STATE OF MICHIGAN

COURT OF APPEALS

JAMES R. GOODRICH,

Appellant,

v

HOWELL BOARD OF EDUCATION,

Appellee,

and

STATE TENURE COMMISSION,

Intervening-Appellee.

UNPUBLISHED
May 12, 1998

No. 195565
State Tenure Commission
LC No. 95-21

Before: Griffin, P.J., and McDonald and O'Connell, JJ.

PER CURIAM.

Appellant James R. Goodrich, formerly a tenured teacher for the Howell Public Schools, appeals as of right the decision of the State Tenure Commission affirming the administrative law judge's order of discharge. We affirm.

Appellant argues the Tenure Commission's adoption of a proposed opinion that was written before the Commission deliberated violated the teacher tenure act and his due process rights. We disagree. We are not persuaded by appellant's attempt to analogize this case to *Beeler v Michigan Racing Commission*, 191 Mich App 498; 478 NW2d 700 (1992). Furthermore, the Commission did not delegate its decision-making authority by having a draft opinion prepared as a tool for the Tenure Commission's consideration of the case. Appellant's brief also refers to appellee's failure to advise the Commission of an error in appellee's brief. We deem this one-sentence argument waived for inadequate briefing and failure to cite authority.

Appellant argues the Commission improperly allowed appellee to call appellant as a witness in appellee's case in chief. Appellant relies on *Luther v Bd of Educ of Alpena*, 62 Mich App 32, 37;

233 NW2d 173 (1975). *Luther* merely states that "the better policy is to require the board to first present its evidence." We reject appellant's invitation to hold that teachers cannot be called to testify by the district until the district has set forth all of the evidence against them.

Appellant challenges each of the seven charges sustained by the Commission. Having reviewed the evidence considered by the agency, we conclude there was competent, material and substantial evidence on the whole record to support the Commission's findings. *Widdoes v Detroit Public Schools*, 218 Mich App 282, 285-286; 553 NW2d 668 (1996).

Appellant argues an adverse inference should have been drawn against appellee because it subpoenaed but did not call a witness who was allegedly present during one of the charged incidents. Failure to produce evidence within a party's control raises a presumption the evidence, if produced, would operate against that party. However, the presumption does not operate if the witness is equally available or accessible by process of the court. *Cavanaugh v Cardamone*, 147 Mich App 159, 163; 383 NW2d 601 (1985). Because the witness was available to appellant by process of court, the Commission properly refused to apply the presumption.

Appellant contends the administrative law judge improperly limited appellant's questioning about whether an accusing former student had told other people her past boyfriend had sexually assaulted her and whether the student's classmates knew about her relationship with that boyfriend. We find no abuse of discretion in the ALJ's decision to preclude these lines of questioning. *Tomczik v State Tenure Comm'n*, 175 Mich App 495, 502; 438 NW2d 642 (1989).

Appellant argues the Commission improperly rejected his laches defense with respect to one of the charges filed more than four years after the incident allegedly occurred. We disagree. This case does not involve an unexcused or unexplained delay in commencing an action, *Dep't of Public Health v Rivergate Manor,* 452 Mich 495, 507; 550 NW2d 515 (1996), or a plaintiff who failed to act with due diligence, *Tomczik, supra* at 503. Furthermore, appellant has not established prejudice. His assertion witnesses may have remembered more or their failure to remember the incident would have more strongly discredited the accusing former student, is mere speculation.

Appellant claims he did not have adequate notice of the nature of the charges against him. He claims he was not aware that appellee was seeking to discharge him for inappropriate behavior even if it did not constitute sexual harassment. Having reviewed the charges against him, we believe he was informed that appellee was asserting that the conduct was unethical, inappropriate and unprofessional and that he had adequate notice of factual claims made against him. We find no basis for reversal. *Sutherby v Gobles Bd of Educ (After Remand)*, 132 Mich App 579, 589; 348 NW2d 277 (1984).

Appellant contends the ALJ and the Commission improperly considered evidence relating to instances of alleged misconduct that were not included in the charges. Because the ALJ determined discharge was warranted on the basis of a single charge, any error in the consideration of uncharged misconduct was harmless. To the extent the Commission referred to uncharged misconduct as a basis for discipline, it did so in the context of evaluating appellant's claim that the penalty was too harsh in light of his exemplary record. Because appellant essentially asked the Commission to evaluate his past

record, he will not be granted relief on the basis that the Commission considered evidence of past misconduct in its analysis. An appellant cannot contribute to error and then argue the error on appeal. *Bloesma v Auto Club Ins Co (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991).

Finally, we conclude the Commission's determination that there was just and reasonable cause for discharge was supported by competent, material and substantial evidence. *Lakeshore Bd of Educ v Grindstaff (After Second Remand)*, 436 Mich 339; 461 NW2d 651 (1990).

Affirmed.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Peter D. O'Connell