and Order (R.3:154-166; App. 101) Peden timely filed a statutory appeal pursuant to § 62.50 (20) Stats. by which he sought review of the FPC's improper discharge decision. He subsequently sought a Writ of Certiorari in order to be able to have the court review aspects of the FPC Decision not otherwise reviewable under the statutory appeal, including that the FPC proceeded on an incorrect theory of law, exceeded its jurisdiction, lacked sufficient evidence to reach its decision, and acted in an arbitrary, oppressive and unreasonable manner representing its will rather than its judgment by improperly discharging Peden when such was not proper; by denying Peden a full and fair hearing due to the deprivation of due process caused by MFD's failure to provide documents and other materials properly and timely requested; by applying an incorrect burden of proof and theory of law; by making findings not supported by the record; and by ordering Peden's discharge when such was, unreasonable and not supported by exculpatory records.

The Circuit Court denied Peden's statutory appeal, and his request for a writ of certiorari, finding in favor of the Board. In its decision (R.33, App. 102), the Circuit Court made a number of references to Peden not having produced certain elements of evidence. Not only did this constitute burden-shifting, it also emphasized the predicament into which Peden was placed by the MFD's refusal to provide the critical documentation prior to the FPC hearing, and thus in the record submitted to the Circuit Court.

Peden was thus incapable of fully developing his claim that a false narrative had been created by MFD leadership so as to accomplish Peden's discharge. The MFD's withholding of critical information directly impacted Peden's actions on June 5th and denied him a fair hearing and led to his termination.

Procedural Status

HEO Michael S. Peden sought a statutory appeal under §62.50(20), Stats., as well as a Petition for Writ of Certiorari. The appeals were consolidated, argued and briefed before the Honorable Laura Gramling Perez, Milwaukee County Circuit Court, Branch 32. The "trial" as the proceeding is designated in the statute, consisted of briefs filed by the parties together with two hearings, the first held on November 30, 2021 wherein Peden sought, *inter alia*, either expansion of the record to include documents received after the discharge hearing, or remand to the Board so that further evidence could be taken; and the second on January 26, 2022. Judge Laura Gramling Perez issued a written decision on March 23, 2022 in favor of the Board. (R.33; App. 102) Peden timely appealed the Circuit Court's denial of the Petition for a Writ of Certiorari to this Court.

ARGUMENT

I. SCOPE OF CERTIORARI REVIEW

A. Standard of Review

This matter comes before this Court after having been presented to the Circuit Court on both a statutory appeal and a certiorari review. The Circuit Court ruled in favor of the Board on both. § 62.50(22), *Stats*.; *Gentilli v. Board of Police and Fire Comm'rs of Madison*, 2004 WI 60, ¶14, 272 Wis. 2d 1, 680 N.W.2d 335.

Peden has appealed the denial of his writ of certiorari. When reviewing a petition for a writ of certiorari, the Court reviews the Board's decision, not the decision of the Circuit Court. *State v. Horn*, 226 Wis. 2d 637, 652, 594 N.W.2d 772 (1999); *Kraus v. City of Waukesha Police*

& Fire Comm'n, 2003 WI 51, P10, 261 Wis. 2d 485, 662 N.W.2d 294; *Herek v. Police & Fire Comm'n Vill. of Menomonee Falls*, 226 Wis. 2d 504, 510, 595 N.W.2d 113 (Ct. App. 1999).

The Writ of Certiorari is available to permit a superior court to exercise control over inferior courts and tribunals. *State ex rel. Kaczkowski v. Fire & Police Comm'rs*, [*6] 33 Wis. 2d 488, 499, 148 N.W.2d 44, 49, *cert. denied*, 389 U.S. 848 (1967).

Where, as here, the circuit court has ruled in favor of the FPC on the statutory appeal, from which there is no further appeal, this court is limited to consider: whether the commission kept within its jurisdiction and whether it proceeded under a correct theory of law. *State ex rel. Smits v. City of DePere*, 104 Wis. 2d 26, 31-32, 310 N.W.2d 607, 609 (1981). In this manner the court avoids a double review of the just cause determination. *Kaczkowski*, 33 Wis. 2d at 501, 148 N.W.2d at 50-51.

The scope of review in certiorari extends to whether the board acted "according to law", referring not only to applicable statutes, but also to guarantees of due process. *State ex rel. Wasilewski v. Board of Sch. Dirs. of Milwaukee*, 14 Wis. 2d 243, 263, 111 N.W.2d 198 (1961). The determination to be made is:

> "…whether the Commission acted according to law; when used in conjunction with certiorari review, the phrase "acted according to law" includes the common law concepts of due process and fair play." *State ex rel. Lomax v. Leik*, 154 Wis. 2d 735, 740, 454 N.W.2d 18 (Ct. App. 1990), *Umhoefer v. Police & Fire Comm'n*, 2002 WI App 217, ¶19, 257 Wis. 2d 539, 652 N.W.2d 412.

In this appeal, then, the review is solely to those same two issues: whether the commission acted within its jurisdiction and whether it acted according to law, including guarantees of due process. Peden agrees the Board had jurisdiction. But it Board failed to act according to law. It also failed to provide Peden the requisite due process guarantees. These

include a fair and impartial hearing, to which he was entitled as provided for by his substantive and procedural due process rights guaranteed by the 14th Amendment to the U.S. Constitution, and Article I, Section I of the Wisconsin Constitution.

B. The Circuit Court Decision on the Writ of Certiorari

The Circuit Court held that Peden had failed to pursue his claims under his Complaint and Petition for a Writ of Certiorari. (R.33:12) This is an erroneous finding and demonstrates a failure to appreciate and/or consider the nature of the arguments made at the trial court level. Interpretation of the word "trial" in protective service disciplinary matters has befuddled many a trial court, as there is no clear definition. Most courts interpret it as either providing for briefs, a review hearing based upon the hearing record, or some combination of the two. If the briefs are to serve as the only opportunity for the parties to develop their positions, such is made clear. In this case the court set a briefing schedule but did not indicate it would be the only opportunity for presentations and argument.

On November 30, 2021 the court conducted what it referred to as a Certiorari Review hearing. (R.32; App. 106) However, the matter had not been noticed as that, and the parties were permitted to address whether the court would consider supplementing the record with additional documents that has been turned over to Peden well after the hearing (R.30; App. 107), or, in the alternative, to remand the matter for further evidence to be taken pursuant to § 62.50 (21) *Stats.*

Peden addressed the court with regard to his due process claims, making them a part of the evidentiary record regarding the certiorari review. (R.32:6-16) The court denied both requests, holding it would not permit any argument at the "trial" hearing, which was set for January 26, 2022, on any of the claims made in the Complaint and Petition for a

Writ of Certiorari because it did "not usually hear arguments on writs of certiorari" …as it did not "believe additional argument on the issue of certiorari is needed." (R.32:34)

In both Peden's initial brief (R.26) and his reply brief and affidavit (R.29, 30) he set forth claims relating to due process and argued the Board acted contrary to law regarding production of documents as well as having prevented Peden from presenting any information about the investigation relating to the criminal charge against him which had been dismissed. The Circuit Court's ruling that Peden had abandoned the certiorari review (R.33:12) is incorrect. It is of import to note that an appellate court does not review the decision of the Circuit Court on the certiorari issue, but rather the decision of the Board.[2]

Peden also addressed the limited nature of the presentation due to improper actions of the Board in blocking production of requested discoverable materials, not only through open records requests over a period of more than a year prior to the hearing but also through direct follow-up with MFD a month before the hearing, ten days before, and again on the morning of the hearing, to minimal effect.

II. THE BOARD VIOLATED HEO PEDEN'S RIGHT TO DUE PROCESS AND A FAIR HEARING

A. Peden Was Entitled to Due Process Protections

HEO Peden "was entitled to the full panoply of due process protections" including the right to timely and adequate notice, the full opportunity to be heard and a decision by a neutral decision-maker. *Sliwinski v. Bd. of Fire & Police Comm'rs of City of Milwaukee*, 2006

[2] The finding of the Circuit Court that Peden had abandoned the certiorari matter was erroneous, as Peden developed several critical aspects of the Petition for the Writ relative to due process in both briefs and arguments at both the motion and trial hearings.

WI App 27, ¶13, 289 Wis. 2d 422, 435, 711 N.W.2d 271; *Milwaukee Dist. Council 48 v. Milwaukee County*, 2001 WI 65, ¶51, 244 Wis. 2d 333, 627 N.W.2d 866. He is "not relegated to a watered-down version of constitutional rights." *Driebel v. City of Milwaukee*, 298 F.3d 622, 637 (7th Cir. 2002) quoting *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).

To establish a due process violation, HEO Peden must show he had a property interest and that he was deprived of that interest without due process. *Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs of City of Milwaukee,* 787 F. Supp. 2d 888, 895 (E.D. Wis. 2011). HEO Peden had a property interest in his continued employment as a City of Milwaukee Firefighter pursuant to § 62.50 *Stats.* absent a finding of "just cause" supporting discipline. *Id*.

HEO Peden was deprived of that interest when the Board upheld his discharge from the Department. (R.9; App. 01). That deprivation was without due process.

B. The Board Violated HEO Peden's Due Process Rights When He Was Deprived of the Opportunity to Present All Relevant Materials and Present a Full Defense

Due process includes the full opportunity to be heard. *Milwaukee Dist. Council 48 v. Milwaukee County*, 2001 WI 65, ¶51. That "full" opportunity "includes the right to present a complete defense..." *Estate of Derzon*, 2018 WI App 10, ¶42, 380 Wis. 2d 108, 132, 908 N.W.2d 471, 483 *(Emphasis supplied)*. The governing statute in this case, §62.50 (16), *Stats*., incorporates that notion by authorizing the Board to compel "the production of records relevant to the trial and investigation.

> In the course of any trial or investigation under this section each member of the fire and police commission may administer oaths, secure by its subpoenas both the attendance of witnesses and the production of records relevant to the trial and investigation and compel witnesses to answer and may punish

> for contempt in the same manner provided by law in trials before municipal judges for failure to answer or to produce records necessary for the trial. The trial shall be public and all witnesses shall be under oath. The accused shall have full opportunity to be heard in defense and shall be entitled to secure the attendance of all witnesses necessary for the defense at the expense of the city. §62.50(16), Stats. (Emphasis added).

That legal principle is critical because the firefighter's appeal hearing before the Board is the "main event not a tryout on the road." *In re Disciplinary Charges Against Younglove*, 218 Wis. 2d 133, 141, 579 N.W.2d 294, 297 (Ct. App. 1998) quoting *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 575, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985) *(Internal quotations omitted)*. Yet, HEO Peden never enjoyed that opportunity because he was deprived of the full hearing to which he was entitled. For that reason alone, remand is required.

Peden began his efforts to obtain documents shortly after the criminal charge was dismissed. He continued to seek those documents both before and after June 5, 2020. Another attorney was also seeking many of the same materials, with a similar lack of success.

On October 2, 2020, ten days before the hearing, Peden filed a Motion to Compel Discovery and accompanying Affidavit of Attorney Charles S. Blumenfield (R.3:51-58; App. 103) in which he sought to have the Board compel the MFD to turn over various documents relating to both the MFD investigation of the allegations which related to the criminal prosecution, and those documents and other materials which were deemed essential to Peden properly preparing his defense. Rather than seeking only documents requested by an Open Records Request, Peden requested the Board issue "an order requiring the City to provide discovery, disclosure and inspection of all documents essential to a full and fair presentation of all issues relating to the pending disciplinary action." *Id.*

At the Scheduling Conference on October 5, 2020 the Board's Hearing Examiner, Rudolf Konrad, denied Peden's motion. In its decision the Board memorialized the rejection. (R.9:3; App. 101) The Board mischaracterized the motion and ignored Peden's efforts over more than a year to obtain the requested documents. In denying Peden's motion the Board stated:

> Most of the documents concerned an investigation into another matter that occurred before the incident that gave rise to this discipline. The motion was denied because the Fire and Police Commission has no authority to enforce a public records request and *Wis. Stats.* Sec. 62.50,p [*sic*] does not provide for discovery practice. (R.9-3)

But §62.50 (16), *Stats.* does provide the Board with the power to issue subpoenas to compel production of documents. It failed to do so. When a few of the items were provided on the day of the hearing it became trial by surprise.

When Peden was given his notice of discharge the Chief was obligated to provide Peden with "exculpatory evidence in the chief's possession related to the discharge or suspension." *Id.* He failed to do so.

When no documents or other materials were forthcoming prior to the hearing, Peden brought a Motion for Immediate Production of Exculpatory Evidence (R.3:110-111; App. 104) on the morning of the hearing. A brief break was taken during which Deputy Chief Lipski was able to produce a number of documents, but by no means all, from his laptop computer. (R.9:25-27)

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." §904.01, *Stats.* What HEO Peden tried to introduce was "relevant" under that standard, as it directly related to the reason for his decision to "lay up".

In Wisconsin "admission of testimony is allowed if the testimony tends to prove a material fact." *State v. Denny,* 120 Wis. 2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984). Peden sought to obtain and present documents and other discoverable materials to assist in the presentation of his defense, including the difficulty he had been subjected to by the MFD in the criminal proceeding, and his resultant PTSD. Not only did the Board prevent Peden from obtaining the critical materials relating to the falsehoods perpetrated by existing MFD members and supervisors, it also blocked his efforts to provide the Board with the history of his battle to prevent a serious felony conviction from absolutely ruining is life.

Peden was able to present limited testimony from Atty. Rebecca Coffee, who successfully defended him in the criminal matter, and from Dr. Jay Schrinsky, who had counseled him, their testimony was necessarily incomplete as it could not fully address material facts related to both the previous investigation and the current one.

By failing to provide Peden with the requested documents, save for a few that were provided on the morning of the hearing with little opportunity to review them and no opportunity to conduct any investigation related to them, Peden was denied due process and prevented from having a fair hearing.

III. THE BOARD'S DECISION TO TERMINATE HEO PEDEN WAS BASED ON AN ERRONEOUS INTERPRETATION OF THE LAW, REPRESENTING ITS WILL, NOT ITS JUDGMENT

In several material respects it appears the FPC failed to proceed on a correct theory of the law. Peden was unable to present his full defense as the MFD had blocked him from obtaining critical materials, at least

some of which addressed the seminal issue in the matter: why was Peden unwilling or unable to report to Station 12 on June 5, 2020.

A. Discovery

As previously noted, the FPC denied Peden's request for assistance with obtaining discovery prior to the hearing. In doing so, the FPC's Hearing Officer, Rudolf Konrad, stated incorrectly the Board had no authority to do so. He was wrong, and later sought to clarify his misstatement by claiming that he, as an individual, could not order the MMFD to turn over any documents or other discoverable materials.

MFD had a reason to obfuscate—it had mishandled an employment investigation that had been pending since 2017 and remained open on the date of the hearing. This despite the allegation of criminal wrongdoing having been dismissed by the State of Wisconsin once discoverable materials were finally obtained. Although Peden had been exonerated and permitted to return to his job as a Heavy Equipment Operator in July 2019, MFD did nothing to close out the investigation and charge those who had made false reports or provided false information regarding the allegation.

At the time of the hearing Peden remained under a directive issued by MFD limiting what he could say about the matter. Even when asked direct questions by FPC members toward the close of the hearing, he had to tell them he could not respond fully because of said directive. (R.9-269-270).

The FPC's failure to address the issuance of a subpoena to MFD prior to the hearing pursuant to § 62.50 (16) *Stats. which reads in pertinent part:*

> …In the course of any trial or investigation under this section **each member of the fire and police commission may** administer oaths, **secure by its subpoenas** both the attendance of witnesses and **the production of records relevant to the trial and investigation**, and compel

> witnesses to answer… (Emphasis supplied) § 62.50 (16) *Stats.*

The PFC's outright refusal to provide the relief Peden requested perpetuated the trial by ambush scenario which developed.

On the day of the FPC hearing Peden was forced to present an additional Emergency Motion pleading for copies of additional materials he had been denied. Among those were two audio recordings his counsel had no opportunity to listen to, interpret, or use as part of the proceeding. In a matter so unusual there had never been anything like it in the history of the department, the limitation on production of relevant materials constituted action contrary to law by the FPC and prevented Peden from having a fair and impartial hearing of the full controversy.

B. *Production of Discovery Materials on the Day of the Hearing Constituted Trial by Ambush*

It is well understood that litigants are to avoid trial by ambush by refusing or simply failing to turn over relevant materials that should have been provided but were not. This process is, if anything, aggravated by the failure of the hearing entity to fail to act when proper request is made. As noted above substantial efforts were made prior to the hearing to obtain discovery materials from MFD prior to the hearing, to no avail. TFPC failed to guarantee Peden's due process rights and in so doing acted contrary to law.

C. *The FPC's Failure to Permit Inquiry and Testimony into the Prior Investigation Prevented Peden from Obtaining a Full and Fair Hearing*

The FPC, through objections offered by its Hearing Officer, and by sustaining the City's objections, prevented Peden from offering testimony and evidence relating to the prior investigation. One such episode occurred during Lipski's testimony. He acknowledged he had

"nothing to compare this situation to." (R.9:173) When asked if the prior investigation still being open meant no action had yet been taken against Jason Strzelecki the FPC barred further inquiry into anything related to that open investigation, which just happened to include everything Peden had been subjected to and made to fight for his life, declaring it irrelevant. (R.9:173-175)

The FPC, in ordering Peden not to pursue that line of inquiry because it was not relevant acted contrary to law and denied Peden the right to a fair hearing and due process.

D. The FPC's Decision Ignored the True Impact of PTSD on HEO Peden

One consequence of the FPC's decision to block inquiry into the sexual assault allegation was to eliminate the opportunity for Peden to fully develop the PTSD issue. While it is true, as noted above, he was able to present testimony from Dr. Jay Schrinsky, who noted that while it may have been possible for Peden to go to Station 12 on June 5, 2020, it would not be in the best interest of either Peden or the MFD for that to occur.

Peden, however, was prevented from asking Lipski or any of the other witnesses any questions about the matter, as MFD and the FPC hid behind the ruse that since the matter was still open all who had knowledge of it were barred from speaking about it. Peden noted that as indicated above when he had to withhold testifying about those matters. This action was contrary to law and the concept of a fair hearing and due process of law.

CONCLUSION

Mr. Peden has a protected property interest in his continued employment as a firefighter for the City of Milwaukee. The FPC acted contrary to law and denied Peden due process of law. For the reasons set forth above Peden respectfully requests that the order of the Board be set aside and held for naught, and the matter be returned to the FPC for a new hearing premised on the basic principles of due process and a fair hearing.

Dated this 25th day of September, 2022.

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FORM AND LENGTH CERTIFICATION

Pursuant to §809.19(8)(d), Stats., I hereby certify that this Appellate Brief conforms to the rules contained in §§809.19(8)(b) and (c), Stats., for a brief produced with a proportional serif font. The length of this brief is 8,188 words.

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ELECTRONIC BRIEF CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of §809.19(s), Stats.

A copy of this certificate has been served with the court and all opposing parties via electronic filing.

Electronically signed by Charles S. Blumenfield
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APPELLANT'S APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as 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 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.

Electronically signed by Charles S. Blumenfield
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INDEX TO APPENDIX

ELECTRONIC APPENDIX CERTIFICATION

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of §809.19(13), Stats.

A copy of this certificate has been served with this appendix via electronic filing with the court and served on all opposing parties.

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