

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

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RICHARD A. SULLIVAN,

Plaintiff-Appellant/Cross-Appellee,

v

RIVER VALLEY SCHOOL DISTRICT BOARD OF  
EDUCATION,

Defendant-Appellee/Cross-Appellant.

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UNPUBLISHED

July 7, 1998

No. 195461

State Tenure Commission

LC No. 95-000025

Before: Neff, P.J., and O'Connell and Young, Jr., JJ.

PER CURIAM.

Plaintiff Richard A. Sullivan, a tenured teacher, was charged with ten counts of misconduct and insubordination in connection with nine separate incidents taking place within a six-month period from January to June 1995. Plaintiff appeals as of right from the State Tenure Commission's decision sustaining six of those charges (charges 1, 3, 5, 6, 8, and 9) and imposing a thirty-month suspension without pay. Defendant River Valley School District Board of Education ("the Board") cross-appeals, essentially arguing that the commission erred in dismissing charge 2, that it erred in discounting the seriousness of charges 1 and 9 when imposing plaintiff's discipline, and that it should have discharged plaintiff. We affirm.

**I. Factual and Procedural Background**

Plaintiff has been employed by the River Valley School District since 1977, teaching physical education, health education, and math. At the time of the incidents giving rise to the charges at issue, plaintiff apparently was working in both the high school and the middle school. Despite having a strained relationship with the Board as a result of his public criticism of the Board and school administrators, as well as his ongoing dispute with the teacher's union regarding payment of a representation fee, plaintiff had consistently received satisfactory evaluations until the 1994-1995 school year.<sup>1</sup>

On April 27, 1995, the school district superintendent, Dr. Charles Williams,<sup>2</sup> suspended plaintiff with pay pending the Board's decision regarding ten charges of insubordination and misconduct. On

July 24, 1995, the Board voted to proceed with the charges. The charges alleged that plaintiff either exercised poor professional judgment or engaged in misconduct or insubordination in the following instances:

- (1) wrote a letter containing inappropriate remarks to the president of the Student Congress;
- (2) disclosed confidential information about a student to members of the press;
- (3) failed to report for a meeting with Superintendent Williams that was scheduled for March 6, 1995;
- (4) left the school without authorization on March 6, 1995, rather than attending the scheduled meeting;
- (5) failed to comply with oral and written directives to turn in his lesson plan and grade book following his suspension;
- (6) failed to comply with the Board's May 8, 1995, directive to submit to physical and psychological examinations at the Board's expense to determine whether an involuntary sick leave was warranted;
- (7) failed to comply with Superintendent Williams' June 16, 1995, directive to schedule a meeting with Williams before June 23, 1995;
- (8) engaged in disruptive outbursts at a board meeting on January 23, 1995, which involved an appeal of plaintiff's grievances, and failed to comply with the board president's directive to sit down and stop talking at that meeting;
- (9) threatened two board members following a board meeting on April 24, 1995, by saying "you'll be sorry for this" and "you will regret this"; and
- (10) failed to sign his evaluation and individualized development plan on March 24, 1995, at a meeting to discuss those documents with school administrators.

After a preliminary decision and order was issued by the hearing referee, exceptions to that preliminary decision were filed by both parties. Thereafter, the Tenure Commission sustained charges 1, 3, 5, 6, 8 and 9, but dismissed charges 2, 4, 7 and 10 for lack of proof.<sup>3</sup> The commission suspended plaintiff without pay for thirty months, or until the beginning of the 1998-1999 school year, and further conditioned plaintiff's reinstatement on his compliance with the Board's order, pursuant to the terms of the collective bargaining agreement, to undergo physical and psychological testing at the Board's expense.

## II. Scope of Review

The scope of review in this matter is provided by § 106 of the Administrative Procedures Act (APA), MCL 24.306; MSA 3.560(206):

(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

- (a) In violation of the constitution or statute.
- (b) In excess of the statutory authority or jurisdiction of the agency.
- (c) Made upon unlawful procedure resulting in material prejudice to a party.
- (d) Not supported by competent, material and substantial evidence on the whole record.
- (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
- (f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings. [See also Const 1963, art 6, § 28.]

“‘Substantial evidence’ is evidence which a reasoning mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance.” *Tomczik v State Tenure Comm*, 175 Mich App 495, 499; 438 NW2d 642 (1989). This Court gives due deference to the expertise of an administrative agency, and we will not “‘invade the province of exclusive administrative fact-finding by displacing an agency’s choice between two reasonably differing views.”” *Widdoes v Detroit Public Schools*, 218 Mich App 282, 286; 553 NW2d 688 (1996), quoting *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974).

### III. Plaintiff’s Appeal

#### A. Charge 1

We first address plaintiff’s claim on appeal that the commission’s finding of some misconduct with regard to charge 1 is not supported by substantial evidence. Specifically, plaintiff contends that there was no showing that his letter to the president of the Student Congress had an adverse effect on the students or on the school. We disagree and conclude that there is more than enough evidence in the record to support the commission’s finding that plaintiff’s letter had at least some adverse effect on the student-recipient of the letter, the other members of the Student Congress, and the faculty advisor to

that organization. Thus, we affirm the commission's finding of "some misconduct" with regard to this charge.

### B. Charge 3

Regarding charge 3, plaintiff argues that it should have been dismissed because both the Tenure Commission and the hearing referee found that the directive to attend the March 6, 1995, meeting with Superintendent Williams was unreasonable because plaintiff did not receive it until two hours before the meeting's scheduled time. Plaintiff also contends that the commission relied on uncharged conduct to sustain the charge because the Board did not specifically charge plaintiff with failing to inform the other participants that he was unable to attend the meeting. Plaintiff's claims are without merit.

Plaintiff's argument that he should have been excused from complying with the directive to attend the meeting because the directive itself was unreasonable misconstrues the decision of the Tenure Commission, which did find that plaintiff could not be charged with insubordination because the underlying directive was unreasonable. The commission's finding that plaintiff was not insubordinate, however, did not preclude a finding that plaintiff engaged in misconduct by failing to at least respond to the letter in some way. The record shows that the president of the River Valley Education Association told plaintiff shortly before the meeting that the union representative would be there, and plaintiff admittedly made no effort to inform anyone that he would be unable to attend due to his prior commitments to his students. Therefore, substantial evidence supports the commission's determination that plaintiff engaged in "some misconduct" with regard to this charge.

Equally lacking in merit is plaintiff's claim that the hearing referee and the Tenure Commission impermissibly relied on uncharged conduct. Charge 3 alleged that plaintiff was insubordinate and engaged in misconduct "by his failure to report for a meeting with . . . Superintendent Williams . . . ." Encompassed within the concept of "failure to report" is a failure to respond in any way. Plaintiff was not deprived of due process because the charge, as written, was sufficient to apprise him of the factual claims made against him. Cf. *Sutherby v Gobles Bd of Ed (After Remand)*, 132 Mich App 579, 589; 348 NW2d 277 (1984).

### C. Charge 5

Plaintiff also contends that the Tenure Commission's decision to sustain charge 5 is not supported by competent and substantial evidence. Plaintiff specifically claims that there is insufficient evidence to support the commission's finding that Superintendent Williams gave plaintiff an express directive to turn in his books, and, in any event, that plaintiff substantially complied with Superintendent Williams' alleged directive by leaving the books on top of plaintiff's office desk. Again, we disagree. Superintendent Williams testified that on April 27, 1995, after he told plaintiff of his decision to suspend him, he instructed plaintiff to turn in his lesson plan and grade books to the high school office before leaving the premises. The high school principal, Douglas Degner, and the middle school principal, David Zech, were both aware of the directive. The commission's finding that Williams verbally directed plaintiff to turn in his books is supported by substantial evidence in the record.

Plaintiff alternatively argues that he essentially complied with the alleged directive by leaving the books on top of his desk. However, this Court gives due regard to the factfinder's unique opportunity to assess the credibility of the witnesses who testify before it. *Arnold v Crestwood Bd of Ed*, 87 Mich

App 625, 660; 277 NW2d 158 (1978). Here, Superintendent Williams and Principals Zech and Degner described a series of searches that were undertaken on the afternoon of April 27, 1995, following plaintiff's suspension, on the morning of April 28, and at later times; however, none of these searches uncovered the books in question.<sup>4</sup> The commission's finding that plaintiff did not comply with Superintendent Williams' directive is supported by substantial evidence in the record.

#### D. Charge 6

Plaintiff next argues that the Tenure Commission's decision with regard to charge 6 should be reversed for two reasons. First, plaintiff claims that the commission erred as a matter of law when it overturned the hearing referee's ruling that the directive was "void ab initio" as a result of the Board's violation of the Open Meetings Act (OMA), MCL 15.261 *et seq.*; MSA 4.1800(11) *et seq.* Second, plaintiff contends that the commission's determination that the Board's directive was reasonable is not supported by substantial evidence because Superintendent Williams' recommendation that plaintiff undergo physical and medical examinations was unfounded. We find neither of these arguments to be persuasive.

As a general rule, the Tenure Commission's "jurisdiction and expertise is limited to questions traditionally arising under the teacher's tenure act." *Rockwell v Crestwood School District Bd of Ed*, 393 Mich 616, 630; 227 NW2d 736 (1975). However, this Court has recognized that the commission has authority to decide "requisite questions of law" in the context of a "just and reasonable cause" determination. *Viera v Saginaw Bd of Ed*, 91 Mich App 555, 560-561; 283 NW2d 796 (1979).

Here, the Tenure Commission did not decline to consider plaintiff's OMA challenge altogether; rather, the commission determined that the hearing referee's did not have the authority to declare "void ab initio" the Board's directive requiring plaintiff to submit to physical and mental examinations. Properly considering plaintiff's challenge in the manner contemplated in *Viera*, the commission stated that it could not conclude that the alleged improprieties in the way that the meeting was conducted "rendered [the Board's] otherwise authorized and reasonable decision unreasonable" in view of plaintiff's failure to challenge the action of the board in a grievance proceeding or pursuant to the procedures of the OMA. We find no substantial and material error of law in the manner in which the Tenure Commission addressed plaintiff's OMA challenge.

Plaintiff's second challenge relates to the reasonableness of the Board's directive, which was based on a packet of written materials supplied by Superintendent Williams. Plaintiff claims that the descriptions of the incidents (most of which formed the basis for the charges at issue in this appeal) alleged in the memo and supporting documents were inaccurate, incomplete, or both. The commission determined that the materials furnished in connection with Superintendent Williams' memo, "in combination with the [B]oard's own first-hand observations of [plaintiff] during board meetings and through his correspondence with them, provided a reasonable basis for the mental and physical examinations directive." Moreover, it is clear that the directive was authorized by the collective bargaining agreement. On this record, we are not persuaded that the commission erred in upholding the directive, and substantial evidence supports the commission's finding of insubordination due to plaintiff's failure to comply with it.

#### E. Charge 8

Next, plaintiff claims that the Tenure Commission's decision to sustain charge 8 is not supported by substantial evidence. Again, we disagree. One witness who was present at the January 23, 1995, board meeting testified that Board President Dennis Zeiger told plaintiff to sit down three times before plaintiff finally did so. Superintendent Williams testified that Zeiger was pounding his gavel the entire time plaintiff was personally confronting each of the board members, and Zeiger testified that plaintiff continued to stand after he told plaintiff at least twice to sit down and declared plaintiff out of order. Hence, there is ample support in the record for the commission's determination that plaintiff's actions amounted to insubordination.

We also reject plaintiff's claim that his conduct at the board meeting cannot form the basis for discipline because it was unrelated to his job. The purpose of the meeting at the time of plaintiff's conduct was to address certain grievances that *plaintiff* had brought pursuant to the collective bargaining agreement. While the purpose of the teacher tenure act is to protect tenured teachers from discharge for reasons other than those of professional competency, *Detroit Bd of Ed v Parks*, 417 Mich 268, 282; 335 NW2d 641 (1983), the term "professional competency" encompasses "more than just teaching skill. . . . [I]t includes compliance with reasonable administrative rules and regulations which may be required for the effective operation of a school or school system." *Sutherby, supra* at 585-586. We believe that the grievance appeal process is inherently related to effective operation of the school system, and that the Board is therefore entitled to set reasonable limits on the behavior of its teachers during that process. Finally, we reject as unfounded plaintiff's First Amendment claim, as well as plaintiff's argument that he could not be disciplined without a prior warning that failure to comply with Zeiger's directive would constitute insubordination.

#### F. Charge 9

We next consider plaintiff's challenges to Charge 9, which arose out of statements plaintiff made to two board members following a board meeting held on April 24, 1995. Both the hearing referee and the commission determined that there was insufficient evidence that the statements were intended as threats. The hearing referee further found that plaintiff's other conduct at the April 1995 meeting was irrelevant because the charges were based only on the specific statements made to the board members after the meeting. However, without addressing this aspect of the preliminary decision, the Tenure Commission noted that "Charge 9 also mentions [plaintiff's] . . . behavior while the board was in session," and proceeded to sustain the charge based on plaintiff's disregard of President Zeiger's directive to stop speaking and sit down (which was similar to plaintiff's behavior at the January meeting that formed the basis for charge 8).

Plaintiff argues that the commission's decision should be reversed because the Board never took exception to the hearing referee's finding that this conduct was irrelevant, and the commission essentially relied on uncharged conduct to sustain the charge. However, even assuming arguendo that the commission should not have considered plaintiff's alleged insubordination occurring during the April 1995 meeting, this does not amount to a substantial and material error of law affecting its decision

because, even leaving aside that conduct, we are not persuaded that the commission erred in disciplining plaintiff as it did.

#### G. Plaintiff's Discipline

Finally, plaintiff finally contends that a thirty-month suspension without pay is too harsh in view of plaintiff's previous unblemished record, and that the Tenure Commission lacks authority to impose conditions on his reinstatement. Although plaintiff claims that a thirty-month suspension is an excessive punishment for what he characterizes as "one bad year," there is record support for the commission's finding that the number and seriousness of the offenses warrants significant discipline. Even more important, we will not "substitute [our] judgment concerning the seriousness of [a teacher's] noncompliance with administrative regulations for that of the tenure commission" because we "do[] not possess the subject-matter expertise necessary to gauge the seriousness of a teacher's noncompliance with" such regulations. *Sutherby, supra* at 589. Finally, we are not persuaded that the Board's failure to employ progressive discipline requires a different result. Consequently, we affirm the Tenure Commission's imposition of a thirty-month suspension without pay.

Plaintiff also contends that, because it lacks equitable powers, the Tenure Commission is without authority to condition his reinstatement on compliance with the Board's May 8, 1995, directive regarding physical and psychological examinations. It is true that the Tenure Commission, as a creature of the Legislature, has no inherent equitable powers. *Bd of Ed of Benton Harbor Area Schools v Wolff*, 139 Mich App 148, 155-156; 361 NW2d 750 (1984). However, contrary to plaintiff's characterization of the Tenure Commission's decision, the commission did not *order* plaintiff to submit to the examinations, and, therefore, has not attempted to exercise any equitable powers. Plaintiff may still choose not to submit to the tests; however, if plaintiff so chooses, he will not be reinstated. We are not persuaded that the Tenure Commission exceeded its authority or otherwise committed an error of law in imposing this condition for reinstatement.

#### IV. The Board's Cross-Appeal

In its cross-appeal, the Board raises several issues. The Board argues that plaintiff's conduct with regard to charge 1 warranted a finding of "obvious misconduct" rather than merely "some misconduct" as found by the Tenure Commission. The Board also asserts that charge 2 was improperly dismissed, and that there was no support in the record for the commission's finding that plaintiff's statements forming the basis for charge 9 were not threats. Finally, the Board contends that the record does not support the commission's finding that animus by the Board toward plaintiff precludes a finding of reasonable and just cause for discharge.

At the outset, we note that each of the Board's claims of error essentially relate to the Board's underlying argument that plaintiff should have been discharged rather than merely suspended. We have reviewed the record and the Tenure Commission's decision and are convinced that none of the errors alleged by the Board amount to substantial and material errors of law affecting the commission's decision that plaintiff's conduct was not sufficiently serious to warrant discharge. In sum, because the factual findings upon which the Tenure Commission's decision was based are supported by substantial



evidence, we give deference to the commission's judgment concerning the appropriate discipline. *Sutherby, supra* at 589.

Affirmed.

/s/ Janet T. Neff

/s/ Peter D. O'Connell

/s/ Robert P. Young, Jr.

<sup>1</sup> In September 1994, the district suspended plaintiff without pay for two days when he did not sign and return his individual contract for the 1993-1994 school year. Plaintiff grieved the suspension in accordance with the terms of the collective bargaining agreement, but his grievance was denied at the board meeting of January 23, 1995. Plaintiff's conduct at that meeting formed the basis for charge 8.

<sup>2</sup> Dr. Williams retired at the end of the 1994-1995 school year, effective July 31, 1995. He was succeeded by Dr. Donald Larsen, who also testified at the hearing.

<sup>3</sup> The commission's determination that the Board had failed to meet its burden of proof with regard to charges 4, 7 and 10 is not a subject of appeal.

<sup>4</sup> Apparently, the books were later found by a teacher's aide in one of plaintiff's desk drawers.