OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

May 21, 2024

To:

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You are hereby notified that the Court has entered the following opinion and order:

2023AP52 James Lucky v. Milwaukee County Personnel Review Board (L.C. # 2022CV901)

Before White, C.J., Donald, P.J., and Colón, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

James Lucky appeals from an order of the circuit court upholding a decision of the Milwaukee County Personnel Review Board (PRB) which terminated Lucky's employment with the Milwaukee County Sheriff's Office (MCSO). We agree with the circuit court that the PRB acted properly and that the evidence is sufficient to support the PRB's decision. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

On September 17, 2021, the MCSO filed charges for discharge with the PRB against Lucky after an internal affairs investigation found that Lucky violated multiple MCSO Rules and Milwaukee County Civil Service Rules.[2] The charges stemmed from an incident that took place in July 2021 when Lucky was a deputy sheriff guarding an inmate at Froedtert Hospital. The investigation found that Lucky sexually harassed the on-duty nurse assigned to the inmate.

Following a hearing, the PRB found that there was sufficient evidence to support the alleged rule violations and upheld Lucky's discharge. Lucky filed a petition for a writ of certiorari with the circuit court.[3] The circuit court affirmed the PRB. This appeal follows.

We review the PRB's decision, not the decision of the circuit court. ***Driehaus v. Walworth Cnty.***, 2009 WI App 63, ¶13, 317 Wis. 2d 734, 767 N.W.2d 343. The PRB's decision enjoys "a presumption of correctness and validity." *See* ***id.*** "However, a board must apply the appropriate legal standards and adequately express the reasons for its decision on the record." ***Id.***

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] Specifically, Lucky was charged with violating MCSO Rules 202.14 (Violation of Milwaukee County's Sexual Harassment Policy), 320.5.4 (Relationships), and 320.5.9 (Conduct), as well as Milwaukee County Civil Service Rule VII, Section 4(1)(l) (Refusing or failing to comply with departmental work rules, policies or procedures, and Section 4(1)(ff) (Offensive conduct or language toward the public or toward county officers or employees).

[3] To the extent Lucky seeks review of any issues pertaining to the statutory review of the PRB's decision pursuant to WIS. STAT. § 59.52(8)(c), we note that a circuit court's decision on statutory appeal is "final and conclusive[.]" *See* ***Gentilli v. Board of Police & Fire Comm'rs***, 2004 WI 60, ¶14, 272 Wis. 2d 1, 680 N.W.2d 335. Therefore, any issues relating to Lucky's statutory claims are not before this court.

"Whether the [b]oard acted in excess of its powers, applied an incorrect theory of law, or made an arbitrary, oppressive or unreasonable decision are each questions of law that this court reviews *de novo*." ***Id.*** (emphasis added). The PRB's findings will be upheld if they are supported by "any reasonable view of the evidence[.]" *See* ***State v. Waushara Cnty. Bd. of Adjustment***, 2004 WI 56, ¶13, 271 Wis. 2d 547, 679 N.W.2d 514.

On appeal, Lucky raises multiple issues. He contends that the circuit court erred in considering statements Lucky made "under express threat of termination," contrary to ***Garrity v. State of New Jersey***, 385 U.S. 493 (1967); that the circuit court considered extrinsic evidence when rendering its decision to uphold the PRB; that the circuit court engaged in *ex parte* communications with the PRB; and that the circuit court failed to hear Lucky's case within a fifteen-day period pursuant to WIS. STAT. § 59.52. Notably, none of Lucky's arguments directly address the criteria this court considers when conducting a review on certiorari, nor does he challenge the sufficiency of the evidence in any meaningful way.

As stated, we review the decision of the PRB, not the circuit court, and we will uphold the PRB's decision if any reasonable view of the evidence supports the PRB's decision. Here, the PRB's decision was based on testimony from the on-duty nurse, multiple exhibits, and what the PRB found to be inconsistent testimony from Lucky that lacked credibility. The evidence supports the PRB's decision that Lucky violated multiple MCSO Rules and Milwaukee County Civil Service Rules relating to noncompliance with departmental work rules, policies or procedures, and offensive conduct.

As to Lucky's specific arguments, he first contends that the circuit court considered coerced statements Lucky made without a ***Garrity*** warning. Specifically, he contends that when

a superior sergeant relieved him of his duties at Froedtert following the harassment complaint, Lucky was coerced into making statements that resulted in his termination. In ***Garrity***, the United States Supreme Court held that when a public officer makes statements under "threat of removal from office," those statements are coerced as a matter of law and may not be used against the officer in criminal proceedings. ***Id.***, 385 U.S. at 500. In ***State v. Brockdorf***, 2006 WI 76, 291 Wis. 2d 635, 717 N.W.2d 657, our supreme court adopted a two-pronged "subjective/objective test" for determining whether statements should be suppressed under ***Garrity***: "[1] [the public employee] must subjectively believe he or she will be fired for asserting the privilege against self-incrimination, and [2] that belief must be objectively reasonable." ***Brockdorf***, 291 Wis. 2d 635, ¶35. In applying this test, courts look to the "totality of the circumstances surrounding the statements." ***Id.***, ¶36.

The Respondent points out that Lucky did not challenge the lack of a ***Garrity*** warning at his hearing before the PRB and has therefore forfeited that claim on appeal. Indeed, Lucky does not challenge this assertion; rather, he argues that the Respondent's argument "proves the absurdity of certiorari without transcript." To preserve an issue for judicial review, a party must raise it before the administrative agency. ***State v. Outagamie Cnty. Bd. of Adj.***, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376. Failure to raise an argument before the administrative agency generally constitutes a forfeiture of the right to raise that argument on appeal. ***Id.*** Although we agree that Lucky forfeited the right to challenge the ***Garrity*** issue, we also note that nothing in the record supports Lucky's claim that he was entitled to, and failed to receive, a ***Garrity*** warning. While Lucky claims that the sergeant "interviewed" him, the record shows that Lucky submitted a statement to the PRB complaining about *the lack of interaction* between the

sergeant and himself. The record suggests that Lucky and the sergeant had minimal contact and that Lucky's testimony as to that interaction was inconsistent. Nothing in the record suggests that Lucky was coerced into making any incriminating statements.[4]

Lucky next contends that the circuit court engaged in *ex parte* communications with the PRB with regard to the filing of the transcript of the PRB hearing, risking actual bias. The Respondent accurately summarizes Lucky's argument as follows:

> [Lucky's] claim … seems to be that a routine communication between a circuit court deputy clerk and a litigant about a procedural issue related to a filing somehow has tainted the entire case, notwithstanding the fact that the case was transferred to a second judge for substantive decision in connection with a routine … judicial rotation. Strikingly, Lucky does not reveal what he believes the relief should be—perhaps because the judge who he claims was biased did not even decide his case.
>
> The underlying premise that appears to be driving Lucky's argument is that the court should have required the PRB to submit a transcript of his hearing before the PRB. In a confusing turn, however, Lucky tries to claim that because the PRB did not supply a transcript of the recording of the hearing, he was somehow required to "certify" the record in violation of WIS. STAT. § 59.52. He cites no authority for this tortured interpretation.

We agree that Lucky's argument is "tortured." Lucky's argument is based on a series of emails between the circuit court clerk and an administrative assistant from the PRB regarding the filing of a flash drive containing an audio of the PRB hearing. At a hearing, the circuit court stated that the audio recordings constituted the official record, but asked for a copy of a transcript. Lucky objected to the circuit court's request, stating that a transcript would be

[4] Because we conclude that (1) Lucky forfeited his claim as to the ***Garrity*** warnings, and (2) the record nonetheless shows that Lucky did not make any incriminating statements under the threat of coercion, we decline to address Lucky's claim that the circuit court considered extrinsic evidence when deciding that no ***Garrity*** violation occurred. *See* ***Garrity v. State of New Jersey***, 385 U.S. 493 (1967).

external to the record and that the circuit court would be "forbidden" from considering it. The circuit court rejected this argument, stating that the transcript was simply a transcript of the audio recording, which was a certified part of the record. The circuit court's response is consistent with WIS. STAT. § 59.52(8)(c), which requires the PRB to "certify to the clerk of the circuit court the record of the proceedings, including all documents, testimony and minutes." Nowhere in the statute does it indicate that "testimony" must be certified to the court in written form. It is unclear to this court how Lucky managed to twist communications regarding filing procedures and the court's request for a transcript into a claim that the circuit court engaged in *ex parte* communications. We decline to address this issue further.

Lucky also contends that the circuit court failed to hold a trial on his statutory claim within fifteen days after he moved for statutory review, as required by WIS. STAT. § 59.52(8)(c). The circuit court found that there was good cause or excusable neglect for the delay. Specifically, the circuit court found that Lucky had delayed the proceedings himself and was not prejudiced by the delay. We agree.

We have already stated that any issues relating to Lucky's statutory claims are not before this court. Nonetheless, we note that Lucky initiated his case against the PRB by filing for certiorari review in February 2022, but he did not file an application for a statutory review trial until June 2022. When the circuit court attempted to schedule a hearing on Lucky's statutory appeal, counsel for Lucky informed the court that he would be out of the country for the entire month of July, resulting in any hearing being pushed off until mid-August. Lucky agreed to the delay. As the circuit court noted, Lucky sat on the matter for months before taking an affirmative

action to have statutory review and agreed to his counsel's request to delay the hearing. Lucky was not prejudiced by any delay that occurred.[5]

For all the foregoing reasons, we affirm the circuit court.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FUTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

[5] In his brief to this court, Lucky contends that he raised a Section 1983 claim against the PRB alleging malicious conduct with regard to the filing of the record in the circuit court. He states that the circuit court "also dismissed [his] 1983 claims without discussion. This is a violation of Lucky's due process rights." Lucky fails to develop this argument and therefore, we do not consider it further. *See* ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶27, 318 Wis. 2d 488, 770 N.W.2d 727 ("[W]e will not address arguments that are not developed."); *see also* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments." (citations omitted)).