

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MAY 1, 1996

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

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No. 95-2112

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

LOUIS SALIMES,

Petitioner-Appellant,

v.

**TOWN OF CALEDONIA
BOARD OF POLICE AND
FIRE COMMISSIONERS,**

Respondent-Respondent.

APPEAL from an order of the circuit court for Racine County:
DENNIS FLYNN, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

ANDERSON, P.J. Louis Salimes appeals from an order affirming the Town of Caledonia Board of Police and Fire Commission's (the Commission) decision to terminate his employment with the Caledonia Police Department. On appeal, Salimes argues that the Commission did not act

within its proper jurisdiction when it terminated his employment and that the Commission proceeded under an incorrect theory of law. He also contends that the Commission failed and the trial court erred in the application of the just cause standards found in § 62.13(5)(em), STATS.

We conclude that the Commission acted within its jurisdiction when hearing the disciplinary matter. Section 62.13(5), STATS., is to be used in any case where an officer is to be discharged and is not simply limited to willful disobedience of a departmental order or rule. Further, we hold that the trial court did not misuse its discretion when it dismissed Salimes' writ of certiorari. Finally, we do not have the authority to review the circuit court's finding of just cause, because it is "final and conclusive." We therefore affirm the trial court's order.

Salimes began his employment with the Caledonia Police Department in June 1985. In August 1991, Salimes began treatment with Dr. Stephen Hart of the Jackson Psychiatric Center due to sleeping disorders and loss of weight. He was diagnosed by Hart as having an adjustment disorder with mixed emotional features. In early 1992, the diagnosis changed to a frank depressive disorder of a major proportion, accompanied by a significant amount of anxiety. Salimes was given prescriptions for an antidepressant medication called Zoloft and a sleep aid called Lorazepam.

Because of his condition, Salimes was unable to perform his duties as a police officer at various times while employed with the police department. The first instance occurred on March 26, 1992, and lasted until January 9, 1993.

During this time, Salimes remained under the care of Hart. On January 9, 1993, Hart indicated that Salimes could return to work, but recommended that he be placed on third shift in order to reduce interpersonal contact.

Following this nine and one-half month leave of absence, Salimes continued to sporadically take unearned sick days. Specifically, on January 21, 1993, Salimes was off work for approximately two days for stress and sleeping problems he attributed to a recent grievance he filed with the administration. On March 4, 1993, Salimes gave the department notice of a worker's compensation claim for duty-related stress due to his 1993 yearly evaluation. On February 23, 1994, after Salimes received what he felt was an unfavorable evaluation, he called in sick for his shift that evening. He returned to work on February 27, but was back on sick leave the next day until March 7, 1994.

Subsequently, Chief of Police Jeffrey Meier decided to have Salimes evaluated by Dr. Walter McDonald, a psychologist, to determine if he did indeed have behavioral or emotional problems that were affecting his work performance or his fitness for duty. On or about June 23, 1994, based on McDonald's report, Meier filed charges against Salimes, alleging that Salimes was unwilling or unable to comply with various rules and regulations of the police department.

The Commission conducted a hearing in the matter on September 19 and 21, 1994. At the conclusion of the hearing, the Commission determined that the police chief had met his burden of proof and that there was just cause to

sustain the charges that Salimes was not able to perform the duties and responsibilities of a police officer.

Salimes appealed the decision and the order of the Commission on a timely basis, both by the appeal of right afforded him pursuant to § 62.13(5)(i), STATS., and by a petition for writ of certiorari. The circuit court dismissed the statutory appeal, dismissed the petition for writ of certiorari and affirmed the decision and the order of the Commission.

Circuit courts have been granted the authority to conduct de novo reviews of appeals such as these, pursuant to § 62.13(5)(i), STATS. The relevant portion of § 62.13(5)(i) relating to a review by a circuit court states that “[t]he question to be determined by the court shall be: Upon the evidence is there just cause, as described under par. (em), to sustain the charges against the accused?”¹ The circuit court went on to conduct a de novo review of the evidence and made an independent determination that there was sufficient evidence to support the discharge of Salimes for just cause.

Section 62.13(5)(i), STATS., states that if the order of the Commission is sustained, it shall be “final and conclusive.” This statute bars appellate courts from reviewing just cause determinations. *See Owens v. Board*

¹ This section was recently amended to require the circuit court to conduct a de novo review of the evidence presented to the commission. *See* 1993 Wis. Act 53, § 7. Prior to the amendment, the statute required the circuit court to give deference to the board’s decision: “The question to be determined by the court shall be: Upon the evidence was the order of the board reasonable?” *See* § 62.13(5)(i), STATS., 1991-92.

of Police & Fire Comm'rs, 122 Wis.2d 449, 362 N.W.2d 171 (Ct. App. 1984).

Therefore, we limit our review to the dismissal of the writ of certiorari.

Certiorari is a writ available to the court to exercise control over inferior courts and tribunals. *State ex rel. Kaczowski v. Fire & Police Comm'rs*, 33 Wis.2d 488, 499, 148 N.W.2d 44, 49, cert. denied, 389 U.S. 848 (1967).

In reviewing a writ of certiorari, a court may review four factors:

- (1) Whether the board kept within its jurisdiction;
- (2) whether it proceeded on correct theory of the law;
- (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and
- (4) whether the evidence was such that it might reasonably make the order or determination in question.

Id. at 500, 148 N.W.2d at 50. This review is limited in instances where the petitioner already has the right to a concurrent appeal under § 62.13(5)(i), STATS.

Under such circumstances, we will only consider: whether the commission kept within its jurisdiction and whether it proceeded under a correct theory of law. *State ex rel. Smits v. City of DePere*, 104 Wis.2d 26, 31-32, 310 N.W.2d 607, 609 (1981). Limiting our review to the first two factors prevents a double review of the just cause determination by means of the writ of certiorari. *See Kaczowski*, 33 Wis.2d at 501, 148 N.W.2d at 50-51.

The circuit court has discretion in accepting or dismissing this writ of certiorari. We only decide whether the lower court misused its discretion when it dismissed the writ of certiorari. *State ex rel. Damerow v. Behrens*, 11 Wis.2d 426, 429, 105 N.W.2d 866, 868 (1960).

Jurisdiction of an administrative body, such as this, is set forth in the statute. Section 62.13(5), STATS. In this case, Salimes argues that the title of the statute section, along with the statements made at the hearing,² deprived the Commission of jurisdiction over this matter, since the statute supposedly only covers disciplinary actions concerning willful disobedience.

The statute, however, was designed to define and protect the due process rights of police officers. Therefore, limiting the jurisdiction to cases of willful disobedience would only hurt the people it was meant to serve. We conclude that § 62.13(5), STATS., is meant to give due process to officers removed for any reason, not just cases of willful disobedience, thereby preserving jurisdiction with the Commission.

The remaining element left for this court to review is whether the Commission acted under the correct theory of law. Salimes is now asking this court to review an issue which has already been properly addressed by the circuit court. If an element of an appeal can be addressed with a statutory appeal, it should not be revisited with a common law appeal. See *Kaczowski*, 33 Wis.2d at 501, 148 N.W.2d at 50-51. The circuit court has already revisited the seven just cause standards challenged by Salimes, and in its lengthy review, the court upheld the decision of the Commission. This court will not review

² At the hearing, counsel for the chief of police stated: "It's the position of the chief tonight that we're not here asking the Commission to terminate Officer Salimes's employment as a disciplinary matter." Additionally, in the Commission's decision and order, it stated: "As both parties acknowledged throughout the hearing, this is not a 'disciplinary' hearing in the sense that the Caledonia Police Department is not seeking the termination of Officer Salimes' employment due to his willful violation of a departmental rule or regulation."

these standards for a third time, but instead affirms the order of the circuit court and dismisses the writ of certiorari since no misuse of discretion was found.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.