STATE OF MICHIGAN

COURT OF APPEALS

JAMES LEWIS, Petitioner-Appellee, v BRIDGMAN PUBLIC SCHOOLS, Respondent-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.

FITZGERALD, J. (*dissenting*).

Before the amendment of the teacher tenure act, MCL 38.71 *et seq.*, by 1993 PA 60, if a controlling board decided to proceed with charges against a teacher with continuing tenure, the controlling board conducted the initial hearing and rendered a decision on the charges. MCL 38.104. The controlling board had "the power to subpoena witnesses and documentary evidence . . ." MCL 38.104(g). *Any* decision by the controlling board could then be appealed to the State Tenure Commission under MCL 38.121. The Michigan Supreme Court and this Court have continuously held that appeal from a school board decision subjects all questions of fact and law to tenure commission review and determination de novo. See, e.g., *Lakeshore Bd of Ed v Grindstaff*, 436 Mich 339, 354; 461 NW2d 651 (1990); *Ferrario v Escanaba Bd of Ed*, 426 Mich 353, 367; 395 NW2d 195 (1986); *Birmingham School Dist v Buck*, 204 Mich App 286, 292-293; 514 NW2d 528 (1994). In *Lakeshore Bd of Ed*, 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.

Under MCL 38.121, as amended by 1993 PA 60, "A teacher who has achieved continuing tenure status may appeal to the tenure commission any decision of a controlling board under this act, *other than a decision governed by article IV on discharge or demotion of a teacher on continuing tenure* . . . ." (Emphasis added.) Article IV governs only charges filed specifying a proposed outcome of either "discharge" or "demotion" and is composed of MCL 38.101 through 38.104. Where a controlling board files charges specifying a proposed outcome of either discharge or a specific demotion, a teacher with continuing tenure may contest the

controlling board's decision to proceed upon the charges by filing a claim of appeal with the tenure commission. MCL 38.104(1). An initial hearing is no longer conducted by the controlling board but, rather, by an administrative law judge (ALJ)[1] in accordance with the Administrative Procedures Act (APA), specifically MCL 24.271 to MCL 24.287. MCL 38.104(4). The ALJ "may subpoena witnesses and documentary evidence." MCL 38.104(5)(f). The ALJ is required to "serve a preliminary decision and order in writing." The preliminary decision and order "shall grant, deny, or modify the discharge or demotion specified in the charges." MCL 38.104(5)(i). If no exceptions are filed by either party to the preliminary decision of the ALJ, "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.*[2] 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." MCL 38.104(5)(l). 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*. MCL 38.104(5)(m). 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." *Id.*

The majority concludes that, because the tenure commission 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," 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 to discharge or demote a tenured teacher is not arbitrary or capricious."[3] In support of this conclusion, the majority concludes that it would be "illogical and contrary to standard agency review procedures . . . 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 [ALJ]." But with the amendment of the statute, the ALJ has simply replaced the controlling board as the entity initially charged with conducting a hearing, taking evidence, and rendering a preliminary decision on the charges. Indeed, the majority recognizes that recent rulings by this Court suggest 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." See, e.g., *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App

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[1] I acknowledge that the proper title for an administrative law judge is now "hearing referee." However, for purposes of clarity and in accord with the statutory language, I use the former designation.

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

[3] The majority also notes that the amended act refers to the tenure commission's role as a "board of review." MCL 38.139. However, before amendment the Act also referred to the tenure commission role as a "board of review" in MCL 38.139.

571 578; 659 NW2d 629 (2003); see also *Galuszka v State Employees' Retirement Sys*, 265 Mich App 34, 44-45; 693 NW2d 403 (2004). And MCL 24.281(3) of the APA states, in part, that "[o]n 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*." (Emphasis added.)

Accordingly, I disagree with the majority's suggestion that the tenure commission's de novo standard of review on appeal is no longer applicable because an ALJ, rather than a controlling board, conducts the initial hearing pursuant to the amended act. I would hold that an appeal from an ALJ's proposed decision subjects all questions of fact and law to tenure commission review and determination de novo.

"Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause and only as provided in this act." MCL 38.101. Pursuant to Const 1963, art 6, § 28 and MCL 24.306(1)(d), a final decision of the tenure commission is subject to direct judicial review and must be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material, and substantial evidence on the whole record. *Beebee v Haslett Pub Schools (After Remand)*, 406 Mich 224, 231; 278 NW2d 37 (1979); *Comstock Pub Schools v Wildfong*, 92 Mich App 279, 284-285; 284 NW2d 527 (1979). The task of the appellate court is "limited to a review of the record to determine whether there was competent, material and substantial evidence to support the tenure commission's finding" of reasonable and just cause to reduce Lewis's discipline from discharge to lengthy suspension without pay. *Beebee, supra* at 231. "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is more than a scintilla but may be substantially less than a preponderance." *Parker v Bryon Ctr Pub Schools Bd of Ed*, 229 Mich App 565, 578; 582 NW2d 859 (1998). This Court's review is not de novo; however, it does involve a degree of qualitative and quantitative evaluation of all the evidence that the commission considered, rather than just those portions of the record supporting the commission's decision. *Ferrario, supra* at 367; *Widdoes v Detroit Pub Schools*, 242 Mich App 403, 408-409; 619 NW2d 12 (2000).

The Bridgman Public Schools (the school district) first argues that the tenure commission's reduction in discipline was unsupported by competent, material, and substantial evidence on the whole record. The school district further asserts that, as a matter of public policy, the tenure commission's decision "sets a dangerous precedent essentially providing Michigan teachers immunity from termination for even the most egregious and dangerous offenses" and "has the effect of holding teachers to a lower standard of conduct than their students."

The school district has failed to demonstrate that the tenure commission's decision is unsupported by substantial evidence on the whole record. Indeed, it is striking that the ALJ and the tenure commission both conducted comprehensive qualitative and quantitative evaluations of all the evidence, yet came to differing conclusions on the appropriate penalty. Nonetheless, in *Lakeshore, supra*, the Court held that the tenure commission has the authority to reduce the level of discipline imposed by a school board on a tenured teacher from discharge to suspension where it finds that the charged misconduct, while proven, was not reasonable and just cause for

discharge. The tenure commission found discharge was not warranted on the basis of Lewis's "lengthy and positive contribution to teaching" and the "principle of progressive discipline as [Lewis's] only previous formal discipline was a two-day unpaid suspension." Both of these contentions are well supported by the record. Several of Lewis's former students and several of his fellow faculty members testified that Lewis is an exceptional teacher and coach who has made a great contribution to the school. While reasonable minds might disagree with the tenure commission's decision, it was supported by competent, material, and substantial evidence on the whole record.

The tenure commission, in its use of escalating discipline, has taken into consideration concerns such as the school district's argument regarding Lewis's history of poor judgment. Only one of the prior incidents in Lewis's record was considered serious enough to merit discipline beyond a reprimand, and that discipline was only a two-day suspension. Here, a two-day suspension of a first offense followed by over a year suspension for a second offense is a reasonable escalation representing the seriousness of the second offense. Ultimately, the question is whether a reasonable person could conclude that the commission's decision to reduce petitioner's penalty from discharge to suspension was adequately supported. *Parker, supra.* Given the evidence of Lewis's lengthy and overall positive performance as a teacher, it was reasonable for the tenure commission to conclude that discharge was too harsh a sanction in this case.

The school district also argues that reinstating Lewis to his teaching position would be against public policy because it would essentially set the bar on teacher misconduct so low that it would be impossible to fire a teacher. This argument is without merit. More serious misconduct by a teacher than that at issue can easily be imagined, and nothing in the tenure commission's reasoning in this case would bar discharge for more severe conduct. Further, the long-term suspension ultimately imposed on Lewis seems apt to deter other teachers from engaging in conduct similar to Lewis's underlying conduct in this case.

I would affirm.

/s/ E. Thomas Fitzgerald