STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL A. FLAMINIO,

Plaintiff-Appellant/
Cross-Appellee,

v

CITY OF KINGSFORD and KINGSFORD CIVIL SERVICE COMMISSION,

Defendants-Appellees/
Cross-Appellants.

UNPUBLISHED
May 30, 1997

No. 195099
Dickinson Circuit Court
LC No. 94-008793-CZ

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants pursuant to MCR 2.116 (C)(10) on plaintiff's request for an order of superintending control. We affirm.

Plaintiff's only claim on appeal is that the lower court erred in granting defendants' motion for summary disposition based on the finding that there was substantial evidence that his civil service examination was properly graded. Plaintiff alleged that defendants improperly graded a portion of his examination to ensure the promotion of another individual (Dennis Charette) to the position of the City of Kingsford's public safety director. He asked the lower court to order a regrading of the examinations or, alternatively, to discard the scores of one particular commissioner whose grading was allegedly widely divergent from the others.

We review the lower court's granting of summary disposition de novo, considering all evidence in the light most favorable to the nonmoving party. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). An order of superintending control is an extraordinary remedy which is used when there is no other remedy available at law. MCR 3.302(b); *Fort v City of Detroit*, 146 Mich App 499, 503; 381 NW2d 754 (1985). Such an order is used to compel governmental agencies, like municipal civil service commissions, to perform clear legal duties. *Id.*; *In re Payne*, 444 Mich 679, 687; 514 NW2d 121 (1994).

Plaintiff argues that our decision in *Neuman v Flint*, 35 Mich App 247; 192 NW2d 267 (1971) warrants a reversal of the lower court. In *Neuman*, we affirmed a lower court's decision ordering that a police officer's promotional examination be regraded. In that case, a member of the civil service commission intentionally "blackballed" the plaintiff and other applicants by giving a portion of their examinations a score of zero. *Id.* at 250. This effectively caused the applicants to fail their examinations and it allowed the offending commissioner effectively to exercise a preemptive veto over his fellow commissioners. This Court stated:

> While we should be slow to interfere with a civil service commission's grading of candidates for civil service positions, the challenge here is not so much to the determination of the civil service commission as it is to the actions of one of the three commissioners who, we are satisfied, preempted the authority of the entire Civil Service Commission. [*Id.* at 254.]

In *Neuman*, the offending commissioner gave the plaintiff and the other applicants a grade of zero while the other commissioners gave them marks in the eightieth percentile. *Id.* at 251. Such a disparity is not evident here. The alleged offending commissioner, did not give plaintiff a score of zero but a grade of four. The next lowest grade was six. This difference alone is significant enough to make the two situations distinguishable. In *Neuman*, the offending commissioner's actions were readily apparent whereas here, it is not at all clear that the commissioner acted improperly. Thus, there was no basis for an order of superintending control compelling the commissioners to regrade the examinations, as there was no indication that they had any clear legal duty to grade the examinations differently in the first place.

The standard which controlled the lower court's decision is the same standard we apply on appeal. We must inquire whether the lower court had substantial evidence before it to support the findings of the civil service commission. *Payne*, *supra* at 683. The Supreme Court defined substantial evidence as constituting:

> [T]he amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla . . . it may be substantially less than a preponderance. [*Id*. at 692.]

The Court also pointed out that a reviewing court should not "set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *Id*. at 692.

The lower court had substantial evidence before it to uphold the commission's appointment of Dennis Charette to the position of the City of Kingsford's public safety director. First, the commission had amended its rules in December of 1993 to make the evaluation process more fair to applicants who were upset with the previous method of scoring. These changes essentially made grading the resume portion of the applicants' examination more of an exercise of discretion by the commissioners than it had been previously and redounded to the benefit of Charette in the instant case. Second, despite plaintiff's allegations of collusion by the city and the commissioners, there was ample testimony that the scores on the written portion of the examinations were released after the resume portions were graded and that, as

a result, there was no opportunity for such manipulation of the scores. Third, in a similar promotion examination administered in 1992, Charette scored five percent higher than plaintiff before the same three commissioners and there were no allegations of improper grading. The decision of the civil service commission inevitably involved the exercise of considerable judgment and the circuit court properly avoided interference with this decision. Accordingly, we find that the lower court had substantial evidence before it to uphold the findings of the civil service commission and to grant defendants' motion for summary disposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Stephen J. Markman