

STATE OF MICHIGAN
COURT OF APPEALS

HOWARD HUBBARD,

Petitioner-Appellant,

v

DETROIT PUBLIC SCHOOLS,

Respondent-Appellee.

UNPUBLISHED

March 31, 2011

No. 293292

State Tenure Commission

LC No. 2008-000305

Before: WILDER, P.J., AND SERVITTO AND SHAPIRO, JJ.

PER CURIAM.

Petitioner Howard Hubbard (“petitioner”) appeals by delayed leave granted from a July 25, 2008 decision of the State Tenure Commission to grant a motion of summary disposition in favor of respondent Detroit Public Schools (“respondent”) and to deny petitioner’s motion for reinstatement of his salary. We reverse.

I.

Petitioner provides the following chronological timeline of his education, certifications, and employment with respondent: (1) he was awarded an associate’s of applied science degree in aviation maintenance technology in 1986; (2) he was hired by respondent in 1987 and worked as a special instructor for four years teaching welding to special needs students; (3) he taught airframe and powerplant during the 1992-1993 school year; (4) he worked as a special instructor teaching aircraft general, airframe, and powerplant from 1994 through 2006, during which time he also was awarded a bachelor of applied science degree in aviation maintenance in 1997 and was issued an “interim occupational certificate” on January 27, 2004¹; and (5) he taught math and aircraft general during the 2006-2007 school year.

¹ The certificate notes the “Subject/Grade Level” as “Air Transportation” and lists a corresponding date of July 14, 2003, but there are no facts in the record to explain the significance of this 2003 date.

The events underlying this cause of action occurred near the end of the 2006-2007 school year when petitioner received a letter dated April 24, 2007, from the executive director of respondent's Human Resources Division. The letter notified petitioner that his performance was unsatisfactory and he would be terminated by respondent effective June 30, 2007. Petitioner received a second letter from the executive director of respondent's Human Resources Division following a June 14, 2007 meeting of the Detroit Board of Education. That letter notified petitioner that the board had authorized the Human Resources Division to proceed with petitioner's termination.

Petitioner filed a claim of appeal with the State Tenure Commission in July 2007, arguing that he was tenured because he had taught for respondent for 20 years and had therefore served the requisite four-year probationary period. Pursuant to respondent's motion for summary disposition, on January 10, 2008, the referee issued a preliminary decision and order ruling that petitioner was eligible to achieve tenure in light of his interim occupational certificate, but he had not yet achieved tenure with respondent since his interim occupational certificate had been issued on January 27, 2004, and the four-year probationary period set forth in MCL 38.81(1) of the Teachers' Tenure Act had not yet been fulfilled. Because petitioner was not a tenured teacher, the referee found that the State Tenure Commission lacked jurisdiction and granted respondent's motion for summary disposition. Neither party filed timely objections to this preliminary decision and order and it became final. The Human Resources Division terminated petitioner effective January 10, 2008.

On February 13, 2008, petitioner filed a second claim of appeal alleging that he achieved tenure with respondent on January 27, 2008 and was not sufficiently notified until February 9, 2008 about his termination for unsatisfactory performance. On July 25, 2008, the referee found: (1) the period of time after May 2007 when petitioner did not work as a teacher did not count toward petitioner's probationary period and, therefore, petitioner did not achieve tenure; (2) in any event, petitioner's termination was effective January 10, 2008, which was before the January 27, 2008 date on which petitioner claimed he achieved tenure; and (3) the doctrine of res judicata barred any claim regarding allegedly deficient notice of unsatisfactory performance or the failure to act by the respondent in regard to petitioner's unsatisfactory performance. Petitioner filed a delayed application for leave to appeal from this order, along with a motion to present new evidence. This Court granted petitioner's delayed application for leave to appeal but denied his motion to present new evidence.

II.

Petitioner first argues on appeal that his interim occupational certificate was issued on July 14, 2003, so his probationary period began at that time. Defendant's argument relies on an entirely new interpretation of the interim occupational certificate. Throughout both the first and second claims of appeal to the State Tenure Commission, petitioner consistently maintained that he had obtained an interim occupational certificate on January 27, 2004. Petitioner's argument is, therefore, not properly preserved for appellate review. See *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007) (an issue is not properly preserved for appellate review when it has not been addressed by the trial court). This Court "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue

involves a question of law and the facts necessary for its resolution have been presented.” *Laurel Woods Apartments*, 274 Mich App at 640 (citation omitted). The issue does not involve a question of law, and the record does not contain sufficient facts regarding the significance of the July 14, 2003 date on the interim occupational certificate to resolve the issue. Therefore, we decline to overlook the preservation requirements with respect to petitioner’s claim that his certificate was issued on July 14, 2003.

Petitioner next argues that the applicable probationary period was only two years, not four years as the referee calculated from January 27, 2004, and thus he was tenured prior to the April 24, 2007 letter by the executive director. Again, this argument is new because petitioner continually asserted throughout the first and second claims of appeal to the State Tenure Commission that he was subject to a four-year probationary period. However, we will address it, as petitioner’s argument involves a question of law and the facts necessary for its resolution have been presented.

MCL 38.81 governs probationary periods and was amended effective June 11, 1993. Petitioner relies on the pre-amended version of MCL 38.81(1), which provided that “[a]ll teachers during the first 2 school years of employment shall be deemed to be in a period of probation.” After the June 11, 1993 amendment of MCL 38.81, the length of the probationary period was doubled from two years to four (unless the teacher was under contract or on continuing tenure as of June 11, 1993). Because petitioner avers that he did not begin his probationary period until July 14, 2003, his reliance on the pre-amended version of MCL 38.81(1) is erroneous. The amended version, which took effect 10 years before petitioner’s probationary period began, governed. Therefore, petitioner was not tenured, and remained a probationary teacher, at the end of the 2006-2007 school year.²

Last on appeal, petitioner argues that even if he was a probationary teacher at the close of the 2006-2007 school year, respondent did not provide him with the requisite notice of unsatisfactory performance at least 60 days before the close of the 2006-2007 school year. Absent requisite notice, petitioner would have been considered to be a satisfactory teacher, respondent would have been statutorily required to employ him for the 2007-2008 school year,

² We decline to address whether petitioner was a teacher under MCL 38.71(2) (“An individual who is not certificated but is employed for a full school year pursuant to section 1233b of the revised school code, Act No. 451 of the Public Acts of 1976, being section 380.1233b of the Michigan Compiled Laws, or is employed pursuant to an annual vocational authorization or a temporary approval, as defined in state board rule, is considered to be a teacher for the purpose of serving the probationary period under article II”), before the probationary period was amended from two years to four years on June 11, 1993. Petitioner has abandoned this argument, *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002) (if a party fails to brief an argument, the issue is deemed abandoned by this Court), and necessary facts have not been presented to establish that petitioner was employed pursuant to an annual vocational authorization or a temporary approval at that time.

and petitioner could have completed his the four-year probationary period and achieved tenure. Petitioner bases this argument on MCL 38.83, which provides:

At least 60 days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory. Failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory. Any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified in writing at least 60 days before the close of the school year that his services will be discontinued.

Petitioner failed to raise this argument during the first claim of appeal, and the State Tenure Commission ruled that petitioner was barred by the doctrine of res judicata from raising it during the second claim of appeal. Res judicata, or claim preclusion, bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Ozark v Kais*, 184 Mich App 302, 307; 457 NW2d 145 (1990). "Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies." *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

In this case, the first, second, and fourth elements of res judicata were met because an order granting a motion for summary disposition constitutes a determination on the merits, *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991), the order was final, and both claims of appeal to the State Tenure Commission involved the same parties. However, the third element was not satisfied. In both the first and second claims of appeal, petitioner unsuccessfully argued that he was tenured. Assuming that petitioner was a probationary teacher, he could not seek a remedy under the Teachers' Tenure Act. See *Cantu v Bd of Ed of Grand Rapids Pub Schools*, 186 Mich App 488, 490-491; 464 NW2d 900 (1990) (the State Tenure Commission has jurisdiction to review a board's decision to discharge when the case involves a teacher on continuing tenure, and also has jurisdiction to determine issues related to whether it has jurisdiction to review a discharge, including whether a person is a teacher on continuing tenure); *Fucinari v Dearborn Bd of Ed*, 32 Mich App 108, 111; 188 NW2d 229 (1971) (the State Tenure Commission did not have jurisdiction to hear the dispute over a teacher's dismissal for unsatisfactory performance since she was a probationary teacher and did not have continuing tenure). Therefore, the State Tenure Commission lacked jurisdiction to decide whether notice of unsatisfactory performance was statutorily defective under MCL 38.83. As such, that issue could not have been resolved in either claim of appeal, the doctrine of res judicata was not applicable, and the State Tenure Commission's ruling that petitioner's claim was barred by res judicata was contrary to law.

The next question is whether this Court has jurisdiction to determine petitioner's claim that the notice of unsatisfactory performance was statutorily defective. In *Fucinari*, the State Tenure Commission erroneously exercised its jurisdiction over a claim of statutorily defective notice brought by a non-tenured teacher, and this Court found that it had jurisdiction because both parties had accepted the jurisdiction of the State Tenure Commission, whose decision was appealed to the circuit court before being appealed to this Court. *Fucinari*, 32 Mich App at 111-

112. Based on this Court's action in *Fucinari* and because both parties accepted the jurisdiction of the State Tenure Commission, we similarly conclude that this Court has jurisdiction to dispose of petitioner's claim on its merits.

This case is similar to the facts involved in *Fucinari*, where

on March 28, 1969, the director of personnel of the defendant board advised the plaintiff by letter that her services as a probationary teacher had not been satisfactory and that her employment with the defendant board would be terminated at the end of the school year on June 13, 1969. The letter assigned various reasons for her unsatisfactory performance and also stated: "This notice is furnished to you pursuant to the provisions of the Michigan Teachers' Tenure Act." The letter was received by the plaintiff on April 1, 1969. [*Fucinari*, 32 Mich App at 110-111.]

The *Fucinari* Court held that the controlling board must make the decision concerning the satisfactoriness of the teacher's performance and then provide the statutory written statement at least 60 days before the close of the school year:

The statute is clear that it is the defendant board which must provide the definite written statement, although the actual mechanics may be carried out by administrative personnel under the direction of the board. It is the defendant board which must make the decision concerning the plaintiff and then provide the statutory written statement at least 60 days before the close of the school year as to whether the plaintiff's work has been satisfactory, and notify such probationary teacher not on continuing contract at least 60 days before the close of the school year that his services will be discontinued.

From the defendant's statement of facts it is clear that the defendant board failed to comply with the provisions of the statute. The defendant's statement of facts indicate that at an executive session of the defendant board, following its regularly scheduled meeting on either March 10 or March 24, 1969, the personnel director discussed plaintiff's case informally with the board members who were present. The board members then advised the personnel director to send the 60-day letter *if* the school administrators still viewed plaintiff's performance as unsatisfactory.

* * *

Therefore, the defendant board had not, at the time of the sending of the alleged 60-day notice, taken final action on the status of the plaintiff. It was not until the regular meeting of the defendant board on April 14, 1969 that a resolution was adopted terminating plaintiff's employment effective June 13, 1969. There is no dispute that no further notification was given to the plaintiff subsequent to the defendant board meeting of April 14, 1969. It is true that the defendant board attempted to ratify the former action of the personnel director, but to allow this would be to allow the defendant to pull itself up by its own

bootstraps. While we are aware that the decisions of a board of education are necessarily based upon reports and recommendations of the administrators and those in positions to evaluate such persons as the plaintiff, the statute is clear that it must be the controlling board which provides the written statement relative to the performance of a probationary teacher.” [*Fucinari*, 32 Mich App at 112-114.]

In this case, the April 24, 2007 letter sent by the executive director of respondent’s Human Resources Division stated that petitioner’s instructional performance was unsatisfactory and he would be terminated by respondent effective June 30, 2007, but made no reference to a decision or finding by the controlling board about petitioner’s work performance. In fact, according to the second letter dated June 15, 2007, it was not until the June 14, 2007 meeting that the Detroit Board of Education had authorized the Division of Human Resources to proceed against petitioner with the charge of unsatisfactory performance. Therefore, the controlling board failed to provide petitioner with a definite written statement about his unsatisfactory work performance at least 60 days before the close of the 2006-2007 school year. Under MCL 38.83, this failure constituted conclusive evidence that petitioner’s work was satisfactory and petitioner was entitled to be employed for the 2007-2008 school year. Petitioner would have otherwise completed the four-year probationary period in January 2008, thereby attaining tenure, and thus is entitled to the protection of the Teachers’ Tenure Act.

Reversed.

No costs are assessed in this case, a public question being involved. MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro