2016 IL App (1st) 152548-U

SIXTH DIVISION
August 26, 2016

No. 1-15-2548

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH BURDI, Plaintiff-Appellant, v. VILLAGE OF BELLWOOD, ILLINOIS and THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF BELLWOOD, ILLINOIS, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 10 L 8815 Honorable Kathleen M. Pantle, Judge Presiding.
JEREMY CARR, Plaintiff-Appellant, v. VILLAGE OF BELLWOOD, ILLINOIS and THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF BELLWOOD, ILLINOIS, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 10 L 8816 Honorable Kathleen M. Pantle, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court properly granted summary judgment to the village and its Board of Fire and Police Commissioners in this dispute involving the village's failure to hire the plaintiffs as police officers.

¶ 2 Plaintiffs Joseph Burdi and Jeremy Carr filed separate lawsuits against the defendants, the Village of Bellwood and its Board of Fire and Police Commissioners (Board),[1] seeking relief with respect to the Board's failure to hire them as police officers. The trial court consolidated the two cases and the parties have briefed them together in this court.

¶ 3 The dispute largely revolves around the enactment of Village of Bellwood ordinance 8-71 (lateral hiring ordinance). The ordinance allowed the village's mayor to appoint experienced and certified individuals directly onto the police force as entry-level police officers, notwithstanding that state law, and an existing village ordinance implementing that state law, granted sole hiring authority to the Board. See 65 ILCS 5/10-2.1-1 *et seq*. (West 2010); Village of Bellwood, IL Code §33.01(C) (2008).

¶ 4 Both plaintiffs applied for police officer positions through the Board. On November 19, 2007, the Board published a final eligibility list of applicants seeking the position of police officer with the Bellwood Police Department. Burdi was ranked number one on the list; Carr was number 11. The list indicated that it would remain in force until two years later, November 19, 2009.

¶ 5 The Board requested that Burdi undergo a polygraph examination, one of the steps required by the Board's rules and regulations, before he would be hired. Burdi took the polygraph examination. In January 2008, the Board sent him a letter stating that his polygraph examination results "from an independent vendor" were "unfavorable" and that he would not be

[1] The Village of Bellwood and the Board are represented by the same counsel and we will sometimes refer to them herein collectively as "Bellwood."

hired. The report from the company which administered the polygraph test was later produced in discovery. It did not indicate that the polygraph examiner found that Burdi had lied during the examination, but merely that the results regarding Burdi's initial answers to questions posed regarding his gang affiliations, criminal history, and shoplifting were "inconclusive". After being asked these questions a second time, the examiner reported that Burdi's responses indicated "no deceptive intent."

¶ 6 On April 9, 2008, Bellwood enacted ordinance 8-25, which allowed the mayor to appoint individuals to be patrol officers who had already obtained full-time law enforcement certification from the Illinois Law Enforcement Training Standards Board (ILETSB) pursuant to 50 ILCS 705/8.1(a) (West 2008), regardless of whether they had been tested or ranked by the Board. The Board's existing internal rules required it to appoint "applicants from the eligibility list in descending order" but the rules also allowed the Board, "within its discretion," to appoint an applicant who had a full-time ILETSB certification ahead of non-certified applicants regardless of the certified applicant's rank on the eligibility list. Village of Bellwood, IL Bd. of Fire and Police Comm. R. 9(C). On July 16, 2008, Bellwood enacted ordinance 8-71, the lateral hiring ordinance at issue in this case. It was a slightly revised version of ordinance 8-25, and it was codified as Village of Bellwood, IL Code §33.60.

¶ 7 By enacting Ordinance 8-71, Bellwood used its home rule powers to create a hiring mechanism completely independent of the statutory system, allowing the mayor to laterally hire any trained and certified police officer from another jurisdiction. See generally *Stryker v. Vill. of Oak Park*, 62 Ill. 2d 523, 527 (1976) (holding that a home rule municipality can enact ordinances conflicting with state law governing the hiring of police officers). This deviated from the strict testing and hiring in rank order regime established in the Municipal Code, 65 ILCS 5/10-2.1-1 *et*

seq. (West 2010). See also Paul N. Keller and Margaret Kostopulos, *Police Departments and Fire Departments*, in Municipal Law §§ 6.49-6.99 (Ill. Inst. for Cont. Legal Educ. 2012). As our supreme court explained when civil service systems for police hiring was established over a century ago, "[t]his system reduces the opportunity for political influence in the hiring process. * * * [A]ppointments to municipal offices or employments must be made according to merit and fitness, to be ascertained by competitive examinations, free to all * * *." *People ex rel. Akin v. Kipley*, 171 Ill. 44, 59-60 (1897). See also *Fahey v. Cook County Police Dep't Merit Bd.*, 21 Ill. App. 3d 579, 586 (1974). Many of the plaintiffs' claims are grounded in expectancy interests they claimed under the standard hiring-by-tested rank system.

¶ 8 Carr, who remained on the eligibility list after Bellwood enacted the lateral hiring ordinance, had only a part-time law enforcement certification from the ILETSB, issued pursuant to 50 ILCS 705/8.2 (West 2008). Despite his lower rank on the list, Carr underwent polygraph, psychological, physical, and medical tests for potential hiring by Bellwood. On April 21, 2008, Carr received a telephone call from Jerry Artis, a Board member. During the call, Artis told Carr that Carr had passed his tests. Artis testified during his deposition that it was "possible" that he also told Carr to expect a call from the police chief regarding his hire. The police chief never called and Carr was never hired.

¶ 9 On August 7, 2011, Bellwood repealed the lateral hiring ordinance. Internal correspondence from the village administration which accompanied the repeal ordinance recites that Bellwood was abandoning the lateral hiring program because it had been challenged through this lawsuit and a failure-to-bargain grievance brought by the police union.

¶ 10 Evidence in the record demonstrates that while the eligibility list was in force, Bellwood hired one officer from it and four others under the lateral hiring ordinance. The eligibility list expired without either Carr or Burdi being hired.

¶ 11 Both Carr and Burdi sued the village and the Board. Carr's complaint, as amended, contained five counts. Count 1 sought a declaratory judgment that ordinance 8-71 was invalid. Counts 2 and 3 were claims for promissory estoppel and tortious interference with employment expectancy. Count 4 sought a writ of *mandamus* to compel the village to hire Carr as a police officer. In count 5, Carr sought administrative review of the Board's decision not to hire him.

¶ 12 Burdi's complaint, as amended, contained seven counts. Counts 1, 2, 3, 6, and 7 paralleled counts 1 through 5 of Carr's complaint, respectively. Count 4 in Burdi's complaint was for fraudulent misrepresentation regarding the results of the polygraph examination Burdi took as part of the hiring process. Count 5 was a claim for violation of the Freedom of Information Act, 5 ILCS 140/1 *et seq*. (West 2010).

¶ 13 On April 15, 2011, the trial court dismissed count 2 (promissory estoppel), 3 (tortious interference with employment expectancy), and 4 (fraudulent misrepresentation) of Burdi's complaint. On the same date, it dismissed count 2 (promissory estoppel) and 3 (tortious interference with employment expectancy) of Carr's complaint. On October 17, 2012, the court dismissed with prejudice both plaintiffs' administrative review claims (count 5 in Carr's complaint and count 7 of Burdi's complaint) and Burdi's Freedom of Information Act claim (count 5).

¶ 14 Through a series of orders entered on October 17, 2012, July 2, 2014, and August 11, 2015, the trial court resolved the remaining *mandamus* and declaratory judgment claims in favor

of Bellwood. We summarize only the portions of these orders which are relevant to the issues plaintiffs raise in this appeal.

¶ 15 Bellwood first moved for summary judgment on the declaratory judgment and *mandamus* claims attacking the validity of the lateral hiring ordinance, arguing, among other things, that the repeal of the ordinance rendered the plaintiffs' claims moot. On October 12, 2012, the court granted the motion as to Burdi, finding that the lateral hiring ordinance was not the cause of his failure to be hired, but rather because he had failed the polygraph examination and was struck from the eligibility list several months before the ordinance was even adopted. However, based on the record then before it, the trial court rejected that argument as to Carr, finding that because the village made lateral hires during his tenure on the eligibility list, Carr might have suffered some concrete injury despite the ordinance's later repeal. The court also found that Carr's claim was not moot, invoking the exception to the mootness doctrine permitting adjudication of questions which are "likely to reoccur" and because the "Village could benefit from guidance on the matter."

¶ 16 The court also granted partial summary judgment to the village on the plaintiffs' claims for *mandamus*. The court found that Burdi was not entitled to *mandamus* relief because the Board had specifically disqualified him based on the polygraph examination before the lateral hiring ordinance was enacted. As to Carr, the court found that the Administrative Review Law (735 ILCS 5/3-301 *et seq.* (West 2010)) was the sole avenue by which persons aggrieved by final decisions of the Board could seek relief. However, the court carved out an exception to that ruling, denying summary judgment on Carr's *mandamus* claim which sought to compel the Board to follow its own rules and regulations. Since Carr had placed 11th on the eligibility list,

the court found there was an issue of fact as to whether the Board might have hired him had the village never enacted the lateral hiring ordinance.

¶ 17 The October 17, 2012 order resolved all of Burdi's remaining claims, which were grounded in the declaratory judgment and *mandamus* counts. The parties then developed a more thorough factual record addressing the portions of Carr's declaratory judgment and *mandamus* claims which remained open.

¶ 18 On July 2, 2014, the court granted another motion for partial summary judgment filed by Bellwood. The court held that Carr was not entitled to any relief on his *mandamus* claim because, even if the village had never enacted the lateral hiring ordinance and the Board had retained sole hiring authority, Carr would still not have been hired. Even though the court credited Carr's assertions regarding the phone call from Board member Artis that he would be hired, the court found that other evidentiary material in the record showed that only five persons were hired during the eligibility list's two-year life-span, so the village would never have reached Carr's place on the list. The court found that when the list expired, Carr would have been, at best, fifth on the list after other hires were taken into account. Accordingly, it held that he did not establish a clear right to relief, which is an element of a valid *mandamus* claim. The court also determined that Carr's claims were barred by *laches.* Citing *Bill v. Board of Education of Cicero School District 99*, 351 Ill. App. 3d 47, 54 (2004), the court found that Carr should have filed his lawsuit no later than May 18, 2010 (six months after the November 18, 2009 expiration of the eligibility list) and he did not do so until August 2, 2010. Finally, the court rejected Carr's claim for back pay because he failed to mitigate damages by not taking sufficient steps to seek other employment.

¶ 19 On August 11, 2015, the trial court granted Bellwood's motion for summary judgment and denied Carr's cross-motion for summary judgment on Carr's claim for a declaratory judgment regarding the validity of the lateral hiring ordinance. Carr requested back pay and court costs as damages if the court invalidated the ordinance. The court noted that resolving this remaining claim required it to reconsider three elements of its July 2, 2014 ruling: (1) Carr's failure to show he would have been hired so far down the eligibility list; (2) laches; and (3) mitigation of damages. The court declined to reconsider those aspects of its earlier ruling.

¶ 20 Carr's claim against the lateral hiring ordinance was based on the fact that it failed to cross-reference or amend section 33.01 of the Village Code. Section 33.01(C) of the Village Code provided that the Board "shall appoint all officers and members of the Fire and Police Departments * * *." Village of Bellwood, IL Code §33.01(C). This section paralleled state law (65 ILCS 5/10-2.1-1, *et seq.*) (West 2010)) in providing that only the Board had the authority to hire police officers. Section 10.19(A) of the Village Code, in turn, specifically provided that: "If the Board of Trustees shall desire to amend any existing chapter or section of this code, the chapter or section shall be specifically repealed and a new chapter or section, containing the desired amendment, substituted in its place." Village of Bellwood, IL Code §10.19(A).

¶ 21 Before the trial court, the plaintiffs contended that the lateral hiring ordinance was invalid because it was not drafted according to the amendment procedure required by section 10.19(A). The trial court rejected this argument, finding, among other things, that section 10.21 of the Village Code resolved the apparent conflict. That section provided: "If the provisions of different codes, chapters, or sections of these codified ordinances conflict with or contravene each other, the provisions bearing the latest passage date shall prevail." Village of Bellwood, IL Code §10.21. Ordinance 8-71, which added section 33.60, was adopted long after section

33.01(C). That finding was also consistent with the well established canon of legislative interpretation that when two statutes conflict, the later one prevails. See, *e.g., Vill. of Chatham v. Cty. of Sangamon,* 216 Ill. 2d 402, 431 (2005)). Having rejected Carr's challenge to the lateral hiring ordinance, the trial court granted the defendants' motion for summary judgment and denied Carr's motion for summary judgment. That order resolved all pending claims in the case.

¶ 22 On appeal, Carr seeks reversal of the August 11, 2015 order, contending that Bellwood ordinance 8-71 was invalid because it amended an existing section of the Bellwood Village Code without specifically also amending the existing provisions granting sole hiring authority to the Board.

¶ 23 The plaintiffs also seek reversal of two other orders. With respect to the October 17, 2012 order, Burdi contends that the trial court made improper inferences of fact when it treated the Board's January 11, 2008 rejection letter to Burdi – regarding his failure of the polygraph exam – as authentic. Burdi contends that certain facts suggest that it may have been "a sham" and he characterizes the results of his polygraph examination as "benign."

¶ 24 Carr contends that the court's conclusion in the July 2, 2014 order that Carr was so far down the list that he never would have been hired was based on improperly admitted evidence regarding the other hirees. Carr also seeks reversal of the court's July 2, 2014 and August 11, 2015 orders barring his claim due to *laches* and failure to mitigate damages.

¶ 25 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). Summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is "clear and free from doubt." *Outboard Marine Corp. v. Liberty*

Mutual Insurance Co., 154 Ill. 2d 90, 102 (1992). "Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied." *Id*. We review a trial court's entry of summary judgment *de novo. Id.* We "can sustain the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was correct." *Rodriguez v. Sheriff's Merit Comm'n*, 218 Ill. 2d 342, 357 (2006).

¶ 26 We first examine Burdi's challenge to ordinance 8-71, which the trial court resolved in its October 17, 2012 order. Bellwood contends that when it enacted that ordinance, the Board had already rejected Burdi's application due to his unsatisfactory performance on the polygraph examination. Accordingly, Bellwood argues that Burdi has no standing to challenge the ordinance. Burdi concedes that Bellwood adopted the ordinance after the Board had disqualified him from employment, but he raises issues regarding the evidence in the record related to the polygraph exam.

¶ 27 Federal law prohibits private, but not governmental, employers from using polygraph examinations in the hiring and disciplinary process. See 29 U.S.C. §§ 2201, 2006. In *Kaske v. City of Rockford*, 96 Ill. 2d 298, 311 (1983), our supreme court held that a police officer's refusal to take a polygraph examination could not be used as a basis for disciplinary charges against him. However, there appears to be no authority (if there is, Burdi has not cited it) for extending *Kaske* beyond the realm of disciplinary matters to *hiring decisions*.

¶ 28 Indeed, rather than invite us to extend *Kaske* to hiring decisions, Burdi simply challenges the factual record relating to the rejection letter. Specifically, Burdi suggests that the circumstances surrounding the Board's rejection letter are "bizarre and suspect" because two slightly different versions of the letter surfaced in discovery: (1) the one he received and (2) a

second version printed on an updated letterhead. The second version is identical to the first, except that the typeface of the pre-printed information on the letterhead stock and the accompanying village logo are different. The Board's explanation for this difference was that it did not keep an exact photocopy of the signed letter it had originally sent to Burdi, and the digital copy of the letter was destroyed in a computer malfunction, so when pressed in discovery for a copy, it printed a fresh copy on current letterhead and Board members signed the fresh copy.

¶ 29 Minutes of the January 8, 2009 Board meeting provide some corroboration for the Board's explanation. The minutes contain the following sentence: "Some discussion on composing a letter for Mr. Burdi regarding employment with the Bellwood Police Department." Likewise, minutes of the January 23, 2008 meeting indicate that a "letter for Mr. Burdi regarding employment * * * was finalized and mailed." The plaintiffs devote a large portion of their arguments to denigrating various actions of Bellwood officials as "botched," "suspect," or otherwise questionable. The record illustrates that some Bellwood officials carried out their duties with somewhat less than an exacting and punctilious attention to detail. But as our local federal court has frequently stated, courts do not "sit as a super-personnel department that reexamines an entity's business decisions." *Dale v. Chicago Tribune Co.*, 797 F. 2d 458, 464 (7th Cir. 1986). The plaintiffs' frustration with the runaround they experienced is understandable, but mere frustration does not entitle them to relief. The underlying facts simply do not support plaintiffs' claims.

¶ 30 Burdi's claim about the letter is one example. He merely disputes the veracity of the polygraph letter and argues that it was insufficiently authenticated to have evidentiary value. We disagree. The deviations in form between the two versions of Burdi's rejection letter are simply distinctions without a difference, and prove nothing. All in all, the record simply does not

support Burdi's contention that the letter is somehow illusory. Also, Burdi never pressed the issue below by filing any motion to compel production of additional evidence in discovery. More importantly, he admitted in his own verified complaint that he had received the letter in January 2008 "with original signatures affixed" by the three Board members "all acting within the scope of their employment". He also attached a copy of the original letter as an exhibit to his complaint. Additionally, the record contains no evidence regarding the independent vendor's findings other than the document described above, stating the examiner's determination that the results regarding Burdi's answers to certain questions were "inconclusive". Indeed, his use of the letter as an exhibit to his own complaint undermines that very claim. See *Konstant Products, Inc. v. Liberty Mut. Fire Ins. Co.*, 401 Ill. App. 3d 83, 86 (2010) (holding that a party's admissions contained in an original verified pleading are judicial admissions that bind the pleader). Therefore, we find that the trial court did not err in granting summary judgment to Bellwood on Burdi's claim.

¶ 31 We next address Carr's declaratory judgment claim regarding ordinance 8-71, which requests reversal of the July 2, 2014 and August 11, 2015 orders. In this court, Bellwood offers several defenses to this claim, one of which is based on a different standing theory than that applicable to Burdi. The trial court granted summary judgment to Bellwood on Carr's claim on, among other things, lack of standing because he was ranked number 11 on the eligibility list. Accordingly, for Carr to have been hired, the ten applicants ranked above him would have to have been disqualified from consideration or given job offers. This is true regardless of whether the lateral hiring ordinance was valid or not. In rejecting Carr's claim, the court relied on a declaration by a Board member who stated that there were insufficient vacancies during the list's

two-year life span – even taking lateral hires into account – for the Board to reach number 11 on the eligibility list.

¶ 32 Our supreme court has explained the doctrine of standing with respect to declaratory judgments in the following manner:

> "In the context of a declaratory judgment action, there must be an actual controversy between adverse parties, with the party requesting the declaration possessing some personal claim, status, or right which is capable of being affected by the grant of such relief. * * * Thus, to have standing to bring a declaratory judgment action challenging the validity of a statute, one must have sustained, or be in immediate danger of sustaining, a direct injury as a result of enforcement of the statute." *Village of Chatham v. County of Sangamon*, 216 Ill. 2d 402, 419-420 (2005) (internal citations and quotations omitted).

¶ 33 An affidavit from a Board member in the record asserts that one person was hired from the eligibility list and four were hired laterally under ordinance 8-71. The trial court relied on this evidence to support its finding that Carr ranked too far down the list to have ever been hired during the lifespan of the eligibility list. Carr challenges this evidence, arguing among other things that the Board member who provided this evidence "pontificated," was a "non-expert" "non-witness" and that, at his deposition, he failed to recall certain details regarding the process. However, the record contains no concrete evidence regarding hiring decisions during this time period other than that adduced through Bellwood's witnesses. Since Carr failed to produce any evidence that contradicted the village's evidence, there was no genuine issue of material fact as

to whether Carr was harmed by, and thus had standing to challenge, ordinance 8-71. See *North Community Bank v. 17011 South Park Avenue, LLC*, 2015 IL App (1st) 133672, ¶ 15 ("Summary judgment requires the responding party to come forward with the evidence that it has."). The trial court's granting summary judgment in favor of the village was therefore correct.

¶ 34 In sum, the lateral hiring ordinance did not cause either plaintiff to sustain, or be in immediate danger of sustaining, any injury. Burdi lacks standing because he was not hired due to the polygraph examination results, before Bellwood enacted Ordinance 8-71. Carr lacks standing because he ranked so low on the list that the ordinance he challenged had no effect on whether he was hired or not. We therefore affirm the orders granting summary judgment on standing grounds. This disposition renders it unnecessary to address whether the lateral hiring ordinance was valid, or whether the court erred by: (1) dismissing Carr's claims due to *laches*; (2) dismissing his claims because of his failure to mitigate damages; and (3) dismissing the plaintiffs' administrative review claims.

¶ 35 Finally, we turn to plaintiffs' *mandamus* claims. "[A] writ of *mandamus* commands a public officer to perform an official, nondiscretionary duty that the petitioner is entitled to have performed and that the officer has failed to perform." *Chicago Bar Association v. Illinois State Board of Elections*, 161 Ill. 2d 502, 507 (1994). "*Mandamus* is an extraordinary remedy." *Noyola v. Board of Education of the City of Chicago*, 179 Ill. 2d 121, 133 (1997). "*Mandamus* cannot be used to direct a public body to reach a particular decision or to exercise its discretion in a particular manner." *Jamison v. City of Zion*, 359 Ill. App. 3d 268, 271(2005). Rather, *mandamus* relief is appropriate only "where there is a clear right to the requested relief, a clear duty of the respondent to act, and clear authority in the respondent to comply with the writ." *Orenic v. Illinois State Labor Relations Board*, 127 Ill. 2d 453, 467–68 (1989).

¶ 36 We find that the trial court properly disposed of plaintiffs' *mandamus* claims. First, with respect to Burdi, there is simply no evidence that the Board failed to perform a ministerial act when it considered, and rejected, his application. To the contrary, the record shows that the Board had the power to accept or reject applicants based on a range of factors, including how the applicant performed on a polygraph test. That means the Board's hiring decisions were discretionary, not ministerial. Burdi's request for *mandamus* relief is therefore inappropriate and was correctly rejected by the trial court. Likewise, with respect to Carr, even though the Board, pursuant to Rule 9(C), *could* have hired him out of list-order if he had a full-time ILETSB certification, the Board was not required to hire even full-time certified candidates out of ranked order. In other words, any decision to bypass the list in favor of a certified candidate was within the sound discretion of the Board, and not its mandatory duty.

¶ 37 Accordingly, we affirm the judgments of the circuit court of Cook County.

¶ 38 Affirmed.