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DISTRICT II

June 28, 2017

To:

Hon. Andrew T. Gonring
Circuit Court Judge
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John Berman
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You are hereby notified that the Court has entered the following opinion and order:

2016AP1295

John Berman v. Wisconsin Department of Safety and Professional Services (L.C. #2015CV727)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

John Berman appeals the dismissal of his mandamus action. The circuit court determined that Berman failed to name the appropriate defendant, and even if Berman had named the correct defendant, his action was not appropriate for a writ of mandamus. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We agree with the circuit court's analysis and summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Berman seeks to have an engineer who testified against him in a California action disciplined by the State of Wisconsin. Division of Legal Services and Compliance screened Berman's complaint and decided not to investigate or commence any disciplinary action. Berman responded by filing this mandamus action against the Wisconsin Department of Safety and Professional Services ("DPS"), seeking an order that DPS either discipline the engineer or investigate his complaint in more depth. DPS moved to dismiss on the ground that DPS is not a proper party to the mandamus action as it is not the body politic that disciplines engineers.

"Mandamus is an extraordinary legal remedy," *State ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 171, 346 N.W.2d 457 (1984), that gives a court the authority to issue a discretionary writ "to compel a public officer to perform a duty of his office presently due to be performed," *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶27, 262 Wis. 2d 720, 665 N.W.2d 155; *see also Moore v. Stahowiak*, 212 Wis. 2d 744, 747, 569 N.W.2d 711 (Ct. App. 1997). If the act being requested is one which the public officer has the discretion to perform or not perform, then mandamus cannot issue. *Morrisette v. De Zonia*, 63 Wis. 2d 429, 432, 217 N.W.2d 377 (1974).

As a jurisdictional matter, DPS is not the body politic that disciplines engineers licensed in this State. The Examining Board of Architects, Landscape Architects, Professional Engineers, Designers, and Professional Land Surveyors is responsible for disciplinary proceedings against engineers. WIS. STAT. § 443.11. DPS is not the appropriate party to this action.

Secondly, any decision by the examining board as to whether it would investigate and discipline is a discretionary act. As Berman noted in his complaint seeking mandamus—he seeks a writ to reverse the "screening decision of October 9, 2014 which was to close out the

matter ... without further investigation.” Complaints filed against engineers are subject to a screening process. *See* WIS. ADMIN. CODE § SPS 2.035 (Jan. 2017). The screening process occurred and is a discretionary determination. Mandamus does not attach to the review of discretionary determinations.

We agree with the circuit court that DSPS was not a proper party to this mandamus action, and even if it was, the action Berman seeks to compel is a discretionary act not appropriate for a writ of mandamus.

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals