

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 29, 1995

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

NOTICE

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

No. 94-3130

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JAMES R. MILBRATH,

Plaintiff-Appellant,

v.

**BOARD OF FIRE AND POLICE COMMISSIONERS
OF THE CITY OF WEST ALLIS,**

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Dismissed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. James R. Milbrath appeals from a judgment sustaining the decision of the Board of Fire and Police Commissioners of the City of West Allis. The Board had discharged Milbrath for violation of its residency rule. Milbrath contends that the circuit court erroneously exercised its discretion when it determined that, pursuant to § 62.13(5)(em)7, STATS., the Board's discretion in determining discipline is not subject to court review. He

also contends, in the alternative, that the circuit court erroneously exercised its discretion by failing to consider any relevant facts in the record when it determined that termination was the only appropriate discipline in this case.

The issue before the Board was whether Milbrath's residence for the purpose of the West Allis residency requirement was in Muskego where his wife lived or in West Allis at a room rented from his wife's parents. The Board unanimously determined that Milbrath resided outside the City of West Allis and discharged him.

Milbrath filed a complaint in the circuit court challenging the Board's decision by appeal pursuant to § 62.13(5)(i), STATS., and by certiorari. The circuit court determined, however, that all of Milbrath's arguments pertained to the statutory appeal, and Milbrath does not challenge this conclusion.

In an appeal pursuant to § 62.13(5)(i), STATS., the sole issue before the circuit court is whether, based upon the evidence, there was just cause to sustain the charges against the accused. The standards governing the Board's and the circuit court's determination of just cause are set forth in § 62.13(5)(em).¹ Section 62.13(5)(i). The latter provision identifies the following seven standards to be considered when making a just-cause determination:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct[;]
2. Whether the rule or order that the subordinate allegedly violated is reasonable[;]
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to

¹ Pursuant to 1993 Wis. Act 53, § 7, effective November 25, 1993, the circuit court's standard of review of the Board's decision changed from whether the Board's decision is reasonable based upon the evidence, *see* § 62.13(5)(i), STATS. 1991-92, to whether there is "just cause" to sustain the charges against the officer.

discover whether the subordinate did in fact violate a rule or order[;]

4. Whether the effort described under subd. 3. was fair and objective[;]

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate[;]

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate[; and]

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

Section 62.13(5)(em).

The circuit court addressed six of the seven standards and concluded that just cause was shown. The court concluded that the seventh standard was not relevant to the just-cause issue because the standard addressed the appropriateness or reasonableness of the "proposed" discipline imposed. The court reasoned that "proposed" discipline is a matter that can only be considered prior to imposition of discipline. This is the reasoning that underlays the court's conclusion that the seventh standard is not relevant to the just-cause review. The court concluded that once just cause is shown, the Board has unfettered discretion in setting discipline. It is this conclusion that Milbrath challenges.

We conclude that this court lacks jurisdiction to review the circuit court's judgment. Section 62.13(5)(i), STATS., provides, in part:

If the order of the board is reversed, the accused shall be forthwith reinstated and entitled to pay as though in continuous service. If the order of the board is sustained[,] it shall be final and conclusive.

This provision has been held to mean that the circuit court's order is final and conclusive and that an appeal from the order is not authorized. *Jendrzewski v. Board of Fire and Police Comm'rs*, 257 Wis. 536, 539, 44 N.W.2d 270, 272 (1950). Although a petitioner may combine a statutory appeal to the circuit court with certiorari review, the court of appeals may only address the issues raised via certiorari. *Owens v. Board of Police and Fire Comm'rs*, 122 Wis.2d 449, 451, 362 N.W.2d 171, 172-73 (Ct. App. 1984). The portion of the circuit court's judgment deciding the statutory appeal is final. *Id.*

Here, Milbrath challenges the circuit court's decision on the statutory appeal. He contends that the circuit court was required to consider the seventh standard of § 62.13(5)(em), STATS., when determining whether just cause existed. This is an attempt to appeal from the judgment sustaining the Board's order under § 62.13(5)(i). This court lacks jurisdiction to consider the appeal, and the appeal must be dismissed.

By the Court. – Appeal dismissed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.