

**WRITTEN TESTIMONY OF ARTHUR R. PRZYBYLOWICZ**  
**SUBMITTED TO THE HOUSE EDUCATION COMMITTEE**  
**APRIL 26, 2011**

I currently serve as Associate Executive Director for Legal Services and General Counsel for the Michigan Education Association. I have practiced law in Michigan since 1976 and have been involved in representing the Michigan Education Association, its affiliates, and members in employment-related disputes during that entire time. From 1976 until November, 1999, I was a member of law firms that represented MEA, along with other clients. Since November, 1999, I have been employed directly by the MEA as General Counsel. During my approximately 23 years working for outside law firms, I regularly represented teachers in matters under the Teacher Tenure Act before local boards of education, the State Tenure Commission, and Michigan courts. Since serving as General Counsel for MEA, I have overseen the representation of MEA members in tenure matters by both outside law firms and MEA staff attorneys.

The Michigan Education Association opposes House Bill 4241 and any other bill that would eliminate the significant protections for teachers contained in the Teacher Tenure Act. However, MEA supports streamlining the process for protecting those rights.

Even school board attorneys Kevin Harty and Gary Collins cautioned this Committee during their testimony against the outright repeal of the Teacher Tenure Act. Moreover, there are substantial constitutional issues involving due process of law, if the amendment attempts to remove tenure status from those already holding this property right.

Teachers without tenure status could be subject to dismissal at the whim of local boards of education for partisan, political reasons and for many other inappropriate reasons, including creating a teaching vacancy for a relative of a board member or school administrator. Teachers could be dismissed without regard to their having received consistent evaluations as highly effective teachers. These are some of the problems that resulted in the enactment of the Teacher Tenure Act. Moreover, there would no longer be a uniform statewide policy in terms of the length of probationary service, there would not be any guarantee in layoff situations of employment priority for teachers who have already proved their competency over those who have not, and teachers could resign their employment positions less than 60 days before the start of a school year without penalty. Moreover, as attorney Collins discussed, courts and juries could be called upon to determine whether a discharge was wrongful and whether future damages would be awarded to a teacher. Under the Teacher Tenure Act, a teacher wrongfully discharged is reinstated with backpay only. If the Act were repealed, as proposed in this legislation, a jury could award as future damages lost compensation until the teacher would have retired.

Despite some claims to the contrary, the Teacher Tenure Act has worked well overall. The standard of "reasonable and just cause" for the dismissal of a tenured teacher has been carefully defined by the State Tenure Commission and Michigan appellate courts. In misconduct cases, proof of serious misconduct is grounds for discharge. In other misconduct situations, there must be evidence of adverse effect on students, staff, or the school district. In competency cases, since the teacher has already proved his or her competency through a four-year probationary period, the

school district administration must advise the teacher of his or her deficiencies and provide the teacher with an adequate opportunity to improve through an individualized development plan. If the teacher continues to exhibit deficiencies, the State Tenure Commission will uphold his or her discharge. I know from personal experience in representing many teachers before the State Tenure Commission, when a school administration appropriately evaluates a tenured teacher as deficient and attempts to assist the teacher in overcoming those deficiencies without success, the State Tenure Commission will uphold the discharge of the teacher. On the other hand, when the attempt to discharge the teacher is merely a pretext to remove the teacher for other reasons, the State Tenure Commission will protect the right of the teacher to continue his or her livelihood as a public school teacher.

At an earlier Committee hearing, school board attorneys Kevin Harty and Gary Collins supported retaining the Teacher Tenure Act, but eliminating the standard of "reasonable and just cause" and replacing it with the "arbitrary and capricious" standard of review. MEA opposes this suggested change to the Teacher Tenure Act. The standard of "arbitrary and capricious" is the most deferential standard that may be used in reviewing government conduct as it applies to an individual citizen's rights. It is an extremely low standard of review that would allow discharges for almost any reason not specifically prohibited by law. Use of the standard under the Teacher Tenure Act may be contrary to due process of law as interpreted by the Michigan Court of Appeals in *Guiles v University of Michigan Board of Regents*, 193 Mich App 39; 483 NW2d 637 (1991). In that decision, the Michigan Court of Appeals held that use of the deferential arbitrary and capricious standard was not appropriate in reviewing the denial of an

employment benefit when the decision subject to review was made by the employer, not an independent decision-maker. A similar situation would occur when the State Tenure Commission is reviewing a decision to discharge by a local board of education.

Even if it is determined by a court that use of the arbitrary and capricious standard is not a violation of due process of law, this standard still has many problems. The standard of "reasonable and just cause" has been applied by the State Tenure Commission and the Michigan appellate courts for decades. Parties involved in matters concerning the application of the Teacher Tenure Act have the benefit of a substantial body of case law as to its meaning and application. The same is not the case with respect to the arbitrary and capricious standard. For example, there would not be reasonable and just cause to discharge a tenured teacher merely because she was unmarried and pregnant. However, it is much less clear whether a decision by a school board to discharge such a teacher would be determined to be arbitrary and capricious. Similarly, a tenured teacher who happens to be gay, but does not engage in misconduct and competently performs his or her job could not be discharged under the reasonable and just cause standard. Whether such a discharge by a board of education would be found to be arbitrary and capricious is unknown. Finally, reducing the standard to discharge a tenured teacher to the arbitrary and capricious standard would place tenured teachers in no better position than probationary teachers. Chief Justice Mary Coleman on behalf of a unanimous Michigan Supreme Court stated in *Boyce v Board of Education of the School District of the City of Royal Oak*, 407 Mich 312, 319-320; 285 NW2d 196 (1979):

"The teacher tenure act was intended to provide probationary teachers with some employment security in the sense of protection from arbitrary

dismissal, but it was not intended to give them a statutory right to continuous employment throughout the school year regardless of any possible future developments."

[Emphasis added.] It would make little sense that tenured teachers, who have proven their competency over a four-year period, would have no greater employment protections than probationary teachers.

At the earlier Committee hearing on the Teacher Tenure Act, there was criticism of the so-called, "Szopo factors," utilized by the State Tenure Commission in reviewing a decision to discharge a tenured teacher. Such criticism is quite unfair to the State Tenure Commission. The Commission adopted the *Szopo* factors in order to establish written criteria that can be applied in cases of alleged misconduct to determine whether the misconduct rises to the level that warrants discharge. The State Tenure Commission would be subject to substantial criticism if it simply made decisions in each case whether the challenged actions of a tenured teacher warranted discharge without applying any guiding principles. School boards could properly claim that they had no way of knowing whether a discharge decision would be upheld or overturned by the State Tenure Commission. By adopting the criteria set forth in *Szopo v Richmond Community Schools Board of Education* (93-60), both tenured teachers and school boards are put on notice of the criteria by which alleged misconduct will be judged. Thus, rather than a reason for criticism, the *Szopo* factors are in actuality a limitation on the discretion of the State Tenure Commission to overturn a discharge decision of a local board of education.

Also at the earlier Committee hearing on the Teacher Tenure Act, the Superintendent of the Millington Community Schools testified regarding a decision of

the State Tenure Commission in which the Tenure Commission overturned the Millington School Board's decision to discharge a tenured teacher who had submitted false restaurant receipts to the school district after attending an approved out-of-town professional development conference. One of the primary purposes of due process of law is to give both sides to a dispute an opportunity to be heard, since the wisdom of a particular decision can most properly be reviewed based upon the facts presented by all parties to the dispute. While the Millington Superintendent adequately addressed the wrongfulness of the teacher submitting a false receipt for meal reimbursement, he did not reference some other facts that were considered by the State Tenure Commission in its decision. In *Giffels v Board of Education of the Millington Community Schools* (07-30) the State Tenure Commission considered the seriousness of the offense and several other facts in the record. Notably, there was no dispute that the teacher actually attended the out-of-town conference and that she was entitled under school board policy to reimbursement of up to \$5 for breakfast and \$7 for lunch during the conference. When she did not have receipts for those meals, she made the serious mistake of submitting false receipts totaling \$12. The State Tenure Commission specifically took into consideration that the teacher had a 30-year career in the district and that there was no evidence that she had ever been disciplined for the same or similar conduct during her lengthy career. As the State Tenure Commission stated at page 7 of its decision, "The record reasonably supports the conclusion that this misconduct was an aberration in her long career and there was no evidence that it is likely to recur." Further, the State Tenure Commission considered the fact that she had been a highly successful classroom teacher. The Tenure Commission decision notes

that her most recent evaluation indicated that she had helped many at-risk students and her principal's comments in that evaluation included descriptions of her as "an excellent teacher," "a remarkable teacher," "a valuable member of the Meachum JHS staff," and "a wonderful teacher who goes out of her way to make Meachum JHS a better school." Moreover, the penalty imposed by the State Tenure Commission was anything but a "slap on the wrist." She was suspended without pay for the period beginning May 6, 2008, through the end of the 2008-2009 school year. The Michigan Court of Appeals reviewed the decision of the State Tenure Commission and in an unpublished opinion unanimously upheld the Tenure Commission's decision to reduce the penalty. *Giffels v Millington Community Schools Board of Education*, 2010 WL 364196 (2010). The decision of the State Tenure Commission to reduce a discharge to a suspension without pay for more than one school year for a teacher submitting false meal receipts totaling \$12 after a 30-year career of good teaching is no basis to repeal or significantly amend the Teacher Tenure Act.

The MEA recognizes that there are times when cases under the Teacher Tenure Act take many years to conclude and involve significant costs to all parties involved. The extensive time involved in some of these cases is due to the appeal procedure that is required by court review of administrative decisions. The tenure process involves an evidentiary hearing and decision by an administrative law judge. Any party that disagrees with any portion of the administrative law judge's decision has the right to file exceptions with the State Tenure Commission. Thereafter, decisions of the State Tenure Commission are subject to review by the Michigan Court of Appeals and Michigan Supreme Court. One way to eliminate the time-consuming appeals is to retain

the Teacher Tenure Act, but substitute final and binding arbitration for the evidentiary hearing and decision. In this way, tenured teachers will still have the important protections of the Teacher Tenure Act, but a determination of whether a tenured teacher may be discharged or demoted by a school board would be determined through the quicker, less expensive process of final and binding arbitration. This process would literally cut years off the time involved in many contested tenure cases.

At the previous Committee hearing, attorneys Harty and Collins stressed the need for the continuation of the State Tenure Commission, so that there may be a single, consistent, statewide interpretation of the Teacher Tenure Act. While eliminating the State Tenure Commission and providing for arbitration would significantly reduce the costs and time of many cases where judicial review would otherwise occur, there would still be consistent standards under the Teacher Tenure Act. The standard of "reasonable and just cause" would continue in existence and labor arbitration decisions will result in its own body of case law that may be cited and relied upon by arbitrators in later cases. Thus, there would still be a uniform body of law interpreting the Teacher Tenure Act.

Thank you for the opportunity to present this information to the Committee.