COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3052 **Cir. Ct. No. 2002CV2158**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DANIEL MADDEN,

PETITIONER-APPELLANT,

V.

BOARD OF POLICE AND FIRE COMMISSIONERS OF THE CITY OF MADISON, ALAN SEEGER, MARCIA TOPEL, ELIZABETH SNIDER, EUGENIA PODESTA, MICHAEL LAWTON, MEMBERS OF THE BOARD AND DEBRA AMESQUA,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 LUNDSTEN, P.J. Daniel Madden appeals an order of the circuit court affirming the Madison Board of Police and Fire Commissioners' decision to

suspend Madden's employment for ninety days without pay and to reduce his rank with the City of Madison fire department. The case was before the circuit court on certiorari review. Madden argues on appeal that he was disciplined under fire department rules that are unconstitutionally vague as applied. We disagree and affirm the circuit court.[1]

Background

¶2 Daniel Madden began his employment with the Madison fire department as a firefighter in 1983. At some point in 1995, 1996, or 1997, Madden was promoted to apparatus engineer. As part of the duties of an apparatus engineer, Madden was sometimes called on to be an "acting lieutenant."

¶3 In January 2000, Madison Police Department detectives and a Federal Bureau of Investigation agent came to Madden's home to interview him in connection with their investigation of drug-related activity at Jocko's Rocket Ship bar in Madison. At that interview, Madden denied using cocaine. Several days later, however, Madden contacted the officers who had interviewed him and admitted using cocaine.

¶4 The Madison fire department conducted its own investigatory interview with Madden in June 2000. Madden then admitted to repeated cocaine use over the previous five years, and repeated marijuana use over the previous ten

[1] The attorney representing Madden is the same attorney who represented David Barlow in an appeal that resulted in our recent unpublished decision, ***Barlow v. Board of Police & Fire Commissioners of the City of Madison***, No. 2004AP2614, unpublished slip op. (Wis. Ct. App. Nov. 10, 2005). Likewise, the chief and the board are represented by the same attorneys. With few exceptions, the briefs in this case contain, often word for word, the same legal arguments as the briefs in the ***Barlow*** appeal. Thus, much of our decision tracks our decision in ***Barlow***.

years. Madden also admitted that other firefighters participated in these activities with him. On December 18, 2000, Fire Chief Debra Amesqua filed disciplinary charges against Madden with the Board of Police and Fire Commissioners pursuant to WIS. STAT. § 62.13(5)(b) (1999-2000).[2] The charges originally alleged four counts of misconduct, but were later amended to include a fifth count after testimony from another firefighter indicated that Madden had provided cocaine to that firefighter on one occasion.

¶5 The applicable fire department rules are rules 18, 39, 47, 51, and 58. Rule 18 states, in pertinent part:

> Members … shall conform to the rules and regulations of the Department, observe the laws and ordinances, and render their services to the city with zeal, courage and discretion and fidelity.

Rule 39 provides, in part:

> Members must conform to and promptly and cheerfully obey all laws, ordinances, rules, regulations, and orders, whether general, special or verbal, when emanating from due authority.

Rule 47 states:

> Members of the Department are required to speak the truth at all times and under all circumstances, whether under oath or otherwise.

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[2] WISCONSIN STAT. § 62.13(5)(b) (1999-2000) provides:

> Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by any aggrieved person. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Rule 51 provides:

> Officers and members shall at all times conduct themselves so as not to bring the Department in disrepute.

Rule 58 states:

> It is the duty of every person connected with the Fire Department to note and report to their superior officer or to the Chief any and all violations of the Rules and Regulations which may come under their notice.

¶6 Count 1 alleged that Madden used and possessed cocaine and marijuana, in violation of rules 18 and 39. Count 2 alleged that Madden lied to investigators, in violation of rule 47. Count 3 alleged that Madden acted in a way that would bring the fire department into disrepute, in violation of rule 51. Count 4 alleged that Madden failed to report violations of the fire department rules to a superior officer, in violation of rule 58. Count 5 alleged that Madden distributed cocaine, in violation of rules 18 and 39.

¶7 The board found that Madden had committed each of the violations alleged and, with respect to each, imposed a ninety-day unpaid suspension and a reduction in rank from apparatus engineer to firefighter. The suspensions were ordered to run concurrently with each other.

¶8 Madden appealed the board's decision to the circuit court, using the statutory review provision in WIS. STAT. § 62.13(5)(i). Under that statute, the circuit court reviews whether the board had "just cause" to impose the discipline it did. The circuit court concluded that the board had just cause, and affirmed the board's decision. Madden also filed a petition for certiorari review with the circuit court that asserted, among other arguments, that the fire department rules were unconstitutionally vague. The circuit court disagreed, and again affirmed the

board's decision. This appeal does not challenge the circuit court's just cause determination, but involves only a challenge to the court's decision, under certiorari review, to affirm Madden's suspension and demotion.[3]

Discussion

¶9 Madden argues that the rules under which he was disciplined are vague as applied because the board's previous application of those rules failed to give him "fair notice that his off-duty conduct would subject him to being suspended, without pay for 90 days, from his employment as a Firefighter, and demoted."[4] We interpret Madden's argument as having two prongs: first, that Madden did not receive notice that his off-duty conduct could result in a rule violation, and, second, that Madden did not receive notice that his particular conduct could result in suspension and a reduction of his rank. We reject both prongs.[5]

¶10 Vagueness is a due process issue, and due process determinations are questions of law that this court reviews *de novo*. *See* ***State v. Aufderhaar***, 2005

[3] Madden's statutory review under WIS. STAT. § 62.13(5)(i) is not appealable to this court. ***Gentilli v. Board of Police & Fire Comm'rs of City of Madison***, 2004 WI 60, ¶14, 272 Wis. 2d 1, 680 N.W.2d 335.

[4] Chief Amesqua raises a mootness claim with respect to Madden's argument. Amesqua argues that Madden contends only that rules 18 and 39 are vague as applied. She points out, however, that the board imposed the penalty of a ninety-day suspension and a reduced rank for each of the counts of misconduct. Thus, according to Chief Amesqua, Madden's failure to argue that rules 47, 51, and 58 are vague as applied renders our resolution of whether rules 18 and 39 are vague as applied moot. Because we decide that rules 18 and 39 are not vague as applied, we do not address the mootness question.

[5] Chief Amesqua concedes that certiorari review of Madden's vagueness claim is proper under ***Gentilli***, 272 Wis. 2d 1. We assume, without deciding, that the chief's concession is appropriate.

WI 108, ¶10, 283 Wis. 2d 336, 700 N.W.2d 4. When discussing vagueness, our supreme court has explained: "'[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process law.'" ***State ex rel. Kalt v. Board of Fire & Police Comm'rs for City of Milwaukee***, 145 Wis. 2d 504, 510, 427 N.W.2d 408 (Ct. App. 1988) (quoting ***Bence v. Breier***, 501 F.2d 1185, 1188 (7th Cir. 1974)). This rule "applies to administrative regulations affecting conditions of governmental employment in the same manner as it applies to penal statutes." ***Kalt***, 145 Wis. 2d at 510.

¶11 The only issue Madden pursues on appeal is whether the fire department rules identified above are unconstitutionally vague as applied.[6] We agree with Chief Amesqua[7] that Madden effectively concedes that the fire department rules under which he was disciplined are not unconstitutionally vague on their face. Madden does not, therefore, argue that the rules are void for vagueness, but instead makes an as-applied vagueness challenge. *See* ***United States v. Powell***, 423 U.S. 87, 92 (1975) (a statute which is void on its face for vagueness is one that "may not constitutionally be applied to any set of facts").

[6] At one point in his brief, Madden asserts that the fire department rules "are breathtakingly broad in their potential application." We read this assertion to be a constitutional overbreadth argument but decline to address it because Madden does not provide legal authority and does not present developed argument on the topic. *See* ***Cemetery Servs., Inc. v. Dep't of Regulation and Licensing***, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998) (we do not address constitutional arguments that are inadequately developed).

[7] Both the board and Fire Chief Amesqua are respondents to this appeal. They have submitted separate briefs. However, because much of their respective arguments overlap, we will refer to both parties as Chief Amesqua.

Whether Madden Had Notice That His Off-Duty Conduct Could Result In A Rule Violation

¶12 Madden admits that "[o]n their face, the Fire Department Rules covered the off-duty conduct in question."[8] Madden contends, however, that administrative rules that clearly apply to given conduct on plain reading may *become* vague through the way in which those rules are applied. Thus, Madden argues that the department's historical failure to apply the rules to off-duty conduct created vagueness because it led employees like Madden to believe that the rules, despite their plain language to the contrary, did not apply to off-duty conduct.[9]

¶13 A party making an as-applied challenge to a statute must "prove, beyond a reasonable doubt, that as applied to him the statute is unconstitutional." ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137. Again, this analysis applies to administrative regulations in the same way it does to statutes. *See* ***Wisconsin Builders Ass'n v. DOT***, 2005 WI App 160, ¶34, __ Wis. 2d __, 702 N.W.2d 433. Thus, Madden has the burden of proving,

[8] Despite this admission, Madden also contends that an amendment to fire department rule 45 indicates that it is intended to be the exclusive provision for disciplining a firefighter for any and all drug use issues because it, unlike other rules, expressly addresses drug use. Rule 45 states that "no member is to report to duty while under the influence of any controlled substance." We find this argument meritless. Rule 45 plainly does not purport to limit the application of other rules to off-duty drug-related misconduct.

[9] To the extent Madden tries to distinguish off-duty *drug-related* conduct from off-duty conduct generally for purposes of discipline under the rules, we are not persuaded. None of the rules under which he was disciplined expressly refer to drug-related conduct. All are couched in terms of any conduct that would constitute a failure to obey the law, bring the fire department into disrepute, constitute a failure to inform a superior officer of rule violations, or a failure to tell the truth.

beyond a reasonable doubt, that, as applied to him, the rules are unconstitutionally vague. *See* ***Joseph E.G.***, 240 Wis. 2d 481, ¶5.

¶14 As support for his particular as-applied vagueness theory, that is, that a rule may lose its plain meaning, Madden cites ***Wolfel v. Morris***, 972 F.2d 712 (6th Cir. 1992), and ***Waters v. Peterson***, 495 F.2d 91 (D.C. Cir. 1973). ***Wolfel*** and ***Waters*** involved prison inmates and government employees, respectively, who engaged in conduct for which they could have been, and were, disciplined under a plain reading of the applicable rules. *See* ***Wolfel***, 972 F.2d at 715, 718; ***Waters***, 495 F.2d at 94, 99. The courts in both of those cases concluded that the disciplinary rules were vague as applied because the rules had not previously been applied to the conduct at issue, even though the parties themselves or other parties had previously engaged in the same conduct. ***Wolfel***, 972 F.2d at 717; ***Waters***, 495 F.2d at 100. In other words, until disciplinary action was taken against the parties in ***Wolfel*** and ***Waters***, the parties and others had engaged in the same conduct on numerous occasions without consequence. The parties, therefore, had no notice that their conduct would subject them to discipline under those rules and, for that reason, the courts concluded that the rules were vague as applied. ***Wolfel***, 972 F.2d at 717; ***Waters***, 495 F.2d at 101.

¶15 ***Wolfel*** and ***Waters*** are not binding on this court, and it is not readily apparent that the vagueness analysis used in those cases flows from an accurate interpretation of the due process clause. However, we need not address that issue because Madden's argument contains a flaw that does not require resolution of whether ***Wolfel*** and ***Waters*** use a correct as-applied vagueness analysis. Even assuming that the ***Wolfel/Waters*** vagueness analysis is correct, to conclude that a rule is unconstitutionally vague as applied under that analysis requires a record that shows that the past application of the rules would lead a person to believe that

the conduct at issue is not subject to the discipline imposed. Here, the record does not show that the fire department or the Board of Police and Fire Commissioners failed to previously apply the disputed rules to identified instances of off-duty conduct.

¶16 Madden relies on testimony from Assistant Fire Chief Carl Saxe and Fire Chief Amesqua to demonstrate that the board had not previously applied the fire department rules to discipline off-duty conduct. We are not persuaded.

¶17 The portion of Assistant Chief Saxe's testimony that Madden relies on primarily concerns a firefighter named Jimmy Johnson. In response to a question regarding whether other firefighters had faced discipline for drug use, Assistant Chief Saxe responded "[i]n one instance, Jimmy Johnson to be specific, I believe an arrangement was made between the Fire Chief, City Attorney and Human Services for him to get into rehab, yes." Saxe later testifies that Johnson "agreed to resign."

¶18 No other portion of the testimony that Madden cites clarifies the reference to Jimmy Johnson. Nothing indicates how Johnson's drug use was discovered, whether it was on or off duty, or whether the "arrangement" entered into between the parties was in lieu of discipline under the fire department rules. In short, nothing about this testimony supports Madden's argument that the rules had not previously been applied to off-duty conduct.

¶19 The portions of Chief Amesqua's testimony that Madden points to are clearer, but cut against his arguments. For example, Chief Amesqua testified that anti-homosexual comments made by a firefighter while off duty in 1996 were subject to discipline under the rules. Chief Amesqua also testified that a firefighter who had committed misdemeanor theft while off duty was terminated

for that conduct in 1997. Amesqua further testified regarding a firefighter who was arrested for driving while intoxicated and possession of drug paraphernalia in 1996. Chief Amesqua testified that, following that conduct, the firefighter entered into a memorandum of understanding that required mandatory drug testing. The firefighter subsequently tested positive once, was suspended, then tested positive again, and was terminated.[10]

¶20 We do not see how the portions of Chief Amesqua's testimony that Madden cites support his claim that discipline was not previously imposed for off-duty conduct. To the contrary, the examples show that such conduct had previously been the subject of discipline under the fire department rules.

¶21 As we have seen, Madden effectively admits that a plain reading of the rules informs firefighters that the rules apply to off-duty conduct.[11] Under Madden's ***Wolfel/Waters*** argument, in order to show that the rules were rendered

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[10] Madden correctly points out that evidence of enforcement that post-dates his illegal drug activities is not relevant to the notice issue he raises. Thus, we do not consider, for example, the treatment of other firefighters who, like Madden, were disciplined after their conduct was discovered in the course of the Jocko's Rocket Ship police investigation.

[11] Both parties discuss Madden's own subjective beliefs. However, even assuming the validity of Madden's vagueness-as-applied argument, under it, a person's subjective beliefs are not relevant. The court in ***Waters v. Peterson***, 495 F.2d 91 (D.C. Cir. 1973), one of the cases Madden relies on, wrote:

> In ***Bouie v. City of Columbia***, 378 U.S. 347, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964), the Supreme Court found it "irrelevant that petitioners at one point testified that they had intended to be arrested," since the determination whether a statute affords "fair warning ... must be made on the basis of the statute itself and the other pertinent law, rather than on ... an ad hoc appraisal of the subjective expectations of particular defendants." 378 U.S. at 355-356 n.5, 84 S. Ct. at 1703.

Id. at 100.

vague by the lack of prior application, Madden needed to point to evidence in the record showing that the board allowed off-duty rule violations to go undisciplined. He has not done so.

Whether Madden Had Fair Notice That His Conduct Could Result In Suspension Or A Reduction In His Rank

¶22 Madden also argues that the rules were vague as applied because previous enforcement of the rules led him to conclude that he would not be demoted and suspended for his conduct. We disagree.

¶23 WISCONSIN STAT. § 62.13(5)(e) authorizes the board to suspend and reduce a firefighter's rank if the board determines that rule-violation charges brought against the firefighter are sustained.[12] Further, a rule is not vague so long as one is put on notice of the conduct proscribed and the severity of the penalty that may be imposed. *See* ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 627, 563 N.W.2d 154 (1997); s*ee also* ***State v. Cissell***, 127 Wis. 2d 205, 216-17, 378 N.W.2d 691 (1985) (criminal statutes not unconstitutionally vague because they made clear the range of punishment authorized). Thus, the question we must answer for purposes of Madden's ***Wolfel/Waters*** fair notice argument is whether Madden could have reasonably expected that suspension and reduction in rank were within the range of authorized penalties for his rule violations.

[12] WISCONSIN STAT. § 62.13(5)(e) provides:

> If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

¶24 In this context, Madden again relies on his factual arguments relating to the lack of previous application of the rules to suggest that the board had never before suspended or demoted a firefighter for drug use. However, the germane question is not whether, in general, anyone had previously been demoted or suspended for drug use, but rather whether someone engaging in conduct comparable to Madden's conduct, brought to the attention of the board, was or was not demoted or suspended. As is apparent from our discussion above, the record does not reflect that.

¶25 Madden points to other evidence: (1) the city's administrative procedure memorandum, which states that the preferred procedure for first-time positive results from random alcohol and drug tests is to have the city employee submit to rehabilitation; (2) WIS. ADMIN. CODE § COMM 30.16, which directs the fire department to establish a policy that firefighters with any mental or physical health problems, including alcohol or substance abuse, should be referred to health care services for treatment or rehabilitation; and (3) the International Fire Service Training Association training manual, which also advises a course of rehabilitative treatment as opposed to termination.[13]

¶26 Madden's reliance on the policy regarding random drug and alcohol testing in the administrative procedure memorandum is misplaced. First, the administrative procedure memorandum does not preclude resort to discipline under the fire department rules. Second, the policy is not implicated by Madden's conduct because the policy comes into play only if a firefighter tests positive

[13] Madden also points out that Chief Amesqua had said at one point that she would not seek termination with respect to other cases of firefighters using drugs. It is unclear why this comment has any bearing on Madden, as termination was not sought in his case.

during random drug testing. That is not the case here. Furthermore, what is at issue here is Madden's conduct, as opposed to Madden's dependence on controlled substances.

¶27 WISCONSIN ADMIN. CODE § COMM 30.16 also does not preclude resort to discipline under the fire department rules. Section COMM 30.16 merely directs fire departments to establish a policy regarding treatment for the physical and mental health of firefighters. It does not state a policy preference for treatment, rather than discipline or discharge, in specific fact situations.

¶28 Finally, there is no indication that the fire department or the board are bound by the International Fire Service training manual. Additionally, the portions of the manual that Madden relies on merely advise against termination of a firefighter; they do not preclude discipline. Indeed, the manual states that if a firefighter is discovered abusing substances, he or she "should be relieved of duty." It does not mention whether a reduction in rank is proper. In short, we see no reason why this manual, even if it were binding on the fire department and the board, would preclude the type of discipline imposed here.

¶29 Madden complains about the severity of the discipline imposed, but that is not an issue we reexamine on certiorari review. It is the circuit court's province, under WIS. STAT. § 62.13(5)(i) statutory review, to determine the propriety of "the relationship between the discipline imposed and the seriousness of the conduct." ***Gentilli v. Board of Police & Fire Comm'rs of City of Madison***, 2004 WI 60, ¶34, 272 Wis. 2d 1, 680 N.W.2d 335. Our review is limited to whether the rules and § 62.13 give fair notice of the range of punishments available.

¶30 In sum, the record does not show that the practice of either the fire department or the board rendered the rules unconstitutionally vague as applied.

By the Court.—Order affirmed.

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