

STATE OF MICHIGAN
COURT OF APPEALS

HOWARD HUBBARD,

Petitioner-Appellant,

v

DETROIT PUBLIC SCHOOLS,

Respondent-Appellee.

UNPUBLISHED

May 24, 2012

No. 293292

State Tenure Commission

LC No. 2008-000305

ON REMAND

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

PER CURIAM.

This case returns to this Court on remand from the Supreme Court as on reconsideration granted. *Hubbard v Detroit Pub Sch*, 490 Mich 902; 804 NW2d 566 (2011). We conclude that this Court lacks jurisdiction and dismiss the appeal.

I. BASIC FACTS AND PROCEDURAL HISTORY

Petitioner worked for respondent school district as a special instructor from 1987 to 2007. He taught welding, airframe and powerplant, aircraft general, and mathematics. During that time, petitioner obtained a bachelor's degree in applied science in aviation maintenance, and an "interim occupational certificate" in January 2004.

Respondent terminated petitioner's employment at the end of the 2006-2007 school year because his performance was unsatisfactory. We set forth the background facts in our prior opinion:

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. [*Hubbard v Detroit Pub Sch*, unpublished

opinion per curiam of the Court of Appeals, issued March 31, 2011 (Docket No. 293292).]

Petitioner filed two claims of appeal to the State Tenure Commission. In his first appeal filed in July 2007, he argued that he was a tenured teacher because he completed the four-year probationary period under MCL 38.81(1) of the Teachers' Tenure Act after receiving his interim occupational certificate. The administrative law judge (ALJ) disagreed because petitioner received his certificate on January 24, 2004, and respondent discharged him in April 2007. Accordingly, the State Tenure Commission lacked jurisdiction and the ALJ granted respondent's motion for summary disposition. Petitioner filed no exceptions, and the January 10, 2008, ALJ's decision became the final decision of the Tenure Commission. *Id.* at 2. On February 5, 2008, respondent sent a letter to petitioner advising him that because the State Tenure Commission upheld respondent's termination decision, petitioner's termination was effective January 10, 2008.

Petitioner then filed a second claim of appeal with the State Tenure Commission on February 13, 2008. He argued that respondent failed to give him notice of his unsatisfactory performance at least 60 days before the close of the 2006-2007 school year. MCL 38.83 requires a school board to notify a probationary teacher of unsatisfactory performance at least 60 days before the end of the school year, and failure to do so requires the school district to employ the teacher for the following school year. Petitioner maintained that the notice he received in April 2007 did not comply with MCL 38.83, and, as a result, the first timely notice he received was in February 2008. Petitioner claimed that, by that time, the four-year probationary period had run and he had attained tenure. *Id.* at 3-4. The ALJ rejected petitioner's arguments and also concluded that res judicata barred any claim of deficient notice. This Court explained:

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. [*Id.* at 2.]

The July 25, 2008, order issued by the ALJ contained the following notice regarding time and form requirements for filing exceptions to the decision, as well as the effect of failing to file exceptions:

A party may file a statement of exceptions to the decision and order granting motion for summary disposition or to any part of the record or proceeding including rulings on motions or objections, with the State Tenure Commission not later than 20 days after service of this decision and order granting motion for summary disposition. . . .

The deadline for filing exceptions is August 14, 2008. Exceptions should be sent to the Office of Administrative Law, 608 West Allegan Street, P.O. Box 30008, Lansing, Michigan 48909.

A matter not included in the statement of exceptions or statement of cross-exceptions is considered waived and cannot be heard before the Commission or on appeal to the Court of Appeals.

Neither party filed exceptions to this decision either, and it became the State Tenure Commission's final decision and order.

This Court granted petitioner's delayed application for leave to appeal and reversed. Relying on *Fucinari v Dearborn Bd of Ed*, 32 Mich App 108; 188 NW2d 229 (1971), this panel concluded that "the State Tenure Commission lacked jurisdiction to decide whether notice of unsatisfactory performance was statutorily defective under MCL 38.83" because petitioner was a probationary teacher, not a tenured teacher. *Hubbard*, unpub op at 4. This panel determined that the State Tenure Commission erred in ruling that its decision in the first appeal precluded petitioner from raising the notice issue in a subsequent appeal because that initial decision was void due to the Tenure Commission's lack of jurisdiction. *Id.*

This panel then determined that it had jurisdiction to address the merits of petitioner's argument regarding whether the notice of unsatisfactory performance complied with the statute. This panel again looked to *Fucinari*, in which this Court exercised jurisdiction in a similar case involving a non-tenured teacher challenging the school district's compliance with the statutory notice requirement. The *Fucinari* Court determined that it had jurisdiction to consider the teacher's claim because both parties had accepted the jurisdiction of the State Tenure Commission. *Id.* at 4-5, citing *Fucinari*, 32 Mich App at 111-112.

This panel determined that respondent's notice of unsatisfactory performance was defective because it was not provided to petitioner at least 60 days before the end of the 2006-2007 school year. Therefore, under MCL 38.83, "petitioner was entitled to be employed for the 2007-2008 school year." *Hubbard*, unpub op at 5. This Court concluded, "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." *Id.*

This panel denied respondent's motion for reconsideration. *Hubbard v Detroit Pub Sch*, unpublished order of the Court of Appeals, entered May 31, 2011 (Docket No. 293292).

Respondent filed an application for leave to appeal in the Supreme Court. On November 2, 2011, our Supreme Court vacated this Court's opinion and remanded as on reconsideration granted. The Court instructed this Court to consider

whether jurisdiction in the Court of Appeals was lacking where the petitioning teacher did not file a statement of exceptions to the decision of the Administrative Law Judge. See MCL 38.104(5)(l), which provides: "A matter that is not included in a statement of exceptions filed under subdivision (j) or in a statement of cross-exceptions filed under subdivision (k) is considered waived and cannot

be heard before the tenure commission or on appeal to the court of appeals.”
[*Hubbard*, 490 Mich at 902.]

II. ANALYSIS

The issue that our Supreme Court has directed this Court to consider is a jurisdictional one. “[A] court is continually obliged to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford” *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 399; 651 NW2d 756 (2002). This Court is to consider its jurisdiction over petitioner’s appeal in light of MCL 38.104(5)(l).

MCL 38.104(5) governs the conduct of teacher tenure proceedings and provides for the filing of a statement of exceptions to an ALJ’s decision by any party. The pertinent sections are as follows:

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

* * *

(j) Not later than 20 days after service of the preliminary decision and order, a party may file with the tenure commission a statement of exceptions to the preliminary decision and order or to any part of the record or proceedings, including, but not limited to, rulings on motions or objections, along with a written brief in support of the exceptions. The party shall serve a copy of the statement of exceptions and brief upon each of the other parties within the time limit for filing the exceptions and brief. If there are no exceptions timely filed, the preliminary decision and order becomes the tenure commission’s final decision and order.

(k) Not later than 10 days after being served with the other party’s exceptions and brief, a party may file a statement of cross-exceptions responding to the other party’s exceptions or a statement in support of the preliminary decision and order with the tenure commission, along with a written brief in support of the cross-exceptions or of the preliminary decision and order. The party shall serve a copy of the statement of cross-exceptions or of the statement in support of the preliminary decision and order and a copy of the brief on each of the other parties. [MCL 38.104(5)(j), (k).]

When exceptions are filed, the State Tenure Commission reviews the issues raised in the exceptions and has the authority to “adopt, modify, or reverse the preliminary decision of the hearing officer. MCL 38.104(5)(m); *Lewis v Bridgman Pub Sch (On Remand)*, 279 Mich App 488, 496; 760 NW2d 242 (2003).

But when exceptions are not filed regarding a particular issue, a party may not raise that issue before the State Tenure Commission or in this Court. MCL 38.104(5)(l) provides:

A matter that is not included in a statement of exceptions filed under subdivision (j) or in a statement of cross-exceptions filed under subdivision (k) *is considered waived and cannot be heard* before the tenure commission or *on appeal to the court of appeals*. [Emphasis added.]

In this case, petitioner did not file a statement of exceptions to the ALJ's preliminary decision. The statute expressly precludes this Court's review under the circumstances. Because the issues that petitioner raises on appeal were not included in a statement of exceptions, they are considered waived and cannot be considered by this Court.

The appeal is dismissed due to lack of jurisdiction.

/s/ Kurtis T. Wilder

/s/ Deborah A. Servitto