STATE OF MICHIGAN

COURT OF APPEALS

36th DISTRICT COURT, Respondent-Appellant,	UNPUBLISHED September 29, 2009
v	No. 285123 MERC
MICHIGAN AFSCME COUNCIL 25 and MICHIGAN AFSCME LOCAL 3308, Charging Party-Appellee.	LC No. 05-000139

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Respondent appeals as of right the order of the Michigan Employment Relations Commission (MERC) adopting the administrative law judge's recommendation and finding that respondent had committed an unfair labor practice under MCL 423.210(1)(e). We affirm.

Respondent first argues that MERC's decision that it repudiated the collective bargaining agreement was contrary to competent, material, and substantial evidence on the whole record.[1] We disagree.

The relevant standard of review was set forth in *St Clair Co Intermediate School Dist v St Clair Co Ed Ass'n*, 245 Mich App 498, 512-513; 630 NW2d 909 (2001), as follows:

> We review MERC decisions pursuant to Cont 1963, art 6, § 28, and MCL 423.216(e). The MERC's factual findings are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole. 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. The MERC's legal conclusions may not be overturned unless they violate the constitution, a statute, or are grounded in a substantial and material error of law. In contrast to the MERC's factual findings, its legal rulings are afforded a lesser degree of deference because review of legal questions

[1] This was the issue as presented in the "statement of questions involved" as required by MCR 7.212(C)(5).

> remains de novo, even in MERC cases. [Citations and internal quotations omitted.]

Our Supreme Court has observed that collective bargaining agreements "are contracts that govern the terms and conditions of employment." *American Federation of State Co & Muni Employees AFL-CIO Michigan Council 25 & Local 1416 v Bd of Educ of the School Dist of the City of Highland Park*, 457 Mich 74, 82; 577 NW2d 79 (1998). The Court further noted that, "both employers and unions are free to negotiate the relative terms of their contracts, and are able to settle on mutually agreed conditions governing the employees' working conditions." *Id*. at 83. In memorializing the results of a matter that was subject to bargaining in a collective bargaining agreement, the employer and the union "create[s] a set of enforceable rules – a new code of conduct for themselves – on that subject." *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 319; 550 NW2d 228 (1996).

"Under the doctrine of repudiation or anticipatory breach, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance." *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). An anticipatory breach of contract is defined as a "definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arrives." 4 Corbin, Corbin on Contracts, § 973, p 905. Moreover, under PERA, a midterm modification of a mandatory subject of bargaining is prohibited absent agreement of both parties. *St Clair Intermediate School Dist v Intermediate Ed Asss'n/MEA*, 458 Mich 540, 552-567; 581 NW2d 707 (1998). In turn, a mandatory subject of bargaining is defined as a matter that has a "significant impact on conditions of employment." *Oak Park Public Safety Officers Ass'n v City of Oak Park*, 277 Mich App 317, 329; 745 NW2d 527 (2007).

Here, although respondent raised the issue whether the MERC properly affirmed the administrative law judge's conclusion that it repudiated the contract, respondent failed to properly argue the merits of this issue. Specifically, respondent failed to cite to any authority in support of its position that it did not repudiate the contract and, further, failed to explain why it contends that there was no repudiation. It is not sufficient for a party "simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority to either sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Because respondent failed to properly argue the merits of its claim, we deem this issue abandoned on appeal. See *Wilson*, *supra*. Nevertheless, if we had considered the matter, we would have affirmed the MERC's decision.

Next, respondent argues that the MERC erred in failing to conclude that the "management rights clause" allowed respondent to reduce the employees' work week. We disagree.

The decision of an employer to reduce the number of its employees or reorganize positions is within the management's prerogative and does not constitute a mandatory subject of bargaining. *Ishpeming Supervisory Employees' Chapter of Local 128, Michigan Council 25,*

AFSCME, AFL-CIO v City of Ishpeming, 155 Mich App 501, 508-516; 400 NW2d 661 (1986). However, under MCL 423.215(1), "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining. *Id*. at 508. Here, respondent argues that it acted within the scope of its managerial prerogative when it reduced the work week schedule by implementing layoff days. The union responds that it does not dispute the employer's right to reduce its work force; rather, it argues, if the employer decides to exercise its prerogative, the employer must do so in the manner provided under the previously negotiated contract.

We agree with the conclusion reached by the MERC—the definition of the "workweek" provided under the contract precluded the application of the management rights clause because "the collective bargaining agreement specifically addresses the number of days in the workweek clearly and unambiguously[.]" We further agree with the MERC that, contrary to respondent's argument, although a reduction in respondent's workforce would be within its prerogative under the management rights clause, because respondent's unilateral action here resulted in a significant impact to the "wages, hours, and other terms and conditions of employment" of the bargaining unit members, the management rights clause did not apply. In other words, if respondent decided to reduce its workforce by laying off bargaining unit members, according to the procedure set forth under the contract relating to seniority, then the management rights clause would have protected respondent's exercise of its managerial prerogative. Respondent's actions here exceeded the scope of its managerial prerogative. See *Ishpeming*, *supra*. Although we acknowledge the harshness of this result, the procedure set forth under the contract was negotiated and accepted by both parties.

Finally, respondent argues that MERC wrongfully inserted itself in what respondent characterizes as a "good faith dispute over contract interpretation," and further erred in holding that respondent committed an unfair labor practice by acting in bad faith and/or refusing to bargain. We disagree.

First, according to respondent, "an unfair labor practice proceeding is not the proper forum for adjudication of a contract dispute" where the contract has "a grievance procedure with final and binding arbitration." However, the language of the contract addressing arbitration is permissive, providing, in relevant part:

> Only unresolved grievances which related to the interpretation, application, or enforcement of any specific Article and Section of this Agreement [. . .] *may* be submitted to arbitration . . .

The contract further states that: "Arbitration shall be invoked by written notice, certified mail, return receipt requested to the other party of intention to arbitrate." Here, even if respondent is correct in its characterization of this litigation as a "bona fide contractual dispute," according to the permissive language of the contract, arbitration would be proper, but is not obligatory, as respondent suggests. Moreover, there is no evidence in the record to demonstrate that either party sought to arbitrate this matter.

Second, we agree with MERC that this was not a bona fide dispute over contract interpretation. The collective bargaining agreement clearly and specifically addresses the number of days in the work week thus the claim of a bona fide dispute is without merit. We also agree with MERC's conclusion that, because the change to a previously-negotiated contractual

provision also involved a mandatory subject of bargaining, respondent was required to secure the union's consent before it imposed the change. *St Clair Intermediate School Dist*, *supra* at 552-567. In other words, because of the significant impact of the proposed change[2] on the members of the bargaining unit, and because the change was in contravention to a previously-negotiated term, respondent was required to bargain, and the union was not. Thus, respondent was prohibited under MCL 423.210(1)(e) from implementing the mid-term modification of a subject of mandatory bargaining in the absence of the union's consent. Because respondent breached its obligation to bargain and failed to secure the union's consent before implementing the change to the work week, MERC properly concluded that respondent repudiated the contract and thus violated MCL 423.210(1)(e). See *Intermediate School Dist*, *supra* at 552-567.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

[2] The parties stipulated that the implementation of the furlough days would result in a 9.2 percent reduction in wages and an increased workload.