

STATE OF MICHIGAN
COURT OF APPEALS

BEN KELSO,

Appellee,

v

SOUTHFIELD PUBLIC SCHOOLS
BOARD OF EDUCATION,

Appellant.

UNPUBLISHED

October 25, 2005

No. 256161

State Tenure Commission

LC No. 02-000033

Before: Kelly, P.J., and Meter and Davis, JJ.

PER CURIAM.

The Southfield Public Schools Board of Education (Board) appeals by leave granted the order of the State Tenure Commission reversing the dismissal of athletic director Ben Kelso for misappropriation of funds and insubordination. We affirm in part, reverse in part, and remand.

Kelso's responsibilities as Southfield High School athletic director included all ticket sales for the school's athletic events, and he voluntarily assumed responsibility for concession sales at school games. In 1999, Kelso followed the school's practice of turning concession sales over to the school's bookkeeper the next business day after games, but he stopped following this procedure in 2001; thereafter, athletic funds disappeared from Kelso's office on several occasions. As a result, Kelso was instructed to turn all ticket and concession proceeds over to the bookkeeper immediately after any athletic event, but he failed to do so and funds again disappeared from his office. Kelso was also instructed to cease his practice of staffing the concession stands with his relatives. Southfield school officials began to suspect Kelso of misappropriating money, and they decided to monitor his activities at the October 26, 2002 home football game.

William Whalen, Southfield's facilities director, placed several hidden surveillance cameras and recruited another employee to follow Kelso and record any suspicious activities with a hand-held video recorder. Hours of tape were recorded, much of which was played at the evidentiary hearing in this matter. Although the tape never shows Kelso or his family members directly taking school funds, the officials believed that it proved Kelso had engaged in a scheme to misappropriate funds by "reselling" tickets without reporting the proceeds and by retaining proceeds from the concession stand. The officials' observations also indicated that Kelso violated the school policy of ending ticket sales at the conclusion of the first quarter of play.

Kelso turned over \$1,230 in ticket revenue, but failed to account for any concession funds by October 29, 2002, despite moderate to heavy concession business at the game.

On October 29, 2002, Whalen, director of labor relations Albert Martin, and interim principal Clarence Stone met with Kelso and informed him of their recent surveillance activities. Whalen testified that he asked Kelso about the concession proceeds and that Kelso denied having any such money. Martin reported no such exchange between Kelso and Whalen. All parties agree that Kelso, Whalen, and a third person left the meeting at some point and went to Kelso's office. Whalen explained that the trip was to "look for" funds, while Martin used the word "retrieve." Kelso and Whalen then returned with a plastic container, inside of which was \$370 in change and small bills. Whalen testified that he then asked why Kelso had not mentioned the money previously. Kelso allegedly replied, "you know I always have a change box in my office." Martin then presented Kelso with a letter of suspension.

Kelso appealed his suspension to the State Tenure Commission pursuant to MCL 38.71 *et seq.* An evidentiary hearing was held before a Department of Education hearing referee, consisting of extensive testimony and the viewing of several hours of video tape. Most of the testimony was uncontested. The only conflicts concerned the October 29, 2002 meeting and the subsequent discovery of money in Kelso's office. Whalen's employee testified that he saw Kelso remove cash from both the ticket booth and the concession stand, and he noticed Kelso retain tickets after collecting them for resale purposes. The proofs further showed that Kelso sold tickets beyond the end of the first quarter and staffed the concession stand with his family members, contrary to the earlier directives from the administration.

After viewing the video evidence and hearing the testimony, the referee issued a preliminary decision and order finding that Kelso had been insubordinate by failing to cease staffing the concession stand with his relatives and by failing to stop selling tickets at the end of the first quarter of play. The referee further determined that Kelso had misappropriated concession proceeds because he had not disclosed their whereabouts to school officials and failed to turn over any concession receipts after the October 26 game. The referee concluded, however, that Kelso had not misappropriated ticket proceeds, because Kelso had turned over \$1,230, and the high school bookkeeper testified that \$1,229 worth of tickets were sold.¹

Kelso filed exceptions to the referee's findings, and the Board filed cross-exceptions. Pursuant to MCL 38.104(5)(m), the State Tenure Commission affirmed all but one of the referee's findings, agreeing that Kelso had been insubordinate but had not misappropriated ticket proceeds. However, it concluded that Kelso had not misappropriated concession proceeds, based on "variances" between Martin's and Whalen's testimony concerning the October 29 meeting and discovery of \$370 in Kelso's office. Specifically, the Commission concluded that Whalen's version of events, in which Kelso initially denied having any concession proceeds, was contradicted by Martin's version, in which "the reason for the trip to [Kelso's] office was to

¹ The \$1 discrepancy was not explained by the testimony.

retrieve funds as opposed to searching for funds.” Thus, the Commission overturned the preliminary decision of the referee by reweighing Whalen’s and Martin’s credibility.

Our review of Tenure Commission findings is limited to determining whether the record contains competent, material, and substantial evidence to support the decision. *Widdoes v Detroit Public Schools*, 242 Mich App 403, 408; 619 NW2d 12 (2000). Substantial evidence is that which a reasonable mind would accept as adequate to support a decision. *Id.* at 408-409. Our 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.” *Id.*, citing *MERC v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974).

The Commission agreed with the referee, as do we, that the record supports a finding that Kelso was insubordinate by failing to comply with directives to stop selling tickets after the first quarter of play and to stop using his relatives to staff the concession stand. We likewise agree with both the Commission and the referee that the Board failed to prove that Kelso engaged in a scheme to misappropriate ticket revenue, based on the amount of money Kelso turned over and the referee’s painstaking review of the video evidence, revealing an actual number of ticket transactions consistent with that sum of money. Thus, we conclude that the final decision and order on these matters was supported by competent, material, and substantial evidence on the whole record. *Widdoes*, *supra* at 408.

The Commission disagreed with the referee regarding misappropriation of concession proceeds. Our review remains of the Commission’s final decision, but the findings of the referee, “an impartial, experienced examiner who has observed the witnesses and lived with the case,” are part of the record evidence we examine as part of that review. *Detroit Symphony*, *supra* at 127. The significance of the referee’s report “depends largely on the importance of credibility in the particular case.” *Id.* Here, the Commission reversed the referee’s finding on the basis of speculation that a certain event must not have occurred because Martin did not report it, despite Whalen’s specific testimony that the event did occur. Thus, the Commission impermissibly reassessed witness credibility and failed to afford the referee the level or degree of deference required by *Detroit Symphony*, *supra* at 126-127. The Commission’s reversal was also based on an inappropriately technical analysis of Martin’s choice of language, concluding that use of the word “retrieve,” as opposed to “look for” or “search for,” indicated that Martin had prior knowledge of the money in Kelso’s office, presumably because Kelso already told officials about it. We decline to hold all people to such precise linguistic standards at all times. Therefore, the Commission’s final decision is not supported by substantial evidence.

The Board argues that because neither Kelso nor any of his family members testified, the Commission should have presumed that their testimony would have been adverse to Kelso. Failure to produce evidence within a party’s exclusive control can raise a presumption that, if produced, it would operate against that party, but not where the witness is equally available or accessible to both parties, such as by process of court. *Cavanaugh v Cardamone*, 147 Mich App 159, 163; 383 NW2d 601 (1985). Here, either party could have requested that the hearing referee subpoena any witness. MCL 38.104(5)(f). The presumption does not apply unless the potential witness is under the adverse party’s control. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 15-16; 527 NW2d 13 (1994). Here, the Board’s witnesses testified that they recognized Kelso’s relatives, so the Board knew their identities and could have compelled their

attendance. The Board has presented no evidence that they were under Kelso's control, and mere family relationships will not suffice. *Isagholian, supra* at 15. The Commission properly declined to apply the adverse testimony presumption.

Affirmed in part, reversed in part, and remanded for reinstatement of the hearing referee's findings regarding misappropriation of concession proceeds and for determination of an appropriate sanction. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Patrick M. Meter

/s/ Alton T. Davis