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March 11, 2020

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

2019AP202 Rodolfo Gomez v. Board of Fire and Police Commissioners for the City of Milwaukee (L.C. #2015CV6824)

Before Reilly, P.J., Gundrum and Davis, JJ.

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).

The Board of Fire and Police Commissioners for the City of Milwaukee (the Board) and Rodolfo Gomez appeal and cross-appeal from an order granting Gomez monetary relief, pursuant to WIS. STAT. § 62.50(22) (2017-18),[1] and remanding to the Board for a determination of that amount. 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. We affirm.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

On December 3, 2013, then-Milwaukee Police Chief Edward Flynn discharged Gomez, a police detective, in connection with Gomez's August 14, 2013 assault on an interrogation suspect. The next day, Gomez appealed his discharge to the Board. The Board did not hold a trial until July 22, 2015. Following trial, "the Board found that the statutory 'just cause' standards for discharge were satisfied and upheld Gomez's discharge." *See* WIS. STAT. § 62.50(17)(b). Gomez then filed a petition for certiorari review, along with a statutory appeal pursuant to § 62.50(20). The actions were consolidated. In his certiorari appeal, Gomez argued that the Board exceeded its jurisdiction by not holding a timely trial in accordance with § 62.50(14). The circuit court agreed and, per its order, "set[] aside" the Board's decision. As a result, the court did not reach the statutory appeal (indeed, given that certiorari was decided on competency grounds, there was nothing to appeal on the merits). We affirmed, holding that the Board lost competency to sustain Gomez's discharge because it did not comply with the mandatory 120-day time limit for holding a trial. *See* ***Gomez v. Board of Police & Fire Comm'rs for Milwaukee***, No. 2016AP2113, unpublished slip op. ¶26 (WI App Dec. 6, 2017).

This appeal concerns Gomez's subsequent motion for back pay, pursuant to WIS. STAT. § 62.50(22). That section provides that where "the decision of the board is reversed, the discharged or suspended member shall forthwith be reinstated … and shall be entitled to pay the same as if not discharged or suspended." ***Id.*** Gomez argued to the circuit court that the Board's "just cause" determination was necessarily reversed when the circuit court "set aside" that decision. Therefore, he contended, he was now eligible for back pay. The Board, in turn, argued that § 62.50(22) applies only where the decision is reversed on the merits. The Board maintained that in any case, Gomez was ineligible for back pay because he could not actually be reinstated (Gomez pled guilty to a federal civil rights charge in connection with the assault). The parties

further disputed whether the circuit court or the Board was the appropriate forum for determining the amount of back pay.

On December 12, 2018, the circuit court issued its written decision and order. The court found that when it "set aside" the Board's decision, it had indeed reversed that decision. Therefore, Gomez was entitled to back pay, regardless of whether he was eligible for reinstatement. The court further found that the Board, and not the circuit court, was the proper forum for determining the amount of monetary relief. Both sides appealed. Since these are questions of statutory interpretation, our review is de novo, although we benefit from the circuit court's analysis. *See* ***Megal Dev. Corp. v. Shadof***, 2005 WI 151, ¶8, 286 Wis. 2d 105, 705 N.W.2d 645.

WISCONSIN STAT. § 62.50 sets out the procedure for discharging a member of the Milwaukee police force. A member may not be discharged except for cause, and only after a trial by the Board. Sec. 62.50(11). The trial must be held 60-120 days following service of the scheduling notice. Sec. 62.50(13), (14). As we explained in ***Gomez***, the 120-day deadline is mandatory; once it passes, the Board loses "competency, or its authority to exercise its jurisdiction, to sustain the discharge." ***Gomez***, No. 2016AP2113, ¶26. At trial, the Board must determine whether there exists "just cause" for discharge, according to seven enumerated standards. Sec. 62.50(17). If the Board finds "just cause," the member may bring a statutory appeal to the circuit court, pursuant to § 62.50(20). The circuit court does not try the matter de novo and is limited to determining whether "[u]nder the evidence [] there [is] just cause … to sustain the charges against the accused[.]" Sec. 62.50(21). Thus, the circuit court's role is to ensure that "the Board's [just cause] decision is supported by the evidence that the Board found credible." ***Younglove v. City of Oak Creek Fire & Police Comm'n***, 218 Wis. 2d 133, 139, 579

N.W.2d 294 (Ct. App. 1998). As discussed above, if the decision of the Board is reversed, then the member is entitled to reinstatement and back pay. Sec. 62.50(22).

The member may bring the statutory appeal in conjunction with a petition for a writ of certiorari, as Gomez did here. *See* ***State ex rel. Heil v. Green Bay Police & Fire Comm'n***, 2002 WI App 228, ¶8, 256 Wis. 2d 1008, 652 N.W.2d 118. In such case, certiorari review is limited to (1) whether the Board kept within its jurisdiction, and (2) whether the Board proceeded on a correct theory of law. ***Gentilli v. Board of the Police & Fire Comm'rs of Madison***, 2004 WI 60, ¶21, 272 Wis. 2d 1, 680 N.W.2d 335.

The Board argues that the circuit court bypassed the "just cause" inquiry at the heart of the statutory appeal when it decided the matter on certiorari review (that is, when it held that the Board exceeded its jurisdiction). Therefore, the Board maintains, the "just cause" decision was "set aside" but not truly "reversed," as that term is understood under WIS. STAT. § 62.50(22). There are two problems with this argument. First, as the circuit court points out, the terms "reverse" and "set aside" are functionally equivalent: they "have the same effect of annulling the Board's prior decision." *See Reverse, set aside,* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "reverse" as "[t]o overturn (a judgment) on appeal" and defining "set aside" as "to annul or vacate (a judgment, order, etc.)"). Therefore, the circuit court's order in effect reversed the Board's decision.

Second, it would be absurd and inequitable to allow for back pay only where the member succeeded on his statutory—but not his common-law certiorari—appeal. That would make the entire process of certiorari review superfluous. Here, for example, a claimant would have no way to address—and there would be no consequences for—the Board's failure to hold a timely

hearing. This would render the statutory deadlines meaningless. The Board's interpretation could also, presumably, preclude recovery where the appellant might succeed on *both* the merits of the statutory appeal and on certiorari. This is because certiorari review in this context addresses systemic issues of fairness, due process, and in this instance, competency. Therefore, a circuit court would likely decide the consolidated appeal on such grounds, without reaching the merits. Furthermore, the Board's position could lead to perverse incentives; in theory, the Board could preclude recovery of back pay by simply ignoring its own deadlines. Conversely, by requiring back pay whenever the Board's decision is reversed (or "set aside") on any grounds, we encourage compliance with the deadlines of WIS. STAT. § 62.50. This is in keeping with the underlying purpose of that section, the "overall framework" of which "demonstrates that the process was meant to be handled with dispatch." ***Gomez***, No. 2016AP2113, ¶21.

The Board next argues that even if its decision is reversed, Gomez cannot receive back pay, because he cannot be reinstated. The Board offers no support for this proposition, aside from the text of WIS. STAT. § 62.50(22). We are unpersuaded. Section 62.50(22) places no conditions on a member's entitlement to back pay, other than reversal of the Board's decision. The text is unambiguous, and that is its plain meaning.

We recognize that this is an unsatisfactory conclusion from the Board's point of view. Gomez committed a serious offense, and it is likely that the circuit court would have sustained the Board's "just cause" decision on the merits. Our conclusion is dictated not by Gomez's actions, however, but by the Board's: it held a trial without the competency to do so, and the circuit court correctly reversed that decision. Pursuant to WIS. STAT. § 62.50(22), Gomez is now entitled to back pay in an amount to be determined.

The parties next dispute whether the circuit court or the Board is the proper forum for determining that amount. Gomez presents several arguments as to why the former is the only appropriate forum. He first argues that the circuit court's authority to determine back pay derives from the plain language of WIS. STAT. § 62.50(22). Second, he argues that the circuit court has the "inherent authority" to so determine. Third, he maintains that the Board lacks jurisdiction to calculate this amount. Finally, he argues that the Board has demonstrated an "impermissible risk of bias," such that Gomez will be denied the right to an impartial decision-maker if this determination is left to the Board.[2]

We find these arguments unpersuasive, as they largely ignore the circuit court's *only* role on consolidated appeal: to act as a reviewing, not a fact-finding, court. As discussed above, neither statutory nor common-law certiorari appeals are de novo. Gomez's arguments notwithstanding, the circuit court simply does not have the legal authority to make this type of fact-specific calculation.

First, WIS. STAT. § 62.50(22) does not confer primary jurisdiction on the circuit court to calculate back pay. That subsection merely "entitle[s]" the discharged member to back pay, without designating the forum for determining that amount. Sec. 62.50(22). Therefore, the plain language of § 62.50(22) cannot overcome the presumption that the Board is the "trial court" in this proceeding. In addition, although the case law is largely silent on this issue, we note that in at least one instance, our supreme court assumed that the Board, and not the circuit court, would

[2] To the extent we do not address the other arguments Gomez presents, we find them insufficiently developed. *See* ***Wisconsin Conference Bd. of Trs. of United Methodist Church, Inc. v. Culver***, 2001 WI 55, ¶38, 243 Wis. 2d 394, 627 N.W.2d 469 (we do not address insufficiently developed arguments).

calculate back pay. *See* ***State ex rel. Smits v. City of De Pere, Bd. of Police & Fire Comm'rs***, 104 Wis. 2d 26, 38, 310 N.W.2d 607 (1981) ("To effectuate and harmonize the circuit court's final order, we reverse and remand this case back to the trial court for purposes of remanding it to the board with directions that … it must provide back pay, calculated pursuant to the [established] formula….").

In addition, we find that Gomez's case does not implicate the circuit court's inherent, implied, and incidental powers. These are the powers "that are necessary to enable courts to accomplish their constitutionally and legislatively mandated functions." ***State v. Henley***, 2010 WI 97, ¶73, 328 Wis. 2d 544, 787 N.W.2d 350. A court's inherent authority extends to three areas: "(1) to guard against actions that would impair the powers of efficacy of the courts or judicial system; (2) to regulate the bench and bar; and (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice." ***Id.*** A court "should only invoke inherent power when such power is necessary to the functioning of the court." ***Id.***, ¶74. Gomez does not explain, and we cannot envision, why the court's inherent authority should extend to the present case, such that it is "necessary to the functioning of the court" for it, and not the Board, to calculate Gomez's back pay. We instead agree with the circuit court, which concluded to the contrary that "[b]roadening the [circuit] Court's power to determine Gomez's relief would create a dangerous precedent for circuit courts to usurp the role of administrative agencies."

We further find that the Board does not lack jurisdiction to determine back pay. We previously held that "[b]ecause the trial in this matter did not occur until almost 600 days after the scheduling notice, the Board lost its competency, or its authority to exercise its jurisdiction, *to sustain the discharge of Gomez*." ***Gomez***, No. 2016AP2113, ¶26 (emphasis added). Neither

we nor the circuit court concluded that by exceeding its jurisdiction, the Board lost the power to address ancillary matters relating to back pay.

Finally, we hold that Gomez forfeited his argument regarding impermissible bias, by not raising it to the circuit court. *See* ***Northbrook Wis., LLC v. City of Niagara***, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851 ("Arguments raised for the first time on appeal are generally deemed forfeited."). Even assuming that Gomez raised this issue, as he argues, we find that he cannot show impermissible bias by the Board constituting denial of due process. *See* ***Nu-Roc Nursing Home, Inc. v. DHSS***, 200 Wis. 2d 405, 415, 546 N.W.2d 562 (Ct. App. 1996). A plaintiff can demonstrate an impermissibly high risk of unfairness or bias by presenting "special facts and circumstances" showing that the "investigator/adjudicator ha[s] become 'psychologically wedded' to a predetermined disposition of the case." ***Id.*** at 420 (citation omitted). Here Gomez merely points to the procedural posture of this case and to the arguments the Board made over the course of litigation (for example, on remand to the circuit court, the Board maintained that it did not believe Gomez was entitled to monetary relief). Gomez does not discuss any "special facts [or] circumstances," aside from the Board's vigorous defense of its own position, that indicate the Board would disregard its statutory duties on remand. Simply put, we find that Gomez has not presented facts sufficient to rebut the strong presumption that those serving as adjudicators in administrative proceedings do so with honesty and integrity. *See* ***Bunker v. LIRC***, 2002 WI App 216, ¶19, 257 Wis. 2d 255, 650 N.W.2d 864; ***Nu-Roc Nursing Home, Inc***, 200 Wis. 2d at 420-21.

We therefore find that the Board, and not the circuit court, is the proper forum for calculating the amount of back pay to which Gomez is entitled under WIS. STAT. § 62.50(22). We affirm the decision of the circuit court.

No costs to either party.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals