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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2022-AP-1086**

MICHAEL S. PEDEN,

Petitioner-Appellant,

v.

CITY OF MILWAUKEE BOARD OF
FIRE AND POLICE COMMISSIONERS,

Respondent-Respondent.

BRIEF OF RESPONDENT-RESPONDENT

**APPEAL FROM THE FINAL ORDER ISSUED BY THE MILWAUKEE
COUNTY CIRCUIT COURT
THE HONORABLE LAURA GRAMLING PEREZ**

Circuit Court Case No. 2020CV6800

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STATEMENT OF ISSUES

- I. Did the circuit court properly dismiss Peden's certiorari appeal when he failed to develop the argument with the circuit court?

The circuit court answered: Yes.

- II. Whether Peden was afforded due process during the appeal hearing?

The circuit court did not directly address the due process argument Peden now raises and develops for the first time on appeal, however should this Court address this issue, this Court should respond: Yes.

- III. Whether the Board applied the correct theory of law by affirming the fire chief's decision that Peden should be terminated by violating fire department rules for disobeying orders from a superior?

The circuit court concluded: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

The Respondent requests neither oral argument nor publication. The briefs in this matter can fully develop and meet the issues on appeal such that oral argument is not necessary. Wis. Statute § 809.22(2)(b). Furthermore, publication is not appropriate based on Wis. Stat. § 809.23(1)(A).

STATEMENT OF THE CASE

Nature of the Case:

This case concerns the written decision of the circuit court dated March 28, 2022 to deny Michael Peden's request for certiorari review. Peden filed a statutory appeal under Wis. Stat. § 62.50 and a certiorari review action seeking judicial review of the City of Milwaukee Board of Fire and Police Commissioners' ("FPC" or "Board") findings and decision. The circuit court affirmed the decision of the Board to terminate Peden's employment. This is an appeal of the denial by certiorari of the circuit court, the Honorable Laura Gramling Perez, who found that the evidence supported the Board's decision terminating Peden from the MFD.

Peden claims he is entitled to this certiorari appeal, despite the circuit court's written decision that he abandoned his request for certiorari review based on his failure to develop the issue in either his opening or reply briefs. As will be explained below, this Court should not have the competency to address an issue Peden failed to raise with the circuit court however, even if this Court takes the extraordinary step to address the certiorari appeal, a review of the record on this

matter, the decision of the Board, and the circuit court leads to one conclusion; that Peden violated sixteen MFD rules and his dismissal was based on the correct application of law and consistent with due process.

Statement of Facts

The underlying facts that served as a basis for Peden's termination are not complicated. However, there are some material facts that Peden omits in his statement of facts section to the Court. Accordingly, the Respondent submits the following facts in support of their response.

The basis for Michael Peden's termination stems from an incident that took place on June 5, 2020, during periods of civil unrest, however, there was a sequence of events years earlier that led to his discipline.

In September 2017, the Milwaukee Fire Department initiated a harassment and intimidation investigation into Peden's conduct with another female firefighter. R. 3 at 123-124. The Milwaukee County District Attorney's Office later issued felony charges against Peden based on the incident. *Id.* The charges were eventually dropped in 2019.¹ *Id.* During the nearly two years of pending criminal charges, Peden was placed on administrative leave. After he was reinstated, in July 2019, Peden filed a formal complaint, titled "Complaint Against Those Who Framed Me." *Id.* at 126. Amongst others, Peden accused firefighter Jason Strzelecki of framing him during the MFD Investigation. *Id.* at 127.

¹ Peden asserts in his brief that the criminal allegations were "untrue." (Pet. Br. at 2.) There is no evidence within the administrative record, other than Peden's repeated insistence to support this contention. He cannot claim that the allegations were false as a matter of fact, however, he can state that the district attorney's office dismissed the charges without prejudice.

A. June 5, 2020

On June 5, 2020, Heavy Equipment Operator Michael Peden, who was trained as a paramedic was scheduled to work a 24-hour shift beginning at 8:00 a.m. until 8:00 on June 6, 2020. *Id.* at 146. He began his shift at Station 11 located at 2526 Kinnickinnic Avenue. *Id.* Peden was assigned to Paramedic Unit 15 (“MED. 15,”) along with Acting Lieutenant Carlos P. Correa-Volkman (“FF Correa-Volkman.”) Based on potential disturbances that night due to civil unrest, the MFD initiated Rally Command, which is an emergency Task Force Command. *Id.* The Task Force command responds to troubled areas, or “hot zones,” while the remaining MFD units cover a larger area than usual. *Id.* Assistant Chiefs Aaron Lipski and David Votsis commanded the Task Force. *Id.* at 147. Peden in his brief has ignored the fact that June 5, 2020, was not a typical day within the MFD, as the department was responding to civil unrest due to the protests. (Pet. Br. at 4.) Peden has omitted the fact that the order he received was via the Rally Command. *Id.*

On June 5, 2020 that night, protestors were engaged in a route that potentially would block the street in front of Station 11, thereby interfering with the department’s ability to dispatch vehicles and respond to emergency calls. *Id.* at 147. Rally Command ordered MED 15 (Peden and FF Correa-Volkman) to go to Station 12, located at 2130 West Oklahoma Avenue. *Id.* Assistant Chiefs Lipski and Votsis issued the order. *Id.* The order was then dispatched to the Firefighter Deputy Chief, Battalion Michael Ciecwa, and FF Correa-Volkman.

Id. Peden in his brief has ignored and minimized the fact that the order was issued from supervisors within the MFD. (Pet. Br. at 4.)

In response to the order, Peden informed FF Correa-Volkman that he would not go to Station 12 because of the issues he had with FF Strzelecki, and that he would “lay-up,” if he had to go to station 12, (“lay up” is a MFD term for taking sick leave.”) *Id.* During the appeal hearing, Peden indicated that he checked the department’s Telestaff site that morning and it showed FF Strzelecki assigned to Station 12. *Id.* at 147. Peden did not give any other reason not to report to Station 12. *Id.*

FF Correa-Volkman testified that he called his superior, Chief Michael Cieciva to inform him that Peden refused to go to Station 12 because of FF Strzelecki’s presence. *Id.* at 147. FF Correa-Volkman was not able to have a full conversation with Cieciva regarding the matter at that time due to the Chief responding to another phone call, however, FF Correa-Volkman understood that the command to report to Station 12 was still valid. *Id.*

FF Correa-Volkman then called Chief Gardner and explained to him that Peden did not want to work with Strzelecki and he would “lay up,” if the assignment were not changed. *Id.* Gardner instructed him to go to station 7 instead, and advised he would notify the dispatch. *Id.*

While en route to Station 7, Chief Cieciva called and advised Correa-Volkman that he would proceed to station 7 to discuss the matter with Peden in person. *Id.* While present at Station 7, Chief Cieciva and Peden discussed the

matter out of the presence of FF Correa-Volkman. *Id.* Peden continued to state that he did not want to be assigned to Station 12 based on a conflict with FF Strzelecki. *Id.* at 148. Peden never indicated that he was unable to do the job or that his safety was endangered. *Id.*

Chief Cieciva who continued to monitor the events, did not consider Station 7 a safe operational site and noted there was no room to secure MED 15 inside the firehouse. *Id.* at 148. Cieciva feared that the nearby protest group would hamper the ability of rigs at Station 7 to travel south or east in response to calls. *Id.* at 148.

Chief Cieciva explained to Peden that he could still sit in his rig, or wait in a room in the firehouse, such that it was a large enough firehouse to still avoid FF Strzelecki. *Id.* at 148. Despite the accommodation, Peden still refused to go to Station 12. *Id.* at 148. Chief Cieciva ultimately gave Peden a direct order, however, Peden refused, and stated if he has to go to Station 12, then he will “lay up.” *Id.* Chief Cieciva explained there was a need to go to station 12 immediately. *Id.* at 148.

Based on Peden’s refusal to comply with an order, he was instructed to go home unpaid. *Id.* FF Correa Volkman drove MED 15 to Station 12 by himself, as Peden stayed behind *Id.* at 117.

The MFD was impacted that night as a result of Peden’s refusal. Because MED 15 was now lacking a paramedic, MED 15 was out of service somewhere between 30 minutes and one hour. *Id.* at 147. Assistant Chief Votsis noted that

MED 15 had to be placed out of service and re-staffed with a paramedic due to Peden's direct refusal to fulfill the needs of the department related to firefighter safety and response readiness as assigned by superior officers. *Id.* at 148. On that evening, the MFD had four units in service with five person crews. *Id.* To replace Peden, one of the crews was reduced to four and the fifth crew member was assigned to MED 15 for the remainder of the shift. *Id.* Chief Cieciva instructed Peden to write a 105 report as to why he disobeyed an order, in response, Peden indicated that he would complete the task the next day when he was back on paid duty. *Id.*

Sick Leave is not a tool to avoid an order or avoid working with another member of the Fire Department. *Id.* at 149. Peden was able to work at Station 12, and because of his refusal he was sent home. *Id.* at 148. Peden disobeyed a direct order. *Id.* Peden's departure from work was recorded in the Engine 11 log at 22:45, "HEO Peden off on UPT." (Unpaid time). *Id.* Chief Cieciva updated Peden's status on Telstaff to "No Pay – Failed to Work No Pay." *Id.* at 148.

B. MFD Investigation

Chief Cieciva reported Peden's refusal to obey his direct order. *Id.* at 148. Assistant Chief Lipski was placed in charge of conducting the investigation. *Id.* Chief Cieciva and FF Correa-Volkman drafted reports from the incident and provided the same to Chief Lipski. *Id.*

In his report Chief Cieciva wrote the following:

While I do my best to accommodate personnel requests when able it is my expectation that all members remain professional and follow their orders. Relocating M15 to an area close to their response area but out of danger while balancing regular city responses and Rally Command needs was operationally necessary. We do not have liberty to choose which rigs we respond with and interact with on a daily bases and we must act professional and fulfil the job we swore to perform. All this was explained to [HEO] Peden. *Id* at 120.

Peden responded to the investigation, titling his response “Further Victimization of Michael Peden by MFD.” *Id.* Peden indicated that as a PTSD survivor he avoids three people including FF Strzelecki, whose names triggers “intense and invasive feelings of distress because of their lack of truthfulness and omissions of facts spawned the injustice I and my family have endured since October 2017.” *Id.* at 149. Peden stated he feared going to Station 12 due to the fact Strzelecki had framed him for a crime that he did not commit and because Strzelecki probably knew he was going to “sue a majority of the people” involved. *Id.* at 128.

In his report, Peden places blame with the MFD in relation to the June 5 incident and lists numerous grievances he has held against the department. *Id.* at 126. Peden claimed that due to Chief’s Lipski’s bias and based on the environment at the MFD he was “forced to disobey orders from Chief Cieciva on June 5, 2020.” *Id.* at 128. Chief Cieciva spoke with Chief Lipski and Cieciva stated he ordered Peden to go to Station 12, and in response, Peden replied, “I’ll go home, I’ll go home.” Chief Lipski then filed charges. *Id.* at 129. Peden

essentially alleges he was subjected to a hostile work environment and received disparate treatment. *Id.* at 126.

C. Charges

Charges were issued against Peden for sixteen counts of failing to follow departmental rules and regulations. *Id.* at 4-9. The charges outlined that Heavy Equipment Operator Peden was given a direct order to transfer to another fire station during civil unrest conditions. *Id.* Peden disobeyed the order, refusing to reposition his unit as ordered. *Id.* “His willful insubordination created a hazardous situation in which Command level resources within the stricken area of the city now under Rally Command’s oversight were required to further deplete resources and redirect attention away from the large city-wide emergency at hand.” *Id.* 9.

D. Peden’s response

On June 14, 2020 Peden via email responded to the charges. *Id.* at 123. Peden complained that charges did not take into consideration his “F-105 report,” that offered an explanation and context for his conduct. *Id.* at 123. Peden continued to argue that Chief Lipski’s investigation lacked objectiveness and impartiality.” *Id.* Peden continued to minimize his conduct and stated his behavior was “not a case of insubordination” as he was willing and able to work. *Id.* He was just not willing to work at Station 12. Peden was offended that FF Strzelecki name was not mentioned in the charging document and stated that his “mental health and well-being were compromised the night of June 2020.” *Id.*

His email response continues to belabor his grievances against the MFD. *Id.* at 123-24.

E. Discharge

On June 14, 2020, the Chief of the Milwaukee Fire Department terminated Peden based on the charges. *Id.* at 144. Peden appealed the termination to the Fire and Police Commission. *Id.* A hearing was held on October 12, 2020. R. 9 at 1.

A week prior to the hearing, Peden filed a “Motion to Compel Discovery” which sought many documents related to the 2017 MFD investigation. R. 3 at 51. Peden had previously made a request via a public records request, which was denied based on a pending investigation. *Id.* at 63. During the hearing, the hearing examiner denied Peden’s motions on the grounds that the FPC lacked authority to enforce a public records request and because Wis. Statute § 62.50 does not provide for discovery practice. *Id.* at 146

That night prior to the hearing, Peden filed a “Motion for immediate production of exculpatory evidence.” *Id.* at 110. During the hearing, the Chief voluntarily agreed to produce the documents sought by the new motion and Peden did not seek an adjournment for the hearing. R. 9:24:23-28:10. The hearing examiner noted the tenuous relevance the documents had for the hearing. R. 9 24:11-14. Ultimately the three-member Board sustained Peden’s termination issuing a written opinion on October 23, 2020. (R.3: 154-166.)

PROCEDURAL STATUS

On June 17, 2020, MFD Chief Mark Rohlfing found Peden guilty for violating sixteen Fire Department rules and regulations and discharged Peden from the MFD. (R. 1.) Peden timely appealed his discharge to the Board of Fire and Police Commissioners for the City of Milwaukee. (R. 3.) An administrative hearing was held before a three-member panel on October 12, 2020. (R. 3.) The Board unanimously concluded that Peden should be discharged. (R. 3, No. 29 at 1-10.)

Wis. Stat. § 62.50(20) allows a firefighter in any first class city to appeal a disciplinary suspension to the circuit court. Fire fighters may supplement this “statutory review” with a parallel common law certiorari review. By decision and order dated March 28, 2022, the circuit court affirmed the decision of the Board. (R. 33.) The Court noted:

Peden did not address his request for certiorari review in either his opening or reply briefs, other than to note that certiorari review may appropriately be pursued together with statutory review. Accordingly, Peden has abandoned his request for certiorari review. *Id.* at 12. The circuit court also affirmed the discipline of the discharge:

Peden’s violation was a serious one, and Peden could have taken steps to avoid the conflict that led to it. As already discussed, June 5, 2020 was not a normal day for the MFD, which was working to address civil unrest due to citywide protests. [...] Witnesses discussed the importance of following orders as given during such emergency circumstances, and that the outright refusal to follow a superior’s direct order is an exceedingly unusual circumstance. Peden’s actions were serious enough to overcome his prior record of good service. *Id.* at 17.

Peden now appeals to this Court. Per Wis. Stat. § 62.50(22), a Circuit Court's decision on a statutory appeal is "final and conclusive." Peden's only appeal avenue, if appropriate, is via a certiorari action. *Herek v. Police & Fire Commission Village of Menomonee Falls*, 226 Wis. 2d 504, 510, 595 N.W. 2d 113 (Ct. App. 1999; *State ex rel. Smits v. City of DePere*, 104 Wis. 3d 26, 31-32, 310 N.W. 2d 607 (1981). Appellate review is limited to whether the Board kept within its jurisdiction and whether it proceeded on a correct theory of law when it discharged Peden. *Herek* supra at 510. These are questions of law that the appellate court reviews de novo. *Herek* at 510.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT PEDEN ABANDONED HIS CERTIORARI APPEAL

"Common law certiorari is available to review legal questions involved in an administrative agency's decision where statutory appeal is either inadequate to address the issue or is not available." *Franklin v. House Auth. Of City of Milwaukee*, 155 Wis. 2d 419, 424 (Ct. App. 1990). In this case, Peden has appealed the denial of his writ of certiorari.

Contrary to Peden's argument, the circuit court correctly denied his request for certiorari review. In reaching this finding the circuit court concluded that Peden failed to address his request for certiorari review in either his opening or reply briefs. (R. 33 at 12.) Peden's failure to advance a certiorari argument in his briefs before the circuit court justified dismissal of his certiorari review. *See State*

v. Petit, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (courts may not act as advocates, inadequately briefed arguments may be ignored), *also see Santiago v. Ware*, 205 Wis. 2d 295, 311 n. 10, 556 N.W. 2d 356 (Ct. App.) (issues which may have been mentioned by the petitioner but which have not been briefed have been waived.) Peden in his briefs before the circuit court failed to articulate or develop a coherent and reasoned argument about how the Board applied an incorrect legal theory supported by the applicable law and facts. Peden’s failure to state a claim under common law certiorari justified dismissal and prevents him from raising this issue before the Court of Appeals. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W. 2d 577 (1997) (arguments not raised before circuit court are forfeited on appeal). “It is a fundamental principle of appellate review that issues must be preserved at the circuit court.” *State v. Huebner*, 2000 WI 59, ¶ 10, 235, Wis. 2d 486, 611 N.W. 2d 727; *see also Vollmer v. Luety*, 156 Wis. 2d 1, 10, 456 N.W. 2d 797 (1990) (stating that “[o]ne of the rules of well night universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the [circuit] court will not be reviewed on appeal.”

As such, Peden’s shortcomings related to his purported certiorari appeal in the lower forum negates jurisdiction with this Court. This Court should not take action on Peden’s certiorari arguments, — a position he failed to develop in the lower forum.

Furthermore, Peden contends the circuit court made an erroneous finding for failing 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.” (Pet. Br. at 17). Peden fails to cite any case law or statutes in support of his argument. *See Teigen v. Wisc. Elections Commission*, 2022 WI 64, ¶45. (Underdeveloped arguments need not be addressed.) As a result, this argument should be rejected outright due to being underdeveloped and unsupported by any relevant legal authority.

II. PEDEN’S DUE PROCESS RIGHTS WERE NOT VIOLATED

Nevertheless, assuming *arguendo* that Peden is entitled to a certiorari review, this Court should find that Peden was afforded due process. Peden argues that his due process rights were violated when he was deprived an opportunity to present all *relevant* materials and a full defense. (Pet. Br. at 18.) The applicable statute under Wisconsin Statute § 62.50(16) and case law permit an officer appealing a disciplinary determination to have a “full opportunity to be heard in defense,” however this right to defend is not absolute, nor should it be dictated by Peden’s desire to fill the administrative record with *irrelevant* information.

“The Fundamental requisite of due process of law is the opportunity to be heard.” *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L. Ed. 2d 287 (1970); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914). The opportunity to be heard includes the right to present a complete

defense, which includes the “right to offer the testimony of witnesses.” *Brown Cty v. Shannon R.*, 2005 WI 160, ¶ 65, 286 Wis. 2d 278, 706 N.W. 2d 269. In an employee discharge context due process means that an employee is “entitled to the full panoply of due-process protections, the minimum requirements of which include a timely and adequate notice of the reasons for the discharge, an impartial decision maker, and the opportunity to confront and cross examine adverse witnesses.” *State ex rel. Deluca v. Common Council of City of Franklin*, 72 Wis. 2d 672, 679, 242 N.W. 2d 689 (1976).

Peden essentially contends that his due process rights were violated because he was deprived documents necessary in preparation of his defense. Peden argues that his efforts to obtain documents (in support of his defense) arose shortly after dismissal of the criminal charge and that he sought these documents both before and after June 5, 2020 similar to another attorney (Pet. Br. at 20.) Peden argues that the Board prevented him from “obtaining the critical materials relating to the falsehoods perpetrated by exiting MFD members and supervisors,” and “blocked his efforts to provide the Board with the history of his battle to prevent a serious felony conviction from absolutely ruining his life.” (Pet. Br. at 22.) Notably, Peden directs his attention to documents that preceded the June 5, 2020 incident, documents that relate to the MFD’s internal investigation into the sexual misconduct and intimidation allegations against Peden. (R. 51 at 51-73.) Peden’s focus on this discovery strays from the issue for his termination.

These documents about the pending investigation into the sexual assault case were irrelevant to the Chief's and the Board's decision for termination. Irrelevant evidence is inadmissible under Wisconsin Statute § 904.02, and otherwise relevant evidence may be excluded if it is needlessly cumulative or a waste of time." Wisconsin Statute. § 904.03. It is important to keep in mind what Peden's termination was *not* about. Despite his focus of the circumstances that led to the criminal charges against him, his termination was not about his theory of falsehoods perpetrated by the MFD.

The discovery and materials he claimed he needed for his defense were not relevant to the violations Peden faced. Plainly put, the charging sheet specifically outlined that Peden was terminated for his refusal to comply with superior orders during a civil unrest. (R. 3 No. 2). As counsel for the chief succinctly stated during his closing, "This case boils down to was he (Peden) given a direct order? Was he capable of following that direct order? Did he choose not to follow that direct order?" (R. 9 at 275: 19-21) The answer is clearly yes. Peden failed to follow a superior order on June 5, 2020. Contrary to the position of Peden, the administrative record demonstrates Peden received the material evidence related to this discipline, his failure to follow a superior order. In fact, Peden was able to contest his termination not only with the relevant documents but he supported his defense with witnesses who testified as to the impact the assault allegations had on him.

For example, the Board heard testimony from Peden's criminal defense attorney who testified about representing Peden on the second degree sexual assault charges that were dismissed in July of 2019. (R. 9. at 79-87.) His criminal defense attorney testified as to Jason Strzelecki's connection to the allegations against Peden and the impact on Peden.

Q. During the representation, did you become aware of the allegations being made by Aleah Ellis against Michael Peden

A. Yes.

Q. During that period of time, did you become aware that Jason Strzelecki was also providing information about the situation?

A. He was interviewed, yes, about the allegation that had been made against Mr. Peden.

Q. During the time that you represented Mr. Peden, did you come to know of his concerns about working with Jason Strzelecki and Aleah Ellis?

A. Yes.

Q. What were those concerns?

A. He was concerned about working with either one of them. (R. 9. 84:7-22.)

In a similar vein, Peden was able to provide testimony to the Board from his mental health provider, Dr. Shrinsky, who testified as to the mental health effects the investigation had on Peden, his PTSD diagnosis, as well as Peden's fitness for being a firefighter. (R. 3 at 209-220.) The Board in their written decision discussed Dr. Shrinsky's testimony at length (R. 3 at 149-50). Peden

through these two witnesses, as well as through his own testimony, was able to provide context to the Board with his mental health crisis as a result of the sexual assault allegation. Notably, this crisis was not communicated to the MFD, the MFD was not notified of the diagnosis, nor was an injury report filed claiming PTSD. (R. 3 at 150.) Peden's argument that he presented limited testimony to the Board from his criminal defense attorney and his doctor fails based on the record and the Board's written decision. More importantly, even if Peden's due process arguments are properly reviewable by this Court, his arguments should fail given he was not denied the opportunity to present *relevant* issues for a full defense.

III. THE BOARD'S DECISION TO TERMINATE PEDEN WAS BASED ON THE CORRECT APPLICATION OF LAW, AND REPRESENTED ITS JUDGMENT, NOT ITS WILL

Peden makes multiple arguments to this Court in support of his claim that the Board erred. Based on the record, the Board committed no error. First, Peden rehashes the argument that he was denied discovery prior to the hearing, (Pet. Br. at 28.) For this proposition, Peden has correctly cited Wisconsin Statute § 62.50(16), the statute that states 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. Thus, the members of the Board have the authority to compel discovery, but the discovery must be *relevant* to the trial *and* investigation. Notably, the initial documents Peden sought were broad in nature, related to an open records request and as indicated by the board, "most of the documents concerned an investigation into

another matter that occurred before the incident that gave rise to this discipline. (R. 3 at 51).

For example, as part of Peden's motion, he referenced an open records request from October 17, 2019, months before the rally command order, demanding documents, recordings relating to the investigation of the allegations FF Ellis made against Peden. (R. 3 at 61.) This information was not germane to the Chief's termination, the investigation, or the trial. As argued above, discovery regarding the investigation into the harassment and sexual assault allegations made against Peden was irrelevant as the evidence has nothing to do with the decision to terminate his employment with the MFD. The hearing examiner denied the request on grounds that the FPC lacked authority to enforce a public records request, and because Wis. Statue 62.50 does not provide discovery practice. (*Id.* at 146).

The plain reading of Wis. Statute § 62.50 (16) justifies the hearing examiner's initial ruling denying Peden's Motion to compel discovery. The statute does not expressly authorize a member of the FPC to secure by subpoena *any* type of discovery, instead the discovery (whether of witnesses or production of records), must be *relevant* to the trial *and* investigation. The documents and information Peden sought that preceded his termination were not relevant to trial and the investigation. Furthermore, under Wis. Stat. § 62.50 the board has statutory authority over disciplinary hearings and not authority over open record requests.

Second, Peden contends the Board acted contrary to the law, when he was subjected to a trial by ambush on the day of the trial, when he received the demanded discovery materials. Critically, Peden has not cited any supportive case law in his assertion that the Board acted contrary to the law and his argument is underdeveloped. *See State v. Petit*, 171 Wis. 2d 627, 646, 492 N.W. 2d 633, 642 (Ct. App. 1992) (declining to review issues that were “inadequately briefed,” including arguments that were “unsupported by references to legal authority.” In fact, Wis. Statute § 62.50(16), offers the accused an opportunity to seek adjournment of the trial or investigation of the charges, for cause not to exceed 15 days. Nothing in the record indicates that Peden sought an adjournment based on his discovery request on the eve of trial. In fact, counsel for the chief stated prior to the hearing, “if they (Peden) want to seek an adjournment and the commissioners here are inclined to give it to him so he can pursue this defense that he’s created for himself, we are not going to stand in the way of that...” (R. 9 at 23:16-19.) Peden did not seek any adjournment. This argument should be dismissed.

Third, Peden contends that the board acted contrary to law when it limited his questioning with Chief Lipski. Peden wanted to ask about any disciplinary action against FF Jason Strzelecki. (R. 9 at 173:12-21.) The disciplinary action against FF Strzelecki or lack thereof was not relevant. The FPC is obligated to decide each case and impose discipline on each case’s own merits and the factual circumstances. The commission did not commit any legal error when the Chief’s

counsel objected and the hearing examiner limited Peden's questioning of Chief Lipski.

Finally, Peden claims the FPC ignored the true impact of his PTSD. The administrative record does not support this claim. As stated previously, the Board discussed Dr. Jay Shrinsky's testimony at length. Peden was able to supplement the record with his own testimony as to his diagnosis of PTSD. Furthermore, Peden's argument is an attempt for this Court to reweigh the evidence, however, this avenue is no longer viable to Peden. This Court is precluded from reviewing an evidence based argument on appeal. *See Sliwinski v. Board of Fire and Police Comm'rs of Milwaukee*, 2006 WI App, 27, ¶ 12, 289 Wis. 2d 422, 711 N.W. 2d 271 (review is "limited to whether the Board kept within its jurisdiction or applied correct legal theories." Peden's argument that the FPC's decision ignored the true impact of PTSD is unsubstantiated based upon the record.

CONCLUSION

This is a case about rules, and in this case it is undisputed, Peden failed to follow the unambiguous rules of the MFD. Based on the foregoing, the Board in reaching the decision to sustain the termination of Peden proceeded within its jurisdiction and correctly applied the law.

Dated and signed at Milwaukee, Wisconsin this 29th day of November,
2022.

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Electronically signed by Anthony Jackson

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b)(bm) and (c) for a brief. The length of the brief is 23 pages and 5,205 words.

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