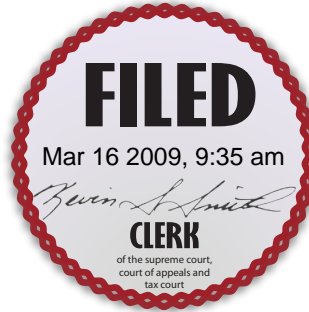


Pursuant to Ind. Appellate Rule 65(D) , this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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SCOTT A. SCHWARTZ,  
Appellant-Petitioner,

vs.

INDIANA STATE POLICE,  
Appellee-Respondent.

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No. 76A03-0806-CV-299

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APPEAL FROM THE STEUBEN SUPERIOR COURT  
The Honorable William C. Fee, Judge  
Cause No. 76D01-0709-MI-360

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**March 16, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Scott A. Schwartz (“Schwartz”) appeals from a judicial review affirming the decision of the Indiana State Police Board (“the Board”) to terminate Schwartz’s employment with the Indiana State Police (“ISP”). Schwartz raises the following issues for our review:

- I. Whether the Board’s decision to affirm the termination of Schwartz’s employment with the ISP was procedurally flawed due to the Board’s failure to rule on Schwartz’s motions and failure to issue sufficiently specific findings of fact; and
- II. Whether the Board’s decision to affirm the termination of Schwartz’s employment with the ISP was arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

In the early morning hours of August 6, 2006, Schwartz, Adriane Lautzenheiser, and Amanda Carper were out on a boat on the lake behind Schwartz’s residence in Hamilton, Indiana. After boating, the three returned to Schwartz’s residence. Sometime thereafter, Lee White arrived at Schwartz’s residence and was looking for his girlfriend, Lautzenheiser. Schwartz opened the door for White, allowing him into the residence and pointed toward the bathroom. White found Lautzenheiser and Carper in a state of undress. White and Schwartz then engaged in a physical altercation in Schwartz’s residence. White left, but returned a short time later throwing a clay pot through a window pane abutting the door to the residence.

Schwartz called 911 to report a breaking and entering claiming that White had unlawfully entered his residence. Officers from the Hamilton Police Department and ISP

responded to the 911 call. After the Hamilton police officers arrived, Schwartz telephoned ISP Trooper Maggie Shortt to seek advice as to the proper ISP procedures to follow when having someone arrested. Schwartz told Trooper Shortt that a woman and child came to his residence in response to a domestic disturbance at their home, and that a man came to his residence thereafter and kicked in his door.

White was arrested by Hamilton police officers for breaking and entering Schwartz's residence. ISP Detectives Harry Nix and Dan Clawson assisted the Hamilton Police Department with their investigation of the incident. They interviewed Schwartz, Carper, and Lautzenheiser at the scene and interviewed White at the Steuben County Jail. Detectives Nix and Clawson determined that Carper and Lautzenheiser were intoxicated during their initial interviews and re-interviewed them within days after the incident. In those subsequent interviews, both women acknowledged being on a boat with Schwartz on the night of the incident. Lautzenheiser's daughter saw the women and Schwartz preparing to go out in the boat on the lake on the night of the incident.

When Schwartz was initially interviewed, he did not inform the Hamilton police officers or the ISP detectives that he had been on the boat with Lautzenheiser and Carper. Instead, he told them that the two women had come to his residence seeking assistance following a domestic disturbance at another residence. When Schwartz was confronted with the women's statements, he stated to ISP detectives and to the internal investigator, Sergeant Kathy Robbins, that he had not been on the boat with the two women.

On August 9, 2006, White had a conversation with Schwartz that was recorded through the use of a body wire as part of the ISP detectives' investigation. During this conversation, Schwartz sought White's assistance in having Lautzenheiser and Carper change their statements to disclaim that they were on the boat with Schwartz on the evening of the incident, in order to make their statements conform with Schwartz's initial statement to the Hamilton police officers and the ISP detectives.

During this conversation, White reiterated that Schwartz had opened the door to his residence for White and let him enter, but White was now being charged with breaking and entering. In response to that statement, Schwartz indicated, "Well and I'm gonna take care of that too." *Appellant's App.* at 161. Schwartz subsequently told the ISP detectives, and then later Sergeant Robbins, that White had broken and entered Schwartz's residence. At the conclusion of Sergeant Robbins's investigation, she issued a summary of her investigation to her commanders.

On November 30, 2006, ISP Superintendent Paul Whitesell filed formal disciplinary charges against Schwartz alleging that Schwartz violated Rule 17, Sections 17-3(A)1, 17-3(A)12, and 17-3(A)14 of the ISP Personnel Rules. The charges against Schwartz are as follows:

1. On or about August 6, 2006, Trooper Schwartz did interfere with a case brought by another agency when he provided false information to the investigating officer called to his residence to investigate a reported breaking and entering, in violation of Police Rule 17, Section 17-3(A)14.

2. On or about August 6, 2006, Trooper Schwartz did give a false report of the commission of a crime; to wit: he called 911 to report a breaking and entering of his residence, knowing the report to be false, contrary to Ind. Code [§] 35-44-2-2, in violation of Police Rule 17-3(A)1.
3. On or about August 6, 2006, Trooper Schwartz did interfere with a case brought by another agency when he contacted Lee William White for the purpose of getting statements from Amanda Carper and Adriane Lautzenheiser in conformance with Trooper Schwartz's statement to investigators, in violation of Police Rule 17-3(A)14.
4. On August 14, 2006, Trooper Schwartz did convey false information to Detective Harry Nix and Detective Dan Clawson, concerning official Department business, when he knowingly told Detectives Nix and Clawson that Lee William White did break and enter his residence when, in fact, he had opened the door and permitted White to enter his residence, in violation of Police Rule 17-3(A)12.

*Id.* at 143.

On December 11, 2006, Schwartz appeared before ISP Assistant Superintendent, Colonel Larry Rollins, for a hearing on the charges against him. ISP Superintendent Whitesell reviewed the documents generated as a result of the investigation, interviewed Schwartz, and found that the evidence supported the charges. Superintendent Whitesell terminated Schwartz's employment with ISP on December 14, 2006.

Schwartz sought review of the Superintendent's decision, and the Board held a public hearing on June 18, 2007. On August 20, 2007, the Board issued its Final Order affirming the termination of Schwartz's employment with ISP. On September 21, 2007, Schwartz filed a verified petition for judicial review of administrative agency action in the Steuben Superior Court. Ultimately, the trial court issued an opinion upholding the Board's decision. Schwartz now appeals.

## DISCUSSION AND DECISION

### Standard of Review

Indiana Code section 4-21.5-5-14 provides that a court shall grant relief to a person seeking judicial review of an agency action only if the agency action is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. The burden of demonstrating the invalidity of the agency action is on the party asserting invalidity. Ind. Code § 4-21.5-5-14(a). In reviewing an administrative decision, a court is not to try the facts de novo or substitute its own judgment for that of the agency. Ind. Code § 4-21.5-5-11.

On appeal, to the extent the trial court's factual findings were based on a paper record, this court conducts its own de novo review of the record. *Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm'n*, 758 N.E.2d 34, 37 (Ind. 2001). If the trial court holds an evidentiary hearing, this court defers to the trial court to the extent its factual findings derive from the hearing. *Id.* Moreover, if a party alleges that the administrative body committed an error of law, both the trial court and this court on appeal owe no deference and review questions of law de novo. *Town of Beverly Shores v. Bagnall*, 590 N.E.2d 1059, 1061 (Ind. 1992).

## **I. Alleged Procedural Errors**

Schwartz alleges that the Board's decision to affirm the termination of Schwartz's employment with the ISP was procedurally flawed due to the Board's failure to rule on Schwartz's motions and failure to issue sufficiently specific findings of fact. The State argues that rulings on those motions were unnecessary as other remedies were available to Schwartz, and that the findings are sufficiently specific to support Schwartz's termination.

### *A. Failure to Rule On Motions*

First, Schwartz argues that the Board failed to act on motions concerning evidence he claimed was being withheld by a witness in the matter. He claims that he was denied a remedy afforded him by the Indiana Administrative Orders and Procedures Act because of the Board's inaction.

During Schwartz's deposition of White, White admitted that he had secretly taped Schwartz by placing a recording device on himself, in addition to the body wire he wore, but had failed to inform ISP investigators of that fact. White stated that he was still in possession of the tape at the time of the deposition, and that he had given a copy of the tape to a friend. Schwartz believed that the tape alluded to by White in his deposition contained information that was exculpatory in nature, damaging to the State, and critical to Schwartz's defense. Schwartz believed that the tape White claimed to have was the only tape produced in the matter.

Operating on that belief, Schwartz applied for and received a subpoena duces tecum and order from the Board commanding White to preserve the tape and make it available for

inspection and review by Schwartz. Although White was served with the subpoena and order, he failed to produce the evidence.

On June 1, 2007, Schwartz filed two motions with the Board requesting a pre-hearing conference to discuss “any and all remedies available to Schwartz in relation to this evidence.” *Appellant’s App.* at 22-24. Schwartz also filed a motion to continue the hearing arguing that he needed to review the tape before proceeding with the hearing. *Id.* On June 18, 2007, both sides appeared before the Board, and held a pre-hearing conference on Schwartz’s motions. The Board heard testimony about White’s failure to produce the evidence, but did not take action on Schwartz’s motions. The Board conducted the hearing on Schwartz’s appeal, later issuing a final order affirming his termination by ISP.

Schwartz argues that the Board’s failure to rule on his motions denied him the opportunity to enforce the subpoena because, without the Board’s ruling, Schwartz had not exhausted his administrative remedies. However, as noted by the State in its brief, Indiana Code section 4-21.5-6-2 provides that any party to a proceeding before an agency who has obtained an order from an administrative law judge may apply for a court order to enforce the subpoena by a verified petition for civil enforcement. That section applies only to the enforcement of a subpoena, discovery order, or protective order issued by an agency. Ind. Code § 4-21.5-6-2(a). The exhaustion of administrative remedies referred to in *St. Joseph’s Hospital, Inc. of Ft. Wayne v. Huntington County Department of Public Welfare*, 405 N.E.2d 627, 629 (Ind. Ct. App. 1980), and cited to by Schwartz, applies to judicial review of final orders or determinations which end the proceedings, not interim decisions. Consequently,



the Board's failure to rule on Schwartz's motions did not prevent him from pursuing enforcement of the subpoena and order.

### *B. Specificity of Findings*

Schwartz contends that the Board's findings of fact are insufficient because the Board adopted verbatim the proposed findings submitted by counsel for the ISP and because the findings lacked the specificity required to provide an explanation of the Board's decision.

The purpose of specific findings of fact is to crystallize an agency's analysis of the evidence in order to provide this court with an opportunity for intelligent review. *Hardesty v. Bolerjack*, 440 N.E.2d 490, 493 (Ind. Ct. App. 1982). "If an agency's findings are sufficiently specific to allow a person of ordinary intelligence to ascertain the basis of the agency's decision, the findings meet the required degree of specificity." *Id.*

Our Supreme Court has observed that the practice of accepting verbatim a party's proposed findings of fact "weakens our confidence as an appellate court that the findings are the result of considered judgment by the trial court." *See Prowell v. State*, 741 N.E.2d 704, 708-09 (Ind. 2001). However, verbatim reproductions of a party's submissions are not uncommon, as "[t]he trial courts of this state are faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning." *Id.* at 708. Although the wholesale adoption of a party's proposed findings and conclusions is not encouraged, the critical inquiry is whether such findings, as adopted by the court, are clearly erroneous. *In re Marriage of Nickels*, 834 N.E.2d 1091, 1095-96 (Ind. Ct. App. 2005).

Here, the Board's findings give a procedural history of the case, set forth the specific charges against Schwartz, including specific ISP Personnel Rules violations and the actions constituting the violations, and give a detailed narrative of the events, in most instances referring to the specific piece of evidence upon which the Board was relying. The Board held that Schwartz committed the conduct, and that the ISP Superintendent's termination decision was rationally related to the misconduct. The Board's findings are not procedurally flawed because they are a verbatim adoption of the findings submitted by counsel for ISP, or because they lack the requisite specificity.

## **II. Arbitrary, Capricious, or Abuse of Discretion**

Finally, Schwartz argues that the Board's decision to affirm his termination was arbitrary and capricious because it was not supported by the record. More specifically, Schwartz argues that the Board "willfully ignored the evidence presented in the matter, completely disregarded factual inconsistencies, and rendered a decision in this matter which was wholly unsupported by the evidence." *Appellant's Br.* at 15. Schwartz claims that three topics addressed in the June 18, 2007 hearing support his contentions: (1) the wire tap; (2) Schwartz's breaking and entering charge against White; and (3) Schwartz's presence on the boat on the night of the incident.

"An arbitrary and capricious administrative act is one which is willful and unreasonable, without consideration and in disregard of facts or circumstances in the case; the act is one without some basis which would lead a reasonable and honest person to the same conclusion." *Palin v. Ind. State Personnel Dep't*, 698 N.E.2d 347, 351 (Ind. Ct. App.

1998) (quoting *Irwin R. Evens & Son, Inc. v. Bd. of Indianapolis Airport Auth.*, 584 N.E.2d 576, 585 (Ind. Ct. App. 1992)).

Schwartz's argument appears to be an invitation for this court to reweigh the evidence and reassess the credibility of witnesses. Courts that review administrative determinations, at both the trial and appellate level, are prohibited from reweighing the evidence and judging the credibility of witnesses and must accept the facts as found by the administrative body. *Shoot v. State, Family & Soc. Servs. Admin.*, 691 N.E.2d 1290, 1292 (Ind. Ct. App. 1998). We are bound by the agency's findings of fact if supported by substantial evidence. *Weatherbee v. Ind. Civil Rights Comm'n*, 665 N.E.2d 945, 947 (Ind. Ct. App. 1996). The substantial evidence standard is met if a reasonable person could conclude that the evidence and the logical inferences therefrom are of such a substantial character and probative value as to support the administrative determination. *John Malone Enters., Inc. v. Schaeffer*, 674 N.E.2d 599, 606 (Ind. Ct. App. 1996). Substantial evidence has been described as "more than a scintilla, but something less than a preponderance of the evidence." *State v. Carmel Healthcare Mgmt., Inc.*, 660 N.E.2d 1379, 1384 (Ind. Ct. App. 1996).

The Board's findings were supported by substantial evidence and were neither arbitrary nor capricious. Fifteen witnesses testified and twenty-nine exhibits were submitted for the Board's consideration. Included among the exhibits was the transcript of Schwartz's 911 call in which he claimed that a woman and her daughter came to his house after a domestic disturbance. Also introduced was the transcript of Schwartz's phone call to Trooper Maggie Shortt made immediately after his 911 call, in which he claimed that two

women came down to his residence and a man later came and kicked in the door to Schwartz's residence. Schwartz testified at the hearing that White broke a window, opened the door, and let himself into the house. The Board examined Schwartz's cell phone records, photographs of Schwartz's house taken the night of the incident, the transcript of the conversation between Schwartz and White recorded via body wire, and numerous depositions and interviews of individuals associated with Schwartz and the other fact witnesses.

While there were inconsistencies in the testimony presented to the Board, it was the Board's function and responsibility to weigh that evidence, judge the credibility of the witnesses, and render a decision. There was substantial evidence in the record to support the Board's decision that Schwartz's termination from his employment with ISP was proper.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.