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.

REPLY 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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INTRODUCTORY COMMENTS

Of all sad words,
Of tongue or pen,
The saddest are these,
It might have been.

John Greenleaf Whittier
"Maud Muller" 1856

When one considers what "might have been" in this matter one realizes it could have, and should have, worked out so differently.

Petitioner-Appellant HEO Michael Peden (hereinafter "Peden") served his country honorably as a U.S. Marine. He is a family man. He had a stellar record of service with the Milwaukee Fire Department (hereinafter "MFD") for over seven years before being falsely accused of sexual assault by a probationary firefighter for whom he provided an honest, yet critical, review.[1] Rather than supporting Peden, MFD initiated an investigation which continued even after the Board hearing in this matter. It was used as a basis for denying production of documents when properly requested, both before and after the events of June 5, 2020. On that date, rather than his supervisor initiating the obligatory sick leave protocol as soon as he indicated he wanted to lay up, Peden agreed to try to work the matter out. That ultimately led to his discharge, despite having had no prior discipline.

Respondent, City of Milwaukee Board of Fire and Police Commissioners (hereinafter "the Board"), conducted a hearing which denied Peden due process by blocking his access to documents and tape recordings related to both investigations. This prevented Peden from deciding which witnesses to call at his disciplinary hearing. In addition, many of them could not speak freely due

[1] Curiously the Board has chosen to challenge Peden's claim of innocence. (Respondent's Brief [hereinafter "R. Br."] at 3, fn 1) The prosecutor dismissed the felony charge, and MFD knows he was innocent, as the same law office representing the Board so stated in a U.S. District Court filing. (R.30-67)

to the ongoing investigation. He was also limited in the questions he could present to those witnesses who were called by both sides, since the lack of audio recordings and documents limited his ability to properly pose questions or cross-examine them.

The Board failed to comply with statutory and case law requirements requiring disclosure of the various items requested. This also blocked Peden from providing relevant documents to the Board prior to and at the hearing.

MFD and the Board contend Peden received a fair hearing, and the Board has now argued Peden waived his right to review by certiorari. (Brief of Respondent [hereinafter "R. Br."] at 12) The Circuit Court adopted the Board's abandonment argument without proper basis. The case should be remanded for a proper review by the Circuit Court.[2]

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT HELD PEDEN ABANDONED HIS CERTIORARI REVIEW

A. No Abandonment Occurred

The decision of the Circuit Court (hereinafter "the court") (R.33) that Peden abandoned his right to certiorari review because he failed to properly present it is incorrect. The court seems to have adopted the argument the Board set forth in that regard. (R.27:21) It is also significant the court ordered Peden not to make *any* argument relative to the certiorari review as the court would

[2] Ordinarily when reviewing a petition for a writ of certiorari the Court reviews the Board's decision, not the decision of the Circuit Court. *Town of Holland v. PSC*, 2018 WI App 38, ¶21, 382 Wis. 2d 799, 913 N.W.2d 914 (citations omitted). Here there was no decision by the Circuit Court thus necessitating remand for the review to which Peden was entitled.

only be reviewing the briefs. This despite no such directive having been provided by the court to alert Peden to this limitation.[3]

The court's decision appears to have ignored issues raised regarding certiorari review despite the pleadings being properly filed, arguments having been properly made, and Peden thus being entitled to consideration of the issue by the court. None of the cases cited by the Board support such action by the court.

The Board cites several cases it claims support its argument, but they are inapposite. *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992) (R. Br. at 16-17) involved numerous violations of appellate rules and the failure to cite *any* legal authority in support of the defendant's arguments. The defects included a lack of "organization and substance that for us to decide his issues, we would first have to develop them." (*Id.)* such is not the case here.

The Board next relies on *Santiago v. Ware*, 205 Wis. 2d 295, 311 n.10, 556 N.W.2d 356, 362 (Ct. App. 1996) (R. Br. at 17[4]) is similarly inapt, as it involved a demand for damages for deprivation of "a right to a remedy guaranteed by Art. I § 9 of the Wisconsin Constitution. We deem Santiago to have abandoned this claim by his failure to offer argument or evidence to support it." *Id.* Peden offered both argument and evidence to support his constitutional due process claims in both of his briefs, as well as in both oral arguments, noting how the Board acted in excess of its authority, basing its decision on its will, not its judgment.

Rather than failing to argue or provide evidentiary support for his claims, Peden has demonstrated a clear basis for relief. (See Section I. B below.)

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[3] The court set a hearing on evidentiary issues but thought it was set for the actual trial hearing. The cover sheet on the transcript actually refers to it as a Certiorari hearing, which it was not. (R.32) The court later advised counsel it *never* conducts such hearings. (R.32-34:6-35:6)

[4] Citation to page numbers in the Board's brief refers to the numbers in the upper right corner of the brief.

B. The Record Demonstrates Peden Properly Perfected His Certiorari Claim

Peden raised issues regarding his certiorari claim in his initial pleading, which noted the Board had acted improperly:

> 19. **Peden** seeks a Writ of Certiorari to obtain review of said decision because 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:
>
> a. Discharging an employee when such discharge was not proper;
> b. Reaching its decision in the absence of a full and fair hearing due to the deprivation of due process caused by the failure of Rohlfing and Lipski to provide documents and other materials properly and timely requested;
> c. Applying an incorrect burden of proof and theory of law;
> d. Making findings that were not supported by the record; and
> e. Ordering a discharge that was oppressive, capricious, unreasonable and not supported by exculpatory records.
> f. Failing to file the statutory mandate under § 62.50 *Stats.*
>
> (R.40:5)

He then provided argument alleging due process violations and denial of a fair hearing in his initial brief, (R.26) noting errors committed by the Board when it chose to disregard favorable testimony elicited from Chief Lipski and Chief Cieciwa:

> As will become clear, the FPC exceeded its authority when it failed to properly interpret the evidence, and ruled contrary to the required findings set forth above. Perhaps the most obvious is the first, as not only did Peden testify he had no knowledge of the probable consequences of the alleged conduct, but the MFD's own witnesses agreed with him.
>
> In addition, the requirement of fairness and objectivity in assessing whether a violation occurred justifying the imposition of discipline was not met. (R.26:5)

After raising concerns that some of the Board's findings missed the point, amounting to a failure to proceed on a correct theory of the law and interpret the evidence properly (R.26:11), Peden offered the following:

> Furthermore, the FPC conclusion that the facts are "basically undisputed" is wholly inaccurate. (R.26:15)

> It would appear that in its rush to sustain the charges against Peden, the FPC (who had previously indicated a desire to conclude the hearing by 4 o'clock) either ignored or simply failed to appreciate any of the testimony regarding Peden's psychological make-up on the date in question. (R.26:17)

His reply brief answered the Board's contention regarding a failure to address the issues as follows:

> For his singular act HEO Peden was hit with 16 charges of misconduct and termination was ordered. In doing so the FPC failed to properly evaluate the entirety of the circumstances involved, **improperly exercising its will, not its judgment.** Part of the reason for this was that the FPC had ruled HEO Peden could not present any testimony or arguments that Peden had been falsely accused by Ellis, that the prosecutor had fought tooth and nail with the MFD to get access to discovery materials (which once obtained caused dismissal of the criminal charge) and then refused to provide the discovery materials to Peden prior to the hearing. The FPC then rejected Peden's request for disclosure of the records prior to the hearing. The department refused to comply with Peden's open record requests, thus preventing him from demonstrating the root cause of his fear that Strzelecki could cause him further harm. (R.29:8)
>
> The primary consequence of MFD's refusal to provide the documents, the FPC's failure to order their production, and then to prevent exploration of the facts underlying Peden's PTSD and safety concerns, was to prevent the FPC from being able to fully consider all that had occurred and the reasons for Peden's actions.
>
> ….
>
> The end result was that the FPC was placed in a position where any decision it issued would necessarily be based upon a flawed perspective and an incomplete record. This denied HEO Peden due process, and resulted in his being issued far more serious discipline for a first-time offense than was proper. (R.29:9)
>
> Accordingly the FPC acted contrary to law when it ordered his discharge, exercising its will, not its judgment. (R.29:10)
>
> The FPC should have been provided with the details about HEO Peden having been falsely accused by FF Ellis because it directly impacted Peden's decisions of June 5, 2020. Failure to share those critical and highly unusual details with the FPC, and MFD's deliberate failure to provide the records which had been properly requested, deprived HEO Peden of due process and a full and fair consideration of the events which led MFD to seek his termination. (R.29:13)

At the evidentiary hearing on November 26, Peden noted the lack of due process at the Board hearing, arguing the Board's actions represented its will, not its judgment. (R.32-4:10-11, 7:8-10, 9:14-18) Although the court had not previously indicated any portion of the matter would be decided on briefs alone, after all briefs had been filed the court advised no argument would be permitted

on the certiorari issue. (R.32-34:1-23; 32-34:6-35:6) The court then advised only one hour would be allowed for argument regarding the statutory appeal aspect of the case. (R.32-36:15-16)

During the subsequent "trial" hearing on January 26, 2022 Peden noted he had been denied a fair hearing, (R.38-10:16 to 11:20) among other due process and constitutional violations (R.38-22:14-20) including:

> …if you say, "I'm going to lay up," end of story, and that wasn't honored here. **And to that extent it represents the FPC's will to discharge here, not its proper judgment,** because they know that that section of FPC of the just cause standards in 62.50 wasn't met, and if it's not met, then they can't discharge him, and they shouldn't have discharged him. (R.38-26:6-12) (Emphasis supplied)

The Board's claim Peden failed to perfect his certiorari claim was incorrect. (R.27:21) The trial court ignored all of Peden's contentions and arguments supporting certiorari review and ruled the properly plead and supported certiorari claims had been abandoned. There was no basis for that finding, making remand proper so the lower court can properly consider the certiorari claims.[5]

The Board also contends Peden failed to develop the argument that no definition of "trial" exists in protective service disciplinary circuit court review hearings. (R. Br. at 18) But it has offered no contrary citation, thus confirming Peden's argument.

II. THE BOARD VIOLATED PEDEN'S DUE PROCESS RIGHTS INCLUDING HIS RIGHT TO A FAIR HEARING

Peden did not seek to fill the record with irrelevant information. (R. Br. at 18) Rather, he sought to present relevant documents, including the audio

[5] The statute does not specify the nature and form the "trial" should take. The trial court indicated it was not certain as to how to proceed, and both counsel offered their opinions. The court ordered briefs followed by a motion hearing and a "trial" at which additional arguments could be presented. The court did not advise counsel no argument would be permitted on the certiorari claims until all briefs had been submitted.

recordings and transcripts of his meeting with Chief Lipski following the June 5th incident, and recordings of the command staff discussions regarding his request to go to Engine 7, as Battalion Chief Gardner had approved, before Battalion Chief Cieciwa countermanded that approval. There are likely other documents relating to how the entry in the logbook got changed after it indicated he was going home on sick leave. Or if it does not so reflect why that is so.

The Board cites *Brown Cty. v. Shannon R. (In re Daniel R.S.)*, 2005 WI 160, ¶66, 286 Wis. 2d 278, 706 N.W.2d 269, which actually supports Peden's argument. The trial court's ruling blocking presentation of relevant evidence (an expert witness) was reversed as it prevented the full presentation of the factual predicate. (*Id.)* So too here.

Peden agrees with the Board when it notes a party should have a full and fair opportunity to confront and cross-examine adverse witnesses. (R. Br. at 19) *State ex rel. De Luca v. Common Council of Franklin*, 72 Wis. 2d 672, 679, 242 N.W.2d 689, 693 (1976) By refusing to provide the requested documents and recordings, Peden was required to engage in trial by ambush, a concept long eliminated in Wisconsin. See *Bourne v. Melli Law, S.C.*, 2019 WI App 1, ¶50, 385 Wis. 2d 210, 923 N.W.2d 177.

Peden was deprived of his right to due process of law when the Board refused to require MFD to provide the oft-requested discovery, a decision which was an expression of its will, not its judgment. The evidence was relevant, and yet Peden was denied it.

MFD had an affirmative obligation to provide all exculpatory evidence to Peden at the time the charges were issued, four months before the hearing pursuant to Wis. Stat. § 62.50 (16). Exculpatory evidence is defined as evidence "which tends to justify, excuse or clear the defendant from alleged fault or guilt." *Black's Law Dictionary* 566 (6th ed. 1990). The evidence sought by Peden would have done just that. MFD also ignored other requests for documents. (R.3:62-66). The Board's comment (R. Br. at 16) Peden was provided "material

evidence" is inaccurate, as demonstrated by the many documents and materials received months after the hearing.

Peden is entitled to have a court review the certiorari challenges and make a proper ruling.

III. THE BOARD'S DETERMINATIONS WERE BASED ON ERRONEOUS INTERPRETATIONS OF THE LAW AND REPRESENTED ITS WILL, NOT ITS JUDGMENT

The Board acknowledges Peden had outstanding requests for documents relating to the prior investigation, which was still ongoing at the time of the hearing, (R. Br. at 23) but claims none of the requested documents and other materials were relevant. It has not challenged Peden's definition of "relevant evidence". Jason Strzelecki and others had been interviewed, provided statements, and Peden sought to avoid him on June 5, 2020. Peden was on trial for his work life. The materials sought were relevant. He should not have had to jump through hoops to obtain them.

A trial court considering a certiorari challenge must determine whether the Board proceeded on a correct theory of law:

> [T]he scope of review in certiorari extends to whether the board or agency "acted according to law." The "law," as so used, refers not only to applicable statutes but also to the guaranties of "due process" found in the state and federal constitutions. *State ex rel. Wasilewski v. Bd. of Sch. Dirs.,* 14 Wis. 2d 243, 263, 111 N.W.2d 198 (1961)

No such evaluation of the Board's actions occurred in this matter.

CONCLUSION

Peden is a good firefighter. He had no prior discipline. Mistakes were made by both parties. Had his supervisor accepted his first statement he wanted to "lay up" and initiated the sick leave protocol there would have been no discharge. Then MFD played "hide the pea" with discoverable materials and

the Board permitted them to do so. And the trial court refused to review these unconstitutional actions.

Peden did not abandon his certiorari challenge. The record contains ample evidence supporting Peden's certiorari claims. Appellant requests this matter be remanded to the Circuit Court for proper certiorari review.

Dated this 15th day of December, 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 2,945 words.

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ELECTRONIC BRIEF CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief, 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.

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