

VILLAGE OF KEWASKUM POLICE AND FIRE COMMISSION

In re: The Discipline of Chief Thomas Bishop and
Lieutenant Bryan Frank, Respondents.

**BRIEF IN OPPOSITION TO RESPONDENTS’
JOINT MOTION TO DISMISS ALL CHARGES**

INTRODUCTION

Village President Martin, as the charging party, respectfully submits this brief in opposition to the Joint Emergency Motion to Dismiss filed by Chief Thomas Bishop and Lieutenant Bryan Frank. Their motion fundamentally misunderstands the nature of administrative discipline, the role of the Police and Fire Commission, and the legal standards governing due process in employment proceedings. Respondents ask this Commission to dismiss charges based on three flawed premises: first, that statements made by the charging authority automatically disqualify an independent adjudicatory body from conducting a fair hearing; second, that allegedly inflammatory rhetoric, standing alone, defeats the statutory just-cause analysis without regard to the actual evidence; and third, that alleged defamation—a separate tort claim with its own remedies—warrants dismissal of employment discipline. This “emergency” motion is mere posturing, rhetoric, and hyperbole, all designed to sway the proceedings, not to seek a fair hearing.

Unsurprisingly, Respondents only citation to law is for the general proposition that the Due Process Clause of the Fourteenth Amendment guarantees a fair hearing before an impartial tribunal. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). No one disputes that proposition. But beyond that general tenet, Respondents fail to cite any Wisconsin law that supports their request for dismissal. Respondents ignore that under Wisconsin law, decision-makers are presumed to be impartial and capable of setting aside extraneous influences,

and the party asserting bias must show a serious risk of actual bias based on objective and reasonable perceptions. *Cty. of Dane v. Pub. Serv. Comm'n of Wis.*, 2022 WI 61, ¶ 45, 403 Wis. 2d 306, 976 N.W.2d 790. Respondents bear a substantial burden to overcome this presumption through objective evidence, a burden they have not met.

The separation of functions between the Village President as charging authority and the Commission as adjudicator is precisely designed to ensure fair adjudication. The Commission retains full authority and duty to conduct a fair hearing based on evidence. Practical curative measures-including limiting instructions, inquiry regarding impartiality, recusal where necessary, and continuance if appropriate-remain available to ensure procedural fairness. Dismissal with prejudice is an extraordinary remedy reserved for the most egregious cases of charging authority misconduct. This case does not present such circumstances. The Respondents' motion should be denied, and the Commission should proceed to adjudicate the disciplinary charges on their merits.

ARGUMENT

I. RESPONDENTS HAVE NOT MET THEIR BURDEN OF ESTABLISHING A DUE PROCESS VIOLATION REQUIRING DISMISSAL WITH PREJUDICE.

A. Legal Standard for Due Process and Impartial Adjudicators.

A fair trial in a fair tribunal is a basic requirement of due process. Administrative decision-makers are entitled to a presumption of honesty and integrity when serving as adjudicators. To overcome this presumption, the party asserting bias of an administrative adjudicator must show a serious risk of actual bias based on objective and reasonable perceptions. *Cty. of Dane*, 2022 WI 61, ¶ 45.

The burden on the party alleging bias is substantial. The party must submit objective evidence that actual bias or the probability of a serious risk of actual bias exists. *Id.* Under

Wisconsin's common-law standard for disqualification of administrative officers, an interest sufficient to disqualify must be direct, definite, and capable of demonstration-not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical. *Le Bow v. Optometry Examining Bd.*, 52 Wis. 2d 569, 574-75, 191 N.W.2d 47 (1971). Bias must be such as to render a tribunal incapable of fair judgment. *Id.*

Furthermore, alleged wrongdoing by a decision-maker must be based on factual evidence, specifically objective factual evidence that the adjudicator prejudged the merits of the matter. Speculation and conjecture are insufficient.

B. Respondents Have Not Presented Objective Evidence of Bias by Any Commission Member.

Respondents rely on a statement made by Village President Martin on social media to argue that the Commission cannot provide a fair hearing. However, this statement was made by the charging authority, not by any member of the Commission itself. Respondents have presented no objective evidence that any Commission member has prejudged the disciplinary charges or harbors actual bias against Respondents.

Mere speculation about community pressure or general awareness of the Village President's statements does not constitute objective evidence of bias. The fact that statements were made in a small community does not, without more, demonstrate that Commission members cannot follow their statutory duties to decide the matter fairly based on the evidence presented at the hearing.

Respondents' argument also rests entirely on the speculative proposition that Commission members might face personal shame and ostracism if they vote to dismiss the charges. This is precisely the type of remote, uncertain, and speculative concern that does not meet the standard for disqualification. *Le Bow*, 52 Wis. 2d at 574. Respondents have not identified any specific

Commission member who has expressed inability to remain impartial. They have not presented evidence of any Commission member making prejudicial statements or demonstrating predetermined views about the outcome. Their entire argument is based on speculation about hypothetical social pressure-not on objective evidence of actual bias.

C. Separation of Roles: Charging Authority Versus Adjudicator.

Wisconsin law establishes a clear separation between the role of the charging authority and the role of the adjudicator. The Police and Fire Commission has specific statutory duties under Wisconsin Statute Section 62.13(5) to conduct a public hearing, determine whether there is just cause to sustain charges by applying statutory standards, determine appropriate disposition, and reduce findings to writing. *Conway v. Bd. of the Police & Fire Comm'rs*, 2003 WI 53, ¶ 34, 262 Wis. 2d 1, 662 N.W.2d 335.

The Village President's role as the official who initiated the charges is distinct from the Commission's role as the independent adjudicator. The Commission's statutory authority and duty to apply the just-cause standards independently of the charging authority supports the conclusion that the Commission can fulfill its adjudicatory function fairly regardless of any statements made by the Village President or by anyone else. This separation of functions is fundamental to the statutory framework. The charging authority files charges and presents evidence, but the Commission-a separate body-determines whether just cause exists based on the evidence and the seven statutory factors. The fact that the charging authority has expressed strong personal views about the underlying conduct does not render the independent adjudicatory body incapable of fair decision-making.

D. There Are Curative Measures Available to Ensure a Fair Hearing.

If the Commission has any concerns about any extrajudicial statements or community commentary, the Commission has several practical measures available to ensure a fair hearing and to address any concerns about impartiality:

1. Instruction to Commissioners: The Commission President or counsel can instruct all members that they must decide the matter solely on the evidence presented at the hearing and must not consider any extrajudicial statements or community commentary.
2. Inquiry Regarding Exposure and Impartiality: The Commission President or counsel can conduct an inquiry of each member regarding their exposure to the Village President's statements and their ability to remain impartial and decide the case fairly based solely on the evidence.
3. Recusal Where Necessary: If any Commission member, upon inquiry, indicates an inability to remain impartial or expresses concern about their ability to be fair, that member may recuse themselves from the proceeding.
4. Continuance if Needed: If the Commission determines that additional time is necessary to allow community attention to the matter to diminish or to ensure a fair hearing, a continuance may be granted.
5. Admonitions Limiting Extrajudicial Commentary: The Commission can issue admonitions to all parties and the public limiting further extrajudicial commentary about the pending disciplinary charges.
6. Appointment of New Commissioners or A Committee. If a quorum of Commission members indicates an inability to remain impartial or expresses concern about their ability to be fair and those members recuse themselves from the proceeding, the hearing can still proceed. The Village Board can remove the recusing members and then the Village President can appoint new members, or the Village Board can dissolve the Commission and proceed with discipline as allowed by Wis. Stat. § 61.65.

These curative measures are consistent with the Commission's statutory authority and demonstrate that a fair hearing remains possible. Respondents have not argued that these measures would be ineffective or insufficient. They have simply asserted, without evidentiary support, that the "bell cannot be un-rung." This assertion does not meet the legal standard for demonstrating that a fair hearing is constitutionally impossible.

E. The Statements Do Not Establish a Lack of Fairness.

Respondents can argue that the Village President's statement may be characterized as inflammatory, but they do not establish that a fair hearing is constitutionally impossible. The

statements do not demonstrate that Commission members have prejudged the matter or that they cannot follow their statutory duties to decide based on the evidence. Respondents have simply failed to meet their burden of presenting objective evidence that any Commission member is biased or that a serious risk of actual bias exists. Mere awareness of statements made by the charging authority in a small community, without more, does not overcome the presumption of impartiality to which Commission members are entitled. *Cty. of Dane*, 2022 WI 61, ¶ 45.

When material presented on a motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant the requested relief. *Wis. Judicial Comm'n v. Gableman (In re Judicial Disciplinary Proceedings Against Gableman)*, 2010 WI 61, ¶ 9, 325 Wis. 2d 579, 784 N.W.2d 605. Here, Respondents ask the Commission to infer from the Village President's statements that Commission members cannot be fair. This inference is speculative and subject to conflicting interpretations. The more reasonable interpretation is that Commission members, as quasi-judicial officers with statutory duties, are capable of setting aside extraneous influences and deciding the case on the evidence.

II. RESPONDENTS' MOTION TO DISMISS IS PREMATURE AND MISDIRECTED BECAUSE EXTRAJUDICIAL RHETORIC DOES NOT DISPLACE THE COMMISSION'S STATUTORY DUTY TO APPLY THE JUST-CAUSE FACTORS TO THE HEARING RECORD.

A. The Commission's Statutory Role Requires Application of the Seven Just-Cause Factors to Evidence Developed at the Hearing.

Wisconsin Statute Section 62.13(5)(em) establishes a mandatory framework for the Commission's determination of just cause in disciplinary proceedings. The Commission must apply seven specific standards to the evidence presented at the hearing, including whether there was a reasonable and fair effort to discover whether the respondent violated a rule or order, whether that effort was fair and objective, and whether rule or order is being applied fairly and without

discrimination. Wis. Stat. § 62.13; *Milbrath v. Bd. of Fire & Police Comm'rs*, 1995 Wisc. App. LEXIS 1033, at *3 (Ct. App. Aug. 29, 1995).

The Commission's duties are clearly defined by statute: providing for a public hearing in which both parties may be represented and compel witnesses; determining whether there is just cause to sustain the charges by applying the statutory standards; determining the appropriate disposition; and reducing findings and determinations to writing. *Conway*, 2003 WI 53, ¶ 34. This framework contemplates that the Commission will evaluate the evidence presented during the hearing process itself, not dismiss charges based on extrajudicial statements made before or during the proceedings.

B. Respondents' Motion Is Premature Because Extra-Judicial Rhetoric Does Not Answer Whether the Investigation Was Fair and Objective or Whether Substantial Evidence Supports the Charged Violations.

Respondents' reliance on President Martin's Facebook statements conflates two distinct inquiries. The first is whether the investigation and charging process satisfied the statutory standards under Wis. Stat. § 62.13. The second is whether substantial evidence supports the violations alleged in the charges. Any extrajudicial commentary, however inflammatory, does not itself establish that the Wis. Stat. § 62.13 factors were not met or that the underlying investigation was one-sided or that the charges lack evidentiary support.

A determination of just cause requires the Commission to examine the actual investigative record: the witnesses interviewed, the questions asked, the documents reviewed, and the conclusions drawn. Respondents must present evidence at the hearing demonstrating concrete investigative unfairness—such as selective interviewing, failure to pursue obvious leads, or deliberate disregard of exculpatory information. Inflammatory rhetoric posted on social media after charges are filed does not substitute for such evidence and does not relieve Respondents of their burden to demonstrate investigative defects through the hearing process.

III. DEFAMATION CLAIMS DO NOT PROVIDE A BASIS FOR DISMISSAL OF DISCIPLINARY CHARGES.

A. The Commission's Statutory Role Does Not Encompass Adjudication Of Tort Liability Or Fashioning Tort Remedies.

The Police and Fire Commission's authority under Wisconsin Statute Section 62.13(5) is narrowly circumscribed and focused exclusively on employment discipline. The statute vests the Commission with specific duties: providing a public hearing, determining whether just cause exists to sustain charges by applying seven enumerated standards, determining appropriate disposition, and reducing findings to writing. *Conway*, 2003 WI 53, ¶ 34. Nowhere in this statutory framework does the legislature authorize the Commission to adjudicate civil tort claims, assess defamation liability, or craft tort remedies such as dismissal of charges as a sanction for alleged defamatory conduct.

Respondents' request for dismissal with prejudice based on alleged defamation fundamentally misaligns the remedy with the forum. Even if Respondents believe they or someone else has suffered defamatory injury, their remedy lies in the civil courts, not in the Commission's disciplinary proceeding. Permitting the Commission to dismiss charges based on a contested tort theory would improperly expand its statutory mandate and convert it into an adjudicator of matters beyond its delegated authority.

B. Defamation Liability Presents Disputed Legal and Factual Questions Unsuitable for Conversion into a Dispositive Sanction.

Whether the statement at issue is actionable defamation depends on multiple contested legal and factual determinations that lie outside the Commission's statutory purview. These include threshold questions of truth, substantial truth, characterization as opinion versus fact, and potentially heightened fault standards applicable to public figures or public officials.

1. Substantial Truth is a Complete Defense.

Under Wisconsin law, substantial truth is a complete defense to defamation. *Prahl v. Brosamle*, 98 Wis. 2d 130, 141, 295 N.W.2d 768 (Ct. App. 1980). The doctrine provides that it is not necessary to establish the literal truth of the precise statement made; slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance. *Laughland v. Beckett*, 2015 WI App 70, ¶ 23, 365 Wis. 2d 148, 870 N.W.2d 466. Whether the statement at issue satisfies this standard requires detailed factual analysis and legal determination that the Commission is not equipped to undertake as part of its disciplinary function.

The Village President's statement refers to a circuit court finding of credible evidence regarding the hiree's sexual contact with a person significantly younger than the officer, and his termination from another department. These factual predicates provide a substantial basis for the characterization, even if the specific terminology used was inflammatory. Determining whether the statements are substantially true requires examination of the underlying court proceedings, employment records, and factual circumstances-matters that are collateral to the Commission's disciplinary inquiry and properly resolved in civil litigation, not before the Commission. The Commission should reject Respondents' invitation to create a rule that to be a pedophile one must target children under thirteen instead of children who are fourteen to seventeen years old.

2. Opinion Versus Fact and Context-Dependent Analysis.

The distinction between actionable statements of fact and protected opinion is notoriously difficult and context-dependent. Courts have long recognized that representations in one case may be held to be matters of opinion while representations of exactly the same character in another case are held to be statements of fact, and this distinction is often uncertain, indefinite, and unreal. *Tietzworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 99, 270 Wis. 2d 146, 677 N.W.2d 233 (citing

Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916)). Whether particular statements constitute opinion or fact depends in part on the circumstances of the speaker and audience.

The characterization of those who support the Respondents' actions as being in the pro hiring-pedophiles camp may be viewed as hyperbolic opinion or rhetorical commentary on a matter of public concern rather than a statement of verifiable fact. Determining whether statements fall within protected opinion requires nuanced analysis of context, intent, and the underlying factual predicates. These are all matters that are collateral to the Commission's disciplinary inquiry.

3. Public Figure Status and Actual Malice.

Respondents' claim of defamation may be further complicated by one's status as public figures or limited-purpose public figures. Wisconsin recognizes two categories of public figures: those with general fame or notoriety in the community, and those who become public figures for a limited purpose by injecting themselves into a public controversy. *Biskupic v. Cicero*, 2008 WI App 117, ¶ 16, 313 Wis. 2d 225, 756 N.W.2d 649. For public figures, whether general or limited-purpose, the plaintiff must establish that the speaker acted with actual malice—that is, with knowledge that the statement was false or with reckless disregard of whether it was false. *Wagner v. Allen Media Broad.*, 2024 WI App 9, ¶ 46, 410 Wis. 2d 666, 3 N.W.3d 758, *Biskupic*, 2008 WI App 117, ¶ 27.

The determination of whether Respondents or the officer at issue qualify as public figures for purposes of a defamation action requires evaluation of the nature and extent of their participation in the controversy giving rise to the alleged defamation. *Id.* Police leadership involved in public disciplinary proceedings may well be deemed public figures for a limited purpose given their involvement in a matter of public concern. Public figures are persons who

have assumed roles of special prominence in the affairs of society or who have become prominently and actively involved in an effort to influence the resolution of particular public controversies. *Denny v. Mertz*, 100 Wis. 2d 332, 338, 302 N.W.2d 503 (Ct. App. 1981). If such status applies, Respondents would bear the burden of proving actual malice—a heightened fault standard that further complicates any defamation analysis and underscores why such determinations are unsuitable for resolution within the Commission’s disciplinary framework.

C. Dismissal of Charges Is Not an Appropriate or Ordinary Remedy for Alleged Defamation.

Even assuming Respondents could establish that defamatory comments were made, dismissal of the underlying disciplinary charges would not be an appropriate remedy. The Commission’s role is to determine whether just cause exists to sustain charges filed against a subordinate based on the seven statutory standards. Wis. Stat. § 62.13; *Conway*, 2003 WI 53, ¶ 34. Dismissal based on alleged defamatory statements by the charging authority would represent an extraordinary and unauthorized use of the Commission’s remedial authority.

If Respondents believe anyone has suffered defamatory injury, the injured party possesses adequate remedies in the civil courts. Permitting the Commission to dismiss charges as a sanction for alleged defamation would effectively allow tort liability to override the Commission’s statutory duty to adjudicate discipline on the merits and would improperly subordinate employment law to tort law in a context where the legislature has not authorized such subordination.

D. The Contested Nature of Defamation Liability Reinforces That Dismissal Is Inappropriate.

The foregoing analysis demonstrates that defamation liability is not a straightforward or undisputed matter. Questions of substantial truth, opinion versus fact, public figure status, and actual malice are all contested and require careful legal and factual analysis. When material presented on a motion is subject to conflicting interpretations or reasonable people might differ as

to its significance, it would be improper to grant relief based on that material. *Gableman*, 2010 WI 61, ¶ 9. This principle applies with particular force when Respondents seek to convert a disputed tort theory into a dispositive sanction against disciplinary charges.

CONCLUSION

For the foregoing reasons, complainant respectfully requests that the Commission **DENY** Respondents' Joint Emergency Motion to Dismiss All Charges with Prejudice, and that the Commission proceed to conduct a public hearing on the merits of the charges against Chief Thomas Bishop and Lieutenant Bryan Frank in accordance with Wisconsin Statute Section 62.13(5) and applicable law.

Dated this 20th Day of May, 2026.

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