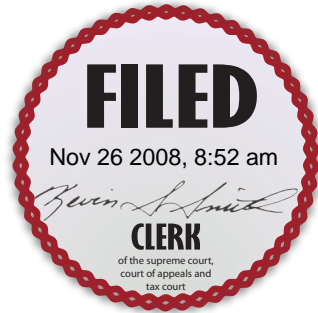


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANTS:

ATTORNEYS FOR APPELLEE:

Attorney for City of Gary,
Nathaniel Brannon and Anthony Stanley:
JEROME M. TAYLOR
Gary, Indiana

MACARTHUR DRAKE
Gary, Indiana

Attorney for Gary Police Civil Service Comm:
CHARLES D. BROOKS, JR.
Gary, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CITY OF GARY, GARY POLICE CIVIL)
SERVICE COMMISSION, NATHANIEL)
BRANNON and ANTHONY STANLEY,)
)
Appellants-Defendants,)
)
vs.)
)
THOMAS PAWLAK and RONALD PINEDA,)
)
Appellees-Plaintiffs.)

No. 45A03-0710-CV-469

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Kavadias Schneider, Judge
Cause No. 45D01-0705-PL-50

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Officers Thomas Pawlak and Ronald Pineda of the Gary Police Department filed a lawsuit challenging Officer Anthony Stanley's eligibility for promotion to the rank of lieutenant. The trial court granted a preliminary injunction removing Officer Stanley from the civil service rank of lieutenant and from the promotion list and moving Officers Pawlak and Pineda up on the promotion list. The City of Gary, the Gary Police Civil Service Commission, former Chief of Police Nathaniel Brannon, and Officer Stanley appeal.¹ We affirm.

FACTS AND PROCEDURAL HISTORY

Every two years, officers of the Gary Police Department may compete for promotions. Promotions are based on an officer's score on a written exam, an interview, history of disciplinary actions, and seniority. Officers who have been in their current rank for at least two years may take the written exam. After the written exam is graded, those who passed are interviewed. Then all of the factors are weighed to arrive at a final score.

Pursuant to Gary Ordinance 5881 and its amendments, the City of Gary Police Civil Service Commission adopted rules governing police officers. According to those rules, exempt rank officers cannot participate in the promotional process. (Plaintiff's Exhibit 3 at 40) (Section V, Rules and Regulations Concerning Promotions and Demotions, para. 10). The exempt ranks are chief of police, deputy chief of police, and commander. The chief of police appoints commanders and may remove officers from the commander position. (Appellant's App. at 48-49) (Section 3.1(D) of Ordinance 5881).

¹ The Appellants' reply brief was not timely submitted and was not filed by the clerk; therefore, we have not considered it in rendering our opinion.

When an officer is removed from the commander position, the officer returns to his or her civil service rank, *i.e.* patrolman, corporal, sergeant, lieutenant, or captain.

On May 25, 2006, then Chief of Police Nathaniel Brannon appointed Officer Stanley to a commander position. At that time, Officer Stanley was a sergeant. He had already purchased the study materials to prepare for the promotional exam, and he asked Chief Brannon if he could step down from the commander position to take the exam. Chief Brannon issued a memorandum dated June 14, 2006, stating Officer Stanley would revert to the rank of sergeant effective June 15, 2006.

The promotional exam was given June 17, 2006. Officers Stanley, Pawlak, and Pineda each had a civil service rank of sergeant and took the test to become lieutenants. In a memorandum dated June 29, 2006, Chief Brannon stated Officer Stanley had reverted to commander on June 19, 2006.

The interviews were scheduled approximately two months after the written exam was given. It is undisputed that Officer Stanley did not step down from his commander position before he was interviewed.

The promotion list was certified on January 4, 2007. Officer Stanley was second in line to become a lieutenant, Officer Pineda sixth, and Officer Pawlak eighth. At that time, there were three lieutenant positions available; therefore, Officer Stanley and the two other officers at the top of the list were promoted. Chief Brannon issued a memorandum stating Officer Stanley would step down to sergeant to receive his promotion to lieutenant. When Officer Stanley returned to his commander position, Thomas Jordan, who was fourth on the list, became a lieutenant.

On May 22, 2007, Officers Pawlak and Pineda filed a lawsuit challenging Officer Stanley's eligibility for promotion to lieutenant. Officers Pawlak and Pineda sought a preliminary injunction removing Officer Stanley from the civil service rank of lieutenant and the promotion list and moving the remaining names up on the list. On August 16, 2007, after hearing evidence, the trial court granted the preliminary injunction.

DISCUSSION AND DECISION

The grant or denial of a preliminary injunction rests in the sound discretion of the trial court.² *Sadler v. State ex rel. Sanders*, 811 N.E.2d 936, 952 (Ind. Ct. App. 2004). We review the trial court's decision for abuse of discretion, and we will reverse only if it is clearly erroneous. *Id.* at 952-53. "Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made." *Id.* at 953. We do not reweigh the evidence; instead, we consider the evidence favorable to the judgment and the reasonable inferences drawn therefrom. *Id.*

To obtain a preliminary injunction, Officers Pawlak and Pineda had to prove by a preponderance of the evidence: (1) their remedies at law are inadequate, thus causing them irreparable harm pending the resolution of the action; (2) they have a reasonable likelihood of success on the merits; (3) the threatened injury to them outweighs the

² The Appellants argue the decision to allow Officer Stanley to participate in the promotional process is owed deference, citing *City of Indianapolis v. Woods*, 703 N.E.2d 1087, 1090-91 (Ind. Ct. App. 1998), *trans. denied*; *City of Greenwood v. Dowler*, 492 N.E.2d 1081, 1084 (Ind. Ct. App. 1986), *reh'g denied*; and *City of Gary v. Gause*, 317 N.E.2d 887, 890 (Ind. Ct. App. 1974). These decisions are inapposite, as they are appeals from the decision of a police merit board where the board conducted a hearing and weighed evidence.

potential harm to the nonmoving parties if the injunction is granted; and (4) the public interest would not be disserved. *Id.* The Appellants argue Officers Pawlak and Pineda did not prove irreparable harm or a reasonable likelihood of success on the merits. The Appellants also argue the preliminary injunction is barred by laches.

1. Irreparable Harm

Officer Stanley's higher placement on the list could prevent Officers Pawlak and Pineda from being promoted or could delay a promotion. A delayed or missed promotion would in turn cause them to suffer a loss of pay and "time in grade," which would affect their ability to receive future promotions. These harms are not irreparable, because they can be remedied on the conclusion of the case just as well as by a preliminary injunction. *See Wells v. Auberry*, 429 N.E.2d 679, 683-84 (Ind. Ct. App. 1982) (officer who claimed he was wrongfully demoted not entitled to preliminary injunction because he could be reinstated and receive backpay at conclusion of the case on the merits). If, after a hearing on the merits, it is determined that Officer Stanley is not eligible for a promotion, each man can be placed in the proper rank, and Officers Pawlak and Pineda may be awarded any lost pay or time in grade.

Officers Pawlak and Pineda invoke the "*per se* rule;" that is, "when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardship in his favor." *Sadler*, 811 N.E.2d at 953. If the defendant's conduct is clearly unlawful, "the public interest is so great that the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm or whether the plaintiff will suffer greater injury than the defendant." *Id.* (quoting *Union Twp. Sch.*

Corp. v. State ex rel. Joyce, 706 N.E.2d 183, 192 (Ind. Ct. App. 1998)). Rules adopted by a police civil service commission have the force and effect of law. *Coleman v. City of Gary*, 220 Ind. 446, 458, 44 N.E.2d 101, 107 (1942).

Section 3.1(D) of Ordinance 5881 provides in relevant part:

The Board shall appoint all police officers, except for the Chief of Police and Deputy Chief of Police, as follows: Appointments to exempt ranks shall be made upon nomination of the Chief of the Department from those police officers presently employed, who have attained five years of continuous service with the Police Department. The Chief may remove any police officer from an exempt rank which is removal from rank only and not from the department.

(Appellants' App. at 48-49.) The Appellants note this section contains no time constraints; therefore, they argue former Chief Brannon had discretion to temporarily demote Officer Stanley so he could participate in the promotional process.

Even assuming the Appellants' interpretation of Section 3.1(D) is correct, the rules governing the promotional process were violated. Former Chief Brannon and Officer Stanley both testified Officer Stanley did not step down when he was interviewed. The interview is part of the promotional process, as it is one of the factors that determines an officer's placement on the list. Because the rules were clearly violated, public policy favors granting the preliminary injunction even in the absence of irreparable harm.

2. Likelihood of Success on Merits

Because Officer Stanley did not step down for the interview, Officers Pawlak and Pineda have demonstrated a reasonable likelihood of success on the merits. Moreover, Officers Pawlak and Pineda presented evidence that Officer Stanley stepped down only "on paper" when he took the exam and received the promotion because he did not lose

his commander's car, badge, or pay, and other officers were not "bumped" to open a sergeant's position for him. Therefore, the trial court did not err by finding Officers Pawlak and Pineda demonstrated a reasonable likelihood of success on the merits.

3. Laches

The Appellants argue Officers Pawlak and Pineda should have filed suit promptly after Officer Stanley took the exam. Instead, they waited until after Officer Stanley was promoted. Therefore, the Appellants argue, any relief should be barred by laches.

The defense of laches is a determination which lies within the sound discretion of the trial court. For a decision to be reversed on appeal, an abuse of discretion must be clearly demonstrated. Three elements which comprise the defense of laches are:

1. inexcusable delay in asserting a right;
2. implied waiver arising from knowing acquiescence in existing conditions; and
3. circumstances causing prejudice to the adverse party.

Bryant v. State ex rel. Van Natta, 405 N.E.2d 583, 585 (Ind. Ct. App. 1980) (citations omitted). "A mere lapse in time is insufficient; unreasonable delay which causes prejudice or injury is necessary." *Shafer v. Lambie*, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996).

The exam was administered on June 17, 2006; however, Officers Pawlak and Pineda did not know until the list was certified on January 4, 2007 whether Officer Stanley would score ahead of them. If Officer Stanley did not score ahead of them, they would suffer no loss. Officer Stanley accepted the promotion the same day the list was certified. Officers Pawlak and Pineda promptly addressed their concerns to Commissioner James Fleming, as evidenced by a memorandum the Commissioner wrote

on January 9, 2007. After a month or two, Commissioner Fleming dropped the issue because he came to believe the promotion was consistent with past practices and Officer Stanley had received his commander's pay while at sergeant rank due to a clerical error. Therefore, the Appellants have not established inexcusable delay or implied waiver, nor have they identified any evidence of prejudice. The trial court did not err by granting the preliminary injunction.

Affirmed.

NAJAM, J., and ROBB, J., concur.