STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, Respondent-Appellee, v JOSEPH SABOL, Charging Party-Appellant.	UNPUBLISHED July 12, 2005 No. 260751 MERC LC No. 03-000007

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Appellant Joseph Sabol appeals as of right the Michigan Employment Relations Commission's (MERC) decision and order adopting the hearing referee's recommended order granting summary disposition in favor of respondent American Association of University Professors (the Association). We affirm.

The Association is a labor organization that represents a bargaining unit that consists of instructors, professors, librarians, counselors, and adjunct faculty employed by Northern Michigan University. Sabol, who has a Ph.D. in chemistry, was hired to fill a one-year analytical chemistry position in NMU's chemistry department for the period beginning August 22, 2001, and ending May 7, 2002. NMU initiated a search in 2002 to fill the analytical chemistry vacancy for the 2002-2003 school year as a tenured position and Sabol applied for the position. On February 14, 2002, Chemistry Department Head Eugene B. Wickenheiser informed Sabol that he was one of the semifinalists for the position. However, NMU terminated its tenure-earning search in May 2002 and converted the vacancy to a 2002-2003 term position. NMU eventually hired an outside candidate to fill the position.

Under the Master Agreement, one of the three types of initial faculty appointments is a term appointment, "which shall normally be made for two (2) years subject to satisfactory evaluation." The Master Agreement further provides,

> Term appointments for less than two (2) years may be made for such reasons as late resignations, illness of regular faculty, enrollment requirements, program demands, or replacements for leaves of absence and sabbatical leaves. Persons employed on two- (2) year Term appointments shall be given first

> consideration for newly authorized two- (2) year Term appointments, provided they meet the qualifications specified for the position. Persons on Term appointments who already hold the appropriate terminal degree shall be given serious consideration for new Tenure Earning Positions, provided they meet the qualifications specified for the position.

Sabol contacted the Association's grievance officer, James Greene, asking for clarification of the process of giving "first consideration" to current term appointees for subsequent term appointments. Greene responded that "first consideration" meant "that other things being equal a present term appointee would get a renewal before an outsider would be given a term position." Greene requested copies of Sabol's evaluations for review and indicated that he would review the matter with the Association's attorney.

Greene subsequently informed Sabol that the Association's attorney explained that, absent evidence of discrimination, no grounds existed for a grievance. The attorney advised that, given the Master Agreement's focus on teaching as an instructor's primary responsibility and the emphasis on student evaluations, low student evaluations could provide the basis for seeking an outside candidate even after giving an incumbent candidate "first consideration." Performance evaluations prepared on Sabol noted that he received acceptable but below average student evaluations for two of the courses that he instructed and that he had received unsatisfactory, below average student evaluations for the other two courses that he instructed. After several more inquiries from Sabol, Greene responded, "Comparatively low student evaluations for a key course . . . would, in my judgment and that of our attorney, be considered sufficient grounds for not re-hiring." Thereafter, the Association's executive committee met and unanimously decided not to pursue a grievance on Sabol's behalf. Sabol continued to pursue his claims, but the executive committee continued to affirm its decision not to pursue a formal grievance on Sabol's behalf. According to the committee, even though the contract language granted only two-year term appointees the right of first consideration, Sabol was nevertheless given first consideration, but NMU was not satisfied with his performance.

Sabol then filed a charge with MERC, alleging that the Association breached its duty of fair representation in violation of § 10(3)(a)(i) of the Public Employment Relations Act (PERA), MCL 423.201 *et seq*. Specifically, Sabol alleged that the Association failed to represent him and that Greene completely failed to investigate Sabol's claims. Both parties moved for summary disposition. The hearing referee issued a decision and recommended order granting the Association's motion for summary disposition and denying Sabol's motion for summary disposition. In her analysis, the hearing referee noted that Sabol's evaluations indicated that he needed to rethink his teaching methods and that he should set a goal toward improvement of his instruction. The hearing referee pointed out that based on the record, even if Sabol had not been given "first consideration," his low student evaluations justified NMU hiring an outside candidate. The hearing referee further explained that the record did not support Sabol's contention that the Association failed to investigate his grievance. The hearing referee concluded that Sabol failed to show that the Association refused to file a grievance on his behalf out of personal hostility, indifference, negligence, or arbitrary refusal. According to the hearing referee, the Association's interpretation of the Master Agreement was "neither 'irrational' nor 'unreasoned.'"

MERC then issued its decision and order adopting the hearing referee's decision and recommended order. MERC specifically pointed out that the Association reacted to Sabol's concerns with diligence. According to MERC, the Association reasonably concluded that Sabol was not entitled to first consideration. MERC ordered that the charge be dismissed. Sabol moved for reconsideration and for a reopening of the record. MERC denied both motions, holding that Sabol failed to present any new issues in his motion for reconsideration and that the evidence submitted in support of reopening the record would not require MERC to change its decision.

Sabol first argues that MERC erred in adopting the hearing referee's decision and recommended order because MERC erred by concluding that Sabol's reappointment was not covered by the Master Agreement, that Sabol failed to show that the Association breached its duty of fair representation, that the Association responded to Sabol's concerns with diligence, and that Sabol failed to state a sufficient basis for his charge against the Association. We disagree.

This Court reviews MERC decisions pursuant to Const 1963, art 6, § 28, and MCL 423.216(e). MERC's factual findings are "conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *St Clair Co Intermediate School Dist v St Clair Co Education Ass'n*, 245 Mich App 498, 512; 630 NW2d 909 (2001). "This evidentiary standard is equal to 'the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance.'" *Id*. at 512-513, quoting *In Re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). MERC's legal rulings are reviewed de novo, and may not be overturned unless they violate the constitution, a statute, or are grounded in a substantial and material error of law. *Id*. at 513.

PERA impliedly imposes a duty of fair representation on labor organizations representing public sector employees. *Goolsby v Detroit*, 419 Mich 651, 661; 358 NW2d 856 (1984), after remand 211 Mich App 214 (1995). The duty of fair representation requires a labor union to serve the interests of all members without hostility or discrimination, exercise its discretion in complete good faith and honesty, and avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903; 17 L Ed 2d 842 (1967); *Goolsby*, *supra* at 661. The union must act "'without fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, wilful, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion in processing or refusing or failing to process a member's grievance.'" *Goolsby*, *supra* at 663-664, quoting *Lowe v Hotel & Restaurant Employees Union*, 389 Mich 123, 146-147; 205 NW2d 167 (1973). Bad faith is demonstrated by intentional acts or omissions made for dishonest or fraudulent reasons. *Goolsby*, *supra* at 679. For example, a union may breach its duty of fair representation if it refuses to process a grievance because of personal dislike or reasons unconnected to the merits of the grievance.

However, bad-faith conduct is not always required to make out a breach of duty. *Id*. at 681-682. "[T]he conduct prohibited by the duty of fair representation includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence." *Id*. at 682. "Absent a reasoned, good-faith,

nondiscriminatory decision not to process a grievance," failure of a union to comply with collectively bargained grievance procedure constitutes a breach of duty. *Id*. "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co v Huffman*, 345 US 330, 338;[73 S Ct 681; 97 L Ed 1048] (1953), as to be irrational." *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67; 111 S Ct 1127; 113 L Ed 2d 51 (1991).

Sabol's charge alleged breach of the duty of representation, including failure to investigate. It did not, however, allege that the Association's decision not to pursue his grievance was arbitrary or the product of bad faith. And it did not allege facts from which such conclusions could be drawn. See *Lowe*, *supra* at 147. Therefore, the hearing referee and MERC did not err in granting the Association summary disposition on the ground that Sabol failed to state a claim on which relief could be granted. "'[T]he allegations of a complaint alleging a breach of a union's duty of fair representation must contain more than conclusory statements alleging improper representation; conclusory allegations without specifying supporting facts to show the union's lack of good faith fail to state a valid claim.'" *Carry v Consumers Power Co*, 64 Mich App 292, 298; 235 NW2d 765 (1975), quoting *Lusk v Eastern Products Corp*, 427 F2d 705, 708 (CA 4, 1970) (alteration by *Carry* Court).

Sabol continues to contend on appeal that Greene failed to investigate his claims and never adequately answered his inquiries regarding NMU's appointment procedures. However, Sabol's claim of lack of investigation is contradicted by the undisputed facts, including the documentary support provided by Sabol with his lower court pleadings. The record shows that Greene promptly responded to and reviewed Sabol's inquiries and allegations. Greene responded at length to Sabol within five days of Sabol's initial inquiry, and on receiving the requested documents from Sabol, Greene promptly responded, informing Sabol that he was not entitled to first consideration. In addition, the record shows that Sabol and the Association had additional extensive email correspondence. There can be no question that the Association did investigate Sabol's claims. As concluded by MERC, the record demonstrates that the Association reacted to Sabol's concerns "with diligence."

Sabol also argues that MERC erred by concluding that the Master Agreement did not cover his reappointment. But Sabol's claims are premised on a fundamental misunderstanding of the reappointment standards set forth in the Master Agreement. Section 5.1.1.b of the agreement states that two-year term appointees are afforded first consideration for newly authorized two-year appointments. Sabol was a *one-year* term appointee who was seeking another one-year term appointment, a situation concerning which this section of the Master Agreement was silent. Therefore, as MERC concluded, under the clear terms of the agreement, Sabol was not entitled to first consideration, and the Association had no duty to attempt to compel NMU to do something that it was not obligated to do.

Sabol also contends that his right to first consideration was established by NMU's past practice of granting such consideration to one-term appointees. According to Sabol, it has been NMU's customary practice to give *all* term appointees first consideration for reappointment. Taking into consideration the documentary support submitted by Sabol on summary disposition, we conclude that he failed to meet his burden to establish that NMU had an established past practice of granting one-year term appointees first consideration. The only evidence provided by Sabol was the example of another one-year term appointee who was reappointed to a 2002-2003

organic chemistry vacancy. Proof of this one occurrence does not demonstrate that there was a tacit agreement that the practice would continue, let alone demonstrate that the practice was so widely acknowledged and mutually accepted by the parties that it amended the contract. *Port Huron Ed Ass'n MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 312, 325; 550 NW2d 228 (1996).

In any event, the record demonstrates that Sabol did receive first consideration, as he was considered before NMU initiated an external search. Indeed, Sabol conceded this when he admitted that Wickenheiser informed him that he was semifinalist for the position. Sabol appears to be erroneously interpreting first consideration as obligating NMU to grant him reappointment. But contrary to Sabol's interpretation, there is nothing in the Master Agreement that obligated NMU to appoint Sabol to the position. An obligation to consider a particular applicant for a position does not equate with requiring an employer to hire that applicant. In other words, being given first consideration did not guarantee that Sabol would be awarded the position. It was reasonable for NMU to look to, and in fact, the Master Agreement required NMU to look to, Sabol's student evaluations in determining his eligibility for reappointment.

With regard to student evaluations, the Master Agreement states that evaluations "shall focus on the faulty member's effectiveness in meeting assigned responsibilities . . . , professional development, and service endeavors . . . ." The agreement further states that instructor evaluation statements should include review of student evaluations from each course. Sabol's evaluation statements indicated that he needed to rethink his teaching methods and set a goal toward improvement of his instruction. Indeed, Sabol conceded in his own self-evaluation that his student's evaluations were critical of his teaching performance. Thus, there can be no reasonable dispute that NMU was justified in concluding that Sabol was not an acceptable candidate for reappointment. The committee reasonably concluded that Sabol was given first consideration, but his unsatisfactory student evaluations provided adequate grounds for NMU to look elsewhere for an acceptable instructor.

Moreover, Sabol's claim that he was singled out as ineligible for reappointment when other similarly situated appointees were reappointed is also unsupported by the evidence. While it is true that he was similarly situated to the organic chemistry appointee to the extent that they were both one-year term appointees who applied for a reappointment, Sabol failed to provide evidence that the organic chemistry appointee had similar unsatisfactory evaluations. In the absence of proof of such a similarity in situations, Sabol has failed to establish this claim.

Sabol also contends that his lower court pleadings and exhibits indisputably establish that the Association was hostile to him, discriminated against him, was dishonest, did not act in good faith, and acted arbitrarily. This conclusory contention is unsupported by the record. Sabol failed to present any evidence to show that the Association acted with anything but good faith. When a union acts in good faith it is allowed broad discretion in discharging its grievance processing duties, which includes deciding which grievances shall be pressed and which shall be settled. *Goolsby*, *supra* at 664. Despite this principle, Sabol argues that his allegation of a violation of the Master Agreement instituted the action against NMU and that the Association did not have the discretion to not pursue the grievance. He contends that the Association acted unreasonably and arbitrarily in determining that Sabol did not have a valid grievance.

Contrary to Sabol's interpretation of the Master Agreement, the Association was not obligated by the terms of the agreement to file a grievance merely on Sabol's demand. Unions are not required to carry every grievance to the highest level. *Goolsby*, *supra* at 663. They have latitude to investigate claimed grievances by members against their employers and assess every grievance on individual merit. *Id*. A union may abandon a frivolous claim. *Id*. An individual member does not have the right to demand that his grievance be pressed. *Id*. at 661. The Association was afforded the discretion and latitude to assess Sabol's claim and determine whether to pursue a grievance. The Association determined in good faith that a grievance was unwarranted and appropriately refused to pursue a frivolous claim *Id*. at 663.

Sabol also argues that MERC erred in denying his motion for reconsideration. Other than referencing his motion and brief below, Sabol provides no other argument or authority in support of this issue. It is insufficient for an appellant to merely announce his position and then leave it to this Court to discover and rationalize the basis for his argument, or unravel his arguments and then search for authority to support or reject his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Further, this Court has declined to address an issue when a party gives the issue "cursory treatment . . . with little or no citation to relevant supporting authority." *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Therefore, this issue has been waived for our consideration. Regardless, we disagree that MERC erred in denying reconsideration when Sabol failed to present any new issues for the commission's review.

Lastly, Sabol asserts that MERC erred in denying his motion to reopen the record because he provided newly discovered evidence to show that NMU approved of reappointment of one-year term appointees. We disagree. MERC may reopen the record in a case and receive further evidence after the close of a hearing. *Knoke v East Jackson Pub School Dist*, 201 Mich App 480, 489; 506 NW2d 878 (1993). However, the evidence must be newly discovered and have been unavailable through reasonably diligent discovery at the time of the earlier hearing. *Id*. There is no dispute that the proffered evidence was newly discovered. However, MERC denied Sabol's motion on the ground that the evidence submitted in support of reopening the record would not require MERC to change its decision. A review of Sabol's proposed exhibits reveals that the evidence would add nothing to the substance of his charge against the Association. See *Knoke*, *supra* at 489. As previously noted, evidence of one occurrence of granting first consideration to a one-term appointee does not establish an accepted past practice.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens