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# Michigan Court Of Appeals Confirms That Tenure Commission Lacks Jurisdiction Over Layoffs

By Mark W. McInerney / Mar 16, 2015

When the Michigan Legislature enacted Public Acts 101-104 in 2011, most observers believed that layoff and recall issues would no longer be within the purview of the Tenure Commission. Revised Section 1248 of the School Code provided that personnel decisions involving a "staffing or program reduction" were to be made on the basis of the performance and effectiveness of the teachers involved, rather than on the basis of seniority. The Public Employee Relations Act ("PERA") was amended to make layoffs and recalls a prohibited subject of bargaining. Section 1248 went on to provide that the "sole and exclusive remedy" of a teacher who wished to challenge a layoff or recall decision was a Circuit Court lawsuit, with recovery limited to an order of reinstatement but not economic damages.

Nevertheless, the Tenure Commission adjudicated a number of layoff and recall cases arising after 2011, asserting jurisdiction over such matters if the teacher claimed that the layoff or failure to recall was a subterfuge for violation of the teacher's tenure rights. The Commission's decisions were based on a 1975 Court of Appeals decision that sanctioned this approach, notwithstanding the provisions of the 2011 amendments that limited challenges to tenure or recall decisions to Circuit Court.

Three Commission layoff and recall decisions were appealed to the Court of Appeals in late 2012 and 2013. In all three, Administrative Law Judges had dismissed the charges on the basis of lack of jurisdiction, citing to the 2011 amendments and the provisions of Section 1248. In all three, the Commission reversed the ALJs on the basis of teacher allegations that the layoffs or non-recalls were subterfuges. The cases were argued together in the Court of Appeals in March 2014, and the education community has eagerly awaited the result for over a year.

The result finally came on March 12, 2015. In a published decision in the consolidated cases of *Baumgartner v Perry Public Schools*, *Aubert v Reed City Area Board of Education* and *Wright v Board of Education of the Flint Community Schools*, the Court held unanimously and very clearly that the Tenure Commission has no jurisdiction of layoff-related disputes. In a strongly-worded opinion, the Court accused the Commission of an "unseemly power grab," by which it sought to "unmake the 2011 amendments." The Court also cast great doubt upon the validity of the 1975 decision in *Freiberg v Board of Education of Big Bay De Noc School District*, in which the "subterfuge" theory that has since been the basis of Commission review of layoff and recall decisions originated. The Court said that *Freiberg* was itself not based on any statutory provision. It had mentioned Section 105 of the Tenure Act, which had given a laid-off teacher recall rights to a position for which the teacher was certified and qualified for three years, and extrapolated that language into a legislative grant of jurisdiction over layoffs. The "slim statutory authority" for *Freiberg* was destroyed when Section 105 was repealed in the 2011 amendments. Even if *Freiberg* had had some validity when issued, therefore, "the 2011 amendments revoked any jurisdictional basis that *Freiberg* provided to the [Commission] in so-called 'subterfuge' cases," thus rendering *Freiberg* "now non-binding, and null and void."

With the "subterfuge" theory now nullified and no other statutory basis for Commission jurisdiction over layoff and recall decisions, there should be no further issue about whether the Commission may assert jurisdiction over any such claims. As established by the 2011 amendments, personnel decisions are to be based solely on the performance and effectiveness of the teachers involved. Although the Court of Appeals decision did not expressly mention recalls as outside of Commission jurisdiction, there can be little question about that conclusion. The Court referred repeatedly in its opinion to "layoff-related" decisions, thus clearly going beyond layoffs to include recalls. Of the three cases consolidated by the Court of Appeals for decision, the *Wright* case from Flint involved a challenge to both a layoff and a failure to recall, was dismissed by the Administrative Law Judge on the basis of the 2011 amendments, was reversed by the Commission on the basis of its "subterfuge" theory, and has now been dismissed by the Court of Appeals in its decision rejecting the "subterfuge" theory. Commission jurisdiction over recall decisions is as plainly a thing of the past as Commission jurisdiction over layoffs.

An appeal to the Supreme Court by the teachers involved in the three cases is at least possible, if not likely. What seems unlikely, however, given the clear legislative intent recognized by the Court of Appeals, is that the teachers will have any more success in the Supreme Court than they did in the Court of Appeals. Meanwhile, the Court of Appeals' decision is binding on the Commission, and should preclude any more layoff or recall decisions being reviewed under the tenure process.

If you have questions about this or other tenure-related issues, please contact Mark McInerney at (313) 965-8383 | [mmcinerney@clarkhill.com](mailto:mmcinerney@clarkhill.com), or another member of Clark Hill's Education Law group.