

STATE OF INDIANA )  
 )ss:  
COUNTY OF MARION )

IN THE MARION CIRCUIT COURT  
CAUSE NO. 49C01-1405-PL-017919

INDIANA DEPARTMENT OF )  
NATURAL RESOURCES, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
DAVID MOSS, )  
 )  
Respondent. )

**FILED**  
142 DEC 19 2014  
*Elizabeth D. White*  
CLERK OF THE MARION CIRCUIT COURT

**SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Comes now, the Court, and having heard and considered the Petitioner's Verified Petition for Judicial Review of the Final Order of the Natural Resources Commission, and the Respondent's Motion for Rule to Show Cause and for Attorney's Fees, hereby enters the following Special Findings of Fact and Conclusions of Law pursuant to Indiana Trial Rule 52:

**I.  
Procedural Background and Facts**

1. The Respondent, David Moss, ("Moss"), was employed by the Indiana Department of Natural Resources ("DNR") as a Conservation Officer in the Columbus, Indiana region.
2. Moss came under investigation by the DNR's Office of Professional Standards on January 10, 2013 as a result of his being a suspect in a child molestation investigation by the Columbus, Indiana, Police Department. This investigation was deemed OPS #1. The molestation charge was not substantiated and no criminal charges were filed. (Final Order ¶ 15).
3. Nevertheless, the DNR filed four disciplinary charges against Moss as a result of OPS #1, concerning matters that came to light during the course of the investigation. (Id. ¶ 41).

4. The second investigation, OPS #2, commenced in April 2013 and was unrelated to OPS #1. (Id. ¶ 18). This investigation resulted in several disciplinary charges being brought against Moss. (Id. ¶ 68).

5. The results of OPS #1 and #2 were brought before the DNR's Disciplinary Action Board on June 13, 2013, which recommended Moss's termination. On July 18, 2013, the DNR Director terminated Moss's employment. (Id. ¶¶ 25, 31).

6. Moss exercised his right to administrative review of the DNR's termination of his employment as provided in 312 IAC 4-4-6.

7. On April 28, 2014, the Natural Resources Commission ("NRC") of the DNR, following an evidentiary hearing before an administrative law judge, briefing, and oral argument, entered its Findings of Fact and Conclusions of Law with Final Order ("Final Order") reducing Moss's termination to a nine-month suspension and ordering the DNR to reinstate Moss "to duty status" no later than thirty days from the date of the Final Order. The NRC concluded that while Moss had "acted imperfectly . . . judgment is tempered slightly by the manner in which the investigations appear to have been conducted." (Id. ¶ 153). The NRC also found that Moss's "character and reputation [are] not so utterly tarnished as to justify his termination from employment." (Id. ¶ 154). The NRC concluded that while some disciplinary action was appropriate, termination was not; it thus reduced Moss's termination to a nine-month suspension and ordered the DNR to reinstate Moss "to duty status." (Id. ¶¶ 157-59).

8. On May 30, 2014, the DNR filed its Verified Petition for Judicial Review and Motion for a Stay of the NRC's reinstatement order.

9. The DNR did not reinstate Moss within thirty days from April 28, 2014, as required by the NRC's Final Order.

10. On August 21, 2014, the Court heard oral argument on the DNR's Motion for Stay.

11. At the August 21, 2014, hearing, Moss orally moved to dismiss the Verified Petition for Judicial Review as untimely. Briefs were filed by the parties with respect to the timeliness issue on September 2, 2014.

12. On September 17, 2014, this Court denied both the DNR's Motion for Stay and Moss's Motion to Dismiss. The Court thereupon ordered the DNR to "reinstate Moss to his full employment status."

13. The DNR subsequently offered Moss an administrative position in Indianapolis, which is an hour away from Moss's home in Columbus, Indiana, and does not involve the performance of law enforcement duties.

14. On September 30, 2014, Moss filed a Motion for Rule to Show Cause why the DNR should not be held in contempt for refusing to reinstate him to his Conservation Officer position. Moss also moved for an award of attorney's fees under I.C. 34-52-1-1 on the grounds that the DNR's refusal to reinstate him to his Conservation Officer position was in bad faith and in disobedience of this Court's and the NRC's reinstatement orders. On October 15, 2014, the DNR responded in opposition to Moss's Motion for Rule to Show Cause. The Court set the Motion for Hearing on November 13, 2014, the same day as the hearing on the DNR's Verified Petition for Judicial Review.

15. The Court heard oral argument on the DNR's Verified Petition for Judicial Review and Moss's Motion for Rule to Show Cause and for Attorney's Fees on November 13, 2014. Representing, the Petitioner, was the Attorney General, by his Deputy Caryn Nieman. William R. Groth and David T. Vlink appeared in behalf of the Respondent David Moss. The

case had been fully briefed prior to the hearing, with the DNR filing a “Brief in Support of Verified Petition for Judicial Review” on September 26, 2014; Moss filing his “Response in Opposition for Petitioner’s Verified Petition for Judicial Review” on October 27, 2014; and the DNR filing its “Reply in Support of Verified Petition for Judicial Review” on November 7, 2014. The matter was then taken under advisement.

## II.

### Conclusions of Law

16. As the party seeking judicial review, the DNR bears the burden of establishing that the NRC’s Final Order is invalid and should be reversed. I.C. § 4-21-5-14(a).

17. Judicial review of administrative decisions is limited, *Comm’n v. Martin*, 836 N.E.2d 311, 313 (Ind. Ct. App. 2005), and is governed by Chapter 5 of the Indiana Administrative Orders and Procedures Act (“AOPA”), I.C. § 4-21.5-5 *et seq.*

18. Under AOPA, judicial relief on a petition for judicial review may be granted only where the party asserting the invalidity of the agency action demonstrates that such action is:

1. Arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law;
2. Contrary to the constitution;
3. In excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
4. Without observance of procedure required by law, or
5. Unsupported by substantial evidence.

IC § 4-21.5-5-14(d)(1)-(5).

19. “An administrative decision is contrary to law if any statute, constitutional provision, legal principle, or rule of substantive or procedural law has been violated.” *John Malone Enterprises v. Shaffer*, 674 N.E. 2d 599, 607 (Ind. Ct. App. 1996); *see also NIPSCO v. Indiana Office of Utility Consumer Counselor*, 826 N.E.2d 112, (Ind. Ct. App. 2005) “[A]

decision is contrary to law when the agency fails to stay within its jurisdiction and to abide by the statutory and legal principles that guide it. Issues that are reviewable under this standard include questions of legality of the administrative procedure and violations of fixed legal principles as distinguished from questions of fact or expert judgment or discretion.” Id p.118

20. DNR Conservation Officers are afforded just cause protections with respect to adverse employment actions. I.C. § 14-9-8-14(a); 312 IAC 4-4-5. This means that the DNR Division Director must have “just cause” in order to “discharge, demote, or suspend” a DNR Conservation Officer.

21. A DNR Conservation Officer who is disciplined is also entitled to administrative review by the NRC. 312 IAC-4-4-6. The NRC is the “ultimate authority” of the DNR for purposes of AOPA. I.C. §§ 14-10-2-3; 4-21.5. The “ultimate authority” of an agency is the “panel of individuals in whom the final authority of an agency is vested by law.” I.C. § 4-21.5-1-15.

### **III.**

#### **Legal Discussion and Final Order**

Ind. Code 4-21.5-3-2 (c) provides that the contents of a final order of an administrative proceeding “must include separately stated findings of fact and, if a final order, conclusions of law for all aspects of the order”.

Petitioner urges and Respondent apparently agrees that the proper standard of review by the Commission in reviewing the Department’s termination of Officer David Moss was whether there was “just cause” for the Director’s actions. The parties disagree as to whether the Commission was guided by the proper standard of review and whether that standard was explicated in its Findings of Fact and Conclusion of Law.

The Court looked in vain for any acknowledgement that the “just cause” standard guided the ALJ and ultimately the Commission in making their decisions. Neither party has found such a statement of law.

Moss suggests that Paragraph 4 of the Commission’s Order incorporates by reference the “just cause” standard of review: “Applicable to the substantive issues presented by the instant proceeding is I.C. 14-9-8 and 312 IAC 4”. What Moss fails to point out is that the above general citations encompass a veritable sea of legal text. The one statutory provision pertinent to the standard of review 14-9-8-14, Ind. Code is surrounded by 27 other sections all under the Chapter entitled “Law Enforcement”. The reference to the Indiana Administrative Code is just as imprecise. Assuming arguendo that these references were intended to identify the standard of review applied by the ALJ and the Commission, they are fatally unclear.

DNR suggests that Paragraph 154 may contain the standard of review employed by the ALJ: “Disciplinary sanction against Moss is appropriate. However, it is concluded that Moss’ character and reputation is not so utterly tarnished as to justify his termination from employment.”

It is possible that the above “conclusion” contains the standard of review utilized by the ALJ and the Commission, but since Paragraph 154 is not denominated as the standard of review, its legal function is unclear. The primary purpose of Conclusions of Law is, however, to avoid such uncertainty, to make explicit the legal underpinnings of a decision, so that a reviewing court can determine whether the law was applied correctly or erroneously. By not revealing the standard of review, the NRC has violated IC 4-21.5-3-27, and has frustrated a review of its decision.

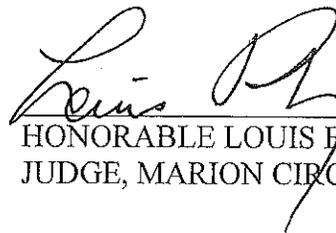
**IV.  
Final Order**

For all of the above reasons, the decision of the NRC is VACATED AND REMANDED to the Commission for further proceedings consistent with this opinion.

The DNR's Petition for Judicial Review is GRANTED.

In light of the Court's decision, the Motion for Rule to Show Cause is DENIED as moot.

SO ORDERED this 19<sup>th</sup> day of December, 2014.



HONORABLE LOUIS F. ROSENBERG  
JUDGE, MARION CIRCUIT COURT

Distribution:

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