COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0157 **Cir. Ct. No. 01 CV 2540**

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

PATRICIA MARTIN,

PETITIONER-APPELLANT,

V.

PERSONNEL REVIEW BOARD OF THE COUNTY OF MILWAUKEE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Patricia Martin appeals from a circuit court order affirming the Milwaukee County Personnel Review Board's decision discharging her from employment as an investigator with the Milwaukee County Medical Examiner's Office (MEO). She argues: 1) the Board lacked substantial

evidence to support its termination decision; 2) the Board deprived her of due process rights: a) "in its inference of facts" supporting its decision, b) in its failure to provide a pre-termination hearing, c) in its failure to allow her to present relevant evidence, and d) in its failure to provide explicit and specific findings; 3) the Board did not apply applicable legal standards in its decision; 4) the circuit court erroneously upheld the Board's decision; and 5) the circuit court deprived her of due process rights in its failure to provide explicit and specific findings. We affirm.

I. BACKGROUND

¶2 Martin began her employment as a Forensic Investigator for the MEO in 1988. As part of her duties in investigating deaths reported to the MEO, Martin was responsible for undressing, examining and photographing corpses. In June 2000, Martin was suspended after photos of the genitals of two male corpses for which she had had responsibility were found at what the Board termed her "workstation."[1]

¶3 Martin admitted taking the photos but contended that one was taken by accident and the other was taken for legitimate investigative purposes. Neither photo, however, was properly labeled or filed as required by MEO policy. Martin maintained that the photos were planted in or on her desk to set her up to be fired in retaliation for her filing of a complaint earlier that year regarding MEO policy requiring female investigators to wear neckties.

[1] One of the photographs was found in a pile of forms on Martin's desk; the other was found in her desk drawer. Out of consideration for the persons and families involved, we will not identify the photos by name but, rather, refer to them generically or as "photo 1" and "photo 2."

¶4 On September 26, 2000, the Board held a hearing on Martin's termination. In its lengthy, written decision, the Board presented extensive findings and concluded that Martin had violated Rule VII, § 4(1) of the Civil Service Rules for Milwaukee County. The Board specified the subsections of Martin's violations:

> (dd) Indecent, criminal, or inappropriate conduct on county premises or during working hours; (ee) Abusive or improper treatment toward an inmate or patient of any county facility or to a person in custody; provided the act committed was not necessarily or lawfully done in self defense or to protect the lives of others or to prevent the escape of a person lawfully in custody; (*l*) Refusing or failing to comply with departmental rules, policies or procedures; and (n) Making false or malicious statements, either oral or written, concerning any employee, the county or its policies.

See MILWAUKEE, WIS., GEN. ORDINANCES Appendix A, Rule VII § 4 (1979). The Board added "that each violation … is sufficient, in and of itself, to merit discharge, demotion or suspension."

¶5 In March 2001, Martin petitioned for a writ of certiorari to the circuit court. On October 17, 2001, the circuit court issued a decision and order affirming Martin's discharge.

II. DISCUSSION

A. Standard of Review

¶6 The Board's statutory authority to review Martin's termination is conferred by WIS. STAT. § 63.10 (1999-2000).[2] *See also* MILWAUKEE, WIS., GEN.

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

ORDINANCES § 33.01 (1979). Review of an order under this section shall be by certiorari. *See* ***State ex rel. Iushewitz v. Milwaukee County Pers. Review Bd.***, 176 Wis. 2d 706, 710, 500 N.W.2d 634 (1993). "In a certiorari action, the appellate court conducts a de novo review of the Board's and not the circuit court's decision." ***Peace Lutheran Church & Acad. v. Vill. of Sussex***, 2001 WI App 139, ¶10, 246 Wis. 2d 502, 631 N.W.2d 229. The scope of review is limited to the record from the administrative proceedings and includes:

> (1) [W]hether [the Board] stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable, representing its will and not its judgment; and (4) whether the evidence was such that [the Board] might reasonably have made the determination under review.

Id. (quoting ***Schroeder v. Dane County Bd. of Adjustment***, 228 Wis. 2d 324, 330-31, 596 N.W.2d 472 (Ct. App. 1999) (alterations in original)). "In a review of a decision on a writ of certiorari, there is a presumption that the board acted according to law and the official decision is correct; the weight and credibility of the evidence cannot be assessed." ***Peace Lutheran Church & Acad.***, 2001 WI App 139 at ¶11 (citation omitted).

B. Appropriate Legal Standard

¶7 Martin argues that the Board failed to apply the appropriate legal standard because it did not use the clear and convincing evidence standard in its analysis. We disagree.

¶8 Martin contends that the Board should have used the burden of proof established by Rule VI, § 7 of the Milwaukee County Personnel Review Board Rules of Procedure, requiring that for criminal conduct the clear and convincing evidence standard must be used. Martin is incorrect. Although the Milwaukee

County Sheriff's Department was initially involved in the investigation of the photos, it was determined that Martin's actions did not amount to a criminal offense. While Martin argues that the Board's "vague charges clearly result in a potential criminal finding," she provides no authority to support her assertion or connect it to her burden-of-proof position. Therefore, we need not further address this argument. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not address "amorphous and insufficiently developed" argument).

C. Due Process

¶9 Martin contends that in its inference of facts, in its failure to provide a pre-termination hearing, in its failure to allow her to present relevant evidence, and in its failure to provide explicit and specific findings, the Board deprived her of due process rights under the Wisconsin and United States Constitutions. We disagree.

¶10 Martin's property interest in her employment is conferred by the laws of the state and is therefore protected by the due process provisions of the Wisconsin and the United States Constitutions. *See* ***State ex rel. DeLuca v. Franklin***, 72 Wis. 2d 672, 678, 242 N.W.2d 689 (1976). A governmental employee "who under state law … has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the protections of due process." *See* ***id.*** (quoting ***Goss v. Lopez***, 419 U.S. 565, 573 (1975)). Martin was 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." ***DeLuca***, 72 Wis. 2d at 679. The record establishes that Martin was afforded all these protections.

1. Impartial Decision Maker

¶11 As part of her due process claim, Martin essentially argues that the Board was not impartial. She contends that the Board unreasonably inferred, *without expert opinion*, that she intentionally took one of the photographs at issue. She relies on ***Weiss v. United Fire & Casualty Co.***, 197 Wis. 2d 365, 541 N.W.2d 753 (1995), arguing that the Board's examination of the photograph's qualities without an expert witness's testimony to determine whether it was taken intentionally or accidentally violated her due process rights. We disagree.

¶12 In ***Weiss***, the supreme court explained: "Whether expert testimony is required in a given situation must be answered on a case-by-case basis. The lack of expert testimony in cases which are so complex or technical that a jury would be speculating without the assistance of expert testimony constitutes insufficiency of proof." ***Weiss***, 197 Wis. 2d at 380-81 (citations omitted). Here, the issue regarding the photograph was not so complex as to require expert opinion.

¶13 Martin testified that she was standing "near the head of the cart with [the man's] body[,] with her Polaroid camera in hand, when [her colleague] ran into the … cart in an effort to get to the weighing scale with her cart." This, Martin said, startled her, causing her to take the photo. At the hearing, Eileen Weller, the administrative manager for the MEO, also testified. She explained, "The reason I don't believe Pat Martin saying it was an accidental photograph is because we have evidence from a photography expert who said it could not have been taken accidentally."

¶14 The Board found that "if Martin was standing near the head of the cart and there was no movement, then the angle of the photograph would have been from the head down and not centered as [the photograph] clearly shows it to be." Further, the Board found:

> If, alternatively, the carts collided and there was movement, then the photograph would be expected to be more centered, but blurred as a result of the movement. This was also not the case. The photograph of [the] body was precisely focused and centered. The Board found the evidence sufficient to support the view that Ms. Martin took the photograph purposefully and then gave a false account of how the photograph came to be taken.

¶15 The Board thoroughly examined the photograph and the events surrounding it. It considered each witness's testimony and drew logical inferences based on the facts. *See* ***Nolop v. Skemp***, 7 Wis. 2d 462, 465, 96 N.W.2d 826 (1959) (fact-finder does not need expert witness to evaluate what photograph depicts). Thus, Martin's argument fails.

¶16 Martin also challenges the Board's impartiality arguing that "substantial evidence did not support [its] termination decision." She relies on ***Madison Teachers, Inc. v. WERC***, 218 Wis. 2d 75, 85, 580 N.W.2d 375 (Ct. App. 1998), contending that a reasonable person could not deduce from the evidence that Martin should be terminated. Again, we disagree.

¶17 In ***Madison Teachers***, this court determined that, on review, where a Board has made a factual finding, we look to the record to determine whether "a reasonable person, acting reasonably, could … have reached the decision from the evidence and its inferences." ***Id*** at 86 (citation omitted). Here, the record establishes that the Board's decision was reasonable and was supported by substantial evidence.

¶18 First, Martin argues that substantial evidence did not support the Board's finding that she "wrongly disposed of photograph 1." This argument, however, is based on a narrow reading of the Board's conclusion. In full, the Board details:

> Patricia Martin also violated the work rules of the [MEO] by not routinely marking photographs that she took with the deceased's name, case number or the day of examination and by not enclosing either photograph in an envelope or associating them with a file…. [Photos 1 and 2] were not identified properly by Ms. Martin according to office policy and procedure nor were they found to be associated with a file. Although Ms. Martin testified that she discarded [photo 1] and suggested that other staff had access to her desk drawer to place the [two] photograph[s] there, there was no other evidence to support this premise other than her own testimony. The fact that [an MEO investigator] found [photo 1], not in the trash, but in a pile of forms on Ms. Martin's desk, and that first shift staff testified that they did not know about the photographs and testified that they did not plant them in Ms. Martin's work area sufficiently controverts that premise. *Both photographs were found in [a] place they should not have been and were not marked as a part of a case file, all contrary to established policy.*

(Emphasis added.) The Board briefly discussed the fact that photo 1 was "not in the trash," but it did not find that Martin "wrongly disposed of photograph 1." The Board simply included this piece of evidence in its analysis to find that neither photo was properly identified or associated with a file.

¶19 Second, Martin argues that substantial evidence did not support the Board's finding that she "wrongly labeled photograph 1." She contends that there was not a proper procedure for labeling an accidental photo. Whether the MEO had such a policy or procedure, however, is immaterial because the Board did not find that Martin "wrongly labeled photograph 1." It joined photos 1 and 2 in its analysis to find that "*both* photographs were found in [a] place they should not

have been and were not marked as part of a case file, all contrary to established policy."

¶20 Third, Martin argues that substantial evidence did not support the Board's finding that photo 2 was taken for personal reasons or that she "improperly retained photograph 2 in her drawer." She contends that photo 2 was taken for identification purposes and that she did not retain the photo for personal reasons. She claims that someone planted it in her desk or that it belonged to one of the colleagues who shared her desk.

¶21 At the hearing, Rodney Brown, an investigative coordinator for the MEO, testified that it was possible that photo 2 was taken for identification purposes as the corpse had identifying marks on its thigh and genitals. He also testified that it was not uncommon for photos of various body parts to be taken for use by medical staff in determining cause of death. Photo 2, however, was neither labeled nor associated with a file. It was simply lying face down in Martin's desk-drawer. The possibility that photo 2 may have been taken for identification purposes does not trump the fact that the photo was found in Martin's desk drawer unmarked and not associated with a file. Eileen Weller, the administrative manager for the MEO, testified that "if a photograph was not labeled and placed in a case file, she could see no other reason that it would be retained except for personal use."

¶22 Further, Martin's contention—that someone placed the photo in her drawer or that it belonged to another colleague who shared her desk—lacks support. More than one MEO employee witnessed the presence of photo 2 in Martin's desk drawer. Brown testified that Martin was the only MEO employee who used that desk drawer and that it was apparent that it was Martin's drawer

because it had "pictures of her children's colors on the drawer." At the hearing, when Janice Beamon, the colleague whom Martin had accused of planting the photo in her desk to get her into trouble, was asked whether she had planted the photo, she denied that she had done so. No evidence supports Martin's contention that anyone planted the photo or that it belonged to someone who shared her desk. Thus, the Board reasonably determined that Martin improperly retained photo 2 in her desk for personal purposes.

¶23 Finally, Martin argues that substantial evidence did not support the Board's determination that she was not targeted for discipline. Martin asserts that, due to a memo she wrote regarding what she viewed as a discriminatory necktie policy, the MEO retaliated against her. The Board found "the evidence insufficient to support Ms. Martin's account of a management conspiracy to discipline her." We agree. Martin's allegation is purely speculative. The record reveals no evidence, aside from Martin's assertion, to support her argument.

2. Timely and Adequate Notice of Reasons for Discharge

¶24 As part of her due process claim, Martin also argues that the Board did not give her timely and adequate notice of its reasons for discharge. She contends that the Board did not "provide explicit and specific findings" to support its determination, and that she was not afforded a pre-termination hearing. We disagree.

a. Explicit and Specific Findings

¶25 Martin relies on ***Stas v. Milwaukee County Civil Service Commission***, 75 Wis. 2d 465, 249 N.W.2d 764 (1977), to argue that the Board's decision was unconstitutionally vague because it did not "provide explicit and

specific findings" to support its conclusions. She asserts that a board must state specific findings of fact and conclusions of law. *See* ***Edmonds v. Bd. of Fire & Police Comm'rs***, 66 Wis. 2d 337, 345, 224 N.W.2d 575 (1975). This, however, is precisely what the Board provided in its lengthy decision.

¶26 The Board's decision included twenty pages of factual findings, many of which we already have recounted in this opinion, supporting its conclusions. The findings are specific and support the Board's conclusions.

¶27 The Board's conclusion that Martin's behavior was indecent and inappropriate and occurred on county premises during working hours, and that her conduct was abusive or improper treatment toward an inmate or patient, are supported by its finding that Martin purposely took photo 1 without a legitimate reason. The Board reasonably concluded that "the taking of a photograph of the genitalia of the dead, without a work related purpose, was improper and indecent treatment of a body entrusted to [her] care." Thus, the Board explicitly and specifically detailed its reasons for concluding that Martin violated paragraphs (dd) and (ee) of Rule VII. *See* ¶4, above.

¶28 The Board's conclusion that Martin refused or failed to comply with departmental work rules, policies, or procedures, in violation of paragraph (*l*) of Rule VII, also is adequately supported by its findings. The Board reviewed the Position Description for the Forensic Investigator, copies of the MEO's Procedures for Reportable Deaths, and the requirements for body photographs. The Board detailed the policy for body photographs: "[A]t least two Polaroid photographs, a frontal and a lateral of the face [are] to be taken. Photographs [are] to be marked with the deceased's name and case number. If there [is] no case

number, the photograph ha[s] to list the date of the examination on both photographs."

¶29 The Board also discussed the testimony of Rodney Brown. He testified that "the Medical Examiner's policies were distributed to all staff and all employees were required to sign a statement that they had been read." He explained that "photographs of bodies and body parts were routinely taken for purposes of identification and for reasons associated with investigating the cause of death, but that all such photographs should be enclosed in a case file or envelope and marked appropriately." Brown testified that there was no written policy on how photos were to be discarded but that "a prudent person would probably cut up discards or shred them so that they would be incapable of outside identification." Moreover, he said, "the [MEO] had a policy that prohibited the retention of photographs of decedents for personal use."

¶30 The photos that Martin retained were not initialed, dated, numbered, or associated with a file in accordance with office guidelines. The Board explicitly and specifically detailed its reasons for concluding that Martin violated paragraph (*l*) of Rule VII. *See* ¶4, above.

¶31 Finally, the Board's conclusion that Martin made false or malicious statements, either oral or written, concerning any employee, the county or its policies, in violation of paragraph (n) of Rule VII, was adequately supported in its findings. The Board's decision discussed Martin's testimony that "she prepared and signed the text and narrative of the admitting report [for the corpse in photo 1] … and that she had taken only two photographs for purposes of identification." The Board reported that "when asked if there was any reason why a copy of [photo 1] was not included in the admitting report for purposes of identification,

Martin answered that she did not know." Further, after determining that photo 1 had not been taken accidentally, the Board found that "Martin falsely reported the circumstances under which she took the photograph to the Sheriff's Department and to the managers in the [MEO]." The Board explicitly and specifically detailed its reasons for concluding that Martin violated paragraph (n) of Rule VII. *See* ¶4, above.

b. Pre-termination Hearing

¶32 Martin claims that she was deprived of due process because she did not receive a pre-termination hearing. However, on June 16, 2000, Martin attended, and had union representation, at a disciplinary hearing with Dr. John Teggatz, the Deputy Chief Medical Examiner. She contends that this was not a pre-termination hearing because "this meeting did not afford [her] oral or written notice of the charges, an explanation of the MEO's evidence or an opportunity to present her side of the evidence related to the photographs." At the hearing, however, Martin was indeed afforded an explanation of the charges and given the opportunity to present her side. She was specifically asked about the circumstances surrounding the two photos; however, as directed by her union representative, she did not respond to these questions. Thus, Martin was not denied a pre-termination hearing.

3. Opportunity to Cross-Examine Witnesses

¶33 Martin argues that the Board denied her due process because it did not allow her to present relevant evidence through cross-examination. We disagree.

¶34 Martin asserts that she was unable to develop her defense strategy because the Board did not allow her to cross-examine Beamon about how a "pill book" that disappeared from another colleague's desk was later found at Beamon's desk. Martin misrepresents the record. She cross-examined Beamon at length on this subject.

¶35 Martin also argues that she was not afforded the opportunity to present relevant evidence because the Board did not allow her to elicit testimony from Beamon that she (Beamon) almost accidentally took a photo similar to the way Martin contends she (Martin) took photo 1. At the hearing, after allowing Martin to explain why she was attempting to elicit this testimony, the Board concluded that it was not proper on cross-examination and that she would have the opportunity to recall Beamon on direct. In fact, the Board went so far as to order that Beamon be present for Martin's direct examination, if necessary. Martin, however, did not recall Beamon.

¶36 Thus, the record establishes that Martin was not denied the opportunity to present relevant evidence through cross-examination. She was able to pursue the very subjects that she claims were foreclosed.

D. Review of Circuit Court's Decision

¶37 Finally, Martin argues that the circuit court erroneously upheld the Board's decision and that it deprived her of due process rights "in its failure to provide explicit and specific findings." She contends that the court failed to explain the bases for its conclusions that: (1) the Board's findings and conclusions were not impermissibly vague; (2) the Board did not improperly disallow her from presenting relevant evidence; (3) the Board did not apply an incorrect burden of proof. Relying on ***Bucyrus-Erie Co. v. DILHR***, 90 Wis. 2d 408, 416, 280 N.W.2d

142 (1979), Martin contends that because the circuit court affirmed the Board's order, we must determine whether the circuit court erred in its determination and in its scope of review. Martin is incorrect.

¶38 In ***Bucyrus-Erie Co.***, an administrative agency's order was appealed to the circuit court through WIS. STAT. § 227.15 (1973), which is essentially equivalent to the current WIS. STAT. § 227.52 (administrative decisions which adversely affect a person's interests are subject to review). This ch. 227 procedure, however, does not apply to the instant case. Martin petitioned for a writ of certiorari to the circuit court through WIS. STAT. § 63.10. *See* ***State ex rel. Iushewitz***, 176 Wis. 2d at 710; *see also* MILWAUKEE, WIS., GEN. ORDINANCES § 33.01. Therefore, because this was a certiorari action, we have conducted a *de novo* review of the Board's decision, *see* ***Peace Lutheran Church & Acad.***, 2001 WI App. 139 at ¶10, and, in doing so, we have rejected Martin's claims.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.