

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 12, 2011**

A. John Voelker  
Acting 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 Nos. 2009AP2413  
2009AP2948  
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2001CV222  
2007CV550**

**IN COURT OF APPEALS  
DISTRICT III**

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**No. 2009AP2413**

**JOHN MARDER,**

**PETITIONER-APPELLANT,**

**V.**

**BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,**

**RESPONDENT-RESPONDENT.**

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**No. 2009AP2948**

**JOHN MARDER,**

**PETITIONER-APPELLANT,**

**V.**

**TOBY E. MARCOVICH, JOSEPH M. ALEXANDER,  
ROGER E. AXTELL, GUY A. GOTTSCHALK,  
JAMES R. KLAUSER, PHYLLIS M. KRUTSCH,  
FREDERIC E. MOHS, JOSE OLIVIERI, GERALD A. RANDALL, JR.,**

**LOLITA SCHNEIDERS, JAY L. SMITH, JULIUS ERLÉN BACH AND  
BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,**

**DEFENDANTS-RESPONDENTS.**

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APPEALS from judgments of the circuit court for Douglas County:  
ROBERT E. EATON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. John Marder appeals two judgments, one affirming a Board of Regents of the University of Wisconsin System decision to terminate his employment, and the other dismissing his separate 42 U.S.C. § 1983 action on preclusion grounds. Marder argues the court erroneously concluded the Board did not receive new material evidence during an *ex parte* meeting with a chancellor. Marder also argues he was entitled to challenge the sufficiency of the evidence supporting the Board’s determination, despite the supreme court’s limited mandate on remand to the circuit court. We reject Marder’s arguments and affirm.

**BACKGROUND**

¶2 Following a closed session meeting with the University of Wisconsin-Superior chancellor, the Board of Regents terminated Marder, a tenured faculty member at UW-Superior. Marder appealed the decision, eventually arriving at our supreme court. The supreme court rejected all but one of Marder’s arguments, and remanded to the circuit court.

¶3 The supreme court explained, “[A]n *ex parte* communication merits ... consideration as a *potential* violation of due process rights only if the

decision-maker is provided *new and material information* in the course of the communication.” *Marder v. Board of Regents of the Univ. of Wis. Sys.*, 2005 WI 159, ¶28, 286 Wis. 2d 252, 706 N.W.2d 110 (emphasis added) (citing *Stone v. FDIC*, 179 F.3d 1368, 1376 (Fed. Cir. 1999)). The court set forth its conclusion and remand directions as follows:

[B]ased on the record before us, we cannot determine whether in the communication between the chancellor and the Board, which occurred immediately before the Board voted to terminate Marder, the chancellor presented new facts to the Board upon which its decision to terminate Marder was based. Therefore, *we remand to the circuit court for the limited purpose of making that determination.* We leave to the circuit court’s discretion the decision of whether discovery is needed to determine whether the chancellor presented any new facts upon which Marder’s termination was based.

....

[A]s the United States Supreme Court has explained, because due process requires that deprivation of property must be preceded by notice and an opportunity for hearing appropriate to the nature of the case, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), Marder’s right to notice of the charges against him was violated if the Board was presented with new facts on which Marder’s termination was based. Therefore, we agree with the court of appeals that a remand to the circuit court is necessary to answer whether such facts were presented.

*Marder*, 286 Wis. 2d 252, ¶¶3, 40 (emphasis added).<sup>1</sup>

¶4 Additionally, at the outset of its decision, the court observed, “Marder does not assert that there was insufficient evidence presented to the Board

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<sup>1</sup> The language set forth in the first quoted paragraph was repeated in the court’s conclusion. *Marder v. Board of Regents of the Univ. of Wis. Sys.*, 2005 WI 159, ¶¶3, 40, 286 Wis. 2d 252, 706 N.W.2d 110.

to terminate him for just cause.” Marder moved the supreme court for reconsideration of that statement, arguing he was never allowed to litigate certain issues because the case had been appealed on procedural matters. The court denied Marder’s motion.

¶5 On remand, the circuit court permitted Marder to conduct discovery. Following discovery, Marder moved for an order reversing the Board’s decision. The circuit court denied the motion, concluding the chancellor had not introduced new, material allegations or evidence in the ex parte meeting with the Board.

¶6 Marder then requested a review of the record to determine whether substantial evidence supported the Board’s decision. The court denied the motion and entered judgment for the Board because the supreme court had “remanded the case for the **limited purpose** of determining whether [the Board] was presented with new facts by the chancellor[,]” and the court had “performed that duty.”

¶7 In the separate, stayed § 1983 action against the chancellor and those board members who voted for termination, Marder alleged the ex parte meeting deprived him of due process because new and material information was presented to the Board. The circuit court dismissed the action on preclusion grounds. Marder now appeals the judgments in both cases.

## DISCUSSION

### Review of the Board’s determination

¶8 Marder presents various issues, including whether the Board members sufficiently reviewed the record and whether there was sufficient

evidence to support the Board's determination.<sup>2</sup> We do not address these arguments because they exceed the limited scope of remand. The supreme court could not have been any more clear in its mandate. The circuit court was permitted only to determine whether the Board received, and relied upon, new material evidence at the ex parte meeting, resulting in a due process violation.<sup>3</sup> See WIS. STAT. § 808.09; *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee Cnty.*, 2000 WI 30, ¶25, 233 Wis. 2d 428, 447-48, 608 N.W.2d 679 (circuit court must act in a manner not inconsistent with the mandate on remand). Therefore, in Marder's second appeal, we are concerned singularly with that determination. Excepting the one issue remanded, the case is closed.

¶9 Whether due process has been provided is a question of law. *Marder*, 286 Wis. 2d 252, ¶¶19, 39 (remand necessary because court did "not have

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<sup>2</sup> Marder's arguments are difficult to follow because he violated a basic rule of appellate procedure. WISCONSIN STAT. RULE 809.19(1)(b) requires that an appellant's brief contain "[a] statement of the issues presented for review and how the trial court decided them." RULE 809.19(1)(e), in turn, requires "[a]n argument, arranged in the order of the statement of issues presented." Instead, Marder's brief contains a statement presenting three issues, while the argument consists of six issues that do not neatly correspond to the issues presented or follow in the same order.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

<sup>3</sup> The Board understates Marder's burden. The Board asserts the supreme court defined "material" as "any fact upon which Marder's termination was based." The court's decision never defines material. Rather, a careful review of the court's decision, quoted supra, reveals that Marder must demonstrate (1) that the Board received new material information and (2) that the Board actually relied on that information as a basis for its decision to terminate Marder.

enough information about what occurred in that meeting to determine if Marder's rights were violated"). At the ex parte meeting, the chancellor told the Board:<sup>4</sup>

Having lived with this situation for almost five full years now, and having filed my statement of charges with Dr. Marder two years ago last month, I can tell you that I am very familiar with this case. I have shared with the Personnel Matters Review Committee my review of the information available to you in the record, which convinces me that the following facts are not in dispute.

....

As your chancellor and your representative on the UW-Superior campus, I can tell you that it is my judgment that this behavior is so flagrantly at odds with the core educational mission of the university that it warrants Dr. Marder's termination. Indeed, in searching for possible explanations for such egregious conduct, including what Dr. Marder has offered in his own defense, my own review of the case reveals that not only can he NOT deny the facts described above, but also that he HAS not denied them.

¶10 The Board's brief addresses the facts that Marder complains are new and material, and then sets forth at length the charges against Marder, the relevant facts of record, the advisory personnel committee's findings, and the Board's findings. We adopt those facts by reference. Our close review of those facts leads us to conclude that the chancellor's stated opinion that various facts were undisputed, and recitation of those allegations, did not constitute any new material evidence upon which the Board relied to terminate Marder.

¶11 However, Marder also contends that the following rhetorical questions the chancellor posed to the Board constituted new and material facts:

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<sup>4</sup> While there was no transcript of the meeting, the chancellor had prepared notes that, he averred, were closely followed in the presentation to the Board. Neither party disputes what information was conveyed in the meeting.

Now, I recognize that this is a difficult matter for you, just as it has been difficult for me. But, as you consider this situation I would also urge you to consider these questions, especially if you are considering dismissing these charges: What do we say to students who have forwarded to you a resolution from the Student Senate, the official campus student governance entity, seeking Dr. Marder's dismissal? What do we say to the many students who signed petitions seeking Dr. Marder's dismissal? What do we say to the good citizens of our campus community and the broader public in the Twin Ports region who continue to monitor this case wondering why, given the press accounts of the review of this matter, Dr. Marder is still on the campus and employed as a member of the faculty? If this behavior is not sufficiently inappropriate or unprofessional for termination, what is? What do we say to parents of prospective students who inquire whether or not Dr. Marder will be on campus next fall—and who point out in the next breath that they will not be sending their daughters to UW-Superior as long as he is on the faculty? Finally, what do you as a board say to me and your other chancellors when we confront similar difficult and egregious situations in the future?

¶12 The chancellor's questions, and assumed facts, were unrelated to the specific charges against Marder or the evidence supporting or refuting the charges. Marder was charged with sexual indiscretions and unprofessional conduct, not with being the target of resolutions, petitions, or public criticism. Thus, because they could not form the basis of the Board's termination decision, they do not constitute material facts. *See Marder*, 286 Wis. 2d 252, ¶¶33, 40 (“[W]e must determine whether Marder has carried the burden to show that the ... ex parte communication[] ... introduced new information on which the Board based its decision to terminate Marder.”). Marder's right was to prior notice of the charges and evidence against him, not to notice of the environment within which the decision makers operate. *See id.*, ¶¶28, 40 (quoting *Stone*, 179 F.3d at 1375-76).

¶13 Moreover, as the advocate for UW-Superior, the drafter of the charges against Marder, and the official recommending Marder's termination to

the Board, the chancellor's comments are not in the least inappropriate. Indeed, the chancellor's comments, as a whole, are precisely what we would expect of a chancellor defending his or her recommendation to terminate a tenured faculty member. We agree with the circuit court that Marder's due process rights were not violated by the chancellor's ex parte meeting with the Board.<sup>5</sup>

42 U.S.C. § 1983 action

¶14 Marder argues that we must reinstate his § 1983 action if we conclude the chancellor presented new and material evidence to the Board. Because we conclude no such evidence was presented, the issue is moot.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

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<sup>5</sup> An amicus curiae brief was filed urging reversal of the Board's determination because the chancellor's statements amounted to "oral argument," thus violating Marder's right to due process. This new argument is not permitted by the supreme court's limited-scope remand.



