

STATE OF MICHIGAN
COURT OF APPEALS

JAMES LEWIS,

Appellee,

v

BRIDGMAN PUBLIC SCHOOLS,

Appellant.

FOR PUBLICATION

May 8, 2007

9:05 a.m.

No. 261349

State Tenure Commission

LC No. 04-000008

Official Reported Version

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

TALBOT, J.

Bridgman Public Schools (the school district) appeals by leave granted the State Tenure Commission's rejection of the appointed hearing referee's decision to terminate the employment of James Lewis as a teacher and imposition of a long-term suspension without pay as the disciplinary consequence for his misconduct. We reverse and remand.

This case arose when Lewis, a high school teacher with 12 years of teaching experience, presented his 18-year old male teaching assistant, a student at the high school, with an air gun as a Christmas gift. Presentation of the gift was made while on school property. The air gun, described as an accurate replica of a Ruger semi-automatic handgun, along with ammunition, was presented to the teaching assistant in the presence of other students. The air gun discharges plastic pellets and has a muzzle velocity of over 250 feet per second, which is comparable to other types of pellet guns and BB rifles. Although the box containing the air gun indicated specific warnings, particularly regarding the need for eye protection, Lewis did not provide such protective gear as part of the student's gift. Lewis did not instruct the student on safe use of the air gun or any dangers regarding its use. In addition, Lewis failed to solicit or secure the advice or permission of school administrators or the student's parents before the selection and presentation of the gift.

The student was uncomfortable with accepting this gift and feared expulsion for having the air gun on school property. This concern was legitimate, as possession of the gun was violative of School District Policy No. 5610.01, which states in relevant part:

In compliance with State and Federal law, the Board shall expel any student who possesses a dangerous weapon in a weapon-free school zone

* * *

For purposes of this Policy, a dangerous weapon is defined as "a firearm, dagger, dirk, stiletto, knife with a blade over three (3) inches in length, pocket knife opened by a mechanical device, iron bar, or brass knuckles" or other devices designed to or likely to inflict bodily harm, including, but not limited to, air guns and explosive devices.

The air gun remained in an unlocked storage room in Lewis's classroom for several weeks before the student took the air gun home. When the student informed his parents of the gift, they complained to the school, which resulted in the school district's decision to proceed with charges for Lewis's discharge.

Historically, a tenured teacher could appeal a school board's decision regarding discipline or termination directly to the State Tenure Commission. MCL 38.121.¹ The tenure commission was structured to act "as a board of review for all cases appealed" directly "from the decision of a controlling board." MCL 38.139.² The assigned standard of review for the conduct of an appeal from a controlling board required the tenure commission to "make a de novo decision on all questions of fact and law . . . [and] . . . review and consider the record made before the controlling board." *Ferrario v Escanaba Bd of Ed*, 426 Mich 353, 367; 395 NW2d 195 (1986) (citations omitted). The "duty" and "authority" of the tenure commission to conduct a review de novo was affirmed by the Michigan Supreme Court, which required the commission "to determine 'anew and as original questions' all issues of fact and law although those issues were theretofore decided by the school board, and to 'make an independent finding of facts, opinionate upon the same, and enter an order accordingly.'" *Lakeshore Bd of Ed v Grindstaff (After Second Remand)*, 436 Mich 339, 354; 461 NW2d 651 (1990) (citations omitted). The Court affirmed the authority of the tenure commission to "vary or reverse the finding of the school board without new material evidence being presented." *Id.* at 352-353.³

1993 PA 60 amended the teacher tenure act and significantly altered the procedures to be employed in the discharge or demotion of a tenured teacher and in the appeal of a controlling board's decision. MCL 38.71 *et seq.* 1993 PA 60 initiated the use of a hearing referee as an interim procedural step between a controlling board's decision to proceed with charges against a tenured teacher and review by the tenure commission. If the controlling board's decision is

¹ 1963 PA 242.

² 1977 PA 252.

³ Justice Riley dissented, arguing that there existed "no express authority granted to the commission in the statute itself to reduce or otherwise modify a penalty imposed by a local board." *Lakeshore, supra* at 359. Justice Riley opined that the tenure commission, in conducting a review de novo, was restricted to "determining whether the original proceedings before the controlling board were proper, without error, and in accordance with the provisions of the tenure act." *Id.* at 360.

challenged, a hearing referee notifies the parties of a fixed hearing date. MCL 38.104(2). The hearing conducted by the hearing referee is in accordance with the Administrative Procedures Act (APA), MCL 24.271 to 24.287. MCL 38.104(4). The manner for conducting the hearing by the referee (and any subsequent "tenure commission review") is defined in MCL 38.104(5), which effectively mirrors the earlier version of the act defining the basic procedural format for the hearing. MCL 38.104(5)(a) to (e).

Notably, the hearing referee is required to "serve a *preliminary decision and order in writing*." MCL 38.104(5)(i) (emphasis added). The preliminary order "shall grant, deny, or modify the discharge or demotion specified in the charges." *Id.* If no exceptions are filed by either party to the preliminary decision of the hearing referee "the preliminary decision and order becomes the tenure commission's final decision and order." MCL 38.104(5)(j). However, either party may file "a statement of exceptions to the preliminary decision and order or to any part of the record or proceedings." *Id.*⁴ Although MCL 38.139 requires that "[t]he tenure commission shall act as a board of a review for all cases appealed from the decision of a controlling board," MCL 38.104(5)(l) provides that issues that are not addressed within the filed exceptions are deemed waived and "cannot be heard before the tenure commission or on appeal to the court of appeals." Specifically:

If exceptions are filed, *the tenure commission, after review of the record and the exceptions, may adopt, modify, or reverse the preliminary decision and order. The tenure commission shall not hear any additional evidence and its review shall be limited to consideration of the issues raised in the exceptions based solely on the evidence contained in the record from the hearing.* [MCL 38.104(5)(m) (emphasis added).]

These statutory modifications severely circumscribe the scope of the tenure commission's authority in the appeal process and imply that a de novo standard of review is no longer applicable.

At the time of oral argument for this appeal, this Court raised the issue regarding what the appropriate standard of review is in cases involving the tenure commission. Specifically, this Court noted that the vast majority of caselaw regarding the standard of review used by the tenure commission was decided before the amendment of the applicable statutes by 1993 PA 60. Historically, the tenure commission conducted reviews de novo of controlling board decisions and has, despite statutory amendment, continued to adhere to this practice without evaluating the continued propriety of this procedure. Because the amendment made by MCL 38.101 *et seq.* initiated significant procedural changes, including the use of an "administrative law judge" to conduct demotion and termination hearings, MCL 38.104, at oral argument we questioned the propriety of the continued use of a de novo standard of review. When the appellate attorneys for the parties were unable to authoritatively address this issue at oral argument, this Court invited

⁴ Cross-exceptions may also be filed in response to the exceptions or in support of the preliminary decision. MCL 38.104(5)(k).

the parties to submit supplemental briefs specifically addressing the appropriate standard of review to be used.

Statutory interpretation comprises a question of law, which this Court reviews de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005). The acknowledged legislative purpose of the teacher tenure act, MCL 38.71 *et seq.*, is to protect teachers' rights and to eliminate arbitrary and capricious demotions or dismissals by school boards. *Goodwin v Kalamazoo Bd of Ed*, 82 Mich App 559, 573; 267 NW2d 142 (1978). MCL 38.101 permits the discharge or demotion of a tenured teacher "only for reasonable and just cause and only as provided in this act." The decision of the hearing referee is not subject to review by the tenure commission, unless exceptions are filed. MCL 38.104(5)(j), (m). Thus, review by the tenure commission is statutorily limited. Not only is the tenure commission precluded from addressing the hearing referee's findings if exceptions are not filed, the commission is also precluded from taking new evidence and must limit its review "to consideration of the issues raised in the exceptions based solely on the evidence contained in the record from the hearing." MCL 38.104(5)(m). Hence, the authority of the tenure commission is highly proscribed in the review process. These restrictions imply that the tenure commission's review is now limited to addressing the propriety and manner of the hearing conducted by the hearing referee to assure the decision for the discharge or demotion of a tenured teacher is not arbitrary or capricious. This is further supported within the act by reference to the tenure commission's role as a "board of review," and not an adjudicative body. MCL 38.139(1).

It is illogical and contrary to standard agency review procedures, as used in other administrative forums, to suggest that review by the tenure commission would continue to be de novo or that it is permissible for the commission to completely disregard the findings of fact by the hearing referee. Instead, the procedure is now similar to other administrative law proceedings, for which the Michigan Supreme Court has indicated that "the determination as to credibility of the only decision-maker to hear testimony firsthand" cannot be ignored. *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 127; 223 NW2d 283 (1974). As such, the hearing referee's determination regarding questions of fact and credibility "should be accorded the appropriate deference" commensurate with "a 'clearly erroneous' standard of review." *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 265 Mich App 185, 206; 693 NW2d 850 (2005).

We are aware of recent rulings by this Court that an administrative hearing referee's findings and conclusions comprise merely "a recommendation," suggesting that the tenure commission is "not required to accept the hearing referee's proposed findings even if those findings were supported by substantial evidence." *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571, 578; 659 NW2d 629 (2003). See also *Galuszka v State Employees' Retirement Sys*, 265 Mich App 34, 44-45; 693 NW2d 403 (2004). However, these rulings rely primarily on the APA, MCL 24.281(3), rather than directly on the most recent provisions of the teacher tenure act, MCL 38.104(5)(m).

MCL 38.104(4) requires a hearing referee to conduct the proceeding in conformance with the APA, MCL 24.201 *et seq.*, specifically MCL 24.271 through MCL 24.287, and involves a significant degree of similarity and overlap between provisions of the APA and teacher tenure

act. Of particular interest is MCL 24.281(3), which provides, in part: "On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing." This is consistent with MCL 38.104(5)(m), which permits the tenure commission to "adopt, modify, or reverse the preliminary decision and order" and acknowledges limitations placed on the tenure commission's authority to conduct a review. MCL 24.285 of the APA further provides for the format and content of "[a] final decision or order of an agency" and requires, in part:

A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as *supported by and in accordance with the competent, material, and substantial evidence*. [Emphasis added.]

"Statutes that relate to the same subject or share a common purpose are in pari materia and must be read together as one law. In construing statutes that address the same subject, the more recently enacted statute takes precedence over the older statute, especially if the more recent statute is also the more specific statute." *Verizon North, Inc v Pub Service Comm*, 260 Mich App 432, 438; 677 NW2d 918 (2004) (citations omitted). Notably, the amendment of the teacher tenure act⁵ occurred after the adoption of the APA.⁶ In addition, it is undeniable that the teacher tenure act comprises the more "specific statute," necessitating that this Court give effect to every word, phrase, and clause in the statute to avoid an interpretation that would render nugatory or surplusage any part of the statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). As such, we determine that MCL 38.104(5) limits the tenure commission's scope of authority in conducting a review and recognizes limitations on agency authority, thereby precluding continued use of a de novo standard of review.

In this case, the hearing referee, after conducting a four-day hearing, issued a preliminary decision determining that the school district had proven reasonable and just cause to terminate Lewis's employment. Both parties filed exceptions to the hearing referee's preliminary decision. The tenure commission subsequently issued a decision and order addressing Lewis's exceptions to the hearing referee's ruling. Specifically, Lewis asserted that the hearing referee's finding that he demonstrated "a serious lack of professional judgment" was not supported by a preponderance of the evidence and was in conflict with prior commission rulings. However, the tenure commission concluded that the findings of the hearing referee "clearly support his determination that [Lewis] demonstrated a serious lack of professional judgment" given his failure to consider "possible ramifications" of giving the gift to the student while on school property, particularly given the "close resemblance" of the air gun "to an actual semi-automatic pistol." The tenure commission also rejected Lewis's exception to the hearing referee's determination that his conduct put the student at risk of expulsion, stating:

⁵ 1993 PA 60.

⁶ 1969 PA 306.

We concur with [the school district] analysis of the expulsion policy Hence, the policy requires the Board to expel a student in possession of a dangerous weapon, expressly including an air gun, and allows the Board, in its discretion, to withhold expulsion of the student proves one of the exemptions to the Board's satisfaction.

In addressing another exception, in which Lewis challenged the hearing referee's determination that the air gun could "reasonably be characterized as a weapon" in accordance with the school district's weapons policy, the tenure commission again concurred with the hearing referee's determination that the air gun met the definitional requirements of a weapon as elucidated in that policy. In addition, the tenure commission agreed with the hearing referee that the mere fact that the air gun constituted a realistic plastic replica of a Ruger P-series semi-automatic pistol did not preclude a finding that the air gun also fell within the characterization of a weapon as defined by the weapons policy.

The tenure commission summarily rejected Lewis's argument that the school district failed to prove a violation of the weapons policy because expert testimony established that the air gun was not capable of inflicting serious bodily harm or property damage as contemplated by the specific inclusion of air guns within the policy's definition of a weapon. Lewis next took exception to the hearing referee's determination that the air gun could have led to a "dangerous law enforcement response" as "speculative" and "far-fetched." Affirming the hearing referee's determination, the tenure commission noted that the air gun was left unsecured in a classroom closet for several weeks and that Lewis failed to provide the student with any instruction regarding removal of the air gun from school property. The tenure commission indicated its concern regarding testimony that a report of a student with a weapon in the school would immediately initiate a call to the police, which could result in a serious incident, particularly given the close resemblance of the air gun to a real semi-automatic pistol.

Lewis also objected to consideration of prior incidents of his alleged misconduct, which were unrelated to the current charges, as violating tenure commission precedent and constituting impermissible double jeopardy. However, the tenure commission responded, noting in relevant part:

It is well established that the consideration of prior incidents to determine the severity of penalty to be imposed for current charges is permissible and does not violate principles of double jeopardy In this case, all of the prior incidents with the possible exceptions of the reprimands for tardiness and sleeping overnight in the school building relate to lapses of appellant's professional judgment and were relevant for that purpose in determining the appropriate penalty.

The tenure commission determined, despite the unavailability of a formal grievance procedure for Lewis to challenge some of the previous incidents of misconduct, that he did have sufficient "opportunity to challenge the prior incidents" when they occurred.

Lewis also challenged the hearing referee's determination that he exhibited a "history of significant lapses of judgment" as unsupported by the record and inappropriately dependent on

the hearing referee's use of prior incidents of misconduct as an "overriding factor in upholding discharge." The tenure commission indicated its concurrence "with the hearing referee's conclusion that they are relevant in the determination of the appropriate level of discipline" and that "[i]n sum . . . we find the evidence establishes the relevancy of the prior incidents in consideration of the level of penalty and to establish [Lewis's] history of lapses of professional judgment." Lewis also took issue with the hearing referee's determination that his "serious lack of judgment" had an "adverse effect" on the school community. Again, the tenure commission sided with the hearing referee, determining that "it was not necessary for [the school district] to establish adverse effect. In cases involving teacher misconduct in the school or involving students, disciplinary action may be taken without a showing of adverse effect where the teacher's conduct is obviously inappropriate [W]e concur with the [hearing referee's] finding that the evidence nonetheless establishes adverse effect."

The only issue raised by Lewis with which the tenure commission concurred was the hearing referee's finding for discharge from his employment. Evaluating identified factors, the tenure commission concluded

that [Lewis's] misconduct was both egregious and a clear violation of the conduct expected of a teaching professional. We are also troubled that [Lewis] does not appear to appreciate the seriousness of his present misconduct even now. It is also disconcerting that previous intervention by [the school district] to correct other, less serious lapses of judgment by [Lewis] have failed to prevent this latest example of extremely poor judgment.

Despite the tenure commission's agreement with the hearing referee's findings, it determined that the proper penalty was an unpaid suspension, given the lack of evidence of an "improper motive" by Lewis and given his "significant contributions to the District" as a teacher. However, the hearing referee did consider these factors in determining discharge to be the appropriate penalty for Lewis's misconduct, stating:

There was undisputed testimony of [Lewis's] significant contributions to the Bridgman school community, and I cannot conclude from the evidence that his motive in this instance was improper. Nevertheless, given [Lewis's] history of significant lapses in judgment, the egregious violation of professional decorum in his choice of . . . gift, and the school district's legitimate concern to maintain a safe environment free of weapons, including replica weapons, I am persuaded that discharge is the appropriate remedy in this case. I find that this is the sole remedy which both reflects the seriousness of [Lewis's] conduct and serves as a clear message that such conduct will not be tolerated.

Because this finding was relevant to the weight and credibility of evidence and testimony, the tenure commission erred in failing to give deference to the hearing officer's findings. *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005).

This Court reviews the tenure commission's findings to determine whether there was "competent, material and substantial evidence to support the commission's finding." *Birmingham School Dist v Buck (On Remand)*, 211 Mich App 523, 524; 536 NW2d 297 (1995);

Const 1963, art 6, § 28. We conclude that the tenure commission exceeded the bounds of its authority by continuing to use a de novo standard of review rather than a clear error standard, and by failing to accord sufficient deference to the hearing referee's determinations as the fact-finder as required by the procedural amendments of 1993 PA 60. Therefore, in light of the tenure commission's concurrence with the hearing referee's substantive findings and conclusions, we find that the tenure commission erred in altering the hearing referee's findings for termination of Lewis's employment.

Reversed and remanded. We do not retain jurisdiction.

Servitto, P.J., concurred.

/s/ Michael J. Talbot

/s/ Deborah A. Servitto