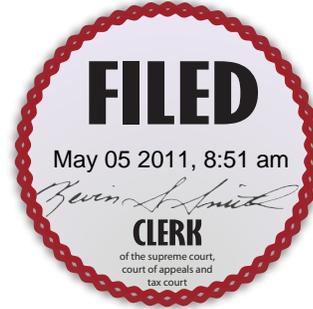


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MARC A. BERNERO,)

Appellant,)

vs.)

No. 49A02-1009-PL-1082

STATE OF INDIANA, DEALER COMPLIANCE)
DIVISION; OFFICE OF THE INDIANA)
SECRETARY OF STATE; TODD ROKITA,)
INDIANA SECRETARY OF STATE; and)
INDIANA BUREAU OF MOTOR VEHICLES,)

Appellees.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn L. Moberly, Judge
Cause No. 49D05-0802-PL-008343

May 5, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Marc Bernero (“Bernero”) was fired from his position at the Indiana Bureau of Motor Vehicles (“the BMV”). He appealed, and his termination was rescinded by the State Employee Appeals Commission (“the SEAC”). While his appeal before the SEAC was pending, Bernero’s position at the BMV was transferred to the Indiana Secretary of State’s Office (“the SOS”). Both the BMV and the SOS denied Bernero’s request to have his employment reinstated. Bernero subsequently filed a complaint for declaratory judgment in Marion Superior Court seeking enforcement of the SEAC’s order rescinding his termination. After the parties filed motions for summary judgment, the trial court entered summary judgment in favor of the SOS and the BMV, except for a determination of damages owed to Bernero for lost wages. Bernero appeals and argues that the trial court erred when it determined that neither the SOS nor the BMV was required to employ Bernero.

We affirm.

Facts and Procedural History

Bernero was a non-merit employee of the BMV from November 1993 until February 19, 2007. Specifically, Bernero was a dealer compliance officer assigned to cover St. Joseph, Elkhart, LaGrange, Steuben, Noble, and DeKalb Counties. On February 19, 2007, his employment was terminated due to allegations that Bernero made racially insensitive remarks, and on a separate occasion, intimidated another BMV employee.

Thereafter, Bernero filed an appeal of his termination with the SEAC. An evidentiary hearing was held on August 15, 2007, and on October 5, 2007, the

administrative law judge issued findings of fact and conclusions of law. The ALJ determined that the BMV did not prove the alleged violations and issued an order rescinding Bernero's termination. On October 25, 2007, the ALJ issued a notice of final order because neither party filed objections to the October 5, 2007 findings and conclusions.

During the pendency of the SEAC proceedings, the Indiana General Assembly enacted Public Law 184-2007 transferring supervision over the duties of the Dealer Compliance Division from the BMV to the SOS effective July 1, 2007. The SOS changed the name of the division to the Dealer Services Division, and the SOS reorganized the geographical areas covered by each compliance officer. The number of geographical areas was reduced from eleven to ten. On July 1, 2007, eight BMV compliance officers were hired by the SOS, and the SOS hired two new compliance officers who had not been previously employed as such with the BMV.

Shortly after the October 25, 2007 final order rescinding his termination, Bernero contacted his BMV division supervisor and notified him that he wanted to return to his position at the BMV. Approximately two weeks later, Bernero was informed that dealer compliance officers were under the supervision of the SOS. Bernero was also told that he would not be reinstated as a state employee, but would receive back pay from February 19, 2007, through June 29, 2007, as well as any accrued vacation pay.

On November 20, 2007, the BMV filed a motion to clarify the SEAC's October 25, 2007 final order and asked SEAC to enter an order requiring the BMV

to pay Bernero's back wages and accrued vacation time up to the statutory limit, to change Bernero's employment status so he is eligible for re-hire with the State of Indiana, [but] not to require the BMV to create a position for Bernero, and not to require SOS to hire Bernero.

Appellant's App. pp. 203-04. The ALJ denied the BMV's motion to clarify and stated that the "order is straightforward and contains no clerical mistake or error of oversight or omission. Further, the final order applies only to the parties to this action, those being Marc Bernero and the [BMV]." Id. at 31.

The next day, the BMV's general counsel sent a letter to Bernero to inform him that the SOS had assumed responsibility and control of the Dealer Compliance Division, and therefore, the SOS "has full and sole authority to hire whomever they choose for positions in that unit." Id. at 213. Further, Bernero was advised that all dealer compliance unit employees were laid off effective June 29, 2007, and had to apply for a position with the SOS if they desired to continue to work for the division. Consequently, Bernero would have been laid off effective June 29, 2007. Id. Finally, the BMV enclosed a check to compensate Bernero for his back wages and accrued vacation time, which the BMV stated "provides full and final satisfaction of the BMV's obligations to you as a former employee and in compliance with the SEAC Final Order." Id. Bernero did not cash or deposit the check.

After Bernero's attempts to obtain employment with other divisions of the BMV were unsuccessful, Bernero contacted the SOS and submitted a resume. The SOS did not respond to Bernero's employment inquiry. Therefore, on February 22, 2008, Bernero filed a complaint for declaratory judgment and injunctive relief naming as defendants the

State of Indiana, the Dealer Compliance Division of the SOS, Secretary of State Todd Rokita, and the BMV (collectively “the Appellees”). The SOS filed a motion to dismiss, which was denied. The parties then filed cross-motions for summary judgment.

On October 28, 2009, the trial court entered summary judgment in favor of the defendants. The court’s order states in pertinent part:

The Plaintiff’s termination was rescinded by the SEAC. Therefore, the Plaintiff should be paid his salary from the date of his last paid work day until the date the dealer compliance division (and therefore Plaintiff’s job) no longer existed within the [BMV]. The SEAC did not order Plaintiff reinstated by the [BMV], as that job no longer existed within the agency which was a party in the action before the SEAC. The Court leaves this matter open as to the measure of damages due Plaintiff by the [BMV] because it is not known whether that figure is in dispute.

The [SOS] and the office of Todd Rokita were not Plaintiff’s employers and were not party to the action reviewed by the SEAC. Therefore, no action may lie against the other defendants and the summary judgment is granted in all respects as to all defendants other than the [BMV]. The action against the [BMV] remains open as to damages consistent with Order, only.

Appellant’s App. pp. 9-10.

Bernero attempted to appeal the October 28, 2009 judgment, but our court granted the Appellees’ motion to dismiss because the judgment was not a final, appealable order. Thereafter, the parties submitted a joint stipulation concerning the amount of damages to the trial court. On August 27, 2010, the court issued an order awarding Bernero “pre tax” damages in the amount of \$13,140.00, which represented the sums due to Bernero from “the date of his last paid work day until the date the Dealer Compliance Division ceased to exist within” the BMV. Appellant’s App. p. 12. Bernero now appeals.

Standard of Review

We review the grant or denial of summary judgment de novo. Tri-etch, Inc. v. Cincinnati Ins. Co., 909 N.E.2d 997, 1001 (Ind. 2009). In so doing, we stand in the same position as the trial court and must determine whether the designated evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1269-70 (Ind. 2009). In making this determination, we construe the evidence in a light most favorable to the non-moving party and resolve all doubts as to the existence of a genuine factual issue against the moving party. N. Ind. Pub. Serv. Co. v. Bloom, 847 N.E.2d 175, 180 (Ind. 2006). The fact that the parties have filed cross-motions for summary judgment does not alter our standard of review, as we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. Blasko v. Menard, Inc., 831 N.E.2d 271, 273 (Ind. Ct. App. 2005), trans. denied.

Discussion and Decision

An employee who is “dismissed, demoted, suspended or laid off for cause may appeal such action” to the SEAC. Ind. Code §§ 4-15-1.5-6; 4-15-2.5-9 (2009). SEAC is authorized and required

(1) To hear or investigate those appeals from state employees as is set forth in IC 4-15-2, and fairly and impartially render decisions as to the validity of the appeals or lack thereof. Hearings shall be conducted in accordance with IC 4-21.5.

(2) To make, alter, or repeal rules by a majority vote of its members for the purpose of conducting the business of the commission, in accordance with the provisions of IC 4-22-2.

(3) To recommend to the personnel director such changes, additions, or deletions to personnel policy which the appeals commission feels would be beneficial and desirable.

Ind. Code § 4-15-1.5-6 (2009). Bernero filed this declaratory action in the trial court requesting that the trial court enforce the SEAC's order rescinding his termination.¹

First, Bernero argues that because the SEAC "rescinded" his termination, Bernero "is entitled to his job as a Compliance Officer, regardless of who now controls the job[.]" Appellant's Br. at 19. Furthermore, he asserts that the trial court should have determined that the SOS is "legally obligated to honor the SEAC's orders and employ Bernero in his Compliance Officer position." Id. at 21. Or in the alternative, that the "BMV should have been found legally obligated to place Bernero in a comparable position to that of Compliance Officer." Id. at 21-22.

In support of his argument, Bernero argues that the SEAC's use of the term "rescind" required the "parties to return to the state of affairs that had existed before the termination," i.e. Bernero "must be employed as a Compliance Officer." Id. at 19. The term "rescind" means "to abrogate (a contract) and restore the parties to the positions they would have occupied had there been no contract" and "to make void (as an act) by action of the enacting authority or a superior authority." See Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/rescind>. The Oxford English

¹ In their Appellees' brief, the BMV and SOS argue that Bernero cannot seek declaratory relief against the State and its agencies because they are not "persons" under the Declaratory Judgment Act. While the Appellees are generally correct, they have waived this issue by failing to specifically raise it in their motion to dismiss. Harp v. Ind. Dept. of Highways, 585 N.E.2d 652, 659-60 (Ind. Ct. App. 1990).

Dictionary (2nd ed. 1989) also provides the following definition: “[t]o revoke, cancel, or repeal.” See OED Online at <http://www.dictionary.oed.com>. See also Colonial Penn Ins. Co. v. Guzorek, 690 N.E.2d 664, 671, n.4 (Ind. 1997) (stating “[t]o rescind means to void the contract from its inception”) (citation omitted).

In response, the Appellees assert that the “only remedy available was rescission of the termination because returning to his previous position as a compliance officer at the BMV was an impossibility.” Appellee’s Br. at 9. The Appellees observe that the compliance officers’ employment was terminated on June 30, 2007, when the Dealer Compliance Division was transferred to the SOS. Therefore, the BMV was only required to pay Bernero his lost salary and benefits from the date of his termination through June 30, 2007. Finally, the Appellees argue that SEAC had the authority to order reinstatement had the commission determined that relief was appropriate. See Ind. Code § 4-15-2-35 (2009).

Unfortunately for Bernero, even if we were to agree with his interpretation of the SEAC’s order, there is no position to reinstate him to. The Dealer Compliance Division was transferred to the SOS, and therefore, BMV dealer compliance officers were laid off from their employment at the BMV on June 30, 2007. The fact that the SOS interviewed and hired many of those individuals for positions in the SOS is unavailing.

Furthermore, contrary to Bernero’s argument, the SEAC’s order rescinding his termination does not require the SOS to employ him as a compliance officer. On the date Bernero was terminated, the Dealer Compliance Division was still under the control of the BMV, and Bernero was terminated by his supervisor who is a BMV employee. The

public law transferring the Dealer Compliance Division to the SOS was signed by the Governor on May 8, 2007, a date nearly three months after Bernero's employment was terminated. The BMV compliance officers were laid off as of June 30, 2007, and were required to apply for positions with the SOS. The SOS did not hire all of the BMV's former compliance officers.

Finally, and most important to this issue, the SOS was not a party or represented in the SEAC proceeding. Bernero was not employed by the SOS, and the SOS had no role in Bernero's termination.² See also Appellant's App. p. 31 (“[T]he [SEAC] final order applies only to the parties to this action, those being Marc Bernero and the [BMV].”).

Bernero also argues that because the BMV and the SOS failed to seek review of the SEAC's final order pursuant to Indiana Code chapter 4-21.5-5,

the trial court should have ruled that they are now barred under AOPA from judicially contesting the SEAC's final order and should have held that any attempt by the SOS or BMV to require the trial court to effectively rule on the legality, scope or content of the SEAC's final order was an impermissible collateral attack which should be rejected.

Appellant's Br. at 23.

In making this argument, Bernero ignores the basic fact that he initiated this cause by filing a Verified Complaint for Declaratory Judgment seeking a declaration from the trial court that he is entitled to be reinstated as a dealer compliance officer. See Appellant's App. pp. 13-20. The Appellees are entitled to present a defense to Bernero's

² For these reasons, we also reject Bernero's argument throughout his brief that the SOS was in privity with the BMV. Privity refers to the “relationship between person who are parties to an action and those who are not parties to an action but whose interests in the action are such that they may nevertheless be bound by the judgment in that action.” Small v. Centocor, Inc., 731 N.E.2d 22, 27-28 (Ind. Ct. App. 2000), trans. denied. The SOS had no interest in the SEAC proceedings concerning the legality of Bernero's termination.

request for declaratory judgment, and have done so by presenting arguments as to what effect the trial court should give to the SEAC's order due to the fact that dealer compliance officers are no longer employed by the BMV. As the Appellees observe, Bernero incorrectly asserts that "any interpretation of the SEAC order other than his own is a collateral challenge to the order." Appellees' Br. at 12.

Finally, Bernero argues that "the trial court should also have held that the SOS and the BMV were barred from attempting to relitigate matters already decided by the SEAC's Chief ALJ by the doctrine of res judicata." Appellant's Br. at 24. The doctrine of res judicata serves to prevent the litigation of matters that have already been litigated. Dev. Servs. Alts., Inc. v. Ind. Family & Soc. Servs. Admin., 915 N.E.2d 169, 179 (Ind. Ct. App. 2009), trans. denied. Likewise, determinations by the board of an administrative agency are final for purposes of res judicata if 1) the issue sought to be estopped was within the statutory jurisdiction of the agency; 2) the agency was acting in a judicial capacity; 3) both parties had a fair opportunity to litigate the issues; and 4) the decision of the administrative tribunal could have been appealed to a judicial tribunal. Ind. State Dept. of Health v. Legacy Healthcare, Inc., 752 N.E.2d 185, 191 (Ind. Ct. App. 2001), trans. denied (citation omitted).

Again, we must observe that the Appellees are not challenging the SEAC's decision to rescind Bernero's termination. The Appellees' arguments concerning the effect of the SEAC order given the circumstances presented in this case are simply their responses to Bernero's claim that under the SEAC order he is either entitled to a dealer

compliance officer position with the SOS, or a similar position with the BMV. Therefore, the principles of res judicata do not apply.

Conclusion

Ultimately, Bernero seeks reinstatement to his position as a dealer compliance officer with the BMV. But this position no longer exists because the dealer compliance division was transferred to the SOS after Bernero's employment was terminated, and the former BMV compliance officers were laid off as a result of the transfer. We therefore affirm the trial court's order granting the Appellees' motions for summary judgment.³

Affirmed

FRIEDLANDER, J., and MAY, J., concur.

³ We do not address Bernero's final argument concerning the admission of Michael Bensi's affidavit. Bernero fails to cite the applicable standard of review or provide citation to relevant authority. Therefore, the issue is waived. See Appellate Rule 46(A)(8)(a).