

STATE OF MICHIGAN
COURT OF APPEALS

KAREN SEPANSKI,

Petitioner-Appellee,

v

DETROIT PUBLIC SCHOOLS,

Respondent-Appellant.

UNPUBLISHED

August 21, 2014

No. 314096

State Tenure Commission

LC No. 12-000004

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Respondent Detroit Public Schools (DPS) appeals by delayed leave granted an October 26, 2012, decision and order of the State Tenure Commission (STC) that granted an exception filed by petitioner relating to the preliminary decision and order (PDO) to terminate petitioner's employment by Administrative Law Judge James Ward. The STC ordered reinstatement of petitioner and payment of lost salary. We affirm.

Petitioner, who is Caucasian, began working for DPS in 2003 and joined Ralph Waldo Emerson Elementary/Middle School as an art teacher on September 17, 2011, after the school year began. Petitioner was assigned to teach art to all of the approximately 750 students. DPS placed petitioner on administrative leave on November 2, 2011, and then, on January 19, 2012, filed a formal charge stating that she engaged in unprofessional conduct and violated DPS Work Rule #9. The charges listed numerous allegations, including that petitioner used derogatory and racial language toward students who are African American and that she referred to a student by asking another student in the classroom, "What's that fat boy's name?"¹

In October 2011, four students who were in the sixth grade (identified only as DD, CW, KD, and KF) reported to Principal Brenda Carethers that petitioner had called them "stupid f--king idiots," that she had said they were "stupid as f--k," and that she had referred to them using the racial epithet "n---r" and called them "dumb n---rs." It was also alleged that a conference

¹ Allegations of additional incidents, relating to engaging in unprofessional conduct and endangering the safety of students, were either not pursued by DPS or were dismissed by the ALJ at the hearing.

was held with the students the following days to investigate the allegations, at which time the students confirmed that petitioner directed “racial and derogatory comments” toward them.

On May 9, 2012, the ALJ conducted a hearing. Principal Carethers did not testify, nor did students DD, CW, KD, or KF. However, three students (AD, DJ, and MM) who claimed to have been present when petitioner allegedly used the racial epithets testified at the hearing.

Student AD testified that petitioner and Assistant Principal “Ms. Dillard” were taking attendance when she arrived in petitioner’s classroom on the day in question. After Dillard left, and while petitioner was passing out an assignment, the students began to act up by stomping their feet and banging on the tables and by chanting. AD claimed that Dillard returned to the room and the students stopped their antics. After Dillard left once again, some students continued the “upbeats.” Petitioner told them to sit down and finish their work, but a few minutes before the lunch period, the students began “bouncing around.” AD claimed that petitioner said, “Y’all acting like a bunch of stupid n---rs.” The students became louder and teacher Andrea House entered the classroom and told them to be quiet. AD acknowledged that she did not tell any of the teachers whom she saw afterward about the incident and that she only advised Principal Carethers at the end of the school day that petitioner called them “n---rs.”

Student MM testified that petitioner referred to the class as “[t]hese n---as” while the students were throwing crayons. MM also testified that Principal Carethers did not come into petitioner’s classroom during the hour, but came into the science class of Rosemarie Montgomery the following day and asked the students for written statements. MM also testified that House came into petitioner’s classroom once to tell them to stop making so much noise, and that petitioner took the students to their lunch period on the day in question. MM further claimed that petitioner was taking attendance and asked another student, “What’s that fat boy[’s] name?”; MM stated that he did not hear petitioner ask this but heard it from the other student.

Student DJ testified that petitioner called the class “n---a” and denied she called them “n---rs.” DJ claimed that the students became angry and began chanting. DJ also claimed that near the end of petitioner’s class, Principal Carethers came into the classroom and asked them to write statements, and petitioner remained in the classroom while they wrote. DJ further stated that House came into petitioner’s classroom once and did not take them to lunch. DJ also claimed that petitioner told student, MM, “You fat.”

Another student, MR, testified on petitioner’s behalf. MR testified that students were throwing crayons, cussing, screaming, and yelling. MR did not hear petitioner use racial epithets. MR also testified that House came into the classroom three times and that he could not remember Principal Carethers coming into the classroom.

In addition to petitioner, three other teachers from Emerson testified. House testified that she went into petitioner’s classroom on the day in question because she heard loud noises. House did not have a recollection of what petitioner said when she entered the classroom. House claimed that the classroom was chaotic, that she calmed the students, and that she told petitioner that she would take the students to their lunch period.

Monesha McKenzie testified that she was the homeroom teacher for the sixth-grade class in question. McKenzie claimed that the class was difficult to manage and that she did not hear the students mention petitioner's alleged use of racial epithets. McKenzie further testified that student MM tended to be a "dishonest kid."

Montgomery, who teaches science to the sixth-grade class in question following their lunch period, testified that none of the students told her about petitioner's alleged use of racial epithets following the lunch period on the day in question. The following day, Principal Carethers came to her classroom and asked the students if they had heard anything inappropriate in petitioner's classroom. Some students raised their hands, and Carethers took six to eight children out of the room for a few seconds and then passed out witness-statement forms to the students and returned to her office. Montgomery claimed that the students filled out the forms, that she collected them, and that she took them to Principal Carethers. Montgomery also testified that student MM was not a truthful person.

Petitioner testified that, on the day in question, Principal Carethers came into her classroom and advised her, "[y]our room is out of hand, and you need to get this under control." Petitioner then saw MM bump into MR, and then, after petitioner inquired of MR if he was okay, petitioner saw MM involved in another incident. Petitioner admitted that she asked a nearby student, "Who was that boy," that the student asked, "Which one," and that petitioner replied, "The fat one." The student then told petitioner MM's name. The students continued to be disruptive, even after House came inside the classroom and told the students to be quiet. House returned, yelled at the students to quiet down, and advised petitioner that she would take the students to their lunch period. Petitioner also claimed that when she walked by MM, she heard him say, "Hey, did you all hear Ms. Sepanski call us the 'N' word?" Petitioner claimed that at the end of the day, she was summoned to Principal Carethers' office and was informed about the accusations. She denied using racial epithets.

On August 22, 2012, the ALJ issued his PDO granting the request to discharge petitioner from employment. In essence, the ALJ found the testimony from the three students AD, DJ, and MM credible. The ALJ wrote, in part:

41. Appellant specifically challenges MM's testimony because MM testified that Ms. Sepanski escorted the class to lunch on the day of the name-calling incident when in fact Ms. House took the class to lunch that day. MM also testified that Ms. Sepanski took him to the office that day, but that fact is not corroborated. MM also testified that he did not tell Carethers about Ms. Sepanski making derogatory remarks to students because, when he saw her, he had forgotten about the incident. Ms. Montgomery and Ms. McKenzie each testified that it was . . . their opinion that MM was a dishonest person. . . .
42. Appellant also challenges DJ's testimony because DJ testified that the principal had the class write out their statements the same day of the incident in appellant's class in her presence; however, the evidence shows that the written statements were taken the day following the incident in Ms. McKenzie's [sic] room. . . .

43. Appellant also challenges AD's testimony because AD did not complain to Ms. House when Ms. House came into Ms. Sepanski's classroom and did not talk about it with any other teachers. Further, appellant argues that AD was the only witness [indicating] that Ms. Sepanski referred to the class as "stupid [n----rs]."
44. I recognize that the students who testified did not recount the events of the October 19, fourth hour art class exactly the same. Nonetheless, I find that early in her fourth hour class period, Ms. Sepanski was unable to control her Section 6-2 art class and Principal Carethers entered Ms. Sepanski's classroom and restored order. Order was only temporary, however. The students resumed their disorderly behavior by stomping their feet, pounding on the desks and chanting. Near the end of the hour, as the disorderly behavior continued, Ms. Sepanski told the class that they were "acting like a bunch of stupid [n----rs]." This statement caused the students to become upset and cause more havoc in the classroom. Ms. House, upon hearing this last loud disruption, came to assist Ms. Sepanski. When Ms. House arrived, Ms. House discovered Ms. Sepanski's classroom to be in chaos. Ms. House took over for Ms. Sepanski and took Ms. Sepanski's class to lunch.
45. The primary issue is whether or not Ms. Sepanski used racially insensitive language toward her students. Ms. Sepanski denies that she called her students "[n----rs]," "[n---as]" or any other similar names. Even in the fact of Ms. Sepanski's denials, I find, by a preponderance of the evidence, that Ms. Sepanski did, in fact, use racially offensive language toward her students. I base this finding on the fact that I find AD's testimony credible. She testified in a forthright manner and was not nervous. Further, AD's testimony regarding the primary question remained firm under cross examination.
46. MM and DJ testified that Ms. Sepanski referred to the students as "[n---a]" or "[n---as]" rather than "[n----rs]," the term AD claims Ms. Sepanski used. Appellant argues that the fact that these three students contradicted each other and thus [sic], their testimony should be discounted. . . . I do not agree. The terms "[n----r]" or "[n---a]" sound very similar when spoken. Moreover, the classroom was loud and chaotic. Obviously, the students in the class were focused on Ms. Sepanski before she uttered the offending words. These circumstances, therefore, account for the discrepancy in the testimony but do not deprive the testimony of its probative value. Moreover, as the Commission noted in the case of *Leizerman v Board of Education for the City of Wyandotte* (89-4), a case where the exact words of a remark to students were disputed because not all the group heard or recalled the remark, the Commission observed that witnesses to an event rarely perceive or recall it in an identical way.
47. DJ admitted that she was out of her seat during Section 6-2, fourth hour art class and admitted that she had been disciplined by Ms. Sepanski two days

prior to the incident under review. Nonetheless, when DJ testified her demeanor gave every indication of truthfulness.

48. Ms. McKenzie and Ms. Montgomery each had the opinion that MM is a dishonest person. I review their opinions as generally accurate. However, neither of them have any knowledge of the events the [sic] occurred in Ms. Sepanski's classroom. Thus, their opinion do [sic] not relate to the specific events of October 19. In my opinion, MM's testimony regarding the offensive reference is corroborated by the testimony of AD and DJ.

The ALJ also found that petitioner referred to MM as "the fat boy" or "the fat one," noting that petitioner admitted that she referred to him as "the fat one." The ALJ further found that petitioner was attempting to identify MM so that she could take disciplinary action against him and "was not purposely attempting to degrade or humiliate MM."

In his conclusions of law, the ALJ determined that petitioner's reference to MM as "fat" was clearly inappropriate but, standing alone, did not warrant her termination. The ALJ further stated that although DPS did not prove "all of the facts alleged in the charges," DPS established by a preponderance of the evidence that its decision to discharge petitioner was not arbitrary or capricious because petitioner's derogatory and demeaning racial comments to the students were far outside the norms of acceptable behavior for teachers.

Petitioner filed two exceptions to the PDO. Petitioner's first exception challenged the credibility findings of the ALJ and the second exception challenged the exclusion of the testimony of an expert witness proposed by petitioner. On October 26, 2012, the STC mailed its 20-page decision and order on the exceptions; the STC ordered the reinstatement of petitioner and a written reprimand and found no abuse of discretion concerning the second exception. In essence, the STC chose not to accept the credibility finding made by the ALJ regarding the use of racial epithets but confirmed the ALJ's finding that petitioner referred to MM as "fat."

In addressing the first exception, the STC noted that petitioner was challenging the credibility findings of the ALJ, and, in particular, the three students who testified against her at the hearing: AD, DJ, and MM. The STC then reviewed the testimony of AD, DJ and MM, while pointing out the discrepancies in their testimony as well as in the testimony of House, McKenzie, and Montgomery. The STC further noted the opinion testimony of McKenzie and Montgomery concerning whether the students were truthful and noted that the ALJ only addressed their testimony that MM was dishonest and that the ALJ did not address McKenzie's testimony about DJ's truthfulness or Montgomery's testimony about AD's truthfulness. The STC further summarized the testimony of student MR, who testified in favor of petitioner, and noted that the ALJ never made any findings on his credibility. The STC then wrote the following critique of the ALJ's credibility finding and the school board's presentation of evidence:

In support of his finding that appellee proved that appellant referred to the students as [n----rs], the ALJ cited *Leizerman v Board of Education for the City of Wyandotte* (89-4). In that case, a teacher was charged with making a racially and sexually offensive statement to a group of four male high school students. Two

students' versions of what the teacher said were the same. The other two students recalled slightly different versions of the teachers' words. The teacher himself offered yet another version. This Commission upheld the controlling board's decision to suspend the teacher for two weeks, noting that witnesses rarely perceive or recall an event in an identical way.

It is certainly true that witnesses often recall an event differently. The facts in *Leizerman*, however, are distinguishable in important respects from the instant facts. In *Leizerman*, there was no evidence casting doubt on the truthfulness of the student witnesses. In the instant case, appellee did not present the testimony of any witness whose truthfulness was not questioned to some degree. In addition, in *Leizerman*, all four of the students to whom the offensive remark was directed testified at the hearing. In contrast, Section 6-2 consisted of over 50 students, but appellee presented the testimony of only three. Given the doubt cast on the truthfulness of those three witnesses, appellee's unexplained failure to present more evidence gives this Commissioner considerable pause.

It was appellee's burden to prove the charges by a preponderance of credible evidence. As noted above, there was no evidence to support most of the charges filed against appellant. The ALJ correctly acknowledged that a controlling board's decision to demote or discharge a tenured teacher may be upheld even if the board fails to prove all of the facts alleged in charges. In this case, however, the overwhelming number of allegations for which there was not one scintilla of evidence is troubling.

The STC also acknowledged the standard of review and the deference afforded to credibility findings of the ALJ, but it gave the following explanation concerning why it was overturning the ALJ:

Given the ALJ's ability to hear the witnesses and to hear their testimony, this Commission as a general rule accords considerable deference to the credibility findings of the ALJ. *Moore v Detroit Public Schools* (11-20); *Benton v Flint Community Schools Board of Education* (08-53); *Green v Detroit Public Schools* (03-39). However, such deference is not absolute. This Commission's responsibility as a board of review is to examine all of the evidence and to consider all arguments raised on exceptions, including arguments related to witness credibility. MCL 38.104(5)(m); MCL 38.139(1). In *Cona v Avondale School District* (12-4), the "not arbitrary or capricious" standard of review of the decisions of controlling boards was discussed. MCL 38.101. As stated in that decision, the responsibility of this Commission is to review both the quality and the quantity of the evidence and to determine if the decision of a controlling board to discharge a teacher is the result of a deliberate, principled reasoning process supported by the evidence. If a controlling board fails to consider an important aspect of the matter, its decision may be considered arbitrary and capricious.

In this case, we have carefully reviewed the record and we conclude that the decision to discharge appellant does not reflect a principled assessment of the

evidence as a whole. We find that the quality of the evidence presented by appellee is too suspect to support the drastic measure of termination of appellant's employment. It is significant that appellee presented only three student witnesses, that their testimony differed in significant respects, and that their credibility was in serious question. It is also noteworthy that appellee did not present the testimony of Ms. Carethers.

The charges in this case are extremely serious and, had they been proven, this Commission would not hesitate to agree that discharge is appropriate. Given the seriousness of the alleged conduct and the proposed level of discipline, it was incumbent upon appellee to conduct a thorough and proper investigation and to fully present its case. For the above reasons, we cannot find that there is a greater probability, based on the evidence admitted at the hearing, that the allegation of racial derogatory language is true. *Okoro v Detroit Public Schools* (12-1); *Giddings v Saginaw Township Community Schools Board of Education* (92-1). We therefore grant appellant's first exception.

Finally, the STC noted that the second exception was "moot" but that, based on its review, it was not persuaded that the ALJ abused its discretion in refusing to allow the proffered expert testimony. The STC further noted that petitioner admitted calling MM "the fat one" and that the ALJ found that this remark was unintentional and would, standing alone, only support discipline in the form of a written reprimand. The STC held that it did not disagree with this finding and directed DPS to place a written reprimand in petitioner's file.

Although the STC mailed its decision on October 26, 2012, apparently, the decision was not sent to the general counsel of DPS, Phyllis Hurks-Hill. On December 3, 2012, Robert Taylor, an Administrative Law Specialist, sent correspondence to the general counsel acknowledging the failure to send a copy to the attorney and enclosing the decision. This letter was received on December 6, 2012, and DPS filed a delayed application for leave to appeal and a brief in support on December 28, 2012.

Petitioner initially contends that the Court of Appeals lacks jurisdiction over this case. Petitioner asserts that the application for leave to appeal was filed 63 days after the STC's decision was mailed and 25 days after the STC mailed the decision for a second time. Therefore, petitioner argues, under *Bellamy v Arrow Overall Co*, 171 Mich App 310, 314-315; 429 NW2d 884 (1988), this Court does not have the power to grant a delayed application.

DPS counters that *Bellamy* was a workers' compensation case, and that, unlike the workers' compensation statutory provision, the statutory appeal provision for tenure matters does not clearly reflect the Legislature's intent to make the specified time limit a jurisdictional limitation. DPS further asserts that the Tenure Commission appeal provision is similar to the Crime Victim Services Commission appeal provision, and, citing *Calloway-Gaines v Crime Victim Services Commission*, 463 Mich 341, 344-346; 616 NW2d 674 (2000), claims that this Court has jurisdiction to consider a delayed application for leave to appeal that is filed beyond the 20-day period for Tenure Commission appeals that is contained in MCL 38.104(7).

In *Calloway*, 463 Mich at 342-344, the commission in question denied the plaintiff's request for benefits under the crime victims act, MCL 18.351 *et seq.*, and she subsequently filed

a claim of appeal with this Court, which was dismissed for lack of jurisdiction on the basis that the decision could only be appealed by an application for leave to appeal under MCL 18.358(1), which provides:

Within 30 days after receiving the copy of the report containing the commission's final decision, the claimant may by leave to appeal commence a proceeding in the court of appeals to review the commission's decision.

The plaintiff subsequently filed a delayed application, which this Court dismissed because it was not filed within 30 days after receipt of the report of the commission's final decision. *Calloway*, 463 Mich at 343-344. The plaintiff then sought leave with the Supreme Court, which reversed this Court's dismissal. *Id.* at 346. In doing so, the Court found that the statutory provisions involved in the cases cited by this Court's order "were quite different" (MCL 418.861, which makes a timely filing of an appeal a condition of the "power" of the appellate courts to review an administrative decision, and MCL 213.56(6), which specifies that only timely appeals are permitted), and then held:

By contrast, the statute governing the instant case reflects no intention to make the specified time a jurisdictional limitation. Thus, the availability of a delayed appeal is governed by MCR 7.205, and the Court of Appeals had the authority to consider the application for leave to appeal, making it improper to dismiss for lack of jurisdiction. [*Calloway*, 463 Mich at 344-346.]

We agree with DPS that *Calloway* is controlling, given the similarities between the statutes providing for appeals in this case and in *Calloway*. Because DPS filed the application within six months from the STC's decision, see MCR 7.205(G)(3), this Court had the power to address and grant the application in accordance with *Calloway*.

DPS asserts that the STC erred when it substituted its assessment of credibility of the student witnesses for the fact-finding of the ALJ's assessment and that there was sufficient evidence for the termination of petitioner's employment.

MCL 38.104(1) provides that a tenured teacher may appeal a controlling board's decision to proceed on discipline charges. Under MCL 38.104(2) through (4), a hearing is then held before an ALJ, in accordance with the contested-case provisions of the Administrative Procedures Act (APA), MCL 24.271 to MCL 24.287. MCL 38.104(5) provides, in relevant part:

The hearing and tenure commission review shall be conducted in accordance with the following:

(i) Not later than 60 days after submission of the case for decision, the administrative law judge shall serve a preliminary decision and order in writing upon each party or the party's attorney and the tenure commission. The preliminary decision and order shall grant, deny, or modify the discharge or demotion specified in the charges.

* * *

(m) 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. 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. The tenure commission shall issue its final decision and order not later than 60 days after the exceptions are filed.

MCL 24.281(3), which is under the contested-case procedures of the APA, provides, in relevant 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.”

In *Lewis v Bridgman Public Schools*, 279 Mich App at 488, 495-496; 760 NW2d 242 (2008), this Court set forth the applicable standard of review that this Court applies to Tenure Commission appeals:

A final decision of the tenure commission 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. Const 1963, art 6, § 28; MCL 24.306(1)(d); *Beebee v Haslett Pub Schools (After Remand)*, 406 Mich 224, 231; 278 NW2d 37 (1979). “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 Center Pub Schools Bd of Ed*, 229 Mich App 565, 578; 582 NW2d 859 (1998). This Court gives due deference to the expertise of an administrative agency, and will not “invade the province of exclusive administrative fact-finding by displacing an agency’s choice between two reasonably differing views.” *Widdoes v Detroit Pub Schools*, 218 Mich App 282, 286; 553 NW2d 688 (1996) (citation and quotation marks omitted). Review involves a degree of qualitative and quantitative evaluation of all the evidence that the tenure commission considered, rather than just those portions of the record supporting the tenure commission’s decision. *Ferrario v Escanaba Bd of Ed*, 426 Mich 353, 366-367; 395 NW2d 195 (1986).^[2]

² Judges Talbot and Servitto wrote separate concurring opinions indicating that they believed statutory changes have altered the standard of review that the STC should apply when reviewing an ALJ’s decision; however, they found that they were constrained by the Supreme Court’s remand order to refrain from implementing this purported alteration. *Lewis*, 279 Mich App at 498-506.

In addition, the Michigan Supreme Court has recognized that the STC employs a de novo standard of review when reviewing decisions of the ALJ. *Lewis v Bridgman Public Schools*, 480 Mich 1000; 742 NW2d 352 (2007);³ see also, generally, MCL 24.281(3).

We are constrained by law to affirm the STC's decision because (1) the STC was empowered to overturn the ALJ's PDO if it saw fit to do so and (2) in light of the credibility issues presented and outlined by the STC, we cannot say that the STC's decision was contrary to law, arbitrary, capricious, a clear abuse of discretion, or unsupported by competent, material, and substantial evidence on the whole record. There was, in fact, a basis for the STC's decision. See, generally, *Widdoes*, 218 Mich App at 286 (court cannot displace an agency's choice between two reasonably differing views). Therefore, we affirm.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter

³ As noted in footnote 2, Court of Appeals Judges Talbot and Servitto take issue with this pronouncement.