COURT OF APPEALS
DECISION
DATED AND RELEASED

August 29, 1995

No. 95-0199

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

DAVID M. IUSHEWITZ,

Plaintiff-Respondent,

v.

MILWAUKEE COUNTY PERSONNEL REVIEW BOARD,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Affirmed and cause remanded with directions.*

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

PER CURIAM. The Milwaukee County Personnel Review Board appeals from a mandamus judgment directing the Board to reconsider the five and one-half month suspension it imposed on David M. Iushewitz, and to substantially reduce the length of his suspension. The Board claims the trial court erroneously exercised its discretion in granting Iushewitz's writ of

mandamus for the following reasons: (1) because the elements necessary for granting mandamus were not present; (2) because laches bars the claim; or (3) because claim preclusion bars the mandamus action.[1] Iushewitz contends that the Board's appeal is frivolous and seeks appeal costs, fees, and attorney fees. Because the trial court did not erroneously exercise its discretion in granting the mandamus writ, we affirm the judgment. Because the Board's appeal is frivolous, we grant Iushewitz's motion seeking appeal costs, fees, and attorney fees. We remand this case to the trial court for a hearing to determine the amount of Iushewitz's appeal costs, fees, and reasonable attorney fees.

I. BACKGROUND

Iushewitz is a deputy sheriff sergeant of the Milwaukee County Sheriff's Department. On November 13, 1987, a complaint was brought against Iushewitz alleging several instances of misconduct. After hearings before the Board, the Board determined Iushewitz had committed only one of the instances of misconduct; that is, he failed to obey a superior's order to return some computer software. As a sanction for the misconduct, the Board imposed a five and one-half month suspension without pay.

In March 1989, Iushewitz commenced a certiorari action in circuit court against the Board challenging the sanction.[2] In January 1991, the circuit court affirmed the Board's determination that Iushewitz committed misconduct, but remanded to the Board because the sanction imposed was too harsh. On remand, the Board again imposed a five and one-half month suspension. Iushewitz again sought relief from the circuit court, but did not file a new writ of certiorari. Despite the absence of another writ of certiorari, the circuit court concluded that it had jurisdiction and issued an order instructing the Board to impose a suspension not exceeding ninety days. The Board appealed to this court challenging the circuit court's jurisdiction. We concluded that the circuit

[1] We note that the Board's argument refers to *res judicata*. Our supreme court, however, has chosen to replace this term with the term *claim preclusion. See* ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 549-50, 525 N.W.2d 723, 727 (1995). Accordingly, we use the term claim preclusion within the text of this opinion.

[2] The Honorable Russell W. Stamper presided over Iushewitz's first writ of certiorari as well as his subsequent appeal to the circuit court.

court did not have jurisdiction. *See* ***Iushewitz v. Milwaukee County Personnel Review Bd.***, No. 91-2171, unpublished slip op. at 3 (Wis. Ct. App. April 27, 1992).[3] Our decision was affirmed by our supreme court. *See* ***Iushewitz v. Personnel Review Bd.***, 176 Wis.2d 706, 500 N.W.2d 634 (1993). The supreme court also held that "[a] party seeking to enforce a mandate of a court may institute a separate action for a writ of mandamus." ***Id.*** at 711, 500 N.W.2d at 636.

In accord with this instruction from our supreme court, Iushewitz filed a separate action seeking a writ of mandamus to compel the Board to comply with the circuit court order requiring the Board to impose a shorter suspension. The trial court entered judgment granting the writ of mandamus, ordering the Board to impose a suspension that is "substantially" shorter than five and one-half months.[4] The Board appeals from this judgment.

II. DISCUSSION

A. Granting of Mandamus Judgment.

"In reviewing a mandamus action, 'the action of a trial judge in either granting or denying the writ will be affirmed' unless the judge erroneously exercised discretion." ***Keane v. St. Francis Hosp.***, 186 Wis.2d 637, 645, 522 N.W.2d 517, 520 (Ct. App. 1994). We will not find an erroneous exercise of discretion if the trial court applied the relevant facts to the applicable law and reached a reasonable conclusion. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

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[3] Our review of the transcripts in this case revealed that there was some confusion regarding citing unpublished opinions. For purposes of clarification, we direct the parties' attention to § 809.23(3), STATS., which provides:

> UNPUBLISHED OPINIONS NOT CITED. An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

[4] The Honorable Patrick J. Madden presided over the mandamus action.

The relevant facts are undisputed. On the initial writ of certiorari, the circuit court concluded that the five and one-half month suspension was too harsh. Upon remand, the Board refused to shorten the suspension. In other words, the Board refused to comply with a mandate from the circuit court. Applying these facts to the applicable law, the trial court reasonably concluded that granting the mandamus action was appropriate. The law governing these actions provides that a writ of mandamus should be granted when: "(1) the writ is based on a clear, specific legal right which is free from substantial doubt; (2) the duty sought to be enforced is positive and plain; (3) substantial damage will result if the duty is not performed; and (4) there is no other adequate remedy at law." ***Iushewitz***, 176 Wis.2d at 711, 500 N.W.2d at 636. The mandamus law further qualifies that in addition to the four factors, there must be no laches and no special reasons to refuse to grant the writ. ***Keane***, 186 Wis.2d at 646, 522 N.W.2d at 520. The Board apparently concedes factors (1), (3) and (4), but argues that the duty sought to be enforced was neither plain nor positive.[5] The Board also argues that laches bars the action and special reasons exist to deny the writ.

1. Plain or positive duty.

The Board argues that the duty sought was not plain or positive because the circuit court's original order did not clearly instruct the Board to reduce the length of the suspension. The Board claims that it was not clear whether the order required a decrease or an increase in the suspension time. The trial court's order specifically states that "punishment of a five and one-half (5 1/2) month suspension without pay is unreasonable under the facts as established in the record."

We reject the Board's claim. Within the context of this case, such a finding obviously implies that the five and one-half month suspension is unreasonably *long* and must be reduced. We conclude, therefore, that the trial court's order was clear—the directive to the Board on remand was to impose a shorter suspension.

[5] We conclude that the Board concedes the other three factors because its brief addresses only the plain/positive factor.

2. Laches.

The trial court also concluded that laches did not bar Iushewitz's claim. We agree. Laches acts as a defense to a mandamus action when there is an "unreasonable delay, lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which he bases his suit, and prejudice to the party asserting the defense." ***Watkins v. Milwaukee County Civil Service Comm'n***, 88 Wis.2d 411, 422, 276 N.W.2d 775, 780 (1979). The delay in the instant case does not satisfy the laches standard. Although the bare dates seem to support the Board's claim that the delay between the January 1991 order and the March 1994 mandamus action constitutes laches, a closer look demonstrates otherwise. As correctly noted by the trial court, the delay here "was brought about by the various appeals that took place here, [and] the uncertainty as to proper remedy, which has now been absolutely clarified by the Supreme Court of Wisconsin." We agree that the delay was not an *unreasonable* one. Further, any claim by the Board that it *lacked knowledge* would be incredulous as would any claim that the delay prejudiced the Board.

The record amply demonstrates that Iushewitz intended to challenge his suspension since the charges were issued in November 1987. Iushewitz has asserted his rights before the Board, the circuit court, the court of appeals, and the supreme court. The Board has knowingly taken part in the case before the various courts. Therefore, lack of knowledge, is not a consideration in this case.

The Board frames its prejudice argument in terms of "special circumstances" that exist to justify denying the mandamus request. According to the Board, these "special circumstances" that justify precluding a grant of mandamus are because "there is no doubt that the actions of the [Board] have been upheld and confirmed both ... at the trial court and by the appellate courts." The Board's belief that any of the courts that have been involved in this case "upheld" the punishment imposed by the Board is preposterous. The only action of the Board that was affirmed involved the conclusion that Iushewitz had engaged in one instance of misconduct.

3. Claim Preclusion.

The Board also claims that the mandamus action is barred by claim preclusion. The Board incredulously asserts that the mandamus action was improper because "Iushewitz's cause of action ... [had already] been litigated to conclusion before the supreme court." The Board is wrong. The issue litigated to conclusion before the supreme court was whether the circuit court that initially reviewed the decision would continue to have jurisdiction absent another writ of certiorari. ***Iushewitz***, 176 Wis.2d at 709, 500 N.W.2d at 635. Our supreme court did not affirm the Board's five and one-half month suspension. ***Id.*** at 708-11, 500 N.W.2d at 635-36. Rather, it noted the Board's "blatant" disregard of the circuit court's order instructing the Board to reduce the length of the suspension. ***Id.*** at 711, 500 N.W.2d at 636. Accordingly, the Board's claim that claim preclusion bars the mandamus action is wholly without merit.

B. Frivolous Appeal.

Iushewitz filed a motion with this court seeking attorney fees and costs on the basis that the Board's appeal is frivolous. We grant his motion and remand to the trial court for a hearing to determine what appeal costs, fees, and reasonable attorney fees should be awarded.[6]

Whether an appeal is frivolous presents a question of law. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 221, 241-42, 517 N.W.2d 658, 666 (1994). An appeal is frivolous under § 809.25(3), STATS., if it is pursued even though the party or the party's attorney knew, or should have known, that the appeal was without any reasonable basis in law or equity. ***Id.*** We conclude that the Board and its attorney knew or should have known that this appeal was without basis. As discussed above, the Board's claim that the circuit court's original order was unclear is preposterous. The laches and claim preclusion arguments are meritless as well. The clear lack of merit of the Board's argument does not even warrant further discussion.

[6] Iushewitz also requested the trial court to find that the Board's defense at the trial court level was frivolous pursuant to §§ 802.05 and 814.025, STATS. He notes, however, that the trial court did not have an opportunity to rule on this issue because the appeal was taken. Accordingly, on remand, we instruct the trial court to also consider whether the Board's defense at the trial court level was frivolous.

Accordingly, we grant Iushewitz's motion seeking appeal costs, fees, and attorney fees on the basis that this appeal was frivolous. We remand the case to the trial court for a hearing to determine and assess Iushewitz's reasonable appeal costs, fees, and attorney fees in this action. ***Stern***, 185 Wis.2d at 253-54, 517 N.W.2d at 670-71.

By the Court.—Judgment affirmed and cause remanded with directions.

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