

STATE OF MICHIGAN
COURT OF APPEALS

FARMINGTON EDUCATION ASSOCIATION,

UNPUBLISHED

February 13, 1998

Petitioner-Appellant,

v

No. 198190

MERC

FARMINGTON PUBLIC SCHOOLS,

LC No. 94-000059

Respondent-Appellee.

Before: Saad, P.J., and O'Connell and M.J. Matuzak*, JJ.

PER CURIAM.

Petitioner appeals as of right the Michigan Employment Relations Commission ("MERC") decision and motion for reconsideration which denied petitioner's petition for unit clarification. We affirm.

Petitioner sought to include the Alternative Academy teachers into its collective bargaining unit. The Alternative Academy is comprised of students who previously attended one of respondent's three high schools and who have been unsuccessful in the regular high school setting. The recognition clause of the collective bargaining agreement in effect specifically excluded Adult Education teachers from the bargaining unit. The MERC found that the Alternative Academy teachers were part of the Adult Education program, and therefore excluded from petitioner's collective bargaining unit.

I

On appeal, petitioner first argues that the MERC improperly considered a reply brief filed by respondent. Petitioner contends that Employment Relations Commission Rule 423.463 ("Rule 63") does not allow respondent to file a reply brief, and therefore the MERC improperly considered it. We disagree.

* Circuit judge, sitting on the Court of Appeals by assignment.

An agency's interpretation of a rule is reviewed for an abuse of discretion. *American Federation of State, Co and Municipal Employees, Council 25 v Wayne Co*, 152 Mich App 87, 98; 393 NW2d 889 (1986). Rule 63 addresses oral arguments and briefs. It states as follows:

A party is entitled upon request to a reasonable period at the close of the hearing for oral argument, which shall be made part of the record. A party is entitled, upon request made before the close of the hearing, to file a brief with the administrative law judge, who may fix a reasonable time for the filing. The commission or administrative law judge may direct the filing of briefs when the filing is, in the opinion of the commission or administrative law judge, warranted by the nature of the proceedings, or the particular issue involved. [R 423.463.]

The MERC interpreted the rule to mean that a party may file a responsive pleading, although it did prefer that a party first obtain permission. By virtue of its wording, we find that Rule 63 does not prohibit the filing of a reply brief. Thus, we find that the MERC did not abuse its discretion by considering the reply brief.

Petitioner contends that *Zeeland Educ Ass'n*, 9 MPER P ¶ 27097 (Sept 8, 1996), dealt with this issue on the day previous to the MERC's decision on the motion for reconsideration, and concluded that the rules did not provide a party the right to file a reply brief. We note that *Zeeland* involved two different rules than the one at bar. Those rules are more restrictive than Rule 63 and specifically set forth what a party may and may not do in regard to the filing of exceptions and corresponding briefs.

II

Next, petitioner argues that the MERC's finding that the Alternative Academy teachers were Adult Education teachers was clearly erroneous. Specifically, it contends that the MERC wrongly determined that the Alternative Academy only received funds from Adult Education appropriations and it incorrectly concluded that the Alternative Academy teachers taught Adult Education students.

Our review of a MERC decision is circumscribed by the statutory mandate that factual findings by the commission are conclusive if supported by competent, material, and substantial evidence on the record considered as a whole. *Port Huron Educ Ass'n v Port Huron Area School Dist*, 452 Mich 309, 322; 550 NW2d 228 (1996). Such decisions are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law. *Id.* at 322-323.

The record shows that in its decision and order on motion for reconsideration, the MERC corrected its finding that the Alternative Academy only received funding from Adult Education funds. In so doing, the MERC implied that the Alternative Academy also received funds from elsewhere when it recognized that the Alternative Academy students were counted as "pupils," similar to the regular K-12 program, and not as "participants," as Adult Education students were counted. Therefore, since the MERC corrected its statement, petitioner's argument has no merit.

Petitioner contends that the MERC's correction was not sufficient because in its decision and order on motion for reconsideration, the MERC focused not on where the funds came from, but how the program was recognized by the State. Petitioner's contention is without merit because where the funds come from and the label the State puts on a program in order to receive funding are intertwined. The Alternative Academy was required to meet certain requirements in order to receive its funding from the Office of Extended Learning. These requirements were met, and the Alternative Academy was allowed to obtain its funding from that source.

Petitioner also argues that the MERC incorrectly found that the Alternative Academy teachers were Adult Education teachers. We disagree. The record established that in order to receive funding from the State of Michigan, three requirements had to be met. The Alternative Academy had to be an identifiable program not regularly available to the general district enrollment. The program support services had to go beyond those generally available within the district. Finally, the program had to be conducted through the Adult Education program. The Alternative Academy fulfilled these requirements.

The record also highlighted other differences between the Alternative Academy and regular K-12 teachers. The Alternative Academy teachers were not full time teachers. Advertisements for job openings in the Alternative Academy were generated by the Adult Education office with no involvement from the central personnel office. Candidates were interviewed and hired by the Adult Education program. The classes were held at the Farmington Training Center. The records of both the Alternative Academy teachers and students were held by the Adult Education program, while regular K-12 records were kept elsewhere. The teachers and counselors from the regular high school ceased involvement when the student transferred to the Alternative Academy. Finally, the interaction between the Alternative Academy students and the regular K-12 students was not sufficient to mitigate a finding that the students were not Adult Education students. Thus, there was competent, material, and substantial evidence on the record to support the MERC determination.

III

Petitioner next argues that the MERC's finding of a contract bar was incorrect. Petitioner argues that the contract bar rule should not apply in this case because it requested that the Alternative Academy teachers be part of the bargaining unit when they first became employees of respondent.

The Alternative Academy teachers joined respondent district at the beginning of the 1994-1995 school year. The collective bargaining agreement in effect contained a recognition clause specifically excluding Adult Education teachers from the bargaining unit. In January 1995, the contract was rescinded and a new contract was negotiated and ratified in the Spring of 1995. No limitations were put on what was subject to collective bargaining in the negotiations. However, the status of the Alternative Academy teachers was not discussed and no attempt was made to add them to the inclusionary language of the recognition clause. The recognition clause in the renegotiated contract retained the exclusionary language regarding Adult Education teachers. Thus, since the record shows that the agreement was entered into and continued to exclude Adult Education teachers, without making an attempt to include the Alternative Academy teachers into the bargaining unit, we find that the MERC's decision is supported by the record.

Similarly, petitioner argues that there was no reason for the Alternative Academy teachers to be excluded from the bargaining unit because the recognition clause does not specifically exclude them. Furthermore, petitioner argues that the teachers were new and the contract did not cover them. We disagree. As stated previously, petitioner had the opportunity to raise the status of the Alternative Academy teachers when the contract was renegotiated in early 1995. However, although there had been a dispute between respondent and petitioner when the Alternative Academy teachers first joined the district, petitioner failed to make any proposal to include them into the specifically included teaching positions within the recognition clause during renegotiations.

Finally, petitioner argues that since there was a community of interest between the Alternative Academy teachers and the regular K-12 teachers, the MERC should have granted the unit determination. The MERC did not disagree that a community of interest existed between the two groups. Rather, its concern focused on the fact that the recognition clause expressly excluded Adult Education teachers, which included Alternative Academy teachers. As discussed previously, the record shows that a contract was in effect when the Alternative Academy teachers first joined the district. However, approximately five months later, that collective bargaining agreement was rescinded and the parties were ordered to renegotiate. The record fails to show that petitioner made any attempt to include the Alternative Academy teachers into the inclusionary language of the recognition clause. Thus, there was competent, material and substantial evidence to support the MERC's finding that the Alternative Academy teachers were excluded from the bargaining unit.

Affirmed.

/s/ Henry William Saad

/s/ Peter D. O'Connell