

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 18, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2008AP1485

Cir. Ct. No. 2007CV874

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN EX REL. RANDY WESTPHAL,

PETITIONER-APPELLANT,

V.

POLICE AND FIRE COMMISSION FOR THE CITY OF KENOSHA,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Kenosha County:
DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. City of Kenosha firefighter¹ Randy Westphal appeals from a judgment dismissing his certiorari action and sustaining an order of the Police and Fire Commission for the City of Kenosha. We agree with the Commission that we have no jurisdiction to review Westphal’s WIS. STAT. § 62.13(5) (2007-08) appeal.² We also agree that the Commission acted within its jurisdiction in imposing the discipline it did. We affirm.

¶2 Westphal’s challenge is the latest in a series stemming from discipline the Commission imposed in 2003 after it found him guilty of sexual harassment, conduct unbecoming a firefighter and failure to cooperate in an investigation. Westphal, another named firefighter, and a firefighter identified only as “Firefighter Doe” allegedly filled out men’s magazine subscription cards in the name of a female superior. Westphal’s initial discipline comprised a ten-day suspension without pay and a two-rank demotion. Westphal filed a statutory appeal pursuant to WIS. STAT. § 62.13(5)(i) and a common-law action for certiorari seeking review of the Commission’s decision. The circuit court, the Honorable Michael S. Fisher presiding, did not rule on the merits of the § 62.13(5)(i) or certiorari actions but ordered the Commission to consider new evidence that Firefighter Doe claimed the bulk of the responsibility for the prank. The Commission amended its findings but did not alter the discipline.

¶3 The parties rebriefed the issue and the case returned to the circuit court, the Honorable Wilbur W. Warren III presiding due to judicial rotation. The court dismissed the certiorari action and sustained the Commission’s amended

¹ We intend the everyday meaning of the term “firefighter,” not the official rank.

² All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

findings of facts and its conclusion that just cause existed under WIS. STAT. § 62.13(5)(i) to uphold the charges. The court concluded, however, that the level of discipline was not sustainable and reversed and remanded to the Commission for it to redetermine the discipline consistent with the court's findings.

¶4 On remand, the Commission upheld the discipline it previously had imposed. Westphal filed another WIS. STAT. § 62.13(5)(i) appeal and petition for a writ of certiorari. The circuit court, the Honorable Barbara A. Kluka presiding, concluded that the Commission acted in excess of its jurisdiction when it “refus[ed] to impose a penalty ... within judicial parameters.” The court again remanded the matter to the Commission to reconsider the discipline in line with Judge Warren’s directive to “impose something less severe.”

¶5 The Commission amended its ruling from the original two-rank demotion and ten-day suspension to a one-rank demotion and reinstated all back pay. Westphal then filed this WIS. STAT. § 62.13(5)(i) appeal and petition for a writ of certiorari on grounds that the discipline still was disproportionate to the offense and to that meted out to the other named firefighter. The circuit court, the Honorable David M. Bastianelli presiding, dismissed the appeal on grounds that the Commission’s amended penalty was reasonable as a matter of law because it was within the parameters Judge Warren set forth. *See State ex rel. Smits v. City of De Pere*, 104 Wis. 2d 26, 37, 310 N.W.2d 607 (1981). It also denied the writ of certiorari on grounds of claim preclusion. *See Mrozek v. Intra Financial Corp.*, 2005 WI 73, ¶28, 281 Wis. 2d 448, 699 N.W.2d 54.

¶6 On appeal, Westphal first argues that the trial court should have engaged in a fairness analysis before concluding that it could not reconsider the discipline parameters Judge Warren set forth.³ Westphal filed both a WIS. STAT. § 62.13(5) appeal and a certiorari review. Generally, the scope of our certiorari review is limited to whether the Commission: (1) acted within its jurisdiction; (2) proceeded on a correct theory of law; (3) was arbitrary, oppressive, or unreasonable; or (4) reasonably might have made the order or finding that it made based on the evidence. *Smits*, 104 Wis. 2d at 31. Pursuant to § 62.13(5)(i), however, the trial court already has reviewed the reasonableness of the Commission's decision. See *Herek v. Police & Fire Comm'n Village of Menomonee Falls*, 226 Wis. 2d 504, 510, 595 N.W.2d 113 (Ct. App. 1999). Where the trial court sustains the Commission's determination, that decision "shall be final and conclusive." Sec. 62.13(5)(i). As to Westphal's statutory claim, therefore, we have no jurisdiction to review it, see *Umhoefer v. Police & Fire Comm'n*, 2002 WI App 217, ¶12, 257 Wis. 2d 539, 652 N.W.2d 412, and thus are restricted to the issues brought under certiorari review. *Herek*, 226 Wis. 2d at 510.

¶7 Westphal chiefly lays out his second appellate argument in the framework of WIS. STAT. § 62.13(5). As discussed above, the trial court disposed of his § 62.13(5) direct appeal. Our certiorari review thus is limited to whether the Commission kept within its jurisdiction and proceeded on a correct theory of law. *Umhoefer*, 257 Wis. 2d 539, ¶12. We review these questions of law de novo. *Id.*

³ We observe as an aside that the fundamental fairness analysis Westphal urges is an issue preclusion argument. See *Mrozek v. Intra Financial Corp.*, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54. The trial court based its decision on claim preclusion.

¶8 Westphal argues that *Smits*, 104 Wis. 2d at 37, authorizes us to revisit the sanction imposed against him. He is incorrect. In *Smits*, the City of De Pere Board of Fire and Police Commissioners discharged police officer Smits for seven counts of misconduct. *Id.* at 28. Smits appealed under WIS. STAT. § 62.13(5)(i). *Smits*, 104 Wis. 2d at 28. The trial court concluded that the evidence did not support four charges, reversed the termination and remanded the remaining three charges for sanction redetermination. *Id.* The Board reinstated the termination, Smits appealed again, and the court again reversed and remanded on grounds the sanction was too harsh. *Id.* at 29. In remanding, the trial court suggested to the Board that “the appropriate exercise of discretion ... would dictate suspension without pay not to exceed one year.” *Id.* (original emphasis deleted). It ordered the Board to reinstate Smits with back pay, reconsider its termination order, and sanction him consistent with the findings the Board made and the trial court approved. *Id.* at 29-30.

¶9 The Board issued an amended order retroactively suspending Smits without pay for fifty-two work weeks, the equivalent of fifteen months and twelve days, exceeding the trial court’s guideline. *Id.* at 30. Smits did not appeal the amended order, but requested that the Board reconsider it. *Id.* When the Board declined, Smits instituted certiorari proceedings seeking reversal of the amended order as against the trial court’s final order, contrary to WIS. STAT. § 62.13(5)(i), and that it resulted from the Board having either exceeded its jurisdiction or applied an incorrect theory of law. *Smits*, 104 Wis. 2d at 30.

¶10 The trial court dismissed the writ of certiorari, concluding that the Board had acted within its authority. *Id.* at 30. The court of appeals affirmed, holding that the retroactive suspension without pay was legitimate and not contrary to WIS. STAT. § 62.13(5)(i). The supreme court agreed that a retroactive

suspension was permissible, but that the Board acted arbitrarily and capriciously and exceeded its jurisdiction when it imposed a penalty outside the parameters the trial court established. *Id.* at 37-38. The supreme court thus remanded the case to the trial court to remand it to the Board with directions that it suspend Smits without pay but within the time frame the trial court had set out. *Id.* at 38.

¶11 *Smits* does not allow us to conclude that the Commission exceeded its jurisdiction because, here, the Commission fashioned a sanction within the judicial parameters Judge Warren established. In doing so, it also complied with Judge Kluka's order. The Commission kept within its jurisdiction and proceeded on a correct theory of law. We affirm the judgment dismissing the writ of certiorari.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

