

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

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PERCY HARRIS,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee,

and

MAYOR OF THE CITY OF DETROIT,

Defendant.

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UNPUBLISHED

January 31, 2006

No. 257345

Wayne Circuit Court

LC No. 03-338610-AS

Before: Sawyer, P.J., and Wilder and H. Hood\*, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order denying his motion for summary disposition and granting defendants summary disposition. We affirm.<sup>1</sup>

This case arises out of plaintiff's discharge from his position as a service guard for the Detroit Water and Sewerage Department (DWSD). During a time of heightened alert on December 6, 2001, plaintiff disobeyed a direct order to remain at his post, and the employee who relieved him was not a security employee. At the time of the incident, plaintiff was a 23-year

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

<sup>1</sup> Because many of the issues raised by plaintiff, who appeals in propria persona, overlap, we have condensed them into two key issues. Further, we may not address the additional issues raised in plaintiff's reply brief because they are not properly before this Court. "Reply briefs must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief[.]" MCR 7.212(G). We also note that plaintiff unpersuasively argues that the trial court erred because it granted defendants summary disposition even though they did not request it. A court may render judgment to the nonmoving party. MCR 2.116(I)(2).

employee who was three weeks away from retirement. Following a hearing,<sup>2</sup> the hearing officer recognized that mitigating factors existed, but recommended suspension pending discharge. Mayor Kwame Kilpatrick concurred with the hearing officer and upheld plaintiff's discharge. Plaintiff sought to reverse the mayor's decision and filed a complaint for superintending control against defendants, requesting reinstatement and back pay.

Plaintiff first argues that the trial court erred when it denied his motion for reassignment. We disagree. This Court reviews a denial of a motion for reassignment for an abuse of discretion. *Salvadore v Connor*, 87 Mich App 664, 671; 276 NW2d 458 (1978).

Typically, all cases in Michigan trial courts are assigned by lot. MCR 8.111(B). If a judge is already assigned to a case and another case arising out of the same transaction or occurrence is filed, then that case must be assigned to the same judge. MCR 8.111(D). Plaintiff contends that MCR 8.111(D) should apply to this case because his earlier case was transactionally related.

The writ of superintending control supersedes the writs of certiorari, mandamus, and prohibition, and provides one simplified procedure for reviewing or supervising a lower court or tribunal's actions. MCR 3.302(C); *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 346; 675 NW2d 271 (2003). The filing of a complaint for superintending control is not an appeal; rather, it is an original civil action designed to order a lower court to perform a legal duty. *Id.* at 346-347. Superintending control is an extraordinary power that a court may invoke only when the plaintiff has no legal remedy and demonstrates that the lower tribunal has failed to perform a clear legal duty. *Id.* at 347.

Plaintiff's first case, which sought injunctive relief and a VPA hearing, resulted in Judge Robert Ziolkowski ordering a VPA hearing. The instant case, on the other hand, challenges the outcome of the hearing process. The causes of action therefore seek different kinds of relief at different stages. They are not transactionally related, for example as are tort actions involving multiple parties and injuries arising from one motor vehicle accident. Whether plaintiff gets a hearing and whether the hearing results are favorable to him are two separate occurrences that share no causal connection.

Although it was decided in a different context, *People v Flint Muni Judge*, 383 Mich 429; 175 NW2d 750 (1970), is instructive. The prosecutor sought an original writ of superintending control in this Court, challenging the refusal of the municipal court to bind over the defendant for trial on his conspiracy to commit murder charge. *Id.* at 431. This Court denied the complaint and ruled that the prosecutor should file the action in circuit court. *Id.* In upholding that decision, our Supreme Court stated the following:

The superintending court does not substitute its judgment or discretion for that of the magistrate; neither does it act directly in the premises. Rather it

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<sup>2</sup> Plaintiff is a U.S. Army veteran who successfully acquired a court order compelling the City of Detroit to conduct a hearing pursuant to the veteran's preference act (VPA), MCL 35.401 *et seq.*

examines the record made before the magistrate to determine whether there was such an abuse of discretion as would amount to a failure to perform a clear legal duty; and in such case, the superintending court orders the magistrate to perform his duty.

The process is not, properly speaking, an appeal. It is rather a whole new lawsuit, with different parties and different purposes. . . . [It is] an original civil complaint designed to require the defendant municipal judge to perform a clear legal duty. [*Id.* at 432.]

Therefore, plaintiff's first action is properly viewed as an action to compel a VPA hearing. Any potential claim arising out of that hearing, including the instant case, is an entirely different case.

Further, the two causes of action do not overlap in terms of the parties plaintiff named. Seven individuals named in the previous suit are not named in this action, and the city of Detroit, a named party in this case, was not named in the first lawsuit. While identity of parties is not a requirement for reassignment according to the language of the court rules, a difference in parties between the cases further suggests that the relief sought in each case is different and the common transaction or occurrence is lacking. Chief Judge Mary Beth Kelly was not required, under MCR 8.111(D), to reassign this case.

Plaintiff challenges, in propria persona, the trial court's dismissal of his request for superintending control. We review a trial court's decision to deny a request for superintending control for an abuse of discretion. *In re Grant*, 250 Mich App 13, 14; 645 NW2d 79 (2002). To the extent that resolution of the case requires interpretation of the provisions of the VPA, the review is de novo. *Id.* at 14-15.

Publicly employed veterans have certain statutory rights. This case implicates MCL 35.402, which provides in part that no veteran shall be removed except for official misconduct or serious or willful neglect in the performance of duty and that such veteran shall not be removed except after a full hearing before the mayor, i.e., the City of Detroit legal department. Plaintiff challenges whether the manner in which he left his post constitutes official misconduct or serious or willful neglect in the performance of duty.

In reviewing that question, we must determine whether the trial court employed the proper standard of review, i.e. whether the hearing officer's decision was supported by "competent, material, and substantial evidence." *Grant, supra* at 18. Substantial evidence is "any evidence that reasonable minds would accept as sufficient to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence." *Id.* at 18-19. Our review is limited to whether the trial court applied the correct legal standard and whether it misapprehended or grossly misapplied the substantial evidence test to the hearing officer's factual findings.<sup>3</sup> *Id.* at 18. We will only overturn the trial court's decision for clear

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<sup>3</sup> Plaintiff also raises arguments concerning the following: 1) the jurisdiction and authority of his supervisors in suspending and discharging him from employment; 2) the impartiality and  
(continued...)

error, such that on review of the whole record, we are left with the definite and firm conviction that a mistake has been made. *Id.* Even if the trial court might have reached a different result than the hearing officer, it may not substitute its own discretion, and it must afford findings of fact deference, especially those concerning witness credibility and evidentiary questions. *Id.* at 19.

Given the narrow scope of review and the relatively low standard of proof, we conclude that the trial court did not err. As the court noted, many equities weigh in plaintiff's favor. He was only three weeks away from retirement. He arranged for non-security personnel to relieve him, and another security employee arrived less than an hour later. The lack of immediate relief for plaintiff stemmed in large part from supervisors' decisions about where to assign people and which unwritten policies to follow. The record creates some doubt regarding whether such policies even existed and whether they were fairly and consistently enforced. The record also contains testimony that supports an inference of animosity between plaintiff and at least one supervisor who may have manipulated the situation to inconvenience plaintiff, and other testimony indicated that employee grievances were not timely addressed.

However, because plaintiff refused to testify, the record does not reflect the extent to which these factors influenced his decision to leave his post at the end of his shift. It is unknown whether he believed that he was being manipulated, that a security employee would relieve his non-security relief in less than an hour, or that a grievance by him would go unheeded. He did indisputably disobey a direct order from a superior to remain at his post when he hung up his phone and left the post in the hands of non-security personnel. The fact remains that he did not wait for appropriate relief from security even though he was told that relief was being sought and would hopefully be forthcoming. Regardless of whether the post was abandoned according to the meaning of that word, it is clear that plaintiff acted unilaterally and in defiance of his superiors and the proper procedure. However rightful or deserved that defiance may be, it is not the place of this Court to weigh the equities.

Instead, this Court must decide whether the mayor relied on competent, material, and substantial evidence when he upheld the dismissal of plaintiff. We conclude that he did. The mayor indicated that he had reviewed the hearing transcripts, and only plaintiff's assertion otherwise contradicts the mayor. While those transcripts do contain mitigating evidence, there is also evidence that plaintiff's work location was under a state of heightened alert less than three months after the terrorist attacks of September 11, 2001. During that alert, plaintiff intentionally left his post at the end of his shift without waiting for appropriate relief. That act constitutes official misconduct and serious or willful neglect in the performance of duty under MCL 35.402.

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(...continued)

independence of the hearing officer and assistant corporation counsel attorney who acted as "prosecutor" at the VPA hearing; 3) denial of due process under the VPA; and 4) a delay between the hearing date and the mayor's decision. Because our review is limited to the trial court's legal standard and application of the substantial evidence test, we will not address these issues. *Grant, supra* at 18.

Defendants therefore lawfully removed<sup>4</sup> plaintiff from his employment. We are not left with the definite and firm conviction that a mistake was made.

Affirmed.

/s/ David H. Sawyer

/s/ Kurtis T. Wilder

/s/ Harold Hood

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<sup>4</sup> Because MCL 35.402 authorizes removal, plaintiff's argument that his discipline was excessive and unfair is unpersuasive.