STATE OF MICHIGAN

COURT OF APPEALS

ANNA LAND,

Petitioner-Appellee/Cross-Appellant,

v

L'ANSE CREUSE PUBLIC SCHOOL BOARD OF EDUCATION,

Respondent-Appellant/Cross-Appellee.

UNPUBLISHED
May 27, 2010

No. 288612
State Tenure Commission
LC No. 07-000054

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Respondent L'Anse Creuse Public School Board of Education appeals by leave granted from a decision of the State Tenure Commission, reversing the preliminary decision and order of an administrative law judge to uphold respondent's decision to discharge petitioner Anna Land. For the reasons set forth in this opinion, we affirm.

Petitioner was terminated from her position as a middle school teacher at respondent's school district after photographs of her engaged in a simulated act of fellatio with a male mannequin appeared on an internet website. The photographs were taken during a combined bachelor/bachelorette party at the "Jobbie Nooner"[1] in the summer of 2005. The photographs were taken without petitioner's knowledge and were posted on the internet website without her consent. Rumors about the photographs began circulating at petitioner's school in September 2007, and students gained access to the photographs. At petitioner's request, the photographs were removed from the website later that month. In the meantime, petitioner was suspended from her teaching position.

[1] The Jobbie Nooner is an annual gathering of boats around Gull Island in Lake St. Clair for a large party. The island is located approximately five or ten minutes away from respondent school district.

On October 15, 2007, respondent voted to adopt the recommendation of its superintendent that petitioner be discharged from her employment for engaging in lewd behavior contrary to the moral values of the educational and school community, which undermined her moral authority and professional responsibilities as a role model for students. Because petitioner was a tenured teacher, the matter proceeded to a hearing before an administrative law judge ("ALJ"), who issued a preliminary decision finding that the charges had been proven and that there was reasonable and just cause to discharge petitioner. Petitioner filed exceptions to the ALJ's decision with the State Tenure Commission (the "commission"), challenging, among other things, the determination that there was reasonable and just cause for her discharge. The commission found that petitioner's conduct occurred more than two years before she was suspended, was not illegal, occurred at a public event off school grounds, did not involve any school activity, and was not associated with petitioner's duties as a teacher. Further, the context for the conduct was a bachelor/bachelorette party in which there was no reasonable expectation that children were or might be present, or that any adults who witnessed petitioner's activity were not willing participants. In addition, there was no evidence that petitioner had mentioned her conduct or attendance at the "Jobbie Nooner" to any students, or that she had advocated the type of conduct in which she was photographed. Accordingly, the commission determined that petitioner did not engage in professional misconduct and that, absent such a showing, any negative publicity arising from petitioner's conduct did not provide reasonable and just cause for petitioner's discharge. Accordingly, the commission reversed the ALJ's decision and ordered petitioner's reinstatement.

On appeal, respondent challenges the commission's decision as being arbitrary and capricious, and contrary to law. It also argues that the commission's finding that petitioner did not commit professional misconduct is not supported by competent, material, and substantial evidence on the whole record. We disagree.

Under MCL 38.101, "discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause and only as provided in this act." "The school district bears the burden of establishing reasonable and just cause, which can be shown only by significant evidence proving that the teacher is unfit to teach." *Lewis v Bridgman Pub Schools (On Remand)*, 279 Mich App 488, 496; 760 NW2d 242 (2008).

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 administrative law judge, 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 pertinent part:

> The [ALJ] hearing and tenure commission review shall be conducted in accordance with the following:
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> (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 [to the ALJ's preliminary decision] 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. [Emphasis added.]

In addition, the contested case procedures of the APA, MCL 24.281(3), provide 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."

Thus, under the tenure act, an ALJ is permitted to adopt, modify, or reverse the controlling board's decision, and the commission is permitted to adopt, modify, or reverse the ALJ's preliminary decision. Similarly, under the APA, the commission has all the powers of the ALJ, as if it had presided over the evidentiary hearing. Therefore, the commission's review is de novo, as it was before the statute was amended to shift evidentiary hearing responsibilities from the commission to an ALJ. See *Ferrario v Escanaba Bd of Ed*, 426 Mich 353, 366-367; 395 NW2d 195 (1986); see also *Lakeshore Bd of Ed v Grindstaff*, 436 Mich 339, 352-354; 461 NW2d 651 (1990). The commission is also "empowered to 'substitute' its judgment for that of the school board regarding the discipline to be imposed" on a tenured teacher. *Id.* at 357; see also *Lewis*, 279 Mich App at 496-497.

On appeal to this Court, "[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." *Id.* at 495-496 (emphasis added); see also *Ferrario*, 426 Mich at 367. "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 Byron Ctr Pub Schools Bd of Ed*, 229 Mich App 565, 578; 582 NW2d 859 (1998). "Although such a review does not attain the status of de novo review, it necessarily entails a degree of qualitative and quantitative evaluation of [all] evidence considered" by the commission, "not just those portions of the record supporting" its decision. *Beebee v Haslett Pub Schools (After Remand)*, 406 Mich 224, 231; 278 NW2d 37 (1979) (citation omitted); see also *Ferrario*, 426 Mich at 367, and *Lewis*, 279 Mich App at 496.

Respondent first argues that the commission's decision that adverse effects stemming from the publicity surrounding petitioner's conduct may not alone provide reasonable and just cause to discharge petitioner is arbitrary and capricious, and contrary to law.

In *Beebee v Haslett Pub Schools*, 66 Mich App 718, 724; 239 NW2d 724 (1976), rev'd 406 Mich 224 (1979), this Court stated:

> Given the presumption of fitness engendered by tenure status, 'just and reasonable cause' can be shown only by significant evidence proving that a teacher is unfit to teach. Because the essential function of a teacher is the imparting of knowledge and of learning ability, *the focus of this evidence must be*

> *the effect of the questioned activity on the teacher's students*. Secondarily, the tenure revocation proceeding must determine *how the teacher's activity affects other teachers and school staff*. [Emphasis added.]

The Court noted that other jurisdictions had similar tenure acts that usually focused on incompetence and inefficiency, "matters which *directly affect* students." *Id*. In addition, other jurisdictions had upheld discharges based on immorality, drug use, physical appearance, and disloyalty where these activities had a "detrimental effect . . . on the students' intellectual and moral growth." *Id*. The Court added:

> Activities outside the classroom have warranted discharge where they brought such notoriety to the teacher that his teaching ability was impaired. Special care must be taken to show this link between out-of-school acts and in-school behavior. [*Id*. at 724-725.]

The *Beebee* Court noted that, in *Morrison v State Bd of Ed*, 1 Cal 3d 214; 82 Cal Rptr 175; 461 P2d 375 (1969), the California Supreme Court reversed a decision to revoke a teacher's license "for a single out-of-school homosexual episode between plaintiff and another adult" that "violated no law," where "[t]here was no evidence that plaintiff had engaged in any other such episode, attempted to solicit any of his students or to impress any homosexual preference on his students." *Beebee*, 66 Mich App at 725. The *Morrison* court held that although immorality was a statutory ground for termination under the California tenure statute, "before any act could be deemed a ground for discharge, it must bear directly on the teacher's fitness to teach and must cause a clearly discernible detriment to the school and to its students." *Id*. The *Morrison* court therefore concluded that the board of education "cannot abstractly characterize the [homosexual] conduct in this case as 'immoral,' 'unprofessional,' or 'involving moral turpitude' within the meaning of [the statute] unless that conduct indicates that the petitioner is unfit to teach." *Id*. The *Morrison* court identified several non-exclusive factors relevant to that determination:

> [T]he likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. [*Beebee*, 66 Mich app at 725-726, quoting *Morrison*, 1 Cal 3d at 229-230.][2]

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[2] The commission in this case also quoted the following passage from *Morrison*, which was not quoted in *Beebee*:

> Since the record contains no evidence that the instant matter received any publicity prior to the board's action, we express no opinion as to when, if ever, a teacher could be disciplined merely because he persistently and publicly violated

(continued…)

Examining the case before it, this Court in *Beebee* found that the teacher was terminated because the school district disagreed with her unstructured classroom teaching methods, and ordered that she be reinstated. *Id*. at 727-729. On appeal, our Supreme Court, after remanding the case to the commission for additional findings, reversed this Court's decision, finding that the teacher was not terminated due to a disagreement over her teaching philosophy, but rather for failing to implement her philosophy in a safe and orderly fashion, and for refusing to cooperate with her employer's efforts to achieve that goal. *Beebee*, 406 Mich at 229-230, 233-234.

Although the Supreme Court's decision in *Beebee* did not mention the *Morrison* factors or the adverse effects doctrine discussed by this Court, subsequent cases have addressed the issue. In *Detroit Bd of Ed v Parks*, 417 Mich 268, 270-275; 335 NW2d 641 (1983), a tenured teacher was terminated for refusing to pay "agency service fees" as required by a collective-bargaining agreement. On appeal, the teacher argued that there was no reasonable and just cause for her discharge. *Id*. at 274-284. Relying on this Court's decision in *Beebee*, which was described as having been reversed on other grounds, the Supreme Court briefly stated:

> The reasonable and just cause standard of the teacher tenure act has been construed to forbid discharge *unless the activity complained off bears a rational and specific relationship to a detrimental effect* on the school and the students. [*Id*. at 281 (emphasis added).]

In *Parks*, however, the Supreme Court concluded that the discharge was authorized by § 10(1) of the Public Employment Relations Act ("PERA"), MCL 423.210(1), which prevails over the just-cause provisions of the teacher tenure act. *Id*. at 275-284. Accordingly, reference to the adverse effects doctrine in *Parks* is dicta.

Approximately six months later, in *Clark v Ann Arbor School Dist*, 130 Mich App 681, 690-691; 344 NW2d 48 (1983), this Court upheld the discharge of a teacher who was involved in an inappropriate relationship with a student. Addressing the argument that reinstatement was required because there had been no showing of adverse effects of the teacher's conduct on students or the school, this Court disagreed with the assumption that this Court's decision in *Beebee* requires proof of adverse effects in every case. *Id*. at 686-687. The *Clark* Court added that, "even assuming that the Court of Appeals was laying down a broad rule requiring a showing of adverse effects in all tenure cases, the continuing validity of the rule is doubtful after *Beebee*'s reversal on appeal by the Supreme Court." *Id*. The *Clark* Court also stated that "[w]hile it is questionable what, if anything, is left of the Court of Appeals 'adverse effects' rule, at a minimum it can be said that it is not the broad rule urged by petitioner," which would require proof of adverse effects in every case. *Id*. at 688.

The *Clark* Court discussed *Morrison*, adding that "[n]onconventional sexual behavior per se is not sufficient to establish unfitness to teach." *Id*. at 689. Rather, "[t]o revoke a teacher's

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> important and universally shared community values in such a manner as demonstrably to handicap his relations with, or control over, his students. [*Morrison*, 1 Cal 3d at 229 n 28.]

credentials for such conduct, it must be shown that the teacher's retention in the profession poses a significant danger of harm to student, school, employees, or others who might be affected by his or her actions as a teacher." *Id*. The *Clark* Court then discussed *Sutherby v Gobles Bd of Ed*, 73 Mich App 506, 511-513; 252 NW2d 503 (1977), remanded on other grounds 400 Mich 843 (1977), in which this Court held that a teacher's consistent pattern of rule violations and insubordination can be presumed to have an adverse effect. *Id*. at 688-689. The *Clark* Court also discussed *Bd of Trustees v Stubblefield*, 16 Cal App 3d 820; 94 Cal Rptr 318 (1971), in which the California Court of Appeals found that a showing of adverse effects was not required where a junior college instructor was discharged after he and a student were found partially undressed in a parked car. *Id*. at 689-690. The *Clark* Court evidently agreed that proof of adverse effects is not required where a teacher engages in misconduct involving a student, and upheld the teacher's discharge for her inappropriate relationship with a male student. *Id*. at 690-691.

In *Bd of Ed of Benton Harbor Area Schools v Wolff*, 139 Mich App 148, 154; 361 NW2d 750 (1984), this Court cited this Court's decision in *Beebee* for the proposition that evidence of reasonable and just cause must focus on the adverse effects of the teacher's conduct. However, relying on the Supreme Court's decision in *Beebee*, this Court found that discharge was justified based on the teacher's persistent failure to control her students. *Id*. at 155-160.

Lastly, in *Miller v Grand Haven Bd of Ed*, 151 Mich App 412, 416-419; 390 NW2d 255 (1986), this Court reviewed *Parks* and *Clark*, as well as *Stubblefield*. The *Miller* Court stated:

> From these cases, we conclude that, while the adverse-effect doctrine remains viable in Michigan, it does not have the broad applicability that [the petitioner] suggests. Rather than being a requirement that school boards are required to meet in all instances, it is a permissible basis for discipline. That is, a school board may justify a disciplinary action against a teacher by showing that the teacher's conduct or attitude has an adverse effect on the students, staff or institution. *Indeed, in some instances the showing of adverse effect may be the only available basis for discipline*.
>
> It may well be appropriate to expect a showing of adverse effects in cases of discipline arising from disputes centering around pedagogical or personal philosophies or courses of conduct. The primary purpose of the tenure act is to maintain a competent teaching staff, free from political and personal interference. Thus, where there is a dispute between a teacher and an administrator over the teacher's teaching style, the school would be hard-pressed to justify disciplinary action absent a showing of adverse effect.
>
> Similarly, *where a teacher's conduct, outside the school and not involving students, is the basis for discipline*, as was the case in *Morrison*, *there is a serious question as to whether the public school may take action against the teacher without showing that that conduct has an adverse effect* upon the educational process. As noted by the *Morrison* Court, the United States Supreme Court has held a number of times that government employment may not be denied based on factors unrelated to that employment. A showing of adverse effect may be necessary in order to protect the teacher against discipline based upon the

> personal bias or prejudice of an administrator for reasons unrelated to classroom performance or conduct.
>
> We caution, however, that our opinion should not be read as requiring a showing of adverse effect in either of those situations. Rather, we are merely skeptical that a school board could show "reasonable and just-cause" for discipline absent such a showing. [*Id*. at 420-421 (citations omitted) (emphasis added).]

Of course, misconduct involving students is always subject to discipline, and no showing of adverse effects is required. *Id*. at 421. The *Miller* Court concluded that such was the situation in case before it, where a teacher had exposed himself to female students, and upheld the teacher's discharge. *Id*. at 421-423. Therefore, the *Miller* Court's discussion of adverse effects as an independent basis for discharge in cases of conduct occurring "outside the school and not involving students" is once again dicta.

Aside from *Clark* and *Miller*, we have not located any decisions discussing the *Morrison* factors. As the above discussion indicates, no appellate cases involve a teacher's termination based on lawful, off-duty conduct occurring off school premises, not involving students. In all of the cases cited where discipline has been upheld, there has been a nexus between the off-duty conduct and the teacher's on duty performance, which justified discipline.

The commission's review of the ALJ's decision is de novo with respect to all questions of fact and law. *Ferrario*, 426 Mich at 366-367; *Lakeshore*, 436 Mich at 352-354. Conversely, this Court's review of the commission's decision "must be undertaken with considerable sensitivity in order that the courts accord due deference to [the commission's] administrative expertise and not invade the province of exclusive administrative fact-finding by displacing [the commission's] choice between two reasonably differing views." *Beebee*, 406 Mich at 231; see also *Lewis*, 279 Mich App at 496.

As the above discussion indicates, this Court adopted the adverse effects doctrine in *Beebee*. However, that case involved a teacher's control of her classroom, not off-duty, off-premises conduct not involving students. Further, this Court's decision was later reversed by the Supreme Court. *Parks* seemed to assume that a showing of adverse effects was required in tenure cases, but that case involved a teacher who was terminated for failing to pay agency fees. *Clark* questioned the continued validity of the adverse effects doctrine, but there was a direct nexus between the teacher's conduct on the job and his termination as the teacher was engaged in an inappropriate relationship with a student. *Wolff* involved a teacher's failure to control her students. *Miller* went the furthest, stating that the adverse effects of a teacher's off-duty, off-premises conduct not involving students could be cause for termination based solely on its adverse effects. However, that case involved a music teacher who had been exposing himself to female students during individual instruction sessions on school premises. *Miller*, 151 Mich App at 414-415. Therefore, the expansive language in *Miller* on which respondent relies is obiter dicta.

In the present case, the commission stated:

> Absent misconduct, consideration of negative publicity surrounding a teacher's behavior would run afoul of the purpose of the Teachers' Tenure Act to protect the rights of competent teachers to teach. Thus, while we agree that it was unfortunate that students gained access to the photographs in this case, we expressly disavow any suggestion that negative publicity alone, absent a showing of underlying professional misconduct, can provide reasonable and just cause for discipline under the Teachers' Tenure Act.

The commission added that, while consideration of the *Morrison* factors may be instructive, consideration of those factors is subject to the requirement that professional misconduct be shown. Thus, the commission declined to reach the issue reserved by *Morrison*, 1 Cal 3d at 229 n 28, finding no evidence that petitioner "persistently and publicly violated important and universally shared community values."

We must accord deference to the commission's administrative expertise and not invade the province of its administrative fact-finding by displacing the commission's choice between two reasonably differing views. In this case, the conduct complained of did not involve students, was not committed while the teacher was performing duties for the school, and was not intended to be seen, known, or discussed with students. Given the lack of binding precedent on this issue and the requirement that reasonable and just cause "be shown only by significant evidence proving that the teacher is unfit to teach," the commission's decision to reinstate petitioner cannot be deemed in excess of its authority, arbitrary or capricious, or contrary to law.

Examination of the entire record reveals that the photographs engendered widespread gossip and some students and parents lost respect for petitioner. Further, there was expert testimony that the conduct depicted in the photographs would tend to cause students to lose respect for their teacher, and could adversely affect learning. However, some parents testified that while the internet posting of the photographs was unfortunate, they had not lost respect for petitioner as a teacher or a person. Moreover, there was overwhelming evidence that petitioner was an excellent teacher who went above and beyond her responsibilities to assist her students to learn and enjoy the material, and to assist students and parents with other issues that might arise. Mindful of the applicable standard of review, we conclude that the commission did not act arbitrarily or capriciously in deciding that, where there is no professional misconduct, the notoriety of a tenured teacher's off-duty, off-premises, lawful conduct, not involving students or school activities, by itself, will not constitute reasonable and just cause for discipline.

Respondent also challenges the commission's determination that petitioner did not engage in professional misconduct. Respondent contends that this determination is not supported by the competent, material, and substantial evidence on the whole record.

As the above discussion indicates, there are no Michigan decisions holding that a teacher's legal, off-duty, off-premises, conduct not involving students constitutes professional misconduct that renders a teacher unfit to teach. Petitioner's conduct, while coarse, was not inappropriate for its adult venue. Respondent, who has the burden of proof, did not come forward with any evidence that children were present or expected to be present at the "Jobbie Nooner." The conduct itself lasted approximately three seconds. The photographs were taken without petitioner's knowledge, posted without her consent, and were removed from the website

approximately two weeks after they became common knowledge. Students who accessed the website and distributed the photographs did so in violation of the website's restrictions.

Petitioner did not "persistently and publicly violate[] important and universally shared community values." *Morrison*, 1 Cal 3d at 229 n 28. To justify termination, respondent was required to produce "significant evidence proving that the teacher is unfit to teach." *Lewis*, 279 Mich App at 496. Under the facts of this case, the commissions finding that respondent failed to prove that petitioner engaged in professional misconduct is supported by competent, material, and substantial evidence on the whole record. Accordingly, we must affirm the commission's decision.

In light of our decision, it is unnecessary to address petitioner's cross appeal challenging the admissibility of respondent's expert witness's testimony.

Affirmed.

/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro

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BANDSTRA, P.J., (*concurring*)

I concur with the decision to affirm this case because the record here could not support a determination that, as a result of the photographs being posted on the internet, petitioner's ability to teach effectively was adversely impacted enough to justify her discharge. That is not to say, however, that I agree with the commission or the majority opinion to the extent they conclude that, absent some misbehavior by a teacher involving students directly, a discharge decision can only be justified by a finding of professional misconduct. There may well be situations where misbehavior short of professional misconduct negatively impacts the teaching environment (either a teacher's ability to teach or the school community more generally) sufficiently to conclude that the misbehavior constitutes a "reasonable and just cause" for discharge under the statute.

/s/ Richard A. Bandstra