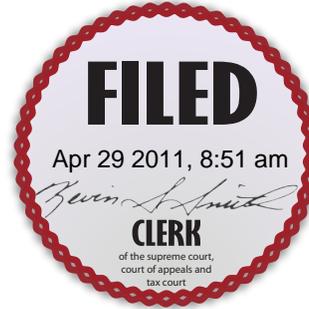


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE
COURT OF APPEALS OF INDIANA

CITY OF MITCHELL, INDIANA; CITY OF)
MITCHELL, INDIANA BOARD OF WORKS)
AND PUBLIC SAFETY; DAN TERRELL,)
MAYOR, CITY OF MITCHELL, INDIANA;)
STEVE BURTON and MICHAEL EAGER,)

Appellants-Defendants,)

vs.)

STEVEN BLAIR,)

Appellee-Plaintiff.)

No. 47A04-1011-PL-754

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable E. Michael Hoff, Special Judge
Cause No. 47C01-1005-PL-762

April 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-defendants City of Mitchell, Indiana; City of Mitchell, Indiana Board of Works and Public Safety (“Safety Board”); Dan Terrell, Mayor of the City of Mitchell; Steven Burton; and Michael Eager¹ (collectively “the City”) appeal from the trial court’s order reversing the Safety Board’s decision to terminate appellee-plaintiff Officer Steven Blair’s (“Officer Blair”) employment with the Mitchell Police Department, and reinstating him with back pay.

We affirm.

Issue

The City raises one issue for our review, which we restate as whether the trial court erred in concluding that the Safety Board did not have jurisdiction to terminate Officer Blair’s employment with the Mitchell Police Department.

Facts and Procedural History

In Mitchell, Indiana, the Safety Board historically had the responsibility to administer the Mitchell Police Department, which included the power of selection, appointment, promotion, demotion, discipline, and dismissal of officers. On November 3, 2008, the Common Council of the City of Mitchell voted in favor of an ordinance establishing a police merit system (“Merit Commission”) to assume the powers listed above from the Safety Board. A majority of the active members of the police department approved the Merit Commission, and its five commissioners were selected by March 2010. However, the Merit

¹ Steven Burton and Michael Eager are members of the Safety Board.

Commission did not adopt rules to govern the operation of the commission or rules governing, among other things, the discipline and dismissal of police officers.

On March 26, 2010, the Safety Board sent Officer Blair a notice stating that it was lodging charges seeking the termination of his employment. Officer Blair formally demanded a hearing from the Safety Board and simultaneously objected to the Board's jurisdiction to hear the disciplinary matter. On April 14, 2010, he again sought dismissal of the charges through a motion to dismiss for lack of jurisdiction.

On April 21, 2010, the Safety Board convened for the purpose of conducting an evidentiary hearing on Officer Blair's case. Officer Blair again moved for a dismissal, the Safety Board denied his request, and Officer Blair thereafter refused to participate further in the proceedings. The Safety Board conducted the hearing in his absence, and on April 28, 2010, it reconvened in a public session and voted to terminate Officer Blair's employment with the Mitchell Police Department.

On May 20, 2010, Officer Blair filed a complaint in Lawrence Circuit Court alleging that the Safety Board's decision was illegal and void. Count I of his complaint alleged common law wrongful termination, and count II requested judicial review of the Safety Board's decision to terminate his employment. On October 15, 2010, the trial court held a hearing where it heard argument of counsel, and on October 21, 2010, the court issued an order declaring that the Safety Board's termination decision was void for lack of jurisdiction and reinstating Officer Blair with back pay. The City now appeals.

Discussion and Decision

Standard of Review

Officer Blair sought judicial review of the Safety Board's decision pursuant to Indiana Code section 36-8-3-4. Our review of an administrative disciplinary action under section 36-8-3-4 is limited to determining whether the administrative board possessed jurisdiction of the subject matter, and whether the board's decision was made pursuant to proper procedures, was based upon substantial evidence, was not arbitrary and capricious, and was not in violation of a constitutional, statutory, or legal principal. Rynerson v. City of Franklin, 669 N.E.2d 964, 971 (Ind. 1996). Here, the only question the parties present is whether the Safety Board had jurisdiction of the matter pursuant to statutory authority.

The interpretation of a statute is a question of law reserved for the courts, which we review under a *de novo* standard. Indiana-Kentucky Elec. Corp. v. Comm'r, Indiana Dep't of Env'tl. Mgmt., 820 N.E.2d 771, 777 (Ind. Ct. App. 2005). "The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used." Id. (quoting Bourbon Mini-Mart, Inc. v. Comm'r, Indiana Dep't of Env'tl. Mgmt., 806 N.E.2d 14, 20 (Ind. Ct. App. 2004)). When the language of the statute is clear and unambiguous, it is not subject to judicial interpretation. Id. However, if the language of a statute is reasonably susceptible to more than one construction, we must construe the statute to determine the apparent legislative intent. Id.

The Safety Board's Jurisdiction to Dismiss Officer Blair

The City argues on appeal that the trial court erred by concluding that the Safety

Board lacked jurisdiction to dismiss Officer Blair. Specifically, the City maintains that, although the Merit Commission had been created and approved, it had not yet fulfilled the necessary rulemaking conditions precedent to assume jurisdiction of police officer discipline. Consequently, according to the City, the Safety Board retained jurisdiction over police officer discipline, and its decision should be affirmed.

In Indiana second and third class cities, the safety board of the city administers the police department, including the discipline and dismissal of officers, unless the city has a merit commission. I.C. § 36-8-3 *et seq.* The key statutory provisions at issue are as follows:

“[t]he safety board of a city shall administer the police and fire department of the city, except as provided by any statute or ordinance referred to in section 5 of this chapter.”

I.C. § 36-8-3-2.

Section 5 states, in relevant part:

sections 3, 4, and 4.1 of this chapter do not apply to a police or fire department having a board or commission established by statute or ordinance to establish or administer polices based on merit for the appointment, promotion, demotion, and dismissal of members of the department.

I.C. § 36-8-3-5.

Section 4 referenced above addresses a safety board’s disciplinary powers and procedures. I.C. § 36-8-3-4. Thus, “when a local ordinance creates a civil service commission to oversee the fire force, the powers of public safety over firemen removal yield to those of the commission.” City of Michigan City v. Austin, 442 N.E.2d 705, 713 (Ind. Ct. App. 1982) (discussing I.C. § 18-1-11-3, the prior (and now repealed) version of I.C. § 36-8-3-5). The same holds true for police departments with a merit commission. I.C. § 36-8-3-5.

The Mitchell Common Council ordinance states that the Merit Commission was created under authority of Indiana Code chapter 36-8-3.5. In order to create a merit commission under this chapter, a police force must first adopt a merit system:

The legislative body of a unit (other than a township) may, by ordinance, establish a merit system under this chapter for the police or fire department of the unit... Before the merit system takes effect, however, the system must be approved by a majority of the active members of the department in a referendum.

I.C. § 36-8-3.5-3.

The code then delineates specific procedures by which members of the police department receive notice of the referendum and the voting procedures. I.C. § 36-8-3.5-4. Following a vote, “[i]f a majority of the active members of the department vote to approve the merit system, the merit system takes effect on January 1 following the vote.” Id.

After the merit system is adopted, “[a] merit commission of five commissioners shall be established for each department of a unit having a merit system.” I.C. § 36-8.3.5-6. The commissioners must possess specific qualifications, and they must be appointed in a particular manner. Id. The parties do not dispute that the Merit Commission has satisfied all of the above requirements.

The City nevertheless maintains that the following (unsatisfied) requirements, restated in relevant part here, are necessary to establish a merit commission:

Within thirty (30) days after the commission is selected, the commission shall adopt rules to govern the commission, including the time and place of regular monthly meetings and special meetings that are necessary to transact the business of the commission.

I.C. § 36-8-3.5-9.

(a) Within ninety (90) days after the commission is selected, the commission shall adopt rules governing:

- (1) the selection and appointment of persons to be employed as members of the department, subject to applicable pension statutes;
- (2) promotions and demotions of members of the department; and
- (3) disciplinary action or dismissal of members of the department.

I.C. § 36-8-3.5-10.

We disagree with the City that the above two provisions are necessary to assume jurisdiction of police officer discipline. Despite any anticipated adjudicatory shortcomings of a merit commission without rules, we have not been asked to review a decision made by the Mitchell Merit Commission. Instead, we need only examine whether the Safety Board here was acting pursuant to its statutory authority, or whether that authority had been sufficiently divested.

In order for the Safety Board's adjudicatory authority to be rendered inapplicable, the Mitchell Common Council needed only to create a merit commission "established by statute or ordinance *to establish* or administer polices." See I.C. § 36-8-3-5 (emphasis supplied). The words "to establish" connote the future development of rules. Thus, a merit commission may be sufficiently "established" without having yet promulgated rules.

The provisions of chapter 36-8-3.5 also lead us to this conclusion. Again, as is our practice in statutory analysis, we are guided by the plain, ordinary meaning of the text, and when the language of the statute is clear and unambiguous, it is not subject to judicial interpretation. See Indiana-Kentucky Elec. Corp., 820 N.E.2d at 777. The only section in the

chapter that addresses the issue of commission establishment is section 6, entitled “Merit commission; establishment; appointment of members; qualifications; oath.” I.C. § 36-8-3.5-6. The other sections in the chapter address different topics, as addressed in their titles, such as terms of commissioners, election of commissioners by members of the department, and of course the adoption of rules governing the business of the commission and the discipline of officers. I.C. §§ 36-8-3.5-8-11. These sections say nothing about being prerequisites to actual establishment, and “in interpreting a statute, we must consider not only what the statute says, but what it does not say.” Curley v. Lake County Bd. of Elections and Registration, 896 N.E.2d 24, 37 (Ind. Ct. App. 2008), trans. denied. The parties do not dispute that the requirements of section 6 have been satisfied with the selection of five commissioners. Therefore, we conclude that the Merit Commission was sufficiently established to divest the Safety Board of jurisdiction.

Conclusion

The Safety Board lacked the authority to discipline Officer Blair. Consequently, the trial court was correct to conclude that the Safety Board’s decision was void, and to reinstate Officer Blair with back pay.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.