

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GEORGE BIRAM,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

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UNPUBLISHED

March 12, 2009

No. 283100

Wayne Circuit Court

LC No. 04-406959-CK

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

PER CURIAM.

In this action alleging wrongful discharge and violation of the whistleblowers' protection act (WPA), MCL 15.361 *et seq.*, plaintiff appeals as of right from a circuit court order denying his motion for enforcement of an arbitration award, and granting summary disposition to defendant. We affirm in part, reverse in part, and remand for further proceedings.

I. Underlying Facts & Proceedings

This case began in 1997, when plaintiff filed a complaint alleging that defendant wrongfully terminated his employment without just cause and in violation of the WPA. On September 30, 1999, plaintiff and defendant placed a settlement on the record that permitted plaintiff to pursue a grievance "pursuant to the rules of the Civil Service Commission," and dismissing the case with prejudice. The circuit court's dismissal order further provided, "[T]his dismissal shall not have any res judicata or collateral estoppel effect as to any subsequent appeal of the decision of the Civil Service Commission regarding Plaintiff's grievance challenging his termination only, however, as to all other claims this order shall have full res judicata and collateral estoppel effect."

The parties stipulated that Louise Hodgson, an independent arbitrator, would conduct a hearing to address plaintiff's grievance. On April 28, 2003, Hodgson "granted" plaintiff's grievance, and recommended that plaintiff "be returned to the payroll to his former or equivalent position at the same salary and benefits," with back pay from the date of his termination. During the next 10 months, defendant's Civil Service Commission (CSC) took no action to affirm or reject Hodgson's recommendation.

On March 8, 2004, plaintiff commenced the instant lawsuit. Plaintiff's complaint alleged that defendant had breached its contractual agreement to comply with Hodgson's arbitration

decision, and sought enforcement of Hodgson's recommendations. Shortly thereafter, on March 17, 2004, the CSC sent plaintiff a letter advising that it had rejected "the Hearing Officer's Report and Recommendations," and affirmed plaintiff's discharge. Plaintiff then filed in the circuit court an action for superintending control, seeking appellate review of the CSC's decision. Meanwhile, in the breach of contract action, plaintiff filed a motion seeking enforcement of the 1999 settlement agreement, which plaintiff characterized as an agreement for binding arbitration. At a hearing on May 7, 2004, the circuit court expressed that it would dismiss plaintiff's breach of contract complaint because plaintiff had agreed "to be bound by the civil service rules."<sup>1</sup>

On appeal, this Court reversed the circuit court's dismissal of plaintiff's complaint, explaining in relevant part as follows:

Plaintiff argues that the settlement agreement was actually an arbitration agreement in which the arbitrator's decision and award was binding on defendant and the commission. We disagree. ... Plaintiff stated on the record that he would be "opting under the Civil Service Commission Rules to have this matter decided by an independent arbitrator as opposed to a City of Detroit employee." However, the parties agreed that any challenge to the arbitrator's decision would be resolved according to the "Civil Service Commission Rules" and state law. The personnel rules adopted by the commission merely grant the arbitrator the authority of a hearing officer, and provide the commission with final, binding authority to accept, modify, or reject the decision and award of the arbitrator. Each side also discussed the options for appealing the arbitrator's decision by judicial means and through resort to the commission. Therefore, on its face, the agreement's plain terms contradict plaintiff's argument that the parties intended the arbitration award to stand alone as a self-enforcing, final decision.

Nevertheless, plaintiff argues we should not allow defendant, through the Civil Service Commission, to have absolute control over whether he ultimately receives an award, because that would make the contract illusory. Plaintiff argues that he exchanged the dismissal of his statutory lawsuit for a determination by an independent arbitrator, not the politically motivated commission. We disagree. Plaintiff allowed the dismissal of his original lawsuit in exchange for the reinstatement of his withdrawn grievance. We can only speculate at what good thing plaintiff hoped to gain by reentering defendant's personnel proceedings, but that was the agreement. Those proceedings do not end with an arbitrator's self-effecting award, but with a hearing officer's recommendation, which the Civil Service Commission may reject. Although we would perhaps reach a different conclusion if the Civil Service Commission were provided with unbridled discretion to reject any arbitration award, the parties agreed that they would settle the dispute by adhering to the rules established by the commission and the laws of this state. Therefore, as with any arbitration contract, plaintiff, by foregoing litigation, received an alternative dispute resolution process in exchange, and we

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<sup>1</sup> The circuit court entered an order effectuating its dismissal of the complaint on May 24, 2004.

are not prepared to declare that the process had no chance of benefiting plaintiff, especially in light of plaintiff's arbitration award.

However, plaintiff persuasively argues that enforcement of the contract's express terms requires us to reject the Civil Service Commission's decision. As explained, plaintiff bargained for reinstatement of his grievance according to the rules of the commission, including those imposed by law. Granting defendant unbridled authority to determine whether it would execute its side of the bargain by adhering to its own rules would reduce the agreement to an illusory contract, but that was not the bargain. Because each side agreed to follow the rules, the contract stands. It follows that any failure to adhere to the established rules would raise the issue of breach. In this case, plaintiff has presented strong evidence that the arbitration award was only overturned because the commission violated the rules that govern it.

Here, the parties concede that the settlement was an agreement to arbitrate plaintiff's dispute, although that arbitration merely meant reentering plaintiff's grievance back into the grievance process. Contracts that require the resolution of statutorily granted rights through alternative (arbitral) means rely for their validity on the chosen, alternative process meeting certain standards.<sup>1</sup>

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<sup>1</sup> Although the contract here was entered as part of a settlement agreement rather than an employment agreement, the two types of contracts are effectively identical. We see no reason to hold this contract to a different standard than its employment-agreement counterpart.

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[*Biram v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2006 (Docket No. 256131), slip op at 1-2 (citations omitted) (*Biram I*).]

Because the CSC's March 17, 2004 letter to plaintiff did not include written findings of fact or conclusions of law, this Court held that a genuine issue of fact existed regarding "plaintiff's claim that defendant undermined the agreement and breached the contract[.]" *Biram I*, slip op at 3. This Court reversed the circuit court's grant of summary disposition in favor of defendant and remanded

for a factual determination whether the commission adhered to the rules outlined in this opinion, including the rules requiring written findings of fact and law. If the trial court finds that the commission failed to comply with any of the rules governing its disposition of the dispute, then the court shall remand to the commission with instructions to comply, just as it would with any other arbitrator. [*Id.* at 3.]

On remand, the circuit court ordered defendant's CSC to supply written findings of fact and conclusions of law supporting its decision to reject Hodgson's recommendations.<sup>2</sup>

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<sup>2</sup> The official record does not contain a copy of this order, and the parties have not provided a copy to this Court. The parties agree regarding the order's substance.

Defendant submitted to the circuit court four pages entitled, “Journal of Proceedings of the Special Meeting of the Civil Service Commission, March 7, 2006,” which appear to be minutes of a CSC meeting held in response to this Court’s January 24, 2006 opinion. The minutes include summaries of statements made by CSC Chairman Maurice Jenkins, and commissioners Claire Hall and Sandra Clemons. The minutes also set forth brief findings of fact and conclusions of law.

After receiving the CSC minutes, plaintiff filed in the breach of contract action a motion seeking “enforcement of arbitration award.” Defendant countered with a motion for summary disposition under MCR 2.116(C)(4) and (7). On May 7, 2004, the parties argued these motions before the circuit court, which reserved a ruling. Defendant then filed a motion for summary disposition of plaintiff’s complaint for superintending control, contending that the breach of contract action provided plaintiff with an alternate and adequate remedy at law. Plaintiff did not oppose the motion, but requested that any dismissal be without prejudice. The circuit court ruled that this Court’s decision rendered moot any writ of superintending control, and dismissed that claim with prejudice.

On July 17, 2007, the circuit court issued an opinion granting defendant summary disposition. The circuit court ruled that because the CSC minutes included findings of fact and conclusions of law, defendant had complied this Court’s instructions in *Biram I*. The circuit court rejected plaintiff’s claim that that defendant had breached a contract to arbitrate. In a footnote to its conclusions, the circuit court’s written opinion provided,

Although the Court has rejected Biram’s breach of contract claim, the Court notes that this holding does not address the underlying merits of the Commission’s decision, including the validity of the Commission’s legal conclusions. Any such challenge would be properly brought in a new action challenging the Commission’s ultimate arbitral decision. The Court further notes that if Biram chooses to file such an action, such action should not be assigned to this Court because the two causes of action would not be transactionally related.

## II. Issues Presented & Analysis

Plaintiff now challenges the propriety of the circuit court’s order dismissing the case. This Court reviews de novo a circuit court’s summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). In granting summary disposition of plaintiff’s breach of contract complaint, the circuit court invoked MCR 2.116(C)(10), which tests a claim’s factual support. “In reviewing a motion under . . . (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Id.*

Plaintiff first contends that the 1999 settlement constituted an agreement to arbitrate, and that defendant could not unilaterally reject the award because doing so “would render the entire arbitration process meaningless[.]” This Court considered precisely the same arguments in *Biram I*. In *Biram I*, a different panel of this Court specifically rejected plaintiff’s claim that “the settlement agreement was actually an arbitration agreement in which the arbitrator’s decision and award was binding on defendant and the commission,” and plaintiff’s contention that the

agreement qualified as “illusory.” *Id.* at 1-2. The law of the case doctrine requires us to abide by this Court’s prior decision regarding this issue. “The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case.” *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Pursuant to the law of the case doctrine, we reject plaintiff’s claim that the 1999 settlement required binding arbitration rather than submission to defendant’s grievance process.

Plaintiff next asserts that the circuit court erred by failing to apply the standards of review for arbitration articulated in *Rembert v Ryan’s Family Steak House*, 235 Mich App 118; 596 NW2d 208 (1999). According to plaintiff, proper application of the *Rembert* standards would require “enforcement of the arbitrator’s award,” because the CSC improperly substituted its judgment for that of the arbitrator. In *Biram I*, this Court noted the parties’ mutual concession “that the settlement was an agreement to arbitrate plaintiff’s dispute, although that arbitration merely meant reentering plaintiff’s grievance back into the grievance process.” *Id.* at 2. This Court then applied *Rembert*’s requirement that “arbitral awards” contain “findings of fact and conclusions of law.” *Id.* at 3, citing *Rembert, supra* at 166. We concede that *Biram I*’s discussion regarding the applicability of the *Rembert* standards does not qualify as a model of clarity. However, in a footnote in *Biram I*, this Court stated,

[T]he parties concede that the settlement was an arbitration contract regarding a dispute over statutory rights, and their assertions on the original record demonstrate that they intended to preserve judicial review of the arbitrator’s decision as though the ordinary rules of arbitration applied. Therefore, we apply *Rembert*’s rules to this dispute’s arbitration. [*Id.* at 3 n 2.]

In *Rembert*, a conflict panel of this Court addressed the procedural requirements governing enforceable arbitration of statutory employment discrimination claims, and set forth “basic elements that careful employers should include as part of the arbitral process to ensure nonwaiver and fairness.” *Id.* at 122, 160. The *Rembert* majority summarized its holding as follows:

(1) Predispute agreements to arbitrate statutory employment discrimination claims are valid as long as the employee does not waive any rights or remedies under the statute and the arbitral process is fair;

(2) to ensure that employees have a fair opportunity to vindicate effectively statutory rights, the arbitration procedures must include: (1) clear notice, (2) right to counsel, (3) reasonable discovery, (4) a fair hearing, and (5) a neutral arbitrator;

(3) if arbitral awards are challenged, the standard of judicial review will be the standard articulated in [*DAIIE v Gavin*, 416 Mich 407, 433-434; 331 NW2d 418 (1982)]; and

(4) to allow for sufficient review, arbitral awards must be in writing and contain findings of fact and conclusions of law. [*Id.* at 165-166 (footnote omitted).]

With respect to *Rembert*'s third requirement addressed to judicial review, our Supreme Court held in *Gavin, supra*, that an arbitrator exceeds her authority if she commits a clear legal error, and set forth the following standard of judicial review: "The character or seriousness of an error of law which will invite judicial action to vacate an arbitration award under the formula we announce today must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Id.* at 443.

Plaintiff submits that the CSC failed to comport with *Rembert*'s rule regarding *judicial* review.<sup>3</sup> However, the issue actually presented does not implicate judicial review of Hodgson's decision, but involves whether the CSC had the power to substitute its judgment for that of Hodgson, and to vacate her arbitration award. Accordingly, the circuit court properly determined that *Rembert* simply does not apply here.

Lastly, plaintiff argues that the CSC committed an error of law by concluding that defendant did not violate the WPA. The circuit court declined to address the "validity of the Commission's legal conclusions," opining that "[a]ny such challenge would be properly brought in a new action." In *In re Payne*, 444 Mich 679, 687 (opinion by Boyle, J.); 514 NW2d 121 (1994), our Supreme Court explained that "[d]ecisions of municipal civil service commissions are reviewed through original actions for superintending control." Citing MCR 3.302(B), the Supreme Court further observed that superintending control "is available only where the party seeking the order does not have another adequate remedy." *Id.*

In *Biram I*, this Court addressed as follows the appropriate form of a challenge to the merits of the CSC's decision in this case:

Ordinarily the decision of a civil service commission is reviewed through the procedural device of superintending control, and the decision is affirmed if substantial evidence supports it. ... However, the parties concede that the settlement was an arbitration contract regarding a dispute over statutory rights, and their assertions on the original record demonstrate that they intended to preserve judicial review of the arbitrator's decision as though the ordinary rules of arbitration applied. [*Id.* at 3 n 2 (citation omitted).]

We agree and reaffirm that the record demonstrates the parties' intention to preserve ordinary judicial review of the ultimate decision rendered regarding plaintiff's grievance. Furthermore, defendant sought and received summary disposition of plaintiff's action for superintending control based on an allegation that the circuit court lacked jurisdiction to enter a writ of superintending control because plaintiff possessed an alternate and adequate remedy at law. "[A] party who has successfully and unequivocally asserted a position in a prior proceeding is

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<sup>3</sup> The primary Michigan authority cited by plaintiff, *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 174; 550 NW2d 608 (1996), concerns "the scope of judicial review of an arbitration award," and addresses "[t]he court's power to modify, correct, or vacate an arbitration award[.]"

estopped from asserting an inconsistent position in a subsequent proceeding.” *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994) (emphasis and internal quotation omitted). Our Supreme Court further noted in *Paschke* that “the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party’s position as true.” *Id.* at 510. In light of defendant’s successful and unequivocal assertion that the instant action provides plaintiff with an opportunity for full relief, we hold that the circuit court erred by declining to review the merits of the CSC’s decision, and remand to the circuit court for this purpose.

Because legal issues regarding the applicable standard of review likely will arise on remand, we briefly address them to provide guidance to the circuit court. A full and fair review of the CSC’s decision requires the circuit court to consider the entire record of the arbitration proceedings. *Justewicz v Hamtramck Civil Service Comm*, 65 Mich App 555, 560-561; 237 NW2d 555 (1975). In *Payne*, *supra* at 692 (opinion by Boyle, J.), our Supreme Court instructed that “[w]hen reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency’s findings of fact if they are supported by that quantum of evidence.” The term “substantial evidence” refers to “the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance.” *Id.* Because the CSC accepted virtually all of Hodgson’s factual findings, the circuit court may reasonably conclude that substantial evidence supports them.

In contrast, however, a different standard of review applies to the CSC’s legal determination that defendant did not violate the WPA. A court may set aside an agency’s legal rulings if they violate the constitution or a statute, or are affected by a substantial and material error of law. Const 1963, art 6, § 28; *Southfield Police Officers Ass’n v Southfield*, 433 Mich 168, 175; 445 NW2d 98 (1989). We direct that after reviewing the entire record, and not merely Hodgson’s written findings, the circuit court must determine whether the CSC properly concluded that plaintiff presented inadequate evidence of a WPA violation.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly